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DYNAMICS OF CYBER DEFAMATION IN INDIA: AN OVERVIEW

Dr. C. Rajashekhar*

Nikhila S. Tigadi**

I Introduction

Defamation is an intentional act to injure the reputation of a person in the eyes of right thinking persons in the society. Defamation is actually used as a generic description for actions in which it is alleged that the making of untrue and unwarranted comments about an individual have tended to lower that person's standing in the minds of right thinking members of society. The question as to what type of comments would constitute this effect varies from society to society.¹ Defamation is committed either by written words or spoken words, generally termed as a libel and slander respectively, and constitutes both, civil and criminal wrong in India.² Traditionally, there was the notion that, the wrong of defamation can be committed in literal sense, in either of the said two modes. In general, the law of libel operates on a stricter basis than that of slander, based on the assessment that statements which are recorded are likely to be damaging than which are not.³

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¹ Ian J. Lloyd, *Information Technology Law*, 545 (6th Ed., Oxford University Press, New York).

² In a number of countries, defamation is a criminal offense in addition to being subject to civil action. In Asia, there is widespread use of criminal defamation laws to suppress political speech. In Thailand, anyone posting pictures that may impair another's reputation is subject to criminal liability. South Korea has established the specific crime of cyber defamation. The application of criminal defamation varies across Africa. Although the African Commission on Human Rights has called for the repeal of criminal defamation laws, many African countries have criminal defamation laws in place and are among the most prolific in using the criminal defamation offense against journalists. Other than the United Kingdom and Cyprus, every European country still had a criminal defamation law in place. "*Defamation In The Internet Age: Protecting Reputation Without Infringing Free Expression*", www.cdt.org/files/pdfs/Defamation-Internet-Age.pdf (Accessed on 11.6.2015).

³ *Supra* note 1 at 547.

Defamation actions of any kind, have a chilling effect on free expression, but the effect is particularly troublesome in the case of criminal defamation. A criminal defendant faces the power and resources of the state. If convicted of criminal defamation, a speaker faces sanctions that could include prison sentence, fines, and criminal record. The chilling effect is further exacerbated by the fact that powerful public figures such as government officials and wealthy businessmen are many times exploiting their position in bringing cases. Civil law is adequate for protection against defamation as these claims are ‘arguably a private matter between two individuals, with which the State should not concern itself.’⁴ Under the law of torts, an action for defamation will lie only on the proof that the statement made is falsely addressing the complainant and published before the third person. Even if such statement is made to a single person, other than the complainant, is sufficient to be considered as defamation.

The law relating to criminal defamation is codified under Indian Penal Code, 1860 which defines defamation as, ‘whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said,...to defame that person and penalizes such an act with simple imprisonment for a term which may extend to two years, or with fine, or with both.’⁵ Sections 501 and 502 of the Indian Penal Code, 1860 also penalise, the printing or engraving the matters known to be defamatory and sale of such substances, respectively, with simple imprisonment for a term which may extend to two years, or with fine, or with both.⁶ Further, the IPC also contain various other provisions

⁴ *Supra* note 1 at 547.

⁵ Sections 499 and 500 of Indian Penal Code, 1860. The law of defamation under Section 499 got extended to "Speech" and "Documents" in electronic form with the enactment of the Information Technology Act, 2000.

⁶ Section 501 of Indian Penal Code states that, “Printing or engraving matter known to be defamatory.-Whoever prints or engraves any matter, knowing or having good reason to believe

relating to defamation such as, criminal intimidation,⁷ forgery for purpose of harming reputation⁸, and holds the person committing the same criminally liable and punished.

Further, the law of defamation in India also seemed to have its strong roots on the adoption of the Indian Constitution, which contemplates that the freedom guaranteed under Article 19(1)(a)⁹ is not absolute. The defamation has been included as one of the grounds on which reasonable restriction could be imposed.¹⁰ However, the doubts regarding the constitutionality of Section 499 and 500 of the Indian Penal Code, 1860 has been raised, on the ground that they affect the constitutional freedom guaranteed in the Article 19(1)(a), and the Apex Court is considering this issue which is pending for the final decision.¹¹ It is rightly pointed out that, if not carefully applied, defamation law can have a disastrous effect on speech, hampering the free expression right of both those expressing themselves and those entitled to receive information, opinion, and ideas. Crafting a defamation law and applying it in a way that does not violate the

that such matter is defamatory of any person, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.”

Section 502 of Indian Penal Code states that, “Sale of printed or engraved substance containing defamatory matter”

⁷ Section 503 of the Indian Penal Code deals with Criminal intimidation, which reads as follows: “Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.”

⁸ Section 469 of Indian Penal Code deals with Forgery for purpose of harming reputation, which reads as follows:--Whoever commits forgery, intending that the document forged shall harm the reputation of any party, or knowing that it is likely to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

⁹ See Article 19(2) for grounds on which the freedom of speech can be restricted.

¹⁰ *Ibid.*

¹¹ *Subramanian Swamy v. Union of India*, Writ Petition (Criminal) No. 184 of 2014. Earlier, the same issue was indirectly raised in *R. Rajagopal v. State of Tamil Nadu*, [famously known as the Auto Shankar Case) wherein the Honorable Supreme Court has observed as follows: “*In all this discussion, we may clarify, we have not gone into the impact of Article 19(1)(a) and clause(2) thereof on Sections 499 read with 500 of the Indian Penal Code. That may have to await a proper case.*”

principles of free expression are difficult but essential. Even if a law's standards are reasonable, the mere threat of a defamation suit can be enough to quiet speech on controversial issues. Defamation claims are often used by the powerful to protect political or economic interests and to silence dissenting voices.¹²

II Advent of cyber defamation

The emergence of internet towards the end of the 20th century, has brought in the revolution in the technological sector. The internet has unique potential to promote free expression and access to information. Compared to all previous media, the Internet is defined by its global and decentralized nature, low barriers to entry, openness, and relative affordability. These developments led the people across the world to be communicated with each other easily and at the same time became the platform to defame the reputation of others. The advent of the technological era has added a new dimension to defamation. One of the significant impacts of the boom in technological sector was on the defamation which highlighted as to how the technology, as a medium, can be used to lower the reputation of the person resulting in the culmination of new concept called cyber defamation or more popularly known as online or computer defamation. The cyber space provides new means by which people can engage in defamation, whether via an e-mail message, a message posted to a newsgroup or bulletin board, or an available file via file transport protocol, or through social networking sites such as Facebook, Twitter etc.¹³ The developments in recording and broadcasting technology have served to blur the distinction between libel and slander and the rationale for distinct treatment.¹⁴

Unlike traditional defamation, cyber defamation is committed through virtual medium has far reaching implications. The defamatory statements made online

¹² *Supra* note 2.

¹³ Magalla J. R, *The Law Of Defamation In Tanzania: A Critical Assessment Of The Development Of Information, Communication and Technology: The Law Of ICT in Tanzania*, Tumaini Law Journal, 2013, p. 31. <http://www.academia.edu/3489838> (last visited on May 10, 2015).

¹⁴ *Supra* note 1.

are accessible to public who uses online services, and spreads easily like a virus. A defamatory statement on television might be heard by millions of viewers and be far more damaging to the reputation of a person than would be the case with a letter published in newspaper.¹⁵ The Content produced by a single individual of limited means can find an immediate global audience. There are also apprehensions that, sometimes the author who publishes the statement does not have control on it because of duplication of the statement and loss of author's control over his publishing statement on cyber world.¹⁶ Even if the statement is edited or deleted in very short time after publishing it, yet there are all the possibilities that someone may have copied or mirrored it and made it available in public which is difficult to take away.¹⁷ If the information is mirrored, then it may be available in public even if it is removed from the main or original source by the real writer. However, the global nature of the internet, when combined with laws punishing speech, can have a perverse effect, as some countries have sought to punish speakers beyond their borders for speech available online.¹⁸ Perhaps the most offensive assertion of jurisdictional authority associated with defamation law on the Internet is the practice known as '*libel tourism*.' In cases of libel tourism, persons offended by information in their home country, sometimes created by a fellow national, sue in another country with laws less protective of speech or friendlier to plaintiffs. Jurisdiction is claimed on the ground that the challenged material is available via the Internet in the country where the suit is filed. American actress Cameron Diaz won substantial damages for defamation in London High Court. Diaz had sued American Media Incorporated for a story in the National Enquirer that alleged that she was having an affair. As the story never appeared in the UK edition of the newspaper, Mr. Justice Eady awarded the

¹⁵ *Ibid.*

¹⁶ Ankit Valdaya, Legal Consequences of online Defamation in India, p.3 <http://dx.doi.org/10.2039/ssrn.2386983> (last visited on March 12, 2015).

¹⁷ *Ibid.*

¹⁸ *Supra* note 2 at 8.

damages on the basis that the story was briefly published on an American website which was potentially accessed by visitors from the UK.¹⁹ In *Bin Mahfouz v. Ehrenfeld*,²⁰ the defendant was taken to court in the UK for a book exclusively marketed in the US. The plaintiff claimed jurisdiction on the grounds that 23 books were shipped to buyers in the UK and that the first chapter was available online. Due to a lack of resources, Ehrenfeld did not defend, lost, and was ordered to pay \$115,000 and to take the excerpt offline. However, in recent years in the UK courts, the practice of libel tourism is finding fewer acceptances. In a March 2011 case, a Ukrainian oligarch, Dmitry Firtash, sued a Ukrainian paper, the Kyiv Post, in the UK courts regarding events taking place in the Ukraine. The oligarch believed he could take advantage of the U.K.'s more favorable laws, but the judge dismissed the case.²¹

III Liability for cyber defamation

As the legal profession struggles to catch up with the problem of cyber defamation the question of who is responsible for defamatory remarks on websites is constantly evolving. Whether the liability should be fixed to the person who posts the defamatory content or the service providers is yet to be settled. Basically it is the authors who should be held primarily liable. But in cyber space it is always not easy to trace them who often remain anonymous and belong to different nationalities. Also, it may be necessary for a claimant to establish that a message was sent by the party whose identifiers appear. Instances have been reported of forged email message purporting to have been sent from the White House.²² A technical facility—anonymous remailing services—which may be based anywhere in the world, accept messages from users, strip out the details of the

¹⁹ Civil Defamation: Undermining Free Expression,
<http://www.article19.org/data/files/pdfs/publications/civil-defamation.pdf>

²⁰ (2005) EWHC 1156 (QB), <http://www.bailii.org/ew/cases/EWHC/QB/2005/1156.html>.

²¹ *Supra* note 2 at 11.

²² Lloyd *Supra* note 1 at 548. Also see *Stratton Oakmont v. Prodigy* (1995) 195 NY Misc LEXIS 229.

original poster and forward them to addressee, with no indication of the original poster. Such a technique makes it too impossible to identify the author without the cooperation of operator of the remailing service.²³ Then the person who is immediately available is the service provider who acts as an intermediary.

IV Intermediaries and cyber defamation

The liability of intermediaries arises due to the fact that anonymous posting by the third party, cannot be traceable, and even if found, due to jurisdictional issues may escape liability. The intermediaries provide the online platform for expressing ones views, opinions etc., which would be a menace if the same is used to defame another's reputation and leaves the intermediaries, along with the publishers if traceable, generally liable. But the cyber defamation suits, in the recent past, have raised serious concern regarding the liability of the intermediaries in cyber defamation. The main issue, however, to be resolved is whether merely because some defamatory comment has been posted on the internet is sufficient to hold the intermediary liable or is it necessary to consider the fact that whether the intermediary had any role to play in publishing the same. This issue has undergone wide spread discussions not only in India but in USA and UK, based on which the safe harbor principle for intermediaries in India is adopted.

The term Intermediaries refers to the entities that provide services enabling the delivery of online content to the end user. These includes the chain of players such as Internet Service Providers(ISP),²⁴ *Search engines*,²⁵ *DNS providers*,²⁶ *Web hosts*,²⁷ *Interactive websites*,²⁸ *blogging platforms*,²⁹ *auction sites*,³⁰ and *payment*

²³ *Ibid.*

²⁴ ISPs like Airtel and MTNL help users to get connected to the internet.

²⁵ These are web sites like Google and Bing.

²⁶ These service providers translate the domain names (e.g. www.sflc.in) to addresses (e.g. 64.202.189.170) that can be understood by computers.

²⁷ These are service providers like Godaddy.com that provide space on server computers to place files for various web sites so that these sites can be accessed by users.

gateways,³¹ and *Cyber Cafes*. Thus, the Intermediaries are the third parties who connect the user with the internet and provide them the services needed.

V Position in USA

In USA, the concern for the protection of Internet service providers against defamatory posting dates back to early 90's.³² In 1991, in *Cubby, Inc. v. CompuServe, Inc.*,³³ the United States District Court, New York, ruling in favour of internet service providers has held that ISP who did not know and had no reason to know of the statements cannot be made liable. In this case, *CompuServe* was an on-line service provider, wherein the defamatory material was posted in a special interest journalism forum. Any subscriber to CompuServe's Information Service could gain access to the forum, which included a newsletter entitled 'Rumorville USA'. CompuServe had contracted with Cameron Communications, Inc., to manage and review the contents of the Journalism Forum. Cameron Communications in turn contracted with Don Fitzpatrick Associates to provide the Rumorville newsletter. The contract between Cameron Communications and Don Fitzpatrick provided that Fitzpatrick accepted total responsibility for the contents of the newsletter. CompuServe had no opportunity to view the newsletter's contents before it was made available to CompuServe subscribers in the journalism forum. While, the plaintiffs had developed a computer database which they intended to distribute electronically, indirect competition with Rumorville. But the Rumorville published false and defamatory statements about plaintiff's service, and thus sued both CompuServe and Fitzpatrick. The defendant,

²⁸ This includes social media sites like Facebook and Twitter that act as platforms to store and retrieve content.

²⁹ BlogSpot and Word press.

³⁰ E-Commerce site like eBay.

³¹ E-Commerce site like PayPal.

³² Michael Deturbide, 'Liability of Internet Service Providers for Defamation in the US and Britain: Same Competing Interests, Different Responses', 2000(3), *The Journal of Information, Law and Technology* (JILT) <http://elj.warwick.ac.uk/jilt/00-3/deturbide.html> (last visited on May 12, 2015).

³³ 776 F. Supp. 135 (S.D.N.Y. 1991).

CompuServe, contends that it merely acted as a distributor, not a publisher, of the statements, and it had no knowledge of the statements posted. Hence it was not liable. The court in this case acknowledged the fact that the defendants were just acting as a distributor and had no opportunity to exert any editorial control over the newsletter's contents and therefore held that defendants were not liable.

But in 1995, in the case of *Stratton Oakmont, Inc. v. Prodigy Services Company*,³⁴ the New York Supreme Court failed to extend the same protection to the Internet service providers as provided in the *Cubby* case, which demanded for the legislative intervention for clarity. In this case, an anonymous person posted a defamatory comment on prodigy's bulletin board 'Money Talk' which, at the time, was one of the most widely read financial information bulletin boards in the United States. The posting stated that the plaintiff, Stratton Oakmont, a securities investment firm, and its president had committed fraudulent acts in connection with an initial public offering, and further made derogatory characterizations of the company and its employees. The plaintiff filed the suit alleging that Prodigy was a publisher of the allegedly defamatory statements, and that the Board Leader for the Money Talk bulletin board acted as Prodigy's agent for the purposes of the claim. In this case the court, observing the Prodigy's policies, stating their conscious editor control over the content posted on its bulletin board, held that it was the defendant, prodigy's policy, altered the characterization of its service from 'distributor' to 'publisher'. Hence they were liable as a publisher of defamatory statement.

However, this decision created an apprehension in the minds of many ISPs that exerted an editorial control over the contents posted resulting in the enactment of the U.S. Communications Decency Act, 1996. This Act completely precludes the liability of internet service providers under Section 230. Section 230 of the Communication and Decency Act, 1996 reads as:

³⁴ [1995] WL 323710 (N.Y. Sup. Ct. 1995).

“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”

Section 230 offers ISPs nearly complete immunity from liability for information that originates with third parties, even if the ISP has notice of the offensive content and fails to act.³⁵ The statute relieves ISPs of the burden of monitoring content they host – monitoring that would be extremely difficult from a practical stand point. It imposes of liability on the author of content, bringing in the ISP as a defendant only if; for example, the ISP was involved in editing or selecting the expression to be posted.³⁶ In effect, the statute treats ISPs as neither publishers nor distributors, but gives them the immunity enjoyed under the common law by common carriers. The post 1996 decisions in various cases³⁷ clearly reaffirmed the immunity of internet service providers liability for the content posted on their sites.

In *Zeran v. America online*,³⁸ in which a user was victim of a malicious hoax. The plaintiff, Kenneth Zeran, had his address and phone number posted in connection with advertisements for souvenirs glorifying the Oklahoma City Bombing. An unknown AOL (America Online) user had obtained Zeran's personal information and posted these ads throughout AOL. Zeran received many disturbing threats due to this hoax, and was continually harassed via telephone and post. He sued AOL claiming negligence on AOL's behalf in allowing such notices to be posted, despite the complaints and postings he had registered with AOL upon first learning of the impersonation. Using the Communications Decency Act, 1996 as its defense, AOL claimed immunity through the protection

³⁵ Barry Waldman, *A Unified Approach to Cyber-Libel: Defamation on the Internet, a Suggested Approach*, 6 (Rich. J.L. & Tech. 9 1999).

³⁶ http://www.internetpolicy.net/practices/libel_law.pdf. (last visited on April 4th 2015).

³⁷ *Zeran v. America Online, Inc.* 958 F. Supp. 1124 (E.D. Va. 1997); *Blumenthal v. Drudge* 992 F. Supp. 44 (D.D.C. 1998); *Doe v. America Online, Inc.* 718 So. 2d 385 (Fla. Dist. Ct. App. 1998).

³⁸ 129 F.3d 327 (4th Cir. 1997)

that the CDA provides Internet providers. The courts ruled in favor of America Online, upholding that interactive computer service providers may not be held liable for posting defamatory statements posted by 3rd parties via the ISP. Effectively, this decision reversed the findings of *Stratton Oakmont, Inc. v. Prodigy*. This immunity applies even if the providers are notified of defamatory material and neglect to remove it, because provider liability upon notice would likely cause a flood of complaints to providers, would be a large burden on providers, and would have a chilling effect on freedom of speech on the Internet. Section 230 may give greater protection to online speech than offline speech. Under Section 230, as interpreted in the *Zeran* case, the publisher of a print newspaper could face liability for printing a defamatory letter to the editor, while the publisher of an electronic newspaper would be immune from liability for carrying unedited the same text. However, the immunity provided to the service providers is extreme, arising out of concern for the protection of freedom of speech and expression.

VI Position in UK

Unlike USA, the law on cyber defamation in United Kingdom is quite stringent. The law on defamation in UK has been developed through the common law over a number of years, periodically being supplemented by statutes. The Defamation Act, 1996³⁹ clearly guards the internet service providers against their liability subject to the fulfilment of three conditions by the Internet service provider viz., he was not the author, editor or publisher of the statement complained of; he took reasonable care in relation to its publication; and he did not know and had no reason to believe, that what he did caused or contributed to the publication of a ‘defamatory statement.’⁴⁰ The provision also further states that, whenever any person is only involved: (a) in printing, producing, distributing or

³⁹ The Defamation Act, 1996 updates the law relating defamation in matters of the liability of intermediaries.

⁴⁰ Section 1, The Defamation Act, 1996.

selling printed material containing the statement; (b) in processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded, or in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form; (c) as the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control, will not be considered as the author, editor or publisher of the statement.⁴¹ Further, to determine whether the ISP has taken reasonable care or not, the Act requires, three factors to be considered viz., (a) the extent of his responsibility for the content of the statement or the decision to publish it; (b) the nature or circumstances of the publication, and (c) the previous conduct or character of the author, editor or publisher.⁴² This implies that, the 1996 Act provided more emphasis on the protection of the reputation of the individuals.

In UK's first case to reach High court relating to liability of the intermediaries, *Godfrey v. Demon Internet Ltd.*⁴³ The court focussed on the significance of the reputation of the plaintiff. In this case, Godfrey, the plaintiff, was a UK based lecturer in computer science, mathematics and physics. He filed an action against Demon, defendant, on the ground of online defamation which arose from a 1997 incident when an unknown person posted to the News group '*soc.culture.thai*', a message purportedly originating with the Plaintiff that was, according to the court, 'squalid, obscene and defamatory' of Godfrey. The posting invited replies by giving Godfrey's e-mail address. The defendant, Demon, carried the news group and stored its contents for two weeks. The Plaintiff requested the defendant to remove the offensive posting. It did not oblige, and the posting remained on its news server for two weeks. There was no dispute if the Demon could have

⁴¹ Section 1(3), The Defamation Act, 1996.

⁴² Section 1(5), The Defamation Act, 1996.

⁴³ (1999) E.W.J. No. 1226 (Q.B.D.).

removed the posting at Godfrey's request. Hence, Godfrey sued for defamation. In its defence Demon stated that it was not, at common law, a 'publisher' of the allegedly defamatory posting, and that even if it was, the defence of Section 1 of the Defamation Act, 1996 was available. The court observed that there was no case of the defendant, as he failed to take reasonable care as required under the 1996 Act. But before the court proceeded to decide the case Demon settled the issue with Godfrey.

However, the courts of U.K, in later part, consciously ascertained the liability of the intermediaries and found that certain of the intermediaries were not publishers for the purpose of defamation.⁴⁴ In *Bunt v. Tilley* and in *Metropolitan International Schools Ltd v. Designtecnica's Corp*⁴⁵ the court has recently clarified that in determining the liability of ISP's, care should be taken to avoid the 'mere facilitators' who owes no liability for the comments posted.⁴⁶

⁴⁴ David Rolph, *Innocent Dissemination And The Internet After Dow Jones & Co Inc V Gutnick*, *UNSW Law Journal* Volume 33(2), 572. Available at http://www.unswlawjournal.unsw.edu.au/sites/default/files/24_rolph_2010.pdf (last visited on May 14, 2015).

⁴⁵ [2010] 3 All ER 528. In this case, the court had to determine whether the claimant, which conducted a business providing adult distance education services, could sue the search engine Google for publishing defamatory matter originally posted in Designtecnica's online forums, in circumstances where third parties used Google to conduct a search that directed them readily to the forums. His Lordship noted that Google had no control over the search terms entered by third parties. Once the search terms were entered, Google would automatically execute the search and arrange the pages according to relevance, without human intervention. Therefore, as Google did not authorise or cause the snippet to appear on the user's screen, His Lordship held that Google was not a publisher but a mere passive facilitator.

⁴⁶ In *Bunt v. Tilley*, [2007]1 WRL 1243. In this case, John Bunt brought defamation proceedings against three individual defendants, as well as against three ISPs – AOL UK Ltd, Tiscali UK Ltd and British Telecommunications plc. The ISPs did not host the websites but merely provided internet access to the individual defendants. Relying on a distinction drawn by Matthew Collins in *The Law of Defamation and the Internet*, Eady J accepted that there was a distinction at the level of principle between publishers, broadly defined, to whom liability for defamation attached, and 'mere facilitators' to whom no such liability attached. Striking down the Bunt's claim against ISP's Eady J held that 'as a matter of law ... an ISP which performed no more than a passive role in facilitating postings on the internet could not be deemed to be a publisher at common law'. His Lordship went further, stating that he 'would not, in the absence of any binding authority, attribute liability at common law to a telephone company or other passive medium of communication'.⁸⁵ Thus, Eady J struck out Bunt's claims against the ISPs.

Although, the courts so far had exempted the passive intermediaries from the liability, but they failed to ascertain when the Intermediaries can be made liable. But in *Payam Tamiz v. Google Inc*⁴⁷ the Court clarified the previously unresolved issue of ISP's liability in defamation under English law for material posted on Blogger.com. In this case, the Payam Tamiz, an english conservative politician filed a case against Google Inc. and Google UK for anonymous defamatory comments on a blog created on Google's blogger platform called, 'London Muslim.' The Court in this case held that once Google was notified of allegedly defamatory content, it became a 'publisher by acquiescence' and therefore may be held liable for failing to remove the content. The role of Google in operating 'Blogger' is not purely passive as they provide design tools, a URL (Uniform Resource Locator), advertisements, service on terms of their choice and can remove or block access to any blog. Richards LJ in this case while interpreting Section 1(1)(c) of the UK Defamation Act, 1996, acknowledged that an intermediary can waive their liability, only when it did not know, and had no reason to believe, that what it did caused or contributed to the publication of a defamatory statement. Hence, the ISP on notification can be made liable and thereby protect the reputation of the claimant.

However, the 1996 Act came under criticism for being too 'claimant-friendly' because of a presumption of falsity, meaning that the burden of proof was on the defendant to establish that the contested statement was true. The claimant was not required to prove specific loss and large awards of damages also proved controversial. This gave rise to concerns over freedom of expression resulting in the enactment of the Defamation Act, 2013, which attempts to address some of the issues.⁴⁸ The defamation Act, 2013,⁴⁹ opts to provide the safe harbor

⁴⁷ [2013] EWCA Civ 68.

⁴⁸ The new Defamation Act: headline issues, Available at https://www.ashurst.com/publication-item.aspx?id_Content=10221, (last visited on May 14, 2015).

protection to the intermediaries by imposing the burden on the claimant, if individual or body trading for the profit, to prove that publication has caused or is likely to cause serious harm to their reputation, has caused serious financial loss, respectively.⁵⁰ In the absence of which, the statement will not be considered as a defamatory. Further Section 5 of the Defamation Act 2013, in certain circumstances, provides the website operators with complete immunity.⁵¹ That is, if the operator can show that they did not post the statement on the website, then the intermediaries can claim protection under the said provision. However, such protection will not be provided, if the claimant proves that, it was not possible for the claimant to identify the poster of the statement and the claimant gave the operator notice of their complaint in relation to the statement, and the operator failed to respond to the notice. Furthermore, the new Act prevents secondary publishers from being sued in the court unless it is reasonably not practicable to bring an action against the author, editor or publisher.⁵² There has been concern that the UK rule in practice has resulted in non-governmental censorship of controversial views or statements, because ISPs are quick to remove material posted by their customers as soon as the ISP receives a complaint from a third party alleging defamation. In order for the ISP to escape liability, it must take down content after being notified that it is defamatory because at that point the ISP no longer can argue that it lacks knowledge of the defamatory content. Rather than dispute the claim of defamation, the ISP removes the content, and subscribers usually have no right to insist that it be restored.

VII Position in India

⁴⁹ The Defamation Act 2013 came into force on 1 January 2014. This Act codifies and consolidates large parts of existing case law and statute but does not replace the earlier legislations.

⁵⁰ The Defamation Act, 2013, Section 1.

⁵¹ Section 5 provides for an additional defence to the website operators. In the sense, the defences provided under Section 5 are in addition to the defenses provided under the Defamation Act, 1996.

⁵² The Defamation Act, 2013, Section 10.

Although, the mode of committing the defamation has taken new dimension in the technological era but yet the traditional definition of defamation, as defined under the IPC is applicable to the new one with wider interpretation. Until 2000, it was only the Indian Penal Code, 1860 which regulated the cyber defamation in India. In 2000, to regulate the wide spread use of internet for cyber-crime, amongst others, Information Technology Act 2000⁵³ was enacted, followed by the amendment in 2008.⁵⁴ However, even after the enactment of Information Technology Act 2000, the court applied the provisions of IPC to decide the suits on cyber defamation in *SMC Pneumatics (India) Pvt. Ltd. v. Jogesh Kwatra*,⁵⁵ and *State of Tamil Nadu v. Suhas Katti*.⁵⁶ This implies that presently it is the IPC and Information Technology Act, 2000, along with its amendment and the rules made there under, govern the cyber defamation in India

⁵³ Enacted with Wide notification [No. 1(20)/97-IID (NII)/F6] and made operative from 17.10.2000.

⁵⁴ The amendment was made operative from 27/10/2009 through wide notification No.9 (16)/2004-EC.

⁵⁵ CS (OS) No. 1279/2001, This is considered as the first case on cyber defamation, where in this case the reputation of a corporate was being defamed by an employee of the plaintiff company by sending derogatory, defamatory, obscene, emails obscene, vulgar, filthy and abusive emails to its employers and also to different subsidiaries of the said company all over the world with the aim to defame the company and its Managing Director. The Hon'ble Judge of the Delhi High Court observing that a prima facie case passed an ex-prate ad interim injunction. Consequently, the Delhi High Court restrained the defendant from sending such emails either to the plaintiffs or to its sister subsidiaries all over the world including their Managing Directors and their Sales and Marketing departments. Further, Hon'ble Judge also restrained the defendant from publishing, transmitting or causing to be published any information in the actual world as also in cyberspace which is derogatory or defamatory or abusive of the plaintiffs.

⁵⁶ In this case, the obscene, defamatory and annoying message about a divorcee woman was posted in the yahoo message group. E-Mails were also forwarded to the victim for information by the accused through a false e-mail account opened by him in the name of the victim. The posting of the message resulted in annoying phone calls to the lady in the belief that she was soliciting. The Additional Chief Metropolitan Magistrate held that, "the accused is guilty of offences under Section 469, 509 IPC and 67 of IT Act, 2000 and the accused is convicted and is sentenced for the offence to undergo RI for 2 years under 469 IPC and to pay fine of Rs.500/- and for the offence u/s 509 IPC sentenced to undergo 1 year Simple imprisonment and to pay fine of Rs.500/- and for the offence u/s 67 of IT Act, 2000 to undergo RI for 2 years and to pay fine of Rs.4000/- All sentences to run concurrently."

The Information Technology Act, 2000 does not define the term cyber defamation. Instead makes the indirect reference under Section 66A⁵⁷ of the said Act which intends to regulate the cyber defamation in India. But, recently, the Supreme Court in *Shreya Singhal v. Union of India*⁵⁸ has struck down Section 66A for being vague and overbroad, and, therefore, unconstitutional under Article 19(1)(a). The invalidity of Section 66A has restored the pre-2008 amendment position.

In India, the liability of the intermediaries is similar to the position in UK. The legislative protection to the intermediaries originally contained only under Section 79 of the Information Technology Act, 2000, which exempted the intermediary on the proof that the offence or contravention was committed without his knowledge or he had exercised all due diligence to prevent the commission of such offence or contravention. The burden of proving this was on him to escape from liability. But the growth of internet across the boundaries raised the concern to fix the liability of intermediaries, in the absence of clarity on the same. The issue assumed greater significance in the backdrop of *Avnish Bajaj v. State*.⁵⁹ In this case, an IIT Kharagpur student Ravi Raj, placed on the baazee.com a listing offering an obscene MMS video clip for sale with the username alice-elec. Despite the fact that baazee.com have a filter for posting of objectionable content, the listing nevertheless took place with the description, 'Item 27877408 - DPS Girls having fun!!! full video + Baazee points.' The item was listed online around 8.30 pm in the evening of November 27th 2004 and was

⁵⁷ Inserted by the amendment Act of 2008. Section 66A reads as "Any person who sends, by means of a computer resource or a communication device, - (a) any information that is grossly offensive or has menacing character; or (b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred, or ill will, persistently makes by making use of such computer resource or a communication device, (c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages shall be punishable with imprisonment for a term which may extend to three years and with fine."

⁵⁸ Writ Petition (Criminal) No.167 Of 2012

⁵⁹ (2005) 3 Comp L J 364 Del.

deactivated, around 10 am on 29th Nov. 2004. The Delhi High Court while considering a petition to quash the criminal proceedings against Avinash Bajaj in this case, found that the website which hosted the MMS could be held liable for 'Sale etc.,... of obscene books' under Section 292 of IPC as well as Section 67 of IT Act, 2000 relating to publishing of information which is obscene in electronic form.

This case highlighted the risk which the intermediaries may be expected to undergo. Like USA, even in India, apprehension of intermediaries led to the amendment of the Information Technology Act, 2000, for providing protection to intermediaries from liabilities arising out of user-generated content. The Information Technology (Amendment) Act, 2008 amended Section 79 of the Information Technology Act, 2000 which provided for a safe harbour protection to intermediaries. The provision when read with the Information Technology (Intermediaries Guidelines) Rules, 2011 clearly provides that, the intermediary is entitled to safe harbour protection subject to fulfillment of certain conditions: The function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted;⁶⁰ or the intermediary does not initiate the transmission, select the receiver of the transmission, and select or modify the information contained in the transmission;⁶¹ and the intermediary observes due diligence while discharging his duties under the Act.⁶²

The intermediary shall comply with, the Information Technology (Intermediaries Guidelines) Rules, 2011, notified by the Central Government in this behalf. These rules require intermediaries to observe the due diligence by discharging certain of the duties such as: (a) To publish the rules and regulations,

⁶⁰ Information Technology (Amendment) Act, 2008, Section 79(2)(a)

⁶¹ Information Technology (Amendment) Act, 2008, Section 79(2)(b).

⁶² Information Technology (Amendment) Act, 2008, Section 79(2)(c).

privacy policy and user agreement for access-or usage by any person.⁶³ Such rules and regulations etc., shall inform the users of computer resource not to host, display, upload, modify, publish, transmit, update or share any of the prohibited information; (prohibited information includes, information, belonging to another person and to which the user does not have any right to; is grossly harmful, harassing, blasphemous defamatory, obscene, pornographic, paedophilic, libellous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise unlawful in any manner whatever; harm minors in any way; infringes any patent, trademark, copyright or other proprietary rights; violates any law for the time being in force; deceives or misleads the addressee about the origin of such messages or communicates any information which is grossly offensive or menacing in nature; impersonate another person; contains software viruses or any other computer code, files or programs designed to interrupt, destroy or limit the functionality of any computer resource; threatens the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign states, or public order or causes incitement to the commission of any cognizable offence or prevents investigation of any offence or is insulting any other nation).⁶⁴ (b) the intermediary shall not knowingly host or publish any information or shall not initiate the transmission, select the receiver of transmission, and select or modify the prohibited information. However, temporary or transient or intermediate storage of information done automatically within the computer resource to transfer or communicate to another computer resource without the exercise of any human editorial control; or removal of access to any information etc., by an intermediary on a request under the Act, will not amount to hosting, publishing, editing or storing of any such information;⁶⁵ (c) the

⁶³ The Information Technology (Intermediaries Guidelines) Rules, 2011, Rule 3(1).

⁶⁴ Rule 3(2).

⁶⁵ The Information Technology (Intermediaries Guidelines) Rules, 2011, Rule 3(3).

intermediary, upon obtaining knowledge by itself or by an affected person in writing or through email signed with electronic signature about any prohibited information, shall act within thirty six hours and proceed to disable such information. Further, the intermediary shall preserve such information and associated records for at least ninety days for investigation purposes;⁶⁶ (d) the Intermediary shall inform its users that in case of non-compliance with rules, regulations etc., it has the right to immediately terminate the access or usage and remove the non-compliant information;⁶⁷ (e) the intermediaries are required to furnish such information as are lawfully required to assist the Government Agencies for the purpose of verification of identity, or for prevention, detection, investigation, prosecution, cyber security incidents and punishment of offences under any law for the time being in force;⁶⁸ (f) the intermediary shall take all reasonable measures to secure its computer resource and information in compliance with prescribed rules⁶⁹ and report the cyber security incidents and also share cyber security incidents related information with the Indian Computer Emergency Response Team;⁷⁰ (g) the intermediary shall not knowingly deploy or install or modify the technical configuration of computer resource or become party to any such act which may change or has the potential to change the normal course of operation of the computer resource;⁷¹ (h) the intermediary shall publish on its website the name and contact details of the Grievance Officer, along with mechanism by which users or any victim can notify their complaints, who shall redress the complaints within one month from the date of receipt of complaint.⁷²

⁶⁶ The Information Technology (Intermediaries Guidelines) Rules, 2011, Rule 3(4).

⁶⁷ The Information Technology (Intermediaries Guidelines) Rules, 2011, Rule 3(5).

⁶⁸ The Information Technology (Intermediaries Guidelines) Rules, 2011, Rule 3(6) & Rule 3(7).

⁶⁹ The Information Technology (Reasonable security practices and procedures and sensitive personal Information) Rules, 2011.

⁷⁰ *Supra* note 64.

⁷¹ The Information Technology (Intermediaries Guidelines) Rules, 2011, Rule 3(10).

⁷² *Ibid.*

However, the above conditions are subject to the further limitation that if the intermediary has conspired or abetted or aided or induced, in the commission of the unlawful act or fails to act expeditiously upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data etc., is used to commit the unlawful act. In such a case, they will lose the protection afforded by safe harbour protection provision.

The above analysis of the provision along with rules shows that the Parliament has made a nice balance while fixing the liability of the intermediaries. It not only controls the intermediaries but restricts the users of internet as well. But continuation of these provisions on the statute book would be difficult for the following reasons: One, there are additional unconstitutional restrictions on speech and expression. Rule 3(2) required a standard ‘rules and regulation, terms and condition or user agreement’ that would have to be incorporated by all intermediaries. Under these rules, users are prohibited from hosting, displaying, uploading, modifying, publishing, transmitting, updating or sharing any information that falls into different content categories, a majority of which are restrictions on speech which are completely out of the scope of Article 19(2).⁷³ Two, a state-mandated private censorship regime is created. Intermediaries could ban speech online without approaching the court or the government.⁷⁴ Three, the principles of natural justice are not observed by the rules of the new censorship regime. The creator of information is not required to be notified nor given a chance to be heard by the intermediary.⁷⁵ Four, different classes of intermediaries are all treated alike. Since the internet is not a uniform assemblage of homogeneous components, but rather a complex ecosystem of diverse entities, the different classes of intermediaries perform different functions and therefore

⁷³ Sunil Abraham, “*Shreya Singhal and 66A A Cup Half Full and Half Empty*”, 13 (Economic & Political Weekly, vol I no 15, April 11, 2015)

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

contribute differently to the causal chain of harm to the affected person.⁷⁶ Five, there are no safeguards to prevent abuse of takedown notices. Frivolous complaints could be used to suppress legitimate expressions without any fear of repercussions and given that it is not possible to expedite reinstatement of content, the harm to the creator of information may be irreversible if the information is perishable. Transparency requirements with sufficient amounts of detail are also necessary given that a human right was being circumscribed. There is no procedure to have the removed information reinstated by filing a counter notice or by appealing to a higher authority.⁷⁷ Section 79 came for interpretation in *Shreya Singhal v. Union of India*,⁷⁸ wherein the Supreme Court considered its validity. It was held that Section 79 was valid subject to Section 79(3)(b) being read down to mean that an intermediary would be liable upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency that unlawful acts relatable to Article 19(2) are going to be committed and then fails to expeditiously remove or disable access to such material. Similarly, the Information Technology (Intermediary Guidelines) Rules, 2011 are valid subject to Rule 3 sub-rule (4) being read down in the same manner as indicated in the judgment. The intermediaries lose immunity only if they ignore government orders or court orders. Thus Supreme Court has imposed the liability on the intermediaries for their failure to observe the due diligence in few of the recent cases such as *Vyakti Vikas Kendra, India Public Charitable Trust v. Jitender Bagga & Anr.*,⁷⁹ and *Google India Pvt. Ltd. v. Visaka Industries Limited*.⁸⁰

⁷⁶ *Ibid.*

⁷⁷ *Ibid.* at 14.

⁷⁸ Writ Petition (Criminal) No.167 of 2012.

⁷⁹ CS(OS) No. 1340/2012. In this case, the suit against the defendants for damages and permanent injunction was filed mainly on the ground that they are aggrieved and hurt because of certain highly defamatory materials posted on www.blogger.com, owned by Google (defendant No.2) and by Mr. Jitender Bagga (defendant No.1). As per the plaintiff, the defendant No.1 was indiscriminately sending e-mails and publishing a large number of blog posts, which according to

VIII Single publication rule v. multiple publication rule

As already discussed, publication of defamatory statement is prerequisite for defamation including the online defamation where publishing of any statement is quite easy. This has assumed greater relevance due to the existence of two different legal positions adopted across the world. One is the Single Publication Rule and other is the Multiple Publication Rule. In Single Publication Rule, the cause of action generally begins from the date of publication till the completion of one year, while in multiple publication rule, the cause of action begins afresh from the every moment of the offending matter is left on a webpage, which can be viewed by others at any time. The effect of the Multiple Publication Rule is that the limitation period runs from the date of the last publication of the defamatory statement, allowing the affected party to sue many years after the statement was first made, which is absent in single publication rule. Even in the case of archived materials, an action could follow decades after the original publication of the

them was making highly vulgar, disgusting and abusive references towards His Holiness Sri. Ravi Shankar, owner of Art of Living Foundation, and other persons associated with the Art of Living. A notice complaining the same was given to the defendant No.1, who failed to give any reply. Thus Delhi High Court in this case holding Google to be an “intermediary” within the definition of Section 2(1)(w) and Section 79 of the Information Technology Act, 2000 directed the Google to remove all defamatory contents about the plaintiffs posted by the defendant No.1 from its website www.blogger.com as well as all the links containing defamatory content within 36 hours from the date of knowledge of the order passed by this Court. Further the court also restrained Defendant No.1 from sending any such e-mails or posting any material over the internet having a direct or indirect reference to the plaintiffs or the Art of Living Foundation or any member of the Art of Living Foundation, or His Holiness Sri Ravi Shankar.

⁸⁰ Criminal Petition No. 7207 of 2009, decided on 19/04/2011. The complainant in this case was engaged in business of manufacturing and selling of Asbestos cement sheets and allied products. It was alleged that In this case, one Mr. Gopala Krishna (A1) [Co-coordinator of “Ban Asbestos India”, a group hosted by Google (A2)] published certain defamatory articles aiming at a single manufacturer of Asbestos cement products viz., the complainant and renowned politicians of the country, G. Venkata Swamy and Sonia Gandhi who had nothing to do with the ownership or management of the complainant. These articles were available on the cyber space for worldwide audience. In the present case, in spite of the 1st Respondent issuing notice to the Petitioner about dissemination of defamatory material and unlawful activity on the part of A1 through the medium provided by A2, A-2 did not make any effort to block the defamatory content or stop dissemination of the unlawful and objectionable material. Therefore, the Andhra Pradesh High Court held that, A2 (Google) cannot claim any exemption either under Section 79 of the Act (as it stood originally) or Section 79 of the Act (after the amendment).

material.⁸¹ In U.K, first it was multiple publication rule applied in *Duke of Brunswick v. Harmer*.⁸² The Duke was given a copy of the newspaper that contained material defamatory of him which had been published 17 years earlier. While upholding the claim for damages as being within limitation, the Court held that the limitation period of 6 years re-started when Duke viewed the publication.

In *Godfrey v. Demon Internet Limited*,⁸³ the same rule was applied to the internet. Moorland J observed:

“In my judgment the defendants, whenever they transmit and whenever there is transmitted from the storage of their news server a defamatory posting, publish that posting to any subscriber to their ISP who accesses the newsgroup containing that posting.”

In *Louchansky v. Times News Papers Ltd*⁸⁴ the claimant sued the defendant newspaper in respect of a number of stories which suggested that he was connected to organized crime in Russia. The stories relating to Mr. Louchansky appeared on the online edition. The action relating to the online publication was not initiated within a year of the publication but it was argued on behalf of the claimant that publication in the context of an online publication occurred a new each time the material was accessed by a reader. The counsel for the newspaper argued before the Court of Appeal that it should adopt the single publication rule on the basis that the emergence of the internet and the wide and long lasting possibilities for accessing material raised possibility of an excessive degree of liability for defamatory material. Rejecting this argument the Court observed that, ‘the change in the law of defamation for which the appellants contend is a radical one. In our judgment they have failed to make out their case that such a change is required.’ Recently, in the United Kingdom, the law has changed with the enactment of the Defamation Act, 2013. Section 8 has introduced the Single

⁸¹ *Khawar Butt v. Asif Nazir Mir & Ors CS (OS) 290/2010* decided on Nov. 7th 2013.

⁸² (1849) 14 QB 185.

⁸³ (2001) QB 201.

⁸⁴ (2001) EWCA Civ 1835, (2002) QB 783.

Publication Rule. Section 8 provides that, where a person publishes a statement to the public, the publication will be deemed to include any subsequent publications of substantially the same statement unless the manner of publication is materially different.

The multiple rule of English law is followed in Australia, Canada⁸⁵ etc., and all these countries, relying on the initial justification of the English courts, refused to apply the single rule for three main reasons; firstly, the single rule considers the date of publication and not date when the libel first came to the plaintiffs' knowledge, which triggers the running of the limitation period. Secondly, it was the jurisprudence of the English law to reject the Single rule, which all the courts never intended to overrule. Lastly, it was considered unfair for the plaintiffs to apply the single rule of publications that are intended for different groups or that may reach different audiences.⁸⁶ Thus these countries adopted the rule of multiple publication.

While the USA, has a long history of single publication rule and was first to develop the same in *Wolfson v. Syracuse Newspapers, Inc*⁸⁷ which was then applied to the books in 1948 in the case of *Gregoire v. G.P Putnam's Sons*.⁸⁸ In the case of *Ogden v. Association of the United States Army*⁸⁹ the court held that: 'it is the prevailing American doctrine that the publication of a book, periodical or newspaper containing defamatory matter gives rise to but one cause of action for libel, accrues at the time of the original publication, and the statute of limitation

⁸⁵ See *Carter v. B.C. Federation of Foster Parents Association*, 2005 BCCA 398; *Shatif v. Toronto Life Publishing Co. Ltd.*, (2013) ONCA 405.

⁸⁶ As observed in *Khawar Butt v. Asif Nazir Mir & Ors CS (OS) 290/2010* decided on 07/11/2013. see *Berezovsky v. Michaels*, [2000] 2 All E.R. 986 (H.L.); *Loutchansky v. Times Newspapers Ltd.*, [2002] Q.B. 783 (C.A.); in Australia: see *Dow Jones and Co. Inc. v. Gutnick*, [2002] H.C.A. 56, 2010 C.L.R. 575; and by the British Columbia Court of Appeal: see *Carter v. B.C. Federation of Foster Parents Assn.*, 2005 BCCA 398 (CanLII), 2005 BCCA 398, 257 D.L.R. (4th) 133

⁸⁷ (1939) 279 NY 716.

⁸⁸ (1948) 298 NY 119.

⁸⁹ (1959) 177 Supra. 498 at 502.

runs from that date.’ Earlier the Single Publication rule was provided in the American Law Institutes Uniform Single Publication Act, 1952.⁹⁰

The New York Court of Appeals, *In Firth v. State of New York*,⁹¹ justified the decision to reject the multiple rule of publication in following words: ‘In addition to increasing the exposure of publishers to stale claims, applying the multiple publication rule to a communication distributed via mass media would permit a multiplicity of actions, leading to potential harassment and excessive liability, and draining of judicial resources.’⁹² Meanwhile, the court has also justified its decision to adopt the single publication rule as, ‘Single Rule of Publication is even more cogent when considered in connection with the exponential growth of the instantaneous, worldwide ability to communicate through the internet.’ Therefore, the rule of multiple publications would give ‘even greater potential for endless retriggering of the statute of limitations, multiplicity of suits and harassment of defendants.’ The court further observed that if the single publication rule is not upheld with regard to internet publications, then ‘Inevitably, there would be a serious inhibitory effect on the open, pervasive dissemination of information and ideas over the internet, which is, of course, its greatest beneficial promise.’

Thus the single publication rule prevents the constant triggering of the statute of limitations, effectuating express legislative policy in favor of a short statute of limitations period for defamation. It also allows ease of management whereby all the damages suffered by a plaintiff are consolidated in a single case, thereby

⁹⁰ It is set out in Article 577A of the 2nd Restatement of Torts (197) as follows:

“(1) *Except as stated in subsections (2) and (3), each of several communications to a third person by the same defamer is a separate publication.*’(2) *A single communication heard at the same time by two or more third persons is a single publication.*”

’(3) *Any one edition of a book or newspaper, or any one radio or television broadcast, exhibition of a motion picture or similar aggregate communication is a single publication.*

’(4) *As to any single publication, (a) only one action for damages can be maintained; (b) all damages suffered in all jurisdictions can be recovered in the one action; and a judgment for or against the plaintiff upon the merits of any action for damages bars any other action for damages between the same parties in all jurisdictions.*

⁹¹ (2002) NY int 88.

⁹² see *Keeton v. Hustler Mag., Inc.*, 465 US 770, 777 [1984].

preventing potential harassment of defendants through a multiplicity of suits.⁹³ That apart, the single publication rule is more consistent with modern practices of mass production and widespread distribution of printed information than the multiple publication rule.⁹⁴

Considering the two conflicting rules relating to the publication, India, followed UK, and adopted the Multiple Rule of Publication. The main reason behind the adoption of multiple rule in India originally was due to the fact that then India did not have a specific legislation on cyberspace until 2000.⁹⁵ The law of limitation in India⁹⁶ also fixed the limitation period for Libel at one year. In this respect, Indian courts found it suitable to follow the traditional English rule of multiple publications. But recently, the Delhi High Court, in *Khawar Butt v. Asif Nazir Mir & Ors*⁹⁷ overruled the multiple publication rule and adopted the single publication rule. In this case, a libelous statement was posted against plaintiff by the defendants, on around 26.10.2008, 27.10.2008 and even the booklet containing the allegedly defamatory material concerning the plaintiff is said to have been circulated around 25.12.2008. The plaintiff resumed the acquaintances of the same on 28.10.2008, 30.10.2008 and 05.11.2008. The suit was filed only on 11.02.2010 and thus plaintiff pleaded for the application of the multiple rule of publication- as the posting on the Facebook gives right to a continuous cause of action, since it tantamount to a fresh publication every moment the offending material remains on the website, and claimed for the permanent injunction and damages for the same. But the Court rejecting the contention of plaintiff observed that, 'Single Publication Rule is more appropriate and pragmatic to apply, rather

⁹³ *Gregoire v. G.P. Putnam's Sons*, 81 N.E.2d 45, 47-49 (N.Y. 1948); Restatement (Second) of Torts.

⁹⁴ *Barres v. Holt, Rinehart & Winston, Inc.*, 131 N.J. Super. 371, 374-375, 379, 390; *Scott Churchill & Anr v. State of New Jersey*, 378 N.J. Super. 471,478 (App. Div. 2005); *Soloman v. Gannett Co. Inc* (Docket No. A-6160-11T4) decided on 26.06.2013.

⁹⁵ *Supra* note 63 at 4.

⁹⁶ Entry 75 of the Schedule to the Limitation Act, 1963.

⁹⁷ CS (OS) 290/2010 decided on 07/11/2013.

the Multiple Publication Rule...find the reasoning adopted by the American Courts in this regard to be more appealing than the one adopted by the English Courts, prior to the amendment of the law by the introduction of the Defamation Act, 2013. It is the policy of the law of limitation to bar the remedy beyond the prescribed period. That legislative policy would stand defeated if the mere continued residing of the defamatory material or article on the website were to give a continuous cause of action to the plaintiff to sue for defamation. Of course, if there is re-publication resorted to by the defendant - with a view to reach the different or larger section of the public in respect of the defamatory article or material, it would give rise to a fresh cause of action', and held that the limitation period for the suit expired on 25.12.2009. Thus, the single publication rule is regarded as more appropriate rule in the determining the publication of the statement in majority of the countries including India.

IX Conclusion

There is concurrence opinion that the author of a defamatory statement is primarily responsible for it. A key question, however, is the treatment of intermediaries that provide access to a defamatory statement or host it on their servers. Many legal systems now agree that intermediaries should not be made liable for the content when they are merely a passive conduit. Furthermore, if intermediaries can be made liable for content they host, that will have an adverse effect on free expression. In addition, if intermediaries are liable for content they do not remove after being notified that it is objectionable to someone, the incentive is for the intermediaries to take down the material, and that seems to turn intermediaries into censors in a way that is inconsistent with the guarantee of free speech on the Internet, especially if subscribers have no rights to restore content even when they can show that it is not likely to be defamatory. Further the single publication rule is regarded as more appropriate rule in determining the publication of the statement in majority of the countries including India. In India,

there is a need to give statutory status to the rule by amending the Information Technology Act, 2000 as it is done in UK. This will remove the present uncertainty about the rule of publication applicable in India.

STATE POLICY ON AFFIRMATIVE ACTION IN HIGHER EDUCATION AND EMPLOYEMENT: AN ENQUIRY FROM THE PERSPECTIVE OF JUDICIARY IN INDIA

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I Introduction

A reading of the Preamble of the Constitution of India is enough to indicate to the citizens of India that the objective of our Constitution is to achieve social, economic & political justice & equality of status and of opportunity. In laying this objective the framers of the Constitution were aware of the historical discrimination faced by the scheduled castes and scheduled tribes in particular and in general by the backward classes segments of our society. The then existing injustice and inequalities of the society was highlighted in a speech delivered in the Constituent assembly by Dr. Ambedkar as follows:

“We must begin by acknowledging first that there is complete absence of two things in Indian society. One of these is ‘equality’. On the social plane, we have in India a society based on privilege of graded inequality, which means elevation for some and degradation of others. On the economic plane, we have a society in which there are some with immense wealth as against many who are living in utter poverty...in politics, we have equality and in social and economic life, we have inequality. We must remove this contradiction at the earliest possible moment, or else those who suffer from inequality will blow up the structure of the political democracy which this Assembly has to laboriously built up.”

In this regard, it is pertinent to mention here that the general ideal of equality is regarded as fundamental right under Articles 14, 15(1) and 16(1) of the

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Constitution of India. These Articles are herein below reproduced for immediate reference:

Article 14: the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 15(1): The State shall not discriminate against the any citizen on the grounds only of religion, race, caste, sex or place of birth or any of them.

Article 16(1): There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

II Affirmative action under the Constitution of India

Affirmative action is one of the means through which our Constitution tries to provide socio-economic justice. Affirmative action can be, and is, viewed as a program of compensation for historical injustices to the deprived castes in India. It is a dynamic concept which is seen as idiom to bring the underprivileged castes up the social ladder.¹ Affirmative action under the Constitution is implemented through reservation of jobs in government employment and seats in educational institution in favour of SCs, STs and other backward classes. Reservations in State employment and educational institutions is seen as a general exception to the main principle of equality guaranteed under Articles 14, 15(1) and 16(1) of the Constitution of India. A direction to the State in this regard is provided under Article 46 of the Constitution which is as follows:

The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes and shall protect them from social injustice and all forms of exploitation.

¹ Suresh Babu G. S., *Affirmative Action Beyond the Quest for Merit Versus Quota*, 320 (Social Action Vol.57 No: 3, Sep 2007).

Article 16(4) has been present in the Constitution since its inception which permits State to reserve posts in government services for any backward class of citizens which, in the opinion of the State, is not adequately represented in State services.

III Socio-economic justice under the Constitution of India

Unlike in the previous century, in the twentieth century, “justice” is understood as connoting distributive idea and the legal system is intended to realize that objective. The term ‘justice’ in the Preamble to the Constitution of India embraces three distinct forms-social, economic and political, secured through various provisions of Fundamental Rights and Directive Principles. For the purposes of our Constitution, the idea of ‘social justice’ concerns itself with the distribution of benefits and burdens throughout the society entitling every member of the society to enjoy the same level of well-being as every other.² It means absence of privileges being extended to any particular section of the society, and improvement in the conditions of backward classes (SCs, STs, and OBCs) and women. “Economic justice” prohibits discrimination between people on the basis of economic factors. Under the Constitutional scheme it involves the elimination of glaring inequalities in wealth, income and property.

Socio-economic justice understood in the background of group concept of equality implies equal opportunities for all without discrimination, obstacles or disabilities of any kind. Simply stated, unequal capacities which are the consequences of social and economic inequalities should not impede or prevent people from availing of opportunities for their well-being. The various Articles in the Constitution of India providing for affirmative action, excludes formal equality and introduces factual inequality. Social justice to be holistic has to harmonize the conflicting interests of different sections of the society and provide for welfare of the society as whole by ensuring the welfare.

² David Miller, *Social Justice*, 317 (1976 Edn.).

IV Judicial overview of affirmative action

In one of the earliest cases which set the trend of judicial approach towards affirmative action and further set the ball rolling for Constitutional amendments favouring affirmative action is the case of *Champakam Dorairajan v. State of Madras*³. In this case the government of Madras reserved seats in State medical and engineering colleges for different communities in certain proportions on the basis of religion, race and caste. This communal government order was challenged as unconstitutional. The government however defended its order on the grounds of Article 46 of the Constitution. The Supreme Court struck down the order as it was violative of equality guaranteed under Article 15(1) and observed that the right to seek admission in a college was a right as a citizen and not as member of any community or class of citizens. The Court refused a general power to the State to pursue the policy of reservations on the guidelines supplied by Article 46. It reasoned that the text of Article 16(4), which permits reservation in State employment, was in the nature of exception to formal equality enshrined in the main guarantee.

As a result of the above said decision, the Parliament brought an amendment to Article 15 and inserted clause (4) in the year 1951. Article 15(4) authorizes the State to make any special provision for the advancement of socially and educationally backward classes and scheduled castes and scheduled tribes. This assertion by the State of its concern for the benefits of the victims of historic discrimination is an exception for departure from formal equality.

Another case for the expression of judicial view on consideration of merit in the reservation policy was the case of *Balaji v. State of Mysore*.⁴ The Supreme

³ AIR 1951 SC 226.

⁴ AIR 1963 SC 649.

Court in this case held that the government order reserving 68 percent of the seats available for admission to the engineering, medical and other technical colleges is unconstitutional and ultra vires the equality provision. The court in this case accorded preference to the merit principle when it indicated that lowering of the quality of the graduates was the inevitable consequence of reservations and the need for technical, scientific and academic personnel was so “great that it would cause grave prejudice to national interest if consideration of merit are completely excluded by wholesale reservation of seat in all technical, medical or engineering colleges.” The court in this case fixed the ceiling limit of 50 percent for reservation in educational institutions and in providing public employment.

In a few months’ time the 50 percent rule laid down in the above case came up for consideration by the Supreme Court in *T Devadasan v. Union of India*.⁵ The question in this case was whether the 50 percent rule was applicable to those posts which were carried forward for next year also. In the instant case, as a result of the application of carry forward rule, the reservation of vacancies went up to 64 percent. The Supreme Court struck down the carry forward rule as unconstitutional and declared it invalid and observed that ‘...that reservation for backward communities should not be as excessive as to create a monopoly or to disturb unduly the legitimate claims of the other communities.’

It may be stated here that this ceiling limit was fixed in the year 1963; however, since then there is an increase in the population of SC/STs and OBCs alongside the increase of the economic power and activities of the State, which calls for a relook at the ceiling limit of 50 percent.

A positive view towards the affirmative policy of the State was reflected in the decision of the Supreme Court in the case of *N.M. Thomas v. State of Kerala*.⁶ In this case, the government through its government order exempted the members of the SC/ST employees of registration department from passing the departmental

⁵ AIR 1964 SC 179.

⁶ AIR 1976 SC 490.

test for promotion to higher posts. This exemption was given only for a period of 2 years. This was challenged as violative of Article 16 of the Constitution. But the Supreme Court upheld the government order as valid, as the classification of employees belonging to the SC/ST for allowing them an extended period of 2 years for passing the departmental test for promotion is a just and reasonable classification having rational nexus to the object of providing equal opportunity for all the citizens in matters relating to public employment.

In this case the judges reaffirmed the special Constitutional commitment for the economic betterment of the Scheduled Castes and Tribes due to their dismal social milieu and utter historical deprivation.

A similar favourable view was expressed by the Supreme Court in the case of *Akhil Bharatiya Soshit Karamchari Sangh (rly) v. Union of India*⁷ when it upheld the carry forward rule of reservation by the railway board which provided for 64.4 percent reservation in selection posts for SC/ST and observed that ‘mathematical precision could not be applied in dealing with human problems.’ It also opined that ‘some excess will not affect the reservation but substantial excess will make the selection void.’

However, there was a setback to the affirmative policy of the State when the Supreme Court in *Indra Sawhney v. Union of India* (The Mandal Case)⁸ held that, Article 16(4) did not permit reservation in promotions and at no point of time, the reservation shall exceed 50 percent rule as laid down in *Balaji’s Case*. The court observed that if the reservation exceeds 50 percent through carry forward rule, the rule is invalid and violative of Article 16(4) of the Constitution. The court further held that reservations at every stage of promotion would inevitably undermine the efficiency in administration.

In order to overcome the impact of the decision of the court in the above case the Parliament amended the Constitution in 1995 which added a new clause 4A to

⁷ AIR 1981 SC 298.

⁸ AIR 1993 SC 477.

Article 16, authorizing reservations even in promotion to any class or classes of posts in the services under the State in favour of SC/ST's where they are not adequately represented.

Despite the Article 16(4), the Supreme Court in the case of *Ajit Singh II v. State of Punjab*⁹ held that the Article 15(4) and 16(4) did not confer any fundamental right to reservation. The Court held that these provisions did not impose any constitutional duty to provide reservations: they simply enabled the State to depart from the merit principle of selection and provide reservations for backward classless.

The State policy on affirmative action was further vigorously carried forward to overcome some of the negative views of the judiciary by amending the Constitution in the year 2000 and 2001.

In the year 2000, an amendment was made and Article 16(4B) was inserted, which allows the State to consider unfilled vacancies reserved for backward classes as a separate class of vacancies not subject to a limit of 50 percent reservation. Similarly the 82nd amendment in the same year was made to the Constitution whereby a proviso was incorporated in Article 335 of the Constitution which enabled the State to give relaxations/concessions to the SC and ST candidates in the matter of promotion.¹⁰

In the year 2001, amendment to Indian Constitution was made and Article 16(4A) inserted which allows the State to implement reservation in the matter of promotion for SCs and STs. The impact of this amendment was the State is now permitted to carry forward unfilled vacancies of one year that were reserved under Articles 16(4) or 16(4A) to any succeeding year(s) and such carry forward vacancies will be ignored while calculating the ceiling of 50 percent.

⁹ AIR 1999 SC 3471.

¹⁰ Permits relaxation of qualifying marks and other criteria in reservation in promotion for SC/ST candidates.

The reaction to these amendments was on a positive note by the Supreme Court by upholding the above amendment it stated:

“The State is free to exercise its discretion of providing for reservation subject to the limitation, namely, that there must exist compelling reasons of backwardness, inadequacy or representation in a class of post(s) keeping in mind the overall administrative efficiency. It is made clear that even if the State has reasons to make reservations, as stated above, if the impugned law violate any of the above substantive limits on the width of the power, the same would be liable to be set aside.¹¹”

The Supreme Court upheld the Article 16(4A) and 16(4B) as not violating the basic structure of the Constitution. The Court stated that equality was furthered by these Articles. The Court has thus reiterated the special quality of Constitutional commitment accorded to the SC and ST in the matter of job reservation.

The latest controversy with regard to reservation in promotion for the SC and ST has been the subject of scrutiny by the Supreme Court in the case of *U.P. Power Corp. Ltd. v. Rajesh Kumar & Ors.*¹² In this case the U.P. Government Servants Seniority Rules was challenged as violative of the Constitution principle of equality and also not following the mandate of the decision of the Supreme Court in the case of *M. Nagaraj v Union of India*¹³. It was argued that the State Government had not formed its opinion based upon the quantifiable data regarding adequacy of representation of SC and ST in State service. The Court held that after the decision of the same court in the case of *M. Nagaraj* reservation of posts in promotion is dependent on the inadequacy of representation of members of the Scheduled Castes and Scheduled Tribes and Backward Classes and subject to the condition of ascertaining as to whether such reservation was at

¹¹ *M. Nagaraj v. Union of India* (2006) 8 SCC 212.

¹² Judgment delivered on 27 April, 2012 source Indian Kanoon- <http://indiankanoon.org/doc/112875558/> (last visited on Jan. 19, 2013).

¹³ *Supra* note at 10.

all required. Since the State Government had not done the exercise prior to such reservation of posts for SC and ST, the Court held U.P. Government Servants Seniority Rules ultra vires as they run counter to the dictum in *M. Nagaraj*.

The decision of the Supreme Court in the above case has put a question mark on the aspect of reservation in promotion for SC/ST, thereby making mandate of Article 16(4) and 16(4B) ineffective without quantifiable date for reservations for SC/ST.

It is to be reiterated here that, the objective of affirmative action of the State is to set right the historical injustices suffered by certain segments of the Hindu population who were discriminated on the basis of caste system. This position is clarified by the Supreme Court in *Ashoka Kumar Thakur v. Union of India*¹⁴, by stating that, “setting quotas or reservations might not be an appropriate means of promoting diversity or affirmation action because it discriminates against “meritorious” candidates who do not suffer social disadvantage on account of caste, race or ethnicity.” (Emphasis added).

V Summary and Conclusion

Affirmative action authorized by the Constitution of India is a measure to overcome social and economic inequality faced by the SC/ST and other backward classes. The historic victimization of SC/ST is to be set right through constitutional commitment. The amendments to the Constitution in this regard are a national commitment to the socio-economic equality of the SC/ST. However, reservation as means of affirmative action has been a sphere of intense debate and conflict between the Parliament, Judiciary and the people.

The Constitutional amendments were made in order to protect the interests of the backward classes including Scheduled Castes and Scheduled Tribes. The validity of all these four Amendments were challenged before the Supreme Court through various writ petitions clubbed together in *M. Nagaraj & others v. Union*

¹⁴ 2008 (6) SCC1.

*of India & others*¹⁵ mainly on the ground that these altered the basic structure of the Constitution. The Supreme Court upheld the validity of all these amendments. After the decision the Supreme Court in *U.P. Power Corp. Ltd. v. Rajesh Kumar & Ors*,¹⁶ the Parliament introduced the Constitution 117th Amendment Bill in the Rajya Sabha. The Bill provides for amendments to Article 16(4) of the Constitution that will allow States to reserve seats in promotion for SCs and STs without collecting data to show the backwardness of class and inadequacy of that class in public appointments. The Bill has been passed by the Rajya Sabha awaiting for the clearance from the Lok Sabha.

¹⁵ *Ibid.*

¹⁶ *Supra* note at 12.

LEGAL PROTECTION OF PRIVACY ON CYBER SPACE – A DECEPTIVE TASK OF THE INFORMATION TECHNOLOGY ACT, 2000

*Dr. Nagarathna A**

I Introduction

“Cyberspace, a consensual hallucination experienced daily by billions of legitimate operators, in every nation, by children being taught mathematical concepts... A graphic representation of data abstracted from banks of every computer in the human system. Unthinkable complexity. Lines of light ranged in the non-space of the mind, clusters and constellations of data. Like city lights, receding...”

- William Gibson, Neuromancer¹

Expansion of cyber technology in all domains including communication, commercial as well as non-commercial transactions across the world has raised various legal issues. India, like many other Nations is attempting to legally deal with numerous of such issues. Threat to personal data and loss of privacy are few of such vital issues affected due to use and abuse of cyber technology. Threat to privacy is raising today due to increased adoption of computerized processes for commercial and other vital transactions of day to day activities including state's governance. A huge amount of information is already being gathered about each of us by government agencies or private companies.²

Personal Data protection³ is essential for outsourcing arrangements that entrust an Indian company with a foreign company's confidential data or trade

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¹ <http://www.goodreads.com/quotes/14638-cyberspace-a-consensual-hallucination-experienced-daily-by-billions-of-legitimate> (last visited on July 19 2015).

² Internet and Bill Gates, <http://www.referatele.com/referate/engleza/online6/Internet-and-Bill-Gates-referatele-com.php> (last visited on Oct. 27 2011).

³ For the purpose of this paper, the terms 'personal data', 'data [information of a person]' and 'privacy' are used interchangeably.

secrets, and/or customers' confidential and personal data.⁴ With the amplified expansion of outsourcing industries in the country, Indian citizens and netizens of all nations using Indian cyber technology are demanding for legal protection to privacy and personal databases. While on the other hand, expansion of State's electronic surveillance has posed challenge to this right of privacy, especially on cyber space. At the same time arguments in favour of privacy protection has taken form of being an inevitable part of fundamental and human rights of concerned person.

II Right to privacy

Right to privacy though is universally acclaimed as an important right yet is not appropriately defined. It is one such human right which inspite of being very important is difficult to define, as its definition vary widely according to the context and environment.⁵ In a more strict sense, privacy protection is frequently seen as a way of drawing the line at how far society can intrude into a person's affairs.⁶ It is used to mean as a "right to be left alone" and as "the most cherished of freedoms in a democracy."⁷ It signifies "the right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by the publication of information."⁸ In the case of *R R Gopal v. State of Tamil Nadu*,⁹ the Supreme Court held that a citizen had a right to be let alone, and further had "the right to safeguard the privacy of his own, his

⁴ Majumdar & Co, Data Protection in India, available at <http://www.majmudarindia.com/pdf/Data%20Protection%20in%20India.pdf> (last visited on 2nd Oct. 2011).

⁵ "Overview of Privacy", Dec. 17, 2007, available at [https://www.privacyinternational.org/article/overview-privacy#\[2\]](https://www.privacyinternational.org/article/overview-privacy#[2]) (last visited on 17th Oct. 2011).

⁶ *Ibid*, quoting from Volio, Fernando, 'Legal Personality, Privacy and the Family' in Henkin (ed.), The International Bill of Rights, Columbia University Press, 1981

⁷ Justice Louis Brandels of the US SC in a case in 1890s. See: "Overview of Privacy", Dec. 17, 2007, available at [https://www.privacyinternational.org/article/overview-privacy#\[2\]](https://www.privacyinternational.org/article/overview-privacy#[2]) (last visited on 17th October 2011).

⁸ UK's Calcutt Committee's definition adopted in its first report, quoted in "Overview of Privacy", Dec. 17, 2007, available at [https://www.privacyinternational.org/article/overview-privacy#\[2\]](https://www.privacyinternational.org/article/overview-privacy#[2]), (last visited on 17th October 2011) quoting from the Report of the Committee on Privacy and Related Matters, Chairman David Calcutt QC, 1990, Cmnd. 1102, London: HMSO, at 7.

⁹ (1994) 6 SCC 632.

family, marriage, procreation, motherhood, child-bearing and education among others...”

Under various laws, the concept of privacy has been confused with Data Protection, and interprets privacy in terms of management of personal information. To an extent both privacy and data protection coincides as they both deal with certain issues common to each other. Privacy protection is frequently seen as a way of drawing the line at how far society can intrude into a person's affairs¹⁰ including the manner in which such persons personal data has be to collected and used. Right to privacy of an individual is not just a legal right but is universally declared as a human right.

International legal instruments including UDHR,¹¹ ICCPR¹² recognize right to privacy as a human right. Many legal systems including Indian treats it as an integral to ‘right to life.’ Yet in the course of business transactions, governance and administration of law, and under many other circumstances, disclosing private information is justified. Hence, protection of privacy is inevitable for which even companies are now brought under legal scrutiny. They are facing numerous litigations finally ending up held liable to pay huge damages to the victim. “Costs of data loss are immense and according to one estimates, over 50 million people have had data about them exposed over the past 18 months, the cost losing data have skyrocketed and businesses lose billions of dollars due to security breaches and consumer law suits. Fines, lawsuits, credit card fraud, insider trading, regulatory crackdown, and damaged reputations is taking its toll on businesses.”¹³

¹⁰ Global Internet Liberty Campaign, privacy and human rights, ‘An international survey of privacy laws and practice,’ available at <http://gilc.org/privacy/survey/intro.html#fnlnk0009>, (last visited on July 30th, 2011), quoting Simon Davies "Big Brother: Britain's web of surveillance and the new technological order," 23(Pan, London, 1996).

¹¹ Universal Declaration of Human Rights 1948.

¹² International Covenant on Civil and Political Rights 1966.

¹³ Importance of Privacy, Data Security and Ethics Training for the Enterprise, available at http://www.metricstream.com/webinars/webinar_4april08.htm (last visited on Oct. 30th, 2011).

III Right to privacy on cyber space

Protecting privacy and data in the online atmosphere is crucial for the promotion of electronic commerce and electronic governance. Its protection on the world-wide cyber space, crossing legal system's geographical boundaries and State's jurisdictions is indeed a huge concern for laws yet cannot be ignored. Despite this reality, right to privacy merits legal protection for being legally recognized human rights of netizens and fundamental rights of citizens, even in today's cyber phase.

Vital data consisting of personal information of many are today stored on computers, internet and clouds requiring sufficient legal protection against illegal retrieval, access and usage of the same. Crucial information such as that of details of credit or/and debit cards, Unique Identity cards, etc., are today used, stored and processed on devices with or connected to cyber technology. Online transactions and online communications are also further complicating the usage, more so with the increased usage of social networking sites on which personal data are uploaded.

Breach of right to privacy on cyber space may get infringed by:¹⁴

- Utilizing private data already collected for a purpose other than that for which it was collected;
- unauthorized reading of emails of others;
- sending of unsolicited emails or spamming;
- spamming;
- adware and spyware.

Even though right to privacy is constitutionally protected as being a part of "Right to Life" under Article 21, yet its protection on cyber space has become ineffective. The reason for the same are varied, some of which being specific to the nature of cyber space and data shared on such space, including the following:

¹⁴ Karnika Seth, *Cyber Laws in the IT Age*, 394 (Lexis Nexis, Butterworths Wadhwa, Nagpur, 2009).

- The nature of cyber space being trans-national may not completely come within the purview of Indian legal institution's jurisdiction and over all legal system.

- Parties violating such rights being not just State but also Non-State agents, do not come under the purview of State under Article 12 or any other constitutional provisions including Articles 19, 21, 32 and 226. Hence, such data protection is breached by a State authority, constitutional remedies cannot be claimed against such violations.

Thus a specific cyber space privacy protection law is the need of the day. This requires us to examine the extent of protection conferred to privacy on cyber space by the only special cyber law of the country, the IT Act, 2000.

IV Information Technology Act, 2000

Though the original IT Act, 2000 did not deal with the issue of privacy, yet the IT (Amendment) Act, 2008 to an extent addresses the issue. The Act has few provisions that to an extent protects personal data.

Section 43 which provides for Penalty and Compensation for damage to computer, computer system, etc., provides:

“If any person without permission of the owner or any other person who is in-charge of a computer, computer system or computer network, - [under clause] (b) downloads, copies or extracts any data, computer data base or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium; [under clause] (i) destroys, deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means; he shall be liable to pay damages by way of compensation not exceeding one crore rupees to the person so affected.”

The above civil wrong is criminalized under Section 66 of the Act, if it is committed with “fraudulent” or “dishonest” intention, thereby resulting in

imposing of imprisonment up to 3 years or with fine which may extend to five lakhs rupees or with both.

The Information Technology Act, 2000 [IT Act, 2000] to an extent protects sensitive personal data or information. The Act defines, ‘Sensitive Personal Data’ ‘as such personal information as may be prescribed by the Central Government in consultation with such professional bodies or associations as it may deem fit.’ The Government of India through the IT (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011¹⁵ has clarified certain issues relating to personal data protection. This rule defines ‘Sensitive personal data or information’ as:

“Such a personal information which consists of information relating to:

- (i) password;*
- (ii) financial information such as Bank account or credit card or debit card or other payment instrument details;*
- (iii) physical, physiological and mental health condition;*
- (iv) sexual orientation;*
- (v) medical records and history;*
- (vi) Biometric information;*
- (vii) any detail relating to the above clauses as provided to body corporate for providing service; and*
- (viii) any of the information received under above clauses by body corporate for processing, stored or processed under lawful contract or otherwise: provided that, any information that is freely available or accessible in public domain or furnished under the Right to Information Act, 2005 or any other law for the time being in force*

¹⁵ Government of India’s Notification issued in exercise of the powers conferred by Section 87 (2) (ob) read with Section 43A of the Act Published on 11th April 2011. Available at [http://www.mit.gov.in/sites/upload_files/dit/files/GSR313E_10511\(1\).pdf](http://www.mit.gov.in/sites/upload_files/dit/files/GSR313E_10511(1).pdf).

shall be not be regarded as sensitive personal data or information for the purposes of these rules.”

Additionally, Rule 2(i) defines "Personal information" as “any information that relates to a natural person, which, either directly or indirectly, in combination with other information available or likely to be available with a body corporate, is capable of identifying such person.”

Section 43A of the IT Act imposes civil liability upon corporates handling sensitive personal data, for failing to protect the same. It provides for payment of compensation by corporates for such failure. According to this provision:

“Where a body corporate, possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation, not exceeding five crore rupees, to the person so affected”.

The statutory explanation to the section defines the "reasonable security practices and procedures" as “security practices and procedures designed to protect such information from unauthorized access, damage, use, modification, disclosure or impairment, as may be specified in an agreement between the parties or as may be specified in any law for the time being in force and in the absence of such agreement or any law, such reasonable security practices and procedures, as may be prescribed by the Central Government in consultation with such professional bodies or associations as it may deem fit.” Thus, corporates handling sensitive personal data are required to protect them through any of the following ways:

1] Procedure which may be specified in an agreement between the parties:

Parties here refers to the person to whom such information belongs and the company handling such information who may determine the

method and means of protecting such personal data through clauses in the agreement entered for this purpose by them.

2] Procedure that may be specified in any law for the time being in force.

This may include laws which currently governs privacy protection such as the following

- a) Article 21 of the Indian Constitution, if such corporate handling such personal data is “State” according to Article 12, which are bound to protect citizen’s right to life and liberty, encompassing under its ambit “right to privacy”. Breach of such personal data’s protection may hence become grounds for seeking compensation before High Court under Article 226 or before Supreme Court under Article 32.¹⁶
 - b) Data which are subject matters of copyright protection can be protected under Indian Copyright Act 1956.
 - c) Data in form of personal communication and information shared between a professional such as a lawyer or a doctor and his client or a patient, being “privileged communication” are legally protected through Indian Evidence Act 1872¹⁷ as well as professional ethical code of concerned professions.
- 3] The IT Act 2000 further states that “In the absence of such agreement or any law the protection can be conferred as per the procedure and reasonable security practices prescribed by the Central Government [in consultation with such professional bodies or associations as it may deem fit]. As mentioned earlier, the 2011 Government of India’s Rule prescribes such procedure and practice. The third procedure hence is

¹⁶ However in order to invoke such constitutional remedies it is essential to interpret “corporates” as inclusive of State owned/run/managed companies and organizations. In such case, remedy that can be claimed cannot however be as per Section 43A but under Article 32 or 226 as stated by the author in this paper.

¹⁷ See provisions from the Indian Evidence Act – Section 126 to 129.

the one that is prescribed by the Government of India's 2011 rules.

Some of the salient features of this rule are as follows:

- Rule 4 requires body corporate to provide policy for privacy and disclosure of information. According to which:

“The body corporate or any person who on behalf of body corporate collects, receives, possess, stores, deals or handle information of provider of information, shall provide a privacy policy for handling of or dealing in personal information including sensitive personal data or information and ensure that the same are available for view by such providers of information who has provided such information under lawful contract.”

Such policy shall be published on website of body corporate or any person on its behalf and shall provide for:

- (i) Clear and easily accessible statements of its practices and policies;
- (ii) type of personal or sensitive personal data or information collected under rule 3;
- (iii) purpose of collection and usage of such information;
- (iv) disclosure of information including sensitive personal data or information as provided in rule 6;
- (v) reasonable security practices and procedures as provided under rule 8.”

Rule 8 prescribes reasonable security practices and procedures according to which:

“(1) A body corporate or a person on its behalf shall be considered to have complied with reasonable security practices and procedures, if they have implemented such security practices and standards and have a comprehensive documented information security program and information security policies that contain managerial, technical, operational and physical security control measures that are commensurate with the

information assets being protected with the nature of business. In the event of an information security breach, the body corporate or a person on its behalf shall be required to demonstrate, as and when called upon to do so by the agency mandated under the law, that they have implemented security control measures as per their documented information security program and information security policies.

(2) The International Standard IS/ISO/IEC 27001 on "Information Technology - Security Techniques - Information Security Management System - Requirements" is one such standard referred to in sub-rule (1).

(3) Any industry association or an entity formed by such an association, whose members are self-regulating by following other than IS/ISO/IEC codes of best practices for data protection as per sub-rule(1), shall get its codes of best practices duly approved and notified by the Central Government for effective implementation.

(4) The body corporate or a person on its behalf who have implemented either IS/ISO/IEC 27001 standard or the codes of best practices for data protection as approved and notified under sub-rule (3) shall be deemed to have complied with reasonable security practices and procedures provided that such standard or the codes of best practices have been certified or audited on a regular basis by entities through independent auditor, duly approved by the Central Government. The audit of reasonable security practices and procedures shall be carried out by an auditor at least once a year or as and when the body corporate or a person on its behalf undertake significant up gradation of its process and computer resource."

A corporate dealing with collection of personal data, according to Rule 5 is required to obtain consent in writing through letter or fax or email from the provider of the sensitive personal data or information regarding purpose of usage

before collection of such information. Such company is obliged not collect sensitive personal data or information unless;

- (a) the information is collected for a lawful purpose connected with a function or activity of the body corporate or any person on its behalf; and
- (b) the collection of the sensitive personal data or information is considered necessary for that purpose.

Further, while collecting information directly from the person concerned, the body corporate or any person on its behalf shall take such steps as are, in the circumstances, reasonable to ensure that the person concerned is having the knowledge of —

- (a) the fact that the information is being collected;
- (b) the purpose for which the information is being collected;
- (c) the intended recipients of the information; and
- (d) the name and address of;
- (e) the agency that is collecting the information; and
- (f) the agency that will retain the information.

A company holding any sensitive personal data or information is required not to retain such information for the duration longer than is required for the purposes for which the information may be lawfully used or is otherwise required under any other law for the time being in force... Such information collected shall be used only for the purpose for which it is collected. Company should also ensure that the providers of information are allowed to review such information provided by them whenever required by them. It is also essential for such companies to ensure that any personal information or sensitive personal data or information found to be inaccurate or deficient is corrected or amended as feasible.

Such corporates are required to keep the information secure as provided in rule 8. They must address any discrepancies and grievances of the providers of such information with respect to processing of information in a time bound

manner. The company shall designate an officer as the Grievance Officer of such company, whose name and contact details must be published on its website. Such officer must be empowered and obliged to redress the grievances of provider of information expeditiously but within one month ' from the date of receipt of grievance.

According to rule 6 which deals with disclosure of information:

(1) Disclosure of sensitive personal data or information by body corporate to any third party shall require prior permission from the provider of such information, who has provided such information under lawful contract or otherwise, unless such disclosure has been agreed to in the contract between the body corporate and provider of information, or where the disclosure is necessary for compliance of a legal obligation: Provided that the information shall be shared, without obtaining prior consent from provider of information, with government agencies mandated under the law to obtain information including sensitive personal data or information for the purpose of verification of identity, or for prevention, detection, investigation including cyber incidents, prosecution, and punishment of offences. The government agency shall send a request in writing to the body corporate possessing the sensitive personal data or information stating clearly the purpose of seeking such information. The government agency shall also state that the information so obtained shall not be published or shared with any other person.

(2) Notwithstanding anything contained in sub-rule (1), any sensitive personal data on Information shall be disclosed to any third party by an order under the law for the time being in force.

(3) The body corporate or any person on its behalf shall not publish the sensitive personal data or information.

(4) The third party receiving the sensitive personal data or information from body corporate or any person on its behalf under sub-rule (1) shall not disclose it further.”

Hence, Section 43A read with the rules prescribed by DEITY imposes civil liability upon corporates handling personal data.

Section 66E imposes criminal liability for violation of bodily privacy, according to which “Whoever, intentionally or knowingly captures, publishes or transmits the image of a private area of any person without his or her consent, under circumstances violating the privacy of that person, shall be punished with imprisonment which may extend to three years or with fine not exceeding two lakh rupees, or with both.”¹⁸

Section 72 of the IT Act, 2000 imposes criminal liability for breach of confidentiality and privacy. According to this:

“Save as otherwise provided in this Act or any other law for the time being in force, any person who, in pursuant of any of the powers conferred under this Act, rules or regulations made there under, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information, document or other material to any other person shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both.”

As per the above provision, any person including a public servant such as an Investigating Officer who in pursuance of their powers gets access to any

¹⁸ The Statutory explanation provided by the Act for this section defines private area as “the naked or undergarment clad genitals, pubic area, buttocks or female breast”. It further defines “under circumstances violating privacy” as circumstances in which a person can have a reasonable expectation that (i) he or she could disrobe in privacy, without being concerned that an image of his private area was being captured; or (ii) any part of his or her private area would not be visible to the public, regardless of whether that person is in a public or private place.

information including personal data, have an obligation not to disclose the same unless the person to whom such information belongs consents for such disclosure.

Further, Section 72 A of the IT Act imposes criminal liability upon service providers who fail to protect personal data. According to this provision:

“Save as otherwise provided in this Act or any other law for the time being in force, any person including an intermediary who, while providing services under the terms of lawful contract, has secured access to any material containing personal information about another person, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain discloses, without the consent of the person concerned, or in breach of a lawful contract, such material to any other person shall be punished with imprisonment for a term which may extend to three years, or with a fine which may extend to five lakh rupees, or with both.”

This provision imposes obligation to protect personal information upon any person including an intermediary¹⁹ who in the course of his official duty or service comes across such information for intentionally or knowingly disclosing such protected information thereby causing or likely to cause wrongful loss or gain.

V Liability of the intermediary’s

An intermediary being a corporate is subject to Section 43A of the IT Act, 2000. As mentioned earlier, Section 72A also imposes criminal liability upon an intermediary. In addition, the Indian Cyber Law through Information Technology (Intermediaries guidelines) Rules 2011 specifically obligates Intermediaries to

¹⁹ An Intermediary according to Section 2(w) of the IT Act 2000 is defined as “any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web hosting service providers, search engines, online payment sites, online-auction sites, online market places and cyber cafés.”

secure privacy protection to an extent.²⁰ According to the Rule, an intermediary is obliged to discharge certain duties including the following:

- He shall publish the rules and regulations, privacy policy and user agreement for access or usage of the intermediary's computer resource
- He shall inform the users of computer resource not to host, display, upload, modify, publish, transmit, update or share any information including that which:
 - belongs to another person and to which the user does not have any right to;
 - is invasive of another's privacy
 - infringes any patent, trademark, copyright or other propriety rights;
 - violates any law for the time being in force;
 - deceives or misleads the addressee about the origin of such messages or communicates any information which is grossly offensive or menacing in nature; and
 - impersonate another person.
- He shall not knowingly host or publish any information or shall not initiate the transmission, select the receiver of transmission, and select or modify the information contained in the transmission as specified in sub-rule (2). Provided that the following actions by an intermediary shall not amount to hosting, publishing, editing or storing of any such information as specified in sub-rule (2) –
 - a) temporary or transient or intermediate storage of information automatically within the computer resource as an intrinsic feature of such computer resource, involving no exercise of any human editorial

²⁰ [http://www.dsci.in/sites/default/files/Rules%20for%20sections%2043A%20and%2079%20of%20the%20IT%20\(Amendment\)%20Act%202008.pdf](http://www.dsci.in/sites/default/files/Rules%20for%20sections%2043A%20and%2079%20of%20the%20IT%20(Amendment)%20Act%202008.pdf).

control, for onward transmission or communication to another computer resource;

b) removal of access to any information, data or communication link by an intermediary after such information, data or communication link comes to the actual knowledge of a person authorized by the intermediary pursuant to any order or direction as per the provisions of the Act,

- Intermediary shall inform its users that in case of non-compliance with rules and regulations, user agreement and privacy policy for access or usage of intermediary computer resource, the intermediary has the right to immediately terminate the access or usage rights of the users to the computer resource of intermediary and remove non-compliant information.
- Intermediary shall strictly follow the provisions of the Act or any other laws for the time being in force.
- When required by lawful order, the intermediary shall provide information or any such assistance to government agencies who are lawfully authorized for investigative, protective, cyber security activity. The information or any such assistance shall be provided for the purpose of verification of identity, or for prevention, detection, investigation, prosecution, cyber security incidents and punishment of offences under any law for the time being in force, on a request in writing stating clearly the purpose of seeking such information or any such assistance.
- Intermediary shall take all reasonable measures to secure its computer resource and information contained therein following the reasonable security practices and procedures as prescribed in the IT (Reasonable

Security Practices & Procedures & Sensitive Personal Information) Rules 2011.

- Intermediary shall publish on its website the name of the Grievance Officer and his contact details as well as mechanism by which users or any victim who suffers as a result of access or usage of computer resource by any person in violation of Rule 3 can notify their complaints against such access or usage of computer resource of the intermediary or other matters pertaining to the computer resources made available by it. The Grievance Officer shall redress the complaints within one month from the date of receipt of complaint.

Further, according to Section 6A of the IT Act 2000, appropriate government in order to facilitate e-governance and also to ensure efficient delivery of services to the public through electronic means, may authorize, by order, any service provider [including an ISP] to set up, maintain and upgrade the computerized facilities and perform such other services as it may specify, by notification in the Official Gazette.²¹ According to Section 87(2)(ca), the Central Government is empowered to make rules to carry out the provisions of this Act in general and specifically to provide for the “manner in which the authorized service provider may collect, retain and appropriate service charges under sub-section 2 of Section 6A. The Central Government, in the exercise of its power under Section 6A and 87(2)(ca) has notified the IT (Electronic Service Delivery) Rules 2011. According to this rule, Electronic service providers including internet service providers are required to observe due diligence in relation to privacy policy. According to Rule 8(4), “All service providers and the authorized agents shall submit a due declaration for protecting the data of every individual transaction and citizen and any unauthorized disclosure to anyone without the written consent of either the individual or the appropriate government shall be debarred from providing such a

²¹ See: IT (Electronic Service Delivery) Rules 2011.

service any further and the provisions of Section 45 of the Act shall be applicable in such cases.” They are required to inform the users of computer resource not to host, display, upload, modify, publish, transmit, update or share any information that is invasive of another’s privacy or violates any law for the time being in force. It requires intermediaries to inform its users that in case of non-compliance with rules and regulations, user agreement and privacy policy for access or usage of intermediary computer resource, the intermediate have the right to immediately terminate the access or usage rights of the users to the computer resource of intermediary and remove non-compliant information.

Legal Exceptions to Right to Privacy:

“When there is competition between the right to privacy of an individual and the right to information of the citizens, the former right has to be subordinated to the latter right as it serves larger public interest.” - Supreme Court of India²²

IT Amendment Act, 2008 has inserted few provisions to IT Act, 2000 which empowers State to conduct Electronic Surveillance and regulate cyber space. According to Section 69 State is empowered to directions for interception or monitoring or decryption of any information through any computer resource. According to this provision: “(1) Where the Central Government or a State Government or any of its officer specially authorized by the Central Government or the State Government, as the case may be, in this behalf may, if is satisfied that it is necessary or expedient to do in the interest of the sovereignty or integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above or for investigation of any offence, it may, subject to the provisions of sub-section (2), for reasons to be recorded in writing, by order, direct any agency of the appropriate government to intercept, monitor or decrypt

²² *People’s Union of Civil Liberties v. Union of India* AIR 2003 SC 2363.

or cause to be intercepted or monitored or decrypted any information transmitted received or stored through any computer resource.”

Section 69B empowers State to authorize to monitor and collect traffic data or information through any computer resource for Cyber Security, according to which: “(1) The Central Government may, to enhance Cyber Security and for identification, analysis and prevention of any intrusion or spread of computer contaminant in the country, by notification in the official Gazette, authorize any agency of the government to monitor and collect traffic data or information generated, transmitted, received or stored in any computer resource.”

In addition, according to Section 69A, State is empowered to issue directions for blocking for public access of any information through any computer resource. According to this provision ‘(1) Where the Central Government or any of its officer specially authorized by it in this behalf is satisfied that it is necessary or expedient so to do in the interest of sovereignty and integrity of India, defense of India, security of the State, friendly relations with foreign states or public order or for preventing incitement to the commission of any cognizable offence relating to above, it may subject to the provisions of sub-sections (2) for reasons to be recorded in writing, by order direct any agency of the government or intermediary to block access by the public or cause to be blocked for access by public any information generated, transmitted, received, stored or hosted in any computer resource.’

An Intermediary is obliged to provide required assistance to State under Section 69, 69A and 69B failure of which results in imposing criminal liability upon such intermediary with an imprisonment for a prescribed term and fine under these provisions.

VI Conclusion

Though Indian Constitution ensures privacy protection, bringing it under the realm of “life” under Article 21, yet it is limited, ineffective in the area of cyber

space. This being a right which is restricted to be claimed against State or its agencies, fails to protect privacy rights as against private institutions and individuals. On the other hand, often breach of privacy right is either committed by corporates handling such private personal data [including BPOs] or by individuals on social networking sites where large amount of such personal data is uploaded and stored by many. These companies and sites mostly being privately owned and managed cannot be proceeded against as per current constitutional law provisions.

The IT Act through Section 43A though obligates such corporates to ensure protection of sensitive personal data, yet they cannot be used to impose criminal liability upon such corporates. On the other hand, Section 43 and 66 even though covers cases of breach of privacy committed by individuals yet is insufficient to cover all forms of threats to privacy on cyber space. While on the other hand Section 66E fails to cover aspects of privacy other than bodily privacy.

While personal data and privacy are to a large extent compromised on cyber space the country currently lacks effective legal checks and remedies. Thus privacy protection on cyber space is a deceptive task attempted to be handled through the current IT Act as it lacks efficiency as well as effectiveness to deal with the issue. Hence, it is essential to have a law, comprehensive enough to tackle challenges posed to privacy on cyber space and is specific to address concerns raised due to such worldwide technology.

STRENGTHENING OF LEGAL EDUCATION TO PROMOTE SOCIAL JUSTICE: A NEED OF 21ST CENTURY

*Dr. G. B. Patil**

I Introduction

“Future lawyers should be more aware that law is not a system of abstract logic, but the web of arrangements, rooted in history, but also in hopes, for promoting to a maximum the full use of a nation's resources and talents.”

Justice Felix Frankfurter¹

Legal education is a human science which furnishes beyond techniques, skills and competences, the basic philosophies, ideologies, critiques and instrumentalities all addressed to the creation and maintenance of a just society.² It provides occasions for articulation of theories of a just society and teaches us that articulation must be grounded in historical realities so that the truth of the working of the legal order is brought to the forefront. It is a subject of great importance as it plays a pivotal role in moulding and envisioning the legal system of the country. It is also instrumental in the accomplishment of the cherished objectives such as justice, liberty, equality and fraternity of a Sovereign, Socialist, Secular, Democratic, Republic State. It must sensitize society to identify its problems and ensure social and economic justice through rule of law and to eradicate injustice, poverty, corruption and nepotism from the society. The legal education stands for enhancement of human sensibility and injects a sense of protecting human liberty and equality before law.

Law is the cement of society and an essential medium of change. The significance of legal education in a democratic society cannot be over-

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¹ In an address to the College of the City of New York, September 30, 1942.

² Report of “The Curriculum Development Centre in Law”, Vol.1, U.G.C., New Delhi, (1990), 12.

emphasized. The aim of legal education should not only be to produce good lawyers but also to create cultured, law abiding citizens having human values and respect for human rights as they are the persons who serve the humanity in various capacities such as administrators, law teachers, jurists, judges and industrial entrepreneurs etc. A well administered and socially relevant legal education is a *sine qua non* for a proper dispensation of justice. Giving legal education a human face would create cultured law abiding citizens who are able to serve as professionals. The National Knowledge Commission³ while deliberating on issues related to concepts of knowledge observed as under:

“The aim of legal education is at preparing legal professionals who will play decisive leadership roles maintaining the highest standards of professional ethics and a spirit of public service. A lawyer, a product of such education would be able to contribute to national development and social change in a much more constructive manner.”

In the era of globalization which promotes a globally interconnected market-economy and is guided by the regime of decontrol, deregulation, the role of the State as a promoter of public good and social welfare has reduced. India is not an exception to this outcome of globalization. The MNCs, TNCs, and big business corporate houses have come to enjoy enormous power, often exercising influence even larger than the State. It has ushered an era of ruthless competitiveness wherein profits have become the only guiding force. India is also facing challenges posed by malnutrition, inadequate healthcare, housing, corruption in Government and the overall fall of political system.

In such a scenario, the role of legal education as a creator of lawyers who are meant to protect the society, as to act as ‘healers’ and to contribute not only from their purse but more so to the happiness of the mankind on a whole becomes more

³ The National Knowledge Commission (NKC) of India established in 2005.

prominent. Legal education should aim at promoting 'Justice' rather than just to resolve disputes. The study of law in order to be meaningful has to take into account the social realities. Law professionals are characterized as 'Social Engineers.' Professor Gower supports the view that the legal education should encourage the students of law to enrich their knowledge in economics, political science, sociology and if possible, psychology. Knowledge of all allied social sciences is necessary to understand the whole complex of social structures, values, institutions and processes. The legal education also needs to promote congenial ethical environment and skill which may help in the effective administration of justice and maintenance of rule of law.

It needs to mediate conflicts of interests and values of society and discover techniques and tools of suppression of disorder and deviance. The law institutes must provide a realistic and comprehensive picture of the structure and functions of society and will also be oriented towards the implementing of a consistent and explicit set of democratic values. He will not only be lawyer for the future but also be a social technician or social engineer.⁴ According to Friedman, the legal education should emphasize upon morality, honesty, self-accountability, patriotism, self-sacrifice, fellow-filling and compassion with all the living beings. The students of law must be exposed to identify the social problems and find out solutions to eradicate corruption, injustice, nepotism and poverty from the global society. Law is not a brooding omnipresence in the sky but a flexible instrument of social order. Law influences every human activity in a civilized society. Almost all the nations have to give importance on value based pragmatic legal education which would ensure and foster economic development and to provide social justice to the people. The legal fraternity of our globe is to revamp their methodology and curriculum to make their legal education humanistic, modern, contemporary and socially relevant. As Roscoe Pound puts it, 'law is a weapon of

⁴ R. Segal and S.R. Bhosale, "*Legal Education in India: Restructuring and Reshaping*", 37 – 46 (IBR, Dec. 26, 1999).

social engineering' history has proved time and again that lawyers do make excellent statesmen.

The present professional legal education is not conducive to the welfare of the masses. It is more oriented towards the welfare of the professionals than meeting the aspirations and hopes of the common man. It is failing to meet the goals set by our Constitution. 'Legal Education' as 'Justice Education' has to sensitize the law students to the problems of society so that when they enter the profession, they would be aware, that they are the main actors on the stage of the legal system; the role being the dispensation of justice especially to the poor, the have-nots and the invisibles. The lawyers of tomorrow must have a positive concern towards the helpless and should tirelessly aid the weak, the poor and the dispossessed. In a recent article published in *The Hindu* daily, Justice Krishna Iyer said that

“while it is true that corporate culture has infused money in the profession, especially for the young college graduates but instead of chasing excellence, they are running after success.”

It is to be noted that the quality of legal education will ensure emergence of advocates in diverse fields who would be better equipped to face the grueling challenges and lead the nation towards prosperity.⁵ In light of the above, there is an urgent need for revamping legal education to promote the desired goals of the Constitution of India at the earliest. In this connection the observation made by Justice A.M. Ahmadi in his report is apt. It reads as:

“We have waited long enough to repair the cracks in the legal education system of this country and it is high time that we rise from armchairs and start the repair work in right earnest.”⁶

⁵ V.R. Krishna Iyer, “The Syndrome of Judicial Arrears”, *The Hindu*, New Delhi Edition, Dec. 2, 2009.

⁶ Justice A.M. Ahmadi Committee Report (1994).

II Meaning, aims and objectives of legal education

Legal education has the potential of creating responsible and responsive social lawyering. Legal education is a broad concept. It includes the profession which is practiced in courts, teaching law, and research in law, administration in different branches. Law plays a role in commercial, industrial employments, all other activities which postulate and require the use of legal knowledge and skill.⁷

Lord Denning in his address to the society of Public Teachers of Law expressed three purposes of legal education:

- To show how legal rules have developed, the reasons underlying them and the nexus between legal and social history;
- to extract the principles underlying the existing legal rules; and
- to point out the right road for future development.

Mr. Dean Wright of the University of Toronto⁸ suggested three objectives of a law school. They are:

- Education which would train a man not merely in the work of solving problems of individual clients but of the society in which he lives;
- to act as a center of research, criticism and contribute for better understanding of the laws by which societies are held together; and
- education in the qualities that should be found in legal practitioners.

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

- To educate students about the operative legal rules, both substantive and procedural;
- to provide students with adequate experience to apply these rules;

⁷ Justice Gajendragadkar Committee, 'On the re-organization of legal education in the university of Delhi,' (1964).

⁸ Sushma Gupta, *History of legal education* (Deep and Deep Publications, (P) Ltd., New. Delhi, 2006).

- to equip students with sufficient knowledge of historical and sociological background of the country's legal system;
- to provide students with some knowledge of other legal system of the world so that the students do not find themselves at a complete loss when it comes to adopting a comparative approach;
- very significantly, the students should be encouraged to participate in discussions, seminars and challenge the very premise of legal concepts and their applications.

The committee of legal education of the Harvard Law School lays emphasis on the following purposes of a law school:

- To train men for the legal profession; and
- to provide a center where scholars might contribute to an understanding of law and government and participate creatively in their growth and improvement.

Legal education is an investment, which if wisely made will produce most beneficial results for the nation and accelerate the pace of development.⁹ Legal Education and the profession have to care for the “invisible man”. The Advocate has to become socially more relevant and technically very sound if he has to survive and serve the needs of the society in 21st Century.¹⁰

III History of legal education in ancient India

The concept of legal education in India goes back to the Vedic age when it was essentially based on the concept of *Dharma*. There is, however, no record of any formal legal education being provided at that time. Training was self-acquired in matters connected with *Dharma*. The Kings either used to dispense justice themselves or appoint Judges and Assessors to administer justice, not

⁹ Dr. G. S. Pathak and Prof. S. K. Agarwal (eds.), *Legal Education in India - Problems & Perspectives* 2-3 (1973).

¹⁰ Dr. Ranbir Singh, “Reforms in legal education and legal profession in India,” *Andhra Law Times* (6) 95: 15-18 (1998).

necessarily trained in law but who were known for their righteousness and justness and had the reputation of being fair and impartial.¹¹ In ancient India Law was understood as a branch of *Dharma*.¹² The Vedas were the original sources of law and Smritis announced the message of Vedas and Smritikars were great jurists. Smritikars, commentators, Nibandhakars, essayists, were the legal guardians of law. King made laws were also interpreted, thus, the commentators were virtually law-makers. *Sadachara*, Custom, *Nyaya* or *Yukti* were the bases of legal process in Ancient India.¹³ The essential aspect of our ancient thought concerning law was the clear recognition of the supremacy of *Dharma* and clear articulation of the status of '*Dharma*', somewhat in terms of modern concept of the Rule of Law i.e., of all being sustained and regulated by it.

The concept of '*Dharma*' has therefore been with us from time immemorial. *Dharma* is for the stability of society, the maintenance of social order and the general well-being and progress of humankind. Whatever conducive to the fulfillment of these objects is *Dharma*.¹⁴ There is nothing higher than *Dharma*. Even a very weak man hopes to prevail over a very strong man on the strength of *Dharma*, just as he prevails over a wrong doer with the help of the King. So *Dharma* can be equated with Truth. Therefore people say about a man who declares the truth that he is declaring *dharma* and about one who declares *dharma* they say he speaks the truth.¹⁵ The *Brihadaranyak upanishad* identified *dharma* with truth and declared its supreme status. From ancient times, the constitutional system depends on the foundation of Truth and social sympathy. Truth is the fundamental basis of the State; indeed the whole universe rests on Truth. The rule

¹¹ Speech Delivered by Justice A.S. Anand on the invitation of the Sarin Memorial Legal Aid Foundation at (Chandigarh, on Jan. 31st, 1998).

¹² P.V. Kane, "*History of Dahrmasatras*", 62, (6 volumes Poona, 1930).

¹³ John Duncan Martian Derrett Volume 1 BRILL, (1976).

¹⁴ Karna Parva of the Mahabharata Verse-58 in Chapter 69.

¹⁵ A similar thought is expressed in the Ayodhya-kanda of the Valmiki Ramayana, in Verse-10, Sarga -109.

of law in our ancient thought was strictly co-related with the purpose of securing social well-being.¹⁶

The *Markandeya Purana* expresses the purpose of *Dharma* as:

“That all persons may be happy, may express each other's happiness, that there may be welfare of all, all being free from fear and disease; cherish good feelings and sense of brotherhood, unity and friendship.”¹⁷

The purpose of referring the historical background of legal education is to draw lessons and guidance in order to outline the future course of action. It is noteworthy that the wisdom of the ancestors, the doctrines and concepts of jurisprudence, the system of laws, could succeed only so long as the essential purpose of *Dharma* and the determination to uphold *Dharma* is maintained in the country. Not just law or doctrine or philosophy but a climate of public opinion and resolution to uphold law, is necessary if the benefits of the Rule of Law are to accrue to Society. The statement "*Dharmo Rakshati Rakshitah*" who shelters and defends law, the law defends and shelters, which occurs in fifteenth verse of the eighth chapter of the Manu Smriti. It is to be noted that in the present society, the acts of human beings are directed contrary to *Dharma* and the laws. All forms of ill-treatments, caste, class & gender based discrimination, complicated social prejudices, unjust subordination, greedy exploitation; inhuman regimens, etc. are showing the deviance from the pristine purity and strength of basic dictates of our ancient tradition & *Dharma*.

IV Role of a lawyer in a social welfare state

We are no longer *laissez-faire* but a welfare State and in the welfare society law plays a very important role in every affair of human being. Law serves as an important instrument to achieve socio-economic development.¹⁸ Today law is not

¹⁶ *Kautiliya Arthashastra*, 1-9-39.

¹⁷ Ch. 188, Verse 12-17.

¹⁸ *Supra* note 3.

viewed merely as an instrument of social control but also as an instrument of social change. The conventional role of a lawyer was to step in after the event took place, in order to resolve the dispute and dispense justice to the aggrieved party. In the changed scenario, the additional roles envisaged are that of policy planner, business advisor, negotiator among interest groups, experts in articulation and communication of ideas, mediator, lobbyist, law reformer etc. Hence lawyers need to be trained in their social responsibility, alternative modes of dispute-resolution, legal aid, etc. Lawyers have been in the vanguard of a country's progress and have always zealously guarded human liberties and the rule of law. The legal profession is different from other professions in that what the lawyers do, affects not only an individual but the administration of justice which is the foundation of the civilized society.

Both as a leading member of the intelligentsia of the society and as a responsible citizen, the lawyer has to conduct himself as a model for others both in his professional, private and public life. The society has a right to expect from him such ideal behaviour. It must not be forgotten that the legal profession has always been held in high esteem and its members have played an enviable role in public life.¹⁹ It is relevant to quote the passage from the book *Howard Gardner's*²⁰ *"Five Minds for the Future."* It reads as under:

"We conceptualize a profession as a highly trained group of workers who perform an important service for society. In return for serving in an impartial manner and exercising prudent judgment under complex circumstances, professionals are accorded status and autonomy."

The observation made by Justice *Krishna Iyer* is more relevant now, when he noted, Law is not a trade, not briefs, not merchandise, and so the heaven of

¹⁹ P. Ramanatha A Iyer's, *Legal and Professional Ethics*, 12 (3rd Edn, 2003)

²⁰ Passage from the book Howard Gardner's *Five Minds for the Future* — Chapter 6 "The Ethical Mind" Page 128 published by Harvard Business School Press, Boston, Massachusetts.

commercial competition should not vulgarize the legal profession. Supreme Court of India in *Ramon Services (P) Ltd v. Subhas Kapur*²¹ observed as under:

“The lawyers are a force for the perseverance and strengthening of constitutional government as they are guardians of the modern legal system.”

The way a lawyer thinks acts and conducts himself has to change if legal services have to be a powerful tool for justice in an unequal society/world. It is here legal education has to take its lesson on value addition. Justice must become central to the law curriculum and community-based learning must give the desired value orientation in the making of a lawyer. Professional education will have to be imbued with a spirit of social service and there is no better way of inculcating it except to expose them, while studying law, to real life experiences.

The Supreme Court of India has also observed in *J. S. Jadhav v. Mustafa Haji Mohamed Yusuf*²² that the legal profession is a noble profession. There is no profession/class which has done more to develop and defend the human rights. Again in *Sanjiv Datta's*²³ case the Supreme Court of India has said that the legal profession is a solemn and serious occupation. It is a noble calling and all those who belong to it are its honourable members. Although the entry to the profession can be by acquiring merely the qualification of technical competence, the honour as a professional has to be maintained by its members by their exemplary conduct both in and outside the Court.

Further, the preamble of the chapter on Standards of professional conduct and Etiquette prescribed by the Bar Council of India²⁴ reads as:

“An advocate shall, at all times, conduct himself in a manner befitting his status as an officer of the Court, a privileged member of the

²¹ (2001) 1 SCC 118.

²² AIR 1993 SC 1535.

²³ (1995) 3 SCC 619.

²⁴ The Preamble of professional conduct and Etiquette prescribed by the Bar Council of India.

community, and a gentleman, bearing in mind that what may be lawful and moral for a person who is not a member of the Bar or for a member of the Bar in his non-professional capacity may still be improper for an advocate.”

These standards of professional ethics have been the same since the beginning when the counsels were permitted to appear before the Kings.²⁵ The source of professional ethics is in moral law. As we know that *ethics is the basis of a civilized and organized society*. Every profession has its code of conduct based on the principles of morality.²⁶

But unfortunately, the moral decadence that has crept into society has not spared the advocates. It is important to underscore that being recognized as a member of a profession is not the same like acting as a true professional. Some lawyers fail to honour the central precepts and strictures of their calling and nobility of profession. It must be remembered that advocates pursue the profession not only for their personal enrichment but primarily to help the court in adjudicating disputes according to law.

V The present scenario

- Legal Education is influenced by a multitude of factors like- Governmental Policy; BCI; UGC; Affiliating Universities; Private Governing Body of Law Colleges; National Litigation Policy; Developments in Legal Profession; Developments in the Legal System; The kind of students who enroll; The Caliber and Commitment of the faculty The Infrastructure available; Technological advancements; The Developments in other fields of Education and The Changes in the Society.

²⁵ Mr. K.P. Jayaswal in *Manu and Yajnavalkya*, 288 (Tagore Law Lectures 1917 Calcutta 1930)

²⁶ P. Ramanatha Iyer, “*Legal & Professional Ethich – Legal Ethics, Duties& Privileges of a Lawyer*,” 143 (Wadhwa, Nagpur), quoting Manohar Raj Saxena’s paper on “Professional Ethics” presented in the Silver Jubilee Celebrations of the Bar Council, AP, Hyderabad, (1987).

- The main challenge faced by India's legal and judicial systems is delivering justice to poor people. For most part, people deprived of constitutional or legislative rights have little access to courts. With the cost of good quality legal services escalating, the ability of common people to get effective, high quality legal assistance and access to justice is diminishing and the legal system is in danger of becoming further alienated from common people. Increasing number of the best law graduates are moving to corporate law practice. Civil and criminal litigation at the local level is suffering from a serious dearth of qualified legal professionals. It is therefore imperative that legal education should prepare students with the aptitude, interest, commitment, skills and knowledge necessary to work with socially excluded people and the poor at the local level to advance the cause of justice.
- Lastly, the regulatory structure for legal education in India is currently seriously flawed and needs careful reconsideration. A law college has four masters at a minimum; the university to which it is affiliated; the State Government; the University Grants Commission; and the Bar Council of India. These four agencies have varying mandates, interests and constituencies. They do not provide coherent guidance for the improvement of legal education in the country.”

VI Suggestions

In the light of the above discussions, the following suggestions are made for consideration and implementation.

- Legal education must be socially engaged. This means that legal education programs must compulsorily expose students to the problems of poverty, social exclusion, social change and environmental degradation through clinical legal education, legal aid programs and through seminars and debates that sensitize and expose students to issues of social justice. Working with the

poor through one or other program must become a mandatory part of the curriculum.

- Curriculum development should include expanding the domain of optional courses, providing deeper understanding of professional ethics, modernizing clinical courses, main streaming legal aid programs and developing innovative pedagogic methods.
- There is a need to restructure the course content keeping in view the vastness and relevance of particular subjects, and the time available for their studies. Wherever necessary the subject should be divided in two semesters. The subjects should be arranged scientifically so that easily comprehensible and interesting subjects are taught in the initial semesters, while the subsequent semesters should be devoted to the study of subjects requiring understanding of abstract concepts.
- There should be greater emphasis on mastering basic concepts of traditional law subjects rather than on increasing the number of new subjects to be taught.

VII Conclusion

Lawyers should not forget that they have glorious traditions left behind them while they have to maintain those traditions of love and service to the society. Advocates must have exemplary traits of sincerity of purpose. Reappraisal of professional obligations, decency and decorum should be placed high on the agenda to check the debasement of advocacy. It is needless to say that for realization of human rights, vibrant democratic machinery with rule of law is essential. That is possible only when judiciary and legal profession shines with its integrity and gains efficiency besides being independent and immune from ordinary influences such as inducement and bribery. Law does not live in the books; it lives with profession. Judges may speak more finally, but only for a moment. They learn from Bar which fabricate the social structure from statutes tailored to the needs of society. The Bar gives shape and meaning to the words of

the statute. The learning of the Bar reflects in the opinion of a Judge. Hence, it is the value based legal education that plays a pompous role in promoting social justice.

DEVELOPMENT, DISPLACEMENT AND HUMAN RIGHTS

*Dr. Vishwanath M.**

I Introduction

“Forced population displacement is always crisis-prone, even when necessary as part of broad and beneficial development programs. It is a profound socio-economic and cultural disruption for those affected. Dislocation breaks up living patterns and social continuity. It dismantles existing modes of production, disrupts social networks, causes the impoverishment of many of those uprooted, threatens their cultural identity, and increases the risks of epidemics and health problems.”¹

In recent social science literature, probably no other term has been subjected to so many diverse and shifting interpretations than the term *development*. This is primarily because of the complexity and multi-dimensionality involved in the very conception of development itself. While it is conceded that development is a multifaceted phenomenon having political, social and cultural connotations, it is the economic dimension which has dominated the very core of the development debate.² The International Labour Organization (ILO) tended to measure development in terms of fulfillment of people's physical and cultural needs like food, water, nutrition, shelter, health, education and security.³ In the context of developing countries, the objective of this approach was to overcome the problems of hunger, malnutrition, illiteracy, infant mortality

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¹ Michael Cernea, “Social Integration and Population Displacement.” *International Social Science Journal*, 1995, 143/1.

² Sharma T.R., ‘Dilemmas of Sustainable Development in Developing Countries’, in Suryakant, Nina Singh, Jadish Singh and A.B. Mukerji (eds.), *Reinventing Regional Development*, 98 (Jaipur: Rawat Publications, 2004).

³ See ILO Meeting Basic Needs: Strategies for Eradicating mass Poverty and Unemployment, (Geneva: International Labour Organization, 1976).

and morbidity.⁴ Development in real terms is to be understood as the participation of an increasing portion of a country's population in growing material, social and cultural wealth. 'This meaning of central term *development* implies that the macroeconomic view is by no means sufficient to get a true picture of reality.'⁵ The capitalist model of development is now clearly on rise with its agenda of transformation toward modern industrial market economies justified morally as the best means to combat poverty and to raise standards of living on a global scale.⁶ Economic prosperity of a nation can never be determined or decided as development or term a state as developed (mostly in case of developing states); recognizing that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting thereof.⁷ As per this specification, a situation where there is a sharp increase in Gross Domestic Product (GDP) or rapid industrialization or an impressive expansion of exports with a large increase in capital inflows does not in itself signify development. 'If these outcomes are not accompanied with an improvement of the well-being of all people, if people do not meaningfully participate in the process, or, if the distribution of benefits is iniquitous and unfair, they will not be regarded as development.'⁸ The paper emphasises the issues of development and displacement especially in the name of big projects (irrigation

⁴ See Sen., A.K., *On Economic Inequality*, (Delhi: Oxford University Press, 1980); Sen., A.K., *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford: Clarendon Press, 1981).

⁵ Dirk Bronger 'Economic Growth or Economic Development? India-China Comparison' in Suryakant, op.cit, N.1, p.209.

⁶ Anthony Oliver-Smith 'Displacement, Resistance and the Critique of Development: From the grass-roots to the global' RSC Working Paper No.9 Refugee Study Center University of Oxford, November 2002, p.6

⁷ The Preamble of Declaration on the Right to Development, which was adopted by the United Nations in 1986.

⁸ Centre for Development and Human Rights, *The Right to Development A Primer*, 49 (New Delhi: Sage Publications, 2004).

projects) which has dented the basic rights of common man; it asserts the failure of the state authority in balancing human rights and development.

II Dimensions of right to development

The right to be developed has become a right of every individual (it doesn't mean that right to develop was not a right earlier but it has an official recognition now) by the adoption of the Declaration of Right to Development (RTD) 1986; and it has indirect references in many international human rights instruments.⁹ It has been reaffirmed by the Vienna Declaration and Programme of Action (Vienna Declaration) which was adopted by 171 countries participating in the World Conference on Human Rights in 1993, that the right to development is a universal and inalienable right and an integral part of fundamental human rights.¹⁰ The main aim of RTD is to bring down economic imbalances that divide the developed and developing worlds and to integrate economic development with human rights, which will enhance the ethical factor in the conduct of international relations.¹¹ RTD establishes that 'States have the right and the duty to formulate appropriate natural development policies that aim at the constant improvement of

⁹ 1944, the Philadelphia declaration of the International Labour Organization, Article 2-"All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual freedom in conditions of freedom and dignity, of economic security and equal opportunity; 1945, The UN charter (chapter IX: International Economic and Social Co-operation) Article 55 - ... Un shall promote higher standards of living, full employment, and conditions of economic and social progress and development...and...universal respect for...human rights...; 1948 UDHR, Article-22- Everyone...is entitled to realization... of the economic, social and cultural rights indispensable for his dignity and the free development of his free personality...; 1968 Proclamation of Tehran: The enjoyment of economic and social rights is inherently linked with any meaningful enjoyment of civil and political rights and...there is a profound interconnection between the realization of human rights and economic development; 1972, Senegalese Jurist Keba M'baye coins the term RTD in his inaugural lecture to the International Institute of Human Rights (Third Teaching Session of the International Institute of Human Rights July 3, 1972); 1979 Resolution 4 (XXXV), Para 2, of the Commission on Human Rights gives official recognition to RTD.

¹⁰ Vienna Declaration and Programme of Action A/CONF.157/23 (12 Jul. 1993)

¹¹ Issabella D. Bunn' 'The Right to Development: Implications for International Economic Law' AM. U. INT'L L. REV. [15:1426-1467] 2000.

the well-being of the entire population of individuals.’¹² There is an assumption that such development will produce benefits for all, not just a particular community or sector within the society. ‘There is also an implicit expectation in these assertions that the state in activating its right to develop will act in an ethical fashion that respects the principles of democracy and the human rights of the people involved.’¹³ Human development focuses on the enhancement of the capabilities and freedoms that members of a community enjoy, human rights represent the claims that individuals have on the conduct of individuals and collective agents and on the design of social arrangements to guarantee and secure their possession of these capabilities and freedom.

The promotion of human development and the fulfillment of human rights share, in many ways, a common motivation, and reflect a fundamental commitment to promoting the freedom, well-being and dignity of individuals in all societies. Human rights are fulfilled when individuals not only enjoy certain goods and freedoms, but when they have social guarantees of secure access to them. Human rights analysis thus involves assessments of the extent to which institutions and social norms are in place that provide security to the human development achievements within a society...¹⁴ The United Nations Development Programme (UNDP) has applied Sen’s concept of capabilities to link human rights and development, specifically noting that... ‘Human development shares a common vision with human rights. The goal is human freedom. And in pursuing capabilities and realizing rights, this freedom is vital. People must be free to exercise their choices and to participate in decision making that affects their lives.

¹² Dhagamwar, Vasudha, Enakshi Ganguly Thukral, and Mridula Singh. “The Sardar Sarovar Project: A Study in Sustainable Development?” In Fisher, William F. (ed.) *Toward Sustainable Development: Struggles Over India’s Narmada River*, (Armonk, New York and London: M.E. Sharpe, 1995), p. 265-288

¹³ Anthony Oliver-Smith op.cit., N.5, p.8

¹⁴ Human Development Report 2000, Draft for Chapter 2, Sudhir Anand and Amartya Sen, 15 January 2000. In Center for Development and Human Rights, *The Right to Development A Premier*, 45(New Delhi: Sage Publications, 2004).

Human development and human rights are mutually reinforcing and helping to secure the well-being and dignity of all people, building self-respect and the respect of others.¹⁵

Arjun Sen Gupta characterizes development in a right based approach by adopting five principles from human rights instrument as follows:

- (i) *Equity* is reflected in policies that are aimed at ensuring the equitable distribution of benefits and that target the most vulnerable and marginalized segments of society;
- (ii) *Non-discrimination* means that there will be no discrimination on the grounds of race, colour, sex, language, political or other opinion, religion, national or social origin, property, birth or other status, not only between the beneficiaries but also between agents;
- (iii) *Participation* is concerned with access to decision-making and the exercise of power in execution of projects which lead to programme of development. This means that citizens have to be empowered and have ownership of the programme;
- (iv) *Accountability* involves establishing responsibility for non-fulfillment of a right and applying corrective measures. Any development programme must identify duty-holders and their obligations;
- (v) *Transparency* is essential for ensuring accountability because programmes must be designed in such a manner as to bring out openly all the interrelations and linkages between different actions and actors.¹⁶

The five principles *i.e., equity, non-discrimination, participation, accountability and transparency* holds the key to determine what development means and how it should be accomplished.

¹⁵ Stephen P .Marks, 'The Right to Development in Context', p.25-26

¹⁶ Fourth Report of the Independent Expert (Arjun Sen Gupta) to the Human Rights Commission, E/CN.4/2002/WG.18/4, 20 December 2001, Para 26-32 as quoted in Centre for Development and Human Rights, *op.cit*, N.13. p.53

III Development, politics and human rights

Development is perceived by its protagonists in terms of modernization, improved standards of living, industrial and economic progress; to materialize this, large infrastructural and manufacturing projects emerge as its manifestation. These projects cannot be executed without compulsory land acquisition¹⁷ and it becomes inevitable to displace the community from their original inhabitation. Is anybody against development? Arguably the answer would be NO, but the argument arising is at what cost are these developments? Answering these questions becomes tough as the stakeholders are divided depending upon the benefits and losses that they obtain from these developmental activities.

Big dams¹⁸ have been ‘potent symbols of both patriotic pride and the conquest of nature by human ingenuity and it is seen as the provider of electric power, water and food; tamers of floods; greeners of the desert; guarantors of national independence- for most of twentieth century, dams have been the largest single structures built by humanity, have symbolized progress, whether that amorphous concept be the creation of capitalist wealth, the spreading of the fruits of socialism, or the great march of communism’.¹⁹ Large dams become paradigmatic illustrations of the belief in today’s dominant form of political economy, neo-liberalism, and class politics.²⁰

“To Lenin and Stalin, big dams formed the core of the strategy to transform the USSR into an industrial super-state; big dams were at the heart of Roosevelt’s public works centered New Deal; to newly independent State leaderships like Nasser, Nkrumah and Nehru these were

¹⁷ Saxena K.B. “Development, Displacement and Resistance: The law and the Policy on Land Acquisition” 351-410 *Social Change*: September 2008: Vol.38 No.3.

¹⁸ ICOLD defines a big dam as above 15 m in height, measured from lowest of the general foundation area.

¹⁹ Patrick McCully, *Silenced Rivers: The Ecology and Politics of Large Dams* (London and New Jersey: Zed Books, 1996), p.1.

²⁰ See Singh Satyajit, *Taming the Waters: The Political Economy of Large Dams in India*, (New-Delhi: Oxford University Press, 1997)

powerful symbols of their countries' 'pride and progress,' 'temples of modernity'; to premier Verwoerd they were the symbol of apartheid power and minority right."²¹

The top five dam-building countries account for nearly 80% of all large dams worldwide. China alone has built around 22 000 large dams, or close to half the world's total number. Before 1949 it had only 22 large dams. Other countries among the top five dam building nations include the United States with over 6,390 large dams; India with over 4,000; and Spain and Japan with between 1,000 and 1,200 large dams each.²² Probably the words of United States of America's former President Franklin D. Roosevelt 'I came, I saw, and I was conquered'²³ would have provoked other leaders of the world, which ignited the eagerness of building big dams which they thought to be the indicator of development. At the opening of the Bhakra Nangal canal in Punjab in 1954, the first Prime Minister of independent India Pandit Jawaharlal Nehru, described his 'strange exhilaration and excitement' at seeing the canal and the construction site of the Bhakra dam.²⁴ Nehru expressed his awe through nationalism mixed with religious reverence:

"What a stupendous, magnificent work- a work which only that nation can take up which has faith and boldness! ... it has become the symbol of a nation's will to march forward with strength, determination and courage.... As I walked around the [dam] site I thought that these days the biggest temple and mosque and gurdwara are the place where man works for the good of mankind. Which place can be greater than this, this Bhakra-Nangal, where thousands and lakhs [hundreds of thousands] of men have worked, have shed their blood and sweat and laid down their

²¹ Patrick Mc. Culley, "Big Dams, Time to Reassess the Faith", *The Ecologist Asia*, Vol. 5& 6 Sep-Oct, 1998

²² The Report of World Commission on Dams, 2000, p.9

²³ Hoover Dam inauguration ceremony, 30 September 1935

²⁴ McCully, op.cit., N. 20

lives as well? Where can be a greater and holier place than this, which we can regard as higher? ”²⁵

In the former Soviet Union (USSR) building dams was a prestigious project and sustained ideological vision of human progress through the total control of nature. In the words of writer Maxim Gorky Soviet dam builders sought to make ‘mad rivers sane’;²⁶ China on an average has built more than 600 big dams every year after the revolution, according to the Reservoir Development Bureau of the Ministry of Water Resources of China (1999), more than 83,000 reservoirs and dams were constructed in China between 1949 and 1998.²⁷ Mao Zedong’s command to aim for ‘higher and higher’ was read by his officials as economic targets to mean building more and more dams and they discarded advises from hydrologist and have built thousands of dams;²⁸ with a planned capacity of 18,200 megawatts, the Three Gorges Dam on China’s Yangtze River is the world’s largest power project. The dam has been the dream of Chinese leaders for more than 80 years, including Sun Yat-Sen, Mao Zedong and Deng Xiaoping. Li Peng, the outgoing chair of China’s parliament, has repeatedly called the project a “symbol of the superiority of the socialist system.”²⁹ Today, a majority of the world’s major river basins are grided with dams and great rivers have become staircases of reservoirs and total investment in large dams worldwide is estimated at more than \$2 trillion.³⁰ Worldwide, reservoirs have a

²⁵ Nehru J., *Speeches*, Vol.III. March 1953-August 1957 (Calcutta: Publications Division, Government of India, 1958), p.2-3.

²⁶ McCully, op. cit., N.18 p.17

²⁷ Yan Tan, Graeme Hugo and Lesley Potter, ‘Government-organized Distant Resettlement and the Three Gorges Project’, *China Asia-Pacific Population Journal*, September 2003, p.6

²⁸ *Ibid.* p.19.

²⁹ Human Rights dammed off at Three Gorges: An Investigation of Resettlement and Human Rights Problems in the Three Gorges Dam Project, A Report Published by International Rivers Network, January 2003, p.1 www.IRN.ORG

³⁰ The Report of World Commission on Dams, 2000, p.xxix

combined storage capacity of as much as 10,000 cubic kilometers, equivalent to five times the volume in all the rivers in the world.³¹

The overall global level of physical displacement could range from 40 to 80 million people. This means that approximately *one out of every hundred people* now living on earth would have been displaced by a large dam. Before the late 1970s, vast displacement was caused by dams such as Sanmenxia³² and Danjiangkou³³ in China. According to official statistics, dams have displaced 10.2 million people in China between 1950 and 1990 (34% of all development-related displacement including that due to urban construction).³⁴ Independent sources estimate that the actual number of dam-displaced people in China is much higher than the official figure, with 10 million displaced in the Yangtze Valley alone.³⁵

Large dams in India displaced an estimated 16-38 million people since 1957-1995. Thus, in India and China together, large dams could have displaced between 26-58 million people between 1950 and 1990. These figures are at best only estimates and certainly do not include the millions displaced due to other aspects of the projects such as canals, powerhouses, project infrastructure, and associated compensatory measures, such as biological reserves; they also refer to physical displacement only and thus do not include communities upstream and downstream of dams that have suffered livelihood displacement;³⁶ millions of

³¹ Chao B.F., 'Anthropological Impact on Global Geodynamics Due to Reservoir Water Impounded', *Geophysical Research Letters*, Vol. 22, No.24, 1995.

³² Sanmenxia reservoir is located on the upper reaches of the Yellow River. It was started on 13 April 1957 and completed in April 1961. The reservoir resulted in 287,000 migrants displaced. The number of migrants increased to 5, 00,000 people.

³³ Danjiangkou reservoir is located on the Han River, the largest tributary of Yangtze River. Dam construction started on 1 September 1958 and was completed in 1973. There were more than 3, 82,000 migrants displaced.

³⁴ China Resettlement Policy and Practice- Review and Recommendations, Draft for Reviewing, Regional Technical Assistance Project, Asian Development Bank (ADB), 1999, p.1

³⁵ Jun Jing, 'Displacement, Resettlement, Rehabilitation, Reparation and Development - China Report' Contributing Paper, Thematic Review I.3 Displacement, WCD 1999, p.5; Danjiangkou reservoir is located on the Han River, the largest tributary of Yangtze River. Dam construction started on 1 September 1958 and was completed in 1973. There were 382,000 migrants displaced.

³⁶ The Report of World Commission on Dams, 2000, p.104.

people living ‘downstream’ from dams have also suffered devastating impacts as a result of disease, altered river flow and loss of natural resources such as fisheries and floodplain agriculture.³⁷ The result has been the impoverishment of a majority of resettlers from most dam projects throughout the world.

The State’s role as the provider of social justice has been under constant strain. Revotajustitia, asked St. Augustine,³⁸ *quid sunt regna nisi magna latrocinia?* ‘States without justice are but robber bands enlarged’; and earlier Plato had taken it as the mark of the just society that it should be free from dissension.³⁹ Justice is bond of society, and without it, no association of human individuals could subsist.⁴⁰ Justice has been much misunderstood, and in practice much neglected. This is why our society has become increasingly divided, and why its members have become more and more alienated from its authority. On many occasions states in the name of *Eminent Domain*, a legal theory of government taking power of sovereignty, to take or destroy private property for public purpose without the consent of the owner;⁴¹ Dutch jurist Hugo Grotius used this term in 1625 and described it:

“... The property of subjects is under the eminent domain of the State, so that the state or he who acts for it may use and even alienate and destroy such property, not only in the case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way”. Grotius

³⁷ Aviva Imhof, Susanne Wong and Peter Bosshard ‘Citizens’ *Guide to the World Commission on Dams* 10 (Berkeley USA: International Rivers Network, 2002).

³⁸ City of Goad, IV, iv quoted in quoted in Lucas J.R. ‘The Concept of Justice’ <http://users.ox.ac.uk/jrlucas/libeqsor/justice.html>

³⁹ Lucas. J.R., *On Justice*, 1 (Oxford: Clarendon press, 1980).

⁴⁰ David Hume “An Enquiry Concerning the Principles of Morals” (ed), Selby Bigge C.A. 206 (Oxford: Oxford Press 1902).

⁴¹ American Jurisprudence, 26, Second Edition, 444 (Rochester, NY: Lawyers Corporation Publishing, 1996) and Leonard W. Levy, et al, ed., *Encyclopedia of the American Constitution* 630-632 (New York: Mac Millian Publishing Company, 1986).

allowed, however, that “the state is bound to make good the loss to those who lose their property”⁴²

Yet, antecedents of eminent domain can be traced back to “higher law” theories, which emphasized inherent rights of man, originating in the classic societies of Greece and Rome. A provision of the Magna Carta, which protected freeholders from being randomly disseized, also reflected another instance where potential conflict between sovereign power and private property rights was recognized. Grotius and other natural rights philosophers of the seventeenth century believed that property was an individual right. Lockean philosophy identified property as existing outside of the social contract. Individuals brought their property into the contract with themselves. Under natural rights philosophies, the right of property flowed from the individual to the state. The state, therefore, derived its right of eminent domain from the popular consent represented by the social contract. Accordingly, natural right theories stipulated that those who forfeited their property were logically entitled to just compensation from the state.⁴³

The truth is the politics of dam building continues in the name of development because the corporate beneficiaries of dam building, including environmental consultancies and electricity-intensive industries like aluminum-are not just passive recipients of government largesse but actively persuade politicians and bureaucrats to build more dams. Such ‘lobbying’ routinely involves bribery: the massive costs of large dams’ means that they are an almost

⁴² Hugo Grotius, *De Jure Belli et Pacis*, 1625, in Ellen Frankel Paul, *Property Rights and Eminent Domain* 74-75 (New Brunswick, NJ: Transaction Books, 1987). Bernard H. Siegan, *Property Rights: From Magna Carta to the Fourteenth Amendment* 37 (Social Philosophy and Policy Foundation and Transaction Publishers, 2001).

⁴³ Paul, *Property Rights*, 71-80; Richard A. Epstein, *Taking: Private Property and the Power of Eminent Domain* 3-31 (Cambridge: Harvard University Press, 1985), Ellen Frankel Paul and Howard Dickman, ed., *Liberty, Property, and the Foundations of the American Constitution* (Albany: State University of New York Press, 1989); William B. Stoebuck, “A General Theory of Eminent Domain,” *Washington Law Review* 47 (1972), p 553-608; Jeremy Waldron, *The Right to Private Property* 3-252 (Oxford: Clarendon Press, 1988).

uniquely effective channel for kick-backs, greatly increasing their attractiveness for business executives, aid bureaucrats and politicians.⁴⁴

Big dams constitute representation of an option whose haphazard course between relative success stories and worrisome dead-ends have yet not taught state institutions how to question the pre-suppositions of their orientations, such process being rarely possible due to the importance of the misrecognition of the determinants that are at work in their consecration.⁴⁵ Indeed, to question the legitimacy of the large dam paradigm amounts today to question the legitimacy of a market economy where growth and productivity are the key objectives, to the detriment of thinking the social conditions of growth and productivity at a social structure level, both in a diffusive and distributive manner. ‘This tutelary theory of economic growth is a pure mathematical fiction. From the start, it has been founded on an abstraction which brackets the economic and social conditions of rational orientations’⁴⁶ and the economic and social structures that are the condition of production. Such conditions favour the belief in the historical inevitability of a subordinated paradigm like the one of large dams, dependent on the survival of its larger ideological frame and professional corps of defenders.⁴⁷

It is worth emphasising James Scoot’s explanation on how government’s planning in making their countries highly developed has been disaster in most of cases for both the state and its people.⁴⁸ He states four elements, (i) administrative ordering,⁴⁹ (ii) high-modernist ideology,⁵⁰ (iii) authoritarian state,⁵¹ and (iv) a

⁴⁴ McCully, op.cit., N.18. p.20

⁴⁵ Joël Cabalion ‘Social Movements and/in the Post Colonial Dispossession, Development and Resistance in the Global South’, for sociology of dam-induced displacements: state-managed dispossession and social movements of resettlement in Central rural India. Ph.D. Thesis (Paris, France: Ecole des Hautes Etudes en Sciences Sociales (EHESS), 2008), p.9-10

⁴⁶ Such an analytical pattern is here inspired of the way in which Pierre Bourdieu analyzed the formation of the economic habitus of Algerians from Kabyle society; Bourdieu Pierre C.F, “Making the Economic Habitus. Algerians Workers Revisited”, in *Ethnography*, 17-41 (London: Sage Publications, 2000).

⁴⁷ McCully, op.cit, N.18. p.273-281

⁴⁸ See James C. Scott., *Seeing Like a State* (New Haven: Yale University Press, 1998)

⁴⁹ *Ibid.*

prostrate civil society that lacks the capacity to resist these plans,⁵² that have failed the state planning. In sum, the legibility of a society provides the capacity for large-scale social engineering, high-modernist ideology provides the desire, the authoritarian state provides the determination to act on that desire, and an incapacitated civil society provides the level social terrain on which to build. ‘Why such high-modernist plans, backed by authoritarian power, actually failed?’ ‘Designed or planned social order is necessarily schematic; it always ignores essential features of any real, functioning social order. The simplified rules animating plans for a city, a village, or a collective farm was inadequate as a set of instructions for creating a functioning social order. The formal scheme was parasitic on informal processes that, alone, it could not create or maintain. To the degree that the formal scheme made no allowance for these purposes or actually suppressed them, it failed both intended beneficiaries and ultimately its designers as well.’⁵³

Big dams schemes have largely been a failure in terms of its stated benefits and perhaps of most significant is the fact that social groups bearing the social and environmental costs and risks of large dams, especially the poor, vulnerable and future generations, are often not the same groups that receive the

⁵⁰High modernism was about “interests” as well as faith. Its carriers, even when they were capitalist entrepreneurs, required state action to realize plans. In most cases, they were powerful officials and head of states. They tend to prefer certain forms of planning and social organization (such as huge dams, centralized communication and transportation hubs, large factories and farms, and grid cities), because these forms fit snugly in to high-modernist view and also answered their political interests as state officials. There was, to put it mildly, an elective affinity between high modernism and the interests of many state officials. *Ibid.*, p.5

⁵¹The ‘State’ that is willing and able to use full weight of its coercive power to bring these high-modernist designs into being. The most fertile soil for this element has typically been times of war, revolution, depression, and struggle for national liberation. In such situations, emergency conditions foster the seizure of emergency powers and frequently delegitimize the previous regime. They also tend to give rise who repudiate the past and who have revolutionary designs for their people. *ibid.*, p.6

⁵²A fourth element is closely linked to third: War, revolution, and economic collapse often radically weaken civil society as well as make the populace more receptive to a new dispensation. Late colonial rule, with its social engineering aspirations and ability to run roughshod over popular opposition, occasionally met this last condition. *Ibid.*

⁵³*Ibid.*

water and electricity, nor the social and economic benefits from these. Applying a 'balance sheet' approach to assess the costs and benefits of large dams, where large inequities exist in the distribution of these costs and benefits, is seen as unacceptable given existing commitments to human rights and sustainable development.⁵⁴ In recent decades, however, a 'new development paradigm' has been articulated, one that promotes poverty reduction, environmental protection, social justice, and human rights. In this paradigm, development is seen as both bringing benefits and imposing costs. Among its greatest costs has been the involuntary displacement of millions of vulnerable people.⁵⁵ Development-Induced Displacement (DID) has been the subject of scholarly⁵⁶ and activists scrutiny.⁵⁷ Even major international donors and agencies have contributed a number of studies.⁵⁸ Many studies are also now linking DID, indigenous peoples and human rights issues.⁵⁹ One of the seventeen thematic reviews of the World Commission on Dams (WCD) by far the most comprehensive review of large

⁵⁴ The Report of World Commission on Dams, 2000, p.xxxi

⁵⁵ W. Courtland Robinson, *Risks and Rights: The Causes, Consequences, and Challenges of Development-Induced Displacement*, (Washington D.C: The Brookings Institution – SAIS Project on Internal Displacement, 2003), p.10.

⁵⁶ e.g. Mc. Mcully, *Patrick Silenced Rivers: the Ecology and Politics of Large Dams*, (London: Zed Books, 2001); Oliver-Smith, Anthony 2002 *Displacement, Resistance and the Critique of Development: From the Grassroots to the Global*, Final Report prepared for ESCOR R7644 and the Research programme on Development Induced Displacement and Resettlement, Refugee Study Center, University of Oxford, July; Scudder, Thayer, *The Future of Large Dams: Dealing with the Social, Environmental and Political Costs*, (London: Earth scan, 2005)

⁵⁷ e.g. International River Network (IRN) www.inr.org; The Corner House an Environment and Social Justice Ngo based in UK www.thecornerhouse.or.uk; World Rain Forest Movement (WRM) an international rainforest movement headquartered in Montevideo, Uruguay www.wrm.org.uy

⁵⁸ e.g. Picciotto et.al. 2001; Asian Development Bank, 1996a, 1996b, Bank 1994, 2004

⁵⁹ e.g. Colchester, Marcus 1999 'Sharing Power: Dams, Indigenous Peoples and Ethnic Minorities', *Indigenous Affairs*, 3-4 (June-December): 4-54, International Work Group for Indigenous Affairs (IWGIA), Copenhagen; Kurdish Human Rights Project (KHRP) 2003 "This is the Only Valley Where We Live": the impact of the Munzur Dams', Report of the KHRP Fact-Finding Mission to Dersim/Tunceli. KHRP, London; KHRP 2005, 'The Cultural and Environmental Impact of Large Dams in South-east Turkey', Fact-Finding Mission Report, February. Written by Maggie Ronayne, National University of Ireland, Galway and KHRP, London; Yong 2006a 'Dam-based development in Malaysia: the temmenggong and Sungai Selangor Dams and the Resettlement of the OrgangAsli', doctoral thesis submitted to the University of Sussex.

dams, focused particularly on indigenous peoples and ethnic minorities. Although nearly eleven years have passed since the WCD process, dams underway or planned continue to displace millions and induce widespread human rights violations, especially of vulnerable groups such as indigenous peoples,⁶⁰ women, children, rural poor and farmers.

IV Development and displacement in India

India has the highest concentration of rural population living in poverty. When economic planning⁶¹ was initiated in independent India, its major tasks were to undo the colonial legacy and establish a firm basis for sustainable economic development.⁶² Poverty reduction is a prominent objective of social and economic development contemplated under the Indian constitution, finding expression in plans, policy statements and programmes.⁶³ For a large country like India with enormous regional disparities in development, and differences in the institutional framework often deriving from cultural diversities, any single strategy for the whole country may not prove to be appropriate.⁶⁴ Despite many development achievements, the performance of programmes directly targeted to the rural poor has been disappointing. Deprivation is complex, and can be understood as interlocked poverty, physical weakness, isolation, vulnerability and

⁶⁰ Carol Yong Ooi Lin “Indigenous Peoples, Displacement Through ‘Development’ and Rights Violations: the Case of the orang Asli of Peninsular Malaysia” in katarzynaGrabska and Lyla Mehta eds. *Forced Displacement Why Rights Matter*, 178 (London: Palgrave McMillan, 2008).

⁶¹ Indian Culture is often regarded as being peculiarly unsuited to planned economic development. When caste and regionalism influence decisions concerning hiring, it is difficult to fit the best man to the job; family history strongly influences the occupational choices of sons; the heavy hand of tradition which reserves decisions regarding farming practices to the elders provides survival value in a world of technology, but lowers income in a world of dynamic technology. John W.Mellor, Thomas F.Weaver, Uma J.Lee and Sheldon R.Simon *Developing Rural India Plan and Practice* (Ithaca, New York: Cornell University Press, 1968), p.4

⁶² Mohan Rao J., ‘Agricuture Development Under State Planning’, in Terence J.Byres (eds.) *The State, Development Planning and Liberalization in India* (Delhi: Oxford University Press, 1997), p.127

⁶³ Barbara Harriss, S.Guhan and R.H. Cassen (eds.), *Poverty in India Research and Policy* 1(Bombay: Oxford University Press, 1992).

⁶⁴ C.H.Hanumanth Rao, *Agricultural Growth, Rural Poverty and Environmental Degradation in India*, 85(Delhi: Oxford University Press, 1994).

powerlessness. Besides income, poor people's evident priorities can be expressed as survival based on stable subsistence; security based on assets and rights; and self-respect based on independence and choice. For many poor people, security and self-respect seem to have risen in importance.⁶⁵

Although it is a virtual truism that the state is the central actor in any programme for planned economic development, its role in planning is not for that reason any less problematical. What does it mean to say that 'the state' acts? Does it act one's own? Do others act through it? Who does it act upon? On other entities outside the state or does it act upon itself? To talk about the state as an 'actor' is to endow it with a will; to say that it acts according to coherent and rational principles of choice is further to endow it with a consciousness. How is this will and consciousness produced?⁶⁶ What the state thinks as politically necessary or feasible is given to the planner; it is determined by a process of politics that is extraneous to the planning exercise *per se*. The task of the planner is to work out the consistencies between different objectives, weight the costs and benefits of different alternatives and suggest an efficient or optimal mix of strategies. Planning, many would say, is an exercise in instrumental rationality. And yet, it is curious that when debates about planning have led to fundamental disagreements within the discipline, economists have not managed to hold themselves back from arguing about the relative priorities among 'socio-political' objectives or about their political feasibility and have defended or attacked particular planning strategies by appealing to considerations that are presumably external to their practice.⁶⁷

⁶⁵ Robert Chambers, N.C.Saxena and Tushaar Shah, *To The hands of the Poor Water and Tress*, 3 (New Delhi: Oxford and IBH Publishing Co.Pvt.Ltd., 1989).

⁶⁶ Partha Chatterjee., 'Development Planning and The Indian State', in Terence J.Byres (eds.) *The State, Development Planning and Liberalization in India* 84 (Delhi: Oxford University Press, 1997).

⁶⁷ *Ibid.*

A prime criticism of Indian rural development is that it did not proceed vigorously enough or early enough to develop a local government. Creating viable, broadly based local institutions in rural India was bound to be a difficult task. Progress was probably further slowed by conflict between national political philosophy favorable to development and the self-interest of the governing bureaucracy. The bureaucracy feared both inability of the masses to govern intelligently and the potential shift of power from the bureaucracy to representatives of the masses.⁶⁸ It is well known that Indian states have performed very differently on poverty reduction over long periods of time. Intuitively, one would expect that the nature of politics and, in particular, the political regime in power would make a difference to policy priorities, expenditure patterns and poverty and human development outcomes.⁶⁹ Data from cross-section of developing countries indicates that ‘the poor...are disproportionately located in rural areas ... they are primarily engaged in agriculture and associated activities, they are often concentrated among minority ethnic groups and indigenous peoples.’⁷⁰

One of the most obvious criticisms of Indian agricultural development policy, closely related to the criticism that planning procedure was too formal, is excessive centralization (constitution made agriculture a state subject because of the requirement that programmes be tailored to suit the highly varying environments of India).⁷¹ Despite the emphasis on the states, early programmes were strongly influenced by, and in many cases operated by, the union government.⁷² Of course, planning institutions and planners do not set the agenda; they are but an agency of the State in its pursuit of particular economic

⁶⁸ Ibid.

⁶⁹ Aashakapur Mehta and Andrew Shepherd (eds.), *Chronic Poverty and Development Policy in India*, 41 (New Delhi: Sage Publications, 2006).

⁷⁰ Todaro, M.P. and Smith. *Economic Development*, 229 (New Delhi: Pearson Education, 2003).

⁷¹ Seventh Schedule LIST II- State List, Entry 14- Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases. Indian Constitution.

⁷² Partha Chatterjee., op.cit., N.65. p.364.

and social goals. It is obviously difficult to disentangle the agency's contributions, technical or otherwise, from the political mandate backing this or that plan or policy.

Agricultural development- irrigation, power, health, education, agricultural production programmes proper- is a state subject. To some extent, this has been a cause of divergent programmes and policies being pursued across the states and a constraint upon a concerted programme of agrarian change and agricultural modernization. Over time, however, as the central government's control over the resources has risen and states have grown increasingly dependent on the centre.⁷³ In this background planning and execution of development projects since independent has seen ups and downs. By 1948, 160 large water projects were being considered.⁷⁴ Aiming to develop the country phase by phase the political leadership adopted five year plans and gave importance to large-scale river water project, more than 29% of the first five year plan budget was allotted to this purpose;⁷⁵ following five year plans also continued to allot more funds keeping in view the agricultural (food grains) demands and swelling population, by the end of seventh five year plan 600 billion rupees were spent on various major and medium irrigation projects;⁷⁶ in the eight five year plan more than 220 billion rupees was embarked for agricultural growth;⁷⁷ ninth to eleventh five year plans have spent more than 600 billion rupees in connection with agriculture and water

⁷³ Vaidyanathan A., *The Indian Economy since Independence (1947-70)*, in Kumar D., and Desai M. (eds.), *The Cambridge Economic History of India*, (Cambridge: Cambridge University Press, 1983), quoted by Mohan Rao J., "Agricultural Development Under State Planning", in Terence J. Byres (eds.) *The State, Development Planning and Liberalization in India* 129 (Delhi: Oxford University Press, 1997).

⁷⁴ Ashok Swain, *Struggle against State: Social Network and Protest mobilization in India* (Surrey, England: Ashgate, 2010), p.29.

⁷⁵ See Hansen A.H. *The Process of Planning: A Study of India's Five Year Plans 1950-64* (Oxford: Oxford University Press, 1966).

⁷⁶ Gulati, Ashok, Mark Suendsen, and Nandini Roy Choudary, 1994 'Major and Medium Irrigation Schemes: Towards Better Financial Performance', *Economic and Political Weekly*, 29(26): A.72.

⁷⁷ Dhawan B.D., 1993 'Irrigation in 8th Plan A Critique' *Economic and Political Weekly*, 28 (26):A.38.

related programmes.⁷⁸ The national plans have also attempted to incorporate wherever possible a multi-purpose orientation to dam projects, including hydro-power, flood control and navigation, in addition to irrigation. As per the Central Water Commission there are about 4710 completed large dams and another 390 are under construction.⁷⁹ Budget provisions for major irrigation projects outstrip most other sectors, including health and education, in the annual plans of many state governments.⁸⁰ These are also far in excess of financial allocations for establishing or strengthening decentralized irrigation schemes. Although enthusiasm for mega-dam projects amongst policy-makers remains largely undimmed, a formidable body of independent empirical research into many of these large dams has established how their social, human and environmental costs have been ignored or grossly understated in the planning of these projects, and the expected benefits exaggerate.⁸¹ The actual output of irrigation and power of these projects has fallen short, sometimes spectacularly, of the level on the basis of which investment on the project was initially justified, from 1951 to 1991 more than 600 billion rupees were spent to create huge canal network, but the direct financial recovery from these schemes was less than 3 billion rupees.⁸²

The major multipurpose dams in India are Hirakud in Orissa,⁸³ Bhakra Nangal in Punjab,⁸⁴ Damodar valley project in Bihar (now in the

⁷⁸ 5 years plans <http://planningcommission.nic.in/plans/planrel/fiveyr/index9.html>

⁷⁹ <http://www.cwc.nic.in/main/downloads/National%20Register%20of%20Large%20Dams%202009.pdf>.

⁸⁰ Dr. N.C. Saxena http://planningcommission.nic.in/reports/articles/ncsxna/art_dam.pdf.

⁸¹ *Ibid.*

⁸² Gulati, et.al, N.75

⁸³ Hirakud Dam Project is built across river Mahanadi at about 15 Kms. upstream of Sambalpur town in State of Orissa. This happens to be the first post independence major multipurpose river valley project in India. The project was formally inaugurated by Prime Minister Pt. Jawaharlal Nehru on 13th, January 1957. Power generation along with supply for irrigation started progressively from 1956 and full potential was achieved by 1966.

⁸⁴ Bhakra Nangal dam is the world's highest straight gravity dam, constructed across the River Satluj. The construction work of Bhakra Nangal dam began in 1948 and got completed in 1963.

state of Jharkhand) and West Bengal,⁸⁵ Nagarjunasagar project in Andhra Pradesh,⁸⁶ Tungabhadra in Karnataka and Andhra Pradesh,⁸⁷ and the list continues but the most ambitious and controversial dam project the Narmada valley project often known as Sardar Sarovar Project (SSP)⁸⁸ is the one which actually highlighted the miseries of oustees, by the movement under the dynamic leadership of Medha Patkar, Sundarlal Bahuguna and many other under the banner Narmada Bachao Andolan (NBA) which created a huge anti-dam protest movement not only in India but throughout the world.

The Narmada valley project comprises two mega-dams, 30 large dams, 135 medium dams and 300 small reservoirs and dams.⁸⁹ SSP is designed to provide irrigation for 1.8 million hectares of land, and drinking water for 4,720 villages and 131 towns in Gujarat and generate 1,450 MW of electricity.⁹⁰ The economics of dam building is not free from politics. The political will for SSP construction has remained high. Firstly, the politicians can now make claims to

⁸⁵ The first multipurpose river valley project in independent India, was set up under a special Act of Parliament, 'Damodar Valley Corporation Act', 1948 (DVC Act). The first dam was built across the barakar River, a tributary of the Damodar River at Tilaiya 1953. The second one, Konar Dam, was built in 1955. Two dams across rivers Barakar and Damodar were built at mailthon in 1957 and Panchect in 1959.

⁸⁶ The multipurpose Nagarjunasagar (named under the inspiring name of the great Buddhist savant, acharaya Nagarjuna, earlier dam was known as Nandikonda) project is built on the river Krishna. P.J.Nehru, laid the foundation stone on 10.12.1955, construction commenced in the year 1956 and completed in 1969.

⁸⁷ It was commissioned during 1953. The Tungabhadra irrigation project is a major inter-state irrigation project of peninsular India.

⁸⁸ The SSP is an inter-state project, which has participation from the States of Gujarat, Madhya Pradesh, Maharashtra and Rajasthan. In 1961 the prime minister of India, P. J. Nehru, approved the first stage of the Narmada project and first works started. By 1965, a first master plan was handed to the government of India containing 12 major projects. According to Narmada Control Authority (NCA), the project has been accorded investment clearance by the Planning Commission in October, 1988 for Rs. 6,406.04 crores at 1896-87 price level. Revised estimate for the project at 1991-92 price level is Rs. 13,180.62 crores which is yet to be approved. A total amount of Rs. 1,698.48 crores has been incurred on the project by the end of March, 2003 of which Rs. 1,698.48 crores was incurred during the year 2002-03.

⁸⁹ Lyla Mehat 'Why Human Rights Violated with Impunity? Forced Displacement in India's Narmada Valley' in Katarzyna Grabska and Lyla Mehta (eds.) *Forced Displacement: Why Rights Matter* (London: Palgrave MacMillan, 2008), p.205.

⁹⁰ Purasuraman S. *The Development Dilemma: Displacement in India* (Great Britain and United States of America: MacMillian Press Ltd, and St.Martin's Press, INC., 1999), p.179.

massive progress in the states by highlighting the areas that now will have access to water for irrigation and energy from an environmentally friendly source and secondly, several industrial groups (industrial groups in the western region especially from Gujarat) have supported the SSP.⁹¹ Needless to say, corruption also plays a key role. A dam involves a huge upfront investment of resources, making it easy for government officials and politicians to skim some off the top. In 2002 and 2003, several of the biggest dam-building companies in the world were convicted of bribing the former director of the Lesotho Highlands Development Authority to win contracts on Lesotho's Katse Dam. Masupha Sole accepted around \$2 million in bribes from major dam-building firms such as Acres International of Canada and Lahmeyer International of Germany. In China, corrupt local officials stole millions of dollars intended for people displaced by the Three Gorges Dam. At least 349 people have been found guilty of embezzling a total of about 12 percent of the project's resettlement budget.⁹²

The SSP is not only a vast project; it is also a project that creates an extensive submergence zone. More than 37,000 hectares of agricultural and forest land will be submerged in Gujarat, Maharashtra and Madhya Pradesh and more than 80,000 hectares of land will be submerged through canal and waterways which is diverted by the dam⁹³ These figures does not include another 72,500 hectares of land required for water courses and field channels.⁹⁴ Other major multipurpose projects also have similar impacts but the real issue is at what cost

⁹¹ Fabiola Bigler, Jan Landert and Arko Ghosh 'A case report for the course Science and politics of large dam projects'. April 2007, p.16-17 ETH Zurich.

⁹² Aviva Imhof and Guy R. Lanza 'Green Washing Hydropower' World Watch, January/February, 2010 pp.13-14 www.worldwatch.org.

⁹³ Narmada Control Authority (NCA) 1991. The dam will divert 9.5 million acre foot water from the Narmada River into canal and irrigation systems running a total 75,000 kilometers, with a canal 460 kilometer long.

⁹⁴ Srivastav, U.K., Sitaraman and Mehta S.S. (1991) 'Compensation Package to the Canal-Affected People', Indian Institute of Management (IIM) Ahmadabad, Consultancy report for Sardar Sarovar Nigam, Government of Gujarat; Sardar Sarovar Narmad Nigam (1993) 'NCA Resettlement and Rehabilitation Sub-Committee minutes', reports, Gandhinagar, Gujarat, in S. Purasuraman *The Development Dilemma: Displacement in India* 179 (Great Britain and United States of America: MacMillan Press Ltd, St. Martin's Press, INC., 1999).

are these development projects been built? As noted above rural poverty, regional disparities seems to be moving upwards with all these projects that were built to help and support them; the development that has taken place has been a class-specific development. It was based on that capitalist market economy, which fostered a lopsided growth, and was underwritten by a state that has close links with the dominant rural classes. The developmental state is being run by a bureaucracy that by large originates from these classes and accordingly has put in place development projects which benefited the haves more than the have-nots.⁹⁵

V Conclusion

The government is assessed for what it claims to be doing, namely providing general facilities for rural development and target oriented facilities to the poorer sections, and it is taken to task for what in practice it allows to happen: the fragmentation of the resources among its strategic support base.⁹⁶ If the state is accepted as a development agent, in what direction would one expect it to formulate policies? The obvious answer would be that it should have a policy that brings welfare and happiness to the highest number of people. Depending on where one stands philosophically and politically, the economic agenda shall have different features.⁹⁷ The concentration on rural India and its people is core when we speak about welfare and happiness as these are the one who bear the brunt of development and Perhaps, we can safely say that almost no benefit has come to the people from these projects, India's then-Prime Minister Rajiv Gandhi warned the country's top irrigation officials in 1986 "for 16 years, we have poured out money. The people have got nothing back, no irrigation, no water, and no increase in production and no help in their daily life."⁹⁸ Narmada project has displaced

⁹⁵ Lieten G.K Power, *Politics and Rural Development Essays on India* 158 (New Delhi: Manohar Publishers, 2003).

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ Rajiv Gandhi, 1986 Address to the Conference of State Irrigation Ministers, quoted in L.C. Jain, (2001) *Dams v. Drinking Water*, p.26.

more than 1,00,000 families, on an average if we count five persons per family it would be 5,00,000 people;⁹⁹ it is estimated that since 1947 people displaced by development projects in India is around 60 millions.¹⁰⁰

A World Bank review estimated that 4 million people were displaced annually between 1986 and 1993 by the 300 large dams (on average) that entered into construction with support from the World Bank every year during this period,¹⁰¹ numbers are swelling year by year without much recourse. It is inevitable to displace populations when big projects comes in but it seems the administration machinery has never felt the need to provide proper compensation or R&R¹⁰² polices that improve the life's of oustees contrary to this state has acted as an authoritarian master disrespecting the constitution mandate by violating the rights of oustees. The sufferings of oustees is more pathetic and painful when we look into the impacts of these projects, which would have been avoided if the concerned governments would have shown concern as much as they have shown on the big projects. The social and economic impact is huge and in many cases the damage has been irretrievable.

⁹⁹ Thayer Scudder, 'Indian's Sarda Saravor Project' (SSP) 10, 3 (unpublished manuscript, 2003), in Phillip Cullet *The Sardar Sarovar Dam Project: An overview* www.ielrc.org

¹⁰⁰ Walter Fernandes, "Sixty Years of Development-induced Displacement in India," *India Social Development Report 2008 in Hari Mohan Mathur Development and Displacement*, (ed.) 90 -91 (New Delhi: Oxford University Press 2008).

¹⁰¹ Leopoldo Jose Bartolome, Chris de Wet, Rhodes Harsh Mander, and Vijay Kumar Nagraj, "Displacement, Resettlement, Rehabilitation, Reparation and Development," Thematic Review 1.3, WCD 2000.

¹⁰² The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013; has been in contention since its inception and now on ordinance devaluing democratic process and public aspirations.

SUSTAINABLE DEVELOPMENT AND INTERNATIONAL PERSPECTIVE

Dr. Ratna Bharamgoudar*

I Introduction

The concept of sustainable development was placed on the international agenda with the release of the report *Our Common Future* by World Commission on Environment and Development (Brundtland Report) in 1987 where it was envisaged that, "Human survival and well being depends on success in elevating sustainable development to a global ethic". Sustainable development must be more than just a slogan. It must be a concrete reality for all of us individuals, organizations, governments in all of our daily decisions and actions, so as to promise a sustainable planet and a safer world, to our future generations. "Our biggest challenge in this new century is to take an idea that seems abstract - sustainable development - and turn it into a reality for all the world's people" (Kofi Annan, United Nations Secretary General). Mere evolution of idea won't toil, it has to be implemented at the need.

‘Sustainable development’ has become the leading environmental theme of our time. Like most great issues, the discussion about sustainable development involves an argument about our future. It is a concept of both common sense and controversy. It reflects common sense because no one is for a mode of life that diminishes our capital stock, which would make future generations poorer or degrades our living conditions, which would make current and future generation less healthy. Yet sustainable development is also a subject of controversy because of the difficulty in comprehending the myriad linkages between environmental factors in the dynamic world.¹

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¹ Dr. Steven Hayward, Elizabeth Fowler & Laura Steadman, "The Challenge of Sustainable Development," available at <http://www.maekinac.org/article>.

II What is sustainable development?

Most discussion on sustainable development begins with the UN World Commission on Environment and Development's 1987 definition. "To meet the needs of the present generation without compromising the ability of future generations to meet their own needs". Alternatively Sustainable development has been defined as:

“Sustainable utilization is a simple idea, we should utilize species and ecosystems at levels and in ways that allow them to go on renewing themselves for all practical purposes indefinitely.”²

“Sustainability might be redefined in terms of requirement that the use of resources today should not reduce real incomes in the future.”³

"The core idea of sustainability... is the concept that current decisions should not impair the prospects for maintaining or improving future living standards... This implies that our economic systems should be managed so that we live off the dividend of our resources, maintaining and improving the asset base.”⁴

"Sustainable development is development without growth in throughput of matter and energy beyond regeneration and absorptive capacities.”⁵

The core idea of sustainable development is that future generations should have the means to meet their own need better than we are able to meet our own today without degrading the natural environment. This notion relies on certain conceptional pillars as "Sustainability", inter-generational equity", intra-generational equity, and finally, "public participation". Sustainability implies a change in the behaviour of consumers based on the awareness of the negative

² Robert Allen, *How To Save The World*, 18 (Totowa, New Jersey: Barnes & Noble Books, 1980).

³ Anil Markandya and David Pearce, "Natural Environments and the Social Rate of Discount", *Project Appraisal*, Vol, No.1, (1988), p.11.

⁴ Robert Repetto, *The Global Possible - Resources, Development, and the New Century* (New Haven: Yale University Press, 1985), p.10.

⁵ Herman Daly and Robert Goodland, "Environmental Sustainability : Universal and Non – negotiable," *Ecological Applications* Vol.6, no.4 (1996), p.1002.

results of unrestrained production and consumption. Intra-generational equity underscores that the elimination of existing inequalities between the "developed" world and the "developing" (but also between the poor and the rich within each country) is an essential condition for a social implementation of the objective of "Sustainability." The element of inter-generational equity refers to the idea that present generations should adjust their behaviour so that the conditions of life of future generations are taken into account.⁶

By extension, sustainable development also means that the current economic growth generates full employment and security of livelihoods; fosters human rights; distributes economic benefits equally; promotes social cohesion and cooperation; and safeguards future human development.⁷ Such a scenario presupposes that there must be no poverty and deprivation, it requires flexible and resilient social and economic systems which are resistant to shocks and crises that can safeguard the possibilities for the well-being of future generations; and demands foresight and leadership from current policy makers, since future generation do not have a vote or say on current decisions.⁸

The right to development implies the right to improvement and advancement of economic, social, cultural and political conditions. Improvement of global quality of life means the implementation of change that ensures every person a life of dignity; or life in a society that respects and helps to realize all human rights. These changes must include the eradication and alleviation of widespread conditions of poverty, unemployment, and inequitable social conditions. Sustainable development ensures the well-being of the human person by integrating social development, economic development, and environmental

⁶ *Supra* note 3.

⁷ UNDP, Human Development Report, (New York, Oxford University Press, 1996).

⁸ Marion L.N. Chibambo, "Records Management: The key to Good Governance and Sustainable Development" available at: <http://www.Atm.uem.mz/esarbic/docs/marion.pdf>.

conservation and protection.⁹

It is impossible to separate the well-being of the human person from the well-being of the earth. Therefore truly sustainable development places just as much importance on the protection of the well-being of the human person and of the earth and the earth's resources. International documents that include the environmental aspect of the development affirm and reaffirm that "human beings are at the centre of concern for sustainable development. They are entitled to a healthy and productive life in harmony with nature". As the goal of sustainable development is to permanently improve the living conditions of human beings, social and economic developments must be carried out in a way that is environmentally and ecologically sound, ensuring the continual rejuvenation and availability of natural resources for future generations.¹⁰

III International legal Instruments

The legislative voyage in the sphere of environmental protection started in its full bloom at international level during the decade of seventies with the historic United Nations Conference on Human Environment at Stockholm in the year 1972. It was the first time when governments at the highest level came together to take notice of what mankind has done to the environment of which they were an integral part.¹¹ This Conference considered as *Magna Carta* of environment protection and sustainable development, resulted in the 'Stockholm Declaration on the Human Environment'.¹² The Stockholm Declaration has proclaimed that, man is both creator and moulder of the environment, which gives him physical sustenance and affords opportunity for intellectual, moral, social and spiritual

⁹ Human Rights Education Associates, Sustainable Development", available at : [http://www , hrea.org/learn/ guides/ development.htm](http://www.hrea.org/learn/guides/development.htm).

¹⁰ *Ibid.*

¹¹ *Bulletin*, UNESCO Regional office for Asia and the Pacific, No. 23, 24 (1982).

¹² The Stockholm Declaration of the United Nations Conference on the Human Environment UN Doc. A/Conf. 48/14 (1972); Shon Locus, "The Stockholm Declaration on the Human Environment," 14 Harvard International Law Journal (1973) p.423.

growth. The basic principle laid down in the Conference included¹³:

- (i) Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permitted a life of dignity and well-being; and
- (ii) Man bears a solemn responsibility to protect and improve the environment for present and future generation.

This Conference has awakened the mankind to undertake all possible means to control and abate the growing degradation of environment by subscribing environmentalism.

The Stockholm Conference led to the establishment of United Nations Environment Programme (UNEP) in 1972 and taking of actions around the world at all levels resulting in the establishment of departments as well as ministries of environment in numerous countries and enhancing the development and implementation of environmental laws. The main functions of UNEP includes ¹⁴:

- (i) Assessing global, regional and national environmental conditions and trends
- (ii) Developing international and national environmental instruments
- (iii) Strengthening institutions for the wise management of the environment
- (iv) Facilitating the transfer of knowledge and technology for sustainable development.

Since late 1980s, sustainable development has become the dominant policy discourse, not just for governments, international organizations and business, but also for environmental movement itself.

The World Commission on Environment and Development, (WCED) in 1987 released the Burndtland Commission Report, titled 'Our Common Future', which

¹³ *Ibid.*, Preamble.

¹⁴ Carol Petsonk, "Recent Developments in International Organizations, The Role of the United Nations Environment Programme in the Development of International Environmental Law", 5 *Am. UIJ Int IL & Pol'y* (1990) p.373.

placed the concept of sustainable development on the international agenda.¹⁵ In this report the term sustainable development is defined in following manner:

‘Sustainable development is development that meets the needs of the present generation without compromising the ability of future generation to meet their own needs.’

This sets out two fundamental principles of inter-generational and intra-generational equity and contains the two key concepts of needs and limits:

- i) The concept of needs, in particular, the essential needs of the world’s poor to which overriding priority should be given.
- ii) The idea of limitations imposed by the State of technology and social organization on the environment’s ability to meet present and future needs.

The definition was vague, but it clearly captured two fundamental issues, the problem of environmental degradation that so commonly accompanies economic growth, and yet the needs for such growth to alleviate poverty.¹⁶

Since 1987, sustainable development has rapidly become part of popular language, however, there are substantial controversies as to how to translate it to practice and develop standards and indicators to assess whether it is being achieved. It has been suggested that the core of mainstream sustainability thinking has become the idea of three dimensions: environmental, social and economic sustainability.¹⁷ The World Commission has put forth the argument that although interpretations of sustainability will vary between countries, these interpretations ‘must share certain general features and must flow from a consensus on basic concept of sustainable development and on a broad strategic framework for achieving it.’¹⁸

¹⁵ World Commission on Environment and Development, (WCED) Our Common Future, Brundtland Report ,(1987), p.308.

¹⁶ Arvind Jasrotia, “Environmental Protection and Sustainable Development; Exploring the Dynamics of Ethics and Law”, 49 *JILI* (2007) , p.36.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, p.39.

To put the world on the path of sustainable development, the United Nations Conference on Environment and Development (UNCED), popularly known as Earth Summit,¹⁹ was the most important and largest UN Conference ever held. The major achievements of Earth Summit are the following documents:

- i) The Rio Declaration of Environment and Development consisting of a series of principles defining the right and liabilities of States regarding protection of environment;
- ii) Agenda 21 is a comprehensive blue print for global actions to affect the transition to sustainable developments.
- iii) A set of principles to support the sustainable management of forests world wide;
- iv) The legally binding Conventions, i.e., the Convention on Climate Change and Convention on Bio-diversity, which are aimed at preventing global climate change and eradication of biologically diverse species.

Towards achieving sustainable development the Rio Declaration states that, “Human beings are at the center of concern for sustainable development and are entitled to a healthy and productive life in harmony with nature.”²⁰ The Declaration reiterates the principle of State responsibility, which means do not behave in a way that hurts your neighbours.²¹ It states, right to development²² and integration of environmental protection and development²³ as significant principle of sustainable development and affirms the spirit of global partnership²⁴ and the precautionary principle²⁵ and polluter pays principles.²⁶ It calls upon the States to develop national laws regarding liability and compensation for victims of

¹⁹ Held at Rio de Janeiro in 1992 where more than 170 countries participated.

²⁰ *The Rio Declaration*, 1992, Principle 1.

²¹ *Ibid.*, Principle 2.

²² *Ibid.*, Principle 3.

²³ *Ibid.*, Principle 4.

²⁴ *Ibid.*, Principle 7.

²⁵ *Ibid.*, Principle 15.

²⁶ *Ibid.*, Principle 16.

pollution and other environmental damages²⁷ and envisages the environmental impact assessment as a national instrument in matters, which adversely affect the environment.²⁸ Thus, this Declaration guides the behaviour of nations towards sustainable development.

The Convention on Bio-Diversity and the Convention on Climate Change, both, recognize the interdependence of humanity and the entire natural world and envisage a holistic approach to environment protection.²⁹ Further Kyoto Protocol adopted in 1997, aimed to prevent dangerous interference with the climate system by limiting the emission of green house gases into the atmosphere has strengthened the Convention on Climate Change.³⁰

The pursuit of sustainable development requires changes in the domestic and international policies of every nation, which may have different implications to different nations, depending on the level of development and various other factors,³¹ as a result there were attempts to reduce the effectiveness of the ‘global partnership’ and ‘precautionary principle’ of Rio declaration by some nations. The Johannesburg Conference took place in 2002, with the major goal to put sustainable development back on the global agenda. The commitment to sustainable development was reconfirmed, along with the recognition of multilateral solution and the need for implementation. Eradication of poverty, change in consumption and production patterns and protection and management of the natural resource base were noted as the three pillars of sustainable development. Economic development social development and environmental protection are accepted as interdependent and mutually reinforcing pillars.³²

²⁷ *Ibid.*, Principle 13.

²⁸ *Ibid.*, Principle 17.

²⁹ Convention on Bio-Diversity, 1992 and Convention on Climate Change, 1992, Preamble.

³⁰ *Kyoto Protocol*, 1997, adopted at the third *Conference of Parties*, available at www.unep.org.

³¹ Jastoria, *Supra* note 16, p.44.

³² *Ibid.*, p. 42-43.

International concern for environmental protection and sustainable development is comparatively of recent origin. The customary international law does not contain any specific rules for protection and preservation of environment. Hence besides the general principles of State responsibility, international treaties are the most significant ones for regulating liberties and duties of States. The doctrine of *sic utero tuo ut alienum non laed as* (one must use his own right so as not to injure others) is a guiding principle for preventing pollution and environmental damage between nations. This doctrine has been recognized and reiterated by the International Court of Justice in the cases³³ that came before it.

IV Conclusion

Right to life being the foremost human right, implies the right to live without the deleterious invasion of pollution, environmental degradation and ecological imbalances. The environment today should be of paramount legal importance and the focal agenda of modern socio-legal order. The legal system, therefore, is expected to instill environmentalism, deep ecological values and eco-centrism to bring about an equitable and sustainable socio-legal regime.³⁴ Earth's resources are finite and there are ecological limits to growth, which, unless we alter our ways, will sooner rather than later be exhausted. The global concern has been aptly enclosed in the preambular assertion made at the Earth summit in the year 1992:

*“Humanity stands at a defining moment in history. We are confronted with a perpetuation of disparities between and within the nations, a worsening of poverty, hunger, ill health and illiteracy and the continuing deterioration of the ecosystems on which we depend for our well-being.”*³⁵

³³ *United States v. Canada* (Trail Smelter case) 39 Am J. Int'l Law 684 (1941) ;
United kingdom v. Albania, (Corfu Channel case) (1949) ICJ Rep 4.

³⁴ Md. Zafar Mahfooz Nomani, “Enviro-Constructional Ethos in Right Duty Discourse: Towards the Creation of an Equitable and Sustainable Socio-Legal Orde”, *Indian Journal of Environmental Law*, Vol. 1., (2000), p.60.

³⁵ Report of the United Nations Conference on Environment and Development (UNCED) AGENDS-21, 1992, Preamble, Para 1.1.

The concerted efforts on international level – the historic Stockholm Conference, 1972, Rio Conference, 1992; and the Johannesburg Conference, 2002 are the milestones in generating awareness around the world about environmental protection. Over the years international and domestic systems of environmental law have evolved in parallel. In certain regions of the world, international law has shaped and significantly contributed to the development of domestic environmental law.

The concept of sustainable development is understood in terms of human needs, rights and responsibility towards the environment as well as terms of solidarity between generations and between communities. In developing countries, environment issues are so bound up with issues of poverty and distributive justice that they are almost indistinguishable. The Burndtland report stated that ‘poverty itself pollutes the environment’ and that those who are poor and hungry will often destroy their immediate environment to survive. Eradicating poverty is the greatest global challenge facing the world today and an indispensable requirement for sustainable development particularly for developing countries. When looking at sustainable development it is essential to first acknowledge that, in order for a person or society to continue advancing, the basic needs of every individual must be met.

WORK PLACE WOES OF WOMEN

*Dr. Kalpana L**

“You can tell the condition of a nation by looking at the status of its women.”

- Jawaharlal Nehru.

I Introduction

Women constitute almost half of the population in the world. The Universal Declaration of Human Rights, 1948 proclaims that all human beings are born free and equal in dignity & rights. They are endowed with reason and conscience & should act towards one another in a spirit of brotherhood.¹ Everyone is entitled to all the rights & freedoms set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.² Thus the UN Declaration of Human Rights is very clear that all the rights & freedoms provided in the declaration are available equally to both men and women without distinction.

Men and women are like two wheels of the chariot of life and have to move together for greater advancement. Both men and women should have equal access to education as well as employment. However, Indian society, still being ridden with poverty and being patriarchal in nature, illiteracy is rampant, more so among women. But this situation is rapidly changing with women being educated and seeking employment. Women's entry into the workplace has been prompted by necessity; since it's difficult to meet the ends if both wife and husband do not work. Indian expanding economy has seen unprecedented numbers of women

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¹ Article 1 of UDHR, 1948.

² Article 2 of UDHR, 1948.

join the workforce, but their emergence has been accompanied by growing threats to their security.³

Economic liberalization has provided a lot of job options and opportunities to educated women. Women are coming out of their homes to work in the profession of their choices.⁴ This change in society has brought positive changes in the lives of women in the sense that working women feel economically independent & liberated. But at the same time it has also increased the vulnerability of women for crimes such as sexual harassment.⁵

Sexual harassment has a profound impact on women. It ranges from derogatory comments to unwanted sexual advances & threats, sexual assault & rape. Harassment can have particularly negative consequences for workers in low wage jobs because these workers can least afford to have their livelihoods threatened.⁶

Furthermore, the number of single-parent families headed by women is increasing day by day.

A woman subjected to sexual harassment endures pressure, degradation, or hostility that her male co-workers don't have to endure – making it just that much harder to compete for the job & for advancement.⁷

As more women enter the workforce, stresses between the genders are to be expected in the patriarchal society. There is a need to inculcate the values of gender equality in a rapidly changing world order perhaps from the school level. Such a healthy social environment where women do not feel any inhibition or fear of sexual harassment at the workplace, would enable them to work to their full

³ www.hvcsnd.edu.vn “India’s Women Commuters Face Daily Sexual Harassment.” (last visited on June 24, 2015).

⁴ www.indiacelebrating.com “Sexual Harassment of Women at Workplace in India” (last visited on June 15, 2015).

⁵ *Ibid.*

⁶ [en.wikipedia.org/wiki/The_Sexual_Harassment_of_Women_at_Workplace_%28Prevention, Prohibition_%26_Redressal%29Act,2013](http://en.wikipedia.org/wiki/The_Sexual_Harassment_of_Women_at_Workplace_%28Prevention,_Prohibition_%26_Redressal%29Act,2013) (last visited on June 10, 2015).

⁷ www.umn.edu/humanrights/svaw/harassment/explore/3causes.htm. (last visited on June 10, 2015).

potential, contributing enormously to society. Such attitudinal changes are urgently required since more and more women are entering the workplace in a rapidly changing global scenario.⁸

The typically men-oriented workplace has been replaced by a large number of women getting employment in every possible field of work. This has given rise to a number of issues that affect the integrity of women and also have an impact on the physical, mental and social well-being of women. In its different frame, sexual harassment is still a part of the workplace irrespective of the fact that it is reported or not. Women generally do not speak of any act of sexual harassment to them. But this is not a trivial issue to be lightly dealt with. Any act of sexual harassment can leave a woman with physical, mental & emotional problems that would have a deep impact on her future life.⁹

The issue of sexual harassment has to be given a serious thought and women's participation should be encouraged to make every workplace safer and healthier. Gender equality includes protection from sexual harassment & right to work with dignity, which is a universally recognized as basic human right. The issue is not just confined to the empowerment of women, but this issue is related to the basic human rights of women to work in a safe & secure work environment, being treated equally with the men and with no fear of being a subject of sexual harassment at the hands of the male counterparts in the workplace.¹⁰

Sexual harassment deprives women of opportunities that are available to male employees. Work is critical to women's survival and independence. Sexual harassment promotes practices disadvantageous to women in work and also degrades and objectifies women. In this perspective, sexual harassment at work undercuts women's potential for social equality in two ways: by using her

⁸ www.ncbi.nlm.nih.gov Industrial Psychiatry Journal Medknow Publications. "Gender differences in perception of workplace sexual harassment among future professions" Amitav Banerjee & Bhavana Sharma. (last visited on June 20, 2015).

⁹ www.helpline.com "Sexual Harassment at Workplace in India" (last visited on June 22, 2015).

¹⁰ *Ibid.*

employment position to coerce her sexually and/or while using her sexual position to coerce her economically.¹¹

Law alone is not enough to root out this social evil. Society has to change its attitude so that women can come out and participate in public life without feeling threatened. What needs to be inculcated is a sense of mutual respect between men and women.¹²

Sexual harassment has historically been a well-kept secret practised by men, suffered by women, condoned by management, & spoken by no one. The cases of sexual harassment of women at the workplace are increasing alarmingly because of several factors, poor status of women, increasing number of working women, poor knowledge of human relations & values, poor law and order position in the society & no adequate provisions of law to deal with the problem effectively. This issue is not just a woman empowerment issue but an issue pertaining to Human Rights, Human Resource Management & Safety and Health of the Workplace Environment.¹³

The Constitution of India ensures and guarantees every individual the right to practise any profession or to carry on any occupation, trade or business.¹⁴ Every woman has a constitutional right to participate in public employment and this right is denied in the process of sexual harassment, which compels her to keep away from employment. Sexual harassment of woman at the place of work exposes her to a big risk and hazard which places her in an inequitable position vis-a-vis other employees & this adversely affects her ability to realise her constitutionally guaranteed right under Article 19(1)(g).¹⁵

¹¹ www.modelgovernance.com “Sexual Harassment of Women at Workplace” by Adithya Singh. (last visited on June 23, 2015).

¹² *Ibid.*

¹³ www.mightylaws.in “Mighty Laws Simplified...Sexual Harassment at Workplace in India” by Jayshree Dugar & Yash Vardhan Deora. (last visited on June 24, 2015).

¹⁴ The Constitution of India, Article 19(1)(g).

¹⁵ *Supra* note 13

Furthermore, protection of life & personal liberty is guaranteed under the Constitution of India. No person shall be deprived of his life or personal liberty except according to procedure established by law.¹⁶

Sexual harassment of women at workplace is also a violation of her right to life & personal liberty. Right to livelihood is an integral facet of the right to life. Sexual harassment is violation of the right to livelihood. Since, 'right to work' depends on the availability of a safe working environment & right to life with dignity, the hazards posed by sexual harassment needs to be removed, for these rights to have a meaning. The Preamble of the Constitution of India guarantees that it will secure to all its citizens – "Equality of status and opportunity." Sexual harassment vitiates this basic motive of the framers of the Constitution.¹⁷

The concept of gender equality embodied in our Constitution would be an exercise in ineffectiveness if a woman's right to privacy is not regarded as her right to protection of life & liberty guaranteed by Article 21 of the Constitution. In view of the fact that sexual harassment of women at the workplace violates their sense of dignity & the right to earn a living with dignity, it is absolutely against their fundamental rights and basic human rights.¹⁸ Lest we forget, the Constitution guarantees equality before law¹⁹ & prohibits discrimination on grounds of religion, race, caste, sex or place of birth.²⁰

India has ratified the Convention on the Elimination of All forms of Discrimination Against Women, 1979, which lays down that states parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights.²¹

¹⁶ The Constitution of India, Article 21.

¹⁷ *Supra* note 13.

¹⁸ *Ibid.*

¹⁹ The Constitution of India, Article 14.

²⁰ The Constitution of India, Article 15.

²¹ Article 11 of CEDAW, 1979.

This right of equality to employment is seriously impaired when women are subjected to gender specific violence, such as sexual harassment at work.

The International Covenant on Economic, Social and Cultural Rights, 1966, recognises the right of everyone to the enjoyment of just and favourable conditions of work.²² The States party to the covenant are obliged to ensure, in particular – safe & healthy working conditions.²³

Each incident of sexual harassment, at the place of work, results in the violation of the Fundamental Rights to gender Equality & Right to Life and Liberty—the two most precious Fundamental Rights guaranteed by the Constitution of India.²⁴

The contents of the Fundamental Rights guaranteed in our Constitution are of sufficient amplitude to encompass all facets of gender equality, including prevention of sexual harassment & abuse & the Courts are under constitutional obligation to protect and preserve these Fundamental Rights. Sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated & that there can be no compromise with such violations.²⁵

The message of international instruments which directs all State parties to take appropriate measures to prevent discrimination of all forms against women besides taking steps to protect the honour and dignity of women is loud and clear. The international instruments cast an obligation on the India to gender sensitize its laws & the courts are under an obligation to see that the message of the international instruments is not allowed to be drowned. The courts are under an obligation to give due regard to the International Conventions & Norms for

²² Article 7 of ICESCR, 1966.

²³ Article 7(b) of ICESCR, 1966.

²⁴ *Supra* note 9.

²⁵ *Ibid.*

construing domestic laws, more so when there is no inconsistency between them & there is a void in domestic law.²⁶

Before 1997, women experiencing sexual harassment at workplace had to lodge complaint under IPC for the following offences: obscenity;²⁷ assault or criminal force to woman with intent to outrage her modesty;²⁸ rape;²⁹ & use of word, gesture or act intended to insult the modesty of a woman.³⁰

Furthermore, the neglect on the part of any Director, Manager, Secretary or other officer of the company is liable for punishment for any offence committed under the Indecent Representation of Women (Prohibition) Act, 1986.³¹

The brutal gang rape of a social worker in Rajasthan in 1997 brought to the attention of the Supreme Court of India, the absence of domestic law to check the evil of sexual harassment of working women at all workplaces. The Hon'ble Supreme Court in *Vishaka & Others v. State of Rajasthan & Others*³² acknowledged the gravity of sexual harassment of the working women at the workplace and laid down guidelines making it mandatory for employer to prevent the commission of acts of sexual harassment & to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment. The guidelines issued by the Hon'ble Supreme Court were treated as law declared by the Hon'ble Supreme Court under Article 141 of the Constitution of India. It was held that the guidelines framed by the Supreme Court should be strictly observed in all workplaces for the enforcement of the right of gender equality of the working women.³³

²⁶ *Ibid.*

²⁷ The Indian Penal Code, 1860, Section 294.

²⁸ The Indian Penal Code, 1860, Section 354.

²⁹ The Indian Penal Code, 1860, Section 375.

³⁰ The Indian Penal Code, 1860, Section 509.

³¹ The Indecent Representation of Women (Prohibition) Act, 1986, Section 7.

³² AIR 1997 SC 3011.

³³ www.mondaq.com/india/x/348338/employment+litigation+tribunals/overview+of+the+Sexual+Harassment+of+Women+AT+Workplace by Rajdutt S. Singh (last accessed on Jun. 10, 2015).

The Supreme Court in *Vishaka* case for the first time recognized, acknowledged & explicitly defined sexual harassment as an unwelcome sexual gesture or behaviour aimed or having a tendency to outrage the modesty of woman directly or indirectly. Defining sexual harassment as an act aimed towards gender based discrimination that affect's women's right to life & livelihood, the Supreme Court developed broad based guideline known as *Vishaka* guidelines & aimed towards resolution and prevention of sexual harassment. These guidelines bring in its purview all employers in organized & unorganized sectors by holding them responsible for providing safe environment for women.³⁴

A history was created by Indian Judiciary by acting virtually as a legislature to afford relief to the working women at their workplace. *Vishaka* guidelines had a revolutionary impact. It imparted dignity to working women.³⁵

The increasing work participation rate of women made it imperative for enacting a comprehensive legislation focusing on prevention of sexual harassment as well as providing a redressal mechanism i.e. The Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act, 2013 & the rules made therein.³⁶ Laws prohibiting sexual harassment first came into being in the US with the enactment of Civil Rights Act, 1964. Australia's Sex Discrimination Act made sexual harassment unlawful in the workplace in 1984. The European Directive on Equal Treatment of Men and Women in Employment recognizing sexual harassment as a form of discrimination, was passed in 2002 & all Member States are required to adopt it by 2008.³⁷

The Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act, 2013, (herein after called 'the Act') widens the scope of the

³⁴ www.humanrights-justice.com "Landmark Initiatives. Sexual Harassment at Work Place" (last accessed on Jun. 22, 2015).

³⁵ *Supra* note 32.

³⁶ www.shrm.org "Sexual Harassment Evolving Globally" by Ellen Pinkos Cobb. (last accessed on Jun. 23, 2015).

³⁷ *Supra* note 33.

guidelines issued by the Supreme Court by bringing within its ambit (amongst other things) “a domestic worker.”³⁸ The Act is an attempt to provide working women a mechanism to counter the menace of sexual harassment at workplace. It has streamlined the guidelines given in *Vishaka* judgement & has also mandated a statutory obligation on employers to follow its provisions.³⁹ The Act came into force from Dec. 9th 2013. The Act will ensure that women are protected against sexual harassment at all work places, public and private.

Any workplace with more than ten employees need to implement it. The sense of security at the workplace will improve women’s participation in work, resulting in their economic empowerment & inclusive growth. This Act supersedes the *Vishaka* guidelines for prevention of sexual harassment, introduced by the Supreme Court of India. While the “Workplace” in the *Vishaka* guidelines is confined to the traditional office set-up where there is a clear employer – employee relationship, the Act goes much further to include organisations, department, undertaking, establishment, enterprise, institution, office, branch, unit etc., in the public and private sector, organized and unorganized, hospitals & nursing homes, educational institutions, sports institutions, stadiums, sports complex & any place visited by the employee during the course of employment including the transportation. Even non-traditional workplaces which involve tele-commuting will get covered under Section 2(O) of the Act.⁴⁰

In exercise of the powers conferred by Section 29 of the Act, the Central Government has made rules which provide that every employer shall formulate & widely disseminate an internal policy or charter or resolution or declaration for prevention, prohibition & redressal of sexual harassment at the workplace intended to promote gender sensitive safe spaces & remove underlying factors of sexual harassment so as to contribute towards a holistic work environment [Rule

³⁸ www.indiacelebrating.com “Sexual Harassment of Women at Workplace in India” (last accessed on Jun. 15, 2015).

³⁹ *Supra* note 6.

⁴⁰ *Ibid.*

13(a)] of Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Rules, 2013.⁴¹

II What is sexual harassment? – Lack of common definition

Despite both national and international efforts to eliminate sexual harassment, there is no single definition of what constitutes prohibited behaviour. Generally, international instruments define sexual harassment broadly a form of violence against women & as discriminating treatment, while national laws focus more closely on the illegal conduct. All definitions, however, are in agreement that the prohibited behaviour is unwanted and causes harm to the victim.⁴²

Sex-based conduct in the workplace is unwelcome when:

- 1) An employee does not solicit or initiate the conduct; &
- 2) When the employee regards the conduct as undesirable or offensive.⁴³

III Sexual harassment detrimentally affects the work environment

The affront to personal dignity that occurs as a result of sexual and other types of harassment, by definition, detrimentally affects the work environment. It is also important to note that the boundaries of the work environment are not determined by location. Instead, the boundaries of the work environment are defined by whether or not the person is doing something related to his or her job. This includes travelling to work-related conferences or branch offices, attending staff parties or the home of a colleague for a work-related activity. The key to understand the boundaries of the work environment is to consider whether the person is in a specific place because of his job. If the answer is “yes” then any unwanted and offensive sex based conduct could be considered sexual harassment.⁴⁴

⁴¹ [www1.umn.edu/human rights/svaw/harassment/explore/1.whatis.htm](http://www1.umn.edu/human%20rights/svaw/harassment/explore/1.whatis.htm). (last accessed on Jun. 10, 2015).

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

IV Types of sexual harassment

Sexual harassment can take a variety of forms. It includes both physical violence and more subtle forms of violence such as coercion or the creation of a hostile work environment. A hostile work environment includes situations, for example, when the victim is not appointed to important committees, does not receive information about training opportunities or is not considered for promotion because of family responsibilities. This type of sexual harassment is difficult to document but still can significantly affect women's work & career paths.⁴⁵

V Causes of sexual harassment

There are many causes for sexual harassment but the most important one is the culture and values system and the relative power and status of the men and women in our society. Whereas men are brought up with macho beliefs, who consider females a mere toy to play with and they easily carry these values into the workplace. Such patriarchal view points create an atmosphere that allow men the freedom of sexual harassment in the workplace, while women remain vulnerable.⁴⁶

Sexual harassment is, above all, a manifestation of power relations. Women are much more likely to be victims of sexual harassment precisely because they, more often than men lack power, are in more vulnerable and insecure positions, lack self-confidence or have been socialised to suffer in silence.⁴⁷ Due to the fear factor women often resign to their fate rather than raising their voice against sexual harassment.⁴⁸

⁴⁵ www.civilserviceindia.com "Sexual Harassment in Workplace Causes & Remedies" by Priya Singh.(last accessed on Jun. 20, 2015).

⁴⁶ www1.Umn.edu "Stop Violence Against Women. Sexual Harassment" (last accessed on Jun. 17, 2015).

⁴⁷ *Supra* note 45.

⁴⁸ *Supra* note 46.

Violence by men against women exist in the workplace as it does in other settings. Focusing on the economics of men's work and women's work exposes sexual harassment as a way for the men to harass women to express their resentment and try to reassert control when they view women as their economic competitors.⁴⁹ Jealousy and perversion are other relevant factors for sexual harassment.

Despite impediments women face in obtaining employment, there has been a massive influx of women into the labour force in the 1960s & 1970s. This influx brought about two simultaneous reactions to women at work. On the one hand, some men resented female employees and perceived them as a threat in traditionally male dominated work environments. In these cases, the women were subject to overt discrimination, i.e., they received lesser-valued job assignment, lack of promotions, & lower pay and sexual harassment caused them embarrassment and humiliation. The second reaction was to exploit the presence of women and make sexual favours and submission to sexual behaviours conditions of employment.⁵⁰

VI Effects of sexual harassment

The effects of sexual harassment vary from person to person & are dependent on the duration and severity of the harassing behaviour. Thus, individuals can suffer through a number of psychological effects ranging from irritation and frustration to anxiety, stress and terror. Individuals may fear retaliation and victim blaming.⁵¹ Sexual harassment can have very serious consequences both for the harassed individual as well as for other working women who experience it second hand. In some situations, a harassed woman risks losing her job or the

⁴⁹ www1.umn.edu/humanrts/svaw/harassment/explore/3causes.htm. (last accessed on Jun. 10, 2015).

⁵⁰ www.northwestern.edu/womencenter/issues-information/sexual-harassment/effects-sexual-harassment.html (last accessed on Jun. 10, 2015).

⁵¹ [www1.umn.edu.human rights/svaw/harassment/explore/4 effects.htm](http://www1.umn.edu/human%20rights/svaw/harassment/explore/4%20effects.htm). (last accessed on Jun. 10, 2015).

chance for a promotion if she refuses to give in to the sexual demands of someone in authority. In other situations, the unwelcome sexual conduct of co-workers make the working conditions hostile and unpleasant putting indirect pressure on her to leave the job. Sometimes the employee is so traumatised by the harassment that she suffers serious emotional and physical consequences and very often, becomes unable to perform her job properly.⁵²

Sexual harassment can have a demoralising effect on everyone within range of it and it often negatively impacts company productivity on the whole.⁵³

Sexual harassment creates a climate of intimidation and repression. A woman who is a target of sexual harassment often goes through the same process of victimisation as one who has suffered rape, battering or gender-related crimes—frequently blaming herself & doubting her own self-worth.⁵⁴

Many employees quit as soon as the first incident of sexual harassment occurs. They are too embarrassed or scared to go back.⁵⁵

VII Remedies

Sexual harassment at a workplace is a universal problem. Of late, it has assumed serious proportions, with a meteoric rise in the number of cases. Surprisingly, however, in most cases women do not report the matter to the concerned authorities.⁵⁶

India is rapidly advancing in its developmental goals & more and more women are joining the workforce. It is the duty of the state to provide for the well-being and respect of its citizens to prevent frustration, low self-esteem, insecurity and emotional disturbance, which, in turn, could affect business efficacy, leading to loss of production and loss of reputation for the organisation

⁵² *Ibid.*

⁵³ *Supra* note 49.

⁵⁴ Jobs.aol.com “Top ten things you need to know if you’re sexually harassed at work” by Donna Ballman. (last accessed on Jun. 11, 2015).

⁵⁵ www.Infochangeindia.org. “Infochange women. A brief history of the battle against sexual harassment at the workplace” by Vibhuti Patel (last accessed on Jun. 11, 2015).

⁵⁶ *Ibid.*

or the employer. Infact, the recognition of the right to protection against sexual harassment is an intrinsic component of the protection of women's human rights. It is also a step towards providing women independence, equality of opportunity and the right to work with dignity.⁵⁷

In any civilized society, it is the fundamental right of the people to be able to lead their lives with dignity, free from mental and physical torture. To ensure this, transgressors must pay for their unsolicited sexual advances.⁵⁸

Sexual harassment is not just a violation of human rights, in the workplace it also damages productivity and professional relationships. ILO is working with employers and managers to address sexual harassment in the workplace and change attitudes.⁵⁹

Urbanisation and the question of women's safety go hand in hand. Constant concern for safety from harassment is the major reason for women's exclusion and thus inaccessibility to public spaces. Main streaming of gender in urban development emphasises women's right to city- life by creating safer public spaces that allows them freedom of mobility.⁶⁰

In every sphere, whether private or work, gender inequality is being intensely questioned in the realm of the public space, however, it remains deeply ingrained and reproduced every day through street harassment. Groping, lewd comments, stalking and staring at women on streets, market places, overcrowded public transport, etc., constitutes everyday harassment in public spaces which is often not openly discussed.⁶¹

⁵⁷ *Ibid.*

⁵⁸ www.ilo.org "India must have zero tolerance for workplace sexual harassment" by Tine Staermose, Director, ILO Decent Work Technical Support Team for South Asia & Country Office for India. (last accessed on Jun. 16, 2015).

⁵⁹ www.cdhr.org.in Centre for Development & Human Rights. Category Archives: "Sexual Harassment. Building Women –Inclusive City Spaces: why local urban governance matters" by Neha Mahal (CDHR) (last accessed on Jun. 25, 2015).

⁶⁰ *Ibid.*

⁶¹ *Supra* note 45.

In a workplace, an employee should feel safe, secure and must be able to show his/her potential.

In order to check sexual harassment, an organisation should have a clear cut policy to register complaints of such nature, and have procedure for disciplinary action. Every organisation should have an effective employment policy that should ensure well planned career paths based on merit to reduce the vulnerability of individuals and harassment by those who abuse their power and authority. There should be an awareness among the staff members about sexual harassment and the consequences they may face if they indulge in such an act. They should know their social responsibilities to prevent such incidents in their organisation.⁶² More than seventeen years ago a fine piece of progressive judicial action by the Supreme Court of India gave the world of work, a pleasant surprise. Filling a national legal gap, the Vishaka judgement boldly relied on international law to formulate effective measures to check the evil of sexual harassment of working women at all workplaces in India. It also called upon the Indian Government to follow suit by enacting a law against sexual harassment.⁶³ This resulted in the enactment of: The Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act, 2013, to provide protection against sexual harassment of women at workplace and for the prevention and redressal of complaints of sexual harassment.

This Act is an attempt to provide working women a mechanism to counter the menace of sexual harassment at the workplace. It is a right step but it is not entirely free from flaws and there still is a scope for improvement in it. For instance, under this Act, sexual harassment is not a crime, but only a civil wrong, which is a major flaw. The victim has to seek criminal remedy under the IPC to get full justice. And again the criminal complaint would be initiated under section

⁶² *Supra* note 58.

⁶³ *Supra* note 38.

354 of IPC, which does not specifically deal with sexual harassment at workplace, but is a general provision.⁶⁴

Therefore, as per the law now, both private and public sectors are under statutory compulsion to protect their female employees from sexual harassment in their organisations, but the problem lies in its implementation and compliance. It is still early days and most of the organisations, barring some big ones, have not complied with the provisions.⁶⁵

VIII Complaint mechanism under the Act

The Act contemplates the constitution of Internal Complaints Committee (S.4) at the workplace & Local Complaints Committee at district and block levels (Section 6). A District Officer (District Collector or Deputy Collector) shall be responsible for facilitating & monitoring the activities under the Act.⁶⁶

The Duties of an Employer:

The Act makes it the duty of every employer to:

- a. provide a safe working environment at the workplace which shall include safety from all the persons with whom a woman comes into contact at the workplace;
- b. display at any conspicuous place in the workplace , the penal consequences of sexual harassment & the order constituting the Internal Complaints Committee ;
- c. organise workshops & awareness programmes;
- d. provide necessary facilities to the ICC for dealing with complaints & conducting inquiries;
- e. assist in securing the attendance of the respondent and witnesses before the ICC;
- f. make available such information to the ICC or LCC, as it may require;

⁶⁴ *Ibid.*

⁶⁵ *Supra* note 33.

⁶⁶ *Ibid.*

- g. provide assistance to the woman if she so chooses to file a criminal complaint ;
- h. initiate criminal action against the perpetrator;
- i. treat sexual harassment as a misconduct under service rules & initiate action for such misconduct; & monitor the timely submission of reports by the ICC.⁶⁷

IX Penalties

Where the employer fails to comply with the provisions of the Act, he shall be liable to be punished with a fine which may extend to Rs 50,000/-, in case of a second or subsequent conviction under this Act, the employer may be punished with twice the punishment prescribed or by cancellation of his licence.⁶⁸

X Compliance

The Act lays down the rules for dealing with cases of sexual harassment at the workplace. However, one major problem is that women often don't come forward to report cases. Victims are also made to feel responsible about what can happen if they report such a case. Victims are often told that reporting the case would have a detrimental impact on the future of the institution, or organisation that they are working for. Victims are sometimes made to feel obligated to let go of a "small incident" keeping bigger interests in mind. When this attitude is adopted by an organisation's leadership or the managers, it encourages rampant sexual harassment & legally the organisation itself & directors can be held complicit in the criminal conspiracy to allow sexual harassment in the workplace. It is hence very important to clearly take a zero tolerance stance from a management point of view towards sexual harassment.⁶⁹

⁶⁷ *Supra* note 33.

⁶⁸ Her.yourstory.com why don't women report sexual harassment cases & what the employers must do about it. (last accessed on Jun. 11, 2015).

⁶⁹ *Ibid.*

Furthermore, the society is unsympathetic to victims, & they view it to be too embarrassing & humiliating to talk to anyone about the incident.⁷⁰

Corporate India's commitment to empower & protect its women employees against sexual harassment at the workplace is unsatisfactory, according to a survey by EY Fraud Investigation & Dispute Services titled 'Reining in sexual harassment at the workplace'.⁷¹

Nearly 88 percent of the female workforce in Indian Information Technology and Business Process Outsourcing & Knowledge Process Outsourcing companies reported having suffered some form of workplace sexual harassment during the course of their work, says a survey conducted by Transforming India, a NGO in the Information Technology BPO / KPO industries. The report says that about 50percent women had been subjected to abusive language, physical contact or been sought sexual favours from.⁷²

A nationwide survey in India has found that 92percent of women working in Information Technology, Hospitality, Civil Aviation and Call Centres feel unsafe travelling home after work.⁷³

Women who work in areas such as travel, tourism & nursing were most vulnerable simply because they had to work late. Employers should take extra precautions in case of women staff working late in the evening.⁷⁴

The survey "Reining in sexual harassment at the workplace in India", was conducted by Ernst & Young Fraud Investigation and Dispute Services from January to April this year. Nearly 130 organisations across India, including industries like banking and finance, manufacturing, media and entertainment,

⁷⁰ News.chennaipatrika.com. Corporate India's Crawl to action in Prevention of Sexual Harassment. (last accessed on Jun. 24, 2015).

⁷¹ *Supra* note 9.

⁷² Employmentdiscrimination.foxrothschild Employment Discrimination Report. Women in India Report Rampant Sexual Harassment. Fox Rothschild LLP (last accessed on Jun. 24, 2015).

⁷³ *Ibid.*

⁷⁴ Wap.business-standard.com Over 30% companies not complying with legal norms on sexual harassment at work: Survey. VeenuSandhu New Delhi May 08, 2015. (last accessed on Jun. 15, 2015)..

information technology, pharmaceuticals and automobile, participated. While 69 percent of the respondents had constituted the Internal Complaints Committee, mandatory under the law, to investigate cases of sexual harassment in the organisation, 18 percent had not done so, more than a year after the Act had come into force. The remaining 13percent were in the process of setting up the Committee. Non- compliance among Indian Companies were higher.⁷⁵

The law, however, requires the organisations to do more than just setup ICCs. They have to be sensitized and trained to conduct an investigation which is of a very serious nature.⁷⁶

It was found that 40 percent of the companies were yet to train the ICC members. 44 percent also did not display the penal consequences of sexual harassment at conspicuous places. The law also requires organisations to file an annual report for each calendar year. The survey found that 34 percent of the respondents were unaware of the need to do so.⁷⁷

Employers in India are studying the new Act and reviewing existing practises to find ways to prevent and deal with sexual harassment. The ILO is supporting these efforts, in collaboration with the All India Organisation of Employers.⁷⁸

The attitude shown so far by employers is encouraging, in view of India's commitment under the ILO Discrimination (Employment and Occupation) Convention, 1957, ratified in 1960.⁷⁹

Women's labour force participation in India is notably low; 29percent compared to men's 71percent. Without ensuring a more conducive, violence-free working environment, women's participation may decrease further. India is gifted with a young workforce. Combined with skills training , manpower planning and the development of a workplace culture that ensures a safe and violence-free

⁷⁵ *Supra* note 74.

⁷⁶ *Ibid.*

⁷⁷ *Supra* note 58.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

environment, India should be able to harness its great human potential and contribute to the well-being of families, as well as to the inclusive economic growth of the country.⁸⁰

However, this will not happen without real change and a pro-active, clear, zero tolerance policy towards sexual harassment in enterprises, combined with a sustained commitment to legal enforcement.⁸¹

The aforementioned points make it abundantly clear that a lot still remains to be done for ensuring the safety of women in workplaces across India. Laws merely remain dead words if people cannot use them to the fullest extent possible.⁸²

Employers are responsible for creating an environment where sexual harassment is not tolerated under any circumstances and promoting transparency amongst employees with respect to this. It is also the duty of the employer to actively create awareness about the rights and duties amongst employees and sensitize both men and women about sexual harassment prevention.⁸³

XI Conclusion

Over the years, women in our society have been subjected to various injustices and inequalities at every stage of life. They face neglect, all kinds of physical and mental abuses, servitude and rejection. Today, women across the globe are making attempts to fight back the discrimination they face, but despite this, their struggle for equality, recognition and survival does not reach a conclusion. Work undertaken by women in every field is grossly underestimated, under-valued and subject to gender-based discrimination.⁸⁴

⁸⁰ *Supra* note 79.

⁸¹ *Supra* note 68.

⁸² *Ibid.*

⁸³ www.lawoctopus.com “Sexual Harassment of Women At Workplace (Prevention, Prohibition& Redressal) Act,2013: A Critical Analysis”. By amoolya. (last accessed on Jun. 19, 2015).

⁸⁴ www.wsj.com. The Wall Street Journal. “WhatsApp Chats, Cellphone Snaps: India’s Changing Approach on Sexual Harassment”. By Jesse Pesta & Preetika Rana. (last accessed on Jun. 15, 2015).

Until recently, sexual harassment was a taboo topic in India, whether it happened at home, on the street, or in the workplace. However, in the past year or so, a string of high –profile claims against powerful men has altered the public conversation. It’s happening in part because women are becoming savvier about mustering evidence to argue their claims- whether by photographing a licence plate after an alleged attack, or by preserving whatsapp messages alleged to show inappropriate workplace behaviour.⁸⁵

The new outspokenness got rolling in 2012, after the brutal rape and murder of a young woman on a New Delhi bus sparked widespread protests. The death “spurred a national conversation”, said Jasjit Purewal, a New Delhi based activist. “Women in India debated the right to work, the right to wear what they want, and the right to equality. All these helped in making them feel more empowered. “And it coincided, of course, with widespread adoption in India of smart phones, instant messaging apps and pocket cameras that make documenting and restraining instances of alleged harassment more practical and immediate.⁸⁶

Many women are the target of inappropriate comments or unwanted sexual advances at some point in time, either at the workplace or elsewhere. Hence, the problem of sexual harassment is increasingly brought out of the closet. Harassment is not so much about lust, but violence. Leeching, making lewd passes, groping, are acts of intimidation and power-display exercised to control, demean and show victims ‘their place.’ Women are then blamed for their ‘dress sense’, ‘behaviour’ and ‘time of the day’ where she happens to be.

For a woman the mind is not without fear. Wherever she goes, the fear of insecurity and encountering sexual harassment always lingers in one of the corners of her brain. And this creates a profound impact on the economy of a country. For the Indian economy to grow, India requires a deluge of talent pool

⁸⁵ *Supra* note 84.

⁸⁶ www.theindianeconomist.com “The Sexual Harassment & the Indian Economy” by Ravi Kant. (last accessed on Jun. 25, 2015).

where it cannot afford to commit a gender bias. Sexual harassment prevents women's workforce participation because of fear and pressure. India ranks 10th from the bottom among countries in female labour force participation rate, according to the World Bank.⁸⁷

Unfortunately, the issue of safety does not encourage women to participate in the labour force and contribute to the economy. Hence the labour supply in the economy shrinks, and that leads to low disposable income in the household. At sociological angle, it will encourage patriarchy to govern our society.⁸⁸

For a successful economy it is very important for women to be financially independent which is possible only when she enters the labour market devoid of pressure and fear. So, if India has to grow, it is very important to create a congenial atmosphere in the workplace and cases related to sexual harassment needs to be dealt with strict attitude.⁸⁹

Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognized basic human right. The common minimum requirement of this right has received global acceptance. The meaning and content of the fundamental right guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse.⁹⁰

Sexual harassment in the workplace is a sensitive issue. It cannot be checked merely by providing staff members information about sexual harassment policy or relying on disciplinary action. The organisation must play pro-active role, provide behavioural support and discuss this aspect as a part of the work routine.

⁸⁷ *Supra* note 86.

⁸⁸ *Ibid.*

⁸⁹ www.elaw.org. India- *Vishaka v. State of Rajasthan* 1997.08.13 (Sexual Harassment) (last accessed on Jun. 24, 2015).

⁹⁰ www.harassmap.org "Around the World" (last accessed on Jun. 24, 2015).

The staff must nurture an inclusive, supportive and respectful environment in the office in order to build a congenial working atmosphere.⁹¹

It is also important that the organisation must support the victim of sexual harassment and help to overcome the negative effects of such an experience. Also, every working woman must know that it is high time to stand up and fight for such injustices, it's only then sexual harassment in workplace can be checked.⁹²

Combating sexual harassment involves developing and understanding of what is sexual harassment and bringing about change of attitudes in all – be it employees, colleagues, friends, administrators, employers or the law-makers. The best way to prevent sexual harassment is to adopt a comprehensive sexual harassment policy. The aim is to ensure that sexual harassment does not occur, and, where it does occur, to ensure that adequate procedures are readily available to deal with the problem and prevent its recurrence.⁹³

⁹¹ *Ibid.*

⁹² Indiatogether.org “Sexual Harassment at Work” by Neeta Raymond (last accessed on Jun. 11, 2015). *Combat Law*, Vol.2, Issue 3.

⁹³ *Supra* note 38.

EVOLUTION OF ENVIRONMENTAL IMPACT ASSESSMENT IN INDIA – A COMPARATIVE STUDY WITH THE LAWS IN UK AND US

Mahesh R.S.*

I Introduction

The concept of Environmental Impact Assessment (herein after called as EIA) is recognised world-wide: it is not simply a European Concept. Originating in the American National Environmental Policy Act, 1969 (NEPA) the concept was explained in the United Nations Environmental Programme's Goals and Principles of Environmental Impact Assessment in 1987. These require that 'Where the extent, nature or location of a proposed activity is such that it is likely to significantly affect the environment, a comprehensive EIA should be undertaken'.¹ The machinery to implement the new legislative directives evolved into a formal exercise to predict probable changes to the environment and to mitigate environmental harm. Today, EIA is routinely employed across the globe to anticipate the negative effect of large projects; to justify the enterprise from a socio-ecological perspective and to tailor measure to minimise the harm.²

Environmental Impact Assessment can be defined as a technique to ensure that the likely effects of developmental activity on the environment will be taken consideration before the developmental activity is authorised to proceed. It's an exercise of evaluating and predicting future changes caused by proposed projects, plans or policies to the quality of the environment. Guiding to make informed tradeoffs among conflicting aspects of environmental quality and other societal objectives, EIA helps administrative agencies to choose correctly from among the various options for making environmentally sound decisions. Development

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¹ Richard Harwood, *Environmental Impact Assessment: What's Next*, J.P.L., 1161 (Sweet and Maxwell Contributors, September, 2004).

² Shyam Divan, "The Contours of EIA in India", Sage Law, Water and the Laws in India Edited by Ramaswamy R. Iyer, 390 (Sage Publications, Delhi. 2009).

projects or policies are either modified or abandoned when in an assessment they are found likely to result in significant adverse effects upon the quality of environment. EIA is a tool not only for identifying potential damage but also for probing methods of preventing such damage. The process is rooted in the principle that prevention is better than cure and carries the warning 'take before you leap'. Needless to say that prevention ensures not only ecological success but also economic success since prevention is not only better than cure but also in many cases cheaper.³

II The concept of EIA

The technique of EIA finds its origin from the 'precautionary principle' which requires refusal of consent or approval of the developmental activity by the competent authority. If such project poses threat of serious or irreversible nature of the environmental effects on the developmental activity, EIA is necessary. The 'precautionary principle' mandates that the EIA should be made obligatory for developmental activities which are likely to have significant adverse effect on the environment. In case EIA reveals that the developmental activity poses threat of serious or irreversible environmental damage, the competent authority must withhold the consent for approval or permission to such activity.⁴

EIA is a multi-disciplinary process requiring application of a variety of knowledge and expertise. It involves resolution of disputes among conflicting and diverse interests in society. Manifestly, the process has to encounter several vexed questions. First, a threshold question has to be settled. Does the project cause significant adverse effects warranting an impact assessment? Projects which impose minor and negligible impact may not require detailed analysis or assessment. Hence this is preliminary study. In the United States this process is called the environmental assessment (EA). The EA is a concise public document,

³ P. Leelakrishnan, "Environmental Impact Assessment: Legal Dimensions", JILI, Vol.34: 4, 1992. P.541

⁴ Gurdip Singh, *Environmental Law in India*, 33 (McMillan India Ltd., New Delhi, 2005).

providing sufficient evidence and analysis for determining whether to prepare an environmental impact statement (EIS) which acts as the basis for EIA. An EA is followed by two conclusions either finding of no significant impact (FONSI) or a decision to prepare an environmental impact statement. Recent legislative initiative in Canada suggests screening of projects to find out whether there are significant adverse effects. In England the concerned regulations list out certain projects which are subject to mandatory assessment and certain others which are likely to give rise to significant environmental effects. Obviously, the latter category requires the threshold enquiry to find out whether or not it will impose significant effects upon the environment. In the case of some such projects the issue of significant effects is a matter of judgement and qualified criteria have little relevance.⁵

Environmental impact assessment (EIA) has evolved over the years as a precautionary management tool to prevent or minimize the adverse effects of development on the environment. The initial idea was to make use of a formal study process to forecast the positive and the negative effects on the environment of major development projects envisaged. Unfortunately, the emphasis shifted towards the assessment of negative impacts only, so that EIAs today focus mainly on potential problem and conflicts arising from natural resource constraints that can affect the viability of a project. EIAs also examine how such projects may harm the people, their homeland and their livelihood, or other nearby developments.⁶

III NEPA: A meaningful model in United States of America

The National Environmental Policy Act of 1969, called NEPA, is a remarkable legislation in the United States representing the best example for the statutory mandatory model of environmental impact assessment. Among the

⁵ Ibid, p.543.

⁶ Madhushree Mazumdar, 'Environmental Impact Assessment in India', Journal of Social and Economic Development, Vol.III, No.1, Jan-June 2000. P.96.

notable provisions of the legislation, the one declaring environmental policy and the other emphasizing the need to prepare environmental impact statement (EIS) are significant. NEPA had established the Council on Environmental Quality (CEQ) to investigate and report on environmental quality, advise the President, gather information and coordinate agency activities and issue guidelines. The law does not specifically demand publication of environmental impact statement and for public participation in environmental decision-making. However, the executive orders issued after the enactment of the legislation laid down the procedures for preparation, publication and consideration of the EIS. Transforming the process of environmental impact assessment into the most powerful weapon in the hands of the public against any environmental assault, the presidential order exhorted the federal agencies to develop the impact procedures in such a manner as to ensure timely public information, elicit views of interested parties, provide for public hearing and to encourage state and local agencies to adopt similar procedures. Active public involvement has grown in the United States as the main feature of the environmental decision-making process. Whether it relates to standard fixing in air or water quality, highway location or design, general land use planning or to the question whether a particular drug can cause cancer to laboratory animals, a public inquiry is made essential. Enacted as complementary to other environmental legislation, NEPA helped creating a political climate favourable to the serious consideration of environmental issues.⁷

The impact of NEPA on environmental concerns in the United States is far reaching. The law turned out to be a lawyers' paradise and a heaven for the environmentalists and public interest groups. Neither Congress nor the White House was prepared to intervene in the process set in motion by the legislation. Although the courts fear to tread on matters of policy, their prescription for procedural norms in impact assessment had significant influence not only on

⁷ Supra Note 3, p.547.

administrative and political relationships but also on the scrutiny and correction of environmental impact assessment and statements. The insistence by courts on procedural compliance had the desired result. It became impossible for the decision-makers to ignore or overstep any substantive criterion in the assessment process. NEPA has been instrumental in effectively constraining administrative behaviour in the interests of environmental values during the past two decades. It is rightly commented that the environmental impact assessment has become the basis of a social learning process with respect to environmental policy in the United States in different times with different institutions playing different roles.

I) British regulations for EIA

The concept of EIA had been alien to British practice until recently before assessment process was tailored into the scheme of town and country planning legislation in 1988. However, the technique of public inquiry was in existence in the laws of public health, housing, town and country planning, new towns, roads, agriculture, transport, aviation, rivers and local government. The schemes or plans proposed, either by the minister himself or by a local authority are subjected to public scrutiny in an inquiry. Inspectors hear the objections and make the report; the minister decides. As the reports of the inspectors are published members of the general public get an opportunity for examining the environmental impact of schemes or plans. Plans were canvassed in the past for a modified, pattern of environmental impact assessment. Official studies also were not rare. In 1977 a specific suggestion was made to integrate environmental impact assessment into the planning assessment and to provide the public with the opportunity to comment upon the assessment. The European Economic Community Directive of 1985 had a significant impact upon the British legal system. It was in pursuance of this directive that the town and country planning assessment of environmental effects regulations were framed. Britain implemented the directive not by incorporating it in a law but in a delegated legislation framed under the planning

legislation. The planning processes are now re-oriented towards the compulsory need of making impact assessment.⁸

The United States and Britain present two different types of statutory mandatory model of EIA process. While EIA is provided by a statute in the U.S. the process is incorporated by way of regulation framed under a statute in Britain. Both examples lay emphasis on the imperative need of making an assessment of projects having a significant impact on the environment. While the NEPA provides for general guidelines which are compulsorily to be observed when a proposal impacting on the environment is made, the British regulations in addition to this compulsion categorise developments which are essentially to be assessed and developments which require a threshold examination of the need for assessment. In the historical background of English democratic traditions which recognise people's participation and public involvement as the corner-stone of administrative process, especially at the grass root planning level, the British pattern of environment assessment shall grow to be a mechanism so strong as the EIA process in the United States albeit the absence of a NEPA type legislation.

IV The Evolution of EIA in India

Historically the importance of EIA increased because of the political attention given to conservation of environment vis-à-vis economic development, emphasised for the first time in the Stockholm Conference, (in 1972), which focussed on the improved human environment. This idea of preservation of environment was later expanded to the concept of carrying capacity of a spatial unit/setting in the UN Conference on Environment and Development, held at Rio in 1992, which became famous for its Local Agenda 21 that proclaimed action planning for management of the environment at the local level. This focus on

⁸ *Ibid* p.548.

grassroots planning for the environment is now being internalized all over the world as a required planning skill for environmental management.⁹

There are two types of EIA models. One is the statutory model that makes the assessment of impact compulsory under an enacted law, or a delegated legislation. The other is the discretionary administrative model under which the administration exercises its discretion to find out whether an impact study is necessary, and if found necessary in what manner it has to be made. Till the year 1992, India was following the administrative model of EIA.¹⁰

V Bhopal: Victim of a Discretionary Model

The Bhopal gas tragedy is said to be the worst industrial disaster of its kind in human history. Did the nature of the impact assessment process available in the country have any relationship with the gravity of the accident? When a licence was applied for and the Carbide plant was about to start operations, many factors seem to have been overlooked or ignored – there were bungalows near the site, a housing estate was being built close by, and the Bhopal railway station, the centre of hectic commercial and trading activities, was only three kilometres away. Many agencies had processed the application. They did not seem to have been concerned about future effects, i.e., whether the site was suitable, whether safety mechanisms were proper and whether the possible socio-economic impact was insignificant. It was alleged that approval was given to a plant, whose design was defective from the standpoint of safety, and that a project of identical design had reportedly been rejected by Canada. Moreover, there were reports of several accidents. Even this did not make the authorities vigilant enough to take precautionary measures. Secrecy shrouding the working plant, and absence of information of safety measures to be taken in case of accidents had frightening

⁹ *Supra* Note 6, p.96.

¹⁰ P. Leelakrishnan, *Environmental Law Case Book*, 425 (II Edn., Lexis Nexis, New Delhi. 2006).

consequences after the tragedy. Even the doctor in the carbide factory hospital did not know the antidote to methyl isocyanate (MIC) poison.¹¹

EIA began in India in 1978-79 with the evaluation of river valley projects, much before the Ministry of Environment and Forests was set up. Since then the scope has expanded to include irrigation and hydel power projects, mining, industries, atomic energy, ports and harbours, rail and road highways, bridges, airports and communications, and other infrastructure projects. Tourism in ecologically fragile areas, and even human settlements have also been included. When the 1994 Notification making EIA mandatory was introduced, 29 types of developmental activities, grouped into nine categories, were listed in Schedule I of the Notification, which required clearance from the central government. Site-specific projects require separate site clearance from the central/state government. Besides, the Government of India notifies certain areas as ecologically sensitive or fragile, from time to time, such as the coastal areas, Doon Valley, Aravalli ranges in Gurgaon, etc. All development projects in these areas require environmental clearance.¹²

VI The Indian model

a) EIA Notification 1994:

Institutionalisation of impact assessment in India took place in the early eighties. It had its origin in the 'necessary and expedient' clause under Environmental Protection Act. A draft notification was published in the year 1992 with provisions for central clearance for certain projects and state clearance for certain other projects. The system gave way to a single agency exercise by the Ministry of Environment and Forests dispensing with the need for state clearance of projects. Till January 1994, EIA in India was carried under a framework of administrative guidelines that required the proponents of major irrigation projects, river valley projects, power stations, ports and harbours to secure a clearance from

¹¹ P. Leelakrishnan, *Environmental Law in India*, 316 (III Edition, Lexis Nexis, Gurgaon, 2013).

¹² *Supra* Note 3, p.98.

the Union Ministry of Environment and Forests (MoEF). On 27th January 1994, the MoEF notified mandatory EIAs for 29 designated projects. The notification was issued under the Environment (Protection) Act of 1986 (EPA) and required an EIA, environment management plan (EMP) and a project report to be submitted to the impact assessment agency for clearance. The MoEF was designated as the impact assessment agency and was required to consult a multidisciplinary committee of experts before taking a decision. The 1994 notification mandated public hearings and was India's first attempt to a comprehensive EIA scheme.¹³

The applicants for new projects or for modernisation of existing industry were to submit an EIA report along with the management plan. A committee of experts would evaluate and assess them and make recommendations based on a technical assessment of the document and data furnished. In 1997, an amendment incorporated public inquiry into the process. However, there was provision for rapid EIA. This would be done on an EIA report submitted by the project proponent and based on one season data. A detailed EIA report could be submitted and evaluated later if the assessing agency so desires. There were severe criticisms against this system.¹⁴

b) EIA Notification 2006

The EIA Notification 1994 gave way to a notification in 2006. There is a fundamental change. Both the Central agency and the state agency are given power to make impact study for projects of separate types with threshold limits. Ministry of Environment and Forests and the State Environment Assessment Authority (SEAC) are the regulatory authorities to render clearance at the Centre and the states respectively. The notification provides for prior environmental clearance before undertaking projects and activities scheduled therein. Expansion or modernisation of existing projects or activities requires clearance. Any change

¹³ *Supra* Note 2, p.391-392.

¹⁴ *Supra* Note 3, p.548.

in product-mix in an existing manufacturing unit beyond the specified range also needs an impact study.

The projects or activities are categorised as ‘A’ and ‘B’ in the schedule. This categorisation is based on the spatial extent of potential impacts and potential impact on human health and natural and manmade resources. Category ‘A’ projects and activities require clearance from Ministry of Environment and Forests on the recommendations of an Expert Appraisal Committee (EAC) constituted by the Central Government. Category ‘B’ projects and activities require prior clearance by State Environment Impact Assessment Authority (SEIAA) on the recommendation of State Expert Appraisal Committee (SEAC). These state authorities are constituted by the Central Government. However, in the absence of duly constituted SEIAA or SEAC category ‘B’ projects shall be regarded as category ‘A’ projects requiring Central clearance.¹⁵

VII Judicial view

In America the court’s attention was drawn to the *Tennessee Valley Authority v. Hiram G. Hill*¹⁶ case. The facts of the case show that the Tennessee Valley Authority had begun construction of a dam in Little Tennessee River, and while major portion of the dam had been constructed; The Endangered Species Act, 1973 was enacted. A small fish popularly known as the ‘snail darter’ was declared as endangered species. The Supreme Court of USA restrained further impounding of reservoir on the ground that it would violate the Endangered Species Act by causing the extinction of snail darter.

However, according to the majority of the Supreme Court of India, the said American decision had no application in the following case:

- *In Narmada Bachao Andolan v. Union of India*¹⁷

¹⁵ *Ibid.* p.326.

¹⁶ (1978) 47 US 153.

¹⁷ AIR 2000 SC 3751.

The Supreme Court had examined whether EIA Notification and its amendments would be applied retrospectively. However, the court held that unlike America in India there is no such legislation like the Endangered Species Act. Further it held that the inter-state water tribunal had already done EIA of Sardar Sarovar Project in the past, and its revised study was not necessary.

- *Sachinanda Pandey v. State of West Bengal*¹⁸

This case was against the Government of West Bengal that displayed lack of awareness of environmental problems by allotting land (part of which belonged to the Zoo) for construction of a five-star hotel near the zoological garden of Calcutta. The court viewed the decision as being detrimental to public interest as the construction would affect zoo inmates. Finally, Taj Group of Hotels, which was to be built there, had to promise not to construct skyscrapers in the path of the migratory birds, and to have subdued lighting, and enhance the aesthetics of the garden. The West Bengal Government, however, believed that building a hotel close to the zoo would encourage tourism and benefit the zoo economically.

- *M.C.Mehta (Taj Trapezium Matter) v. Union of India*¹⁹

The case alleged degradation of the Taj Mahal, a monument of international repute, by air pollution. According to the expert committee, the use of coke/coal by the industries in the Taj Trapezium should be replaced by natural gas or any other substitute. It was held that the Taj, apart from being a cultural heritage, was also an industry by itself, and that pollution must therefore be stopped so as to encourage the tourism industry. Then decided that those industries that were unable to replace coke by gas connections, for any reason, shall stop functioning.

VIII Conclusion

Environmental Impact Assessment (EIA) is a technique to ensure that the likely effects of developmental activity on the environment will be taken into consideration before the developmental activity is authorised to proceed. EIA

¹⁸ (1987) 2 SCC 295.

¹⁹ (1997) 2 SCC 353.

requires the developer to give to the deciding agency, a statement of the environmental effects on the developmental activity to be considered in the decision making process. EIA gives a chance to adopt or modify a scheme to mitigate adverse environmental consequences, and for taking the environmental dimension into account in project decisions. EIA when applied sufficiently early in the decision-making process, it may assist in choosing an optimal location, or, indeed, in judging whether a project is desirable at all. Thus, in order to bring about sustainable development, EIA is considered as a strong instrument of reconciliation.

**JUDICIAL CODIFICATION OF LIFE IMPRISONMENT; A NEW
INSERTION IN SENTENCING POLICY: A CRITICAL NOTE ON
SWAMY SHRADDANANDA V. STATE OF KARNATAKA AND ITS
CONSEQUENTIAL EFFECTS**

*Praveen Patil**

Life after all is full of questions!¹

I Introduction

Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of "order" should meet the challenges confronting the society. Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be and tempered with mercy where it warrants to be.²

The above observation of the Supreme Court vindicates that proportionality and just desert shall be the governing currency of the judiciary. Though India lacks sentencing guidelines as is available in other jurisdictions, the gap has been substantially filled by judicial guidelines, yet the critics have the scope of arguing inadequacy.

Nothing has troubled the courts like death penalty. The attempted introduction of mathematical calculation of aggravating and mitigating factors, the failure of lower courts to understand the ratio of *Bachan Singh* case,³ the fine tuning of *Bachan Singh* case by Apex Court in context specific judgments, the indiscriminate adjustment in the awarded sentences of death penalty by higher

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¹ Aftab Alam J, in *Swamy Shraddananda (2) v. State of Karnataka* (2008) 13 SCC 767, para 1.

² *Shailash Jasvantbhai v. State of Gujarat*, (2006) 2 SCC 359.

³ *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684.

courts have all contributed to the climax of confusion surrounding the death penalty.

The second highest punishment in India is life imprisonment. It has attracted the sceptic attention of the court and constitutional experts in these years. The lime light of judicial focus has been tilted on life imprisonment now especially in view of March of movement towards abolition death penalty. The otherwise settled interpretation of life imprisonment suddenly attracted the attentions of penologist after the judgment of Supreme Court of Indian in *Swamy Shraddanada* case for following reasons.⁴

Though life imprisonment is awardable for number of offences under IPC and other criminal laws, the controversy of life imprisonment is more apparent in respect of murder cases. A convicting and sentencing court normally have two sentencing options in convicting murderers- either life imprisonment or death. The speaking reasoning for awarding either of the punishment is must yet the choice is limited. Death is extreme and hence was classified as a last resort of criminal jurisprudence. However, life imprisonment may fail the retributive theory of punishment, if the grace of executive were to fall on convicts. In other words, if the life imprisonment which is intended to be jail till life is remitted by the executive, after 14 years of minimum incarceration, the convicts would enjoy double lottery- escaped from the gallows and secondly set free after 14 years. Precisely this was the question that hunted the judiciary since the time of *Jagmohan case*.⁵ In *Jagmohan case* it was observed that:

“In the context of our Criminal Law which punishes murder, one cannot ignore the fact that life imprisonment works out in most cases to a dozen

⁴ *Swamy Shraddananda v. State of Karnataka*, (2008) 13 SCC 767.

⁵ *Jagmohan Singh v. State of U.P.*, (1973) 1 SCC 20.

years of imprisonment and it may be seriously questioned whether that sole alternative will be an adequate substitute for the death penalty...”⁶

The unacceptability of death sentences in routine cases and inadequacy of life imprisonment (tempered by executive in the form of remission) lead the Constitutional bench in *Swamy Shraddananda case* to find an alternative in between death and life- i.e., minimum mandatory life in jail. (Meaning thereby that executive shall exercise their privilege of remission only after the mandatory minimum fixed by the court has been run.)

II. Swamy Shraddananda episode

A. Factual matrix

Before we delve into ratio and reasoning of this case, two lines on facts. The conviction of *Swamy Shraddananda* under Section 302 for offence of murder resulted in the sentence of death by the Sessions Judge which was confirmed by the Karnataka High Court. On appeal to the Supreme Court, the appeal was earlier heard by a bench of two judges. Both the honourable judges unanimously upheld the appellant's conviction for the two offences but they were unable to agree to the punishment meted out to the appellant. S. B. Sinha J. felt that in the light of facts and circumstances of the case, the punishment of life imprisonment, rather than death would serve the ends of justice. He, however, made it clear that the appellant would not be released from prison till the end of his life. M. Katju J., on the other hand, took the view that the appellant deserved nothing but death. The

⁶ Five years after the pronouncement of Jagmohan Singh, Section 433A was inserted by the amendment Act of 1978 with effect from 18th December, 1978, imposing a restriction on the powers of remission or commutation in certain cases. Section 433A of the Cr.P.C. reads as follows:

Restriction on powers of remission or Commutation in certain cases.-Notwithstanding anything contained in Section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment.

matter was consequently placed before the three Judge Bench which judgment is being referred to herein.

B. Observations and ratio

1. Two aspects of sentencing

Aftab Alam J succinctly observed that ‘The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to Supreme Court carrying a death sentence awarded by the trial court and confirmed by the High Court, the Supreme Court may find ... that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment that subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then the Court should do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous.’⁷

Further, ‘the court may be of the view that the punishment of death awarded by the trial court and confirmed by the High Court needs to be substituted by life imprisonment, literally for life or in any case for a period far in excess of fourteen years. The court in its judgment may make its intent explicit and state clearly that the sentence handed over to the convict is imprisonment till his last breath or, life permitting, imprisonment for a term not less than twenty, twenty five or even thirty years. But once the judgment is signed and pronounced, the execution of the sentence passes into the hands of the executive and is governed by different provisions of law. What is the surety that the sentence awarded to the convict after

⁷ *Supra* note 4 para 66.

painstaking and anxious deliberation would be carried out in actuality? The sentence of imprisonment for life, literally, shall not by application of different kinds of remission, turn out to be the ordinary run of the mill life term that works out to no more than fourteen years. How can the sentence of imprisonment for life (till its full natural span) given to a convict as a substitute for the death sentence be viewed differently and segregated from the ordinary life imprisonment given as the sentence of first choice?’⁸

Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of the rare cases. This would only be a reassertion of the Constitution Bench decision in *Bachan Singh* besides being in accord with the modern trends in penology.⁹

2. Breaking the standardisation

The answer lies in breaking this standardisation that, in practice, renders the sentence of life imprisonment equal to imprisonment for a period of not more than 14 years; in making it clear that the sentence of life imprisonment when awarded as a substitute for death penalty would be carried out strictly as directed by the Court. This Court, therefore, must lay down a good and sound legal basis for putting the punishment of imprisonment for life, awarded as substitute for death penalty, beyond any remission and to be carried out as directed by the Court so that it may be followed, in appropriate cases as a uniform policy not only by this Court but also by the High Courts, being the superior Courts in their respective States.¹⁰

A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the court, i.e., the

⁸ *Supra* note 4 para 1.

⁹ *Supra* note 4 para 67.

¹⁰ *Supra* note 4 para 38.

vast hiatus between 14 years' imprisonment and death. It needs to be emphasized that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years imprisonment would amount to no punishment at all.¹¹

3. Operative part

In para 68 and 69, the Honourable Supreme Court concluded that:

Para 68 - In light of the discussions made above we are clearly of the view that there is a good and strong basis for the Court to substitute a death sentence by life imprisonment or by a term in excess of fourteen years and further to direct that the convict must not be released from the prison for the rest of his life or for the actual term as specified in the order, as the case may be.

Para 69 - In conclusion we agree with the view taken by Sinha J. We accordingly substitute the death sentence given to the appellant by the trial court and confirmed by the High court by imprisonment for life and direct that he shall not be released from prison till the rest of his life.

IV Aftermath of *Swamy Shraddanada* and fallouts

Though *Swamy Shraddanada* is not a first of its kind judgment, the three judges bench supplied the strength to the opinion that apex court is entitled to choose a sentence in between death and life popularly understood life imprisonment. This case furnished a judicial sound basis for the succeeding courts to apply the ratio of this case in similar situated cases and modify the term of sentences in other similar cases. Courts have ruled in favour of determinate sentencing ranging from 20 years compulsory life imprisonment to life in jail till life! The cases which were inspired by and fall in line with *Swamy Shraddanada* ratio can be categorized as under.

¹¹ *Supra* note 4 para 66.

In the following cases the courts have ordered that, no remission shall be granted for the rest of life.

1. *Sebastian Chevithiyan v. State of Kerala*¹² : Imprisonment for life for rape and murder of two year old minor.
2. *Subhash Chandra v. Krishan Lal*¹³ : Rest of life without remission for gunning down entire family due to enmity.
3. *Jayawant Dattatraya Suryarao v. State of Maharashtra*¹⁴ : In this case of terrorist convict, committing brutal murder of two police constables who were on duty to guard person who whom he wanted to kill, held not entitled to any commutation or premature release.
4. *Reddy Sampath Kumar v. State of Andhra Pradesh*,¹⁵ it was directed that the appellant shall not get the benefit of any remission either by the State or by the Government of India on any auspicious occasion.
5. *Subash Chander v. Krishan Lal*,¹⁶ Trial Court had awarded death sentence but the High Court had commuted the same to life imprisonment. Subash Chander, a witness before the Trial Court filed an appeal praying for setting aside the order by the High Court of acquittal of some of the accused persons and sought awarding of death sentence to the convicted persons, in other words, sought restoration qua them of the judgment of the Trial Court. In this case, counsel for the main accused made a statement that instead of depriving him of his life, the court could pass appropriate orders to deprive him of his liberty throughout his life and that if sentenced to life imprisonment, he would never claim his premature release or the commutation of his release on any ground. The court had passed such sentence in view of the said statement.

¹² (2010)1 SCC 58.

¹³ (2001)4 SCC 458.

¹⁴ (2001)10 SCC 109.

¹⁵ JT (2005)8 SC 294.

¹⁶ (2001)4 SCC 458.

In the following cases the courts have ordered that, remission shall be granted only after certain time as fixed by the court:

1. *Dharam Deo Yadav v. State of Uttar Pradesh*¹⁷ : Imprisonment of 20 years without remission over and above the period already undergone for the murder of a foreign tourist lady by the appellant who was a tourist guide.
2. *Birju v. State of M.P.*¹⁸ : Sentence of 20 years imprisonment, over and above the period already undergone without remission for killing a child, motive was for getting money from child's grandfather for consuming liquor. Accused was involved in 24 criminal cases.
3. *Ashok Debbarma v. State of Tripura*¹⁹ : Imprisonment of 20 years without remission in the case of armed extremists setting fire to 20 houses belonging to linguistic minority leaving 15 dead.
4. *Dilip Premnarayan Tiwari v. State of Maharashtra*²⁰ : Sentence of 20 and 25 years rigorous imprisonment in the case of honour killing of husband of young sister and his family members over intercaste marriage of younger sister.
5. *Ramnaresh v. State of Chhattisgarh*²¹ : Imprisonment of 21 years for gang rape and murder.
6. *Brajendra Singh v. State of M.P.*²² : Sentence of 21 years for killing wife suspecting illicit relations and his three young children.
7. *Ramraj v. State of Chhattisgarh*²³ : Imprisonment of 20 years including remission for killing wife with stick.
8. *State v. Ajit Seth*²⁴ : 20 years prison term for burning of two children.

¹⁷ (2014) 5 SCC 509.

¹⁸ (2014) 3 SCC 421; 2014 (2) SCALE 293.

¹⁹ (2014) 4 SCC 747; 2014 (3) SCALE 344.

²⁰ (2010) 1 SCC 775.

²¹ (2012) 4 SCC 257.

²² (2012) 4 SCC 289.

²³ (2010) 1 SCC 573.

²⁴ (2010) 9 SCC 42.

9. *Reddy Sampath Kumar v. State of Andhra Pradesh*²⁵ : Jail Term in terms of Section 57 IPC (20 years) without any remission (death of father-in-law, mother-in-law and their three minor children caused due to poisoning with the intention to grab property).
10. *Nazir Khan v. State of Delhi*²⁶ : Prison sentence of 20 years without remission over and above the sentence already undergone (case of terrorist acts).
11. *Prakash Dhawal Khairnar v. State*²⁷ : Imprisonment of 20 years (dispute with regard to partition of land, one brother led one brother to annihilate entire family of his brother and also committed murder of his own mother).
12. *Ram Anup Singh v. State*²⁸ : The court sentenced the appellants - Lallan Singh and Babban Singh to suffer rigorous imprisonment for life with the condition that they shall not be released before completing an actual term of 20 years including the period undergone by them. There was no interference with the appeal of the appellant - Ram Anup Singh in whose case the High Court had given life imprisonment.
13. *Shri Bhagwan v. State*²⁹ : Prison sentence of 20 years for murder of five persons of a family for robbery.

In the following cases the courts have ordered that, remission shall be granted only after minimum incarceration of 30/35 years:

1. *Amar Singh Yadav v. State of U.P.*³⁰ : Imprisonment of 30 years without remission for burning in a vehicle of wife and four children, where wife and two daughters died.

²⁵ JT 2005 (8) SC 294.

²⁶ (2003) 8 SCC 461; AIR 2003 SC 4427.

²⁷ (2002) 2 SCC 35.

²⁸ (2002) 6 SCC 686.

²⁹ (2201) 6 SCC 296.

³⁰ 2014 (8) SCALE 113.

2. *Alber Oraon v. State of Jharkhand*³¹ : Sentence of 30 years imprisonment without remission in addition to sentence already undergone for murder of woman and two children on property/land dispute.
3. *Md. Jamuluddin Nasir v. State of West Bengal*³² : Appellant Nasir awarded 30 years without remission for attack at American Centre, Calcutta.
4. *Rajkumar v. State*³³ : Prison term of 35 years without remission for rape and murder of a 14 year old girl.
5. *Gurvail Singh Gala v. State of Punjab*³⁴ : Sentence of 30 years without remission for murder of four persons.
6. *Neel Kumar v. State of Haryana*³⁵ : Prison term of 30 years without remission for rape and murder of a four year old daughter by father.
7. *Sandeep v. State of U.P.*³⁶ : Sentence of 30 years without remission for murder of pregnant girlfriend and unborn child.
8. *Haru Ghosh v. State of West Bengal*³⁷ : Imprisonment of 35 years without remission for double murder and attempt to murder.
9. *Anil Anthony v. State of Maharashtra*³⁸ : Sentence of 30 years without remission in addition to sentence already undergone for strangulation of minor boy aged 10 years after subjecting him to carnal intercourse.

The judicial pronouncements noticed by us shows that the Supreme Court has extensively exercised the option of directing a fixed term of imprisonment before exercise of the discretion by the executive under Section 432 Cr.P.C.

³¹ 2014 (58) SCALE 525.

³² 2014 (7) SCALE 571.

³³ 2014 (2) JCC 1217.

³⁴ (2013)10 SCC 631.

³⁵ 2012 (5) SCALE 766.

³⁶ (2012) 6 SCC 107.

³⁷ (2009) 15 SCC 551.

³⁸ 2014 (4) SCALE 54.

V Conclusion

A sentence of life imprisonment can thus be classified in two categories i.e., the ordinary category whereby the Court leaves the exercise of executive power at the discretion of the executive, to be so exercised after 14 years of imprisonment and grant remission and a higher category, where the Court, in a rare case, but not the rarest of the rare, would clip said benefit being extended by directing that the accused shall undergo an actual sentence for a higher period or even for the remainder of his life. Such kinds of cases can be put in the category of rare cases with appropriate direction of not being entitled to the benefit of remission till a fixed term of imprisonment is undergone. Only after carrying out such an exercise should the Court take resort to the extreme action in a case which would be in the category of the rarest of the rare.

However, this judicial classification at the compromise of executive prerogative has a raised the eyebrow of those who believe in executive fiat. Clemency jurisdiction belongs to the corridors of executive. Imposing judicial restrictions on such powers in the name of judicial innovation of sentencing policy impinge on separation of power theory. Creation and classification of offences is the exclusive domain of the legislature coupled with sanction to be carried out by the executive. Though the via media created by the courts is welcome and would be seen as a milestone, the constitutional correctness by appropriate Bench is still pending. The progressive developments in this sentencing jurisprudence are awaited.

EMERGENCE OF SURROGACY AS A NEW FORM OF EXPLOITATION - SOME REFLECTIONS

Sharada Patil*

I Introduction

Mother is such a sacred body who is always adored, loved and worshipped by her children for her unique capacity to give and rear life on the earth. Motherhood has always acquired highest place amongst all the states of life. She gives birth to new life, nourishes it and sacrifices her own life for the welfare of the child. Such wonderful opportunity is not available to all women on the earth. Many are suffering from the problem of infertility or some diseases due to which they cannot beget children. They are longing to have a child of their own. Often adoption was the practice adopted by such people. Since it cannot provide them genetic connection with the child development in new reproductive technology has given a new ray of hope to such couple especially in the form of surrogacy. Though it was not so easily accepted by many in the beginning it is now widely used to fulfill their desire to have their own genetic offspring. Various reasons can be attributed to the growth of this practice. This growth has increased the demand for women with healthy uterus to beget children for them. India being country with more number of poor people has become the popular destination for such aspirants as the medical expertise, surrogate women, and other facilities required are available at a very low cost. Foreigners fly to India for realizing their dream. This practice has grown to such an extent that it is labeled as womb outsourcing industry and being calculated in terms of billion dollars. More than any other medical technology this reproductive technology has given significant powers to human beings over human reproduction.

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The surrogacy arrangements allow the creation of non-traditional families. Surrogacy may affect the society, the country as a whole because of its impact on the family structure, which is the primary institution of a society. Disruption of family structure has manifold effects on the education, health and welfare of the children. Procreation has been taken to the market place. Motherhood is for sale. Baby factories and mother machines are available to get an offspring. It not only raises fundamental questions pertaining to procreation, its foundation and the procedure involved, but also creates dilemma as to its socio-economic consequences and legal complications arising out of it. The body politics and its manipulation through technology has been the matter of serious discourse. It involves various ethical, moral, legal, social, economic, psychological and political issues that need to be determined and analysed in the context of fast growing surrogacy industry in India. Now the practice of surrogacy has taken the form of a source of livelihood for poor women in India. The apprehension in this regard is that a woman who is easily susceptible to abuse may further be exploited. Though there are arguments to favour this practice on the ground of freedom of woman to choose as to the use of her body it is very difficult to imagine such an independent status of woman in India where she is regarded as second class person or considered always subordinate to male member of the family. In this connection it becomes very essential to debate on the concept of surrogacy, its practice and its implications on women.

II Meaning and concept of surrogacy

The word 'surrogate' has its origin in Latin word '*surrogatus*', past participle of '*surrogare*,' meaning a substitute, that is, a person appointed to act in the place of another. Thus, a surrogate mother is a woman who bears a child on behalf of another woman, either from her own egg (traditional) or from the implantation in her womb of a fertilized egg (gestational) from other woman.

This arrangement involves an agreement between commissioning parents and the surrogate mother through which surrogate agrees to bear, beget and relinquish the child of commissioning parents after carrying it to full term. In return she may agree to get compensation or she may do it for altruistic purpose. Surrogacy can be classified in different ways. It can be altruistic if no compensation is involved in the arrangement whereas it is commercial surrogacy if compensation is paid to the surrogate mother. It is traditional or partial surrogacy if surrogate's egg is used and she is artificially inseminated with the sperm of the donor or biological father. It is gestational or full surrogacy if done through IVF process, by implanting embryo in her womb and her eggs are not used. In IVF process fertilization takes place outside the womb whereas it happens in the womb of surrogate in GIFT procedure. This arrangement leads to the creation of multiple fathers and mothers namely genetic mother (egg donor), gestational mother (surrogate), commissioning mother (social mother who is entering into contract with surrogate), genetic father (sperm donor) and commissioning father (social mother who is entering into contract with surrogate).

III Historical Roots

Surrogacy is an ancient practice. Traces of its practice can be found during ancient period in India as well as in the west. In *Mahabharata* there are various instances of in vitro fertilization and womb transfer. Great sages of ancient India debated and successfully conducted experiments to reproduce offspring. Parthenogenesis¹ in human beings was known to our sages. A child can be produced without sexual intercourse between man and a woman. Gandhari, wife of King Dhritarashtra, conceived but the pregnancy went on for nearly two years; after which delivered a mass (mole). Bhagwan Vyasa found that there were 101 cells that were normal in the mass. These cells were grown in vitro (*Ghruta*

¹ Parthenogenesis means reproduction from an ovum without fertilization, especially as a normal process in some invertebrates and lower plants.

Kumbha) till full term. Of these 100 developed into male children (Duryodhana, Duhshasana, and other Kouravas) and one as a female child called Duhsheela.² Dr. P. V. Vartak convincingly argues that all the *Pandavas* were born through parthenogenesis system.³ Another instance from *Mahabharata* is the embryo transfer from the womb of Devaki to Rohini to protect the child (Balarama) from being killed by Kansa. It has been mentioned both in the *Bhagvata Purana* and the *Vishnu Purana* that birth of Balram took place due to embryo transfer from Devaki's womb to the womb of Rohini. Even Lord Krishna was begotten by Devaki but reared by Yashoda, who is referred to be surrogate mother by today's surrogates themselves.⁴ It is believed that 24th *Tirthankar* Lord Mahavira was born after an embryo had been transferred from one woman's womb to another one's. During Biblical times an interesting story that runs around Sarah, the wife of Abraham, could not have children in the beginning. She instructed her maid Hager to go to Abraham to produce them a child. Hagar gave birth to a son called Ishmael. Ishmael was the first child in history of western countries where Christianity is their religion born due to the so-called traditional surrogacy program.⁵ During medieval period services of wet nurses and concubines were used. This situation prevailed until the final decades of the twentieth century, when a series of technological developments re-created the option of arm's length conception.⁶

IV New era of modern reproduction

² Dr. Padmakar V. Vartak *Swayambhu - Vyasamahabharata Vijnananishta Samshodhane* 213 trans into Kannada by Hemantraj, (Pracheta Book House 2008).

³ *Ibid.* at 215-223.

⁴ SAMA – 'A Resource group for women and health Birthing A Market : A Study on Commercial Surrogacy' available at www.samawomenshealth.org/downloads/Birthing%20A%20Market.pdf (last visited on Dec. 21, 2014).

⁵ The Book of Genesis, Chapter 16.

⁶ Debora L. Spar, *For love and money: The political economy of commercial surrogacy*, 291 (12:2 May 2005 *Review of International Political Economy*).

The past half century has witnessed a revolution in human reproduction. With the birth of Louis Brown (first test tube baby in the world) in England in 1978 and Kanupriya (first in India during the same year) in India the new reproductive technological era began. Various treatments were made available to infertility problems viz. Artificial Insemination, oldest of all the reproductive technologies, (Artificial Insemination by donor - AID & Artificial Insemination by Husband - AIH), In vitro fertilization, GIFT (gamete intra fallopian transfer), ZIFT (zygote intra fallopian transfer), super ovulation with fertility drugs, TUDOR (trans-vaginal ultrasound-directed oocyte recovery), embryo transfer, and surrogacy. AID and AIH are solutions to male infertility problems where as IVF and embryo transfers are solutions for both male and female infertility problems. Procreation has been made possible without sexual intercourse with the help of modern technology.

First successful birth through gestational surrogacy in the world took place in the year 1984. In India it happened ten years later, in Chennai, for the first time. In 1997, an Indian acted as a gestational carrier, in order to obtain medical treatment for her paralyzed husband. India witnessed steep increase in surrogate births after Oprah Winfrey show in which a couple was interviewed who got their child through surrogacy in Anand, India during October 2007. Dr. Nayana Patel's clinic became popular worldwide. In the past couple of years, the number of births through surrogacy doubled with estimates ranging from 200 upto 350 in 2008 alone.⁷ With the popular film stars Amir Khan and Shah Rukh Khan of the Bollywood adopting this method to get children now it is being widely accepted which was opposed earlier on the ground of ethical considerations.

It is very difficult to arrive at the exact statistics pertaining to the existing surrogacy industry in India the sharp growth in the industry is evident from various reports published by the research institutions, newspapers and

⁷ Centre for Social Research, New Delhi, 'Surrogate Motherhood – Ethical or Commercial' 34 available at <http://csrindia.org/index.php/publications> (last visited on Nov. 29, 2014).

governmental organizations. As on 2005, there were an estimated 250 IVF clinics in India.⁸ To regulate the activities of the ART clinics National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India were issued by Ministry of Health and Family Welfare, Government of India and ICMR, New Delhi during the year 2005. Now ICMR has taken an initiation to create a registry of ART clinics for which it has called for submission of information by all the clinics and at present only 274 Assisted Reproductive Technology clinics in India are registered with Indian Council of Medical Research, New Delhi, under National Registry of ART Clinics and Banks in India.⁹

According to National Commission for Women, there are about 3000 clinics throughout India that offer surrogacy services to not only Indian infertile couple but foreign couple as well. India's reproductive tourism industry promoting surrogacy is estimated to be worth more than 25,000 Crore today.¹⁰ India is a favourite destination for commercial surrogacy as these services are available at a very low cost as compared to other developed countries viz., USA, UK, Canada etc. Lack of regulation, shorter waiting time, the possibility of close monitoring of surrogates by commissioning parents, availability of large pool of women willing to be surrogates, infrastructure, access to cheap drugs, cheap labour, best medical expertise comparable to international standards and commercialization of surrogacy are the other reasons that promoted this industry in India. In addition to the clinics there are various other agency services available in India like National and International health care consultants, travel agencies, law firms, surrogacy

⁸ Ministry of Health and Family Welfare, Government of India and ICMR, New Delhi, 'National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India' issued in the 4-5 (2005) Available at: http://icmr.nic.in/art/Chapter%20_1.pdf (last visited on Dec. 21, 2014).

⁹ Available at: http://www.icmr.nic.in/icmrnews/art/New%20list%20of%20approved%20ART%20Clinics_02.12.2014.pdf (last visited on Dec. 11, 2014).

¹⁰ Anil Malhotra and Ranjit Malhotra, *Surrogacy in India – A Law in the Making*, 8(Universal Law Publishing Co. New Delhi, 2013).

agents, surrogacy hostels, tourism departments etc.¹¹ India has become popular in this industry because of the prohibition or stricter regulation of this commercial surrogacy in most of the countries. Another factor that contributes towards the rise in popularity of surrogacy industry is that people in India (doctors, agents and even some surrogates) are fluent in English language. There is rapid growth of this industry which is evident by the fact that it was worth \$445 million in the year 2008 but now it is worth \$ 5000 million. Earlier these services were available in few cities including metros like Anand, Surat, Jamnagar, Mumbai, Delhi, Bangalore and Chennai but now almost every smaller city offers this service namely, Jalandhar, Indore, Bhopal, Kochi, Madurai, Ahmedabad, Pune, Lucknow so on. Anand in Gujarat which is already popular for milk revolution has become world's surrogacy capital.¹²

This arrangement costs \$11,000/- (approximately Rs. 5,00,000/-) in India, while in the US, surrogacy alone, excluding ART charges, costs \$15,000/- (approximately Rs. 6,75,000/-). A similar arrangement in the UK costs about £10,000/- (approximately Rs. 7, 00,000/-). According to another research study conducted by Centre for Social Research, New Delhi, the fees for surrogates are reported to range from \$2,500/- to \$7,000/- in India in comparison with \$20,000/- to \$25,000/- in United States of America. The total costs can be anything between \$10,000/- and \$35,000/-. This is a lot less than what intended parents pay in the United States, where rates fluctuate between \$59,000/- and \$80,000/-.¹³

¹¹ *Supra* note 4 at 7, Also see : Preetia Nayak "The Three Ms. of Commercial Surrogacy in India" in Sayantani Dasgupta and Shamita Das Dasgupta *Globalisation and Transnational Surrogacy in India – outsourcing life* 3 (eds.3 Plymouth, UK: Lexington Books, 2014).

¹² *Ibid.* at 2.

¹³ *Supra* note at 7. Also see Usha Rengachary Smerdon "Crossing Bodies, Crossing Borders: International Surrogacy between United States and India" 39:1 2008 *Cumberland Law Review* p. 32 and Sharmila Rudrappa "Mother India – Outsourcing Labor to Indian Surrogate Mothers" in Sayantani Dasgupta and Shamita Das Dasgupta (eds.), *Globalisation and Transnational Surrogacy in India – outsourcing life* 125 (Lexington Books, Plymouth, UK, 2014).

Following observations can be deduced after analyzing all these statistics presented and the research data published by Centre for Social Research, New Delhi.¹⁴

1. Surrogate mothers are available at a very low cost and receive very meager amount of money for the services they render compared to their counterparts in foreign countries especially United States of America.
2. Almost all surrogate mothers decided to go in for surrogacy due to their poverty.
3. Majority of them are illiterate and are employed as domestic helpers, house maids, construction workers and earned very low income with less than Rs. 3000/- p.m.
4. Most of them belong to nuclear male dominated family and husbands do not mind to allow them to be surrogates.

These statistics, inferences and rapid growth of this industry make us to ponder over the aspect of surrogacy from the point of view of women's rights.

V Surrogacy as a new mode of exploitation

Family is the primary institution of the society. It is the family, more particularly mother, plays a vital role in creating future citizens. She nourishes, nurtures, socializes the child. It is this family, the bonding; the upbringing makes future of the country. Therefore it becomes essential to see how families are made, what policies and practices govern the structure of the family. The responsibility of the state to control the lives of members of the family and to determine the structure of the family is equally important. In this connection various arguments are proposed mainly accusing surrogacy as a new form of exploitation of women. Hence it has become important now to find out a way to secure rights of surrogate women. New reproductive technologies have made the

¹⁴ *Supra* note at 7.

body a property that can be bought, sold and hired. In the absence of legislation abuse of rights of the vulnerable groups is very much possible.

Commodification itself is an attack on the dignity of the child, the surrogate mother and the commissioning parents and everyone else. Children and the surrogate mother are objects here in the surrogacy arrangement to be bought or hired.

“Surrogacy compromises the dignity of the child by making the child the object of a contract—a commodity. It further compromises the dignity of the mother, even if her participation is voluntary, by merely treating her as a ‘womb for hire.’”¹⁵

Hence, dealing with human body as a commodity is prohibited under the Constitution of India. Trafficking involves exchange of human beings, their body and its parts. It also includes exchange of bodily capacities.¹⁶ Trafficking benefits men, who in the guise of doctors, lawyers, brokers or agents carry on the exchange of women’s bodies for surrogate contracts. Janice Raymond observes:

“Trafficking wrenches the term surrogate mother out of its present context of blaming women and highlights that women are the objects of international exchange. Trafficking situates surrogate arrangements in the system of gender inequality – as practice that enhances the subordination of women by making women into reproductive objects of global exchange.”¹⁷

Trafficking in women and children is an offence both at national and international levels. It is argued that women are forced to become surrogates and their free consent cannot be termed free as they are driven by the situation of poverty and large sum of money is involved. It is apprehended that it also

¹⁵ A paper by the Iona Institute ‘the ethical case against surrogate motherhood: what we can learn from the law of other European countries’ available at www.ionainstitute.ie 5 (last visited on June 17, 2015)

¹⁶ Janice Raymond, *Women as Wombs* 139 (New York, Harper Collins Publishers, 1994).

¹⁷ Janice Raymond, *Women as Wombs* 139 (New York, Harper Collins Publishers, 1994).

amounts to baby sale and babies are trafficked across international borders though there are various arguments that agreement is entered into even before the child is born hence it is not sale of babies.

Another serious objection to surrogacy is that it amounts to prostitution. Prostitution is also a form of exploitation of women. Though it is not prohibited in India any activity that promotes prostitution is an offence. Both are equated for the reason that sale/hire of reproductive organs of the body is involved in them. The compelling reason behind women's decision to opt for prostitution or surrogacy is same.

Much more damaging and unnatural factor is that it adversely affects the surrogate mother psychologically as she is required to surrender the child as soon as it is born which was part and parcel of her body. The entire process of reproduction involves not only bearing and begetting but also rearing of the child. Surrogate bears and begets the child and commissioning mother has to continue with rearing of the child which is described by many as deconstruction of motherhood. In this process both the surrogate mother and the child are at loss. The greatest harm caused in this process is that it adversely affects a woman's physical health. As it is well said and known that whenever a mother gives birth to a baby it is rebirth for her as well. That is the extent of risk involved where her life itself will be threatened. Though every process is carried out under strict supervision of experts these risks cannot be overruled. Moreover risk of failure is there in every stage of this treatment. Only about 60 to 80 percent of IVF attempts at fertilization are successful and most of those do not result in pregnancy.¹⁸ In order to ensure success more than one embryo is placed in the surrogate's womb which may result in unwanted multiple pregnancies leading to health hazards for the surrogate. The possible risks of multiple pregnancies are increased chances of

¹⁸ Stacey Sutton 'The Real Sexual Revolution: Posthumously Conceived Children' 73 *St. John's L. Rev.* 857 available at westlaw.com (last visited on Jan. 21, 2012).

miscarriage, obstetric complications, premature deliveries, and birth complications. Fetal reduction may cause bleeding, perforation, infection, premature labour, and loss of all fetuses.¹⁹ Repeated IVF procedures leave surrogate exhausted and it is very painful.²⁰ It is also very much likely that a surrogate might get infected with HIV or Hepatitis if the donors or commissioning parents have these transmitting diseases. However, it can be controlled by thoroughly testing the sperm and ovum before fertilization.

In spite of all these adverse consequences, if women opt for being surrogate there must be some strong reason behind it. The reason may be either to help them (i) voluntarily; or (ii) to submit themselves voluntarily out of necessity or compulsion; or (iii) involuntarily out of force, intimidation or coercion. Only those people with too much of love care and compassion towards others will be ready to help infertile couple altruistically the instances of which are very rare. Only poor women will be ready to take such risks out of compulsion or due to coercion. Poverty is the driving force for women to go in for this practice.

There are various situations which make a woman's life vulnerable. She is susceptible to attack and infertility is one in which she may be exploited. Her position, whether commissioning mother or surrogate mother, is equally under threat. This is true throughout the world. As per various reports published worldwide and in India a woman is still not an independent sole but acts under the control and influence of male member of the family or society. Though many women regard pregnancy as creative and positive experience²¹ and become ready to be surrogates to help infertile women, they do so out of economic compulsion.²² Their freedom of choice is controlled by various social and

¹⁹ *Supra* note 4 at 65.

²⁰ *Supra* note 7 at 36.

²¹ Barbara Winters "Engineered conception: The New Parenthood" in Jan Zimmerman *The Technological Woman: Interfacing with Tomorrow* (eds.) 230 (Praeger Publishers, New York, 1983).

²² Almost all the women are poor and opted for being surrogates out of economic necessity as per the study conducted by CSR, New Delhi. See *supra* note 7.

psychological concerns. It may be a woman's private choice but it is argued that it is publicly sanctioned violence against women.²³ Moreover, most of the women who engage in surrogacy are usually poor. They are from lower middle class strata predominantly uneducated, married, often engaged in casual work, and in need of quick money (that would otherwise take many years to earn) to solve their poverty issues. The need for money is so much that infertile couple bargain a better price favourable to them as a result of competition among surrogate women. Some of them have chosen it as last decent resort to earn money after suffering lot of trauma due to their poverty. All these arguments are supported by the data collected by research study.²⁴ It interferes with the nature and leads to exploitation of poor women in underdeveloped countries who sell their bodies for money.²⁵ There is evidence that most of the surrogates are uneducated, unemployed or employed with very trivial wages, unsupported by their partner and are responsible for children and family. According to the study,²⁶ it is always the surrogate woman who has to compromise and bear the burden if there is any problem. First of all, she would like to remain anonymous due to social stigma attached to it. She is not paid properly the promised amount or under paid and she has no means or capacity to fight for her right. Benefits can be derived only when there is equal exchange – money paid for the service rendered. But in reality there is a contract amongst unequals. She is neither aware of the terms of the contract nor is explained of various risks involved in the process. The contract is always biased in favour of the financially sound commissioning parents and freedom of the surrogate is an illusion. All the surrogates belong to the male

²³ *Supra* note 16 at 8.

²⁴ *Supra* note 7 at 29.

²⁵ Dr. Justice A. R. Lakshmanan, Chairman, Law Commission of India address on "Surrogacy: The Future of Children" at Faculty of Law, Punjab University, Chandigarh. (2009) 2 *MLJ* p. 10.

²⁶ Two research studies conducted by Centre for Social Research, New Delhi in five cities namely Anand, Surat, Jamnagar, Mumbai and Delhi (which are main cities offering surrogacy services in India) See *Supra* note 7.

headed/dominated nuclear family which means that they become surrogate mother with the approval of the husband. Their choice is not free and they act out of compulsion. They are exploited by the clinic as well by not paying their due. Surrogates even had to lose their daily wages to travel to the clinic for IVF attempts. They are compelled to stay at hostels away from home throughout the period of pregnancy.²⁷ These are some of the instances of their exploitation. Weaker section is always liable to be exploited. The more astonishing fact that the contract between the surrogate mother and the commissioning parents is entered into after the confirmation of the pregnancy during the second trimester of the pregnancy²⁸ gives account of extent of exploitation. She is compelled to sign the document as she is already four months pregnant forcing us think to that it is nothing but slavery. Neither she nor her husband are able to read or write and are explained the terms of the contract which is beyond verification. She has to surrender her body completely to the doctors and cannot refrain back. Thus it is similar to slavery as slaves do not have self-ownership and are bound by the orders of the masters. Surrogate mothers are used as an instrument or object to achieve the desired end i.e. child. Hence it is seriously objected as it amounts to slavery. Even in case of abortion decision due to abnormality of the fetus it is the commissioning parents who decide on the issue not the surrogate. In such case the compensation is not paid in some places where as in other places it is claimed that half the promised amount is paid. It is disturbing to note that in most of the cases the money paid to the surrogates is coaxed by their alcoholic husbands and surrogates position remains same as before. These states of affairs explain the extent of exploitation that takes place in surrogacy arrangement. It is the clinics in majority of the cases that exploit these poor women. It is quite natural that in a country where domestic violence is deep rooted in every household woman may be forced to become surrogate.

²⁷ *Supra* note 7.

²⁸ *Ibid.* 7 at 40.

All these accounts make it clear that surrogacy brings new mode of exploitation of women which may be successfully practiced in the absence of any legislation. This practice has every potential to exploit surrogates as they belong to poor families, are illiterate and are not aware of their legal rights. Exploitation is unethical and selfish use of human beings for satisfaction of personal needs or desires which may be in the form of human trafficking, bonded labour, slavery, forced labour, prostitution, economic exploitation, child labour etc. Though all these forms of exploitation are prohibited under the Constitution of India and various laws there is need for specific legislation to clarify and control exploitation in the form of surrogacy as it is allowed since 2002 in India. Every person has right against exploitation. Surrogacy is opposed on the ground that it amounts to human trafficking, slavery and there is economic exploitation.

The term exploitation implies harm. Lot of harm physically and mentally is caused to the surrogate women as she has to bear the consequences of the physical labour by giving birth to the child, hormonal changes and mental agony suffered by staying away from her own family and handing over the child soon after the delivery.

Exploitation involves coercion and deception in variety of forms. It may in the form of giving misleading information about their rights and privileges in order to keep them in the position of dependency. The same kind of activity can be seen in surrogacy practice wherein they are compelled to sign the contract documents and are not notified about the terms of the contract, health hazards involved in the process etc. Financial inducements are softer threats that are used to coerce a woman to be surrogate. The exploitation may be both consensual and nonconsensual. Here even if consent is given surrogates allow themselves to be

exploited to as they do not have viable options and is given in the circumstances of financial desperation.²⁹

Even though some opine that surrogacy should be treated as a means of earning a livelihood and the body as a resource and productive asset can be utilized; absence of free consent or lack of independence among Indian women make the opponents to strongly resist it. A market created where people are willing to buy commodities and sell body parts further worsens the exploitation situation of women who are already oppressed.³⁰ It exploits socio-economic class differences. Financial and emotional needs of the surrogate and couple are used as currency. It is a form of medical violence against women which is dangerous, destructive, debilitating and demeaning.

VI Conclusion

Infertility is an age old problem that causes mental agony and trauma to the infertile couple. Though it is not life threatening this problem creates a sense of useless life in the minds of the couples especially the female. Barren women are treated as incomplete women and face social exclusion. Adoption was resorted to as a last resort earlier. Now the availability of IVF technique using which couple can have their own genetically related child has given a new ray of hope and has acquired the place of adoption successfully. But in a country like India where women are subject to violence, abuse and exploitation to a greater extent surrogacy can be viewed as a new social problem. In this context, surrogacy may pave the way for further exploitation of women. Indian women are vulnerable. The poorer the country, the more is the fear of exploitation. The combination of poverty, illiteracy and lack of power that women have over their own lives will

²⁹ 3rd Annual legal wise international family law conference Sep 17–20, 2014 by federal circuit court of Australia on “Parenting and Children’s Issues: International Commercial Surrogacy and the risk of abuse” Available at http://www.abc.net.au/reslib/201409/r1332410_18536962.pdf.

³⁰ Sarojini N. B. and Dharashree Das “ARTs: Voices from Progressive Movements” in Sandhya Srinivasan *“Making Babies: Birth Markets and Assisted Reproductive Technologies in India”* (eds.) 36 (Zuban, New Delhi 2010).

land them in difficulties. Even Law Commission of India in its 228th report has stated that a woman is respected as a wife only if she is mother of a child, so that her husband's masculinity and sexual potency is proved and the lineage continues.

In the absence of any legislation it is difficult for the courts to decide the legality of the surrogacy contract, rights of the surrogate, child and commissioning parents. Courts started determining taking into consideration the best interest of the child. Various committees worldwide were constituted to study the implications of this new technology. Most of the countries either prohibit or strictly regulate surrogacy. Very few countries have allowed its practice. The thought that it destroys the family structure, values, mental and physical health of human beings consequently resulting into unhealthy society has made various opponents to propagate for its ban. However the proponents argue for it as they emphasize on individual freedom of choice and reproduction. This ideological clash warrants legislative action to manage the situation and prevent exploitation of women by either banning this practice or by strictly regulating it.

PROMOTING CONSTITUTIONALISM THROUGH DHARMA; THE ANCIENT INDIAN EXPERIENCE

*Dr. Tharanatha**

The idea of limited governance was part of ancient Indian polity. Ancient political thinkers viewed that, the ultimate sovereign is the creator. Having created his '*shristi*' of human beings and becoming concerned about their well-being, namely to prevent their degrading into chaos (*mastyanyaya*), he proceed to create law of *dharma*. Again, for proper enforcement of laws, he created *Rajan* or authority of the King to enforce obedience to *Dharma* to make creation beautiful. An examination of institutions of India's hoary past brings out the contemporary values of constitutionalism through checks on royal absolutism through actual and abstract limitations.

The origin of the institution of state in ancient India can be gathered from epics of *Mahabarat*, *Kautilay's Arthasastra* and of course *Manusmriti*. In *Sukranti*, the concept of 'State Tree' as envisaged of four beautiful flowers of *sama* (conciliation), *dana* (concession) *danda* (force) and *bheda* (dissension)¹ The *Mahabarat* at *Shanthiparva* states that, *Vishnu* created a monumental text of life and then established a king called *Virajas* to restore conditions of order, law and justice. This implies that power should not be used as a means by the state; instead the state should be considered a means whereby power is concretized so as to help in the maintenance of social organization. The *Manusmriti* also concedes the creation of *Prabhu* to overcome anarchy² *Kautilya* also concedes the fact that

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¹ Nagendra Singh, *Juristic Concepts of Ancient Indian Polity* 13 (Vision Books, 1980).

² *Arajake hi lokesmin, sarvato vidrute bhayat, raksarthamasya sarvasya, rarjunamasrjat prabhuti-* *Manusmriti*, 7, 3 (Trans) If there is no king on this earth; certainly people would flee everywhere; to protect everyone god created the King.

installation of first King by agreement in order to overcome unrestness. *Manu Vaivasvata* was embodied with force and 1/6th of harvest as both for obedience and running administration. *Buddhist, Dighanikaya* agrees with *Arthasastra* when it explains the election of King, *Mahajanassammaata*, with duty of protection of subjects and receipt of 1/6th of produce by the citizens as his wages.

The ancient philosophers attached so much importance to *Dharma* that they could imagine a society without the king but not without *dharma*. *Shanthi Parva*³, brings out the idea that, there was neither kingdom nor the king, neither punishment nor the guilty to be punished, people were acting according to *dharma* and thereby protecting one another. It is said '*Rajadharma*' in *Shanthiparva* incorporates the rule of law, the institution of kingship, duties and the powers of the king. *Rajadharma* is the *dharma* of the king and according to *Shanthiparva* all *dharma*s are merged in *Rajadharma*, and it is therefore the supreme *dharma*.⁴ it is no doubt that there was no forum before which any violation of provisions of *Rajadharma* could be questioned. The king himself, who was expected to obey those laws, was the highest court, and the *smritis* provided no forum for challenging the action of the king on the ground that it was in violation of *Rajadharma*. Such was also the nature of all provisions of *Rajadharma*, that the people could not put pressure on the king to follow *Rajadharma* through advice by ministers, representation by corporations and guilds, or by giving expression to their disapproval publicly, but not through a court of law. *Rajadharma* was much stronger because the king or the state had no power to abrogate or modify its provisions but at the same time it cannot be said that the kingship in ancient India was uncontrolled and the rulers could be despotic. Every king was required to rule

³ *Shanthiparva* 9-16; see also, Chapter I part VIII, *Rajadharma* in M. Rama Jois, *Legal and Constitutional History of India* Vol I 579 (Ancient Legal, Judicial and Constitutional system, 1984).

⁴ M. Rama Jois, *Legal and Constitutional History of India* Vol I 579 (Ancient Legal, Judicial and Constitutional system, 1984).

in accordance with dharma. It was a '*sankusha prabhutva*' (controlled ruler ship), *dharma* acting as the check, and not '*Nirankusha prabhutva*;' (uncontrolled ruler ship) Before the kings assumed the office their limitations on kingship is brought about by the sages in reply to enquiry by the king Vena in *Shanthi parva*;⁵

1. You must act according to dharma systematically and rule fearlessly.
2. You shall treat all living beings equally without yielding to evil desires, anger or greed or prompted by personal ego or acting according to your own pleasure or displeasure.
3. You should punish in accordance with law those who transgress the laws.
4. You should take a pledge that by thought, word and deed, you will rule the world believing that creation is very incarnation of the creator.
5. You shall never allow yourself to become despot.

Therefore, the nature kingship in the ancient Indian polity can be summarized as an essentially secular office, meant for the protection of the people, who accepted the sovereignty of the king. The king was no means absolute in his powers. He was subject to the sacred law, had to maintain and uphold the social order, to enforce justice and receive in return the obedience of his people and share of their produce.

All ancient thinkers are of single opinion that the King had the power to exercise '*danda*' and that should be in accordance with '*Dharma*' thus when *danda* shows the path of *dharma*, it gets identified with dharma itself. Hindu Jurisprudence is founded on the concept of *Dharma*, which is an aspect of the more cosmic *Vedic* concept of *Rta*. *Rta* is the concept of cosmic harmony which sustains. Dharma does not merely mean religion or denomination, Dharma signifies the supremacy of law. The word *Dandah* in is not confined to

⁵ *Shantiparva* 59; see also, A.S. Altekar, *State and Government in Ancient India* 75-108 (Motilal Banarsidas, New Delhi, 1984).

punishment as is often assumed, but it is according to ancient Indian tradition meant in its best sense, the power and procedure established by law and functioning in accordance with law. According to Manusmriti *Danda* was created and endowed with *Brahmatejas*.⁶ The subordination of power to *Dharma* is expressed in the composite concept of *Danda* which is nothing but a manifestation of *Dharma*.

Manu, while describing the virtues of *danda*, says that it not only provides force necessary for governance of state, but it also provides the means for it protects all when everyone sleeps, it is the ever vigilant. *Danda* with its all-pervading force which keeps thieves away and hence, *danda* is indeed *dharmā* itself. In short, the connection of *danda*, *dharmā* and *Rajan* can be stated as *danda* alone has the power to restore out of chaos, and thus leads to observance of *danda*, *dharmā* and the identification of the king to *dharmā* was so well established in the political theory of ancient India that the King who was embodiment of *danda* was destroyed if he acted in contrary to known laws of *Dharmasastra*. The oath by *Prthu*, the king of men in *Mahabharata* stated that, King's position as mere medium for attainment of *dharmā*.⁷ This approach of abidingness to *dharmā* by both king and subjects is in contrast with ancient western idea of social contract theory which appears to be purely unilateral in nature. In social contract theory of Hobbes, no obligation was imposed on the 'sovereign' whose powers were unlimited. According to *Mahabharata*, the King gets no unlimited rights because his powers born of *dandashakthi*, but by the supreme code of *dharmā* itself. If we look into the ancient polity, we come across so many mechanism apart from *dharmā* to check royal absolutism to prevent the

⁶ *Brahmatejo-mayam Dandam Asrajat Purvamisvarah, Manu, VII.14. (trans) Eshwar created 'danda' with brightness of Brahma.*

⁷ *Yas catra itukodanda anitivyapaksayah-Shanthiparva 8, 115-19 (trans) the king can rule with the help of punishment.*

emergence of uncontrolled despotism and leading to tyranny and consequent eradication of rule of law itself.

The fear of religion, in an age which was essentially religious, when the very concept of sin was so awe-inspiring is to act as the greatest deterrent to law – breaking, it was considered adequate to prescribe that the ‘ruler who collects his dues from his subjects but fails to offer them protection and to do his duty sinks into well.’⁸ In *Yajñavalkyasmṛiti*, it is clearly laid down that any punishment given by the king contrary to the laws of dharma would result in his destruction whereas the punishment meted out in accordance with *dharmaśāstras* would entitle him to a place in heaven.⁹ In addition to these injunctions, the maxim was that all wrongs are attributable to the king whom stands in sharp contrast to the western theory, ‘the king can do no wrong.’ The laws of dharma threatened the unworthy king. The ministers merely held an advisory position and thus made the king the sole centre of responsibility. Thus, *danda* could slay the king also, if he transgressed *dharma*; the law protects only when it is cherished or in other words *dharma rakṣati rāṣṭraṁ*. *Arthaśāstra* says; in any matter where there is conflict between *Dharmaśāstra* and practice or between *Dharmaśāstra* and any secular transaction, the king should decide the matter by referring the Dharma alone.¹⁰

The holy power of Brahmins - There are instances from *Aitareya Brahmana*¹¹ and *Arthaśāstra* reveals that the ‘holy powers’ of *brahmana*’s was itself as powerful check on royal despotism and even a powerful king like *Janamejaya* was humbled by the *brahmana*’s.

⁸ *Yo rāksanbalimadatte karian sulkain ca parthivah, pratibhogain ca dandain ca sa sadyo narakain brajet-Manusmṛiti*, 8, 307.

⁹ *Adarmadandanain svarga kirti lokamea nashyet, samyaktu dandanain rajnah svarga kirti jayavaham-Yajñavalkyasmṛiti*, 13.357(trans) if the King does not punish the guilty his reputation is lost. If he punishes the guilty he is venerated not only in this world but in the next world too.

¹⁰ *Arthaśāstra*, 1, 2. 14; see also, Nagendra Singh, *Juristic Concepts of Ancient Indian Polity*, 12-32(Vision Books, 1980).

¹¹ *Aitareya Brahmana* 7, 17 and also see Nagendra Singh, *Juristic Concepts of Ancient Indian Polity* 12-32 (Vision Books, 1980).

The council of ministers or *ratins* - Another check to royal despotism was provided by the ministers, both individually and as a council. If the council of Ratnins occupied an important constitutional position in the political structure of the Vedic period, the council of *mantrins* and *mantra-parishad* of the *Maurya* and *Gupta* empires constituted an effective machinery of consultation which the king could not ignore either in theory or in practice. Their role is not mere advisory in nature but they used to enjoy such prestige and importance that the king invariably consulted his council before acting. Referring to the checks over the authority of the kings, R.C. Majumdar observes; "It has often been discussed whether ancient Indian monarchy was an absolute despotism, or there are some limitations upon its authority. Saturated as we are with the idea of modern constitutional development, we naturally look for constitutional checks upon the authority of kings, such as are to be found in most countries of modern Europe where monarchy prevails. The only check of this nature in ancient India seems to have been *mantris* and *mantra parishad*, roughly corresponding to the modern executive and legislative councils. It will follow from what has been said above that ministers controlled the authority of the king to a great extent. We have seen that the decisions arrived a joint sessions of two bodies were generally binding upon the king."¹²

The power of *samiti* or *parishad* - The assembly of people called *samiti* or *parishad* could exercise considerable constitutional authority acting as healthy check against the king. From the historical perspective *Samiti* appears to be more powerful as *Arthasastra* says the 'bitterest curse that could be pronounced upon a king was that his *samiti* should never be in agreement with him.'¹³ In the absence of accord between the king and the assembly there could be even be a possibility

¹² Nagendra Singh, *Juristic Concepts of Ancient Indian Polity* 22 (Vision Books, 1980).

¹³ *Arthhasastra* 5, 19, 15 M. Rama Jois, *Legal and Constitutional History of India*, Vol I 571-605 (Ancient Legal, Judicial and Constitutional system, 1984).

of the latter expelling and executing the king. In *Padakusalamanava Jataka* it was mentioned that the assembled folk of a kingdom beat the king and priest to death since they had become a source of woe and proceeded to appoint a good man as king. Similar, incidents also have been narrated in *Satapatha brahamana* and *Aitareya brahamana*. This clearly indicates that an unworthy sovereign no longer deserves any respectful submission.

The rights of the subjects to dethrone a king - The *Mahabarat* permits the subjects to dethrone the king who had become tyrannical and oppressive.

Araksitaram vilotparam nayakam

*Tam vai rajakatnim hanyuh prajah samnahya nirghnam*¹⁴

Budhist Jatkas record a number of cases on which subjects made wicked kings punished for tyrannical acts. *Vena*, *Nahusa*, *Sudasa*, *Sumukha* and *Nimi* were some of the well-known tyrants who lost their lives. Hence, apart from *sabaha* and *samities* the most dangerous weapon of royal tyrannicide had provided an effective constitutional check on royal imperatives.

The coronation pledge - The coronation pledge made it clear that the king was a mere public functionary remunerated for services rendered by raising taxes. The typical coronation oath of the king says, 'between the night I am born and the night I die, whatever good I might have done, my heaven, my life and my progeny may I be deprived of, if I oppress you or become tyrannical.' This oath was not mere hypocritical as *Satapata Brahamana* narrates the story of *Srnjayas* who expelled their King, *Dustaritu Paumsayana* and *Tandya Brahamana* mentions a sacrifice which was performed by the subjects to oust their king.¹⁵ *Aitreya Brahamana* prescribed elaborate rites (called *Aindra Mahabhisheka*) to be observed before the actual coronation or the incumbent to the royal office. This

¹⁴ *Mahabharat* 18, 86, 35-6 (trans) when King is powerless to protect his own people; the people have the right to kill him.

¹⁵ *Satapata brahamana* 6-6.5; see also, Nagendra Singh, *Juristic Concepts of Ancient Indian Polity* 24 (Vision Books, 1980).

sacred ritual was observed scrupulously in every coronation so that the people might recognize their ruler as having derived necessary *dharmic* sanction before assuming office. K. M. Panikkar observes; ‘that importance was therefore attached to the coronation ceremony. Not only was it a dedication to the service of the people but also an affirmative of the covenant between the people and the ruler.’¹⁶

The recital of duties of the king - Another check to absolutism was to be found in the detailed recital of the duties of the king and the king’s time-table was so fully worked out in such a manner that there was little room for the king to deviate from the path of *dharmas*.

Primogeniture not sacred - The rule of primogeniture regarding devolution of royalty on near blood relatives need not be mandatorily followed. *Patanjali Jataka*, narrates that, when the king of Banaras died, the claims of his son, *Patanjali*, an idle loafer, were set aside and the minister in charge of the things spiritual was raised to the throne. In *Sonka jatakas* reference is made about the failure of an heir to the kingdom of *Banaras*, a prince of Magadha was elected. *Rigveda* refers to the visas electing the king.¹⁷ *Atharva Veda* expects the king to be elected by the people when it recites ‘*vain viso vrnatain rajyata*.’¹⁸ The fact that a successor king could be selected from outside the royal family must have been an effective check to absolutism.

The institution of *prayopaesa* to check absolutism - this was the most effective safeguard against authoritarian tyranny of the state. Since, *brahmana*’s held in high esteem, the fasting unto death of a priest as a protest against any act of the state had great deterrent against authoritarianism. *Kalhana’s Rajatarnagini* gives

¹⁶ M. Rama Jois, *Legal and Constitutional History of India* Vol I 600 (*Ancient Legal, Judicial and Constitutional system*, 1984).

¹⁷ *Rigveda* 10, 124, 8 see M. Rama Jois, *Legal and Constitutional History of India*, Vol I 593-596 (*Ancient Legal, Judicial and Constitutional System*, 1984).

¹⁸ *Atharva Veda* 3, 4, 2.

the description of the same and in such circumstances, the king appoints a special officer to watch such public protests as it was believed that, if a *brahamana* is well versed in sacred learning is found dying of hunger that kingdom will invariably be visited by feminine.¹⁹

The village councils-Apart from *sabhas* and *samities* of *vedic* times, the political set up was so decentralized, making the village councils and town committees' semi-autonomous institutions which made state in ancient India against despotism.

The over-riding concept of dharma or law - The kings in ancient India were so found of dharma that they assumed titles such as Dharma-Maharaja, indicating the fact that the institution of kingship is deeply interwoven with the concept of dharma sanction that everyone who ascended to that high office bowed to dharma first and last.

Checks exercised by corporations and guilds - The town and city corporations, guilds of merchants and associations of persons carrying various occupations appear to have had an honoured place in the monarchical set up and these institutions enjoyed considerable influence upon the king. It was said that after entering the hall of audience the king was required to give priority to the representatives of corporations and guilds and he was required to speak gently and honour them with presents.

The cardinal principle of *dharma* overriding all written texts of law was so well founded in ancient India, that even Privy-Council in 1854²⁰ upheld the dictum of *Naradasriti* as valid.

One more concept which should be note at this juncture is doctrine of Trivarga Siddantha found in Manusmriti,

¹⁹ *Rajatarangini* 8-428, 6585; see also, Nagendra Singh, *Juristic Concepts of Ancient Indian Polity* 25-27 (Vision Books, 1980).

²⁰ *Collector of Mathura v. Mottu Ramalinga Satupati* 12 MIA 397, 435-436.

“Some people declare that acquiring wealth alone will do good for any human society.

There are others who declare that fulfilment of human desires and the acquisition of wealth is better as after all individual have to fulfil their desires.

There are others who declare that Dharma or righteous code of conduct is sufficient and there are also others who say that acquisition of wealth alone is sufficient.

But the correct position is that there should be a harmonious balance between dharma (code of conduct) and acquisition of wealth and fulfilment of desires, in that acquisition of wealth (artha) and fulfilment of desires (kama) must conform to dharma and any wealth (artha) or desire (kama) which contravenes dharma should be rejected.”²¹

Hence, observance of *dharma* is utmost important in which the entire concept of rule of law is incorporated. The meaning it conveys is that, an orderly society would be in existence if everyone acts according to *dharma* and thereby protect *dharma*, and such an orderly society which would be an incarnation of *dharma*, in turn, protects the rights of individuals. Therefore, *dharma protects those who protect it*. Hence, observance of *dharma* is utmost important in which the entire concept of rule of law is incorporated. Therefore, *dharma protects those who protect it. Those who destroy dharma get destroyed. Therefore, dharma should not be destroyed so that we may not be destroyed as a consequence thereof.*²²

In conclusion, the principles of constitutionalism had its true manifestation in the ancient Indian polity through the Rules of *Dharma* which were meant to regulate the individual conduct, in such a way as to restrict the rights, liberties,

²¹ Manusmriti, Chapter IV-176; see also, M. Rama Jois, *Ancient Indian Law Eternal in Manusmriti* 27 (Universal Law Publishing Co. Pvt. Ltd 2002).

²² *Id.* at 1.

interests and desires of an individual as regards all matters to the extent necessary in the interest of other individuals, i.e., society and at the same time making it obligatory for society to safeguard and protect an individual through its social and political institutions. Briefly put, *dharma* regulated the mutual obligations of the individual and society. Therefore, it was stressed that protection of *dharma* was in the interest of both the individual and society. Manusmriti warns do not destroy *dharma* so that you may not be destroyed *Reject wealth ,money and desires which are contrary to dharma reject also such rules of dharma obedience to which lead to unhappiness or a few or which cause public interest*²³ shows that *dharma* would never always leads individual towards unhappiness.

²³ *Manusmriti*-IV 176; see also, M. Rama Jois, *Ancient Indian Law Eternal in Manusmriti* 27 (Universal Law Publishing Co. Pvt. Ltd. 2002).

EVOLUTION AND HISTORICAL DEVELOPMENT OF HUMAN RIGHTS A JOURNEY FROM ANCIENT TO MODERN

R. M. Kamble*

“the rights one has simply because one is human being.”
- Jack Donnelly¹

I Introduction

The term ‘right’ indicates a behavior, action, or a policy that is morally good or justified; required by law or duty.² In subjective terms, right connotes power to exact or to do something. Consequently, right entails one to decide how he/she is to be treated by other individuals, society and government.

The concept of right is as old as the world, and it is often said we cannot think of a world without rights, whatever it might be good and virtue but it would become morally insolvent.³ Right is something, which arises from the obligation; it is something, which imposes a constraint, whether by way of forbearance, acquiescence or active support, on the people.⁴ The preamble to the Constitution of India stresses on the ‘rights’ but there is no explanation in the Constitution. Any uncertainty, ambiguity, litigation, civil conflict and even war can be resolved with the analysis of rights. The concept of rights help to the maintenance of legal, political, social, economic, cultural and educational status quo.

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¹ Donnelly Jack, *Universal Human Rights in Theory and Practice* 10 (Ithaca: Cornell University Press, 1989).

² Crawther Jonathan, ed. *Oxford Advanced Learner's Dictionary*, 1011.

³ Joel Feinberg, defines right as ‘something which a man stand on, something which can be demanded or insisted upon without apprehension, embarrassment or shame,’ *Duties rights and Claims, American Philosophy Quarterly* 136 (1966) (3).

⁴ Hobhouse, LT, *The Elements of Social Justice*, 35 (Ruskin House, 4th edn., George Allen and Unwin Limited, London, 1958).

II Human right

(a) Meaning of the term ‘right’

There is no more ambiguous word in legal and juristic literature than the word ‘right.’ As a noun, it can be used in several senses in the legal literature. One meaning is *interest* which covers both legal and moral rights⁵ or which involves protection by law⁶. A second meaning is recognized claim to act or forbearances by another or all others in order to make the interest effective. Legally, interest is enforceable through the application of the force of a politically organized society or morally, by the pressure of the moral sentiment of the community or extra legal agencies of social control.⁷ A third use is to designate a capacity of creating, divesting or altering rights and duties. Here, the proper term is ‘power.’⁸ A fourth use is to designate certain condition of general or special non-interference with natural faculties of action. These are called ‘liberties’ and ‘privileges.’⁹

(b) Human rights

Human Rights are rooted in the culture and values of every nation of the world. To understand the true significance of the concept of human rights, we must know its historical context. The struggle to preserve, protect and promote

⁵ Fitzgerald, PJ., *Salmond on Jurisprudence* 217 (Sweet and Maxwell, London 1988).

⁶ Roscoe Pound, *Jurisprudence* Vol.4 59 (Minn. West Publishing Company, London, 1959).

⁷ *Ibid.* at 56.

⁸ Gray considers legal right as that ‘power by which a man makes other persons to do or refrain from doing a certain act by imposing a legal duty upon them through the agency of law.’ For instance, if a man lends some money to another, the right of the creditor to recover his money from the debtor is in reality, not his legal right but it is rather a power conferred on him by law by the exercise of which he recovers the debt. In other words, the creditor’s interest to get back his money from the debtor is protected by law but this interest is not a legal right it itself, it is rather his ‘object’. It is the power conferred on him by law to recover the money which is his legal right. Gray, *Nature and Sources of Law*, p.51.

⁹ Hobbes has defined right as “right consist in liberty to do or forbear; whereas law binds to one of them’ so that law and right differ as much as liberty and obligation”. *Leviathan* 1651 Chap.14 as cited in Roscoe Pound, *Jurisprudence* 57.

basic human rights continues in every generation in every society. New rights arise from the womb of the old. Today we widen the sphere of human rights thought and action to new areas and constituencies.¹⁰

It was in ancient Greece where the concept of human right began to take a greater meaning than the arbitrary persecution. Human rights became synonymous with natural rights, rights that spring from natural law.

III Evolution of human rights

Evolution of human rights can be studied into two main perspectives; they are - (A) religious or philosophical perspectives on evolution of human rights and (B) legal perspectives on evolution of human rights.

(a) Religious/philosophical perspectives on evolution of human rights:

Early civilization BC - The foundation

Human rights in the early civilizations of both the East and the West were composites of various philosophies that served people's social and cultural contexts. Both religious and secular conceptions of civilization determined the laws that dictated early human rights. The primary forerunners of civilization, namely agriculture and warehousing of food, allowed for humans to stay settled and increase in population, leading to advances in civilization as settlements turned into cities. Civilization spread outward from ancient Mesopotamia taking and evolving the components of the western tradition, including the earliest tenets of human rights.

The Babylonian king *Hammurabi* issued set of laws to his people called as *Hammurabi's* codes, which established fair wages, offered protection of property

¹⁰ Baxi Upendra, *In human wrongs and Human rights, un conventional essays* 1(Har Anand Publications, New Delhi, 1994).

and required charges to be proven at trial. *The Code of Hammurabi* from about 1800 B.C. is often cited by historians for its foundational place in the western tradition of human rights. Two hundred eighty two mostly rational clauses governed Babylonian existence and were rooted in “eye for an eye” justice. Of course, there was great disparity between judgement on nobility and judgment on slaves.¹¹

Among the most famous texts that shaped human behavior in the ancient world was the *Hebrew Torah’s Ten Commandments*,¹² later part of the Christian Old Testament. The specific commandments attempting to discourage anti-social behavior are:

1. Honour your mother and father.
2. You shall not murder.
3. You shall not steal.
4. You shall not bear false witness.
5. You shall not convert anything that belongs to your neighbour.

In addition to the Ten Commandments, the Old Testament lent the *Proverbs* and *Ecclesiastic*, among other documents, to the history of good behavior and evolving human rights.

By 800 BC, the rise of Grecian city-states which focus on the rights of the (free) individual established an ideal atmosphere for Greek thinkers to develop some of the most sophisticated ideas the world had yet seen. Plato (427-348 BC) is among the foremost of the ancient Greek philosophers who developed theories of existence that included some of the basic tenets of human rights, emphasizing individual virtue to benefit the common good. Stoicism borrowed heavily from

¹¹ Dr. Agarwal H.O, *International Law and Human Rights* 736 (Central Law Publication, 16th edn., Allahabad, 2009).

¹² www.hebrew4christians.com/scripture/torah/Ten_Cmds/ten_cmds.html (last visited on Feb. 20, 2015).

Plato and Socrates when defining *acosmopolite* meaning “citizen of the world.” *Cosmos*, meanwhile, is the order of the universe within which all humans are moving together in common humanity.¹³

As the Greeks waned and the Roman Empire grew and came into contact with unique cultures throughout the Mediterranean, the republic was obliged to strike relationships with people who held very different perceptions of the world. Most importantly, the philosophy rejects out war violence toward any other human being. The question of slavery under the Roman Empire, like slavery in any civilization, complicates the question of membership in the human race, but the fundamentals of human rights and duties, like those laid for roman citizens in “The Twelve Tables” from 450 B.C., were nevertheless in place.¹⁴

According to Roman Jurist Ulpian, natural law was that which nature and the state assured to all human beings. He stated that according to law of nature, all men are equal and by the same law all are born free.¹⁵

From the beginning, basic rights and duties of citizens would become central to the drafting of any local universal human rights ethic. The belief in a sympathetic existence is a common theme throughout the early history of human rights. But the value of brotherhood, in particular, is fundamental to early religious texts, including both the Christian New Testament and the Muslim Quran.

(b) First millennium - the rise of faith

The birth of Christ and the record of his “Sermon on the Mount” (of

¹³ Naik K P & Wakman M., *Human Rights & International Organisations*, 223 (Trinity Publication, Davangere, 2013).

¹⁴ *Ibid.*

¹⁵ Dr. Agarwal H.O, *International Law and Human Rights*, 736 (Central Law Publication, 16th edn., Allahabad, 2009).

Beatitudes) in the *New Testament* are key religious texts of the early first millennium in the Western tradition. Christian universalism explicitly preached that its adherents love their neighbors and endowed all human beings with the potential for virtue and moral equality.

In all of Christianity, Islam and Judaism, there are questions of religious tolerance among faiths and variations in the universality of rights in practice, especially with respect to slaves, women, homosexuals and each other, but the basic principles of modern human rights are nevertheless laid out.

(c) Renaissance and reformation

Jon E Lewi's *A Documentary History of Human Rights* calls the era following the fall of the Republic of Rome "*The Age of Faith*" because, the Church of Rome survived and spread across much of Europe. The Church continued to spread virtually unimpeded until the east-west schism of 1054 divided medieval Christianity along geographical and ecclesiastical divides. Western Roman Catholicism and Eastern Greek Orthodoxy took root and spread independently and was only the first of many divisions in Christianity.

Over the next few centuries, the Western world experienced a growth in urban population and an intellectual revival that helped to drive a transition from the high-middle ages in to renaissance. The era, however, was troubled by the vicious series of crusades attempting to free muslim-controlled Jerusalem. There was further violent religious persecution at the hands of the Spanish Inquisition. It was a period of extreme religious prejudice largely rooted in Christian fear and intolerance. But such intolerance and acts of violence would prompt reformers to encourage change based upon a return to what they perceived to be the central truths of the Gospels. Such change would reshape the western tradition not only

in the old world, but by 15th century, began to broaden its reach. European conceptions (and restriction) of human rights extended into new world, as European conquest almost always violently suppressed indigenous practices and stripped native rights.¹⁶

Determining absolute conceptions of human rights was never an easy task. Sir Thomas More's *Canonical Utopia* from 1516 suggests an ideal world where men and women have access to free education and freedom from religious and economic oppression. Renaissance ideals like those suggested in *Utopia* emerged in a more secular, republican atmosphere that nurtured the revival of humanist ideals and rights from classical antiquity. Those greco-roman foundations of human rights had been largely supplanted by the Church during the middle-ages in Europe. It would take revolutions in science, geo-politics and culture to pave the way to individual enlightenment and revive the conservation of human rights.

Meanwhile, human rights were left in limb during religious tension set off by Martin Luther and the Protestant Reformation. The reformation of the 16th century and the subsequent several *Great Awakenings* (beginning in the eighteenth century) continued to divide and refine human rights as drawn from Christianity. Those divisions subtly changed how faith influenced conceptions of human rights according to where religion spread. The challenges to supremacy of Roman Catholicism incited wars across the European continent consuming the better part of a century between 1562 and 1648. That final year, the treaty of Westphalia ended the religious wars and divided the continent into spheres of influence. Individual religious freedom, however, would be saved for the colonization of the new world. Subsequent revolutions would affect nations of

¹⁶ *Supra* note 3.

human rights all over the West.

(B) Legal perspective

There are some of the important agreements, charters and treaties which are of great historical significance. Which has given way to the present day most widely accepted and translated document in the world. The Magna Carta of Human Rights. These charters have also been a source for the constitutions of many different countries in the world.

Magna Carta 1215

The Magna Carta (also called Magna Charta)¹⁷ granted by King John of England to the English baron on June 15, 1215 was in response to the heavy taxation burden created by the third Crusade and the reason of Richard-I. The conception of human rights from the recognition of U.K. perspective may be found in *Magna Carta*.¹⁸ The Magna Carta of 1215 CE, is considered as an important milestone in the human rights struggle, where the freemen English feudal lords intended to restrain the king from arbitrary arrest or punishment of any kind. Consequently, Magna Carta was only concerned with baronial liberties rather than universal human rights. This Great Charter promised that no civil or criminal action would be taken against any free man without sufficient proof.¹⁹ The critics pointed out that this Great Charter was a set of baronial demands and not an assertion of the rights of all individuals.²⁰

¹⁷ The original Carta was in Latin which consisted of 70 clauses.

¹⁸ Magna Carta 1215, provided to no man will we deny, to no man will we sell or delay, justice or rights. This famous twenty ninth chapter of King John Charter of Liberties, or the twenty-ninth of Henry III is reissue of 1225, through which, it was mainly know, to our ancestor, as 'the palladium of our liberties' cited in Lohit, D. Naikar, The Law Relating to Human Rights 52 (Puliani and Puliani, Bangalore, 2004).

¹⁹ Mcilvan CH "Due Process of Law in Magna Carta" Vol.14 27-51 (*Columbia Law Review*, 1914).

²⁰ It was the Charter of Concessions extended to feudal nobles than to the ordinary subjects. In

Petition of rights 1628

However, the movement of recognizing individual rights which started with Magna Carta continued through the Petition of Right 1628 and culminated in the Bill of Rights, 1689 which was enacted in the form of parliamentary statute.²¹

Bill of rights 1689

The Bill of Rights contributed towards the development of fundamental rights.²² This Bill was a part of major settlement between the Crown and Parliament and like Magna Carta it also constituted a demarcation of powers. Nonetheless, some of general principles such as prohibition of illegal and cruel punishments assumed universal significance and subsequently appeared in many instruments including UDHR.²³

Social contract

The doctrine of natural rights, during the 17th and 18th century received further impetus with the proponents of social contract theory particularly *Locke*²⁴ and *Rousseau*²⁵ who attempted to trace the genesis of political society and

1222, the King Andrew II of Hungary guaranteed that no noble would be arrested or ruined without being first convicted in accordance with judicial procedure, see Sen AN “Human Rights” 16 (Law publications, 1st edn., Haryana, 2002).

²¹ Basu DD, *Law relating to Human Rights and Constitution*, 49 (Wadhwa and Company, 2003).

²² Basu DD, *Select Constitutions of the World*, 10 (MC Sarkar and Sons, 3rd edn., 1990).

²³ Brownlie Ian, *Basic Documents in International Law*, 3 (Oxford University Press, 2nd edn., 2000).

²⁴ John Locke theory was that, in the original state of nature, man was governed by the law of nature, but for the sake of better safety, he joined in a political society by means of ‘social compact’ for the mutual preservation of life, liberty and property. Thus, the legislature was limited by natural law; and a law made by the legislature contrary to the natural rights of the individual was invalid. Some of these natural rights were equality, liberty and property, (Government, x, 135; xiii, 149).

²⁵ It was Rousseau who gave a kinetic impetus to the doctrine of social contract by emphasizing that the State should derive its authority from the people and guarantee the natural rights of man,

government in the terms of social contract among the subjects, without disturbing the natural rights of men. The concept of ‘social compact’ reflects that people set up the civil society and political government by virtue of social agreement in their desire of finding security to life and property. Even in such state of nature, they had retained the natural rights.²⁶ But to what extent theory can be relied upon is a debatable issue as the whole theory is developed on a priory rule.

Virginia bill of rights 1776

For the first time, the Bill of Rights was adopted in the written constitution of the state as ‘the basis and foundation’ of the government.²⁷ It was the constitution of Virginia that recognised the natural rights as bill of rights. Consequently, it inspired the makers of the American constitution to introduce the First Ten Amendment to The Constitution.²⁸

American declaration of independence 1776

Theory of natural rights, then, entered into the realm of constitutionalism with two revolutionary documents, namely the American Declaration of Independence and the French Declaration of Rights of Man, which asserted that there were certain inalienable rights and it was the duty of the state and its organ to protect these rights.²⁹

of freedom and equality as they inherent in man in the ‘state of nature.’ “Man is born free and everywhere he is in chains,” Rousseau, *Social Contract*, 1762(everyman), I.i; *Discourse on Inequality*, pt. II.

²⁶ Basu DD, *Law relating to Human Rights and Constitution* 49 (Wadhwa and Company, 2003).

²⁷ The Preamble to the Declaration acknowledges the doctrine of natural rights: “All men are by nature equally free and independent and have certain inherent natural rights of which when they enter society, they cannot by any compact deprive or divest of their prosperity, cited in Basu DD, *Law relating to Human Rights and Constitution*, 51

²⁸ Ritchie, D.G., *Natural Rights: A Criticism of Some Political and Ethical Conceptions* 4 (Muihead, London, 1952).

²⁹ The Declaration as drafted by Jefferson in 1776 states: “We hold these truths to be self-evident; that all men are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty and pursuit of happiness.

French declaration of rights 1791

Inspired by the American Declaration of Independence, the French National Assembly in 1789 formulated the declaration of the Rights of Man. This Declaration recognised and declared natural rights as imprescriptibly and inalienable rights and operated as limitation over the acts of the government.³⁰

American bill of rights 1789

The original draft of the Constitution of America didn't contain the bill of rights. Therefore, some states urged for inclusion of Bill of Rights as precondition for their ratification to the federal Constitution. The demand was conceded and ultimately led to incorporate a Bill of Rights in the form of First Ten Amendments to the Constitution in 1791.³¹ By the 14th Amendment, the First Ten Amendment has been extended to the states in the year 1868.³² It should be noted that the fundamental rights emerged as limitation over governmental power, so that it could not be used tyrannically against the individuals.³³

The concept of universality understood in 18th century was not worldwide in scope, and these rights were incorporated in constitution and applied only to the citizens of the state.³⁴ Nonetheless, not all the citizens enjoyed the privileges, particularly women, children and slaves who were excluded fully or partially from possessing the rights. Similarly, in France, women were not given equal status with men. In 18th century, Olympe de Gouges was executed, as she demanded to include women to be full subjects of rights and proposed 'Declaration of Rights of Woman and of the Female Citizen'. This gender

³⁰ *Supra* note 29.

³¹ *Ibid.*

³² See generally, Chemerisky E, *Constitutional Law*, (Aspen Law Publishers, New York, 2001).

³³ *Adamson v. California*, (1947) 332 US 46.

³⁴ Eva Brems, *Human Rights: Universality and Diversity*, 17.

discrimination was based on enlightenment thought, that rights are based on universal human nature derived by the reason, and women were considered as naturally irrational.

IV Human rights in Indian scenario

The Indian History is warranted by the fact that human rights jurisprudence has always occupied a place of prime importance in India's rich legacy of historical tradition and culture. This is evident in the prevalence of different cultures, traditions and faiths in India. It is claimed, that what the west has discovered today in the field of human rights has been an accepted principle in India since time immemorial.³⁵

The concept of Human Rights has evolved and developed gradually through ages in different parts and religions of the world so as to attain the present status. Long before civilization dawned in Egypt and Greece, we have the Hindu jurisprudence of about 4000 BC. 'A king should enter the court- room with all humility,' 'More cruel than the man who lives the life of a murderer is the king who gives himself to oppress and act unjustly (towards his subjects).'³⁶ 'For it is punishment alone that guards this world and the other, when it is evenly met by king to his son and his enemy, according to the offense.'³⁷

The concept of human rights as it is understood today has evolved over the centuries. Though the expression 'Human Rights' seems to have modern face, human rights are as old as human civilization. Human rights have existed, in however, nascent form, ever since man, as a gregarious animal, has lived in

³⁵ Sharma Arvind, *Hinduism and Human Rights: A Conceptual Approach*, 30 (Oxford University Press, New Delhi, 2006).

³⁶ See, W.H. Drew and J. Lazarus, (trans.) Thirukkural 112 – 113 (The voice of nobility, written by Thiruvallavar around 300 B.C. in Tamil language, 1991).

³⁷ See, K. D. Irani and Silver Morris,(ed.) Social justice in the ancient world, 95 (1995).

communities, families, clan, tribe, village, town or nation and now in an independent world community³⁸. As far as historical perspective it can be said that, the concept of human rights in India may be seen to have existed in the crystallization of values that are considered to be the common heritage of mankind.

(a) Human rights in ancient India

The concept of human rights is not new thing to the Indian political thinkers and philosophers. They have expressed concern to secure human rights and fundamental freedom for all human beings everywhere since the very early times of *vedic* age. Philosophy of human rights had already occupied a place of prime importance in ancient Indian Brahmanical society. The Indian thinkers are of the view that it is not justified to limit the origin of the concept of human rights to only western civilization. What the west has discovered today in the field of human rights has been an accepted principle of India's rich the declarations made in the *vedas*, the relevant declarations are:

Ajyestaso akanishtas etc
*Sam Bhrataro va vridhuhu sowbhagaya*³⁹
Samani prapa saha vaha ann abhagaha
Same yoktre saha vaha yunajmi
*Araha habhimiva Abhitaha*⁴⁰.

³⁸ R. P. Dhokalia, Human Rights as objects of Thought and Expression of Global Conscience, *Banaras Law Journal*, 5 (1992) Vol.26.

³⁹ No one is superior (*ajyestaso*) or inferior (*akanishtasha*). All are brethren (*bhrataraha*) all should strive for the interest of all and should progress collectively (*sowbhagayanam va varidhulu*). *Rig Veda – Mandala 5, Sukta- 60, Mantra – 5*, cited in inaugural address of Justice M. Ramajois, in (Judicial Colloquium in Mangalore, Feb. 24-26, 1998).

⁴⁰ All have equal rights in articles of food and water. The yoke of the chariot of life is placed equally on the shoulders of all. All should live together with harmony supporting one another like the spokes of a wheel of the chariot connecting its rim and the hub. *Atharvaveda – Samjuana Sukta*, cited in inaugural address of Justice M. Ramajois, in Judicial Colloquium in Mangalore, Feb. 24-26 (1998).

These *vedic* provisions forcefully declare equality among human beings. The last of them impress that just as no spoke of wheel is superior to other, no individual can claim to be or regarded as, superior to others. Equality of all human beings and the duty of each individual to strive for the happiness of every other individual as also the equal rights over food, water and other natural resources are found incorporated in these declarations.⁴¹

The modern utopia of a global village is more or less akin to this concept. It is quite interesting to pinpoint here that the immoral epics, *Vedas*, *Ramayana* and *Mahabharata* demonstrate the deep commitment and faith of our *sages* towards justice. All the four *vedas* insist on equality and respect for human dignity.

In the whole eighteen *puranas*, Vyasa has said two things doing well to another are right, causing injury to another is wrong. Manu says, 'king should protect and support all his subjects without any discrimination in the same manner as the earth supports all living beings.'⁴²

There was however, a downfall of human rights jurisprudence in Post-*Vedic* age. But with the rise of Buddhism and Jainism there was a revival of human rights jurisprudence. Influenced by the teachings of Buddha worked extensively for the protection of human rights. His chief concern was the happiness of his subjects. Torture and inhuman treatment of prisoners were prohibited under Ashoka's administration. King used to dispense justice to the people. The study of *Mudra Rakshas*⁴³ shows that dispensation of justice was considered as one of the important duties of the rulers.

Hence, it is abundantly clear that ancient Indian jurisprudence stood for

⁴¹ *Supra* note 40.

⁴² S. N. Dhyani, *Law, Morality and Justice*, 87 (1984).

⁴³ *Mudra-Rakshas* was written by Vaishaka Dutta who was contemporary of Chandra Gupta.

enlarging and encouraging human freedom, liberty and equality for all people. It has developed common ideals based on human unity and harmony which transcends diversities of race, colour, language, religion, etc.

(b) Human rights in medieval India

During Muslim era in India, especially in the pre-mughal period, there were series of cultural, social and political stressed and strain on the style and way of life of *hindus*. The *muslim* rulers in India were fundamentalists and despotic who forced upon the *hindus* their own laws, customs and religious practices. *Hindus* were not treated in law on par with the Muslims, the latter being the conquerors and former being the *Kafirs* - the non-believers of Islam, special disabilities like *jazia*, were imposed on *Hindus*. Both in theory and practice, there was discrimination against *hindus* vis-à-vis *muslims*. Muslim rule in India was not founded on the basic principles of human dignity, equality and justice and was essentially autocratic, theocratic and irresponsible, devoid of the idea of rule of law, morality, justice, tolerance and social harmony. So significance of *muslim* rule in India from the point of view of human rights was counter-productive to harmony, justice and equality and the concept of human rights got lost on its way in the dark and narrow alleys of the middle ages. It was however; at a later stage that Muslim state in India became considerably modified in its form.

Some of the Moghul rulers especially Akbar, he brought some basic change in administration. He adopted the policy of tolerance and non-discrimination towards Hindus. Hence, it was not wrong to say that, with Akbar a new era began. The right of an accused to be released on bail did exist during Mughal rule in India. Similarly the right to benefit of doubt was known to Muslim jurisprudence in the administration of criminal justice. The benefit of doubt was known as

shuba (doubt) which entitled an accused to be acquitted.⁴⁴

Finally, the bhakti movement evolved in later periods ultimately revived and regenerated the old Indian values of justice and morality. It may be recalled that from time immemorial Indians have called their culture by the name of human culture. No gain saying the fact that human dignity had universal appeal and Indian culture had tried to be so comprehensive as to suit the needs of every human being, irrespective of age, colour, sex or caste.⁴⁵

(c) Human Rights in Modern India

The transition from the medieval to modern period has resulted in a prodigious change in the Indian history. The British Indian rulers discriminated against Indians in matters of their political and civil liberties and rights. They resorted to arbitrary acts such as brutal assaults on unarmed satyagrahis, internments, deportation etc., against Indians fighting for national independence, equal justice and economic equality. After witnessing the colonial rule, every Indian was of the firm opinion that the recognition, protection and implementation of human rights are not only basic but also inalienable for them for leading a civilized life.

To review the philosophy of human rights in modern sense, concerted efforts were made by the Indian National Congress, which demanded basic human rights in the Constitution of India Bill, 1895. Constant resistance to the foreign rule manifested in the form of demand for fundamental freedoms, civil and political rights for the people. The rights like freedom of expression, right to property,

⁴⁴ Martin Ennals, "The Struggle for Human Rights", in A. R. Desai (ed.), *Violation of Democratic Rights in India*, 37 (1986).

⁴⁵ Sanjay Joshi, 'The Right to Equality, Life and Liberty under the Constitutional Law of India' 83 (1999).

equality before law figured in this Bill. Congress as early as in 1918 in Bombay session demanded declaration of rights of people of India and again demanded of these basic rights ere reiterated in Nehru Committee Report in 1928. The congress in the resolutions of 1917 and 1919 asserted demand of civil rights and equal status with the English men. In 1922, congress aimed at achieving swaraj to shape dignity of the country. The Sapru Report 1945 incorporating the proposals of fundamental rights did not find favour. Later the British cabinet mission in 1946 recognized the need for a written guarantee of fundamental rights in the Constitution of India and envisaged a constituent assembly for framing the Constitution of India.

The constitution assembly pledged to draw constitution for the country wherein shall be guaranteed and secured for the people of India Justice: social, economic and political equality of status and of opportunity before the law; freedom of thought, expression, belief, faith and worship, vocation, association and action, subject to law and public morality.⁴⁶

The aspirations of people of India found expression in the Indian Constitution, which enacted a nearly complete catalogue of human rights around the time when the international scene was witnessing the framing of Universal Declaration of Human Rights. The human rights content of the Indian Constitution is a complex amalgam of civil and political rights along with economic, social, religious and minority rights.

V Conclusion

In conclusion it can be said that, the word human rights is essentially a recent phenomenon however the spirit is as old as the human civilization. Human Rights

⁴⁶ C.A.D., Vol. II, 296.

are a dynamic concept and endeavors to adopt itself to the needs of the day. Human rights constitute those very rights which one has precisely because of being a human. In their basic meaning, human rights are claims of the individuals for such conditions, which are essential for the fullest realization of the innate characteristic which nature has bestowed upon him/her with as a human being. Apart from the constitutional provisions, various statutes have also been enacted by the Indian legislature with a view to protect and promote human rights. These legislations seek to protect different aspect of human rights.

PERSISTENT CLIMATIC RISKS IN INDIAN AGRICULTURE AND THE WEATHER BASED CROP INSURANCE SCHEME - A POSITION REVIEW

Dr. Jyothi Vishwanath*
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I Introduction

“Climate change, which is taking place at a time of increasing demand for food, feed, fiber and fuel, has the potential to irreversibly damage the natural resource base on which agriculture depends. The relationship between climate change and agriculture is a two-way street; agriculture contributes to climate change in several major ways and climate change in general adversely affects agriculture.”

- *The Executive Summary of the IAASTD¹ Synthesis Report, Article 4.1*

With inherent abilities of stimulating economic growth, generating employment, assuring food security, reducing poverty² and sustaining environment, agriculture summates as a crucial sector across the globe. FAO statistics, 2014 substantiate that India is second worldwide in farm output;³ is largest producer of many fresh fruits and vegetables, milk, millets; is second largest producer of wheat and rice;⁴ is one among the world's five largest producers of over 80 percent of agricultural produce and poultry meat; is the largest employment generator. Notwithstanding this, Agriculture Growth Rate in

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¹ International Assessment of Agricultural Science and Technology for Development.

² Agriculture is twice effective in reducing poverty as non-agricultural GDP growth (World Bank, 2008). -<http://www.worldbank.org/> (last visited on October 20, 2014).

³ <http://www.fao.org/countryprofiles/index/en/?iso3=IND> (last visited on October 16, 2014).

⁴ Year 2007-08 witnessed food grain production worth 219.32 million tones. Rice production (94.08 million tonnes), maize (16.78 million tonnes), soya bean (9.45 million tonnes) & cotton (23.38 million bales each). -Key Features of Budget 2008-2009.

India gross domestic product (GDP) has declined over the years due to the beleaguering risks impacting agricultural yields ranging from production risks, price risks, credit risks, technological risks, institutional risks, natural catastrophes, pest and diseases risk, climate variability and change risk, frequent natural disasters risk, risk of yield and price uncertainty,⁵ risks relating to weak rural infrastructure, imperfect markets and lack of financial services including limited span and design of risk mitigation instruments including credit and insurance apart from poor accessibility to them.

The Fourth Assessment Report, 2014, United Nations Inter-Governmental Panel on Climate Change confirms difficulty of according reliable food supply on a hotter planet.⁶ Depending on the differences in baseline climate and soil, apart from the duration and timing of crop exposure to various conditions, relationship between weather and yields is moreover crop and region specific.⁷ Asian-Pacific region experiences nearly 60 percent of the world's natural disasters⁸ and India is worst affected due to its geographical placement and climate. Spiraling out of control, natural disasters devastate the country with grim regularity and increased frequency, causing tremendous injury, disability, disease and death adding to the health, economic and social burden of an already impoverished economy.

⁵ Uncertainty refers to an event the outcome of which is not certain *i.e.*, outcome may be one of the many possible outcomes & thence cannot be measured. Risk is the impact of the uncertain outcome on the quantity/value of some economic variable & refers to the variations in value of an economic variable resulting from the influence of an uncertain event & can be measured as variations in the value are measurable. - Singh, Gurdev. *Crop Insurance in India*. Vol. W.P. No. 2010-06-01. Ahmadabad: Indian Institute of Management, 2010.

⁶ <http://www.ipcc.ch/> (last visited on Oct. 1, 2014).

⁷ Risks of increased insect-predation, crop diseases & migration of agronomic & invasive weeds can be added.

⁸ Disaster is the catastrophic situation disrupting normal pattern of life/ecosystem, requiring extraordinary emergency interventions for saving & preserving lives/environment. - K Sharma, Vinod, and D Kaushik Ashutosh. "Natural Disaster Management in India." *YOJANA* (2012). It disrupts the functioning of a society causing widespread human, material or environmental losses exceeding the ability of the affected society to cope with its own resources & may be natural (floods, droughts, tidal waves, earth tremors, land-slides) or man-made (chemical, transportation or industrial accidents, environmental pollution, political unrest, conflicts between nations, terrorist activities & fires).

Plethora of climatic vagaries cause enormous loss in the agricultural production,⁹ endanger farm related income and livelihood and prevent agriculture from emerging as a potent solution to rural poverty and food insecurity. For reviving the vulnerable farm sector from the shocks of climatic variations and combating losses in agricultural operations, many governmental innovative insurance schemes have been launched from time to time including the most pertinent Weather Based Crop Insurance/Rainfall Insurance Scheme (WBCIS) which assumes all the more relevance keeping in mind the climatic risks battled by Indian agriculture. Analysis of Indian Crop Insurance Program during 1985-2003 incarnates that, rainfall accounted for around 95 percent insurance claims (85 percent due to deficit rainfall and 10 percent due to excess rainfall)¹⁰ and this renders WBCIS even more relevant. Being an innovative technology based agricultural insurance scheme, WBCIS covers insurance losses due to vagaries, inadequacies and cruelties of weather, honours claims based on the recorded deviations from standard weather parameters on the premise that weather conditions affect crop production even when a cultivator has taken all the care to ensure good harvest.¹¹ In this backdrop, this article attempts to focus on the WBCIS and its development in India. It examines the nature of Indian agriculture, climatic risks impacting it; history of agriculture insurance in India and their role in protecting farmers from climatic risks. It elaborately evaluates WBCIS, its characteristic features and benefits to the farmers, claim settlement mechanism and its advantages over the other traditional agricultural insurance schemes apart

⁹ Refer <http://www.mospi.gov.in> for year-wise disasters & effect on crop production statistics; Compendium of Environment Statistics India, 2008-2009, Central Statistical Organization, Ministry of Statistics and Programme Implementation, Government of India.

¹⁰ <http://www.aicofindia.com/AICEng/Pages/evolution.aspx> (last visited on Oct. 1, 2014).

¹¹ Goudappa, S.B, B. S. Reddy, and S.M. Chandrashekhar. "Farmers Perception and Awareness about Crop Insurance in Karnataka." *Indian Research Journal of Extension Education* Special Issue, Volume II (2012): 219.

from focusing on its deficiencies and suggests the needful action for rendering WBCIS more farmers friendly and cost effective.

II Indian agriculture: nature

Hindered by Zamindari¹² system, fragmentation of land, ryotwari¹³ and mahalwari system,¹⁴ exploitation by the revenue oriented and disinterested government, money lenders and middlemen, commercialization and modernization of Indian agriculture gathered momentum only in the latter half of the 19th century.¹⁵ Vested interest of the government during the British rule,¹⁶ colonial economic policies, overcrowding of land due to ruin of handicrafts, land revenue system and colonial administrative and judicial system impoverished the farmers.¹⁷ Presently agriculture dominates the economy by contributing around 13.7 percent to the national GDP,¹⁸ provides employment, direct and indirect, to around 2/3¹⁹ of the population, feeds 69 percent population, produces food, nutritional requirements and important raw materials for major industries²⁰ and

¹² Farmers suffered from high rents, illegal levies, arbitrary evictions & unpaid labour in the zamindari areas. -Ahir, Rajiv. *A Brief History of Modern India*, 276-277 (New Delhi: Spectrum, 2013).

¹³ *Ibid.* at 332.

¹⁴ *Ibid.* at 275; also refer Myneni S R. *Indian Economy*, 208-209 (Faridabad: Allahabad Law Agency, 2007).

¹⁵ *Supra* note 12 at 276-277.

¹⁶ *Supra* note 12 at 275.

¹⁷ *Supra* note 12 at 332.

¹⁸ This downfall in 2012-2013 is from 51.9 percent in 1950-51, 18 Oct. 2014. <http://articles.economictimes.indiatimes.com/2013-08-30/news/41618996_1_gdp-foodgrains-allied-sectors accessed at 1.23 pm>; Maruti Arjun, Kekane. "Indian Agriculture- Status, Importance and Role in Indian Economy." *International Journal of Agriculture and Food Science Technology* Volume 4.Number 4 (2013): 343-46. [Http://www.ripublication.com/Ijafst.htm](http://www.ripublication.com/Ijafst.htm).

¹⁹ It employed 166 million (56.6percent) of the total workforce in 2012.-Economy of India 19 Oct. 2014. [http://censusindia.gov.in/\(S\(utccyo55du5ps3yqkeo2b1vz\)\)/Census_And_You/economic_activity.aspx](http://censusindia.gov.in/(S(utccyo55du5ps3yqkeo2b1vz))/Census_And_You/economic_activity.aspx), accessed 11.44 pm.

²⁰ Industries like cotton, textiles, jute, and sugar depend directly on agriculture. -Myneni, *Supra* note 14 at 188.

accounts for about 14 percent of exports. Growth of agriculture assumes great relevance for the well-being of the rural population.²¹

Being a source of food for the ever-increasing population and of revenue to the government,²² ignoring agricultural sector will be highly suicidal. Monsoon based Indian agriculture depends on rain for 60 percent of its net sown area. The southwest monsoon (June-September) provides about 80 percent of the area's precipitation.²³ Being a biological activity, agricultural production is highly sensitive to changes in weather. Indian agriculture is characterized by perennial risks like over-dependence on rains, multiplicity of crops, predominance of small farmers, semi-commercialized farming, poor and outmoded farming techniques, inadequate irrigation facilities,²⁴ low level of productivity, rural indebtedness apart from the climatic vagaries.²⁵ Despite scientific and technological innovations, it continues to be the most vulnerable sector. Price rise benefits the intermediaries while slump market leading to fall in the prices hits the farmers making them further indebted. Unfavorable changes in domestic and international agricultural policies including subsidy structure, tariff and credit facilities further deteriorate the situation.²⁶ Variety of risks including human or personal risks, asset risks, production or yield risks, price risks, institutional risks and financial risks haunt the farmers²⁷ requisitioning innovative plans for mitigation.

²¹ Setu, Sahaj. "Weather Based Crop Insurance." Vol IV. Issue 8 (2012). Department of Marketing Communications Sahaj E-Village Limited, www.sahajcorporate.com.

²² *Supra* note 14 at 187.

²³ Good monsoons with sufficient rainfall results in enhanced agricultural production while bad monsoons with low precipitation negatively impacts economy. - Weiss, Margo. *In India, Reducing the Dependency on Monsoon Precipitation*. (1 May 2014, 1 Oct. 2014).

<<http://blogs.ei.columbia.edu/2014/05/28/in-india-reducing-the-dependency-on-monsoon-precipitation/>>

²⁴ *Supra* note 14 at 196-197.

²⁵ *Ibid.* at 186-187.

²⁶ *Supra* note at 21.

²⁷ "Policy Brief, Crop Insurance for Sustaining Agricultural Production." *Centre for Policy Planning, Dhan Foundation*.

III Climatic risks affecting Indian agriculture

Climate change *i.e.*, the continuing process of global warming, resulting from the green house gases generated by the human activities,²⁸ threatens sustainable development around the world and manifests in gradual temperature increase, greater variability in rainfall, rise in sea level and increased frequency, magnitude, intensity and duration of natural disasters prove that drought, flood, cyclone and storm surge (IPCC, 2007). Impact of climate change not being uniform all over the globe, low-latitude tropical countries in South Asia and Africa suffer worst due to their heavy reliance on climate sensitive agriculture sector,²⁹ high levels of susceptibility, low coping capacity due to high reliance on natural resources, low per capita GDP, high poverty, limited ability to adapt financially and institutionally and a lack of safety nets. Being located in the low latitude region of South Asia, Indian subcontinent is nothing better in this regard due to its tropical climate, monsoon rains, long coast line, greater dependence on agriculture, high incidence of poverty, low irrigation coverage and inadequate resources and technology to combat climate change.³⁰

Indian agriculture is inherently risky venture due to its dependency on weather, climate, rainfall, humidity, sunshine and temperature which are beyond human prediction and control. Exposure to extreme weather conditions like temperature rise, erratic rainfall pattern,³¹ cyclones,

²⁸ Climate change is likely to increase the frequency of climatic extremes in the future & result in changes in cropping practices & patterns over time & space. The green house gases impact globally (rising sea levels due to ice-melt) as well as locally (changes in rainfall patterns).

²⁹ Low-income countries are agriculture dependent economies & are most vulnerable to climate change. - S.G. Thomas, David, and Chasca Twyman. *Equity and Justice in Climate Change Adaptation amongst Natural-resource-dependent Societies, Global Environmental Change* Vol. 15: Pp. 115–124.

³⁰ Swain, Mamata. "Crop insurance for adaptation to climate change in India." *Asia research centre working paper 61* 1 July 2014.

³¹ Due to irregular, uncertain, unfriendly & unevenly distributed rainfall, the agricultural production is worst affected.

flood,³² drought,³³ storms, tsunami,³⁴ landslides,³⁵ avalanche,³⁶ hail, frost and earthquakes significantly impact agricultural production and farm incomes.³⁷ On an average 12 million hectares of crop area is affected annually by these calamities. Resultantly, total cultivable land has shrunk to 182.385 million hectare in 2008-09 against 185.142 million hectare in 1988-89. Noticeably, out of

³² Floods inundate dry land with water. Short monsoon season of four months (June-September) bring 75 percent of the total rainfall leading to overflowing rivers & widespread floods. Floods are regular in Eastern India where the Himalayan rivers inundate large parts of its catchment areas, uprooting houses, disrupting livelihoods & damaging infrastructure. While the area liable to floods is 40 million hectares, average area affected by floods annually is about 8 million hectares. Annual average cropped area affected is approximately 3.7 million hectares -C Menon, Vinod, and Shirish Kavad. 29 Sept. 2014. <<http://infochangeindia.org/disasters/backgrounders/disasters-background-a-perspective.html> accessed 11.53 pm>; Flood is a condition that occurs when water overflows the natural or artificial confines of a stream of other body of water or accumulates by drainage over low-lying areas. - Sivakumar, M.V.K. *Impacts of Natural Disasters in Agriculture: An Overview*. Geneva: World Meteorological Organization.

³³ Drought is a condition of abnormally dry weather within a geographical region with expectation of some rain. Nearly 2/3 of the cropped acreage is vulnerable to drought in different degrees. When rainfall deficiency is widespread, afflicted area is declared to be suffering from drought. National Commission of Agriculture defined a meteorological drought as an occasion when the rainfall for a week is half of the normal or less when the normal weekly rainfall is 5mm/more. Agricultural drought refers to drought during the growing season & is defined as a period of 4 consecutive weeks of (meteorological) drought in the period from middle of May to middle of October or 6 such consecutive weeks during the rest of the year. Indian Meteorological Department (IMD) defines drought as a situation when rainfall deficiency in an area is 25percent or more of the normal. When the deficiency is more than 50percent of the normal, it is termed as severe drought. Areas where probability of drought is at least 20percent of the time period are classified as drought areas while areas with 40percent probability are chronic drought areas. - Bharat Ramaswami, Shamika Ravi, S. D. Chopra., *Risk Management in Agriculture*. June 2003 Discussion Paper 03-08. Indian Statistical Institute, Delhi; Drought is consequence of natural reduction in precipitation over an extended period of time, usually a season or more, often associated with climatic factors (high temperatures, high winds & low relative humidity) aggravating the severity of the event. Three types of droughts meteorological, Agricultural & Hydrologic drought are recognized. -Sivakumar, *Supra* note.32.

³⁴ Tsunami is a system of ocean gravity waves having a long wave length & period (time between crests), formed as a result of large-scale disturbance of the sea caused by an earthquake. 16 Oct. 2014. <http://www.enchantedlearning.com/subjects/tsunami>, (last accessed 5.58 am.>.

³⁵ Landslide is a geological phenomenon including a wide range of ground movement such as rock falls, deep failure of slopes & shallow debris flow. -Sivakumar, *Supra* n.32.

³⁶ Avalanche is release of snow down slope & is one of the major dangers faced in the mountains in winter.

³⁷ *Ibid*.

60.47 percent of total cultivable land in India,³⁸ 28 percent is drought-prone. Due to the weather-sensitive nature of crop cultivation with 60 percent of net sown area under rain-fed farming,³⁹ an adverse climate impacts not only the agriculture dependent livelihoods but the overall economy. Avalanches, forest fire and landslides occur frequently in the Himalayan region. Among the 35 total states/Union Territories, 25 are disaster prone.⁴⁰ Situation is further worsened by outbreak of epidemics and man-made disasters such as fire, sale of spurious seeds, fertilizers and pesticides, price crashes,⁴¹ uncertainty in production, volatile prices, infestation of plant diseases and pest attack, technology failure and irregularity in input supply.

Weather variables like sunlight, temperature, humidity, rainfall, hails, wind influence agricultural production.⁴² For instance, low soil moisture due to poor precipitation in the pre-sowing period adversely affects seed germination resulting in reduced plant population. Poor precipitation during growth period results in

³⁸ World Bank, 2011; Agricultural land refers to the share of land area that is arable, under permanent crops & under permanent pastures. Arable land as defined by FAO includes land under temporary crops (double-cropped areas are counted once), temporary meadows for mowing/pasture, land under market/kitchen gardens & land temporarily fallow. Land abandoned as a result of shifting cultivation is excluded. Land under permanent crops is land cultivated with crops that occupy the land for long periods & need not be replanted after each harvest such as cocoa, coffee & rubber. This category includes land under flowering shrubs, fruit trees, nut trees & vines but excludes land under trees grown for wood/timber. Permanent pasture is land used for five/more years for forage including natural & cultivated crops. -Agricultural land (percent of land area) in India. 29 Sept. 2014. <<http://www.tradingeconomics.com/india/agricultural-land-percent-of-land-area-wb-data.html> accessed at 11.31 pm>.

³⁹ Lall, Madhurima, Harnam Singh & Rashmi Tripathi. "Agriculture Insurance in India: Issues and Concern." *Bilingual Journal of Humanities & Social Sciences* 2.1 & 2 (Joint Issue) (2011). www.shodh.net, p.1.

⁴⁰ Around 50 million people in the country are affected by one/other disaster every year besides loss of property worth several million. -*Supra* note 8.

⁴¹ Raju, S.S. & Ramesh, C. (2008). A Study on the Performance of National Agricultural Insurance Scheme and Suggestions to Make it More Effective. *Agricultural Economics Research Review*, 21, Pp.11-19; Ghalavand, Kiyanoush, Karim.MH, and Abolhassana Hashemi. "Agriculture Insurance as a Risk Management Strategy in Climate Change Scenario: A Study in Islamic Republic of Iran." *International Journal of Agriculture and Crop Sciences* 4(13) (2012): 831-38.

⁴² *Supra* note 39.

stunted plant growth. Heavy rainfall during early growth period causes submersion of plants. Hailstorms, wind and cyclones damage the standing crops by lodging and uprooting. High humidity causes pests and diseases outbreak. Ultimately, what surfaces is partial yield loss and total crop failure and hence reduced farm income.

In India, 2/3rd of the cultivated area has no irrigation and large part of irrigated area gets inadequate water supply for intensive/double cropping. In rain fed areas, sowing of *kharif* crops commences with the onset of monsoons and delay in the monsoons delays sowing. Further growth of crops and output realization are determined by the quantum of rainfall and its distribution during the monsoon season. Sowing of *rabi* crops depends on the soil moisture retained from the rains especially during the later part of the monsoon season. Rainfall pattern affects the irrigated crops also. Rainfall during flowering period washes the pollens adversely affecting the crop yield. Heavy rains submerge the growing crops in the early stages and cause lodging in the later stages of crop growth. Floods due to heavy rains disrupt the sowing schedule and damage the standing crops. Around 50 percent of the variations in crop yield are due to variations in rainfall.⁴³

Though temperature and sunlight are important determinants of yield growth, they are not major causes of production risk since they do not vary much from year to year. Strong winds occurring in association with cyclonic storms, depressions, thunder or dust storms damage crops and reduces yields. Rainfall or moisture deficit emerges as the most important weather factor affecting crop growth in India.⁴⁴

⁴³ *Supra* note 39 at page 5.

⁴⁴ *Supra* note 39 at page 33.

IV Agricultural insurance mechanism: need and relevance

Mitigation and adaptation are two possible responses to pest attacks, crop diseases and weather vagaries affecting agriculture.⁴⁵ Government adopts measures like flood proofing, drought proofing, and watershed management, extension of irrigation facility, technology development, and provision of insurance relief measures to mitigate and reduce production risk. Similarly, farmers resort to wide variety of adaptive measures *viz.*, ex-ante measures before the event of crop loss and ex-post measures after the crop loss due to climatic aberrations. Ex-ante measures mostly aim at smoothing income while ex-post measures are mostly consumption smoothing.⁴⁶ Former includes changes in cropping pattern, intercropping, mixed farming and sowing drought/flood resistant seeds, increasing irrigation efficiency and income diversification while the latter constitute using grain stock or past savings, entry of weaker members of the family into the labor market, borrowing, sale of assets and migration. This leads to severe long term distress for farmers who are driven to commit suicide. In this scenario, risk transfer mechanisms like agricultural insurance⁴⁷ assume utmost importance.⁴⁸

Government has launched agricultural insurance to cope with these risks and provide financial security to the farmers in the event of crop failure due to natural calamities, pests and diseases. Agriculture insurance helps in reducing risk

⁴⁵ *Supra* note 39 at page 41.

⁴⁶ J. Morduch. *Income Smoothing and Consumption Smoothing*, 103–14 (Journal of Economic Perspectives, 9, 1995)

⁴⁷ Insurance is a mechanism where payment of a certain small amount of premium ensures receipt of a larger amount of compensation contingent upon the occurrence of an uncertain loss event. It is a technique of transferring & sharing risk where losses suffered by few are met from the funds accumulated through small contributions made by many who are exposed to similar risks. Insurance is not a tool to make money but a tool to compensate an individual/business for unexpected losses that might otherwise cause a financial disaster. -*Supra* note.10.

⁴⁸ Pal, Debdatta. "Agricultural Insurance in India: Approaches and Challenges." *International Journal of Rural Studies (IJRS)* Vol. 17.1 (2010).

horizontally across states; vertically across big and small farmers⁴⁹ and compensates losses incurred in bad years from resources accumulated in good years.⁵⁰ It is a veritable tool that farmers can potentially use to adapt and even mitigate the risks associated with adverse natural events.⁵¹ Insurance sector can play a major role in strengthening the security of farmers (UNCTAD, 1994; World Bank, 2005) against systemic and idiosyncratic risks;⁵² stabilizing farm income and initiate production activity after a bad agricultural year. There exist two major categories of agricultural insurance viz., single and multi-peril⁵³ coverage.⁵⁴ Considering the overwhelming impact of nature on agricultural output and its disastrous consequences on the society and farmers, multi-peril crop insurance programme is being implemented in India.⁵⁵

V Agricultural insurance mechanism in India - historical perspectives

For managing agricultural/crop insurance, Agriculture Insurance Company of India (AIC)⁵⁶ has been established with capital participation of General Insurance

⁴⁹ The basic principle underlying Agriculture insurance is that the loss incurred by a few is shared by many in an area. -*Supra* note 11 at 218-219.

⁵⁰ *Supra* n. 30; Dandekar, V.M. "Crop Insurance in India." *Economic and Political Weekly* 1 Jan. 1976. Vol. 11, No. 26.

⁵¹ Nnadi, F. N., J. Chikaire1, J. A. Echetama, R. A Ihenacho, P. C. Umunnakwe, and C. O. Utazi. "Agricultural Insurance: A Strategic Tool for Climate Change Adaptation in the Agricultural Sector." *Net Journal of Agricultural Science* Vol. 1(1) (2013): Pp.1-9; *Supra* note.39. p.2.

⁵² Risk can be those which affect & are common to all farm households such as price & weather shocks & those which are specific to a particular farmer such as pest or disease. The former are systemic/covariate risks while the latter are idiosyncratic risks. Risk pooling & insurance arrangements (whether formal or informal) usually offer protection against idiosyncratic risks rather than systemic risks.

⁵³ A peril is an extreme weather condition causing damage to crops & thus yield loss. *Supra* note 21.

⁵⁴ While the former offers protection from single hazard, latter protection from several hazards.

⁵⁵ *Supra* note 51.

⁵⁶ AIC was incorporated under the Indian Companies Act 1956 on 20th December, 2002 with an authorised share capital of INR 15 billion & paid up capital of INR 2 billion. AIC commenced business from 1st April, 2003. - *Supra* note 10.

Corporation (GIC), four public sector general insurance companies⁵⁷ and NABARD.⁵⁸ Agricultural insurance is subsidized by government, managed by GIC and delivered through rural financial institutions offering crop loans. Offering yield-based and weather-based crop insurance programs in almost 500 districts, covering almost 20 million farmers, AIC emerges as the biggest crop insurer in the world. Varieties of insurance schemes have been launched time and again to combat losses in agricultural operations. They are briefly discussed hereinafter.

1. First individual approach scheme (1972-1978) was the first crop insurance scheme on H-4 cotton and was based on individual approach.⁵⁹ It later covered groundnut, wheat and potato and was implemented in the states of Andhra Pradesh, Gujarat, Karnataka, Maharashtra, Tamil Nadu and West Bengal.⁶⁰

⁵⁷ These four companies are Oriental Insurance Comp. Ltd, United India Insurance Comp. Ltd, New India Assurance comp. Ltd, National Insurance Company & recently added Agriculture Insurance Company.

⁵⁸ Sidharth Sinha., Agriculture Insurance in India Sidharth. June 2007. Centre for Insurance and Risk Management. Working Paper Series. Institute for Financial Management and Research (IFMR) www.ifmr.ac.in

⁵⁹ It was realized that crop insurance programs based on the individual farm approach would not be viable & sustainable in this country. -*Supra* note 10.

⁶⁰ Introduction of crop insurance in India was taken up for examination soon after independence & a special study to work out modalities of crop insurance was commissioned in 1947-48 following an assurance given by the Ministry of Food and Agriculture to introduce crop & cattle insurance. The first aspect considered was whether crop insurance should be on Individual or Homogenous Area Approach. The individual approach seeks to indemnify the farmer to the full extent of the losses & premium is determined with reference to his own past yield & loss experience. Homogenous area approach envisages that in the absence of reliable data of individual farmers & in view of the moral hazards involved in the individual approach, a homogenous area would form the basic unit instead of an individual farmer. It would comprise of villages that are homogenous from the point of view of crop production & whose annual variability of crop productivity would be similar. The study favored homogenous area approach. The ministry circulated the scheme for adoption by the state governments but the states did not accept. In 1965, the Central Government introduced a Crop Insurance Bill & circulated a model scheme of crop insurance on compulsory basis to constituent state governments for their views. Bill provided for the Central Government framing a reinsurance scheme to cover indemnity obligations of the states but it was not accepted by the states due to high financial obligations. On receiving the responses of state governments, the subject was considered in detail by an Expert Committee headed by the then Chairman, Agricultural Price Commission set up in July 1970 for full examination of the economic,

2. Pilot crop insurance scheme (PCIS) (1979-1984) was based on the feasibility study carried out by V.M. Dandekar.⁶¹ Introduced in 1979, it was based on Homogeneous Area Approach for providing insurance cover against a decline in crop yield below the threshold level. It covered cereals, millets, oilseeds, cotton, potato and chickpea and was confined to loanee farmers of institutional sources on a voluntary basis. The risk was shared by GIC and the respective State Government in the ratio of 2:1. Maximum sum insured was 100 percent of the crop loan and was later increased to 150 percent while the premium ranged from 5 to 10 percent of the sum insured and the premium payable by small/marginal farmers was subsidized by 50 percent shared equally by state and central governments.⁶²

3. All-risk comprehensive crop insurance scheme (CCIS) (1985-99) was introduced by the Government on 1st April 1985 with the active participation of State Governments, though the Scheme was optional for the State Governments. The premium and risk claims were shared in 2:1 ratio by the Central and State Government. It was implemented based on the homogenous area approach⁶³ and was confined only to farmers who borrowed seasonal agricultural loan from financial institution for growing food crops and oilseeds on compulsory basis.⁶⁴ The coverage was restricted to 100 percent of crop loan subject to a maximum of Rs.10,000/- per farmer. Premium was 2 percent for cereals and millets and 1 percent for pulses and oil seeds. Small and marginal farmers were given a subsidy of 50 percent of the premium payable shared equally by the central and state

administrative, financial & actuarial implications of the subject. Different experiments on crop insurance on a limited, ad hoc & scattered scale started in 1972-73.

⁶¹ Professor V. M. Dandekar, often referred to as the “Father of Crop Insurance in India” -*Supra* note 10.

⁶² *Supra* note 39 at 5; *Supra* note 10.

⁶³ The Scheme would operate on the basis of Area Approach *i.e.*, defined areas for each notified crop for widespread calamities. -*Supra* note 39 at 5.

⁶⁴ CCIS differs from PCIS since the latter was on voluntary while the former was compulsory for loanee farmers. *Supra* note 10.

governments. The scheme was a multi-agency effort involving Central Government, State Governments, Banking Institutions and GIC.⁶⁵ The Scheme was implemented by 19 States and 3 Union Territories.⁶⁶ It had many drawbacks. It was voluntary; gave option to state governments to identify crops and areas in which the scheme would operate leading to adverse selection. Many farmers and crops were excluded from the coverage.⁶⁷ Many states did not participate while some opted out of the scheme later. There was no uniformity in the basic unit area of insurance (district, taluka, block) for determining the threshold yield and assessment of actual yield in the calamity affected areas.⁶⁸ The scheme was non-viable.⁶⁹

4. Experimental crop insurance scheme (ECIS) 1997-98 was introduced during Rabi 1997-98 season for covering even the non-loanee small and marginal farmers in 14 districts of five states. It provided 100 percent subsidy on premium. The premium subsidy and claims were shared by Central and State Governments in 4:1 ratio.

5. National agricultural insurance scheme (NAIS) 1999 replaced CCIS and was introduced from the rabi season of 1999-2000 and was offered under individual and homogenous area approach.⁷⁰ As compared to CCIS, it had greater coverage in terms of farmers and crops. It was available to both loanees and non-loanees

⁶⁵ *Supra* note 5.

⁶⁶ Andhra Pradesh, Assam, Bihar, Goa, Gujarat, Himachal Pradesh, Jammu & Kashmir, Karnataka, Kerala, Madhya Pradesh, Maharashtra, Manipur, Meghalaya, Orissa, Rajasthan, Tamil Nadu, Tripura, Uttar Pradesh, West Bengal, Andaman & Nicobar Islands, Delhi & Pondicherry.

⁶⁷ Scheme was dominated by rainfed crops like oilseeds, millets & pulses & excluded cash crops & was limited to loanee farmers. -Ramaswami, *Supra* note 33.

⁶⁸ In a large unit areas (*i.e.*, block, taluka or district) incidence of calamity is rarely uniform all over the unit area. The success of area approach crop insurance depends upon the homogeneity of the unit area of insurance which was not observed in all cases.

⁶⁹ As against the premium income of Rs.402.83 crore, indemnities worth Rs. 2302.68 crore were paid during the period of 14 years of operation of CCIS resulting in a premia to claim ratio of 1:5.72.

⁷⁰ Scheme operates on the basis of area approach for widespread calamities & individual approach for localized calamities such as hailstorm, landslide, cyclone & floods.

and covers all food grains, oilseeds and annual horticultural/commercial crops for which past yield data are available. Among the annual commercial and horticultural crops, sugarcane, potato, cotton, ginger, onion, turmeric, chillies, coriander, cumin, jute, tapioca, banana and pineapple were covered. Unit area was required to be reduced to the Gram Panchayat. Premiums were based on actuarial considerations and the small farmer subsidy was to be gradually phased out in 5 years. Claims and premiums were equally divided between the Central and State Governments.⁷¹

The performance of NAIS was not satisfactory due to its low coverage, poor financial performance and delay in indemnity payment.⁷² Though food, oilseeds and annual commercial/horticultural crops were covered, perennial crops such as apple, coconut, orange and mango were not covered. Great gaps existed between existing premium rates and actuarial rates making the scheme less financially viability.⁷³ Major drawback was that the settlement of claims was done through a manual process called Crop Cutting Experiments (CCE) where yield measurements of sample plots are done. It is easy to influence or tamper with the results. CCE process is cumbersome and involves huge administrative costs. At times it is possible that the selected sample plots might not represent the overall yield in the given administrative areas.

6. Pilot scheme on seed crop insurance (PSSCI) was implemented on pilot basis in 2000 and financial assistance was provided to the identified states for implementing it.⁷⁴ It provided financial security and income stability to the seed

⁷¹ *Supra* note 33.

⁷² Involvement of financial institutions as delivery channels & government departments in crop cutting experiments resulted in a longer period of settlement.

⁷³ During the rabi season 2007-08, claims worth Rs. 11607 crore was paid against a premium collection of about Rs. 3626 crore. While the claim premium ratio was less than unity in states like Assam, Goa & Haryana, NAIS paid claims more than ten-times of premium in Bihar & Jharkand. - Raju, *Supra* note 41.

⁷⁴ Andhra Pradesh, Orissa, Gujrat, Haryana, Karnataka, Madhya Pradesh, Punjab, Rajasthan, U.P, Maharashtra participated in the scheme.

growers in the event of failure of seed crop.⁷⁵ Only the Foundation and Certified Seed produce that is offered to State Seed Certification Agency (SSCA) for certification is eligible for coverage.⁷⁶ In case of Breeder Seed, the coverage is subject to the production being carried out under the supervision of the concerned Monitoring Committee. It covered different risks at different stages of growing the seeds like field stage, flowering stage, after harvest, certification stage.⁷⁷

7. Farm income insurance scheme (FIIS) was launched by National Insurance Company (NIC) on a pilot basis during rabi 2003/04 to protect farmers' income against production and market risks. Around 1.8 lakh farmers were covered over an area of 1.9 lakh hectares. Scheme carried a subsidy of 75 percent on the premium, borne by the central government in respect of small and marginal farmers and 50 percent in respect of others. Poor response from farmers resulted in the withdrawal of the scheme.⁷⁸

8. Livestock insurance is provided by public sector insurance companies and the insurance cover is available for almost all livestock species.

9. Modified national agricultural insurance scheme (MNAIS) 2010 is an improved version of NAIS and was implemented during Rabi 2010–11 season in 34 districts across 12 states. Insurance unit for major crops is village panchayat. In case of prevented/failed sowing, claims up to 25 percent of the sum insured is

⁷⁵ In Karnataka, it covered Paddy, Maize, Jowar, Bajra, Sunflower, Cotton, Groundnut, Red Gram, Bengal Gram, Black Gram, Green Gram, Ragi. Likewise coverage was given to different seeds in different states.

⁷⁶ *Supra* note 10.

⁷⁷ At field stage, failure of Seed Crop Field either in full/part due to natural fire, lightning, storm, hailstorm, cyclone, typhoon, tempest, hurricane, tornado, flood, frost, inundation, landslides, drought, dry spells, excessive rain, large scale incidence of pests & diseases are covered. Apart from these perils, prevalence of excessive rain, blowing of hot/cold wind, excessive hot weather during flowering or seed setting stage is also covered. Damage to the harvested seed crop due to the above mentioned perils whilst lying on the field until it is removed from the field for transportation to the processing plant is covered. At Seed Certification Stage, losses due to seed lots having failed in Germination Test due to any of the above mentioned insured perils will be compensated. Failure in germination test due to any reason other than the insured ones will not be covered.

⁷⁸ *Supra* note 39 at 5.

payable while insurance cover for subsequent period gets terminated. There was individual farm level assessment of losses in case of localized calamities like hailstorm and landslide.⁷⁹ Premium rates are actuarial, subsidized up to 75 percent equally shared by Centre and State governments.

10. National crop insurance program (NCIP), 2013 proposes to merge NAIS, MNAIS and WBCIS.

Apart from these major schemes, AIC has also launched some specific schemes like Rainfall Insurance Scheme for Coffee, Bio-Fuel Tree/Plant Insurance Policy, Cardamom Plant & Yield Insurance, Potato Crop Insurance, Pulp Wood Tree Insurance Policy, Rubber Plantation Insurance, Varshaa Bima/RainFall Insurance for seasonal and annual crops and Coconut Palm Insurance Scheme, Wheat Insurance, Rabi Weather Insurance, Poppy Insurance. Insurance products are also available for plantation crops in specific geographical areas such as Uttarakhand Seb Bima Yojana (Apple Insurance), Grapes and Mango Insurance *etc.*

VI Weather Based Crop Insurance Scheme (WBCIS)

WBCIS is a unique weather based insurance product designed to provide protection against losses in crop yield resulting from adverse weather incidences, like losses due to adverse rainfall incidence (both deficit and excess) during *Kharif* and adverse incidence in weather parameters like frost, heat, relative humidity, unseasonal rains during *rabi* season and aberrations in sunshine, temperature and humidity.⁸⁰ Not being a yield guarantee scheme, it has been

⁷⁹ Post harvest losses caused by cyclonic rains are assessed at farm level for the crop harvested & left in cut & spread condition up to a period of two weeks.

⁸⁰ Department of Agriculture & Cooperation Ministry of Agriculture, Government of India Krishi Bhavan, New Delhi Dated the 1 November, 2013, No. 1301 51 021201 2-Credit-II. Component-II: Weather Based Crop Insurance Scheme (WBCIS); Madhao Deshpande, Vivek. "A Wider Insurance Cover, with Options to Choose from." (7 Feb. 2014, 30 Sept. 2014). <http://indianexpress.com/article/india/india-others/a-wider-insurance-cover-with-options-to-choose>

piloted by AIC since *Kharif* 2003 in many states.⁸¹ Though idea of weather insurance was proposed by J. S. Chakravarti⁸² way back in 1920, it was introduced very recently. It is largely compulsory, publicly subsidized program.

Among various weather parameters like rain, temperature, wind, sunshine *etc* rainfall is the most important parameter in India. WBCIS compensates loss in crop yield resulting from adverse rainfall incidence whether deficit or excess rainfall. It also covers risks relating to unseasonal rains, temperature, frost, humidity, hailstorm and cloudburst and is applicable to major cereals, millets, pulses, oilseeds and commercial/horticultural crops grown during *Kharif* and *Rabi* seasons. It covers loanee and non-loanee farmers though it is compulsory for former and optional for latter. Insurance companies were given freedom to work out their products particularly in respect of premium, risk coverage, sum insured, claims and premium subsidy *etc*. Maintaining maximum limit of sum insured at cost of cultivation, non-loanee farmers have option to insure smaller amounts within maximum limit but not less than 50 percent of maximum limit of sum insured.⁸³

Concept of weather insurance is still nascent in India. AIC, ICICI Lombard, IFFCO-Tokio and Chola mandalam offer this scheme. ICICI Lombard launched a rainfall insurance scheme with support from World Bank⁸⁴ for groundnut and castor in Mahabubnagar, Andhra Pradesh in 2003. Due to delayed monsoon that

⁸¹ Some of the States where WBCIS is piloted are Andhra Pradesh, Chhattisgarh, Gujarat, Haryana, Karnataka, Madhya Pradesh, Maharashtra, Punjab & Rajasthan.

⁸² Chakravarti, J.S. *Agricultural Insurance: A Practical Scheme Suited to Indian Conditions*. Bangalore: Government, 1920; India was the first developing country to pilot weather indexed insurance. - J. Clarke, Daniel, Olivier Mahul, Kolli N. Rao, and Niraj Verma. "Weather Based Crop Insurance in India." *Policy Research Working Paper* -5985. The World Bank.

⁸³ J.S. Chakravarti of Mysore State had proposed a rain insurance scheme for the farmers for insuring against drought based on area approach. -*Supra* note 10.

⁸⁴ Department of Agriculture & Cooperation Ministry of Agriculture, Government of India Krishi Bhavan, New Delhi Dated the (1 November, 2013, No. 1301 51 021201 2-Credit-II. Component-II: Weather Based Crop Insurance Scheme (WBCIS).

⁸⁴ Policy was developed with technical assistance of Agricultural & Rural Development Department, World Bank.

year, rainfall index fell by 21 percent resulting in payment.⁸⁵ ICICI Lombard also launched a pilot scheme for insurance against excess rainfall for rice farmers in Aligarh, Uttar Pradesh. In 2004, IFFCO-Tokio chose four States of Gujarat, Maharashtra, Andhra Pradesh and Karnataka for a deficit rainfall insurance scheme during monsoon months. AIC introduced Varsha Bima-2005 in about 125 India Meteorological Department (IMD) station areas spread across 10 states. Under each IMD rain gauge station area, two or three blocks adjoining the station were chosen. Farmers were given choice to cover either sowing failure or full season option (seasonal rainfall/rainfall index). AIC has also launched crop-specific and location-specific WBCIS like Rainfall Insurance Scheme for Coffee, Apple Insurance, Rubber Plantation Insurance *etc.*⁸⁶ Transitioning from pilot programs, WBCIS presently covers around 9 million farmers.

Method of operation: WBCIS operates on the concept of area approach. Reference Unit Area (RUA), deemed homogeneous unit, is notified before the commencement of *Kharif* season by the State Government and all the insured cultivators of a particular insured crop in that area are deemed on par in the assessment of claims. Each RUA is linked to a Reference Weather Station (RWS) on the basis of which current weather data and claims are processed. Claims arise when there is a certain adverse deviation in actual weather parameter incidence in RUA as per the weather data measured at RWS and all the insured cultivators under a particular crop are deemed to have suffered the same adverse deviation. Claim settlement is automatic process based on weather readings at the RWS. Insured cultivators are not required to make a claim. In a given RUA, the payout given per unit area is the same for all cultivators under the same RWS. Claims are settled within 45 days from the end of insurance period.

⁸⁵ S. Sinha. "Agriculture Insurance in India, Scope for Participation of Private Insurers." (*Economic and Political Weekly* 19 June 2004) *Supra* note 5.

⁸⁶ *Supra* note 48.

Sum Insured: Sum insured is the cost of inputs incurred by the insured in raising the crop and is pre-declared per unit area by AIC at the beginning of each crop season in consultation with the experts and may differ for different crops in different RUA. Premium was fixed crop wise. Major perils covered under WBCIS are deficit rainfall causing malnutrition during seedling stage; excessive rainfall causing plant lodging in the full grown stage; extreme temperature causing plant drying during any stage in the plant life cycle and humidity causing diseases like Blight in Rabi crops like potato. Insurance is available for separate as well as for combined perils.

VII Operational assessment

WBCIS is considered as an improvement over NAIS due to its less administrative cost, more transparency, objectivity and efficient, quicker and direct payments. The insurer need not visit farmers' fields to assess losses. Insured is not required to submit claim form or other documents as proof for loss and claims are automatically paid within 45 days from the end of the insurance period on the basis of weather data collected from the RWS. This gives WBCIS an edge over the other insurance schemes which take more time as the claims processing is linked to yield estimates. It uses the correlations between crop yields and rainfall to trigger⁸⁷ insurance payments to policy holders when rainfall is below or above a certain level, not requiring insurance companies to assess crop damages for individual farmers, thereby cutting transaction costs and makes insurance more affordable and quicker.

Appreciably, scheme is open to all farmers, loanee or non-loanee; small/marginal or owners or tenants. Further since weather data decides the compensation, insured is willing to put extra effort for getting better yield of

⁸⁷ A strike/trigger is the level of a weather parameter below/above which it is considered as unnatural & harmful for the crop. *Supra* note 21.

crop.⁸⁸ There exists scope of reinsurance since the scheme is based on standardized/well defined internationally verifiable data.⁸⁹ WBCIS facilitates governments and relief agencies to plan ahead of crises knowing that funds will be available when they need them by tracking the index. Popularity of WBCIS in India is gradually increasing with farmers realizing its value.⁹⁰ There is a need to properly explain the policy to the farmers.⁹¹

Most of the weather stations are owned by public institutions and much of the historical data has been collected through a manual process and is in the form of hard copies. This gives rise to issues like missing data, inaccuracies forcing insurers and reinsurers to fix higher premium. Further the weather stations are not capable of recording parameters beyond rainfall which restricts protection against temperature, sunlight, frost, humidity.⁹² Taking readings from far off or old weather stations leads to inconsistencies in the contracts and ultimately high premiums. This ultimately affects affordability of the scheme for the farmers. Need is there to extend premium subsidies to weather index insurance schemes as well.⁹³

Certain technical challenges need to be met at the earliest since the scheme presupposes 25 years' historical weather data for better results. Basis risk with regard to weather could be high for rainfall and moderate for others like frost, heat, humidity etc.⁹⁴

Since claim settlement is made on the parameters recorded at the respective weather stations, it is essential to have a large number of weather stations. Poor

⁸⁸ *Supra* note 5.

⁸⁹ Reddy A. Amarender, Agricultural Insurance in India- A Perspective. Paper presented at 6th Global Conference of Actuaries. (18-19 February 2004), New Delhi.

⁹⁰ *Supra* note 21.

⁹¹ *Ibid.*

⁹² Pattankar Mangesh. "Comprehensive Risk Cover through Remote Sensing Techniques in Agriculture Insurance for Developing Countries: A Pilot Project." *Research Paper No.6* (2011).

⁹³ *Ibid.*

⁹⁴ *Supra* note 10.

weather infrastructure is one of the biggest issues due to which only a few private players presently. The country needs around 8,000 automatic weather stations and about 32,000 rain gauges to effectively service the index insurance compared to the current network of 5,000. As per the suggestions of the Working Group on Risk Management in Agriculture, existing weather station network needs to be strengthened and automated with at least one Automatic Weather Stations (AWS) in each Block, Circle or gram panchayat in the country. Similar to other agricultural insurance, government needs to support WBCIS and Weather Insurance Pool needs be created to participate in the overall market's claim experience.⁹⁵

Ultimately, the success of a weather insurance programme in India largely depends on the product design; steps taken to minimize the base risk; the adoption of reliable and sustainable pricing mechanisms (including Government subsidies) and resolving issues of product servicing and timely payout.⁹⁶

VIII Ways forward

The loss of crop yield affects the farmer and farming in multiple ways. Their input including labor gets lost. Low yields mean reduced income and difficulty in arranging the necessities of life as well as inputs for the next season. Repayment of outstanding loans becomes irregular, resulting in default. Conversion or rescheduling of loans helps farmers in getting fresh loans but liquidity problems are not completely solved. They are compelled to divest and dispose their assets and resort to costly borrowing from informal sources. Natural calamities can slow the pace and process of development by reducing the food supplies and raw materials in the short run. This necessitates hedging of agriculture from vagaries

⁹⁵ Report of the Working Group on Risk Management in Agriculture for the Eleventh Five Year Plan. (2007-2012). Government of India. Planning Commission. New Delhi

⁹⁶ Rao, Kolli N, and Louis Bockel. "Risk Management as a Pillar in Agriculture and Food Security Policies - India Case Study Policy Brief." *FAO* (2008). Food and Agriculture Organization of the United Nations, www.fao.org/easypol.

of nature for development and growth of economy in general and agriculture in particular.

There are about 100 million farmers in India who work the hardest and yet suffer the highest since their occupation totally depends upon the mercy of nature. Government needs to step in more vigorously to reduce farms productivity risks and enhance welfare of the farmers. Since the crucial aspect of agriculture is weather, need is there to give more importance to WBCIS.⁹⁷

Farmers should be encouraged and educated to habitually include insurance in their budgets by designing products offering genuine protection at reasonable premiums. Community-wide awareness and education programs on natural disasters should be a priority. Insurance companies need to roll out priority insurance services as part of their corporate social responsibility. Programs for improving prediction methods and dissemination of warnings should be expanded and intensified.⁹⁸ Government subsidy on insurance schemes has to reach the farmer. Non-loanee farmers should be encouraged by providing doorstep service.

WBCIS appears to be more efficient in comparison NAIS due to wide coverage in terms of crops and farmers, lower premium, faster and more frequent compensation payment and more transparency. Unfortunately WBCIS covers only weather related risk and the sum assured and the compensation amount are lower. Hence, designing a new scheme having the advantages of both the schemes is desirable. Public sector ought to address catastrophic risk and provide multi-peril insurance with high subsidies and allow private sector cover less severe and individual independent idiosyncratic and localized risk. Need is there to redesign insurance products for reducing risk and crop loss rather than mere

⁹⁷ *Supra* note 39 at 6-7.

⁹⁸ *Supra* note 32.

risk transfer, simultaneously balancing the interests of both the insurer and the insured.⁹⁹ Affordability and economic viability criterion need to be synergized.

Indian farmers, the crusaders of agricultural revolutions, need appropriate technologies and proper skilling. India leads in producing rice, wheat, pulses, fruits, vegetables and is net exporter of agricultural produce. Still, Indian agriculture is stressed by the pressures of burgeoning population, climate change, dwindling availability of natural resources, labor problems, rising cost of production, market vagaries, changing food consumption pattern and widening inequality of incomes.¹⁰⁰ Agricultural insurance in general and a well designed WBCIS in particular can greatly work towards reduction of this stress.

⁹⁹ The insurer's interest lies in the economic viability or profitability of the insurance product whereas the insured is concerned with his ability to pay the premium & the affordability of the product.

¹⁰⁰ "Technological Options for Enhanced Productivity and Profit." Indian Agricultural Research Institute, New Delhi, www.iari.res.in (last visited on Jan 1, 2014).

SEXUAL HARASSMENT OF WOMEN AT WORKPLACE: VIOLATION OF FUNDAMENTAL RIGHTS TO GENDER EQUALITY

Dr. Anil Kumar Singh^{*}

I Introduction

Right to equality is one of the basic fundamental right guaranteed by the Constitution of India, sexual harassment of women at workplace is violation of the fundamental right of a woman to equality. From ancient time women of the world have remained an easy and convenient target of crime, violence and atrocities of a male dominated social order. Despite all around changes in the cultural values and lifestyle brought about by a technological revolution of massive magnitude, women continue to be at the receiving end of male partners for no fault of theirs. Clearly and apparently, the fate of the women in this age of a space exploration and cyber revolution is no better than that of medieval society, the media reports of the surging trend violence and crime against the weaker sex are indicative of this.¹

The General Recommendation of the Convention on the Elimination of all Forms of Discrimination against Women committee defines sexual harassment as including: such unwelcome sexually determined behavior as physical contact and advances, sexually colored remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable ground to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion or when it creates a hostile working environment. European Commission of the EU defines sexual

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¹ Dr. Ran Bijay Kumar, *Sexual Harassment of Working Women*, 77(Indian Bar Review, vol. XXXV (1 to 4) 2008).

harassment as; unwanted conduct of a sexual nature or other conduct based on sex affecting the dignity of women and men at work. This includes unwelcome physical, verbal or non-verbal conduct.

Sexual harassment of women at work place is any sexually oriented conduct that may endanger the victim's job performance or undermine the victim's personal dignity. It may manifest itself physically or psychologically. Its milder and subtle forms may imply verbal innuendo, inappropriate affectionate gestures or propositions for dates and sexual favours. However, it may also assume blatant and ugly forms like leering, physical grabbing and sexual assault or sexual molestation.² Sexual harassment may be in the form of unwelcome sexual behavior, which can be verbal, non-verbal, physical or visual nature, requests for sexual favours, and other verbal or physical conduct of a sexual nature. Whether a single incidence amounts to harassment or it should be a series of incidences, depends upon the nature and severity of the incidence. A single incidence may constitute harassment provided if it is very offensive and of a serious nature.

II International conventions and instruments

Right to work with dignity is universally recognized human rights by International Conventions and Instruments such as the Convention on the Elimination of all Forms of Discrimination against Women, (CEDAW) which has been ratified on the 25th June, 1993 by the Government of India. Article 11(1) of the CEDAW addresses sexual harassment generally at all workplaces, not only public sectors and also it requires that all state parties should take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, equality of men and women.³

² Alok Bhasin, *Law Relating to Sexual Harassment At Work*, 9 (Eastern Book Company, Lucknow, 1st edn., 2007).

³ Article 11(1) of CEDAW-State Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on the basis of equality of men and women, the same rights in particular:

a. The right to work as an inalienable right of all human beings.

Article 22 of the CEDAW, lays down that equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the work place. Article 1 of Declaration on Elimination of Violence against Women provides that violence against women mean any act of gender - based on violence that results in, or is likely to result in, physical, sexual or, psychological harm or suffering to women, includes threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life. Article 2(b) of the said declaration states that violence against women shall be understood to encompass physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution. Article 7 of Universal Declaration of Human Rights states that equality before law and equal protection of law.⁴

III Sexual harassment: violation of human rights & constitutional rights

Human rights are basic entitlements that belong to every human being, regardless of their background. Sexual harassment of women at work place is the grossest violation of human rights. The law does not establish human rights as they are inherent entitlements which accrue to every person by virtue of his or her birth into humanity. They belong to all persons, irrespective of any distinctions based on sex, race, caste, religion and the like.⁵ Sexual harassment in the context of work place violates one's personal freedom and dignity to which they have the right to work in a healthy environment free from discrimination.⁶

b. The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

⁴ Universal Declaration of Human Rights - Article 7: All are equal before law and are entitled without any discrimination to equal protection of law.

⁵ Y. S. R. Murthy, *Human Right Hand Book*, 1 (Lexis Nexis Butterworths, 1st edn. 2007, New Delhi, 2007).

⁶ Supra note 1 at 78.

For the first time in *Vishaka v. State of Rajasthan*,⁷ the Supreme Court held that sexual harassment at the workplace is a violation of fundamental rights. Article 14 of the Constitution of India guarantees equality before law which includes prohibition against unreasonable classification,⁸ whereas Article 15 prohibits the State from discrimination against any person on the ground of religion, race, caste, sex or place of birth among other things, sex.⁹ Further Article 19(1)(g) of the Constitution of India provides that all citizens shall have the right to practice any profession or to carry out any occupation, trade or business. Sexual harassment of women at work place is a violation of right to work as provided by the present Article of the Constitution since right to carry on any occupation, trade or business depends upon a safe working environment. Article 21 of the Constitution which deals with protection of life and personal liberty, provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. Right to life includes right to live with dignity and sexual harassment is an obstacle to the right to live with dignity as enshrined under Article 21. Further, right to personal liberty includes right to privacy and an act of sexual harassment is a violation of a woman's right to privacy.

IV The sexual harassment of women at workplace (prevention, prohibition and redressal) Act 2013: An assessment

In the year 1977, the Supreme Court of India in *Vishaka v. State of Rajasthan*¹⁰ laid down certain guidelines to deal with sexual harassment of women at work place, since there was no formal legislation. The above guidelines were the set of procedures to be followed in case of sexual harassment and the court directed to implement the guidelines to deal with the sexual harassment

⁷ (1997) 6 SCC 241.

⁸ Article 14 - Equality before law-The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

⁹ Article 15 (1) - Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth-The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

¹⁰ AIR 1997 SC 3011.

cases until any formal legislation is passed. In 1995, the Supreme Court held that sexual harassment is a crime under Section 354 of IPC as the outraging of modesty of a woman includes outraging of the dignity of women.¹¹

After the long 16 years from the Supreme Court's guidelines for preventing sexual harassment at work place, popularly known as 'Vishaka guidelines' our Parliament enacted legislation known as 'The Sexual Harassment of Women at Work Place' (Prevention, Prohibition and Redressal) Act, 2013, (herein after referred to as the Act) which came into force from 9th December 2013. This legislation has been enacted with a view to make the workplace safe not as benevolence but as woman's right to work; and to set up some mechanisms which ensures not to tolerate any kind of sexual harassment towards the women at workplace. This act is a welcome step towards increasing gender equality at workplaces in India.

'Sexual harassment at workplace' has been defined in the same terms as it was laid down in by the Supreme Court in *Vishaka v. State of Rajasthan*.¹² The term 'work place' used under the act is not confined to the work place of the victim of harassment in its strict sense; it could be outside the work place also.¹³ 'This includes traveling to work-related conferences or branch offices, attending staff parties, attending conferences, or at the home of a colleague for a work-related activity. The key to understanding the boundaries of the work environment is to consider whether the person is in a specific place because of their job. If the answer is 'yes' then any unwanted and offensive sex-based conduct could be

¹¹ *Rupan Deol Bajaj v. Karam Pal Singh Gill*, (1995)6 SCC 194.

¹² Section 2(n) "sexual harassment" includes any one or more of the following unwelcome acts or behaviour (whether directly or by implication) namely:--

- (i) physical contact and advances; or
- (ii) a demand or request for sexual favours; or
- (iii) making sexually colored remarks; or
- (iv) showing pornography; or
- (v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

¹³ Section 2 (o)(v) any place visited by the employee arising out of or during the course of employment including transportation provided by the employer for undertaking such journey.

considered as sexual harassment.¹⁴ Section 3 of the Act deals with prevention of sexual harassment and provides that no woman shall be subjected to sexual harassment at any workplace.

Section 4 of the Act makes it obligatory on the part of the every employer, irrespective of whether public or private sector to constitute an Internal Complaints Committee. The section further provides for the composition of such committee, duration of the office of the presiding officer and other members of the committee, the circumstances under which presiding officer or other members can be removed and to fill up the vacancies arising from such removal. Section 5 lays down the notification of District Officer,¹⁵ whereas Section 6 deals with composition, tenure and other terms and conditions of Local Complaints Committee. Section 9 of the Act requires the aggrieved woman to file complaint about sexual harassment at workplace in writing to Internal Complaints Committee (ICC) or Local Complaints Committee (LCC) as the case may be and if the victim is unable to make complaint in writing, in that case the presiding officer or any other member shall render all reasonable assistance to help her in reducing complaint in writing. The present section further provides that if it is not possible for victim of sexual harassment to file complaint in person, some other person who has knowledge of the incidence, can file complaint. The Act also provides an option of settlement through conciliation before initiating an enquiry; however, the process of conciliation can be initiated by the committee members of ICC or LCC only at the request of the aggrieved woman.¹⁶

¹⁴ <http://www1.umn.edu/humanrts/svaw/harassment/explore/1whatis.htm> (last visited on Nov. 11, 2014).

¹⁵ Section 5-The appropriate Government may notify a District Magistrate or Additional District Magistrate or the Collector or Deputy Collector as a District Officer for every district to exercise powers or discharge functions under this Act.

¹⁶ Section 10(1) Conciliation - The Internal Committee or, as the case may be, the Local Committee, may, before initiating an inquiry under Section 11 and at the request of the aggrieved woman take steps to settle the matter between her and the respondent through conciliation.

Section 12 of the Act affords some protection to the complainants during the pendency of the enquiry which includes transferring the aggrieved woman or the respondent to any other place or granting leave to the aggrieved woman up to three months. Present section further requires the employer to comply with the recommendations of the ICC or LCC and send report of the implementation to them. The Act also provides for monetary compensation to the aggrieved woman in addition to the disciplinary action against the respondent if the committee finds that sexual harassment at workplace has taken place.¹⁷ The Act also protects the respondent in case of false or malicious complaints and false evidence. Section 14 states that if ICC or LCC arrives at a conclusion that the allegation against the respondent is malicious or aggrieved woman or any other person making complaint made false complaint or produced any forged or misleading document, the committee may recommend to the employer or the District Officer, to take action against the women or the person who has made false or malicious complaint or produced forged or misleading documents.

Section 16 of the Act imposes an obligation upon all the persons involved in the proceeding to protect the identity and addresses of the aggrieved woman, respondent and witnesses and further requires that any information relating to conciliation and inquiry proceedings, recommendations of the Internal Committee or the Local Committee, as the case may be and the action taken by the employer or the District Officer under the provisions of this Act shall not be published, communicated or made known to the public, press and/or media in any manner.

¹⁷ Section 13(3) Where the Internal Committee or the Local Committee, as the case may be, arrives at the conclusion that the allegation against the respondent has been proved, it shall recommend to the employer or the District Officer, as the case may be - (i) to take action for sexual harassment as a misconduct in accordance with the provisions of the service rules applicable to the respondent or where no such service rules have been made, in such manner as may be prescribed; (ii) to deduct, notwithstanding anything in the service rules applicable to the respondent, from the salary or wages of the respondent such sum as it may consider appropriate to be paid to the aggrieved woman or to her legal heirs, as it may determine, in accordance with the provisions of Section 15.

Section 17 provides for penalty for publication or making known contents of complaint and inquiry proceedings by any person entrusted with the duty to handle or deal with the complaint, inquiry or any recommendations or action to be taken under the provisions of this Act. In furtherance to provide safe working environment at work place, Section 19 lays down certain duties of the employer.

V Conclusion & suggestions

In present article an attempt is made to overview the outcome of Supreme Court's guideline in *Vishaka v. State of Rajasthan*, and 'Sexual Harassment at Workplace (Prevention prohibition and Redressal) Act, 2013. Prior to 1997, there was no mechanism to deal with sexual harassment of a woman at work place. For the first time the Supreme Court in *Vishaka v. State of Rajasthan* issued guidelines under Article 141 of the Constitution.¹⁸ The court laid down the definition as to what precisely amounts to sexual harassment at workplace, what will be the duty of the employer to prevent or deter the commission of acts of sexual harassment and provided to setup complaint mechanism to deal with the complaint.

Almost 16 years after the guidelines given by Supreme Court in *Vishaka's case* the present Act is enacted, which endorses many of the guidelines, and is a step towards codifying gender equality. The Act includes all women employees within its ambit, including women employed in the unorganized sector, as well as domestic workers. The Parliament has enacted legislation to deal with sexual harassment cases at work place. However, the legislation alone will not be able to prevent the increasing number of cases of sexual harassment of women at work place; rather there is dire need for imparting proper gender sensitization.

¹⁸Article 141 - Law declared by Supreme Court to be binding on all courts- The law declared by the Supreme Court shall be binding on all courts within the territory of India.

Sexual harassment is the major hindrance to maintain gender equality; therefore, it is the duty of the employer to prevent such incidences and to provide mechanism for resolving complaints of sexual harassment at work place. It is the duty of the employer to develop and maintain a very clear procedure to tackle with the complaints of sexual harassment. Legislation alone cannot eradicate the deep rooted social problems. If legislation lacks the support of public, it is not more than a waste bundle of papers and regarded as dead law.

JUDICIAL ACCOUNTABILITY IN INDIA: A JOURNEY HITHERTO

*Shrinivasaprasad R.**

Accountability of public institutions is very important for the survival of democracy. Absolute and unlimited power to any high public institution without accountability, is harmful to the society at large.¹ Authority is given in trust, and judicial authority is no exception. In principle, unaccountable power is bad and dangerous.² A mature democracy requires that those exercising significant public power should hold themselves open to account.³ Hence, in a democracy all organs of the state are responsible and accountable to the people at large.⁴ Justice V.R. Krishna Iyer has rightly stated that ‘no’ institution is exempted from accountability including the judiciary.⁵

The word ‘accountable’ means ‘the quality or state of being accountable, or responsible;’⁶ ‘subject to having to report, explain or justify; responsible; answerable;’⁷ ‘responsible for your own decisions or actions and expected to explain them when you are asked.’ Transparency facilitates accountability; accountability is the *sine qua non* of democracy.⁸ It means the obligation of public officials to explain, justify and legitimise the use of authority in

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¹ Dr. Sunil Deshta & Kamal Jeet Sooch Kaur, *Philosophy of Judicial Accountability: An Introspection*, 60 (*Civil and Military Law Journal*, vol.45, 2009).

² Gavison Ruth, ‘*The Implications of Jurisprudential Theories for Judicial Election, Selection, and Accountability*,’ 1655 (61 *S. Cal. L. Rev.* 1617, 1988).

³ Andrew Le Sueur, *Developing mechanisms for Judicial Accountability in the U.K.*, 74 (24 *Law and Society*, 2004).

⁴ *Supra* note 2.

⁵ V.R. Krishna Iyer, “Judges are Public Servants, Not Bosses,” *The Hindu*, May 2, 2008. <http://www.thehindu.com/todays-paper/tp-opinion/judges-are-public-servants-not-bosses/article1250346.ece> (last visited on Jan, 12 2013).

⁶ Philip Babcock Gove (ed.), *Webster’s Third New International Dictionary* 13 (Massachusetts, G & C Merriam Company, Publishers, 1969).

⁷ *The Random House Dictionary of the English Language*, 723 (New York, Andom House, 1950).

⁸ Justice Ruma Pal, *An Independent Judiciary*, 30 (*XXX Common Cause* 3, 2011).

discharging public duties.⁹ However, the judiciary, as an institution, and every judge as a public functionary are accountable. The only difference is in the form or nature of the mechanism needed to enforce their accountability.¹⁰

The rationale of judicial accountability is to ensure high standards of decision-making and public acceptance of judicial decisions.¹¹ The standards of decision-making depend on the quality of the judges and their independence in the decision-making process.¹² As Justice J. S. Verma has observed:

“The accountability of the judges is to the people in whom the ultimate sovereignty vests. It is, therefore, imperative to retain public confidence which is the real source of strength of the judiciary.”¹³

Judicial accountability like independence is better characterized as an instrumental value that first, promotes the rule of law by deterring conduct that might compromise judicial Independence, Integrity, and impartiality. Secondly, judicial accountability promotes public Confidence in judges and the judiciary. Thirdly, judicial accountability promotes Institutional responsibility by rendering the judiciary responsive to the needs of the public, it serves as a separate branch of government.¹⁴ Decisional accountability relates to the manner in which a judge uses judicial power. It is almost universally recognised that in exercising judicial functions judges are primarily accountable to the law and conscience.¹⁵ The

⁹ Rajeev Dhavan, *Judges and Accountability*, in Rajeev Dhavan *et al* (eds.) *Judges and the Judicial Power* 167 (London, Sweet & Maxwell, 1985).

¹⁰ Justice J. S. Verma, “Judicial Independence - Is it Threatened?,” Lecture delivered in the first S Govind Swaminadhan Memorial Lecture at the Madras High Court Bar in Chennai on Jan. 29 2010, in Paul Santosh, *Choosing Hammurabi*, 159 (edn.1, Gurgaon, Lexis Nexis, 2013).

¹¹ Gleeson M., ‘Judicial Accountability’, in *Courts in a Representative Democracy: A Collection of the Paper from a National Conference in Canberra* 168 (Victoria: The Australian Institute of Judicial Administration, 1994).

¹² Campbell E & Lee H P., *The Australian Judiciary*, 272 (Cambridge, Cambridge University Press, 2001).

¹³ Justice J. S. Verma, ‘Recent Judicial Trends in Enforcement of Freedoms – The Indian Experience,’ (2001) 27 *CLB* 571.

¹⁴ Suraj Narain Prasad Sinha, “Efficacy of Judicial Accountability” *IBR* 35 1 to 4 (2008).

¹⁵ Arthur S. Miller, “Judicial Activism and American Constitutionalism: Some Notes and Reflections,” (Eds) John W. Chapman & Ronald J Pennok., *Constitutionalism*, NOMOS XX, 337 (New York, New York University Press, 1979).

accountability of judges may be ensured through a number of ways, in summary: public exposure of judicial functions, reasons for judicial decision, appellate process, discipline of judges and scrutiny by lawyers.

The present paper makes a critical analysis of Constitutional provisions, the role of the judiciary, and legislative efforts to make the judiciary accountable, with the background of international initiatives on securing judicial accountability and journey towards judicial accountability in India.

I International efforts

The growth of judicial power in liberal democracies has been accompanied by demands for new forms of judicial accountability.¹⁶ In the international sphere, many states, international organizations and judges' organizations have developed their own codes and guidelines. On November, 25th and 26th 2002, a round table meeting of Chief Justices adopted the *Bangalore Principles of Judicial Conduct, 2002 (Bangalore Principles)* arguably representing the views of a majority of democracies. It contains a set of six values that should determine judicial behaviour. These values, which are reflected in most codes of conduct are independence, impartiality, integrity, propriety, equality, competence and diligence. As regards the implementation of this, the *Bangalore Principles* says, "By reason of the nature of judicial office, effective measures shall be adopted by national judiciaries to provide mechanism to implement these principles if such mechanisms are not already in existence in their jurisdictions." Thus, national laws and policies regarding judicial conduct are essential to give effect to the *Bangalore Principles*.¹⁷ But this *Bangalore Principles* has not as yet been implemented in India, primarily because it has neither received statutory recognition, nor does it have any sanction. Even, *Latimer House Guidelines for*

¹⁶ Clifford Wallace, *Resolving Judicial Corruption While Preserving Judicial Independence: Comparative Perspective*, (ed.) Cyrus Das, *Judges and Judicial Accountability*, 86 (edn.1, Delhi, Universal Law Publishing Pvt. Ltd., 2004).

¹⁷ Jyotika Yog, "Towards Greater Judicial Accountability," *Lawyers Collective*, Vol.20, No.8 & 9, 14 (2005).

the Commonwealth on Parliamentary Supremacy and Judicial Independence,¹⁸ stress the importance of judicial accountability.¹⁹

II Indian context

The Indian Constitution contains detailed provisions relating to basic patterns of the courts, their composition, powers, jurisdiction etc.,²⁰ which cannot be touched by an ordinary legislative process, intended to secure the institutional independence for the judicial wing essential to deliver free and fair justice, even against the state.²¹ The contempt jurisdiction²² which the judiciary enjoys is vast enough to ensure compliance of its orders and directions. The power of judicial review over executive and legislative actions and the theory of “basic structure”²³ judicially evolved, make the Supreme Court of India one of the powerful courts in the world.²⁴ The importance of independence of the judiciary is a ‘cardinal feature,’²⁵ ‘fighting faith,’²⁶ ‘basic structure’²⁷ and central value.²⁸ In short, justices wear robes on oath under the Constitution²⁹ as trustees par excellence of judicial power, of course within their legal jurisdiction and constitutional

¹⁸ Adopted on June 19, 1998 at a meeting of the representatives of the Commonwealth Parliamentary Association, the Commonwealth Magistrates and Judges Association, the Commonwealth Lawyers’ Association and the Commonwealth Legal Education Association.

¹⁹ Para VII(b) Judges are accountable to the Constitution and to the law which they must apply honestly, independently and with integrity. The principles of judicial accountability and independence underpin public confidence in the judicial system and the importance of the judiciary as one of the three pillars upon which a responsible government relies.

²⁰ The Constitution of India, Articles 32, 71, 124 – 147, 214-237

²¹ N. R. Madhav Menon, “Evaluating Judicial Performance: A Consumer Perspective,” 50 *JILI* (4) 476 (2008).

²² The Constitution of India, Article 129 and 215

²³ In *Keshavandabharati v. State of Kerala*, AIR 1973 SC 1461.

²⁴ *Supra* note 21 at 476.

²⁵ Per Chandrachud J. in *Shankal Chand Himat Lal Seth v. Union of India*, AIR 1977 SC 2328.

²⁶ *Ibid.*

²⁷ Per Fazal Ali, J. in *S.P. Gupta v. Union of India*, AIR 1982 SC 149, Para 324.

²⁸ Venkataramaiah, J. *Id.* at 324.

²⁹ The Constitution of India, Schedule III

jurisprudence.³⁰ As far as judicial accountability is concerned Justice Sawant in the case of *In Re. Sanjiv Date*³¹ noticed that:

“There are internal and external checks to correct the errors of courts. The law, jurisprudence and the precedents, the open public hearings, reasoned judgments, appeals, revisions, references and reviews constitute internal checks, while objective critiques, debates and discussions of judgments outside the courts, and legislative correctives, provide the external checks. Together, they go a long way to ensure judicial accountability.”

Even at the highest level, the rules permit a petition for review. Still more, the Supreme Court has, by a judicial order, introduced the remedy of a curative petition.³² And then, every judgment is a public document.³³ It is open to critical public analysis.³⁴

The Supreme Court has lent strength, through its holding in *Budhan Choudhury v. State of Bihar*³⁵ and *A. R. Antulay v. R.S.Nayak*,³⁶ it held that the judiciary is “State” for the purpose of constitutional limitations on power.³⁷ The inclusive definition of “State” in Article 12 correctly perceived by the Apex Court, to include the judiciary, gives dimensions for the restraints on the powers of the judges.³⁸ The definition of a ‘Public Servant’ in Section 21 of the Indian Penal Code, 1860 covers the judges.³⁹ The Judicial Officers’ Protection Act, 1850

³⁰ *Supra* note 5.

³¹ 1995(3)SCC 619.

³² In *Rupa Ashok Hurra v. Ashok Hurra*, (2002) 4 SCC 388 it was held that the power of review can be exercised under Article 136 and 32 by filing curative petition if there is deprivation of fundamental rights.

³³ The Supreme Court and High Court are courts of record as provided under Articles 129 and 215 respectively.

³⁴ Jawahar Lal Gupta & Shruti Bedi “Judicial Accountability: Watching the Watchmen,” 2 (2011) 5 SCC(J).

³⁵ (1955) 1 SCR 1045, 1049.

³⁶ (1988) 2 SCC 602.

³⁷ T. Devidas T. & Hem Lall Bhandari, “Judicial Accountability,” 48 *JILI* (1), 95 (2006).

³⁸ *Ibid.* at 97.

³⁹ *K. Veeraswami v. Union of India*, (1991) 3 SCC 655.

and the *Judges (Protection) Act*, 1985 do not confer, consistently with Section 166⁴⁰ of the IPC, any immunity for crime. Thus, the laws already prescribe judicial accountability.⁴¹ The Supreme Court, in a ruling of the Constitution Bench in *K. Veeraswami v. Union of India*,⁴² held that:

“Judges are under the law, not above it. Your public life, and even private life to the extent it influences your judicial role, should be accountable and transparent to the public.”⁴³

In *C. Ravichandran Iyer v. Justice A M Bhattacharjee*⁴⁴ the Supreme Court relied on *Krishna Swami v. Union of India*⁴⁵ to observe that:

“The holder of the office of a judge of the Supreme Court or the High Court should be above the conduct of ordinary, mortal-sin, society. The standards of judicial behavior, both on and off the bench, are normally high. However, the Bench was not inclined towards laying down any fixed or set principles, but asserted that the unwritten code of conduct of well-established traditions should continue to be the guideline for judicial conduct.”

Even the judges in the subordinate courts are made accountable and their conduct and functions are made answerable directly to the High Courts of the State and that can definitely take care of the errant judges in the subordinate judiciary.⁴⁶

⁴⁰ Section 166 Public servant disobeying law, with intent to cause injury to any person.—Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

⁴¹ *Supra* note 37 at 97.

⁴² (1991)3 SCC 655.

⁴³ *Supra* note 5.

⁴⁴ (1995) 5 SCC 457.

⁴⁵ (1992) 4 SCC 605.

⁴⁶ The Constitution of India, Article 233-237

III In-effectiveness of formal and informal methods of accountability

In the exercise of the power conferred by Article 124(5) of the Constitution, for the removal of a High Court or a Supreme Court judge,⁴⁷ the Parliament has enacted the *Judges (Inquiry) Act, 1968*,⁴⁸ being an Act “to regulate the procedure for the investigation and proof of the misbehaviour or incapacity of a judge of the Supreme Court or of the High Court and for the presentation of an address to the President and matters connected therewith.” The constitutional provisions for the removal of a High Court or a Supreme Court judge have proved to be highly ineffectual in the case of Justice V. Ramaswami issue.⁴⁹ Its applicability for the first time reflected the impracticability of the procedure envisaged for holding judges accountable. The incident was enough to show the loop holes in the prevalent system.⁵⁰

IV Code of Conduct for Judges in India

The judiciary itself has taken various steps to reduce the corruption in judiciary to ensure a corruption – free judicial system. In India, on 7th May, 1997, a Code of Conduct was adopted at the full court meeting of the Supreme Court. Later, in December 1999, at a conference of the Chief Justices of the High Courts held in New Delhi, the code of conduct called “*Restatement of Values of Judicial Life*” was adopted. The Code has sixteen clauses embodying values to be followed by judges and also a code of ethics for judges to comply in public and private lives. Maintenance of distance from relatives, too much activity and participation in social functions be avoided, media publicity be avoided, not to involve himself in any business or trade directly or indirectly, not to contest elections to any office of a club, society or association other than those connected with the law and

⁴⁷ The Constitution of India, Article 124(4), 217(1)(b).

⁴⁸ Section 51.

⁴⁹ Kauveri Haritas, Questioning the Judicial Accountability System,” *The Lawyers Collective*, Vol.1-18 (2) 6-11 (2003).

⁵⁰ Dr. Arti Puri, “Accountability of Superior Judiciary in India: Need of the Hour,” *AIR* July 109 (2008).

declaration of assets by judges. Along with this, the Apex Court devised an ‘in-house procedure’ for taking suitable remedial action against judges who, by their acts of omission or commission do not follow the universally accepted values of judicial life.⁵¹ There have been a series of instances in the recent past wherein allegations against judges of the higher judiciary have been probed through an ‘in-house’ mechanism devised by judges themselves and resulting in the resignation or voluntary retirement of the judges concerned.⁵² In some cases in the absence of an effective method of disciplining judges, passing resolutions demanding their resignation and boycotting their courts by the Bar and such other extra constitutional methods did yield results by forcing the errant judges to resign.

V Contempt of Court

Another major obstacle to ensuring judicial accountability is the *Contempt of Courts Act*, 1971, which provides that ‘any act that scandalizes or tends to scandalize the courts or lowers or tends to lower the authority of the court, would constitute criminal contempt.’⁵³ In such a case, the Supreme Court or the High Court can *suo moto* initiate action against the accused. An example is the *In Re Arundhati Roy* case⁵⁴ where the Supreme Court *suo moto* initiated contempt for certain statements made by Ms. Roy and imprisoned her for a day. The fact is that even if a true statement of corruption is made against the judiciary, the maker of the statement cannot plead truth as a defense.⁵⁵ The suggestion that contempt of court should be made a criminal offence and punishable only by regular criminal courts, would not be a satisfactory solution for the maligning of judges given the indefinite tardiness of prosecutions in criminal courts in India.⁵⁶ Judges must not

⁵¹ Dr. Arti Puri, “Accountability of Superior Judiciary in India: Need of the Hour,” *AIR* July 109 (2008).

⁵² *Supra* note 21 at 477.

⁵³ Section 2(C)(1).

⁵⁴ *AIR* 2002 SC 1375.

⁵⁵ *Supra* note 49.

⁵⁶ T. R. Andhyarujina, “Scandalising The Court- is it absolute?,” 13 (2003) 4 *SCC* (J).

be oversensitive to criticism even if it is ill-founded and painful as Justice V. R. Krishna Iyer, has said:

“The courts should be willing to ignore by a majestic liberalism, trifling and venial offences- the dogs may bark, the caravan will pass.”⁵⁷

All this adds to a serious and legitimate dissatisfaction with this branch of law of contempt.⁵⁸

VI Right to information

In 2005, Parliament enacted one of the most liberal and powerful *Right To Information Act*, 2005. Several High Courts have framed rules, in violation of this Act, stating that no administrative or financial information would be given. The application fees for RTI applications in the courts are sometimes 50 times that of other public authorities. The courts have, therefore, refused information about appointments of employees of the courts, about appointment and transfer of judges, and about complaints against judges. The Supreme Court even refused to disclose whether any judges are declaring their assets in accordance with the Code of Conduct that they had framed. Thus the criticism is that the higher judiciary could only preach accountability to other organs of state, but when it comes to following their own preaching, they are fearful.⁵⁹ Finally, however, they declared the assets of the judges after the judgment of the single judge of High Court of Delhi in *Secretary General, Supreme Court of India v. Subhash C. Agarwal*.⁶⁰

The growing criticism against the judiciary, for its alleged lack of accountability is now taking its toll.⁶¹ But, as well known, the only mechanism in India for judicial accountability is an impeachment process as provided under Article 124(4); it has proved to be impracticable and unworkable. Other than

⁵⁷ *In re Mulgaokar* (1978)3 SCC 339, 351.

⁵⁸ *Supra* note 56 at 13.

⁵⁹ Avijit Mani Tripathi, Comments “Acknowledging Accountability? A Comment on *Secretary General, Supreme Court of India v. Subhash C Agarwal*,” 1 *ILI Law Review* (1) 195 (2010).

⁶⁰ LPA No.501/2009 in the High Court of Delhi, Judgment pronounced on Jan.12, 2010.

⁶¹ Harnish R Gadhia, “Judicial Accountability - Re-visioning the role of Judiciary,” *AIR* Vol.96, March 34 (2009).

removal as prescribed under Article 124(4), there is no institutionalized mechanism to investigate complaints against judges.⁶² Stopping work being assigned to the errant judges is an *ad hoc* and ineffective measure. As Prof. N. R. Madhava Menon has said, ‘If in the initial four decades there were hardly any allegations of judicial misdemeanor, in the last two decades there have been many uninvestigated allegations of judicial misbehavior which no doubt, sullied the image of the judiciary as whole.’⁶³ Once the then Chief Justice of India, Justice Bharucha said that 20 percent judges are corrupt in the higher judiciary, as they are provided protection at the following three levels:⁶⁴

- There is no practical procedure to remove corrupt judges in India.
- There is no proper authority available to enquire about the charges, if leveled against the judge.
- Power vested with the court/judge to initiate contempt proceedings against those who level charges against judges.

The lacuna in the Judges (Inquiry) Act, 1968 is also one of the reasons for the need of judicial accountability. The Act provides only the procedure for the impeachment, but not disciplinary action for the minor misconduct of the judge.

After having witnessed an insistent public demand for an independent body to hold judges of higher judiciary accountable in view of the escalating number of misconduct cases, the government has introduced the Judges (Inquiry) Bill, 2006, for replacing the Judges (Inquiry) Act, 1968, which has been drafted, keeping in view the 195th Report of the Law Commission of India. Even the Second Administrative Reforms Commission, in its Fourth Report on ‘Ethics in Governance,’ endorsed that ‘the independence of the judiciary is inextricably

⁶² Prashant Bhushan, “*The Lack of Judicial Accountability in India*,” Talk delivered at Princeton University on Mar. 10, 2009 at the Department of South Asian Studies, <http://www.judicialreforms.org/files/thelackofjudicialaccountabilityinindia.pdf>, (last visited on Sep. 2, 2013).

⁶³ *Supra* note 21 at 477.

⁶⁴ Jena K.C. Prof., “Judicial Independence and Accountability: A Critique,” *IBR* 39(4) 14 (2012).

linked with judicial ethics and any conduct on the part of a judge which demonstrates lack of integrity and dignity will undermine the trust reposed in the judiciary by the citizens and, therefore, the conduct of a judge should be above reproach.’⁶⁵

Again, in Parliament, the Judges (Declaration of Assets and Liabilities) Bill, 2009,⁶⁶ was introduced to provide for the declaration of assets and liabilities by the judges. But it was not enacted. Then the government introduced the Judicial Standards and Accountability Bill, 2010;⁶⁷ again, with minor amendments, the Judicial Standards and Accountability Bill, 2012,⁶⁸ ‘to lay down judicial standards and provide for accountability of Judges, and, establish credible and expedient mechanism for investigating into individual complaints for misbehaviour or incapacity of a Judge of the Supreme Court or of a High Court and to regulate the procedure for such investigation; and for the presentation of an address by Parliament to the President in relation to proceedings for removal of a Judge and for matters connected therewith or incidental thereto’ was introduced.

The Bill set some judicial standards, making judges accountable for their lapses in declaring their assets and liabilities.⁶⁹ The Parliament Standing Committee observed the said ‘*Restatement of Judicial Values*’ are outdated and suggested and defined judicial standards in an exhaustive manner and recommended that Government should remain alert and willing to update the judicial standards as and when required in future.⁷⁰

⁶⁵ Statement of Objectives and Reasons the Judges (Declaration of Assets and Liabilities) Bill, 2009.

⁶⁶ Bill No.XXI of 2009.

⁶⁷ Bill No.136 of 2010.

⁶⁸ Bill No.136-C of 2010.

⁶⁹ Judicial Standards and Accountability Bill, 2012 (Section 3 and 4).

⁷⁰ Para 12.2 Forty Seventh Report on the Judicial Standards and Accountability Bill, 2010, Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, E <http://www.prsindia.org/uploads/media/Judicial%20Appointment/SCR-%20Judicial%20Appointments%20Commission%20bill.pdf>, (last visited on Jan. 12, 2013).

The Scrutiny Panel was constituted at the Supreme Court and every High Court level to scrutinise the complaints against a judge under this Bill.⁷¹ As far as the composition of Scrutiny Panel⁷² is concerned the Standing Committee feels that it would not be prudent to reserve the membership of Scrutiny Panel only to members of the judiciary merely in the name of preserving judicial independence; rather, the principle of judicial independence needs to be balanced with the ideal of judicial accountability.⁷³ If a Panel member has a soft corner for the judge under scrutiny then this panel can sabotage entire stressful exercise because a case returned with “No substance” will never be re-examined by the Oversight Committee.⁷⁴ At the High Court level, the Scrutiny Panel should include judges from another High Court so as to ensure the element of impartiality in the inquiry process. The Standing Committee therefore recommends that the expression "two judges of that High Court" should be replaced by "two judges of another High Court."⁷⁵ And more importantly, sitting judges would find it difficult and embarrassing to hold their brother judges (sometimes their seniors), with whom they share the Bench every day, guilty of misdemeanors - not impossible, but unlikely!⁷⁶ The judges, acting as the members of the committees, will have to spare time from their regular work as judges, thus leading to delays in the judicial functioning.⁷⁷

⁷¹ Section 10, *Supra* note 69.

⁷² Section 11(1) The Scrutiny Panel in the Supreme Court shall consist of a former Chief Justice of India and two Judges of the Supreme Court to be nominated by the Chief Justice of India.

(2) The Scrutiny Panel in every High Court shall consist of a former Chief Justice of that High Court and two Judges of that High Court to be nominated by the Chief Justice of that High Court.

⁷³ *Supra* note 70 para 16.4.

⁷⁴ N.S Poonia, “Judicial Standards and Accountability Bill, 2010 Is Misconceived and Imaginative Which Is More Obstructive Than Inquiry (Judges) Act, 1968,” *AIR*, Vol.98, 158-159 (2011).

⁷⁵ *Supra* note 70 para 16.5.

⁷⁶ Prashant Bhushan, “Judicial Accountability or Illusion?” 4849 (*EPW* 2006).

⁷⁷ *Supra* note 17 para 17.

The composition and nature of the National Oversight Committee⁷⁸ was one of the main debating issues – it was maintained that the composition should be made more representative and should be more broad based, Standing Committee also suggested that, at least one member from the Bar should be included.⁷⁹ The National Judicial Oversight Committee should be a permanent and independent body; the concern was also raised that the sitting judges who are members of the Oversight Committee, would be busy with enough judicial work. In that case, if they have to enquire into complaints against some other Judge, it would take a lot of time. It is also possible that the Oversight Committee would not even be able to meet easily when required.

Section 22 of the Bill provides for an Investigation Committee to be constituted by the Oversight Committee for the purpose of inquiry into misbehaviour by a judge. The Standing Committee is constrained to note that the Bill provides no guidelines for the Oversight Committee in the matter of the constitution of the Investigation Committee.⁸⁰ Composition of the Investigation Committee should be clearly mentioned for the sake of objectivity and uniformity as also to prevent uncertainty and the exercise of unnecessary discretion. There should be guidelines for selecting the Members of the Committee. Shri. Prashanth Bushan, Senior Counsel, Supreme Court of India, criticized, the formation of an

⁷⁸ Section 18(1) The National Judicial Oversight Committee shall consist of the following, namely:

(a) a retired Chief Justice of India appointed by the President after ascertaining the views of the Chief Justice of India - Chairperson;

(b) a Judge of the Supreme Court nominated by the Chief Justice of India - Member;

(c) the Chief Justice of a High Court nominated by the Chief Justice of India - Member;

(d) the Attorney-General for India - *ex officio* Member;

(e) an eminent person nominated by the President - Member:

Provided that -

(a) where the allegations are against a Judge of the Supreme Court, who is a member of the Oversight Committee, then, the Chief Justice of India shall nominate another Judge of the Supreme Court in his place as a member of that committee; or

(b) Where the allegations are against the Chief Justice of a High Court, who is a member of the Oversight Committee, then, the Chief Justice of India shall nominate a Chief Justice of another High Court in his place as a member of that committee.

⁷⁹ *Supra* note 69 para 14.1.

⁸⁰ *Ibid.* 17.

in-house body of sitting judges to deal with complaints against judges; experience, shows that such in-house bodies and self-regulation rarely works, whether in the judiciary or the Bar or with the Medical community.⁸¹

About the punishment for frivolous and vexatious complaints- the Standing Committee recommends that Government should substantially dilute the quantum of the punishment so as not to discourage people from taking initiatives against the misbehaviour of a judge.⁸²

VIII Conclusion

Absolute immunity may be conducive to independence, but it may give protection to corrupt judges or to gross forms of misconduct.⁸³ Judges should not be held accountable for upholding the rule of law. This canvasses a picture of conflict between judicial independence and judicial accountability, but they are inseparable and not inconsistent with each other; in fact they nourish each other.⁸⁴ As Subhash C. Kashyap says, “Judicial accountability is a facet of judicial independence. Still in certain situations they may conflict.”⁸⁵ Neither judicial independence nor judicial accountability are ends in and of themselves. Both are means toward the construction of a satisfactory process of adjudication.⁸⁶ The judges can no longer oppose calls for greater accountability on the ground that it will impinge upon their independence. Independence and accountability must be sufficiently balanced so as to strengthen judicial integrity for effective judicial impartiality.

⁸¹ Prashant Bhushan, “The Lack of Judicial Accountability in India,” Talk delivered at Princeton University on Mar. 10, 2009 at the Department of South Asian Studies, <http://www.judicialreforms.org/files/thelackofjudicialaccountabilityinindia.pdf>, (last visited on Sep. 9, 2013).

⁸² *Supra* note 70 para 18.

⁸³ Gavison Ruth, ‘The Implications of Jurisprudential Theories For Judicial Election, Selection, and Accountability’, 61 *S.Cal.L.Rev.* 1617 (1988).p.1655.

⁸⁴ M. P. Singh, “Securing the Independence of the Judiciary: The Indian Experience.” *Indian International & Comparative Law Review*, 2000.

⁸⁵ Subash C. Kashyap, *Reviewing the Constitution*, 93 (1st edn. Delhi, Shilpa Publication, 2000).

⁸⁶ Zemans Frances Kahn, ‘The Accountable Judge: Guardian of Judicial Independence,’ 72 *S.Cal.L.Rev.* 625 (1999).pp.628-632.

Appointment of judges and judicial accountability are closely related in certain senses that if men of integrity and character are appointed in the judiciary then, the proceedings will be fair, away from corrupt practices. Hence they look to the quality of decisions rendered and past records of the judge, so that the best of the best may go to the higher courts ensuring the best results.⁸⁷

It is high time that this unhappy situation is corrected by reforms in the law and amendments in the Constitution. There needs to be an independent statutory and full time body for performance audit and disciplinary control over judges. The *Judicial Standards and Accountability Bill* provides statutory backup to Judicial Standards, hitherto having sanction of the Restatement of Values as adopted in the Conference of Chief Justices in 1999. Though it needs some minor modification, it is clearly an initiative in the right direction and endeavours to strike a reasonable balance between the demands of accountability and of judicial independence. At the earliest it should be enacted into a law. Finally aptly quoting Justice V.R. Krishna Iyer, "... all public power in a republic is a people's trust. Judicial power is no exception."⁸⁸ And a judiciary is a democratic instrumentality, not an occult class of divinity.⁸⁹

⁸⁷ *Supra* note 64 para 20.

⁸⁸ Iyer Krishna V.R., *Our Courts on Trial*, 36 (Delhi, B.R. Publishing Corporation, 1987).

⁸⁹ *Supra* note para 5.

**A MOCKERY ON THE PHILOSOPHY BEHIND PWDVA, 2005
AN INDIAN CASE STUDY *INDRA SARMA V. V.K.V. SARMA***

Dr. Anuja S*

*Indra Sarma v. V.K.V. Sarma*¹ was an Apex Court decision rendered by a two judge bench comprising of J. K. S. Radhakrishnan, and J. Pinaki Chandra Ghose, in the year 2013. The facts of the case revealed that Indra Sarma, the appellant herein before the Supreme Court had entered into a live-in relationship with one Mr. V.K.V. Sarma, the respondent. It was alleged by the appellant in the Lower Court proceedings that, the respondent having enjoyed the relationship for quite long years, left her company and failed to provide maintenance to her. The allegations raised by the appellant reveals the story that the respondent had taken money from her to start a business and subsequently the respondent shifted the same to his own residence and manipulated the relationship to make believe the public that there was non-existence of live-in relationship between them. She sought her reliefs under Sections 18, 19, 20, 22 and 23 of the Protection of Women from Domestic Violence Act, 2005 (PWDVA, 2005) to which the respondent raised objections.

Both the appellant and the respondent admitted the existence of co-habitation between them. On finding evidence as to the fact that the parties had lived together for a considerable period of time i.e., for about eighteen years, and then the respondent left the company of the appellant without maintaining her, the learned Magistrate granted the reliefs sought for by the appellant and passed an order directing the respondent to pay an amount of Rs.18,000/- per month towards maintenance of the appellant from the date of the petition. Respondent aggrieved by the said order of the learned Magistrate, filed an appeal before the Sessions

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¹ S L P (CRL.) No.4895 of 2012.

Court under Section 29 of the Act. The Appellate Court also concluded that as the appellant had no source of income respondent was legally obliged to maintain her and confirmed the earlier order passed by the learned Magistrate.

The respondent had then moved the High Court of Karnataka which allowed the appeal and overturned the decision of the lower courts holding against the appellant, as the court took cognizance of the fact that despite having full knowledge that the respondent was a married person having two children, she had developed a relationship with the respondent, remaining a deaf ear to the opposition raised by the legally wedded wife of the respondent and also by the appellant's parents. Reliance was placed by the respondent at this juncture, on the judgment of the Apex Court in *D. Velusamy v. D. Patchaiammal*² and submitted that the tests laid down in *Velusamy* case had not been satisfied. The High Court agreeing to the respondent's argument gave a green signal to that and held that the relationship between the parties would not fall within the ambit of *relationship in the nature of marriage* and the tests laid down in *Velusamy* case have not been satisfied. Consequently, the High Court allowed the appeal and set aside the order passed by the lower Courts.

Aggrieved by this, the appellant approached the Supreme Court. The main issues raised in the case were; (1) whether an arrangement alleged by the appellant as live-in relationship would amount or is in pari materia to a relationship in the nature of marriage falling within the definition of domestic relationship under Section 2(f) of the PWDVA, 2005 and (2) Whether the disruption of such a relationship by failure on the part of the respondent by his acts and omission to maintain a women involved in such a relationship amounts to domestic violence within the meaning of Section 3 of the PWDVA, 2005. The Apex Court dissected the issue by going into the nitty-gritties of difference between marriage and marital relationship, analyzing the concept of relationships

² (2010) 10 SCC 469.

in the nature of marriage under the Act, understanding the status of the appellant and towards the end the ramification or impact of such mid-way arrangements on the legal relationship of a legally wedded wife. The appellant's contention was that the relationship between them constituted a *relationship in the nature of marriage* within the meaning of Section 2(f) of the Act, which takes in every relationship by a man with a woman, sharing household, irrespective of the fact whether the respondent is a married person or not. The tests laid down in *Velusamy* case according to her version was contended has been satisfied.

To clarify as to what the tests are laid down under *Velusamy* case, the details of the dictum in that case is required at this juncture. In the landmark case of *D. Velusamy v. D. Patchaimmal* the bench comprising of Justice Markandey Katju and Justice T S Thakur held that a woman in a live-in relationship is not entitled to maintenance unless she fulfills certain parameters, the Supreme Court observed that merely spending weekends together or a one night would not make it a domestic relationship. The Supreme Court observed that not all live-in relationships will amount to a relationship in the nature of marriage to get the benefit of PWDV. The Court opined that if a man has a 'keep' whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not be a relationship in the nature of marriage. The Court has defined "relationship in the nature of marriage" using the Common Law principles to the effect that:

- (a) The couple must hold themselves out to society as being akin to spouses.
- (b) They must be of legal age to marry.
- (c) They must be otherwise qualified to enter into a legal marriage, including being unmarried.
- (d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

Making an attempt to iron out certain ambiguous situations, in order to be eligible for ‘palimony’, a relationship must comply with certain conditions, above referred. The scope of the right of maintenance of women in “relationship in the nature of marriage” under the Act has been severely curtailed by the Supreme Court in its judgment in *D. Velusamy v. D. Patchaiammal*. Conscious that the judgment would exclude many women in live-in relationships from the benefit of the PWDVA, 2005, the Apex court cautioned that it is not for this court to legislate or amend the law. The Parliament has used the expression ‘relationship in the nature of marriage’ and not ‘live-in relationship.’ The court held that it cannot change the language of the statute. This judgment when rendered at that point of time was considered as the ultimate manner to interpret relationship in the nature of marriage vis-a-vis live in relationships.

Coming back to the discussion on the case in hand, the amicus curiae rendered assistance to the Court by pointing out the significance of the PWDVA, 2005 and its noble objective. She supported the contentions of the appellant in detailing out that the Act, intended to provide for protection of rights of women who are victims of violence of any type occurring in the family and that the various provisions of the Act were intended to achieve the constitutional principles laid down in Article 15(3),³ reinforced vide Article 39 of the Constitution of India. A reference to the Justice Malimath Committee report⁴ was also made and submitted that a man who marries a second wife, during the subsistence of the first wife, should not escape his liability to maintain his second wife, even under Section 125 of Cr.P.C. The essence behind is to prevent the husband from absolving himself

³ Protective Discrimination Principle.

⁴ The Committee on Reforms of Criminal Justice System, headed by Dr. Justice V.S. Malimath, in its report of 2003 opined that evidence regarding a man and woman living together for a reasonably long period should be sufficient to draw the presumption that the marriage was performed according to the customary rites of the parties. Thus, it recommended that the word ‘wife’ in Section 125 Cr.P.C. should be amended to include a woman who was living with the man like his wife for a reasonably long period.

from responsibility to maintain the second wife on the ground that since the first marriage was not dissolved; the second marriage would not be valid.

The respondent's counsel drew support from judgments of the Constitutional Courts of South Africa, Australia, New Zealand, Canada etc., and also referred to parallel legislations on the subject in other countries. Respondent contended that the principle laid down in *Velusamy* case has been correctly applied by the High Court and, on facts, appellant could not establish that their relationship was a *relationship in the nature of marriage* so as to fall within Section 2(f) of the Act. Accordingly, the appellant was not a victim of any fraudulent or bigamous marriage and it was a live-in relationship for mutual benefits.

After hearing to the opposing arguments and submissions, the Apex Court went on to discuss in detail the status of marriage and marital relationship. It held:

“The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally as a public ceremony, often before family and close friends.”

The Court referred to various South African Constitutional Court judgments⁵, Article 23 of the International Covenant on Civil and Political Rights,

⁵ *Satchwell v. President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC), *Du Toit and Another v. Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC)

1966⁶ and Article 16 of the Universal Declaration of Human Rights, 1948⁷ which fall on similar lines, the Hindu Marriage Act, 1955, Section 5 and 7,⁸ taking into account the religious affiliation of the parties concerned, in the case at hand and clarified that the law has distinguished between married and unmarried people. The Court referred to its own judgment in *Pinakin Mahipatray Rawal v. State of Gujarat*⁹ where it held, that marital relationship means the legally protected marital interest of one spouse to another which include marital obligation to another like companionship, living under the same roof, sexual relation and the exclusive enjoyment of them, to have children, their up-bringing, services in the home, support, affection, love, liking and so on.

As the next step, the Apex Court culled out certain guidelines for testing under what circumstances, a live-in relationship will fall within the expression relationship in the nature of marriage under Section 2(f) of the Act. The guidelines were held to be illustrative and not exhaustive, but that can shed light on understanding the difference between the two relationships under issue in the case at hand. Accordingly, eight guidelines comprising of certain indicators of relationship in the nature of marriage as envisaged by the Act were laid down viz.,

- (1) duration of period of relationship,
- (2) shared household,
- (3) pooling of Resources and financial arrangements, supporting each other, or any one of them, financially, sharing bank accounts, acquiring immovable properties in joint names or in the name of the woman, long term investments in business, shares in separate and joint names, so as to have a long standing relationship,

⁶ Article 23(1) declares that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

⁷ Article 16(3) declares that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

⁸ On Conditions and ceremonies of marriage respectively.

⁹ (2013) 2 SCALE 198.

(4) domestic Arrangements entrusting the responsibility, especially on the woman to run the home, do the household activities like cleaning, cooking, maintaining or up-keeping the house,

(5) sexual Relationship not just for pleasure, but for emotional and intimate relationship, for procreation of children, so as to give emotional support, companionship and also material affection, caring etc.,

(6) children as a strong indication of a relationship in the nature of marriage. Sharing the responsibility for bringing up and supporting them is also a strong indication,

(7) socialization in public holding out to the public and socializing with friends, relations and others, as if they are husband and wife and

(8) intention and conduct of the parties the common intention of parties as to what their relationship is to be and to involve, and as to their respective roles and responsibilities.

Looking into the status of the appellant, the Court opined that as the appellant was fully aware that the respondent was a married person even before the commencement of their relationship. Hence, the status of the appellant is that of a concubine or a mistress, who cannot enter into relationship in the nature of a marriage. The Court took a compassionate view in holding the long standing relationship as a concubine, though not a relationship in the nature of a marriage may at times, deserves protection because that woman might not be financially independent. Simultaneously, along with the compassionate support, the Court viewed with skepticism that the Act do not take care of such relationships which may perhaps call for an amendment of the definition of Section 2(f) of the PWDVA, 2005, which is restrictive and exhaustive.

The court was inclined towards the traditional understanding of the marriage and the sanctity of such relationship and held:

“Appellant, having been fully aware of the fact that the respondent was a married person, could not have entered into a live-in relationship in the nature of marriage. All live-in- relationships are not relationships in the nature of marriage. Appellant’s and the respondent’s relationship is, therefore, not a relationship in the nature of marriage because it has no inherent or essential characteristic of a marriage, but a relationship other than in the nature of marriage and the appellant’s status is lower than the status of a wife and that relationship would not fall within the definition of domestic relationship under Section 2(f) of the PWDVA, 2005. If we hold that the relationship between the appellant and the respondent is a relationship in the nature of a marriage, we will be doing an injustice to the legally wedded wife and children who opposed that relationship. Consequently, any act, omission or commission or conduct of the respondent in connection with that type of relationship, would not amount to domestic violence under Section 3 of the PWDVA, 2005.”

The alienation of affection from the respondent that was due to the legally wedded wife and the legally born children which was result of the act of the appellant who was categorized by the Apex Court as a concubine was the serious concern of the court while deciding against the vulnerable group of women to which the appellant also belongs. The court went on to the extreme step of condemning the act of the appellant in entering into a live-in relationship with respondent who was fully aware that the respondent was a married man with children and held:

“...If any direction is given to the respondent to pay maintenance or monetary consideration to the appellant, that would be at the cost of the legally wedded wife and children of the respondent, especially when they had opposed that relationship and have a cause of action against the

appellant (the woman) for alienating the companionship and affection of the husband/parent which an intentional tort.”

The court has gone into a peculiar way of understanding the realities and its ramification on the legally wedded wife. The opposition raised by the legally wedded wife to the live in relationship and the legal status of marriage itself were considered as crucial from the perspective of the court which according to the author creates a contradictory stance while legislating to do away the mischief and interpreting it in a different fashion illogical to understand. Importing extraneous considerations and creating difficulties to the appellant appears to be the agenda behind rather than protecting and rendering maintenance to the victim in the lines of *Palani's* case.

The Supreme Court went on to observe that live-in relationships are neither a sin nor a crime. It also observed that though it has been accepted in many countries, it is still regarded as a sin in the patriarchal society of India. If it continues for a long time, it is a relationship like marriage despite not being a marriage in a legal sense and many difficulties arise as the present laws are not enough to redress the grievances of an aggrieved party under such relationships. The court clarified that such a relationship can only be established between two unmarried adults of opposite sex.¹⁰ To an extent court takes a positive stand for live-in-relationship but at on the other side makes the society aware about the problems involved in the live-in style arrangements.

The Disconnect

The constitutionality of the Act was under test in the case of *Aruna Pramod Shah v. Union of India*,¹¹ a case hailed as progressive by the proactive supporters of the PWDVA, 2005 which was decided by Vikramajit Sen and P.K. Bhasin, JJ.

¹⁰ <http://www.thestatesman.net/news/34730-living-in-without-protection.html> (last visited on Aug. 12, 2014).

¹¹ WP.Cr. 425/2008, Del.

This judgment of the Delhi High Court was delivered on a writ petition filed by the mother-in-law seeking to quash proceedings under the Act initiated against her in a lower court. One of the ground of contest was that the placing of “near or like marriage” status (relationships in the nature of marriage) at par with ‘married’ status in Section 2(f) of The PWDVA, 2005 leads to the derogation of the rights of the legally-wedded wife. Recognition of women in live-in relationships was a relatively new concept in Indian jurisprudence. The Court rejected the contention by holding that there is no reason why equal treatment should not be accorded to a wife as well as a woman who has been living with a man as his “common law” wife or even as a mistress.

In *S. Khusboo v. Kaniammal and Anr.*¹² JJ Deepak Verma and B. S. Chauhan had clarified the scope of criminality in consensual adult relationships when they reiterated that:

“While it is true that the mainstream view in our society is that sexual contact should take place only between marital partners, there is no statutory offence that takes place when adults willingly engage in sexual relations outside the marital setting, with the exception of adultery as defined under Section 497 IPC.”

An array of judgments has come up on this issue interpreting live in relationships by Indian judiciary¹³. If such judicial interpretations meant to help the women in bigamous and fake marriages and to be provided with a support system through this legislation then this judgment comes as a mockery to the whole noble understanding of the provision of ‘*relationship in the nature of*

¹² (2010)5SCC 600.

¹³ *A. Dinohamy v. W.L. Blahamy* AIR 1927 PC 185; *Mohabhat Ali v. Mohammad Ibrahim Khan*; AIR 1929 PC 135; *Gokal Chand v. Parvin Kumari*; AIR 1952 SC 231; *Badri Prasad v. Dy. Director of Consolidation*; AIR 1978 SC 1557; *S. P. S. Balasybramanyam v. Suruttayan*; 1994 (1) SCC 460; *Ranganath Parmeshwar Panditrao v. Eknath Gajanan Kulkarni*; 1996 (7) SCC 681; *Tulsa and Others v. Durghatiya and Others*; AIR 2008 SC 1193; *S. Khushboo v. Kaniammal*; Criminal Appeal No. 913 of 2010 [Arising out of SLP (Crl.) No. 4010 of 2008]; *Lata Singh v. State of U.P. and Another*; AIR 2006 SC 2522.

marriage' in the Act. If an analysis of the earlier judgments on live in relationships vis-a-vis marriage is considered, a rosy picture is made out creating the impression that Indian society has moved away from the conventional life styles recognizing mid-way live in arrangements. The reference by the Supreme Court of judgments of the Constitutional Courts of South Africa, Australia, New Zealand, and Canada, the threshold of common law marriage and comparing the position of live in relationships and trying to import it in the Indian context was quite deplorable. Seemingly, a smoke screen is created with no clarity by neither legalizing nor interpreting logically on such relationships. The indicator coming forth with the new judgment at hand is that check the man's marital status before going in for a live-in partnership and that the act could not be invoked by a woman in a live-in relationship with a married man, especially if she knew his marital status. In effect, any unscrupulous man can take advantage of this situation and make woman vulnerable at his whims and fancies.

In the present case, court has completely ignored the liability of the respondent entered into a bigamous relationship for a continuous long period and who enjoyed the companionship of the appellant for a long period. The non-cognizance by the court of the dereliction on the part of the respondent who took advantage of the relationship with the appellant appears to be contradictory to the philosophy running behind the judgment rendered by Madras High Court in *M. Palani v. Meenakshi*.¹⁴ In this case, the man challenged the award of interim maintenance to the woman, on the grounds that they were not married and not even lived together at any point. Rejecting his arguments, the Court opined,

“...The averments made in the plaint as well as in the counter affidavit will make it very clear that the petitioner and the respondent had a close relationship and had sex. As stated already, the Act does not contemplate that the petitioner and the respondent should live or have

¹⁴ *M. Palani v. Meenakshi*, AIR 2008 Mad 162.

lived together for a particular period or for few days...one can infer that both of them seem to have shared household and lived together at least at the time of having sex by them.”

The High Court therefore held, that there is no stipulation under the Act for the parties to live together for any particular period. Since the man had admitted to sexual contact and it was evident that the couple enjoyed a close relationship, it was immaterial that they not lived together as a married couple. The judgment is pious to the extent that it takes care of the mental deprivation of the destitute woman with whom the unscrupulous man enjoyed sexual relationship. No man can be benefitted by his wrong deeds is the louder signal given thereby to the society while being in such mid-way relationships.

The eight guidelines comprising of certain indicators of relationship in the nature of marriage as envisaged by the Act that was outlined through the present decision is highly drawn from the western culture and sends out the signal that had the appellant and respondent been into any of the arrangements and brought evidence to that effect the relationship of appellant with respondent could have been genuine. The one size fits all approach is likely to create ripples and distort the whole picture of average Indian women who is vulnerable within the patriarchal system. The court while deciding in the present case has condemned the act of appellant who was clearly categorized as a concubine. The judiciary fails here in rendering justice to the appellant. The Court here has made a deliberative attempt in bringing back through the backdoor the nobility and sanctity that is solely attributable to marriage and family relationships. The culture of tolerance to new western ideas that was propagated by the Court in the earlier instance gets diluted through this decision.¹⁵ In toto, the judicial interpretation had gone back to the point one, by reiterating the inviolability of family and marriage as social institutions in the Indian context.

¹⁵ *S. Khushboo v. Kaniammal and Another* (2010) 5 SCC 600.

A lawfully married woman who is supported both by formal and informal support systems of a society needs to be differentiated and treated differently from other women who are vulnerable and have entered into such mid-way arrangements in living. To protect the interests of women and their children who have fallen prey to the abuse of male, such decisions are not helpful and rejuvenating to lead a life of dignity in the society. The effectiveness of any legislation can be assessed to some extent from the judicial response to it.¹⁶

Acknowledging violence and propagating a zero tolerance for violence against the women within the private space of a home is applaudable. The requirement of proving the validity of marriage has been a major impediment in determining the rights of women to maintenance is pertinent in a country like India where pluralistic traditions of marriage exist¹⁷. By taking away the necessity of strictly proving marriage, the Act addresses these concerns and lays down that even if a marriage is not valid or cannot be proved, the woman would still be entitled to her rights under the Act. Keeping in consonance with this idea, many judgments has provided a wise and tact full solution to the problem by acknowledging and upholding the right of maintenance of women victims in fake and bigamous marriages. Under the provision of this Act, any woman who claims relief such as protection orders, restraining orders or even maintenance, need not prove the validity of her marriage. So naturally the violence perpetuated against a woman within a man-woman relationship irrespective of their marital status, ought to be taken care of by the law and judicial interpretations. The judgment at hand is a glaring incongruity to this understanding.

¹⁶ <http://www.unwomensouthasia.org/assets/LCWRI-4th-PWDVA-ME-Report-2010-Staying-Alive3.pdf> (last visited on Dec. 22nd, 2012).

¹⁷ Marriages are performed as per customary rights and there is seldom any clear-cut proof that a marriage ceremony has been performed. Furthermore, even if documentary proof of a marriage exists, once a woman initiates proceedings in court against her partner, it often becomes virtually impossible for her to return to her matrimonial household to reclaim such documentation.

The Act neither in its title nor in its preamble makes a differentiation as to the status of woman who may be vulnerable to domestic violence in the Indian context. A bare reading of the Act creates the impression that woman as a group vulnerable to the menace of domestic violence are being protected upholding the ideology of violence free safety atmosphere. The purposive interpretation that ought to have gone into understanding the legislation has failed hereby. The Act seeks to define the concept ‘domestic relationship’¹⁸ as a relationship between persons who live or have at any point of time, lived together in a shared household, when they are related by consanguinity, marriage or through a relationship in the nature of marriage, adoption or are family members living together as a joint family. Under this definition live-in relationships are legally recognized in the phrase ‘relationships in the nature of marriage.’ Women in live-in relationships are supposed to receive the same protection as wife when it comes to domestic violence. Domestic relationships protect women of fraudulent or bigamous marriages or in marriages invalid in law. This marks the beginning of the legislative recognition shown to couples choosing to cohabit rather than marry under Indian law. The inclusion of ‘relationships in the nature of marriage, is an incredible understanding unlike earlier legislations, put in place to deal with violence against women in the family space, keeping in tune with the principles of social justice and upholds the dignity of the individual enshrined in the Preamble to the Constitution. There appears no rationale for restrictively interpreting relationships to deny women protection under certain circumstances.

Conclusion

The legislation and its noble ideals and aspirations have seemingly lost its way into dreary desert sand creating fear and insecurity among women coming to the judicial interpretations of its provisions, supposedly that ought to be in consonance with each other. On the one hand, the Act has made significant

¹⁸ The PWDVA, 2005, Section 2(f)

improvements to the existing laws pertaining to violence against women, and has effectively linked all forms of domestic violence to demands for dowry. On the other hand, the development of the Act through legal interpretation has been marred by confusion and inconsistency.

The interpretations suggestive of contradictory outcomes had led to inconsistency and thereby aggravating the skepticism as against the Act. The clearly articulated object of the Act is to protect women in need of protection irrespective of her status within the relationship has dealt a severe blow through this decision. The judgment ultimately reiterates that women except in marital relationships are not human beings and are not entitled to be treated as humans. The purpose of law is perceived as to promote the *ought* which has faced a stiff blow at the hands of judicial interpretation. *Ought* can never be found out by dragging on with the *is* proposition. Human rights protected through interpretations based on rule of law are the surest gift to universal brotherhood and prosperity.

CHILD PORNOGRAPHY IN INDIA-A PROBLEM YET TO BE TACKLED EFFECTIVELY!

Dr. Vishnu Prasad R* and Gowri Vishnu Prasad**

“No violence against children is justifiable and all violence against children is preventable.”

- Prof. Paulo Pinheiro¹

I Introduction

Others might not accept a thing that or as section of population may term as pornography. Similarly, the sovereign nations differ in their approach as to what is child pornography, should it be legalised or banned, and where it is illegal, what punishments can be prescribed to the exploiter. Thus, devising a universal and conclusive definition of child pornography is not only a controversial idea but also a distant dream. Nevertheless, there has to be some consensus as to the understanding of child pornography and modalities to deal with it. As a result the consensus among nations would be a pre-requisite to tackle a complex international problem like child pornography. Child pornography is both a national and an international problem. It interferes with all rights of the children, including their human rights such as right to privacy, right to dignity, right to liberty and right to security, among others. On the one hand, as to its extent and form of existence, child pornography varies from one country to another making it a complex problem. On the other hand, such variations in the form and subsistence of child pornography demand its combating measures to be scientific and collective.

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¹ Vakul Sharma, *Information Technology: Law and Practice – Law & Emerging Technology Cyber Law & E-Commerce* 203 (Delhi: Universal Law Publishing, 3rd edn., 2011).

The launch pad for child pornography could be the internet, other offline modes, and magazines. Child pornography could have been in existence since a number of years but it has grown prominently and became easily accessible from the time internet became a necessity for mankind. The obscene materials involving children who could not reach certain regions of the world have become accessible in such regions on computers, laptops, tabs, and smart mobile phones. There is a great deal of demand for child pornography on the internet.² Victims of child pornography are immediately harmed during abuse and the creation of the images; however, that would turn to perpetual harm when their distribution on the Internet spreads or continues. Certainly, it is a flipside of the internet that needs to be addressed collectively and effectively. Indeed, a lot depends upon the lenses chosen by the policy makers to understand the problem and subsequently to deal with it. It is said, “at least 1.8 million children are used in commercial sex, many sold into sexual slavery by poor families and others abducted and trafficked into brothels.”³ This article attempts to highlight some of the overarching contexts and factors that seem to have been ignored by the policy-makers in India notwithstanding the fact that they are important in understanding the problem. In addition, the article attempts to highlight the inadequacies in the legislative measures to tackle child pornography in India.

II Setting the context

Sovereign nations aspire to be recognized in relation to its military power, economic social scientific and technological progress, effective administration

² It is highlighted by a study that search engines get 116,000 queries every day related to child pornography. See, <http://www.webroot.com/us/en/home/resources/tips/digital-family-life/internet-pornography-by-the-numbers>. (last visited on July 17, 2015).

³ Statistics provided by the International Centre for Missing and Exploited Children, cited in <http://www.internetsafety101.org/predatorstatistics.htm> (last visited on July 17, 2015).

and advancement in medicine.⁴ This would mean that the list of nations' motto, *inter alia*, might include promotion and protection of rights of the individuals including children. On the other hand, the individuals who are the primary subject of the State would focus on their necessities as the first priority. Subsequently, their focus would shift to accumulation of wealth, power and status. Undeniably, the individuals would also aspire for an environment to be provided by the State wherein they are protected and nurtured in a manner by which all the subjects can progress.⁵

Individuals can achieve progress if they are entitled to certain basic civil, political, economic, social and cultural rights. Hugo Grotius had claimed that a right had reference to a moral quality of a person, making it possible for that person to possess or to do something lawfully.⁶ This would suggest that Grotius had viewed the idea of right as a moral property of a person. Since right was seen as a moral concept, it was agent-specific.⁷ This is an important proposition as Grotius links the task of exercising rights to lawful means and morality. Thomas Hobbes, another thinker, had tried to clarify the concept of rights in the backdrop of nature. According to him, "the right of nature is the liberty each man has, to use his own power, as he will himself, for the preservation of his own nature; that is to say, of his own life; and consequently, of doing anything, which in his own

⁴ However, the extent of realisation of nations' motto essentially would depend upon its geographical location, agenda, measures and policies undertaken, ecology, resources and in particular, the way in which they are utilised by that nation.

⁵ When one speak about individuals' wants, it is necessary to view that it is subject to the following factors: a) 'Relativism'- people's wants are subjective and relative; b) 'desire and position factor'- the position of the individuals in society have direct impact on the nature and degree of their want; c) realisation of one's wants depend upon the laws and policies of the Government to which they are subjects; and d) education, skills, capabilities and intelligence of the individuals are crucial in enabling them to realise their wants.

⁶ Therefore, his conception was recognised as one of subjective right. It is said, the prominence that Grotius gave to subjective rights even characterised a new progress in intellectual history. See William A. Edmondson, *An Introduction to Rights*, 17 (New York: Cambridge University Press, 2004).

⁷ Yu KamPor, *Human Rights and Chinese Ethical Thinking*, (1996) <http://hdl.handle.net/10722/34337>, (last visited on May 10, 2014).

judgment, and reason, he shall conceive to be the apt means thereunto.”⁸ This idea unlike the preceding one allows the right-holder to do anything by which he preserves one’s own life. It does not expressly refer to morality or lawful means. However, it is submitted that rights are not absolute as they are limited and subjected to certain larger community interests or what is conferred by the state of nature. Another thinker, Roscoe Pound, tried to identify the interests based on the realities of the social process by which he pointed out that rights can be understood in terms of concerns and wants of the people.⁹ Jeremy Bentham, who expounded classical utilitarianism, had pointed out that every human decision was motivated by some calculation of pleasure and pain as he presumed that every political decision would be made on the same calculation, that is, to maximize the net produce of pleasure over pain.¹⁰ This would imply that both governments and the limits of governments were to be judged not by reference to individual rights but also in terms of what tends to promote the greatest happiness of the greatest number, which the theory could not sufficiently address. The positivists claimed that rights are creatures of law and therefore they might exist only to an extent that is permitted by the legal framework.¹¹ In this view, natural rights would be imaginary. The social contract theory claims that persons’ moral and/or political obligations are primarily dependent upon a contract or agreement among them to form the society in which they live. Thomas Hobbes being a profounder of modern contractual theory asserted that political authority and obligation are based on the individual self-interests of members of the society who are understood to be equal to one another, and in addition, no single individual is invested with any essential authority to rule over the rest. Each of these views has

⁸ William A. Edmondson, *Supra* note 6 at 22-23.

⁹ Jerome J. Shestack, *The Philosophic Foundations of Human Rights*, 20 (Hum. Rts. Q. 212 1998).

¹⁰ *Id.* at 211.

¹¹ *Id.* at 253.

their advantages and disadvantages. Since they are not the focus of this article, further discussion on the same is not preferred here.

However, the aforementioned theories and observations concerning rights allow, *inter alia*, drawing of the following inferences. Firstly, individuals' rights are not absolute and the means to preserve one's life must be lawful or what does the community to which one belongs accept. Secondly, the Individuals are expected to exercise their freedoms and realise their wants (of themselves and their family), subject to the policy framework laid down by the State. Thirdly, that nation cannot concentrate exclusively on certain of its mottos while excluding the others. If the State adopts preferential approach, then it may have devastating effects on the individuals besides affecting nation's growth. Hence, balance must be sustained by nations and the same must be reflected in their policies and legislations.

III Factors leading to child pornography

If it is supposed that the state has struck a balance in its policy, as mentioned above, and the individuals enjoy their freedoms and rights by adhering to the regulations made by the state then one important fact that needs to be looked into is whether all individuals are equally competent to enjoy their rights or freedoms through which they realise their wants or wants of their family members. Ideally and according to natural rights theory everyone is equal. However, in reality not all the individuals are placed on the same footing, when it comes to their capabilities, intelligence, potential, and skills. As mentioned earlier, it is these factors, which enable the individuals to the enjoyment of their life, freedoms, and actualise their wants. Therefore, the disparities in capacities and skills of the individuals results in inequality. If the issue of inequality is not addressed then it would bring in inequality of income, status and allied issues.

Let there be a further presumption that the State is aware of this and it has made some special provisions concerning unequals for their upliftment. Another

concern that stem, is that whether all such needy persons get the protection and benefit of special provisions. Indeed, such a concern can be analysed from the perspective of the scope of the actual policy or law, and in particular, its manner of application. This being the case, not all may get the benefit. Hence, the practical outcome is wants and desires are aplenty but the ability in the individual to realise them is limited or not sufficient. This is coupled with another factor, that is, modern living values and standards have redefined the necessities and the luxuries. Interestingly, be it a necessity or luxury, human bent is not just to have mutually, but to have both as much as possible. The State ought to have addressed these issues by this time and unfortunately it has neither addressed it effectively nor thought of them as a reason for practice of unlawful actions through which one can earn. Poverty and large population add to the misery of the people and Government continues to fail in securing *de facto* equality among all.¹² It is argued that if these fundamental problems are addressed properly then they would produce permanent solution to many complex problems including a problem of the stature of child pornography. Issues of inequalities in income, inequalities in capacities of the individuals, the problem of concentration of wealth among few persons, unending wants/desires, large population, unemployment, and poverty guides one to consider ‘illegal means of attaining economic capacity.’¹³ The practice of human trafficking, smuggling, piracy, selling of banned drugs, looting, commission of cyber-crimes, internet pornography including child pornography

¹² The reality also indicate that the State has failed to promote welfare of the people by securing and protecting as effectively as it may promote a social order in which justice, social, economic and political shall inform all the institutions of life and in particular, to minimize the inequalities in income, and to eliminate inequalities in status, facilities and opportunities amongst individuals residing in different areas or engaged in different vocations. (See the Constitution of India, Article 38 (a) and (b)).

¹³ Illegal means could refer to any means by which money or the capacity to realise one’s want is achieved is either prohibited or made punishable by laws, or prohibited by morality, values, and customary practices of the society. On the contrary, legal means of attaining economic capacity may refer to any mode of earning that is within the bounds of law or as permitted by law, i.e., by lawful means.

are some of the means of earning by illegal method. Child pornography on the Internet is not only on the rise but also has become a concern for people around the world. Indeed, it is said that “the internet has become an abundant resource for pedophiles searching for child pornography.”¹⁴ It is rapidly growing in light of the ‘technology era.’¹⁵

In addition, the following reasons appear to be prominent, *inter alia*, for the practice of child pornography.

1. Children everywhere are the easy targets to different kinds of sexual abuse, which includes child pornography, among others, as they are vulnerable.
2. Indulging children in pornography is easy as trifling offers like chocolates, toys, or dresses could make them submit to the act.
3. Obtaining consent from children is either easy or not required as they can be easily forced, owing to their tender age and physical strength. However, it must be borne in mind that the lives of children exploited through child pornography are continually affected and altered. Sometimes, the abuser may use the encounters on film to blackmail the child, force the child into further submissions, or force the child to continue association even after becoming a major and maintain secrecy.
4. Usually, children remain unaware of the consequences of the act of child pornography and they do not disclose to their parents or friends due to hesitation or fear induced by the perpetrator. This hesitation from the child, in most cases, would allow extra time for the abuser to escape or destroy evidence against him. In fact, such representations rarely get disclosed only when it is watched by somebody and subsequently revealed by that person or the child itself.

¹⁴ George Ivezaj, *Child Pornography on the Internet: An Examination of the International Communities Proposed Solutions for a Global Problem*, 8 (Mich. St. U.-DCL J. Int'l L. 819 1999).

¹⁵ Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439-40 (1997).

5. There is higher money in child pornography than compared to adult pornography,¹⁶ because the abuser transmits young children having sex or losing their virginity. However, this in the opinion of normal people is not only illegal means of earning but also inhuman conduct. Indeed, it is also a frightful attitude of such exploiters towards the future generation.
6. Certain people choose children as the subject of depiction in porn video/picture/3D¹⁷ as there is a demand for such depictions in the market! Yes, you read it right! Indeed, such people are considered to possess abnormal sexual behavior and they may fall in any of the following categories *voyeur*,¹⁸ *sadist*, *masochist*,¹⁹

¹⁶ Child pornography is one of the fastest growing businesses online, with estimated annual revenue of \$16.9 Billion annually (<http://www.webroot.com/us/en/home/resources/tips/digital-family-life/internet-pornography-by-the-numbers>). According to the Association of Sites Advocating Child Protection, child pornography is usually distributed two ways. It's either commercial child pornography that is distributed for profit, or non-commercial child pornography that is offered free or traded among offenders. See http://www.huffingtonpost.com/mary-l-pulido-phd/child-pornography-basics_b_4094430.html?ir=India&adsSiteOverride=in

¹⁷ One of the classic case studies on children as the subject of depiction in porn video/picture/3D happens to be 'Helena'. "Probably a British girl, who, tragically, may be one of the best-known sex stars on the Web. In the late 1980s, as a little girl of seven or eight, Helena became the subject of a photo series that depicted her not only in all the familiar nude poses of hardcore pornography but also showed her in numerous sex acts with Gavin, a boy of about the same age. Both are shown having sex with an adult man, presumably Helena's father. The images are collectively known by various names but the commonest is "hel-lo," that is, "Helena/Lolita." Since their first appearance they have had an astonishing afterlife; probably not a day has passed without the hel-lo images appearing anew on some electronic server somewhere in the world, and they are cherished by thousands of collectors worldwide."

See Philip Jenkins, *Beyond Tolerance Child Pornography on the Internet*, 4 (New York: New York University Press, 2001).

¹⁸ *Voyeur* is a person who practices *Voyeurism*. "It is a practice by which someone derives their sexual pleasure from watching others undressing, being nude or indulging in sex, and this interferes with the others' lives and privacy."

¹⁹ *Sadist*, *masochist* is a person who practices *Sadism* and *Masochism*, respectively. "It is relatively normal for aggression to enter natural intercourse and aggressive sexual fantasies are often acted out during normal intercourse. In sadism and masochism, however, the element of physical or psychological cruelty - inflicting pain and being subjected to it - assumes a central role in sexual functioning. It is hard to draw a line where these activities go from normal to abnormal, however evidence of distress, interpersonal difficulty and impairment in functioning due to the fixation are clues that the behaviour is abnormal."

*frotteur*²⁰ or *apedophile*.²¹

7. According to International Criminal Police Organization (INTERPOL), more than ninety-five countries have no law addressing child pornography.²² This would mean that such countries are child exploiters' paradise.

IV Meaning, definition and types of child pornography

Child pornography bring up to content that represents sexually explicit activities involving a child. Such representation could be the actual documentation of a crime scene in image form or videos, or both, which is then circulated for personal consumption or otherwise through any viable mode such as books, magazines, CDs, diskettes, bluetooth, and internet. Child pornography involves molestation and hence it is well-accepted proposition that 'child pornography in theory is molestation in practice' very often, child sexual offenders sexually exploit children through the collection, creation, or distribution of child pornography.²³ It is also said, "Child pornography seemingly is an underground and isolated activity."²⁴ Defining child pornography comprehensively, conclusively and that too in a manner to be accepted by all countries and international organisations has been a challenge given the fact that it is an international problem varying in degree and form of its existence. The optional

²⁰ *Frotteur* is a person practicing *Frotteurism*. With *frotteurism*, a person obtains sexual gratification from touching or rubbing against a non-consenting person. Frotteurs usually operate in crowded places, such as buses or subways, where they are likely to escape notice. Part of the excitement for the frotteur is their sense of power that they feel over their unsuspecting victim.

²¹ *Pedophile* is one that enjoys *Paedophilia*: *Paedophiles* are adults who seek sexual gratification through sexual contact with children. See for detailed discussion on *Voyeurism*, *Sadist*, *masochist*, *Frotteur* and *Pedophile* at <http://www.psychologycampus.com/abnormal-psychology/sexual-paraphilias-gender.html>, (last visited on Aug 12, 2014).

²² Harish V Nair, *Government aims to tackle child pornography with more 'control' over social networking sites*, news article available at <http://www.dailymail.co.uk/indiahome/indianews/article-2738034/Government-aims-tackle-child-pornography-control-social-networking>

²³ Megan Westenberg, *Establishing the Nexus: The Definitive Relationship Between Child Molestation and Possession of Child Pornography as the Sole Basis for Probable Cause*, 81 U. Cin. L. Rev. (2013)

²⁴ See <http://pedowatch.org/pedo-text.html>

Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography has made a significant attempt to define 'Child Pornography.' According to it, child pornography is an act that includes, but is not limited to, any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes, as well as for the use of a child to create such representation.²⁵ However, this definition is inclusive and non-exhaustive as it is capable of including in it any other mode of depicting the role-play of the child in sexual encounters or erotic pictures, either forced or consented.

The INTERPOL has described 'child pornography' as a visual description of sexual exploitation of a child.²⁶ The Council of Europe has defined 'child pornography' as any audio or visual material that uses children in any sexual context.²⁷ As far as the types of child pornography are concerned, it is observed that a child may be used in any of the following modes of pornography- real-child pornography, virtual-child pornography, soft-core and hard-core child pornography.²⁸ Pornography involving a child is closely associated with molestation and trafficking of children as sometimes it is that latter which may end up in the practice of kiddie pornography.

²⁵ The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, Annex II, U.N. Doc. A/54/49, Vol. III, art.2, para. c, entered into force Jan. 18, 2002.

²⁶ Interpol Recommendations on Offences against Minors, INTERPOL 61st General Assembly (1995).

²⁷ Council of Europe, Recommendation R (91)11 and Report of the European Committee on Crime Problems (1993).

²⁸ Real-child pornography is the real time transmission of images or videos or depiction of children being sexually abused, transmitted through technologies, whereas, virtual-child pornography is through graphics and it would not involve the transmission of a real child. Secondly, the child pornography may either be soft or hard-core, wherein, the soft-core content features nudity but no sexual activity, while hard-core images or videos depict actual indulgence in sexual activities.

V Child molestation and trafficking of children - As facilitator of child pornography

Sometimes, child molestation may be accompanied by an act of capturing pictures or taking of videos, which later may be shared with the external world through internet or any other mode of transmission. Similarly, the issue of trafficking of children is capable of being either a direct or an indirect facilitator of child pornography. Trafficking of children would be in the former category if it procures children for the exclusive purpose of pornography and it would be in the latter category if the reason for procurement of children were remotely related to depiction of children in sexual abuses. Indeed, the Protocol to Prevent Suppress and Punish, Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime has defined 'trafficking of children' as the recruitment, transport, transfer, harboring or receipt of a person under the age of eighteen for the purpose of exploitation (including prostitution or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs).²⁹ It is submitted that child molestation and trafficking must be dealt in severe manner to prevent further abuse of child, which may include using the child in pornography.

VI Legislative framework and schemes governing child pornography in India

The Indian legislations are modelled on the international legal instruments. At the international level, three main legal instruments address child pornography, namely, the Optional Protocol to the (U.N.) Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child

²⁹ The Protocol to Prevent Suppress and Punish, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, opened for signature Dec. 15th 2000, 2237 UNTS 319, Annex II, Article 3.

Pornography;³⁰ the Council of Europe Convention on Cybercrime;³¹ and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.³² In addition, India is a member to INTERPOL.³³ INTERPOL with its vision of connecting police for a safer world has collaborated with many international organisations³⁴ and has developed certain important investigation steps in the context of crimes against children.³⁵ However, it is surprising to note that none of the Indian laws comprehensively deal with prevention and punishment of child pornography as its subject matter. Most Indian laws, as highlighted below, deal with prohibition of human or child trafficking and punishing molestation and it is argued that in itself is insufficient to address the issue of child pornography.

The Indian Constitution imposes a duty on the State to direct its policy towards securing children, ensuring opportunities and facilities by which children could develop in a healthy manner besides ensuring conditions of freedom and dignity to children. This essentially requires protection of childhood and youth against exploitation as well as moral and material abandonment as envisaged in

³⁰ Entered into force on January 18, 2002. “The Optional Protocol and the Convention on the Protection of Children also serve as comprehensive examples of legal mechanisms that require governments to implement and provide for services to assist child victims and their families.” See Child Pornography: Model Legislation & Global Review, available at http://icmec.org/en_X1/icmec_publications/English_6th_Edition_FINAL_.pdf, (last visited on June 18, 2014).

³¹ Entered into force from July 1, 2014.

³² Entered into force from July 1, 2010.

³³ INTERPOL is the world’s largest international police organization, with 190 member countries. Its role is to enable police around the world to work together to make the world a safer place. Its high-tech infrastructure of technical and operational support helps meet the growing challenges of fighting crime in the 21st century. See <http://www.interpol.int/About-INTERPOL/Overview>

³⁴ For instance, the United Nations, European Union, G8, World Health Organisation, and some private organisations..

³⁵ For instance, it believes in Victim Identification, it is the term normally given to the analysis of photographs and films depicting the sexual abuse of a child, known as Child Abuse Material (CAM) and Image analysis. Image analysis is the examination of the digital, visual and audio content of those photographs and films for identification purposes. Clues can come from many places and in many forms, and it is the task of the victim identification specialist to retrieve those clues and piece them together using a range of specialized tools.” See <http://www.interpol.int/Crime-areas/Crimes-against-children/Victim-identification>

Part IV of the Constitution.³⁶ For this purpose, the Constitution explicitly prohibits trafficking of human beings and forced labor, and makes both as offences punishable.³⁷ However, the Constitution does not make any express reference to child pornography. Yet the duty imposed upon the State is broad enough to include preventing children from all forms of sexual exploitations.

As far as other legislations are concerned, the Immoral Traffic Prevention Act, 1956 (ITPA) is one of the main legal instrument addressing the trafficking of human beings in the country. The ITPA is focused on banning trafficking for the purpose of prostitution. Accordingly, among others, it outlaws the running of a brothel³⁸; living on the earnings of a prostitute;³⁹ procuring, inducing or taking a person for the sake of prostitution;⁴⁰ and detaining a person in a place where prostitution is carried on.⁴¹ The Act also provides for the rescue and rehabilitation of victims/survivors of trafficking, action against exploiters and increased punishment for trafficking offences involving children. In general, punishment is stringent under the Act, and ranges from seven years to life imprisonment. Like the Constitution, this Act does not refer to child pornography. It is argued that the Act ought to have provided for examination of contents of material searched besides search of premises⁴² used for trafficking or prostitution. Further, the Act could have provided that on examination of materials found in such premises, if pornographic materials are found then they must be seized and destroyed by the competent authorities.

The Indian Penal Code, 1860 (IPC), contains various provisions related to child trafficking and molestation. For instance, it imposes, criminal penalties for

³⁶ The Constitution of India, Article 39(f).

³⁷ The Constitution of India, Article 23(1) provides that traffic in human beings, forced labor is prohibited, and any contravention of this provision shall be an offence punishable in accordance with law.

³⁸ The Immoral Traffic Prevention Act, 1956, Section 3.

³⁹ The Immoral Traffic Prevention Act, 1956, Section 4.

⁴⁰ The Immoral Traffic Prevention Act, 1956, Section 5.

⁴¹ The Immoral Traffic Prevention Act, 1956, Section 6.

⁴² The Immoral Traffic Prevention Act, 1956, Section 15.

kidnapping,⁴³ abduction (including for the purpose of compelling marriage),⁴⁴ buying or selling a minor for prostitution,⁴⁵ unlawful compulsory labour,⁴⁶ importing/procuring girls and buying or selling a person for slavery.⁴⁷ In addition, sexual assault on a child under sixteen years of age, even with formal consent, amounts to rape under the IPC.⁴⁸ The Criminal Law Amendment Act, 2013 has introduced Section 354-A that holds that sexual harassment of the nature of unwelcome physical contact and advances or a demand or request for sexual favours, showing pornography as a cognizable and bailable offence that is punishable with Imprisonment which may extend to three years or with fine or with both. Some of these provisions may be liberally read to include in it child pornography. However, cardinal rule of interpreting a penal statute is strict interpretation and therefore no straining of words may be allowed. Similarly, the Young Persons (Harmful Publications) Act, 1956, addressed cases of pornographic material involving or affecting children and defines the term 'harmful publication' as 'any book, magazine, pamphlet, leaflet, newspaper or other like publication, which consists of stories told with the aid of pictures or wholly in pictures, being stories portraying wholly or mainly: i) the commission of offence; ii) acts of violence or cruelty; and iii) incidence of a repulsive or horrible nature.

The Prohibition of Child Marriage Act, 2006 also seeks to address the issue of child trafficking and child marriages, by making involvement in the promotion of child marriage a punishable offence,⁴⁹ and by making a child marriage null and

⁴³ The Indian Penal Code, 1860, Section 359.

⁴⁴ The Indian Penal Code, 1860, Sections 362 and 366.

⁴⁵ The Indian Penal Code, 1860, Sections 372 and 373.

⁴⁶ The Indian Penal Code, 1860, Section 374.

⁴⁷ The Indian Penal Code, 1860, Sections 366A, 366B and 370.

⁴⁸ The Indian Penal Code, 1860, Section 376.

⁴⁹ The Immoral Traffic Prevention Act, 1956, Section 11.

void if the child is married in connection with trafficking.⁵⁰ The Cable Television Network (Regulation) Act, 1995, lays down rules and regulations, regulates programs and thus, protects children.⁵¹ Also relevant for the repression of child trafficking is the Juvenile Justice (Care and Protection of Children) Act, 2000 which includes prohibitions on cruelty to a child;⁵² employment of a child for begging;⁵³ use of narcotic drugs or psychotropic substances against children;⁵⁴ and forcing a child into hazardous employment.⁵⁵ The Juvenile Justice Act also establishes a framework for providing care, protection, treatment, education, vocational training, development and rehabilitation to vulnerable children.⁵⁶ In terms of judicial protection, there have been a number of Supreme Court decisions aimed at combating trafficking, and ensuring rescue and rehabilitation of victims.⁵⁷ However, much remains to be done by the Court in the field of child pornography.

It is necessary to point out that the United Nations Convention on the Rights of the Child, 1989⁵⁸ (UNCRC) states that all children must be protected from all

⁵⁰ The Immoral Traffic Prevention Act, 1956, Section 12(b) and (c).

⁵¹ It lays down that no program should be carried in the cable service, which denigrates children; care should be taken to ensure that programs meant for children do not contain any bad language or explicit scenes of violence; programs unsuitable for children must not be carried in the cable service at times when the largest number of children are viewing; and no advertisement, which endangers the safety of children or creates in them any interest in unhealthy practices or forces them into begging or shows them in an undignified or indecent manner, shall be carried in the cable service.

⁵² The Juvenile Justice (Care and Protection of Children) Act, 2000, Section 23.

⁵³ The Juvenile Justice (Care and Protection of Children) Act, 2000, Section 24.

⁵⁴ The Juvenile Justice (Care and Protection of Children) Act, 2000, Section 25.

⁵⁵ The Juvenile Justice (Care and Protection of Children) Act, 2000, Section 26.

⁵⁶ To assist with this, the Juvenile Justice Act authorizes the establishment of Child Welfare Committees and protection homes in each State. *Ibid.* Section 29.

⁵⁷ For instance, *Bachpan Bachao Andolan v. Union of India and Ors.*, (2011) 15 SCC 646; *St. Theresa's Tender Loving Care Home & Ors. v. State of Andhra Pradesh*, (2005) 8 SCC 525; *Lakshmi Kant Pandey v. Union of India*, (1984) 2 SCC 244; *Baby Manji Yamada v. Union of India & Anr.*, (2008) 13 SCC 518; *Anokha v. State of Rajasthan & Ors.*, (2004) 1 SCC 382; *Staphanie Joan Becker v. State & Ors.*, (2013) 12 SCC 786; *Voluntary Health Assn. of Punjab v. Union of India & Ors.*, (2013) 4 SCC 1; *R.D. Upadhyaya v. State of Andhra Pradesh*, (2007) 15 SCC 337.

⁵⁸ Entered into force from 2 September, 1990.

forms of abuse including sexual abuse.⁵⁹ This Convention also calls for taking of appropriate measures to prevent the exploitative use of children in pornographic performances and materials by the signatories.⁶⁰ India has ratified the Convention on the Rights of the Child, 1989 as well as the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2002. The Optional Protocol mandates international obligations to pass specific laws against child pornography punishable by appropriate penalties that take into account their grave nature. It also enables extradition, mutual assistance in investigation, and seizure of property. As a preparatory step in 1998, the Indian Government adopted a 'National Plan of Action to Combat Trafficking and Commercial Sexual Exploitation of Women and Children'.⁶¹ Under this Action Plan, a monitoring mechanism was intended to oversee implementation of the Plan from the district to the central level. The Central Advisory Committee on Child Prostitution monitors State implementation of the Plan of Action.⁶²

One more key anti-trafficking intervention is the 'UJJAWALA' scheme for trafficked women and children, launched by the Ministry of Women and Child Development in December 2007. The scheme focuses on females trafficked for the purpose of commercial sexual exploitation, is concerned with its prevention,

⁵⁹ The United Nations Convention on the Rights of the Child 1989, Article 19.

⁶⁰ The United Nations Convention on the Rights of the Child 1989, Article 34.

⁶¹ It is concerned both with implementation of the ITPA and the rescue and rehabilitation of victims.

⁶² Notably, according to the United Nations Office on Drugs and Crime, the Indian Ministry of Home Affairs has initiated a comprehensive four-year anti-trafficking scheme focusing on two important areas: (a) the development of a cadre of master trainers through training of trainers of the police and (b) the establishment of Anti-Human Trafficking Units across the country, the funds for which have been committed by the Government. The latter are task forces within local law enforcement agencies, which are composed of specially trained officers responsible for human trafficking investigations. A 24-hour emergency phone service has also been created and can be accessed by children in need (or adults on their behalf). The aim is to link such children to support and care providers.

rescue and other important steps.⁶³ Similarly, the ‘Swadhar Scheme’ was introduced by the same ministry that sought to address the needs of females in difficult circumstances, including victims of sex trafficking.⁶⁴ This apart, under the Information Technology (Amendment) Act, 2008, punishment is provided for publishing or transmitting of material depicting children in sexually explicit act, among others, in electronic form.⁶⁵ To an extent Section 67-B of the Act is the caretaker of the problem. Similarly, the Protection of Child Rights Act, 2005 has sought to establish Commissions for protection of child rights which under Section 13 of the Act has the obligation to examine all factors that inhibit the enjoyment of rights of children affected by terrorism, communal violence, riots, natural disaster, domestic violence, HIV/AIDS, trafficking, maltreatment, torture and exploitation, pornography and prostitution and recommend appropriate remedial measure.⁶⁶ Besides, the Information Technology (Guidelines for Cyber

⁶³ i. “Prevention, including the formation of community vigilance groups/adolescent groups, as well as awareness generation and sensitization of police, community leaders and other relevant actors

ii. Rescue and safe withdrawal of victims;

iii. Rehabilitation, including the provision of safe shelter, food, clothing, counseling, medical care, legal aid, vocational training and income generation activities;

iv. Reintegration, involving the restoration of victims into families/communities (where they so desire) and payment of accompanying costs; and

v. Repatriation, including the provision of support to cross-border victims for their safe returns to their countries of origin.” See. Pallabi Deka and Deboleena Sengupta, *Her Body, Her Rights: In Reference To Women Trafficking In North East India*, available at http://www.academia.edu/9154140/HER_BODY_HER_RIGHTS_In_Reference_to_Women_Trafficking_in_North_East_India, (last accessed on Apr 18, 2014).

⁶⁴ For more information - <http://wcd.nic.in/revisedswadhar.htm>

⁶⁵ The Information Technology Act, 2000, Section 67-B of states, “whoever publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually explicit act or conduct or creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner or cultivates, entices or induces children to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resource or facilitates abusing children online or records in any electronic form own abuse or that of others pertaining to sexually explicit act with children is known as child pornography.”

⁶⁶ The Protection of Child Rights Act, 2005, Section 13(d).

Cafe) Rules, 2011⁶⁷ are framed which among other things deal with filtering software so as to avoid as far as possible, access to the websites relating to pornography including child pornography or other obscene information.

Though the enactment of the Protection of Children from Sexual Offences Act, 2012 has strengthened the legislative attempt to protect children from certain forms of abuse including subjecting them to pornography,⁶⁸ it is not a special legislation dealing exclusively with the problem. The Act compared to other formerly referred instruments of law has dealt with child pornography in more detail. Sections 13 and 14 of the Act specifically deal with using of a child for pornographic purposes and punishment thereof. The Act also deals with punishment for abetment of attempt to commit,⁶⁹ procedure for recording statement of the child,⁷⁰ and procedures to be followed by the special courts,⁷¹ among others. However, the Act neither does define child pornography nor address the following deficiencies as highlighted in the latter part of the following paragraph.

It would be clear from the above discussions that legislations deal with molestation and trafficking in greater detail than they do in the case of child pornography. It is important to note that the legislations have failed in indicating the proximate nexus existing between child pornography, molestation and trafficking, as explained in this article. However, the Acts are only successful in highlighting child pornography, molestation and trafficking as forms of punishable sexual abuses. Further, the Acts considered do not comprehensively

⁶⁷ Ministry of Communication and Information Technology (Dept. of Information Technology) Notification. No. G.S.R 315(E), dated 11-4-2011, published in the Gazette of India, Extra., Part II, Section 3(i).

⁶⁸ The Long Title of the Protection of Children from Sexual Offences Act, 2012 states that it aims “to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto.”

⁶⁹ The Protection of Children from Sexual Offences Act, 2012, Chapter IV.

⁷⁰ The Protection of Children from Sexual Offences Act, 2012, Chapter VI.

⁷¹ The Protection of Children from Sexual Offences Act, 2012, Chapters VII & VIII.

deal with prevention of child pornography in all modes,⁷² seizure and destroying of child pornographic materials, assistance to victims of child pornography, creation of special police combating child pornography, relief to victims besides restoration of custody with parent or suitable guardian and in defining the role of cyber police and the Department of Telecommunications in dealing with child pornography. These are the serious deficiencies in the existing laws dealing with child pornography that the policy makers must aim to address effectively. The focus must be on regulation and reduction of child pornography that could be achieved through a transformation of present law enforcement techniques than eradication as it consumes time and requires universal or collective efforts, which could be next in the State's agenda.

VII Conclusions and suggestions

The domestic legislative measures in India are insufficient to tackle the problem and it is submitted that some of the contexts and factors highlighted in this article are ignored by the policy makers which if addressed properly would act as permanent or at least long-term solution to the problem of child pornography. Undoubtedly, child pornography raises challenges to national and international legal regimes as it is connected with the issues of inequalities in income, inequalities in capacities of the individuals, unemployment, poverty, and sexual orientation, perhaps which form a vicious circle. There is evidence of growing harmonization of policing efforts worldwide in dealing with the issue. This is a good sign, as successful combating of child pornography on a global scale requires uniform legislations. If the approach were different, then it would result in making of varying laws that only aid to weaken the stance against child sexual exploitation. This would further mean that the child predators might take advantage in countries where they know they are best able to exploit children. Therefore, a uniform approach is required to combat the sexual exploitation of

⁷² On the internet and other mediums such as books, journals, magazines, pictures or paintings.

children effectively. Thus, complying with international legal standards is an initial step and the legal frame work developed and adopted by the States play a very important role in this regard. Whether the fact that legislations in India are not fully addressing the issue of child pornography takes it away from control? No, it is argued that lack of special legislation though intrudes in combating child pornography; it is the poor reporting of cases and deficiency of sensitisation among the bureaucrats that are the actual spoilers. It is also observed that cooperation from the Department of Telecommunications, cyber police and NGOs would also go a long way besides having a special legislation to deal with the problem.

In the light of the above discussions, the following suggestions are made. Firstly, the law enforcement officers and the judiciary must not ignore the relationship between child molestation, trafficking and pornography; secondly, the Internet Service Provider (ISP) must be held accountable if it authorise access to websites consisting of child porn and it is believed that it would bring a radical and a substantial reduction of child pornography on the Internet; thirdly, there must be appointment of special police wing to check the sale of child porn. Indeed, the special police could work in collaboration with NGOs, publishers and sellers (books and CDs) to achieve the desired end; fourthly, pop-ups or advertisements leading to pornographic websites on the internet must be banned to prevent people being driven to such sites either by curiosity, provocation or chance; fifthly, organisation of periodical training for enforcement officers, creation of intense public sensitisation are to be initiated at the earliest; and lastly, a special legislation or an Act that consolidates law relating to child pornography must be enacted which is capable of addressing the abovementioned issues.

PUBLIC INTEREST LITIGATION AND THE ROLE OF ENVIRONMENT NON GOVERNMENT ORGANIZATIONS IN THE PROTECTION OF ENVIRONMENT IN INDIA

*Dr. M.P Chengappa**

I Introduction

In the present era of development, urbanization and industrialization, the concerns relating to environment protection have assumed paramount importance. With the fast pace of development, the need to protect the nature and the environment can certainly not be overlooked. Population explosion, the growing trend of consumerism and the advancement in the methods of life style of the population has forced the environment in a hazardous position and serious steps need to be taken to stop the same.

To combat such situation and to acquire a sustainable manner of development, pioneering steps have been taken. The concept of Environmental Non-Governmental Organizations (hereinafter, ENGOs) as has developed today is one of such steps taken to protect and conserve the environment. The evolving of ENGOs is a result of the positive steps taken by the noblest minds of the society who are highly dissatisfied with the state of affairs. As the name suggests, the ENGOs focus primarily on the protection of environment in the interest of the public. The role of judiciary also has assumed a prime importance in the working of the ENGOs. There are myriad examples where the ENGOs have moved the judiciary by means of "Public Interest Litigation" advocating the cause of environment protection. The present paper has its focus on the same lines. The paper at hand throws light on the role of the ENGOs in the protection of the environment. The paper provides the reader with various instances where the ENGOs have played an important role by bringing to the notice of the judiciary

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any gross neglect of the environmental concerns. The first part of the paper deals with the ENGO's and its role in the protection of environment within the Indian law framework. The subsequent part of the paper delves into the response of the judiciary to the efforts of these ENGO's towards safeguarding of environment. The author shall discuss various case laws in this regard. Lastly, the author will conclude with his own findings.

II ENGO's and the Indian environmental law framework

Environment jurisprudence has evolved in a substantial manner in past two decades. The judiciary as well as the legislature has recognized environment as one of the vital aspects, protection of which is necessary as well as deemed important. But these two have not been the only chief players in this evolution. Public and common people have played an integral role in highlighting the importance of the environment protection in the eyes of judiciary as well as legislature. Rising concerns pertaining to destruction of environment has led to formation of ENGO's that have constantly voiced their concerns against the depletion of environment. Campaigning groups have been key drivers of negotiations, ranging from the regulation of hazardous wastes to a ban on land mines.¹ Constitutional provisions regarding safeguard of environment in addition to the endeavors of ENGO's have helped environmental jurisprudence develop majorly.

1. Constitutional provisions

The laws relating to the protection of environment was not a part of the Constitution of India since its inception but now form an integral part of the Constitution. The Indian Constitution imbibes some specific provisions on

¹ International Institute of Sustainable development, *The rise and role of NGO's in sustainable development*, available at <http://www.iisd.org/business/ngo/roles.aspx>, (last visited on Sep. 12, 2013).

environmental protection. The concepts, 'the right to life' and 'personal liberty' contained in Article 21 of the Constitution found new meanings through constitutional interpretation in terms of right to healthy environment.² The apex court has time and again widened the domain of Article 21 of the Constitution to include in its spectrum the right to a wholesome environment.³ Even the High Courts have not been reluctant in including the concept of right to life within the ambit of Article 21 of the Constitution. In the decision of *T. Damodhar Rao v. Special Officer, Municipal Corporation of Hyderabad*⁴ the court held that the Article 21 embraces the 'protection of nature's gifts without which life cannot be enjoyed.'⁵

In addition to the above provisions various amendments and the letter and spirit of the Constitution of India have also time and again dictated the same principle. By the Forty-Second Amendment Act, Environmental protection and the necessity to improve the environment were explicitly incorporated in the Constitution of India. Also, Article 48A was added to the Directive Principles of State Policy stating that - '*The State shall endeavor to protect and improve the environment and to safeguard the forest and wildlife of the country.*'⁶ Also, Article 51A(g) the new chapter of "Fundamental Duties" imposes a responsibility upon every citizen to - '*Protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creature.*' The Constitution of India can be regarded as the parent law in the concerns related to environment protection. Several laws have been enacted for the protection and improvement of the environment which draw validity and force from the Constitution of India. It is a matter of pride for India that the Indian Constitution

² P. Leelakrishnan, *Environmental Law in India*, 224 (3rd Edn., Lexis Nexis Butterworths Wadhwa).

³ *Subhash Kumar v. State of Bihar* AIR 1991 SC 420, *MC Mehta v. Union of India* 1992 (3) SCC 256, 25.

⁴ AIR 1987 AP 171.

⁵ *Ibid.* at 181.

⁶ The Constitution of India, Article 48A.

is the first constitution in the world which has adopted specific provisions for the protection and improvement of the environment.⁷ The Supreme Court of India has also, by means of decisions has supported the cause of protection and improvement of the environment. The Supreme Court of India has observed that the features essential to “sustainable development” such as the “precautionary principle” and the “polluter pays” principle are essential features of the environmental laws of the country.⁸

2. Public Interest Litigation: A tool for the NGOs

The Non-Governmental Organizations have moved the judiciary time and again in respect of the protection and conservation of the environment. In this regard, one important question that may be asked is why should an NGO be allowed to seek the court’s intervention in any case that does not personally affect the NGO i.e., what is the *locus standi* of the NGO in moving the court for any random environmental issue? In response to this question, the concept of Public Interest Litigation acts as an important tool. Traditionally, a petition could only be filed by a person who suffered infraction of his rights and was an “aggrieved person”.⁹ The emergence of *pro bono litigation* that is litigation at the instance of public spirited person espousing cause of others, known as Public Interest Litigation has relaxed the traditional rule considerably.¹⁰

It is by virtue of the principle of Public Interest Litigation as recognized by the Constitution of India under Articles 32 & 226 that any NGO enjoys adequate *locus standi* to commence litigation against any person or entity who or which is causing harm to the environment. In accordance with this liberalized approach, the Supreme Court has allowed various public spirited persons and social

⁷ P.S. Jaswal and Nishta Jaswal, *Environmental Law*, 40 (Allahabad Law Agency, Faridabad Haryana).

⁸ *Vellore Citizens’ Welfare Forum v. Union of India*, (1996) 5 SCC 647 at 659-660.

⁹ *Bokaro and Ramgur Ltd. v. State of Bihar*, AIR 1963 SC 516.

¹⁰ Mahendra P. Singh, and V.N. Shukla’s *Constitution of India*, 332 (11th edn., Eastern Book Company, Lucknow).

organizations to bring petitions before the Court in respect of any grave environmental concern.¹¹

The principle and practice of Public Interest Litigation has deep nexus with the constitutional provisions as enshrined in Articles 32 & 226 of the Constitution of India. The Supreme Court and the High Courts of India, in exercise of their powers under Article 32 and Article 226 of the Constitution of India can entertain a petition (in the nature of a writ petition) filed by any interested person in the welfare of the people who is in a disadvantaged position and thus, not in a position to knock the doors of the Court.¹² Time and again, the courts have entertained petitions filed by various NGOs in the nature of Public Interest Litigation regarding the protection and conservation of the environment and passed remarkable judgments regarding the same. The *Narmada Bachao Aandolan (a NGO) v. Union of India and others*¹³, the famous *Dehradun Quarrying Case*¹⁴, *Karnataka Mining Case*¹⁵, & *Samanth v. State of Andhra Pradesh*¹⁶ are a few notable judicial decisions in this regard. The process of litigation in all such cases was initiated by NGOs and voluntary organizations in the public interest.

III Role of judiciary in the protection of environment with help of PILs

Protecting environment and safeguarding it against its depletion has been one of the most debated and discussed issues. Formerly, not much recognition was given to this aspect, but due to rapid increase in rate of globalization and incessant depletion of natural resources, this issue has garnered much attention. The Supreme Court has played an extremely important role in the environmental

¹¹ Mahendra P. Singh, and V.N. Shukla's, *Constitution of India*, 333 (11th edn., Eastern Book Company, Lucknow).

¹² R.P. Kataria, and S.K. Sarkar, *Public Interest Litigations and Public Nuisances*, 4 (2nd Edn., Orient Publishing Company).

¹³ AIR 2000 SC 3751.

¹⁴ *Rural Litigation and Entitlement Kendra v. State of U.P.*, AIR 1988 SC 2187.

¹⁵ *Samaj Parivartana Samudaya & Ors. v State of Karnataka & Ors.*

¹⁶ AIR 1988 SC 1626.

protection and has applied the principle of sustainable development while deciding various cases. The judiciary has done its best in ensuring environmental protection. There are numerous cases on this point and therefore, it will be necessary to study and analyze a few important cases in this area. It is also worthwhile to mention here that, most of the environmental cases have come before the Courts through 'Public Interest Litigation' (hereinafter, PIL). Indian environmental regulations have seen considerable development in the last two decades. Most of the principles under which environmental law works in India today were assembled over the last 20 years with a predominate share from careful judicial thinking in the Supreme Court and High Courts of the State.

This active participation of the judiciary has brought a realm of change in the environmental jurisprudence. The immense contribution of the judiciary can be ratified from the fact that the Supreme Court of India has been termed as the '*Lords of Green Bench*' or Garbage supervision¹⁷ by many critics. International legal experts have been unequivocal in terming the Indian Courts of law pioneer, both in terms of laying down new principle of law and also in the application of innovative methods in the environmental justice delivery system.¹⁸ The rigid structure and framework that the environment jurisprudence has witnessed in the history of India is being broken down by the innovative directions and rules that are framed by the entire judicial framework of the nation. Unlike other litigations, the frequency with which dynamic principles are being evolved by the Supreme Court there remains no dearth of innovative methods¹⁹ in environmental

¹⁷ S.S. Prakash and P.V.N. Sarma, 'Environmental Protection vis-a-vis Judicial Activism', *SCJ* 56 (1998).

¹⁸ G.L. Peiris, '*Public Interest Litigation in the Indian Subcontinent: current Dimension*', 40(1) *International and comparative law quarterly* 66(1991), see also M.R. Anderson, '*Individual Rights to Environmental Protection in India*' in A.E. Boyle and M.R. Anderson (ed.), *Human Rights Approaches to Environmental Protection*, 1-24 (United Kingdom: Oxford University Press, 1998).

¹⁹ M.K. Ramesh, '*Environmental Justice: Courts and Beyond*', *Indian Journal of Environmental law*, 3(1) 20 (2002).

jurisprudence. A number of distinctive innovative methods are identifiable, each of which is novel and in some cases contrary to the traditional legalistic understanding of the judicial function.²⁰

The most important procedural innovation for environmental jurisprudence has been the relaxation of traditional process of standing in the Court and introducing the concept of Public Interest Litigation (PIL).²¹ Until the early 1970s, litigation in India was in its rudimentary form because it was seen as a pursuit for the vindication of private vested interests. During this time period, initiation and continuance of litigation was prerogative only to the individual aggrieved party. A complete change in the scenario in the 1980s with efforts taken by Justice P.N. Bhagwati and Justice V.R. Krishna Iyer was marked by attempts to bring wider issues affecting the general public at large within the ambit. The ambit and extent of PIL were expanded in 1980s. A number of cases on environmental issues have been initiated through PIL. Beginning with the Dehradun Lime Stone Quarrying case in 1983, followed by the Ganga Water Pollution case, Delhi Vehicular Pollution case, *Oleum Gas Leak case*, *Tehri Dam case*, Narmada Dam case, Coastal Management case, industrial pollution in Patancheru, and *T.N. Godavarman case*, all of them came to Court's attention through PIL. These cases have been initiated by Non-Governmental Organizations (NGOs), and environmental activists on behalf of other individuals and groups or public at large, to ensure the implementation of Statutory Acts and Constitutional Provisions aimed at the protection of environment and enforcement of fundamental rights. It has been found from Indian Supreme Court Case reports

²⁰ Jamie Cassels, 'Judicial Activism and Public Interest Litigation in India: Attempting the impossible,' *The American Journal of Comparative Law*, vol. 37(3) 495 (1989).

²¹ In the Indian context, some of the legal scholars prefer the expression 'Social Action Litigation' to 'Public Interest Litigation', as this tool for justice to protect basic rights of individuals and communities has, through innovations of higher Court in India, for greater positive impacts on the social lives of the people in India than the United States, where the PIL movement took roots. For more details, see Upendra Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India', in Tiruchelvam and Coomaraswamy eds., *The Role of the Court in Plural Societies*, New York: St. Martin's Press, (1987).

that out of 104 environmental cases, sixteen from 1980-2000 in the Supreme Court of India, fifty four were filed by individuals who were not directly the affected parties and twenty eight were filed by NGOs on behalf of the affected parties. This suggests that the instrument of PIL has provided an opportunity to the third party to represent on behalf of the affected people and the environment itself.

1. *Narmada Bachao Andolan v. Union of India*²²

Narmada Bachao Andolan v. Union of India is a very significant case in respect of the role of the NGOs and voluntary organizations in protecting the environment and representing the people who are unable to represent themselves in the court of law. Narmada Bachao Andolan (NBA) is a social organization consisting of farmers, adivasis, environmentalists, activists protesting against the implementation of the Sardar Sarovar Project (SSP) on the river Narmada. The major environmental problems associated with the construction of the Sardar Sarovar Dam on river Narmada was the large scale exploitation of the resources and the submerging of an enormous area of approximately 37,000 hectares of land, which includes both agricultural land and forests. Another major problem which crept up in the construction of the dam was the displacement of almost one million people which included both peasants and culturally diverse population.

The organization of Narmada Bachao Aandolan, by means of a PIL filed a petition in 1994 for the first time. The questions regarding the environmental concerns and the Rehabilitation and Resettlement of the affected people were raised before the Court by means of this petition. Since then the organization of Narmada Bachao Aandolan has fought for the protection of the environment and the rights of the disadvantaged people. In the case of *Narmada Bachao Andolan v Union of India*,²³ the Supreme Court of India observed that environment clearance

²² AIR 1999 SC 3345.

²³ (2002) 10 SCC 664.

by the Ministry of Environment and Forest, Government of India was given without proper study and without proper planning of the mitigating measures. Thus, the Environmental Impact Assessment Notification given for the construction of a dam on river Narmada was held to be inapplicable.²⁴ In the present case, the organization did not only fight for the protection for the environment but also for the rehabilitation and resettlement of the displaced persons living on the proposed project sites. The Court held that the '*Oustees should be in a better position to lead a decent life and earn livelihood in the rehabilitated locations.*'

Thus, the organization of Narmada Bachao Aandolan stands as a bright example of the important role played by the NGOs and voluntary organization in the maintenance of the ecological balance and the welfare of the people.

2. The Kudremukh Case

Environment degradation by the Kudremukh Iron Ore Company Limited (KIOCL), a Government of India and Public Sector Unit were a major issue for many environmental groups. Separate petitions were filed in the Supreme Court and High Court. The Supreme Court's response was based on an interlocutory application.²⁵ According to the petitioner mining activities were conducted by the Kudremukh Iron Ore Company Ltd. (here in after, KIOCL) within the Kudremukh National Park which were in clear violation of orders passed previously by Supreme Court. It was noted that Kudremukh National Park in which mining activities were being carried out was declared to be National Park in terms of Section 35(1) of the Forest Conservation Act.

The court accepted the contention of the petitioners and held that the mining activities were indeed affecting the environment, due to which the KIOCL was

²⁴ Justice T S Doabia, Environmental Pollution Laws in India, 893 (2nd Edn, Volume 1, Lexis Nexis Butterworths Wadhwa, Nagpur 2010).

²⁵ I A. NO. 670 of 2001 in Writ Petn. (N) No. 202 of 1995. D/-30-10-2002 filed by K.M. Chinnappa. Applicant in *T.N. Godavarman Thirumulpad. v. Union of India and others*, AIR 1997 SC SC 1228.

asked to wind up its operations within a period of five years or on the exhaustion of the oxidized weathered secondary ore, whichever is earlier in the already broken up area.²⁶ The ending up of the Company was also subjected to various conditions. Rehabilitation and reclamation and a proper eco-restoration plan prepared for the mined area and project impact area through appropriate agency at the coast of KIOCL plans being the most integral ones. Compensation of Rs 5 crore per year which would be utilized for the purposes of research, monitoring and strengthening protection of the Kudremukh National Park and for other protected areas in the State of Karnataka and transfer of property of KIOCL to the Forest Department of the State of Karnataka at book value being the other ones.

The Supreme Court's verdict on mining by the Kudremukh Iron Ore Company (KIOCL) brought significant impact on the society as well as environmental protection. The Kudremukh issue remains a major concern for many, including environmentalist, ecologists, intellectuals and civil society groups. It also has larger implications for workers, tribals, the ecology and sustainability of a larger population in those areas. Further, the Kudremukh issue also combined important issues with regard to the national park, leasing ecologically sensitive lands to the company etc.

3. *Samatha v. State of Andhra Pradesh*²⁷

In this case a social action group by name *Samatha* which works at mobilizing the *adivasi* communities to assert their rights, demanded implementation of Scheduled Areas laws and restoration of tribal lands from the control of non-tribal landlords and money lenders. *Samatha* was approached for assistance by the tribals who were denied title deeds to their lands by the mining companies which were given leases on tribal and forest lands.²⁸ *Samatha* filed a Public Interest

²⁶ LA. NO. 670 OF 2001 in writ Petn. No.202 of 1995, Para 5 SC 727.

²⁷ AIR 1988 SC 1626, 1633 – 1634.

²⁸ AIR 1988 SC 1626, 1633 – 1634.

Litigation in the Andhra Pradesh High Court in 1993, seeking issue of the writ of mandamus to terminate the mining leases in Borra Gram Panchayat area of Antagiri Mandal, which had been granted and/or renewed in favour of the private respondents. This action was taken on the ground that government does not have the power to grant leases in a Schedule land/or renewed in favour of the private respondents. These leases would violate the Fifth Schedule land transfer regulations for the Scheduled Area.

The court held that Government land, forest lands and tribal lands in the Schedules areas cannot be leased out to private industries for mining as it contravenes the Fifth Schedule of the Constitution. In addition to this directions were given to the State Government for issuance of title deeds to tribals in occupation of tribal lands in reserve forest enclosures in Borra Panchayat. One of the most essential consequences of this case was, the introduction of Constitutional Amendment wherein the principle of local self-governance based on democratic principles at Gram Panchayat level and upwards through Article 343A - 343ZG was introduced. The State Government was also directed to stop all industries from mining activities except where the mining lease had been granted to the State instrumentality, i.e., the APSMD Corporation, and these industries were to report compliance to this order within 6 months to the Registry of the Supreme Court.

4. *Parivartana Samudaya & Ors. v. State of Karnataka & Ors*²⁹

In this case the Supreme Court directed the Central Empowered committee to probe the illegal mining in Bellary and other forest regions of Karnataka and submit a report in six weeks. A three- judge Bench of Chief Justice S.H Kapadia, Justice Aftab Alam and Justice K.S.R Radhakrishnan gave this direction to the CEC after hearing counsel for Samaj Parivartan Samudaya, a Non-governmental organization, mentioned the matter and sought urgent direction. The petitioner

²⁹ SLP (C) Nos.7366-7367 of 2010, SLP (C) Nos.32690-32691 of 2010, WP (CrL.) No.66 of 2010.

alleged that rampant illegal mining was going on in Karnataka and the same had been recorded in a detailed report of Lokayukta.

5. *Dehradun Quarrying Case*³⁰

In the case of Rural Litigation and Entitlement *Kendra v. State of U.P.*, the Supreme Court entertained a petition filed by Rural Litigation and Entitlement Kendra, an NGO based in Dehradun. The said petition objected to the operation of the lime stone quarries in Mussoorie, Dehradun which resulted in serious degradation of the environment and heavily affected the ecosystem in the area. In the present case, the Supreme Court, exercising its powers under Article 32 of the Constitution of India, ordered the closure of the quarries that resulted in the upsetting of the ecological balance of the environment. A point that needs to be noted is that though no explicit reference to Article 21 of the Constitution of India was made by the Court but acting under the powers granted to the court under Article 32 presupposed the violation of right to life guaranteed under Article 21 of the Constitution of India.³¹

IV Conclusion

ENGOS have undoubtedly played a huge role in resolving the environmental disputes. The collective role of ENGOS, PILs and Supreme Court brings a hope for better environment. The increasing intervention of Court in environmental governance is being seen as a part of the pro-active role of the Supreme Court in the form of continual creation of successive strategies to uphold rule of law, enforce fundamental rights of the citizens and constitutional propriety aimed at the protection and improvement of environment. Unlike other litigations, the frequency and different types of orders/directions passed periodically by the Supreme Court in environmental litigation and its continuous engagement with

³⁰ AIR 1988 SC 2187.

³¹ Deepika Chouhan and Prabhash Dalei, *Right to live in Healthy Environment - In framework of Indian Constitution*, International Conference on Humanities, Economics and Geography (ICHEG'2012) 230 (March 17-18, 2012 Bangkok).

environmental issues have evolved a series of innovative methods in environmental jurisprudence. Hence, the trend of judicial approach in favouring development to framing environment has resulted in balanced approach.

AN OVERVIEW OF LAW RELATING TO PROTECTION OF CONSUMERS FROM MISLEADING ADVERTISEMENTS: FEW SUGGESTIONS

Dr. Sangeeta Taak*

Every one of us is a consumer in one way or the other. In today's scenario we are dependent upon the information before we buy a good. We get this information about the product through advertisement. The major sources are television, print, outdoor, radio, events, digital etc., are all means of promotion of a product.¹

Though, there is no precise law or Act that deals specifically with fraudulent or consequences of fraudulent advertisements, the consumer can claim relief upto a certain extent under The Consumer Protection Act, 1986.

The meaning of misleading advertisement is something which gives false information regarding a product, and is regarded as unethical means of gaining profits. Misleading and false advertisement violates several rights of consumers like: right to information, right to choice, right to be protected against unsafe goods, and services as well as from unfair trade practices.

Now a days, it is very easy to sell any product just by getting it popular with the help of advertisements. These advertisements looks very tempted with the acting of models. Every day, we see advertisements making claims of, quick results from slimming to healthy heart and faster growth for children. There are various chocolate drinks for kids that claim for them becoming taller, sharper etc. Certain cereal brands claim to slim you down if eaten regularly. These brands

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¹ Deceit in terms of quality, quantity, danger, services, price, etc. that practically prejudice a person's freedom of choice, all constitute fraudulent advertisements. Announcing a free gift with a particular product and increasing its amount also constitutes a fraudulent advertisement.

mostly don't carry out any studies to prove the claims made by them. As a result, consumers are left behind feeling cheated. At numerous instances consumers also face major health hazards due to the harmful effects of the product not mentioned in the advertisements and promotions of the product.

Advertising Standard Council of India (ASCI) regulates the advertisements in the television through self-regulation codes, so that such misleading acts cannot be taken place, it has placed certain codes which have to be followed by the industries to make its advertisements.

The term consumer² has been defined in Section 2(d) of the Consumer Protection Act, 1986.

Challenges before the society for filing a complaint in relation to misleading advertisement

In order to prove a case before the court of law, the consumer has to prove that the advertisement is false and the commercial activity has lead a deception to the audience. Moreover that deception has either resulted in the injury.

A person must furnish all the documents, deeds, agreements etc., that he/she has in order to solicit a remedy incase harmed already.

Selling of goods or drugs through advertisements may create an anti-social attitude. For example, an advertisement by super models of consuming liquor is a

² "Consumer" means any person who -

i) Buys any goods for a consideration which has been paid or promised, or under any system of deferred payment and includes any user of such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose. Or

ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person, who hires or avails of the services for consideration paid or promised or partly paid and partly promised, or under any system of deferred payment, when such services are availed or with the approval of the first mentioned person;

For the purpose of sub clause (i) "commercial purpose" does not include use by a consumer of goods, bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment.

kind of anti-social attitude. The advertisement of using a particular drug may help in removing conception or to take a drug within 48 hours in case of unprotected sex. The Drugs and Magic Remedies (objectionable advertisements) Act, 1954 controls only certain advertisement of certain drugs under certain cases. This act prohibits those kinds of drugs which are related to the following concepts like;

- miscarriage or prevention of conception,
- increase in sexual pleasure,
- improving menstrual disorders in women, or
- any other drug which may lead to harmful effects to women health.

These drugs can be purchased by the consumers without consulting the doctors and it may cause serious disorders or defects in women's health. Who can be held responsible for these damages? The Supreme Court of India in the case of *Zaffar Mohammad v. State of West Bengal*³ held that the advertisement was for a prohibited drug of which sale is not in the interest of general public therefore it can't be seen in the preview of freedom of speech and expression.⁴

Regulations by the government and judiciary in case of misleading advertisement

The Consumer Protection Councils are available under the Consumer Protection Act, 1986 to deal with the matters of the misleading advertisements. State Consumer Protection Councils are also constituted under the Act and these councils meet once in a year to deal with the matter of unfair trade practices. Other remedies are also available as per the law. A civil suit by the consumers is

³ AIR 1976 SC 171.

⁴ False advertising lures the potential consumers away from the honest producers and injures the individual consumers by inducing transaction premised on inaccurate or false information. It affects the general economic interest of the country and is antisocial in nature.

an option and civil actions by the competitors.⁵ Various cases have been filed by the consumers in case of misleading advertisements. However it is very difficult to satisfy the case beyond reasonable doubt.

In the case of *Colgate-Palmolive (India) v. Anchor Health & Beauty Care*⁶ and M/S. Swabhanu Universal Agencies, the stockist of Colgate Palmolive (India) Ltd., has come up with a similar suit C.S.No.452 of 2008 for identical reliefs. Pending their suit, they have come up with - O.A. No.495 of 2008 for an interim order of injunction restraining the respondent from in any manner continuing with the telecast of the impugned television advertisements, filed the grievance of the plaintiff in these suits is that the defendant recently came out with a television commercial, advertising their tooth paste "Anchor". The TV Commercial was telecast in Tamil as well as in hindi in various satellite channels. In the advertisement, a hindi film actress advises her daughter that "Anchor" tooth paste is the only tooth paste containing triclosan, calcium and fluoride and that it is the first tooth paste providing all round protection. Ultimately, the actress questions the viewer as to when the viewer would change over to "Anchor" tooth paste.

The plaintiff has filed the story board of the tamil version of the impugned advertisement and its Hindi version as plaint document continues. Similarly, the third and fourth objections of the plaintiff with regard to the fluoride protection and the efficiency of Triclosan, are on the basis that every tooth paste is supposed

⁵ In India it is very difficult to prove that the consumer has been a victim of the misleading advertisements. The consumers have to prove from his side that the product bought by him is an act done in the influence of false advertisements. The greatest problem in Indian economy is to prove the misleading advertisements is exaggeration in statements about the quality of the product which is the main concern. To file any case regarding misleading advertisements it has to be proved beyond any reasonable doubt.

⁶ O.A. No. 494 of 2008. These Original Applications along with O.A. No. 495 of 2008 in C.S. No. 452 of 2008, having been heard on 01.08.2008 in the presence of Mr. Aravind P. Datar, Senior Counsel for M/s. Sathish Parasaran, R. Parthasarathy & Rahul Balaji, Advocates for the Applicant in both Original Applications, and Mr. C. Harikrishnan, Senior Counsel and Mrs. Elizabeth Seshadri for M/s. Iyer & Thomas, H. Karthik Seshadri, Advocates for the respondent in both Original Applications.

to contain 1000 ppm (particles per million) of fluoride and that the fluoride content is also regulated by Rule 149-A of the Drugs and Cosmetics Rules. When the ingredients of a normal tooth paste are just the same, the claim of superiority that the defendant's product would give 30 percent more cavity protection and 10 times more effective in fighting bacteria, were obviously false, intended to mislead the consumers.

Original application praying that this Hon'ble Court be pleased to grant an order of ad-interim injunction restraining the Respondent, its directors, officers, agents, assigns in business and service, from showing, screening, exhibiting or telecasting the offending TV commercial or advertisements [the theme of which is titled - Anchor All Round Protection], or any other advertisements which seek to disparage/denigrate the Applicant's products by making false and misleading representations either directly or indirectly or in any other manner whatsoever pending disposal of the above suit.

In another suit of *United Breweries Limited v. Mumbai Grahak Panchayat*⁷ Maharashtra State Commission issued following direction to the appellant that the misleading advertisements shall be removed within one week on coaches of Western Railway at their cost that is “Keep Liquor Away from Young Generation India's No. 1 Only Natural Fruit Drink *Limbu Paani, Nariyal Paani, Yehi hai Apna Alag Andaz*”

Mumbai Grahak Panchayat filed a complaint against the appellant as well as Western Railway for having adopted Unfair Trade Practices in prominently displaying/ exhibiting false, misleading and surrogate Liquor Advertisements on the coaches of the western railway trains and to seek discontinuance of the same along with corrective advertising by the opposite parties to neutralize the effect of the said advertising and punitive damages.

⁷ (2007) CPJ 102 NC.

United Breweries manufactured Bagpiper, London Pilsner and Derby Special Whisky and Beer. The said advertisement made a claim of "India's No. 1 and the World's No. 3." This description matches with the 'Bagpiper Whisky' and not "Bagpiper Soda'. There was no Bagpiper Soda in the market. The second advertisement is of "London Pilsner Soda' describing 250 ml. pint 'soda' available for Rs.16 and on inquiry, it was stated that 'London Pilsner' has come out with 250 ml. bottle of beer. The complainant's volunteers had purchased a bottle of 250 ml. London Pilsner Soda beer costing Rs.16. London Pilsner advertisement of railway trains proclaimed "*Ab Cold Drink Out.*" An attempt was made to substitute cold drinks with beer. This was an attempt to induce the young generation to switch over from cold drinks to beer. There was third advertisement of "Derby Special Soda." On inquiry, it was found that there was no Derby Special Soda anywhere in the market and there was "Derby Special Whisky" available with Wine Dealers. These attempts were highly objectionable, deplorable and also patently illegal. Liquor advertisement is prohibited in Maharashtra as per Section 24 of Bombay Prohibition Act, 1949.

The complainant approached the railway authorities but they did not pay any heed to their request for stopping the advertisement on the ground that agreements had already been executed.

Feeling dissatisfied with response, the complaint was filed before the State Commission against the appellant and western railways seeking discontinuance of Unfair and Deceptive Trade Practice of displaying/carrying the impugned advertisements of Bagpiper, London, Pilsner and Derby Special Soda from western railway trains.

Issue with regard to impugned advertisements of Bagpiper Soda, London Pilsner was also taken to the Advertising Standards Council of India. The complaint with regard to London Pilsner was upheld by the Advertising Standards Council of India and the Council held that the advertisement is misleading by

ambiguity since the headline, "*Ab cold drink out*" and the claim of "Rs.16 only Rs.3 refundable deposit," is not supportive of the product mentioned-'pint glasses,' and contravened Chapter 1.4 of Advertisement Code. The Council further held that the advertisement is surrogate advertisement for an alcoholic beverage brand and contravened the Advertisement Code. Written request was also made to the advertiser to withdraw the advertisements.

Similarly, complaint against Bagpiper Soda was also upheld.⁸ On recommendation of the Central Consumer Protection Council, the Consumer Affairs, Food and Public Distribution Department, Government of India has set up a working group on "Misleading Advertisements" to address various problems that consumers face with regard to misleading advertisements. There is a specific clause in the Consumer Protection Act, 1986, Section 14(l) (HC): to issue corrective advertisement to neutralize the effect of misleading advertisements at the cost of the opposite party responsible for issuing such misleading advertisements. The State Commission in the light of the evidence on record took the view that Railway Department had contravened its own guidelines. O.P. No. 2 issued surrogate advertisements for liquor. Both the parties are responsible for misleading and surrogate advertisements and both were held liable to issue corrective advertisement and after referring the Australian Competition and Consumer Commissions order, issued the above mentioned direction for prominently displaying the corrective advertisement mentioned herein above.

The appellant feeling aggrieved by the order of State Commission has filed this appeal and contends that legal standards required for corrective

⁸ The mention of the word "Soda" in an inconspicuous manner, while boldly stating the brand name "Bagpiper" with the baseline, "India's largest, World's No. 3," was misleading by its ambiguity and contravened Chapter 1.4 of the Advertisement Code. It is further held that the advertisement is surrogate advertisement for an alcohol produce brand and contravened Chapter III of the Advertisement Code. Similar request was also made to the Advertiser to withdraw the advertisement.

advertisements would relate to factual perquisites. The appeal was dismissed accordingly with cost of Rs. 5,000 to the respondent.

Similarly a case has been decided by the Supreme Court of India in re of *Centre for Public Interest litigation v. Union of India & Ors.* on 22 October, 2013.

The writ petition was preferred for constituting an independent Expert/Technical Committee to evaluate the harmful effects of soft drinks on human health, particularly on the health of the children, and also for a direction to Respondent No. 1 Union of India to put in place a regulatory regime which could control and check the contents in a particular chemical additive in foods, including soft drinks. Further, direction was also sought for against respondent no. 1 to make it mandatory for the soft drinks manufacturers to disclose the contents and their specific quantity on the labels of soft drinks, including appropriate warnings, qua a particular ingredient, and its harmful effects on the people.

The Court held that any food article which is hazardous or injurious to public health is a potential danger to the fundamental right to life guaranteed under Article 21 of the Constitution of India. A paramount duty is cast on the States and its authorities to achieve an appropriate level of protection to human life and health which is a fundamental right guaranteed to the citizens under Article 21 read with Article 47 of the Constitution of India.

Further it held that the provisions of the FSS Act and PFA Act and the rules and regulations framed thereunder have to be interpreted and applied in the light of the Constitutional Principles, discussed above and endeavor has to be made to achieve an appropriate level of protection of human life and health. Considerable responsibility is cast on the authorities as well as the other officers functioning under the above mentioned Acts to achieve the desired results. Authorities are also obliged to maintain a system of control and other activities as appropriate to the circumstances, including public communication on food safety and risk, food

safety surveillance and other monitoring activities covering all stages of food business.

These decisions are welcoming step to remove the misleading advertisements in the interest of the public.

Conclusion

In order to keep the consumers aware about the quality of the product it is necessary to provide the free, fair and efficient functioning of a free market. Packages and labels must enable the consumers to obtain accurate information with regard to quality and quantity of the product then it will be easy for the consumers to value the product in appropriate and efficient manner. Therefore, the government must come forward in regulating advertising process to achieve highest goal in the marketing of consumer goods in a developed country like India.

Advertising Standard Council of India (ASCI) regulates the advertisements in the television through self-regulation codes, so that such misleading acts do not take place, it has placed certain codes which have to be followed by the industries to make its advertisements. The efforts of ASCI are amenable but as it can't act as *suo motu* i.e. until a complaint is been launched it can't take any action and hence the misleading advertisement are rampant/continuity. The Consumer Protection Act deals with the compensation to the consumers, the law define misleading advertisements as an unfair trade means. The telephone regulatory authority, insurance regulatory authority etc. has also made rules to combat misleading advertisement.

CONSTITUTION AS THE SUPREME LAW: A CRITICAL ANALYSIS OF CONSTITUTIONS OF UNITED STATES OF AMERICA, INDIA AND UNITED KINGDOM

*Piyush Kumar**

“The aim of every political Constitution is, or ought to be, first to obtain from rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.”¹

- James Madison

I Introduction

The present article opens by giving a brief informative account of notion of constitutional supremacy and its philosophical roots. It moves on to test the notion of Constitutional Supremacy in the United States of America from where the notion has originated for the first time in the constitutional history of the world. The author has also analysed how far the Constitution of India is the supreme law of the land. A critical analysis of the role of Indian Judiciary in upholding and maintaining the supremacy of the Constitution has also been done in the course of discussion on notion of constitutional supremacy in India. The notion of Parliamentary Sovereignty in order to develop a better understanding of the constitutional supremacy is also discussed in this article. The notion of constitutional supremacy is very flexible in nature but almost in all the democratic nations it is an established fact barring a few exceptions like the United Kingdom.

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¹ James Madison, *The Federalist*, (1788).

II The notion of constitutional supremacy and its philosophical roots

The views expressed by Sir Edward Coke in *Dr. Bonham's Case*² although they had not been incorporated by British in their Constitutional Law, were relied on in *Writs of Assistance Case* in 1761 and may have played some part in persuading the colonies to provide for judicial review in the Constitution of the United States.³ The status of the Constitution as a higher order of law, prior and superior to the powers of the legislative branch was articulated very clearly by the Supreme Court of United States of America by *Justice Samuel Chase* in the case of *Calder v. Bull*⁴ in 1798. He observed that:⁵

“I cannot subscribe to the omnipotence of a state legislature or that it is absolute and without control. An act of legislature, contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority.”

The Constitution is said to be a law of superior obligation; and consequently that if it were to come into collision with an act of the legislature, the latter would have to give way.⁶

In order to understand the philosophical roots of the notion of Constitutional Supremacy it is pertinent to mention the words of *Chief Justice Marshall* in *Cohens v. Virginia*.⁷ He observed that the people made the Constitution and the people can unmake it. It is the creature of their will and lives only by their will.⁸

Constitutional Supremacy is the derivative of popular sovereignty, which is the fundamental principle from where the state and the federal institutions acquire

² 8 Co. Rep. 114

³ Lord Irvine of Lairg, *Sovereignty in Comparative Perspective; Constitutionalism in Britain and America*, 76 (NYU L.R. 5 2001).

⁴ 3 US (3 Dall.) 386 (1798).

⁵ *Ibid.*

⁶ *Eakin v. Raub* 12 Serg and Rawle 330 (1825).

⁷ 19 U.S.264.

⁸ *Ibid.*

their legitimacy.⁹ It reflects the notion of social compact of a population, which is engaged in the political process and upon whose license the continued existence of the institutions of government depends and it also, invokes the idea of participatory democracy.¹⁰

III Constitution as the Supreme Law – position in the United States of America

The Constitution of United States of America is the oldest written national constitution in continuous use, and it influenced later international figures establishing national constitutions. United States was the first country to incorporate the notion of Constitutional Supremacy in its Constitution and since then the notion has been adopted by many Constitutions which have heavily relied on American model with a little bit of differences in the mode of expression. The Constitution was adopted on September 17th, 1787 by the Constitutional Convention in Philadelphia, Pennsylvania, and ratified by conventions in eleven States. It went into effect on March 4th, 1789. The first ten constitutional amendments ratified by three-fourths of the States in 1791 are known as the ‘Bill of Rights.’ The Constitution has been amended seventeen additional times (for a total of 27 amendments) and its principles are applied in courts of law by judicial review.

It is to be noted that point that the Constitution of the United States of America declares in its preamble, that the Constitution has been enacted by the people of United States of America, which is a conclusive evidence of the intention of the people of United States that they want to make the Constitution as the supreme law of the land. The Preamble of Constitution of United States of America reads as follows:

“We the people of the United States, in order to form a more perfect Union, establish Justice, insure domestic tranquillity, provide for the

⁹ *Supra* note 2 at 9.

¹⁰ *Supra* note 2 at 10.

common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America. Article VI Clause 2 of the Constitution of United States of America expressly provides that Constitution shall be the supreme law of the land.” It provides:¹¹

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.”

Dicey the eminent Constitutional Law scholar has also termed the Constitution of United States of America as the Supreme law of the land in the following words:¹²

“But if their notions were conceptions derived from English law, the great statesmen of America gave to old ideas a perfectly new expansion, and for the first time in history of the world formed a Constitution which should in strictness be the law of the land.”

The notion of Constitutional Supremacy has been formally recognized by *Chief Justice Marshall* in the famous case of *Marbury v. Madison*¹³ in the following words:¹⁴

“...the people have an original right to establish, for their future government, such principles as...shall most conduce to their own happiness. As the authority from which they proceed is supreme...they are designed to be permanent. This original and supreme law will organizes the government and assigns to different departments their respective

¹¹ The Constitution of United States of America, Clause 2 Articles VI.

¹² A.V. Dicey, *Law of the Constitution*, 144-148 (10th Edn., 1962).

¹³ *Marbury v. Madison*, (1801) 1 Cr. 137 (175).

¹⁴ *Ibid.* at 175.

powers. The Constitution is a *supreme paramount law*, unchangeable by ordinary means...and consequently an Act of legislature repugnant to the Constitution is void...”

In order to establish this fact that in United States of America Constitution is the supreme law of the land it is pertinent to mention the following observation of the *Sutherland J.* In the case of *Carter v. Carter Coal Co.*¹⁵:

“The supremacy of the Constitution as law is thus declared without qualification. That supremacy is absolute; the supremacy of the statute enacted by Congress is not absolute but conditioned upon its being made in *pursuance of the Constitution.*”

The express provisions of the Constitution and decisions of the United States Supreme Court lead to a conclusion that in United States of America, Constitution is the Supreme law of the land and all the other laws enacted by the Legislature has to be in consonance with the express provisions of the Constitution.

IV Judicial review a legal instrument to uphold and maintain supremacy of The Constitution of the United States of America

Judicial review is one of the most important features of a written Constitution. For the same reason even when the Constitution of United States does not have an express provision for judicial review but it is one of the features of the constitution. The framers of the constitution assumed that it would follow from the common law doctrine of *ultra vires*, according to which courts had the power and duty to invalidate the act of an inferior body which transgressed the mandate of a superior authority which is binding upon the inferior or subordinate body.¹⁶ Shortly after the adoption of constitution when the Bill of Rights was presented before the first congress, *Madison* argued for the adoption of judicial review in the following words:

¹⁵ (1935) 29 US 238 (296-297).

¹⁶ D.D. Basu, *Comparative Constitutional Law*, 405 (2nd ed., 2008)

“The judges will consider themselves in a peculiar manner the guardian of these rights.”

It is a noticeable point that the Constitutional Supremacy is protected by the authority of an independent judiciary, which is under a pious obligation to act as the guardian and protector of the constitution. Whenever any organ of the state is found to transgress the limitations imposed upon its powers by the Constitution, in a properly framed litigation before it, it would be the duty of the court to invalidate such offending act, including a law made by the legislature – because the constitution constitutes the supreme law which has to be interpreted and applied by the court of law.¹⁷

Article III in defining the extent of the Supreme Court’s original jurisdiction, did not include among its grants of power the authority to issue writs.¹⁸ *Marbury v. Madison*¹⁹ was the first case in which the Supreme Court asserted that a federal court has power to refuse to give effect to congressional legislation if it is inconsistent with the court’s interpretation of the Constitution.²⁰ In this case *Marshall C.J.* placed the doctrine of judicial review upon a sure footing by saying that since the judges as directed by the constitution itself, took oath to support the Constitution which constitutes the paramount law of the nation, it was the duty of the judges to annul any law made by the Legislature which violates the constitution or was repugnant to it.²¹ To the American minds, the concepts of the Constitution as ‘Supreme Law’ and of judicial review are intertwined and

¹⁷ *Ibid.* at 333.

¹⁸ Constitution of United States of America, Refer Article III.

¹⁹ *Supra* note at 11.

²⁰ In *Marbury v. Madison* Supreme Court held that the Congress acted unconstitutionally in conferring upon the Court authority in conferring upon the court authority to issue original writs of mandamus in cases not affecting ambassadors, other public ministers and consul or those in which state is a party.

²¹ *Supra* note 12 at 405.

inseparable, as would appear from the words of Sutherland J. in the case of *Carter v. Carter Coal Co.*²², in the year 1935. Sutherland J observed:²³

The supremacy of the Constitution as law is thus declared without qualification. That supremacy is absolute, the supremacy of the statute enacted by Congress is not absolute but conditioned upon its being made in *pursuance of the Constitution* and a judicial tribunal clothed by that instrument with complete judicial power and therefore, by the very nature of the power, required to ascertain and apply the law to the facts in every case or proceedings properly brought for adjudication, must apply the supreme law (i.e., Constitution of United States of America) and reject the inferior statute whenever the two conflicts....

But the doctrine of judicial review is under criticism right from its inception and the justifiability of Court acting as the guardian of the Constitution to control the other two co-ordinate branches on the following grounds, *inter alia*:

- (a) The legislature represents the popular sovereignty while the judges do not and
- (b) since the Constitution set up three co-ordinate organs which are equally bound by the constitution, the determination of unconstitutionality or interpretation of the Constitution should rest with the three organs so far their own acts are concerned? It would therefore be a violation of the constitution itself if the judiciary assumes the function of invalidating the acts of the other organs on the ground of unconstitutionality.

As far as first criticism is concerned, it is true that Legislature represents the popular sovereignty but it does not enjoy the same status as it enjoys in United Kingdom. It derives its powers and authority from the Constitution and has to function within the limitations imposed by the Constitution. The second criticism

²² *Supra* note 12 at 405.

²³ *Ibid.*

also does not have a substantial rationale behind them because Constitution is a legal document and it can only be interpreted by an expert authority i.e., an independent judiciary. Moreover it is a blatant violation of principles of Natural Justice if the respective organs of the government are authorised to decide on the unconstitutionality of their acts. It is also too late in the day to reopen the controversy, for the Marshillian arguments have been consistently established by later Supreme Court decisions in a plethora of cases, like, *U.S. v. Butler*,²⁴ *Minersville School Dt. v. Gobitis*²⁵ etc., which have been taken by the executive and the legislature to be binding upon themselves.²⁶

V Supremacy of Constitution an essential characteristic of federal Constitution

The Constitution of United States of America was enacted by way of an agreement between various independent states to form a federation. Therefore, the concept of federalism has been incorporated in the Constitution in the strict sense and powers and functions of the federal and state has been demarcated very clearly. The three essential characteristics of federalism in the Constitution of United States of America are:

- a. Supremacy of a written Constitution;
- b. Distribution of powers amongst the various organs of the federation and of the regional units of the federation by the provisions of that constitution; and
- c. Judicial review or the enforcement of that Supreme Constitutional as law.

It is pertinent to mention the observation made by Dicey on American federalism, which is as follows:

²⁴ (1936) 297 U.S. 1 (62).

²⁵ (1940) 310 U.S. 586 (600).

²⁶ *Supra* note 12 at 407.

“In doing so created modern federalism. For the essential characteristic of federalism ...the supremacy of the Constitution... the distribution of powers... the authority of the judiciary – reappear though no doubt with modifications, in very true federal state.”²⁷

The guardianship of Judiciary in enforcing the constitution expands where there is a constitutional division between the federal and the State, with a consequential distribution of powers as between the two units as laid down in the Constitution, that is to say where the constitution is federal.

VI Constitution as the supreme law – position in India

It has already been mentioned that Constitutional Supremacy is a derivative of popular sovereignty. The Constitution of India derives its legitimacy from the citizens of India which is evident from the declaration in Preamble²⁸ that the Constitution has been enacted by ‘the People of India.’ Unlike U.S.A. Constitution nowhere it is expressly mentioned in the Constitution of India that it is the Supreme Law of the land. There are two provisions Article 13(2) and Article 254(1) which make it clear that inconsistency with the express provisions shall render a law made by the legislature but there is no express mention of the words like ‘Supreme Law’, ‘Paramount Law’ etc.

However, the Supreme Court in *A.K. Gopalan v. State of Madras*²⁹ made it amply clear that even without such express provisions, the result would have been the same, and the court would have been obliged to strike down such inconsistent law to be unconstitutional and void; because the Constitution constitutes the paramount law of the land and imposes certain legal limitations upon the powers of the legislature, which it is the duty of the court to enforce.³⁰ The reason why there is no need of any express provision declaring the Constitution as the

²⁷ *Supra* note 8 at 144-148.

²⁸ The Constitution of India, The Preamble.

²⁹ (1950) SCR 88.

³⁰ *Supra* note 12 at 322.

Supreme Law of the land has been beautifully explained by *Das J.*, in *A.K. Gopalan*³¹ case in these words:³²

“the written Constitution of India is supreme above all the three limbs of Government and therefore, the law made by the Congress, in order to be valid, must be in conformity with the provisions of the Constitution. If it is not the Supreme Court will intervene and declare that the law to be unconstitutional and void.”

It is pertinent to mention the observation of *Bhagwati J.*, in *State of Rajasthan v. Union of India*³³ in which he termed the Constitution as *suprema lex*. He observed:³⁴

“...the Constitution is *suprema lex*, the paramount law of the land, and there is no department or the branch of government above or beyond it. Every organ of Government be it the Executive or the Legislature or the Judiciary, derives its authority from the constitution and has to act within the limits of that authority.”

Beg C.J., in *A.D.M. Jabalpur v. Shukla*³⁵ also declared the Constitution of India as the supreme law of the land. The notion of Constitutional supremacy has been firmly established in India when in the famous case of *Kesavanad Bharti v. Union of India*³⁶ where ‘Supremacy of Constitution’ recognized as a part of basic structure of the Constitution. The opinion of the court is followed in the *Reference Case*³⁷, *Indira Gandhi v. Raj Narain*³⁸ etc.

³¹ (1950) SCR 88.

³² (1950) SCR 88 (99,100).

³³ AIR 1977 SC 1361 (1413-14).

³⁴ *Ibid.*

³⁵ AIR 1976 SC 1207.

³⁶ AIR 1973 SC 1461 (Sikri C.J., Shelat and Grover JJ, And Palekar J recognized the Supremacy of Constitution as a part of Basic Structure).

³⁷ AIR 1965 SC 745 (762).

³⁸ AIR 1975 SC 2299 (571-75).

VII Role of judicial review in maintaining and upholding the supremacy of constitution

In India the doctrine of judicial review has been embodied in Article 13 of the Constitution itself, so far as the provisions guaranteeing the Fundamental Rights (in Part III) are concerned. Clause 1 and 2 of this Article lay down that any law made by any Legislature in India, whether before or after the commencement of the Constitution shall be void if and in so far as it offends against any of the Fundamental Rights included in Part III.³⁹ It is a noticeable point that Indian Courts acknowledged the *Marshalling doctrine* of the Constitution being the higher or paramount law or fundamental law of the land and judiciary has been assigned the pious task of protecting and interpreting the provisions of the Constitution. Same can be beautifully explained in the words of Kania C. J., as follows:⁴⁰

“It is difficult upon any general principles, to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written constitution give that authority... but it is only in express constitutional provisions limiting legislative power and controlling the temporary will of majority by a permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the authority of the Court of Justice to declare void any legislative enactment.”

Unlike Constitution of U.S.A., the Constitution of India has express provisions which provides for judicial review. There are numerous provisions in the Constitution of India which provides that the Acts of the Legislature or any other

³⁹ *Mahendra v. State of U.P.* AIR 1963 SC 1019 (1029-30).

⁴⁰ *A.K. Gopalan v. State of Madras* (1950) SCR 88 (100).

organ are subject to the provisions of the Constitution. As Dr. M.P. Jain has rightly observed:⁴¹

"The doctrine of judicial review is thus firmly rooted in India, and has the explicit sanction of the Constitution."

In the framework of a Constitution which guarantees individual Fundamental Rights, divides power between the Union and the States and clearly defines and delimits the powers and functions of every organ of the State including the Parliament, Judiciary plays a very important role under their powers of judicial review. The power of judicial review of legislation is given to the judiciary both by the political theory and text of the Constitution. There are several specific provisions in the Indian constitution providing for judicial review of legislation such as Articles 13, 32, 131-136, 143, 226, 145, 246, 251, 254 and 372.

Article 372(1) establishes the judicial review of the pre-constitutional legislation similarly Article 13 specifically declares that any law which contravenes any of the provision of the part of Fundamental Rights shall be void. Even our Supreme Court has observed, even without the specific provisions in Article 13 the court would have the power to declare any enactment which transgresses a Fundamental Right as invalid. The Supreme and High Courts are constituted as the protector and guarantor of Fundamental Rights under Articles 32 and 226. Articles 251 and 254 say that in case of inconsistency between union and state laws, the state law shall be void.

VIII Article 13(2) and Article 254(1) the very basis of the notion of constitutional supremacy – an analysis

Article 13(2) and Article 254(1) are the very basis of notion of Constitutional Supremacy in Indian Constitution. Article 13(2) of the Constitution reads as follows:

⁴¹ <http://www.preservearticles.com/2011100314420/essays-on-the-doctrine-of-judicial-reviewq-in-the-indian-constitution.html>, (last visited on September 19, 2012).

The State shall not make any law which takes away or abridges the right conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void and Article 254(1) of the constitution reads as follows:

(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

The abovementioned provisions are the only provisions under the Constitution of India which casts a duty upon the Courts of Justice to declare a law unconstitutional which contravenes the express provisions as provided under these Articles. The Supreme Court has struck down various legislations and declared them as violative of Article 13(2) or Article 254(1). But it is a noticeable point that merely because the Constitution uses the word ‘void’ only at two places, it should not be supposed that the result would be otherwise if the Legislature violates other mandatory provision of the Constitution outside the Fundamental Rights in Part III.⁴²

IX PART III – Constitution as the Supreme Law – position in Britain

1. In U.K. Parliament is Supreme not the Constitution: It is a well-known fact that Britain does not have a written Constitution. The notion of parliamentary sovereignty is fairly established in Britain and can be termed as the basis of Constitutional Law. But it is a noticeable point that the sovereignty principle has not always been rigidly endorsed. During the early seventeenth century certain

⁴² *Supra* note 12 at 409.

judicial decisions had questioned whether the courts owed unqualified loyalty to Parliament's enactments.⁴³ Most notably in *Dr. Bonham's Case*⁴⁴ Chief Justice Coke said that the common law could "control acts of Parliament and sometimes adjudge them to be utterly void; for when an act of Parliament is against common right and reason, or repugnant or impossible to be performed, the common law will control it and adjudge such act to be void."⁴⁵ Similar sentiments were expressed by Chief Justice Hobart in *Day v. Savadge*⁴⁶ in these words:

"Even an act of Parliament, made against natural equity, as to make a man judge in his own case, is void in itself."

However, later on in his classic work *Institutes* Justice Coke's view had become markedly more orthodox, and he accepted that Parliament possessed a transcendental and abundant jurisdiction which could not be confined within any bounds.⁴⁷ The correctness of Justice Coke's view was placed beyond doubt by the revolution at the end of seventeenth century. The most enduring definition of Parliamentary Sovereignty is given by Albert Venn Dicey. He described Westminster Parliament as having 'the right to make or unmake any law whatever, and no person or body is recognized by the Law of England as having a right to override or set aside its legislation.'⁴⁸

It is pertinent to mention the informative remark made by Lord Reid in *British Railways Board v. Pickin*⁴⁹ which reads as follows:

"The idea that the court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and startling to anyone with any knowledge of the History and Law of our Constitution.....Since the

⁴³ *Supra* note 2 at 3.

⁴⁴ 77 Eng Rep. 646 (K.B. 610).

⁴⁵ *Ibid.* at 652.

⁴⁶ Eng. Rep 646 (K.B.1610).

⁴⁷ *Supra* note 2 at 4.

⁴⁸ *Supra* note 2 at 4.

⁴⁹ 1974 A.C. 765.

Supremacy of Parliament was finally demonstrated by the revolution of 1688 any such idea has become obsolete.”⁵⁰

The supremacy of Parliament is undisputed in Britain and for the last three hundred years British Courts have not questioned Parliament’s capacity to enact any legislation which it chooses.

2. Rule of Law and Parliamentary Sovereignty: The doctrine of Rule of Law is a product of English Common Law and is in vogue from the times of *Magna Carta* and was illuminated by Dicey. The significance of the doctrine can be understood by the fact that it is a very important feature of both unwritten and written Constitutions. In Britain this doctrine is of high importance as it is the only viable authority in the hands of British citizens to guide the Parliament to act in a just fair and reasonable manner.

The doctrine of Rule of Law or Supremacy of Law involves three distinct propositions or kindred conceptions:⁵¹

- (a) In England the government possesses no arbitrary and discretionary power, apart from the power conferred by law and no man is punishable, nor can be made to suffer in body or goods, except for a district breach of law established in the ordinary legal manner before the ordinary courts of land.
- (b) Not only is no man above the law in England, but herd every man whatever be his rank or condition, is subject to the law of the realm and is subject to the ordinary jurisdiction of the ordinary tribunal.
- (c) The general rules which in other countries form part of a constitutional code, are not in England, the source but the consequence of the rights of the individuals. In England, these rights are rather inductions drawn from judicial decisions determining the rights of the private persons in

⁵⁰ *Ibid.* at 782.

⁵¹ *Supra* note 12 at 324-325

particular courts brought before the courts in accordance with the ordinary law.

It is a noticeable point that the doctrine is derived from Parliamentary Sovereignty and is also complementary to it. But it should always be kept in mind that the doctrine is predominated by the sovereignty and legal omnipotence of the Legislature.

X Conclusion

After briefly analysing the provisions of the Constitution and the leading judgements of the Supreme Court, it has become very clear that the Constitution of United States of America and India are the Supreme Law or Paramount Law in their respective legal systems. The notion of Constitutional Supremacy is a derivative of the Popular Sovereignty and thereby establishes a relationship of trust between the citizens and state. Unlike Parliamentary Sovereignty, which has turned the pure theory of legal positivism into legal reality, the notion of Constitutional Supremacy gives a higher status to the Fundamental Rights and makes it impossible to divorce legal validity from considerations of political and social morality. The existence of Constitution as Supreme Law enjoins an approach, which embraces an ineluctable connection between questions of law and questions of morality.

It has already been discussed in the length of Article that how judiciary has played an active role in upholding and maintaining the Supremacy of Constitution in U.S.A. as well as in India. In a democratic country, the notion of Constitutional Supremacy can only be protected and preserved by an active and independent judiciary. The Constitution provides only the skeleton; it is the judiciary which supplies flesh and blood to its provision and make it a living document for the present as well as future generation. The ultimate objective of Constitution is the welfare of people and judiciary has been entrusted with the task to make sure that

the other two branches of government i.e., Legislature and Executive are heading towards achieving the welfare of people.

However, the power of judicial review is being heavily criticized in U.S.A. as well as in India but unfortunately fail to provide any viable alternative to uphold and maintain the Supremacy of Constitution. Some scholars have started terming the judicial review as judicial over reach or judicial terrorism. But they have failed to foresee the grave consequences which will be there if judiciary is stripped of its power of judicial review.

As far as Indian Constitution is concerned a party enjoying a requisite majority in both houses of Parliament can easily amend the most of the provisions of Constitution and thereby pose an imminent threat to the Supremacy of the Constitution. The amendment power under the Indian Constitution if not used in a justifiable and prudent manner shall make the Constitution a very flexible document. But after the evolution of doctrine of Basic Structure in the case of *Keshavanand Bharti v. Union of India*⁵² the Supreme Court has, to a larger extent has restricted the amendment power of the Parliament. But at the same time one should not lose sight of the fact that amendment provisions are the very essence of the Constitution as it is through these provisions that constitution can easily absorb the shocks of civil, political, social and economic changes in the society in which it operates. Therefore, provisions providing for amendment are inevitable for any Constitution in order to make its provisions inconsonance with the needs and demands of the people. It is the utmost duty of all the three organs of the Government i.e., Legislature, Executive and the Judiciary to exercise the power and perform the functions assigned to each of them in welfare and justice oriented manner. While exercising their power and performing their function each organ must strictly refrain from taking such decisions which might put one or the other kind of danger to the supremacy of Indian Constitution.

⁵² AIR 1973 SC 1461.

JUDICIAL ACTIVISM IN INDIA – AN ANALYSIS

*Sunil N. Bagade**

I Introduction

“I answer to you from my doors ever open.

I respond to whatever request you make.”¹

This is the promise, according to Justice R. C. Lahoti, which the active Judiciary holds out. Society is dynamic. It undergoes change from time to time and along with it needs of the society also undergo changes. This necessitates change in the law so as to meet the needs of the changing society. If the law remains unchanged then it may become obsolete or a dead letter.

No doubt, bringing change in the law is the task of legislature, but it is already over-burdened. The adoption of concept of welfare state has increased the responsibilities of the government manifold. Due to this factor, the government may not immediately respond to the changing needs of the society. This imposes immense responsibility on the judiciary to interpret and apply the law in such a way so as to fulfill the needs of changing society. At the same time, it is well known fact that the Legislature, while enacting a law, cannot visualize all situations arising in future. As such, the judicial creativity or craftsmanship is necessary to fill in the gaps in the law. This judicial creativity is called as 'judicial activism.'

By judicial activism, the higher judiciary in India is successful in meeting the needs of the changing society, bringing changes in the law. Though judicial activism has proved to be an effective instrument of social change, as well as of

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¹ R. C. Lahoti, C.J.I., “Judicial Activism – Constitutional Obligation of the Courts”, AIR (J) 177 (2005).

law, it has often been a subject of controversy. Many a times the criticism against the judicial activism is based on the ‘doctrine of separation of power’. This doctrine envisages the three organs of the government that have been well defined independent powers to be exercised and no organ can interfere with the powers conferred on other organs. However, judicial activism involves some encroachment by judiciary in legislatures sphere of work.

This article aims at understanding the meaning of judicial activism and the reasons for its growth. It also seeks to examine the Constitutional basis of judicial activism, impact of judicial activism on doctrine of separation of power, on the development of law, etc.

II Meaning of judicial activism and jurisprudential basis

The term ‘judicial activism’ has no statutory definition. Broadly speaking, it connotes that function of the judiciary which represents its active role in promoting justice.²

According to the Webster’s new 20th Century dictionary, the word “activism” has been stated to mean ‘the doctrine or policy of being active’.³

Therefore, judicial activism means judiciary being active in adjudicating the matters and administering justice which leads to judicial pronouncements on different intricate issues whereby, new approach towards legal philosophy is sought to be developed.⁴

Justice R. C. Lahoti defines judicial activism as:

“It is a description of performance of duty consistent with the needs of time, by the judiciary and judges who are active and within the parameters of Constitution and the laws.”⁵

² R. C. Lahoti, C.J.I., “Judicial Activism – Constitutional Obligation of the Courts”, AIR (J) 177 (2005).

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

Thus, it can be said that judicial activism means the performance of the duty by the judiciary, wherein it takes active role in promoting justice by evolving new approach towards legal philosophy so as to meet the changing needs of the society.

The term judicial activism has often been confused with the concept of PIL i.e., Public Interest Litigation, they are not synonymous.⁶ In fact, PIL is the off shoot of judicial activism. Judiciary by liberalizing the rule of *locus standi* allowed the public spirited persons, organizations etc., to espouse the cause of oppressed people.

There are many reasons which led to the growth of judicial activism. These reasons can be broadly summarized into three main reasons. They are:

- 1) Changing needs of the society and paucity of time on the part of legislature and executive to respond to the needs of the society.
- 2) Violation of human rights by the executive.
- 3) Lethargic attitude of executive and legislature.

There are two theories which have been propounded to explain the evolution of judicial activism. They are:⁷

- 1) Theory of vacuum filling
- 2) Theory of social want

1) Theory of vacuum filling - It states that due to the inaction and lethargic attitude on the part of legislature and executive, a vacuum is being created in the governance of the country. This necessitates the judiciary to take steps to fill up the vacuum.

For instance, failure on the part of the government to respond to the issue of sexual harassment of women at workplace made the Supreme Court of India to

pronounce Guidelines in *Vishaka v. State of Rajasthan*⁸ to curb the same.

⁶ Sampat Jain, *Public Interest Litigation*, 178 (1st Edn., 2002).

⁷ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1156979 (last visited on Jan 18, 2014).

2) Theory of social wants - It states that judicial activism emerged due to the failure of the existing laws to cope up with the existing situations and problems in the country.

The verdicts of higher judiciary in human rights violation, environmental degradation, violations of labour legislation cases are the classic instances, wherein the judiciary tried to remedy the failure of existing laws to protect the interest of the people.

These two theories highlight different reasons for the emergence of judicial activism. The point to be noted here is that, judicial activism does not mean Judiciary deciding the case on its whims and fancies, but it denotes the adjudicatory process wherein the court relies on many factors such as canons of interpretation, prior decisions, international conventions, etc. It is generally said that creative adjudicatory process carried on with *dictionary in hand, decisions in head and Constitution at heart*.⁹

Judicial activism has few unique characteristics by which it can be identified and they are:¹⁰

- 1) Precedential Activism
- 2) Jurisdictional Activism
- 3) Judicial Creativity
- 4) Remedial Activism

1) Precedential Activism - The court either by over ruling or departing from its earlier decisions pronounces new judgment which forms the precedent to the subsequent cases. For instance, in *Sajjan Singh v. State of Rajasthan*¹¹ the court held that the Parliament has the unrestricted power to amend the Constitution. However in *Golak Nath Case*¹² and *Keshvanand Bharati case*¹³ the court held that

⁸ AIR 1997 SC 3011.

⁹ N. S. Chandrashekhara, *Labour Law and Activism of Apex Court*, 349 (Vol. 21, CULR 1997).

¹⁰ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=330266 (last visited on Jan 18, 2014).

¹¹ AIR 1965 SC 845.

¹² AIR 1967 S C 1643.

the power to amend the Constitution is subject to the basic structure of the Constitution.

2) Jurisdictional Activism - Generally interpreting and applying the law is the role of judiciary, but under the guise of judicial activism, it lays down rules to be observed which actually is not in its domain. For instance, in *Vishaka v. State of Rajasthan*¹⁴ the court laid down the guidelines relating to the prevention of sexual harassment of women at workplace which remained as a model law till the enactment of the Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act, 2013.

3) Judicial Creativity - Judicial Activism involves creative role on the part of the judiciary. The principle of compensatory jurisprudence evolved in *Rudul shah* case,¹⁵ absolute liability principle in *Bhopal gas tragedy* case¹⁶ etc., are the examples for the creative role of judiciary.

4) Remedial Activism - The judiciary evolves new remedies in order to remedy the wrongs. The principle of compensatory jurisprudence evolved under writ proceedings is the example.

The concept of judicial activism has the jurisprudential basis. *Sociological school of law* acknowledges the role of judiciary in bringing changes in the law. In fact, the chief exponent of this school, Roscoe Pound has expressly said that the main aim of the law is social engineering and lawyers and judges are engineers who have to balance the individual interest with interest of society with least friction.¹⁷

American realists do speak of role of judiciary in bringing changes in the law. In fact, Justice Holmes says that 'law is what the court does (i.e., decision) rather

¹³ AIR 1973 S C 1461.

¹⁴ AIR 1997 SC 3011.

¹⁵ *Rudul Shah v. State of Bihar*; AIR 1983 SC 1086.

¹⁶ *Union Carbide Corporation v. Union of India*; (1989) 3 SCC 38.

¹⁷ R.W.M. Dias, *Jurisprudence*, 430 (5th edn., New Delhi, Aditya Books Pvt. Ltd., 1994).

what it states.’¹⁸ Even Julius Stone recognizes the role of judiciary as a law giver. He calls jurisprudence as *lawyer’s extraversion*.¹⁹ By this he means that the lawyers’ and judges’ have to interpret the law in the light of changing needs of society and provide for the same.

III Origin and growth of judicial activism in India

It is said that history of judicial activism can be traced back to 1893, when Justice Mehmood of Allahabad High Court delivered a dissenting judgment dealing with the rights of under trials. It was a case of an under trial prisoner who could not afford to engage a lawyer. The court proceeded with the case by relying on his written submission. However, Justice Mehmood in his dissenting judgment held that the term “heard” denotes when somebody speaks and not merely being read. Thus, he tried to give broad interpretation to the term “heard” and laid the foundation for the judicial activism in India.²⁰

The concept of judicial activism gained impetus especially after adoption of the Constitution of India and took momentum during 1980s. During that period Indian Economy was undergoing a sea change. Agri centric economy was treading on the path to become industry centric economy. During this transition period the Judiciary witnessed the violation of human rights, labour rights, degradation of environment, etc. Adding to this, the inordinate delay on the part of Executive and the Legislature to act swiftly to remedy the state of affairs, made the Judiciary to assume pro-active role in justice dispensing.

Further, the judicial activism in India is the outcome of power of *judicial review* as conferred by the Constitution.²¹ Judicial review means scrutinizing the acts of other organs of government by the courts to make sure that they act within

¹⁸ M.D.A. Freeman (ed.), *Lloyd’s Introduction to Jurisprudence*, 800 (7th edn., London, Sweet and Maxwell Ltd., 2001).

¹⁹ Julius Stone, *Legal System and lawyers’ Reasoning*, 25 (2nd edn., Delhi, Universal Law Publishing Co. Pvt. Ltd., 2004).

²⁰ S. P. Sathe, *Judicial Activism in India*, 76 (I edn., New Delhi, Oxford University Press, 2002).

²¹ *Supra* note 1 at 178.

the limits of their competence as provided under Constitution. Article 13 of the Constitution specifically provide that any law in contravention of provisions of Part –III of the Constitution will be void and this power to negative the validity of the statute has been conferred on Judiciary.

In U.S. the Constitution does not specifically provide for judicial review. The Supreme Court of U.S. has assumed this power by creative interpretation in *Marbury v. Madison*.²² This power extends for reviewing both legislative and administrative acts. Even in India, both legislative and administrative acts are subject to judicial review.

In the initial days, the Supreme Court was reluctant to use the power of judicial review for the liberal interpretation of the statutes and adhered to the words of the provisions of law. This is evident from the decision of the Supreme Court in *A.K. Gopalan v. State of Madras*.²³ The court in this case narrowly interpreted Article 21 i.e., right to life and personal liberty merely to mean freedom from physical restraint and not more than that.

This tendency of court to adhere to the letters of law was described as “black letter law tradition” by Dr. Rajiv Dhavan.²⁴ The aggravated form of this tradition could be seen in *A.D.M. Jabalpur v. Shiv Kant Shukla*,²⁵ wherein the court held that during proclamation of emergency under Article 352 of the Constitution, a court is powerless to protect an individual from the actions of the state.

This does not mean that there was no judicial activism at that period. But it was not resorted frequently. *Romesh Thappar v. State of Madras*²⁶ is a classic example, wherein the Supreme Court of India upheld the freedom of press against prior censorship and read it in Article 19(1)(a).

²² 5 U.S. (Cranch 1)137 (1803)

²³ AIR 1950 SC 27.

²⁴ *Supra* note 23 at 41.

²⁵ AIR 1976 SC 1207.

²⁶ AIR 1950 SC 124.

The judicial activism gained importance and came to public gaze when court took the pro-property stand as against to the property related policies of government. In *Kameshwar Singh v. State of Bihar*,²⁷ the Patna High Court upheld the objection pertaining to differential rates of compensation provided under the law reforms legislation as violative of equality clause of Constitution. The Parliament responded to that decision by amending the Constitution. By Constitution (First Amendment) Act of 1951 two new Articles 31A and 31B were introduced in the Constitution and certain property related laws were listed in 9th schedule so as to keep them out of the scope of judicial review.

When the legislature sought to delete the provision relating to Right to property under Article 19(1)(f), the Supreme Court in *Golaka Nath v. State of Punjab*²⁸ clearly held that constitutional amendment is a law under Article 13 of the Constitution and the power of the Parliament to amend the Constitution are subject to fundamental rights. The concept of judicial activism gained popularity by the decision in *Keshavananda Bharati v. State of Kerala*,²⁹ wherein the Supreme Court evolved a doctrine of 'basic structure' subject to which the power to amend Constitution can be exercised.

Until the end of emergency period declared in 1975, the main subject of judicial activism was property rights. But the grave violations of fundamental rights during emergency period made the judiciary to come out of traditional approach and the focus of judicial activism shifted from property rights to civil liberties. The classic example is *Maneka Gandhi v. Union of India*,³⁰ wherein the court interpreted Article 21 liberally which expanded horizons of the said Article touching upon all aspects of life.

²⁷ AIR 1951 Pat. 91.

²⁸ AIR 1967 SC 1643.

²⁹ AIR 1973 SC 1461.

³⁰ AIR 1978 SC 597.

Now-a-days, the court has gone one step ahead. To protect the sanctity of legislature, it has intervened in the affairs of it. In *Jagadambika Pal v. Union of India*³¹ and in 2005 Jharkhand Assembly case³² where the Governor of that State setting aside the claim of majority party to form the government asked Shibu Soren, who enjoyed no majority, to form government, the Supreme Court intervened in the matter and issued guidelines for summoning the session and holding floor testing.

Thus, the concept of judicial activism developed and has stood on strong base in India. Though, it has been criticized by many scholars, but the court by judicial activism stood for the protection of rights, environment, sanctity of legislature etc.

IV Judicial activism and constitutional obligations

The basic question which arises while dealing with judicial activism is whether Constitution of India empowers the court to resort to it? Constitution of India envisages “doctrine of separation of power” but not in strict sense. The doctrine provides that each organ of the state has distinct powers to be exercised and no organ should encroach upon the powers of other organs. *Cooley* highlights the significance of the doctrine of separation of power thus:

“This arrangement gives each department a certain independence, which operates as a restraint upon such actions of others as might encroach on the rights and liberties of the people, makes it possible to establish and enforce guarantees against attempts at tyranny.”³³

Though Indian Constitution specifically demarcated the powers and functions of three organs, but it has not completely provided for the separation. It has

³¹ (1999) 9 SCC 95.

³² Editorially, *Judicial Activism: An issue to ponder at*, 11 Vol.5, No.5 Lawz (2005).

³³ D. Rajeev, *Separation of Powers and Judicial Activism: Tradition Versus Modernity*, 329 (Vol. 21, CULR 1997).

adopted 'checks and balance' type of system³⁴ and also few powers of one organ have been assigned to other organ. For instance, the President, executive head of State exercises few judicial and legislative (pardoning and ordinance) powers.

The relevance of this doctrine in the Indian context has been elucidated by the Chief Justice Mukherjee in the classic case, *Ram Jawaya v. State of Punjab*³⁵ in the following words:

"...it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the state, of functions that essentially belong to another. However, the executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also, when so empowered, exercise judicial functions in a limited way."

From this decision, it can be inferred that the organs of government have to exercise their functions within their limits, though they are having certain constitutionally assigned limitations. However, the Supreme Court recognized the need of one organ exercising certain powers of other organs in *Bandhua Mukti Morcha v. Union of India*,³⁶ wherein the court observed that it is well recognized proposition that in a certain sphere the Legislature is possessed of judicial power, the executive possessed of legislative power and judiciary possessed of some legislative powers.

If judicial activism were to be examined in the light of doctrine of separation of power, it violates the doctrine, but in the system of checks and balance, the judicial activism fits in. The other aspect to be noted here is that, the cherished goals of Constitution i.e., Liberty, Equality and Justice requires the judiciary to be active so as to give effect to those goals.³⁷

³⁴ Mohd. Ali Ashraf, *Judicial Legislation and The Doctrine of Separation of Power*, 160 (2BLJ, 2008 (2)).

³⁵ AIR 1955 SC 549.

³⁶ AIR 1984 SC 803.

³⁷ Dr. M. S. Rashi, *Judicial Activism and Judicial Restraint*, AIR (J) 45 (1999).

V Judicial activism and the development of law

Law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic development taking place in a country. For a law to be living, it must be growing, and law which regulates life must keep pace with the life. As new situations arise the law has to be evolved in order to meet the challenge of such new situation. Law cannot afford to remain static.

Law must respond to the new urges and aspirations. Regarding the philosophy of law, Dean Roscoe Pound observed that law is an instrument of social engineering. The point to be noted here is that law can sustain social order and hold together human beings constituting the society only if it keeps pace with changing social setup, values etc.³⁸

The task of modifying the law to meet the changing aspirations, values of the society is on the Legislature. But with the adoption of the concept of welfare state, it has been overburdened with many tasks.³⁹ As such it may not be possible to respond to the changing needs of the society. And if the changing needs are not meted out at proper time then that may cause disturbance in the society. This task of molding the law to changing situations of the society has been taken up by the judiciary as it has interest in maintaining the peace and harmony in the society. This activism on the part of the higher judiciary in India has played a vital role in the development of law and keeping the law in tune with the changes in the society.

The most important achievement which can be attributed to judicial activism is the expansion of rule of *locus standi* in *S. P. Gupta v. Union of India*.⁴⁰ Until that case, the traditional rule was that only that person could approach the court whose rights have been violated or who was wronged. But in the above cited case, the Supreme Court while extending the scope of *locus standi* said that not

³⁸ Soli J. Sorabjee, Judicial activism – boon or bane? 3 SCC (J), 26 (2008).

³⁹ *Supra* note 6 at 170.

⁴⁰ AIR 1982 SC 149.

only aggrieved person, even the public spirited person or organization can approach the court for espousing the cause of the disadvantage.

This pronouncement paved the way for the developments in law. The most significant offshoot of the extension of *locus standi* rule is the emergence of the concept of Public Interest Litigation⁴¹ (PIL) which empowers the public spirited person to file petition before the High Court or Supreme Court to get the wrong redressed. Another important development in this field is the concept of “Epistolary Jurisdiction.”⁴² In cases of grave violation of human rights, the letters addressed to the court or judge have been converted into writ petitions and accordingly dealt with by the court. The other remarkable developments emerged out of judicial activism are:

1. Expansion of horizon of Article 21: By way of liberal interpretation the Honourable Supreme Court of India and also the High Courts have expanded the reach of Article 21 of the Constitution.

In the initial days of the commencement of Constitution, the Supreme Court was hesitant to liberally interpret Article 21 of the Constitution. This is evident from *A.K. Gopalan v. State of Madras*⁴³ wherein the Supreme Court refused to interpret the Article 21 liberally so as to include principles of Natural Justice within its sphere. The court in this case narrowly interpreted the Article 21 i.e., right to life and personal liberty merely to mean freedom from physical restraint and not more than that.

The imposition of emergency and the grave violations of human rights during that period made the Supreme Court to take up the task of activist court in order to protect the human rights and to act as the guardian of the Constitution of India.⁴⁴ This resulted in the liberal interpretation of Article 21. In *Maneka Gandhi v.*

⁴¹ *Supra* note 6 at 182.

⁴² *Ibid.* at 184.

⁴³ AIR 1950 SC 27.

⁴⁴ D. P. Madon, J., ‘Judicial Activism - An essential part of the judicial function’, Vol.11, IBR 248 (1984).

*Union of India*⁴⁵ the court resorted to liberal interpretation of Article 21 and gave a new dimension to it. It held that the right to live is not merely restricted to physical existence but it includes within its ambit the right to live with human dignity.

Elaborating on the same view, the court in *Francis Coralie v. Union Territory of Delhi*,⁴⁶ categorically said that right to life and personal liberty is not restricted to “mere animal existence.” It is more than just physical existence. The court emphatically said that right to life is not confined to the protection of any faculty or limb through which life is enjoyed or the soul communicates with the outside world, but it 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 and shelter and facilities for reading, writing and expressing ourselves in diverse forms, moving about and mingling with fellow human beings. This liberal interpretation paved the way for the expansion of the horizons of Article 21 to include various aspects of life and liberty of individuals.

2. Environmental jurisprudence: The Indian judiciary has taken a very active stance in protecting the environment for the welfare of the people. The judiciary took active steps towards environmental protection by infusing pro-environmental steps in the Constitution and by declaring ‘right to healthy environment’ as a fundamental right guaranteed under Article 21 of the Constitution.

In *M.C. Mehta v. Union of India*,⁴⁷ the Supreme Court ordered the closure of tanneries at Jajman near Kanpur, which were the causes of pollution of Ganga River. The most remarkable aspect of activism of the court in this sphere is the development of indigenous environmental jurisprudence by way of coining new concepts such as, *Polluter Pays principle*, *Absolute liability*, *Sustainable development* etc.

⁴⁵ AIR 1978 SC 597.

⁴⁶ (1981) 1 SCC 608.

⁴⁷ (1987) 4 SCC 463.

The efforts of the Apex court in protection of environment and in the prevention of degradation of environment through public interest litigation is indeed laudable particularly when the Legislature is lagging behind in bridging the lacuna in the existing legal system and administration is not working properly.

3. Protection of children: Standing tall for the welfare of the child: The Honourable Supreme Court of India with the strong notion that “Today’s children are tomorrow’s citizens” has touched upon many aspects of problems surrounding the rights of children. For this purpose, the court took the full advantage of directive principles of state policy, international conventions and the existing statutes.

The glaring example concerning to this filed is *Sheela Barse v. Secretary, Children Aid Society*⁴⁸ wherein the Supreme Court observed that if there is no proper care of children of today, the future of the country will be dark. It is the obligation of every generation to bring up children who will be citizens of tomorrow, who will hold the country’s banner high and protect the prestige of the nation. If the child commits wrong for want of proper attention, training and guidance, it will indeed be a deficiency of the society and of the government of the day. A problem child is indeed a negative factor. Every society must, therefore, devote full attention to ensure that children are properly cared for and brought up in proper atmosphere where they could receive adequate training, education and guidance in order that they may be able to have their rightful place in the society when they grow up.

In *Laborers Working on Salal Hydro Project v. State of Jammu and Kashmir*,⁴⁹ the Court directed that whenever, the central government undertakes a construction project, which is likely to last for a considerable period of time, it should ensure that children of the construction workers who are living at or near

⁴⁸ (1987) 3 SCC 50.

⁴⁹ 1983 Lab. I.C. 542.

the project site are given facilities for schooling. The court also specified that this may be done either by the central government itself or if the central government entrusts the project work or any part thereof to a contractor, necessary provision to this effect may be made in the contract with the contractor.

Further, in *M.C. Mehta v. State of Tamil Nadu*⁵⁰ the court took progressive stance made a remarkable contribution to the child rights jurisprudence. The decision has attempted to tackle the problem of child labour. A writ under Article 32 was filed by Mr. M. C. Gupta contending that the fundamental rights of the children against exploitation were being grossly violated in match and fireworks industries in Sivakasi where children were employed. The Court therein noted that the manufacture process of matches and fireworks is hazardous giving rise to accidents including fatal cases. Therefore, keeping in view the provisions contained in Articles 39(f) and 45 of the Constitution, it gave directions as to how the quality of life of children employed in the factories could be improved. The Court prohibited the employment of children in such hazardous industries and formulated various guidelines for the rehabilitation of such children.

4. Upholding the dignity of women and gender justice: In *AIR India v. Nargesh Mirza*,⁵¹ the Court declared Air India Regulation 46(i)(c) which provided for the services of the Air Hostesses to stand terminated on first pregnancy, as violative of Article 14 as it sought to discriminate only on grounds of sex. In categorical terms the Court observed;

“the provision according to which the services of air hostesses would stand terminated on first pregnancy is not only manifestly unreasonable and arbitrary but contains the quality of unfairness and exhibits naked despotism and is, therefore, clearly violative of Article 14 of the Constitution. It amounts to compelling the hostesses not to have any children and thus interfere with and divert the ordinary course of human

⁵⁰ AIR 1991 SC 417.

⁵¹ (1984) 4 SCC 335.

nature. By making pregnancy as a bar to continuance of ordinary course of air hostess, the corporation seems to have made an individualized approach to a women's physical capacity to continue her employment even after pregnancy which undoubtedly is a most unreasonable approach. The termination of the services of an air hostess under such circumstances is not only a callous and cruel act, but an open insult to Indian womanhood the most sacrosanct and cherished institution. Such a course of action is extremely detestable and abhorrent to the notions of a civilized society. Apart from being grossly unethical it smacks of a deep rooted sense of utter selfishness at the cost of all human values. Such a provision, therefore, is not only manifestly unreasonable and arbitrary but contains the quality of unfairness and exhibits the quality of unfairness and exhibits naked despotism and is, therefore, violative of Article 14"

The other important pronouncement of the court in this area is *Vishaka v. State of Rajasthan*⁵² wherein the court dealt with the problem of sexual harassment of women at work place and laid down elaborate guidelines pertaining to it to protect the dignity, honor of women folk and to provide conducive atmosphere for work.

5. Standing for the dignity of Bonded Labor: The concern of the Court for the protection of the destitute and the have-not can be firmly witnessed in *Bandhu Mukti Morcha v. Union of India*⁵³, wherein the Court observed that the strict adherence to the adversarial procedure can some times lead to injustice, particularly when the parties are not evenly balanced in social or economic strength. Where one of the parties to a litigation belongs to a poor and deprived section of the community and does not possess adequate social and material resources, he is bound to be at a disadvantage as against a strong and powerful opponent under the adversary system of justice, because of this difficulty in

⁵² AIR 1997 SC 3011.

⁵³ AIR 1984 SC 803.

getting competent legal representation and more than anything else, his inability to produce relevant evidence before the court. Therefore, when the poor come before the court, particularly for enforcement of their fundamental rights, it is necessary to depart from the adversarial procedure and to evolve a new procedure which will make it possible for the poor and the weak to bring the necessary material before the court for the purpose of securing enforcement of their fundamental rights. If the adversarial procedure is truly followed in their case, they would never be able to enforce their fundamental rights and the result would be nothing, but a mockery of the Constitution. Therefore, the Courts should abandon the *laissez faire* approach in the judicial process particularly, where it involves a question of enforcement of fundamental rights and forge new tools, devise new methods and adopt new strategies for the purpose of making fundamental rights meaningful for the large masses of people.

6. Protection of human rights: The other area wherein the Supreme Court has played a vital role in the development of law is the protection human rights. Whenever the human rights have been violated by the acts of state it is the Supreme Court which came to the rescue of the people as they could not fight against the mighty state.⁵⁴ Concerning to this filed the court evolved a new jurisprudence, namely, compensatory jurisprudence wherein the Supreme Court started awarding compensation in the writ proceedings for the violation of the human rights.

VI A need to have restraint on judicial activism

No doubt, judicial activism helped in the development of law, innovating new remedies to remedy the wrongs, and to activate the Executive and Legislature but it has negative consequences associated with it. This has been discussed in detail as follows.

⁵⁴ Supra Note 43 of 28, Soli J. Sorabjee.

1. Judicial adventurism: Judicial activism should not amount to judicial adventurism. The critics of judicial activism have expressed the fear that it may turn to be judicial adventurism.

Judicial adventurism means judiciary disregarding the fundamental separation of powers underlying Constitution and encroaching upon the powers of executive and legislature. Judiciary in the guise of activism should not take over the administration by government. It is said that, ‘an activist court is no substitute for good governance.’⁵⁵

2. Lack of enforcement machinery: The judiciary in the guise of activism has laid down many guidelines, rules but it lacks machinery to enforce the same and oversee its implementation. More over such guidelines issued in disregard to the economic conditions of state bound to fail.⁵⁶ It is also said that as judiciary is not the elected body as such it does not represent people’s will like legislature. And it has no expertise to make law applicable generally. Hence it should not be allowed to lay down laws.

3. No interference in policy decisions: As a rule of judicial restraint the court has made it a point that in policy decisions no court intervention will be exercised. This is really a sound policy as it is the executive and the legislature which can understand the needs of the society more clearly and it can lay down the rules which will be having general application rather than individual application in particular case.⁵⁷

The glaring example is *Vincent Panikalungara v. Union of India*⁵⁸ wherein the Supreme Court of India while agreeing on the point that ‘right to life’ as enshrined in Article 21 includes protection of health and just, humane conditions refused to

⁵⁵ Editorially, “Judicial Activism in Public Interest Litigation”, 16 – 28 (Vol.2, No.10 Halsbury laws, 2008).

⁵⁶ S. K. Agarwala, ‘Public Interest Litigation in India – A critique’, 36 (1st edn., Bombay, N. M. Tripathi Pvt. Ltd., 1995).

⁵⁷ *Supra* note 6 of 244.

⁵⁸ (1987) 2 SCC 165.

interfere with the executive and to issue directions to the central government for maintaining the standard of drugs and banning of import, manufacture, sale and distribution of such drugs as that was a policy decision to be taken by executives.

In *State of H.P. v. Student's Parent, Medical College, Shimla*,⁵⁹ the Supreme Court of India has categorically stated that the court should be extremely careful to see that under the guise of the redressing public grievance it does not encroach upon the sphere reserved by the Constitution to the executives and the legislature.

4. Threat to the independence of judiciary: The active intervention of judiciary in the guise of activism may create a situation wherein the very independence of judiciary may be at stake.⁶⁰

Realizing these short comings and necessity to protect the delicate balance between the other two organs of the state, the Supreme Court of India way back in 1991 in *Dharwad PWD Literate Daily wages employees' case*⁶¹ said that judicial activism should be resorted to with judicious restraint. This caution has received elaborate exposition in *Divisional Manager, Aravali Golf Club v. Chander Hass*.⁶² In this case, while addressing the importance of judicial restraint, the court said that judges must exercise judicial restraint and must not encroach into the executive or legislative domain. The court specifically said that under our Constitution the Legislature, Executive and the Judiciary have been given their own broad spheres of operation and for any of the three organs encroaching upon the domain of another is not proper and violates the Constitutional scheme.

VII Conclusion

Judicial activism is a part of judicial function. It only connotes the creative, liberal interpretation of the provisions to meet the exigencies, changing conditions of the society that is also within the bounds of law. It is not judicial adventurism

⁵⁹ (1985) 3 SCC 169.

⁶⁰ *Supra* note 20 of 44.

⁶¹ 1992(2) LLJ 318 (SC).

⁶² JT 2008 (3) SCC 221.

as the judiciary is not trying to usurp the power of other two organs. From the study of judicial decisions, it can be said that the judiciary has interfered in those matters where the justice demanded such intervention and where the Executive and the Legislature failed to take steps.

It can be made out that the quest for social justice and relief of human suffering is the paramount motivation for judicial activism. It has laid down various principles in different fields such as environmental law, human rights law, protection of women and ensuring equality of treatment, protection of laborers and the protection of children, etc.

No doubt, it has helped the development of law. But it may lead to encroachment of powers of other organs. It is said that, if the Constitution of India has stood the test of time, it is because the three pillars of the democracy have respected the jurisdiction of each other. Therefore, it is necessary to have judicial restraint on the exercise of judicial activism so that the balance of power as provided under the Constitution should not be disturbed.

ROCKET EMISSIONS AND THE ENVIRONMENT: NEED FOR LEGAL REGIMES

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I Introduction

Emissions from the launch of rockets into space pose a huge risk to the earth's climate and the ozone layer. A number of scientific studies have concluded that though the scientific uncertainty prevails over the extent of damage caused by each type of rocket propellant, rocket launches certainly affect the climate and deplete the ozone layer.¹

In the recent years there has been a huge increase in rocket launches with new states entering the space club.² There has also been increase in suborbital rocket launches on account of private players who have invested large amounts of money in hope of returns in the form of payload contracts and space tourism.³ It is to be noted that the National Aeronautics and Space Administration (NASA), European Space agency (ESA), and the new entrants in the space club and the private players have designed space vehicles which increasingly use solid rocket motors

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¹ Martin Ross et al., *Limits on the Space Launch Market Related to Stratospheric Ozone Depletion*, 7:1 *Astropolitics* 50 (2009); Martin Ross et al., *Potential climate impact of black carbon emitted by rockets*, 37 *Geophysical Res. Letters*, 1, 5 (2010); World Meteorological Organization, *Scientific Assessment of Ozone Depletion 4.6* (2002), available at http://ozone.unep.org/new_site/en/scientific_assessment_2002.php (last visited on Apr. 25, 2015); R. Friedl et al., *Study blazing new trails into effects of aviation and rocket exhaust in the atmosphere*, 80(38) *EOS* 437, 437- 443 (1999).

² *South Korea launches space rocket carrying satellite*, BBC News Asia (Jan. 30, 2013), <http://www.bbc.co.uk/news/world-asia-21256683> (last visited Apr. 15, 2015); Charlie Hamilton, *UAE leads the Middle East's race into space*, THE NATIONAL (July 30, 2009) <http://www.thenational.ae/news/uae-news/uae-leads-the-middle-east-race-into-space> (last visited on Apr. 15, 2015).

³ Futron Corporation, *Suborbital Space Tourism Demand Revisited 4* (2006), available at http://www.futron.com/upload/wysiwyg/Resources/Whitepapers/Suborbital_Space_Tourism_Revisited_0806.pdf (last visited on Apr. 22, 2015).

(SRM) and hybrid fuels, emissions from both of which are known to affect the climate and deplete the ozone layer in excess to the launch vehicles based on liquid rocket engines (LRE).⁴ Nevertheless emissions from rockets of all types deplete the ozone layer, even if the emissions only contain water vapors.⁵

Rocket emissions pose a unique threat to the ozone layer based upon their characteristics; they are the only human-produced source of ozone-destroying compounds which are injected directly into the stratosphere where the ozone layer resides.⁶ Since, the stratosphere is to some extent isolated from the troposphere, the emissions accumulate in the stratosphere and stay there for a considerable period of 3-5 years and thus facilitate ozone depletion.⁷ Ozone layer depletes as a result of catalytic chemical reactions which can be initiated by only trace amount of reactive gases and particles.⁸ Thus, even though the rockets might be emitting trace amount of reactive gases and particles like oxides of Nitrogen, Hydrogen and Chlorine they still pose a huge risk to the ozone layer.⁹

Rocket emissions affect climate by the release of greenhouse gases like carbon dioxide and particles like black carbon.¹⁰ The release of carbon dioxide from rockets is not significant as compared to other sources; however, the release of black carbon and the resulting warming of the climate is particularly alarming.¹¹ Black Carbon is considered to be the second largest source of global warming after carbon dioxide and its containment is considered as the fastest way of controlling global warming.¹² Black carbon is highly efficient in absorbing heat

⁴ *Supra* note 1 at 75.

⁵ *Ibid.* 74.

⁶ *Ibid.* 52.

⁷ Waugh, D. W., T. M. Hall, *Age of stratospheric air: Theory, observations, and models*, 40(4) REV. GEOPHYSICS 1, 13 (2002).

⁸ *Supra* note 1 at 52.

⁹ *Ibid.*

¹⁰ *Supra* note 1 at 2.

¹¹ *Ibid.* 1.

¹² Anjali D. Nanda, *India's Environmental Trump Card: How Reducing Black Carbon Through Common But Differentiated Responsibilities Can Curb Climate Change*, 39 Denv. J. Int'l L. & Pol'y 523 (2011).

from sunlight. When released by burning of fossil fuel on the surface of the earth it remains in the troposphere and contributes to warming for weeks until rains and other climatic forces cleanses the air of it.¹³ However, the black carbon resulting from rocket emissions affect the climate more severely than other sources as it is injected in the stratosphere where it remains for 5 to 10 years, as rain and other climatic forces do not operate at this altitude.¹⁴ Thus, black carbon keeps accumulating in the stratosphere due to rocket launches and contributes significantly to warming of the earth.¹⁵

Scientific studies have concluded that even at a modest estimate of 1000 suborbital launches, the resulting black carbon would affect the climate to the same extent as the world's fleet of subsonic aircraft.¹⁶ It has been estimated that black carbon from rockets would lead to one degree rise in Polar surface temperatures and a shrink of 5 - 15 percent in polar summer sea ice fractions and clearly cross a threshold to be considered a human-influenced climate impact of global importance.¹⁷ The emission of greenhouse gases like carbon dioxide from rockets is also going to touch significant levels with the growth in the space industry.¹⁸

It is estimated that an increase in the rocket launches by a factor of ten is in order owing to increase in demand of national security, global navigation, space exploration and emergence of new industries such as space tourism.¹⁹ If the space industry continues to expand following a normal developmental path then it would become a significant threat to the earth's climate.²⁰

As of the time of writing this paper there are no regulatory frameworks, at a

¹³ *Supra* note 1 at 10.

¹⁴ *Ibid.* 12.

¹⁵ *Ibid.*

¹⁶ *Supra* note 1 at 9.

¹⁷ *Ibid.* 10.

¹⁸ *Supra* note 1 at 51.

¹⁹ *Ibid.*

²⁰ *Ibid.*

national or international level, to control the climate change owing to rocket emissions. Rockets cause the same percent of ozone depletion as aircrafts and the contribution to the global warming by rockets would be at the same level as aircrafts. But the aviation industry is regulated in order to curb green house gases emission while the space industry is not.²¹

Chlorofluorocarbon based Metered Dose Inhalers make a small contribution to ozone depletion yet their use is only depended upon obtaining Essential Use Exemption under the Montreal Protocol, however, rockets which are a greater contributor to ozone depletion are not subject to any such restrictions.²²

The precautionary principle and the principle of intergenerational equity require the launching States to take measures in order to mitigate the adverse effects of rocket emissions on climate and the ozone layer. The ozone protection regime and the climate change regime also obligate the launching states to take such measures.

Other modes of transportation which affect the climate of the earth such as aviation and shipping are subject to regulatory and policy restrictions on the behest of International Civil Aviation Organization (ICAO) and International Maritime Organization (IMO) respectively.²³ It is pertinent to note that originally, the objectives of the ICAO and the IMO did not refer to environmental pollution.²⁴ While the ICAO understood the negative impact of air transport on environment in the early 1970s,²⁵ the IMO understood the enormity of environmental pollution caused by ships only after the Torrey Canyon oil spill

²¹ *Supra* note 1 at 75.

²² *Ibid.*

²³ Sebastian Oberthür, *Institutional interaction to address greenhouse gas emissions from international transport: ICAO, IMO and the Kyoto Protocol*, 3 CLIMATE POL'Y 191, 195 (2003).

²⁴ Philippe Sands, *Principles of International Environmental Law* 97, 99 (2d ed. 2003).

²⁵ International Civil Aviation Organization, *Global Aviation and our Sustainable Future* 6 (2012), available at http://www.icao.int/environmental-protection/Documents/RIO+20_booklet.pdf (last visited on Apr. 20, 2015) [hereinafter *Global Aviation Briefing*].

disaster of 1967.²⁶ Prior to the Kyoto Protocol, 1997 of UNFCCC, the ICAO and the IMO were making regulations with respect to other environmental impacts of international aviation and shipping and these organizations did realize the problem of climate change.²⁷ However, it was only after the Kyoto Protocol of 1997 of the UNFCCC was adopted that they started elaborating regulations to reduce the GHG emissions from aircrafts and ships.²⁸

In Part I, the authors have discussed the international obligations of the international community which necessitate action on the climate change and ozone depletion owing to rocket emissions. In Part II, other modes of transportation such as aviation and shipping which were regulated by the international community due to their contribution to climate change have been discussed. In Part III, of the paper the authors have suggested possible regulatory models which could mitigate the effect of rocket emissions on climate and ozone layer. These three parts are followed by a conclusion.

II International obligations

There are no regulatory frameworks governing the rocket emissions, however, there are international obligations on the launching states to prevent environmental damage arising out of these emissions. Precautionary principle and the principle of intergeneration equity have attained the character of an international custom and are applicable to the present scenarios. In addition there are ozone protection and climate change regimes which should ideally be governing the rocket emissions but unfortunately that is not the case yet, their inapplicability is discussed here so as draw reference in the recommendations given in the Part III of the paper.

A. Precautionary Principle

Launching states are obligated by the precautionary principle to use measures

²⁶ Ved P. Nanda, *The "Torrey Canyon" Disaster: Some Legal Aspects*, 44. DENV. L.J. 400 (1967).

²⁷ *Supra* note 23 at 195.

²⁸ *Supra* note 23 at 195.

to prevent the depletion of the ozone and warming of the planet even in the absence of a full scientific certainty regarding the effect of rocket emissions.

Precautionary principle as a principle of international environmental law provides that activities which have a potential to damage the environment should be avoided and precautionary measures should be taken for them.²⁹ The principle applies in the event of possibility of a serious or irreparable environmental damage from an activity even when there is a scientific uncertainty regarding the environmental effect of the activity.³⁰ The principle is quite flexible in its approach and it does not prescribe any sort of manner in which measures have to be applied to prevent environmental damage and can be applied by means of appropriate regulatory, administrative and other measures.³¹ Measures are not to be applied in vacuum and due consideration is given to factors such as proportionality, cost-benefit analysis and socio-economic issues.³²

The principle is best illustrated in the Principle 15 of the Rio Declaration on Environment and Development, adopted by the United Nations Conference on Environment and Development in 1992 which states that ‘where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.’³³

The preamble of both the Vienna Convention on the Protection of the Ozone Layer, 1985 and Montreal Protocol, 1987 contain references to the precautionary principle in context of the depletion of the ozone layer.³⁴ Article 3(3) of the UNFCCC also contains the precautionary principle. States cannot ignore this

²⁹ Meinhard Schröder, (ed.) *Precautionary Approach/Principle*, in The Max Planck Encyclopedia of Public International Law (R. Wolfrum 2008).

³⁰ Alexandre Kiss & Dinah Shelton, Guide to International Environmental Law 95 (2007).

³¹ *Supra* note 24 at 246.

³² *Supra* note 29.

³³ Ved P. Nanda & George Pring, International Environmental Law & Policy for the 21st Century 59 (2003).

³⁴ *Supra* note 24 at 268.

principle owing to the legal status it has acquired; various scholars have concluded that there is sufficient evidence of state practice with regards to the principle so as to give it a character of customary international law.³⁵

It has been already stated above, that emissions from rockets pose a huge risk to the ozone layer and the climate of the earth. Even though there is some scientific uncertainty regarding the effect of different kinds of propellants on the ozone layer and the duration for which particles and gases released from rockets stay in the stratosphere, the lack of certainty cannot pre-empt measures to prevent serious environmental damage which can be caused by rocket launches. The precautionary principles as a part of customary international law and treaty law requires measures to be taken by the launching states to prevent this potentially serious damage to the ozone layer and the earth's climate.

B. Principle of Intergenerational Equity

The principle of intergenerational equity requires the states to preserve and improve the environment thereby requiring the launching states to mitigate the effects of rocket emissions on the ozone layer and the earth's climate.

The principle identifies the fact that the human life is dependent upon the earth's environment which can be altered by human beings by their activities and puts a requirement of fairness among generations in the use and conservation of the environment and its natural resources.³⁶ It does not cover all kinds of activities which harm the environment but only those with serious implications like toxic or nuclear contamination of water bodies, anthropogenic climate change, and depletion of ozone layer *etc.*³⁷

Equity amongst the generations can be seen in various conventions related to environment including the 1992 UNFCCC,³⁸ 1992 Convention on Biological

³⁵ *Supra* note 24 at 279; 29.

³⁶ *Supra* note 30, at 106; Edith Brown Weiss, *Intergenerational Equity*, in *The Max Planck Encyclopedia of Public International Law* (R. Wolfrum Edn., 2008).

³⁷ *Ibid.*

³⁸ United Nations Framework Convention on Climate Change, preamble, Art. 3.1, Sep. 5, 1992,

Diversity³⁹ and the 1992 Helsinki Water Convention.⁴⁰ Reference to the principle of intergenerational equity can be seen in hundreds of international legal instruments concerned with the protection of environment and flora and fauna.⁴¹

Intergeneration equity is often referenced in international declarations where it forms an essential part of the concept of sustainable development.⁴² As per the Principle 1 of the 1972 Stockholm Declaration humans bear ‘a solemn responsibility to protect and improve the environment for present and future generations.’ The UN General Assembly Resolution 35/8 of 1980 noted the responsibility to preserve the nature for the present and future generations. The Rio Declaration of 1992 pits the idea of intergenerational equity against the right to development in Principle 4 which states that ‘right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.’

Emissions from rocket are surely degrading the earth’s environment for the future generations. Ozone depletion and climate change raises important issues of intergenerational equity. Since, there can only be growth in the space industry the quality of environment in which the present generation lives cannot be comparable to the one which would be inherited by the future generations and would certainly degrade unless launching states take appropriate measures. The launching states must take measures to preserve the environment in the interest of fairness amongst generations.

C. Protection of Ozone Layer

The international regime for the protection of the ozone layer comprises of the 1985 Vienna Convention on the Protection of the Ozone Layer (‘Vienna

1771 U.N.T.S 107 (entered into force Mar. 21, 1994) [hereinafter UNFCCC].

³⁹ Convention on Biological Diversity, preamble, Art. 2, June 5, 1992, 1760 U.N.T.S. 79 (came into force Dec. 29, 1993).

⁴⁰ Convention on the Protection and Use of Transboundary Watercourses and International Lakes Art. 2, Mar. 17, 1992, 1936 U.N.T.S. 269 (came into force Oct. 6, 1996).

⁴¹ *Supra* note 36.

⁴² *Supra* note 24, at 257.

Convention') and the subsequent 1987 Montreal Protocol on Substances that Deplete the Ozone Layer ('Montreal Protocol').⁴³ Ozone layer is located at an altitude of 25 to 15 kilometers from the surface of the earth and is instrumental in protecting the earth from excessive ultraviolet radiation that can cause skin cancer and cataracts, and also damages agricultural production and natural ecosystems.⁴⁴

The Vienna Convention came into being after five years of negotiation and attracted widespread support from all industrialized nations and a large number of developing countries.⁴⁵ It provided a framework for the adoption of measures 'to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer.'⁴⁶

The convention though provided a framework for concerted action in the future, it did not require states to undertake any concrete obligations.⁴⁷ The parties to the convention were, however, obligated to co-operate on systematic observations, research and information exchange; the adoption of appropriate legislative or administrative measures and policies for activities that contribute to the depletion of the ozone layer; and co-operate in the formulation of measures, procedures and standards to implement the Convention.⁴⁸

The Montreal Protocol came into force in 1989 and expanded the protection of the ozone layer by obligating states to 'take appropriate measures to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer'.⁴⁹ It gave way for precautionary measures in the face of scientific

⁴³ *Supra* note 24, at 343.

⁴⁴ K Madhava Sarma, *Ozone Layer, International Protection*, in THE MAX PLANCK Encyclopedia of Public International Law (R. Wolfrum ed. 2008).

⁴⁵ *Supra* note 24 at 344.

⁴⁶ Convention for the Protection of the Ozone Layer art. 2(1), Mar. 22, 1985, 1513 U.N.T.S. 323 (came into force Sep. 22, 1988).

⁴⁷ *Supra* note 33 at 257.

⁴⁸ *Supra* note 24, at 345.

⁴⁹ Montreal Protocol on Substances that Deplete the Ozone Layer, preamble, Sep. 16, 1987, 1522

uncertainty.⁵⁰ Montreal Protocol aimed to reduce and phase out ozone depleting substances according to a time schedule and on the basis of periodic scientific assessment.⁵¹ The Montreal Protocol lists 96 chemicals as ozone depleting compounds (ODCs) and all of them have a phase out schedule, subject to essential use exemptions which can be granted by a Meeting of the Parties.⁵²

Currently, rocket emissions are not listed as an ODC. World Meteorological Organization ('WMO') which publishes the Montreal Protocol Scientific Assessment Panel Report in co-operation with United Nations Environment Programme studied the possibility of including rocket emission in the list in 2002.⁵³ In the report WMO concluded that at present rocket emissions are not a significant source of the ozone depletion, however, it also stated that it might become a significant source in the future.⁵⁴ The report said that Space launch activity has undergone substantial growth of 60 percent over last decade and if this growth is sustained then associated ozone depletion from stratospheric chlorine and particle injection might become significant.⁵⁵

It has been a decade since that report came in and since then a lot of developments have taken place like the entrance of new states in the space club or the formation of various private space companies which intend to develop space tourism. In the light of the new developments, the WMO should re-consider its position.

In the absence of an ODC status for rocket emissions the launching states may not be obligated to take any measures under the Montreal Protocol, however, under the Vienna Convention they are obligated to adopt appropriate legislative or administrative measures and policies for activities that contribute to the depletion

U.N.T.S. 3 (came into force Jan. 1, 1989).

⁵⁰ *Supra* note 33.

⁵¹ *Supra* note 44.

⁵² *Ibid.*

⁵³ *Supra* note 1.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

of the ozone layer. Thus, even though rocket emissions may not be an ODC under the Montreal Protocol, launching states are still obligated under the Vienna Convention to adopt appropriate legislative administrative and policy measures for rocket launches.

D. Climate Change Regime

The UNFCCC was adopted in 1992 at the Rio de Janeiro Summit, with the objective of stabilizing atmospheric concentrations of greenhouse gases in order to prevent ‘dangerous anthropogenic interference with the climate system’.⁵⁶ The UNFCCC entered into force in 1994, it was only a framework convention and it did not have any specific obligation.⁵⁷ The convention was concretized in 1997 when international community agreed on Kyoto Protocol.⁵⁸

The Kyoto Protocol requires the developed countries and countries in transition to a market economy to reduce emissions of GHGs.⁵⁹ Under the UNFCCC and Kyoto Protocol there are only six GHGs which are to be controlled.⁶⁰

As discussed above, black carbon released from the rocket emissions adversely affects the climate, however, black carbon is not listed as a GHG and thus currently there are no obligations on the launching states under the UNFCCC or the Kyoto Protocol.⁶¹

III International Civil Aviation Organization & International Maritime

Organization: Regulations on aviation emissions and emissions from ships

ICAO and the IMO are United Nations specialized agencies which are working towards reducing the environmental impact of aviation emissions and of emissions from ships respectively. It is pertinent to discuss the manner in which

⁵⁶ *Supra* note 38 at 2.

⁵⁷ *Supra* note 24.

⁵⁸ Charlotte Kreuter-Kirchhof, *Atmosphere, International Protection*, in *The Max Planck Encyclopedia of Public International Law* (R. Wolfrum ed. 2008).

⁵⁹ *Supra* note 30 at 174.

⁶⁰ *Ibid.*

⁶¹ *Supra* note 12 at 535.

ICAO and IMO have brought about a change by reducing the environmental impact of aviation emissions and emissions from ships respectively.

A. ICAO

The ICAO, a specialized agency of the United Nations, was set up in December, 1944, under the Convention on International Civil Aviation (Chicago Convention)⁶² and serves as a global forum for civil aviation for its 191 member states.⁶³ It was set up with the objective to promote safe, efficient, to provide economical air transport and for the development of all aspects of international civil aeronautics.⁶⁴ In furtherance of its objectives, the ICAO has adopted several relevant instruments, including international standards and recommended practices on aircraft engine emissions and on noise pollution.⁶⁵

It was as early as 1970s when the ICAO understood the enormous impact that air transport operation has on noise, local air quality of airports, and the climate of the earth.⁶⁶ It is highly probable that aircraft emissions contribute more to global atmospheric problems than the burning of fossil fuels by other modes of transportation, due to the altitude at which it functions.⁶⁷ This leads to stratospheric ozone layer depletion as well.⁶⁸ The activities conducted in the aviation industry also contribute to climate change, by emitting carbon dioxide (CO₂), nitrogen oxides (NO_x), aerosols and their precursors (soot and sulfate), and increased cloudiness in the form of persistent linear contrails and induced cirrus cloudiness.⁶⁹

⁶² Dobrica Savic, International Civil Aviation Organization 4 (2005), *available at* http://www.dobrica.savic.ca/pubs/Fundamentals_of_law_ICAO.pdf (last visited on Apr. 26, 2015).

⁶³ *About ICAO*, International Civil Aviation Organization, <http://www.icao.int/about-icao/Pages/default.aspx> (last visited on Apr. 26, 2015).

⁶⁴ L.K. Caldwell, International Environmental Policy 75-76 (2d ed. 1990), *available at* <http://earthwatch.unep.net/> (last visited on Apr. 26, 2015).

⁶⁵ World Meteorological Organization, World Weather Watch: Fourteenth Status Report on Implementation (1989).

⁶⁶ *Supra* note 25 at 6.

⁶⁷ Intergovernmental panel on Climate Change, Aviation and the Global Atmosphere 17 (1999).

⁶⁸ *Ibid.*

⁶⁹ Steven Taber, *Climate Change Impacts of the Aviation Industry*, EHS JOURNAL (Oct. 3, 2010),

While on one hand, the governmental and aviation industry organizations state that the contribution of aviation to climate change is less than 3 percent, environment groups, particularly from Europe, estimate the contribution of aviation industry to climate change to be between 5 to 9 percent.⁷⁰ Nevertheless, the ICAO recognizes the impact which the aviation industry has and will continue to have on the environment due to increased air travel in the future, and thus has been taking numerous steps to reduce this impact.⁷¹

The activities of ICAO in the furtherance of environmental protection are mainly focused on those problems that benefit most from a common coordinated approach all across the world, such as, impact of aircraft engine emissions.⁷² Environmental protection is not an explicit objective of the ICAO, however, it undertakes it on the basis of Article 44 of the ICAO Convention relating to standards of efficiency in the operation of aircraft.⁷³ ICAO has an assembly of all parties,⁷⁴ a Council with limited membership and numerous committees to discharge specific tasks.⁷⁵ The ICAO Council's Committee on Aviation Environmental Protection (CAEP), does substantial work towards achieving the strategic goals of the ICAO and its Council, which gives high priority to environmental protection⁷⁶ and prepares the Council's decision on environmental matters.⁷⁷ The ICAO Assembly meets once in three years⁷⁸ and provides general policy guidelines for the work of other ICAO bodies framed in 'Assembly

<http://ehsjournal.org/http://ehsjournal.org/steven-taber/climate-change-impacts-of-the-aviation-industry-global-warming/2010/> (last visited on Apr. 24, 2015).

⁷⁰ *Ibid.* at 72.

⁷¹ *Supra* note 25.

⁷² *Environmental Protection*, International Civil Aviation Organization, <http://www.icao.int/environmental-protection/Pages/default.aspx> (last visited on Apr. 24, 2015).

⁷³ *Supra* note 23 at 194.

⁷⁴ *Governing Bodies: Assembly*, International Civil Aviation Organization, <http://www.icao.int/Pages/assembly.aspx> (last visited on Apr. 24, 2015).

⁷⁵ *Supra* note 23, at 194.

⁷⁶ International Civil Aviation Organization, ICAO Environmental Report 2010: Aviation and Climate Change 16 (2010), *available at* http://www.icao.int/environmental-protection/Documents/Publications/ENV_Report_2010.pdf (last visited on Apr. 24, 2015).

⁷⁷ *Supra* note 23 at 194.

⁷⁸ *Supra* note 76.

Resolutions.⁷⁹ It adopts legally binding standards and recommended practices that are included in the annexures to the ICAO Convention.⁸⁰

Annexure 16 of the 1944 ICAO Convention established rules on environmental protection relating to two things, first, Aircraft Noise and second, Aircraft Engine Emissions (1980 ICAO Aircraft Emissions Standards and Recommended Practices).⁸¹ Apart from regulating the other environmental impacts of international aviation, the ICAO, has taken and continues to take measures to address the impact of the aviation industry on climate change.⁸² This is pursuant to Article 2.2 of the Kyoto Protocol, 1997, of UNFCCC, which asks, industrialized countries to ‘pursue limitation or reduction of emissions of GHGs not controlled by the Montreal Protocol from aviation and marine bunker fuels, working through the ICAO and the IMO, respectively.’⁸³

In the 32nd ICAO Assembly, 1998 the CAEP was asked to study policy options to limit the GHG emissions, after taking into account the findings of the IPCC Special Report and the requirements of the Kyoto Protocol.⁸⁴ In 2004, the ICAO adopted three main environmental goals. One of these goals was to limit or reduce the impact of aviation GHG emissions on the global climate.⁸⁵ In the 37th ICAO Assembly Resolution A37-19: *Consolidated statement of continuing ICAO policies and practices related to environment protection and climate change* was adopted.⁸⁶ The ICAO was able to bring its 190 member states together to adopt a comprehensive global policy on how to address GHG emissions from international aviation.⁸⁷ It was agreed by the member states, that there will be a global average fuel efficiency improvement rate of 2 percent per annum from

⁷⁹ *Supra* note 23 at 194.

⁸⁰ *Ibid.*

⁸¹ Convention on International Civil Aviation Annex 16, Dec. 7, 1944, 15 U.N.T.S. 295.

⁸² *Supra* note 23 at 193.

⁸³ *Ibid.*

⁸⁴ *Supra* note 23 at 193.

⁸⁵ *Supra* note 76.

⁸⁶ *Supra* note 76 at A1.

⁸⁷ *Ibid.*

2021 to 2050.⁸⁸ Member states also adopted a medium-term aspirational goal of maintaining global net CO₂ emission from international aviation at 2020 levels.⁸⁹ Undoubtedly, this is an unprecedented commitment to collective action among the countries of the world, both developing and developed, towards the reduction of CO₂ emission.⁹⁰ In addition to this the ICAO invited member states to submit voluntary action plans outlining their CO₂-reduction policies and activities by June, 2012.⁹¹ Apart from these individual efforts undertaken by the ICAO, the organization works closely with United Nations Framework Convention on Climate Change (UNFCCC) and collaborates with other United Nations specialized agencies, such as, the Inter-governmental Panel on Climate Change and the IMO, industry groups and non-governmental organizations.⁹²

The ICAO provides the UNFCCC with regular updates on its developments with bunker fuels and international civil aviation CO₂ emissions.⁹³ The organization expects the UNFCCC to give recognition to ICAO as a leader which has a special role in the development of a global solution for the aviation industry.⁹⁴

The ICAOs collaboration with IPCC has resulted in two significant outcomes.⁹⁵ First, in the year 1999, the Special Report on Aviation and the Global Atmosphere was released.⁹⁶ Second, in the year 2007, the IPCC Fourth Assessment Report (AR4) was released. These reports provided a comprehensive

⁸⁸ Centre for International Sustainable Development Law (CISDL), Legal Analysis on the Inclusion of Civil Aviation in the European Union Emissions Trading System 9 (2012) *available at* http://cisdl.org/public/docs/news/CISDL_EU_ETS_Expansion_Legal_Brief.pdf (last visited on Apr. 20, 2015).

⁸⁹ *Ibid.*

⁹⁰ *Supra* note 88.

⁹¹ *Ibid.*

⁹² *Supra* note 25 at 12.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

account of the science on aviation's climate impact.⁹⁷ It was useful in briefing the policy makers on the challenges ahead and highlighting the key mitigation options. Currently, the ICAO and IPCC are collectively working on the IPCC Fifth Assessment Report (AR5), expected to be completed in 2014.⁹⁸ Though the responsibilities of the IMO and the ICAO are different, both the organizations share good practices in developing climate policies, such as the GHG mitigation measures and actions.⁹⁹

B. IMO

In the year 1948, an international conference was held in Geneva, which adopted the International Convention on Maritime (the "IMO Convention") which then formally established the IMO.¹⁰⁰ It is a UN specialized agency, which has the responsibility for the safety and security of shipping and for the prevention of environmental pollution by the ships.¹⁰¹ According to Article 1(a) of the IMO Convention the purpose of the organization is 'to provide machinery for cooperation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships.'¹⁰²

The IMO soon realized the emergence of a new kind of problem, environmental pollution,¹⁰³ the enormity of which was confirmed by the *Torrey*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Introduction to IMO*, International Maritime Organization, <http://www.imo.org/About/Pages/Default.aspx> (last visited on Apr. 24, 2015).

¹⁰¹ *International Maritime Organization*, United Nations Environment Programme, <http://www.unep.org/un-env/default.asp?gegid=15> (last visited on Apr. 24, 2015).

¹⁰² Convention of the Intergovernmental Maritime Consultative Organization Art 1(a), Mar. 6, 1948, 289 U.N.T.S. 3 (came into force Mar. 17, 1958).

¹⁰³ *Supra* note 101.

Canyon disaster of 1967, in which 80,000 tons of oil was spilled into the sea.¹⁰⁴ Shipping transports 90 percent of the world trade and is the least environmentally damaging mode of transport, when one takes into consideration its productive value and its importance to world trade.¹⁰⁵ This is because without shipping, it would be impossible to conduct intercontinental trade, the bulk transport of raw materials or the import and export of affordable food and manufactured goods.¹⁰⁶ Even despite the fact that shipping has a far lesser impact on environment, as compared to other modes of transport, the IMO adopted and continues to adopt numerous measures not only to prevent and control pollution caused by ships but also to mitigate the effects of any damage that may occur as a result of maritime operations and accidents.¹⁰⁷

IMO, as the custodian of 1954 Oil Pollution Convention, assumed responsibility for pollution issues, as soon as the IMO came into force in 1958.¹⁰⁸ In 1973, it adopted the International Convention on Prevention of Pollution from Ships (MARPOL). This convention addresses pollution from ships by noxious liquid substances in bulk, by harmful substances carried by sea in packaged form, by oil, garbage, sewage, and the prevention of air pollution by ships. It has been amended by the protocols of 1978 and 1997 and has undergone amendments to keep it updated.¹⁰⁹ It is pertinent to note that air pollution from ships causes a cumulative effect that contributes to the overall air quality problems, which lead to problems such as, poor respiratory health among people in many regions and affects the natural environment, for example, through acid rain.

¹⁰⁴ *Supra* note 26.

¹⁰⁵ Efthimios E. Mitropoulos, *Climate change: a challenge for IMO* tool 3 IMO AND THE ENVIRONMENT 1 (2009).

¹⁰⁶ International Maritime Organization, IMO Marine Environment Policy Background Paper 3 (2008), available at <http://www.osce.org/eea/30453> (last visited on Apr. 28, 2015).

¹⁰⁷ *Marine Environment*, International Maritime Organization, <http://www.imo.org/OurWork/Environment/Pages/Default.aspx> (last visited on Apr. 28, 2015).

¹⁰⁸ *Supra* note 100.

¹⁰⁹ International Maritime Organization, IMO and the Environment 2 (2011), available at <http://www.imo.org/ourwork/environment/documents/imo%20and%20the%20environment%202011.pdf> (last visited on Apr. 20, 2015).

In 1997, Annex VI, the Regulation of Air Pollution from Ships was added to the MARPOL Convention, with the objective of minimizing the airborne emissions and to reduce their contribution to local as well as global air pollution and environmental problems.¹¹⁰ It limits the main air pollutants, such as, nitrous oxides (NO_x) and Sulphur Oxides (SO_x), prohibits the deliberate emissions of ODCs, the emission of volatile organic compounds from tankers and regulates shipboard incineration.¹¹¹ A revised MARPOL Annex VI, and the NO_x Technical Code, 2008 were adopted by the IMO and entered into force on July 1st, 2010.¹¹² The two main changes which were made are, first, a progressive reduction in emissions of SO_x, NO_x and particulate matter (PM) and second, the extension of designated emission control areas (ECAs), for more stringent control of emission of SO_x, NO_x and PM.¹¹³ It is pertinent to note that in addition to regulating the other environmental impact of emissions from ships, the IMO is now regulating climate change.

This is mainly in response to Article 2(2) of Kyoto Protocol of UNFCCC.¹¹⁴ Carbon Dioxide (CO₂) is the most important GHG emitted by ships, both in terms of quantity and the potential for global warming.¹¹⁵ The second GHG IMO study, in 2009, revealed that the emissions from ships contributed 2.7 percent to the global emission of Carbon Dioxide (CO₂) in 2007.¹¹⁶ The study also stated that in the absence of any regulations, it is expected that by the year 2050, ship emissions are likely to grow by a factor of 2 to 3, in comparison to emissions in 2007, due to an expected increase in world trade.¹¹⁷ The same study also revealed

¹¹⁰ *Air Pollution and Greenhouse Gas Emissions*, International Maritime Organization, <http://www.imo.org/OurWork/Environment/PollutionPrevention/AirPollution/Pages/Default.aspx> (last visited on Apr. 20, 2015).

¹¹¹ *Supra* note 105 at 3.

¹¹² *Supra* note 106 at 3.

¹¹³ *Supra* note 121.

¹¹⁴ *Supra* note 23 at 195.

¹¹⁵ *Supra* note 106 at 3.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

that there can be a substantial reduction in emissions through technical and operational measures which will increase the efficiency energy of ships.¹¹⁸

Thus, in July 2011, IMO adopted a new chapter 4, Regulations on Energy Efficiency for Ships to MARPOL Annex VI, which contains a package of technical and operational measures in order to decrease the GHG emissions from international shipping, and came into force on 1 January, 2013.¹¹⁹ This made the Energy Efficiency Design Index (EEDI) for new ships and the Ship Energy Management Plan (SEEMP) for ships mandatory. Other amendments made to MARPOL Annex VI include, additions of new definitions, the requirements for survey and certification, such as, the format for international energy certificate.¹²⁰

Thus, even though the combined contribution of aviation emissions and emissions of ship to global CO₂ emissions is 4 percent in total, significant measures have been taken by ICAO and IMO to curb these emissions and other environmental impacts of international aviation and international shipping industries respectively.¹²¹ However, it is estimated that in the absence of any regulations their contribution to global climate change will increase manifold.¹²²

IV Recommendations

The space industry is growing at a rate at which, if left unregulated, will have significant impact on the global environment.¹²³ The rocket launches not only lead to the depletion of ozone layer, but also affect the climate. This has been confirmed by numerous studies. However, one pioneering study, with respect to

¹¹⁸ *Ibid.*

¹¹⁹ Edmund Hughes, *A new chapter for MARPOL Annex VI – Regulation for Technical and Operational Measure to Improve the Energy Efficiency of International Shipping*, International Maritime Organization (February, 2013), <http://www.imo.org/KnowledgeCentre/papersandarticlesbyimostaff/documents/a%20new%20chapter%20for%20marpol%20annex%20vi%20-%20e%20hughes.pdf> (last visited on Apr. 21, 2015).

¹²⁰ *Ibid.*

¹²¹ *Supra* note 23 at 192.

¹²² *Supra* note 106 at 7.

¹²³ Jon Krois, *Onwards and Upwards: Space Tourism's Climate Costs and Solutions*, 37 COLUM. J. ENVTL. L. 1, 1 (2011).

the expected effects of rocket launches on ozone layer depletion has been conducted by researchers in California and Colorado, this study provides a market analysis for estimating future ozone layer depletion based on the expected growth of the space industry and known impacts of rocket launches.¹²⁴

The three essential findings of this study are; first, an increase in the rocket launch market will lead to an increase in the ozone destroying rocket emissions.¹²⁵ Second, if the rocket launches are left unregulated, then by the year 2050 they will lead to more ozone destruction than was ever realized by CFCs, which stimulated the 1987 Montreal Protocol banning ozone-depleting chemicals.¹²⁶ Third, the global market for rocket launches may require stringent regulation in order to prevent significant damage to earth's stratospheric ozone layer in the decades to come.¹²⁷ Also, with respect to rocket launches affecting the earth's climate, a study revealed that as less as 1000 rocket launches per year will lead to worldwide climate change.¹²⁸ The authors of this paper suggest the following three plausible solutions to curb the environmental impact of rocket launches, which lead to depletion of the ozone layer and having an impact on the earth's environment.

A. A new international organization

A new International Organization ("Organization"), such as, the ICAO and the IMO, must be established under a new International Convention on Launch Vehicles. The objectives of the ICAO and the IMO did not refer to environmental pollution, when they were established,¹²⁹ unlike them this organization must refer to environmental pollution and must have environmental protection as one of its primary objectives. Similar to the ICAO and the IMO, this Organization must

¹²⁴ Sivasakthivel T. & K. K. Siva Kumar Reddy, *Ozone Layer Depletion and its Effects: A Review*, 2 Intl. J. Env'tl. Sci. Dev. 30, 33 (2011).

¹²⁵ *Ibid.*

¹²⁶ *Supra* note 139.

¹²⁷ *Ibid.*

¹²⁸ Adam Mann, *Space tourism to Accelerate Climate Change*, NATURE (Oct. 22, 2010), <http://www.nature.com/news/2010/101022/full/news.2010.558.html> (last visited Apr. 30, 2015).

¹²⁹ *Supra* note 24 at 97, 99.

have an Assembly, a council and numerous committees, each of which have specific functions. In particular it should have a Committee for Environmental Protection (CAEP).

The Organization's Assembly must meet after definite periods of time, for example the ICAO Assembly meets every three years,¹³⁰ and the IMO Assembly meets once in two years and may meet in an extraordinary session as well.¹³¹ The Assembly, like the ICAO Assembly, must have similar authority to not only make policy guidelines for the work of other bodies of the Organization framed in Assembly Resolutions but also set legally binding standards and recommended practices that are then included in the annexures of the new International Convention on Launch Vehicles.¹³²

The Civil Aviation Environmental Committee, gives high priority to environment protection, prepares the decisions of the council and works towards the attainment of the goal of environmental protection.¹³³ The Marine Environment Protection Committee of the IMO considers any matter within the scope of IMO, which is concerned with prevention and control of pollution from ships.¹³⁴ In particular this committee is concerned with the adoption and amendment of conventions and other regulations and measures to ensure their enforcement.¹³⁵ The Committee of Environmental Protection of the Organization should be concerned with environmental protection, prevention and control of pollution from launch vehicles. It should possess broad powers and should be able to prepare the decisions of the council. This will give enough flexibility to the Committee on Environmental Protection of the Organization to function and

¹³⁰ Assembly, International Civil Aviation Organization, <http://www.icao.int/about-icao/Pages/Assembly.aspx> (last visited on Apr. 30, 2015).

¹³¹ *Structure of IMO*, International Maritime Organization, <http://www.imo.org/About/Pages/Structure.aspx> (last visited on Apr. 30, 2015).

¹³² *Supra* note 23.

¹³³ *Supra* note 76 at 16.

¹³⁴ *Structure of IMO*, International Maritime Organization, <http://www.imo.org/About/Pages/Structure.aspx> (last visited on Apr. 30, 2015).

¹³⁵ *Ibid.*

to discharge its duties effectively.

Article 2(2) of the Kyoto Protocol, 1997 of the UNFCCC, asks industrialized countries to ‘pursue limitation or reduction of emissions of GHGs not controlled by the Montreal Protocol from aviation and marine bunker fuels, working through the ICAO and the IMO, respectively.’¹³⁶ It was only pursuant to this, that the ICAO and the IMO started taking measures to reduce the environmental impact from aviation and shipping respectively.¹³⁷ Therefore, it is proposed that Article 2(2) of the Kyoto Protocol, 1997 of the UNFCCC should be amended, so as to include the Organization as a body which strives to limit or reduce emissions of GHGs from rockets.

Article 44 of the ICAO Convention sets environmental standards,¹³⁸ Article 37 of the ICAO Convention requires contracting states to adopt international standards¹³⁹ and Article 38 requires contracting parties to notify the ICAO in case it is impracticable for them to follow the international standards and also require them to inform the ICAO about the difference between their domestic standards and international standard.¹⁴⁰ The International Convention on Space, under which this new organization will be established should itself have articles which deal with environment protection, prevention of environmental pollution, requesting contracting parties to develop international standards, and a process by which a contracting party can notify this Organization, if it is impracticable for the contracting party to follow an international standard and also inform the Organization about the difference in the domestic standard of the contracting party and the international standards so set by the Organization.

In 1997, Annex VI, the Regulation of Air Pollution from Ships was added to

¹³⁶ *Supra* note 23.

¹³⁷ *Supra* note 23.

¹³⁸ *Environmental Protection*, International Civil Aviation Organization, <http://www.icao.int/environmental-protection/Pages/default.aspx> (last visited on Apr. 20, 2015).

¹³⁹ *Supra* note 24 at 343.

¹⁴⁰ *Ibid.*

the MARPOL Convention, with the objective of minimizing the airborne emissions and to reduce their contribution to local as well as global air pollution and environmental problems.¹⁴¹ The Organization must time and again, have the flexibility to adopt annexures to the international convention on launch vehicles.

The regulatory model adopted by the ICAO and the IMO to curb the environmental impacts of the aviation industry and the shipping industry is a suitable model to which can be followed to set up an international organization for the space industry for two reasons. First, the ICAO and the IMO have been fairly successful in curbing the environmental impacts of the aviation industry and the shipping industry respectively. For example, today, aircrafts are 70 percent more fuel-efficient and 75 percent quieter than they were four decades ago.¹⁴² Second, the challenges faced by the aviation industry, the shipping industry and the space industry, in dealing with environmental degradation is similar. Studies conducted have shown that these three industries have a minimal contribution to the global CO₂ emission, however in the absence of any stringent regulation the contribution of these industries to the global CO emissions is expected to increase significantly.¹⁴³ Thus, it is essential to have an international organization for the space industry, which is similar to the ICAO and the IMO and serves, functions, operates, and delivers in the space industry, like the ICAO and the IMO have delivered in the aviation industry and the shipping industry respectively.

B. Bringing changes through the framework agreements

Rockets pose a unique threat to the environment because they directly inject gases and particles which deplete ozone in the stratosphere; moreover black carbon released by the rockets in the stratosphere gets trapped there and warms

¹⁴¹ *Air Pollution and Greenhouse Gas Emissions*, International Maritime Organization, <http://www.imo.org/OurWork/Environment/PollutionPrevention/AirPollution/Pages/Default.aspx>

¹⁴² *Supra* note 25.

¹⁴³ World Meteorological Organization, *Scientific Assessment of Ozone Depletion*, *supra* note 1; Jane A. Legget et al., Cong. Research Serv., R42392, *Aviation and the European Union's Emission Trading Scheme 1* (2012); International Maritime Organization, *IMO and The Environment*, *supra* note 109 at 7.

the climate of the earth. Under the current ozone and climate change regimes there is no obligation on the parties to prevent this damage as rocket emissions are not included in the list of controlled substances under the Montreal Protocol and Black Carbon is not included in definition of GHGs.

The precautionary principle and the principle of intergenerational equity would require states to take measures to prevent the degradation of the environment; however the same would not involve any specific commitments. In order to obtain specific commitments from the launching states it is important to widen the definition of Ozone Depleting Substances to include rocket emissions which are harmful to the ozone. Under the Article 2(10) of the Montreal Protocol a new substance can be added to the list of controlled substances only if all the members ratify. An addition of a substance of a highly specific nature which only concerns those states which have space programmes would not be unacceptable to the states which do not have a space programme of their own. Those who have space programmes should agree to this addition in the light of the obligations of precautionary principle and the principle of intergenerational equity as rocket emissions do pose a huge risk of ozone depletion. Such additions have been not very troublesome in the past and it can be seen in the fact that there are a total of 96 substances which have been included in the list of ODCs.¹⁴⁴

There have been oppositions in the past to the idea of addition of black carbon to the list of GHGs,¹⁴⁵ however, it can easily be circumvented by giving the addition a specific nature of black carbon directly injected in the stratosphere. Alternatively the provisions of Article 17 of UNFCCC can be used in order to create a new protocol specifically dealing with black carbon emissions by rockets.

¹⁴⁴ *Supra* note 44.

¹⁴⁵ *India to resist attempt to bring black carbon within UNFCCC: Jairam Ramesh*, Indian Express (Dec. 8, 2010), <http://www.indianexpress.com/news/india-to-resist-attempt-to-bring-black-carbon-within-unfccc-jairam-ramesh/722025>.

C. A new climate regime especially for stratospheric pollution

Launching states should realize their obligations under the precautionary principle and to prevent serious environmental damage which would be inequitable in an intergenerational setting, negotiate a measure to deal with the problem of rocket emissions in the stratosphere. Since the problem is only caused by a handful of states, a negotiation on this level would be less burdensome and can be executed in a speedy manner. A common but differentiated responsibility clause can also be introduced to attract developing countries which are at an initial level of development of their space programmes. Existing treaty law such as the Outer Space Treaty¹⁴⁶ can also be useful as amendments can be introduced for creating a body to monitor compliance of a stratospheric pollution treaty.

V Conclusion

There is some scientific certainty to the fact that rocket emissions pose a serious threat to the ozone layer and the earth's climate and measure should be taken by the international community to curtail that threat in the interest of present and future generations. The authors have suggested various measures which can be undertaken by the international community and the launching states to address this threat which has the potential of attaining significant proportions in the near future.

While we take steps to address this threat it should not be forgotten that the space industry is at a nascent stage and space tourism industry can be rightfully be said to be in its embryonic stage. Over regulation of an industry at this level can be harmful to the prospects of advancement of science and technology which can be achieved through space exploration. The key lies in the idea of sustainable development in regulating the industry just enough to mitigate its adverse effects but yet allowing it to develop so that the humanity can also enjoy the fruits of

¹⁴⁶ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 610 U.N.T.S. 205 (came into force Oct. 10, 1967).

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