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Editorial

It is heartening to note that Kashmir Law college is publishing the *Special Issue* of its research journal, *Kashmir journal of legal studies* wherein most of the articles included have been chosen from the presentations made in the national seminar, "*The Challenges of Globalization to the Legal System in the 21st Century*", sponsored by ICSSR, and organized by Kashmir Law College on 14th and 15th September, 2013. However, all the articles presented in the seminar could not be included due to space and cost constraints, without anything to do with their merit. The present issue though a voluminous one is aimed at presenting an insight into the legal paradigm related to diverse developmental issues in contemporary world and includes a good number of articles on different legal issues of seminal importance.

Prof. M.Afzal Wani in his paper "Parimatrix Of Longing For Global Peace And Development: an analysis of conceptual foundations and implementation policies set out under international instrument has focused on global policies and provisions in the International instruments related to the establishment of endowing Peace in the world with responsibilities of nation States and International agencies for promoting harmony. The author is of the opinion that the western concept of globalization seemingly collides with the protection of human rights of the poor and under privileged people at the global level. He has suggested that the faith rather than commerce could bridge the gap between the haves and have-nots and need for harmonization of socio-political and cultural ethos might provide help in the process of globalization with the human touch.

Prof. M. Ayub & Iftikhar Hussain Bhat in their jointly written article "Environment Friendly Hydroelectric Power Generation In Jammu And Kashmir: The Legal Perspectives Under The International Environmental Law" have asserted climatic change and global

warming responsible for the emissions of greenhouse gases (GHGs) from human activities as a major threat to our survival and well-being. The authors contend that the State Power Development Corporation is contemplating to register its upcoming hydropower projects under the UNFCCC which would help the State to claim benefits for checking emission of greenhouse gases during energy generation. The paper is an overview of the legal perspectives of eco-friendly hydroelectric power generation and potential benefits that the State of Jammu and Kashmir can claim under international environmental law.

The joint article by **Dr. Mushtaq & Dr. Mohammad Hussain**, on "Constitutional Protection To Political Empowerment Of Women Through Panchayats: A Historical Step By Indian Parliament suffers From Legislative And Judicial Constraints" highlight the constitutional provisions to political empowerment of women through panchayats. They have maintained that there is conflict between law, policy and practice which need to be addressed so that constitutional protection of 33% reservation of seats guaranteed by 73rd Amendment for women can be utilized for their overall empowerment.

Dr. Shakeel Ahmad & Mr. S. M. Uzair Iqbal in their paper "Pornography Through Internet And Indian Legislation: An Analysis", have given the historical background of the subject and attempted to resolve the controversy between freedom of speech and Pornography. The author's have also discussed child Pornography in the society and its possible effects on the society. The author's have also focused on pornography, obscenity and Indian legislation and discussed some of the important cases on the subject.

The article on "Entry of Foreign Legal Services in India" by ***Rafia Hassan Khaki*** is a critical evaluation of current regulatory system in India in respect of Legal services under GATS; and recommends reforms in the system of Legal education in India to make Indian Lawyers capable of competing with the foreign Lawyers.

Mohammad Rafiq Dar in his paper titled "A Historical Perspective and Critical Appraisal of Consumer Protection Amendment Act, 2002 highlights its benefits, shortcomings and their repercussions and examines the historical perspective of consumer protection in India from the ancient to the modern period.

Mr. Debasis Poddar has exhaustively dealt with "Baghliar Model in sharing Water Resources; (Jurisprudent) Lessons learnt Apprehension ahead. The author explores the treaty regime in terms of underidence which is instrumental for its survival against all adversities including successive armed conflicts, diplomatic face-off proxy war in Kashmir Valley.

The article "Liability of Corporations for Environmental Pollution: An Indian Perspective" by ***S.A.Bhat*** is an attempt to explore some essential conflicts between the legal structure of corporations and the desire of regulators and victims seeking to hold them liable for their environmental harm. The author in his study maintains that legal personality of corporations is enjoying some of the rights and responsibilities as that of human beings, but no allowance is made to them for the fact that they have no soul.

Mir Mubashir Altaf in his research paper "Judicial Appointments in India – A Critique" has made an in-depth analysis of the power of the Supreme Court of India of making appointments to the higher Judiciary by introducing the system of collegium. The

author has made an attempt to analyze the working of the collegium system in India and to make out a case for establishing a Judicial Appointments Commission in India.

The article by **I.*G. Ahmed*** on "Nomenclature under the Shariat Act and Application of Muslim Law of Wills" is comprised of seven parts. The paper deals with the importance of Muslim wills and also focuses on constitutional backing given to various views propounded in this regard.

The article on "Drug Abuse in Kashmir: A Socio-Legal Perspective" by Mr.***Burhan Majid***, analyses the causes of Drug Abuse and its impact on society. The author has evaluated the current legal frame work in the state on the subject and proceeds to signal the inaction on the part of state apparatus in containing this wide spread of menace. The author maintains that alongside some self-regulation, a legislative intervention in the form of a comprehensive legislation is called for.

Mrs. Asma Rehman et al in their paper titled "Rights of Women under Indian Criminal Justice System" have given a broader perspective of rights of Women under various laws framed by Government of India for the Protection of Empowerment of Women. The author has emphasized III of VI per implementation of laws with respect to the empowerment of women.

The paper Ground Water Management and Protection of Water Rights by **Suriaya Saleem** highlights the importance of ground water for human survival and projected the problem that the rapid increase in the exploitation of ground water resources in India for irrigation, domestic, industrial requirements, livestock consumption and other uses has been recognized as a national priority problem. The author has discussed the International trends in water rights allocation in the present context of ecological devastation and stressed the need for re-examination of the whole question of law relating to water in the country. .

Ms. Rehana Shawl in her paper titled "Capital Punishment: International And Human Rights Perspective'' has thrown light on various International Developments and Human Rights with relation to Capital Punishment. In the opinion of the author Capital Punishment does not conform to the moral standards of Human Rights and decency.

Ms. Gul Afroz Khan in her paper "Special Economic Zone: Reality And Conflict", has highlighted an important issue regarding the emergence of special economic zones where near total immunity is granted at the cost of the common people. These special economic zones serve the interest of few people without rationalizing the developmental process in the new millennium, especially in India

The article "Development of Medical Services under Consumer Protection Act Vis-À-Vis Recent Trend in India" by ***Unanza Gulzar*** is an attempt to analyze the whole phenomenon of medical services in India and the extent of Liability. The author argues that a consistent judicial approach is called for to protect the poor patient from the apathy of the men in white.

In the article "Constitutional Mandate of CAG of India" the author, **Mr. *Tajamul Yousuf*** is of the opinion that the corruption in Indian politico administration have touched heights. In this regard C IV of VI has an important role to audit the money spent by the administration. This article examines the mandate provided to CAG by Indian Constitution.

Mr. Mubashir Malik in his write-up Indian legal profession from a discriminatory and haphazard system to uniform criteria for an open access worldwide to those who prefer to practice the profession of law in India exhibits that the upcoming Indian economy prompted many American and British law firms to establish their liaison offices in India to tape the potential economic dividends offered by legal profession. The author predicts that India will not go against the process of globalization and thus will amend the law before the final judgment of the Supreme Court.

Mr. Yasir lateef Handoo in his paper "Administration of Justice and Role of Forensic Science in India: An Appraisal" highlights the role of forensic labs and forensic techniques adopted to ascertain criminal investigation on scientific basis. He suggests that forensic lab infrastructure need to be upgraded to answer the needs of growing scientific investigation in India.

Mr.Eqbal Hussain in his write-up "Monopoly of Creative Rights: An Overview of the Copyright Act, 1957" has highlighted the nature of copyright law as available in India and different issues related to monopolistic right of an author and its availability for public use .

The note on "Medical Aid as a Right to Life" by **Insha Hamid** is an attempt to analyse the widening scope of right to life interpreted by the Supreme Court acting itself as a saviour of mankind by applying its judicial activism. The paper further makes a special emphasis on the right to Medical Aid as a part of right to life including several policies of medical aid framed by the Government.

Dr. Fareed Ahmad Rafiqi, in his case comment on "*Mohinder Singh v. State of Punjab AIR 2013 SC"* has tried to evaluate the relevance of determinate sentencing in criminal administration of justice and need for guidelines determining the 'span of life sentence' by courts beyond the scope of executive discretion.

I am thankful to the [illegible] the Editorial Committee and other subject experts for editing the manuscripts a[illegible] that the present volume finds its own niche in the academic and other relevant fields. I will be failing in my duty if I do not place on record the appreciation for the untiring work of Dr. Fareed Ahmad Rafiqi, Associate Editor and Ms. Rehana Shawl, Assistant Editor and lecturer in Kashmir Law College, for bring out this special issue.

I am thankful to **Mr. Omer Javeed Zargar** for Computer Layout and the design of the journal. I am also grateful to the Salasar Imaging systems, Delhi for printing the Journal with meticulous care.

The editor acknowledges the support and co-operation of all the members of the management of the college in general and of Mr. Altaf Ahmad Bazaz in particular whose patronage has enabled the publication of the present issue of the journal.

A S Bhat

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CONTENTS

THE PARIMATRIX OF LONGING FOR GLOBAL PEACE AND DEVELOPMENT: AN ANALYSIS OF CONCEPTUAL FOUNDATIONS AND IMPLIMENTATION POLICIES SETOUT UNDER INTERNATIONAL INSTRUMENTS

M.Afzal Wani*

Abstract

Today the discussion around the world are at a high pitch for giving boast to economy and strengthening of the legal regime through liberalization and privatization but this would be in vein if global peace is not endured. This is evident from a perusal of events of the second world war which shows that, along with the international instruments for economic developments and trade, the international declarations and conventions providing for establishment of peace have been a priority with the world bodies and are even today at the top of their monitoring list. This paper gives a detailed account of the global policies and provisions in the international instruments related to the establishment of enduring peace in the world with responsibilities of nation states and international agencies for promoting harmony. The paper further analysis the finer aspects of peace as a human right and correlative measures for promoting economic activities and development, it ends with an over view of the peacekeeping missions of the United Nations around the world.

Keywords: Human rights, United Nations Charter, United Nations Organizations.

Introduction

Law and economy are the most pervading concepts of the 21st century with technology as the bull worker. The discussions around the world are at a very high pitch for giving boast to economy and strengthening of the legal regime through liberalisation and privatisation. This all, however, would be in vein if global peace in not ensured. A perusal of events from the Second World War shows that, along with the international instruments for economic development and trade, the international declarations and conventions providing for establishment of peace have been a priority with the world bodies and are even today at the top of their monitoring list. Hence, while discussing law and economy at the national or international level, the importance of the peace process for economic development cannot be under assessed. This paper has, therefore, been structured to give a detailed account of the global policies and provisions in the international instruments related to the establishment of enduring peace in the world with responsibilities of nation states and international agencies for promoting harmony. While it analyses the finer aspects of peace as a human right and correlative measures for promoting economic activities and development, it ends with an over view of the peacekeeping missions of the United Nations which have or are working in different parts of the world.

Understanding peace

Peace is a state of harmonic co-existence--an earnest desire of all human beings. It enjoys precedence in thought and priority in action. Whenever man has behaved differently,

* Professor & Dean University School of Law, GGS IP University, Delhi-75, [m_afzalwani@yahoo.co.in]

and opted for war, he has done so under some misunderstanding or considered it a prelude to peace. The issue was never understood better earlier than during the two World Wars. The realization of the significance of peace during the period invoked positive responses from almost all nations of the world which led to the adoption of many declarations related to peace by the UN General Assembly and a number of operations for peacekeeping in different regions of the world. Efforts to restrict the nuclear culture and destruction by mines are the recent manifestation of the same basic human desire for peace.

To emphasise further it may be stated that peace is a state of tranquillity, serenity and order. It implies calmness, harmony and freedom from war. It is marked by cessation of hostilities and non-existence of strife. As the most cherished desire of humanity and an unending aspiration of every individual, in its wider perspective, peace refers to conditions of liberty, good health and security as indicators of development. It has, therefore, a direct nexus with enjoyment of human rights—the rights without which it is not possible either to live or to live like a human being. They are fundamental in their nature and purpose, accordingly sometimes termed as basic human rights. When allowed they help in the fullest development of human qualities, intelligence, talent and conscience. They improve human dignity, enable a maximum use of human capabilities, ensure greater safety and also tend to satisfy the spiritual needs of an individual. Availability of human rights facilitates life with comfort and excellence. Their denial leads to conditions of social imbalance, unrest and violence.

It is not in any way imponderable or difficult to understand that nobody can live, labour, develop and sustain without peace; and nor can anyone enjoy rights in belligerence. To think of rights in a ruffled and raucous situation is quite moronic and doltish. Even in biological sense life is a peaceful, harmonious and coordinated existence of various constituent elements. Placatory is a *sine qua non* to birth, growth and dignity of human beings, while as antagonism is a prelude to rage, rowdiness and destruction. Likewise it can be asserted that peace is a *sine qua non* to enjoyment of human rights and belligerence renders life with health, comfort and excellence impossible. Thus peace, human rights and development are interdependent. It is not possible to appreciate and enjoy human rights, including right to economic development, fully without peaceful circumstances and, conversely, it is not possible to maintain peace without securing human rights and economic well being for all people. Thus, right to peace is the first and foremost right of every human being, as well as that of a group of human beings or a nation, without which other rights cannot be enjoyed. The fact is supported by the unending chain of events in the whole human history, which in its reality has been, nonetheless, a struggle for rights and establishment of peace and prosperity. In other words, technically speaking, whole human history can be described and explained just by three co-dependent variables, ‘peace’, ‘human rights’ and development. For this reason the issue of peace and development should be brought to focus academically with due concern it deserves.

Recognition of peace as human right

The matter of correlation between human rights and peace has been well within the appreciation of the concerned world bodies and the universal instruments adopted by them from time to time. The development of the post World War movement for human rights is

basically an outcome of the concern for peace, which precipitated during the most destructive phases of the age when there was no respect for life and humanity. The reasons for birth of United Nations Organization and the recognition of the principle that human rights and fundamental freedoms are the corner stone for future maintenance of peace are in this respect a relevant subjects for any body's consideration. It may be recalled that during the Second World War, President Franklin D. Roosevelt of the United States of America (USA) and Prime Minister Winston Churchill of the United Kingdom (UK) expressed in Atlantic Charter (1940) their fervent desire to establish a peace which would afford to nations the means of dwelling within their own boundaries, and which would afford assurance that all the men in all the lands may live out their lives in freedom from want and fear. Subsequently, in 1941, 26 allied nations which were later joined by 21 additional nations expressed their firm conviction through a declaration that a complete victory over their enemies was essential to defend life, liberty, independence, religious freedom, to preserve human rights and justice in their own lands as well as other lands. They were, it is being claimed, the first to use the term 'human rights' in an international instrument. The doctrine put forward in this study has, therefore, been unequivocally a part of many basic universal instruments with a definite programme of action.[1]

UN Charter and peace

In its essence the present human rights movement is a culmination of the quest for peace initiated during the first and the second World Wars. After the First World War many treaties-were concluded by several European countries binding them to protect social, religious and national minorities. The execution of these obligations was supervised by the League of Nations. In view of the relationship between action for establishment of peace and need for enforcement of human rights a demand was made by the representatives of Cuba, Mexico and Panama in the United Nations Conference held at San Francisco in 1945 proposing that the Conference should adopt a declaration of the Essential rights of Man. This eventually became a voice of all the people and thereby establishment of peace and promotion of respect for human rights became a common goal of the United Nations (UN). The United Nations Charter (here in after referred as UN Charter) accordingly brings the matters of peace and human rights together in its preamble as follows:[2]

"We the people of the United Nations determined to save succeeding generations from the scourge of war, which twice-in our life time has brought untold sorrow to mankind, and to re-affirm faith in fundamental human rights in the dignity and worth of the human person, in equal rights of men and women and of nations large and small, and *to practice tolerance and live together in peace* with one another as good neighbours, and to unite our strength *to maintain international peace and security, and…[t]*o employ international machinery for the *promotion of economic and social advancement* of all people, ... *[h]ave resolved to combine our efforts to accomplish those aims."*

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1. *See* generally: Thomas Buergenthal, *International Human Rights In A Nutshell,* (1995) and Muhammad Zamir, *Human Rights Issues and International Law,* 1-5. (1990).
2. 'Preamble; *to The United Nations Charter,* 1945.[Emphasis added].

The Preamble of the UN Charter therefore, makes *inter alia,* a special mention of the urge to practice tolerance and life in peace and a will to strength the maintenance of international peace and security. The UN Charter, while specifying the purposes of the United Nations, further asserts that its objectives are:[3]

(a) **to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;**

(b) to develop friendly relations among nations based on respect for the principles of equal rights and self determination of peoples, and to take other appropriate measures to strengthen universal peace;

(c) to achieve international cooperation in solving international *problems of an economic, social, cultural, or humanitarian character,* and in promoting and encouraging *respect for human rights* and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

(d) to be a centre for harmonizing the actions of nations in the attainment of these common ends.

In these emphatic expressions the UN Charter not only recognizes the nexus between peace and human rights but makes it a duty of the commity of nations to work together for the establishment of peace which can make possible the enjoyment of human rights. The Charter urges upon the nations.

(a) **to take effective collective measures to prevent and remove threat to peace;**

(b) to suppress acts of aggression or breach of peace,

(c) to work for the adjustment and settlement of international disputes;

(d) to try to develop friendly relations among nations based on respect for the principle of equality and self determination;

(e) to take appropriate measures to strengthen universal peace;

(f) to join hands in solving problems of social, economic and cultural or humanitarian character; and

(g) to maintain respect for human rights and fundamental freedoms.

In the light of these provisions of the UN Charter, it is an inalienable right of the people of the world to claim to live in peace and to seek conditions to make the enjoyment of their basic rights possible. All the nations of the world have an inherent obligation to show due deference towards this right and take positive measures to check any obstruction, direct or indirect, hindering its enjoyment.

Declaration on the Essentials of Peace

The United Nations concern for peace and necessity of peaceful enjoyment of rights is forcefully and sufficiently made obvious by its adoption of separate declaration, namely, *Declaration on the Essentials of Peace, 1949* which recognizes the promotion and

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3. *Ibid.* Article 1.[Emphasis added]

paramouncy of human dignity and other human rights as important essentials of peace. The declaration was adopted by the UN General Assembly on 1 December, 1949.[4]

Primarily, for the purposes of this Declaration two proposals came before the General Assembly each presented by the then Union of Soviet Socialist Republics and the combine of the United Kingdom and the United States of America. The former stressed upon the five permanent members of the Security Council to conclude among themselves a "Pact for Strengthening the Peace" and the latter called upon the United Nations to lay down the basic principles necessary to achieve an enduring peace. The Soviet proposal was not adopted but criticized as being an attempt to create a body superseding the Security Council. The US and UK proposal was adopted by the UN General Assembly by 53 votes to 5 though it was termed as "wholly unrealistic, inadequate and composed of phrases culled from the UN Charter". The General Assembly declared the UN Charter as the most solemn pact of peace in history and underlined it as a document, which lays down the basic principles necessary for the establishment and maintenance of peace.

It may not be out of place to mention here that the UN Charter requires the United Nations to promote universal respect for human rights and fundamental freedoms and their observance for all without distinction as to race, sex, language and religion.[5] The Charter requires all member States to pledge themselves to take joint and separate action in cooperation with the Organization for the promotion of universal respect for the observance of human rights and fundamental freedoms for all alike.[6] It also empowers the General Assembly to initiate studies and make recommendations necessary for realization of human rights and fundamental freedoms[7] and authorizes the Economic and Social Council to make recommendations for the same purpose and prepare draft conventions and call International conferences with respect to matters falling within its competence.[8] Additionally the Council may make arrangements with the members of United Nations and other specialized agencies to obtain reports on the steps taken to give effect to its recommendations and those of the General Assembly[9] and set up commissions for the promotion of human rights.[10] Pursuant to this the Council has established the commissions or like bodies on human rights and status of women and sub-commissions on prevention of discrimination and protection of minorities. These principles being a substantive part of the UN Charter have been further sanctifies by the *Declaration on the Essentials of Peace,* 1949, as basic principles necessary for the endurance of peace.[11] The common disregard of these principles is the main cause for prevalence of international tension. The Declaration of 1949, therefore, earnestly calls upon every nation to exercise certain restraint and take some other positive measures for enabling people to live in peace. Under the Declaration every State has been required:[12]

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4. General Assembly Resolution, 290 [IV].
5 *Supra* note 2, Article 55.
6 *Id*, Article 54.
7 *Id*, Article 13.
8 *Id*, Article 62.
9 *Id*, Article 64.
10 *Id*, Article 86.
11 Clause 1 Declaration On The Essentials of Peace, 1949, (hereinafter referred to as Declaration of 1949).
12 *Id*, Clauses 2 and 3.

(a)**to refrain from threatening or using force contrary to the Charter; and**

(b) to refrain from any threats or acts, direct or indirect, aimed at impairing the freedom, independence or integrity of any State, or at fomenting civil strife and subverting the will of the people in any State.

The Declaration further calls upon every nation--[13]

(a) **to carry out in good faith its international agreements;**

(b) to afford all United Nations bodies full cooperation and free access in the performance of the tasks assigned to them under the Charter, and

(c) to promote, in recognition of the paramount importance of preserving the dignity and worth of the human person, full freedom for the peaceful expression of political opposition, full opportunity for the exercise of religious freedom and full respect for all the other fundamental rights expressed in the Universal Delcaration of Human Rights.

While defining the essentials of peace the Declaration is most explicit about respect for human rights and advises the States to take necessary steps:[14]

(a) **to promote nationally and through international cooperation, efforts to achieve and sustain higher standards of living for all people;**

(b) To make possible for people free exchange of information and ideas essential to international understanding and peace.

To make peace enduring, the Declaration advises the member nations to participate fully in all the works of the United Nations and calls upon the five permanent members of the Security Council to broaden progressively their cooperation and to exercise their restraint in the use of the veto in order to make the Security Council a more effective instrument for maintaining peace.[15]

Regarding settlement of disputes and to avoid frequent cropping up of further troubles every nation has been called upon, under the Declaration to play a positive role by requiring them:[16]

(a)**to settle international disputes by peaceful means and to cooperate in supporting United Nations efforts to resolve outstanding problems;**

(b) to agree to the exercise of national sovereignty jointly with other nations to the extent necessary to attain international control of atomic energy which would make effective the prohibition of atomic weapons and assure the use of atomic energy for peaceful purposes only.

An examination of the heretofore referenced provisions of the 1949 Declaration on the Essentials of Peace exhibits, no less than necessary, a basic nexus between the matters essential for achievement and sustenance of peace and the respect for and promotion of human rights. It is not possible to think of either without the other. Peace is an inalienable human right and the promotion of human rights, in the first instance, implies a positive effort to establish enduring peace.

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13 *Id*, Clauses 4 to 6.

14 *Id*, Clauses 7 to 8.

15 Id. Clauses 9and 10.

16 *Id. Clauses 11to 13.*

Declaration on Preparation of Societies for Peace

After the 1949 Peace Declaration in 1978, the United Nations General Assembly adopted another declaration, namely, *Declaration on the Preparation of Societies for Life in Peace*[17] and reaffirmed the right of individuals, States and whole mankind to peace and highlighted the need that every State must accept certain duties and responsibilities which may ensure the enjoyment of that right. The Declaration invites all States to guide themselves in their activities by recognition of the supreme importance and necessity of establishing, maintaining and strengthening a just and durable peace for present and future generations through the following principles:[18]

(a) **Every nation and every human being regardless of race, conscience, language or sex, has the inherent right to life in peace. Respect for that right, as well as for the other human rights, is in the common interest of all mankind and an indispensable condition of advancement of all nations, large and small, in all fields.**

(b) A war of aggression, its planning, preparation or initiation are crimes against peace and are prohibited by international law.

(c) In accordance with the purposes and principles of the United Nations, States have the duty to restrain from propaganda for wars of aggression.

(d) Every State, acting in the spirit of friendship and good neighbourly relations has the duty to promote all-round mutually advantageous and equitable political, economic, social and cultural co-operation with other States, not withstanding their socio-economic systems, with a view to securing their common existence and cooperation in peace, in conditions of mutual understanding of and respect for the identity and diversity of all peoples, and the duty to take up actions conducive to the furtherance of the ideals of peace, humanism and freedom.

(e) Every State has the duty to respect the right of all peoples to self determination, independence, equality, sovereignty, the territorial integrity of States and the inviolability of their frontiers, including the right to determine the road of their development, without interference or intervention in their internal affairs.

(f) A basic instrument of the maintenance of peace is the elimination of the threat inherent in the arms race, as well as efforts towards general and complete disarmament, under effective international control, including partial measures with that end in view, in accordance with the principles agreed upon within the United Nations and relevant international agreements.

(g) Every State has the duty to discourage all manifestations and practices of colonialism, as well as racism, racial discrimination and apartheid, as contrary to the right of peoples to self determination and to other human rights and fundamental freedoms.

(h) Every State has the duty to discourage advocacy of hatred and prejudice against other peoples as contrary to the principles of peaceful coexistence and friendly co-operation.

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17 General Assembly Resolution, 33/73, 15th December 1978.

18 *Id.* Part I Clause (a).

The Declaration on Preparation of Societies for Peace calls upon all States to act, for the implementation of the given principles, perseveringly and consistently with due regard to constitutional rights and the role of family and the institutions and the organizations concerned.[19] *States are supposed to ensure that their policies, including educational processes and teaching methods as well as media information activities are compatible with the task of the preparation for life in peace of entire societies and in particular, the young generations.*[20] They must discourage and eliminate incitements to racial hatred, national or other discrimination, injustice or advocacy of violence and war.[21] Nonetheless, States must develop various forms of bilateral and multilateral cooperation, also in international, governmental and non-governmental organization, with a view to enhancing preparation of societies to live in peace and, in particular, exchanging experiences on projects pursued with that end in view.[22]

The United Nations General Assembly in Part-III of the declaration recommends that the governmental and no-governmental organizations concerned should initiate appropriate action towards the implementation of the Declaration. It has appropriately expressed the need for concerned action on the part of governments, the United Nations and the specialized agencies, in particular the United Nations Educational, Scientific and Cultural Organization, as well as other international and national organizations, both governmental and non-governmental.[23] The General Assembly has shown its greater concern for the principles laid down in the Declarations by requesting the Secretary General to follow the progress made in the implementation thereof and to submit periodic reports thereon to it.[24]

Declaration on Right of Peoples to Peace

Besides the above mentioned Declarations the UN General Assembly, in 1984, adopted another very significant Declaration known as *Declaration on the Right of Peoples to Peace*[25]and made a direct mention of the fact that recognition and enjoyment of the right of peoples to peace is essential to full implementation of the human rights and fundamental freedoms. On the occasion the General Assembly reaffirmed that the principal aim of the United Nations is the maintenance of international peace and security and expressed a will to eradicate war from the life of mankind and avoid a worldwide nuclear catastrophe. Maintenance of a peaceful life for people is a sacred duty of each State. *The Assembly felt concerned that peace is the primary requisite for material well-being, development and progress of countries and for the full implementation of the human rights and fundamental freedoms.* This is also a primary condition for the preservation of human civilization and the survival of mankind. In its specific provisions the General Assembly through this Declaration "Solemnly proclaims that the peoples of the world have a sacred right to peace" and "declares

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19 *Id.* Part II Clause (a)
20 *Ibid.*
21 *Ibid.*
22 *Ibid.* Part II Clause (b).
23 *Id.* Part III Clauses 1 and 2.
24 *Ibid.* Clause 3.
25 General Assembly Resolution, 39/11, 12th November 1984.

that the preservation of the right of peoples to peace and promotion of its implementation constitute a fundamental obligation of each State.[26]

The General Assembly further emphasizes that ensuring the exercise of the right of peoples to peace demands that the policies of States be directed towards the elimination of threat of war, particularly nuclear war, the renunciation of the use of force in international relations and the settlement of international disputes by peaceful means on the basis of the UN Charter.[27] It appeals to all States and international organizations to do their utmost to assist in implementing the right of peoples to peace through the adoption of appropriate measures at both the national and the international levels.

Implementation of programmes and enforcement of right to peace

Promotion and achievement of the ideals of peace and the advancement and protection of human rights being co-dependent constitute two fundamental objectives of the UN Charter. To strengthen the process of peace and to make promotion of human rights possible the United Nations General Assembly declared the year1986 to be the international Year-of Peace.[28] In this regard the proclamation was approved by the General Assembly on 24 October, 1985, the 40th anniversary of the United Nations. The Proclamation in unequivocal terms considered peace a "universal ideal" and its promotion" "the primary purpose of the United Nations". It also made clear that promotion of peace and security, *inter alia,* requires "the promotion and exercise of human rights and fundamental freedoms, decolonization in accordance with the principle of self-determination, elimination of racial discrimination and apartheid, the enhancement of the quality of life, satisfaction of human needs and protection of environment.[29] The proclamation recognized that education, information, science and culture can contribute towards living in peace and practicing tolerance, and offered an opportunity of Governments; inter governmental and non-governmental organizations and others to reflect and act creatively and systematically to carry out the common aspirations for peace. It called upon all peoples to join with the United Nations in resolute efforts to safeguard peace and the future of humanity.[30]

The working linkages, between human rights and peace are also obvious from the reports of UN *Sub-Commission on Prevention of Discrimination and Protection of Minorities*[31] which it prepared after studies on the request of the Commission on Human Rights.[32] The study pointed out that many instruments have made references to the interrelationship between the realization of human rights and peace. The Report proves beyond any doubt that the strengthening of international peace and security is a pre-requisite for economic and social development and for the materialization of all human rights and that the *vice versa* is also true.[33]

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26 *Id.* Clauses 1 and 2.
27 *Id.* Clause 3.
28 General Assembly Resolution, 37/16, (1982).
29 Annexure to General Assembly Resolution, 40/3, 24th October 1985.
30 *Ibid.*
31 UN Doc. E/CN,4/Sub 2/1988/2.
32 General Assembly Resolution,1982/7.
33 General Assembly Resolution,1989/47.

A pro-active measure adopted by United Nations for maintaining international peace and security is the use of UN peacekeeping forces. These forces are interposed between hostile States or hostile communities in a state of conflict within a State to create conditions necessary for peaceful settlement of disputes. From 1948 till date more than a million troopers have served under the Flag of United Nations by monitoring ceasefire, patrolling demilitarised areas, manning buffer zones and de-escalation of conflicts. Before 1993 (i.e. prior to the ending of 'cold war') peacekeeping forces were largely used to maintain calm on the front lines while giving warring factions an opportunity to arrive a settlement through negotiations. But, the UN peacekeeping forces adopted a new role after 1988. This new generation of the peacekeeping forces responds not only by rescuing weak institutions or 'failed States, but also plays a role in situations like collapsing economies, natural disasters and international conflicts including ethnic and tribal warfare. For more effective operations an agenda for peace was issued by the then UN Secretary General, Boutros Boutros Ghali in 1992 which provided for increased use of confidence building and fact finding measures and the preventive deployment of a UN Presence or establishment of demilitarised zones in potential conflict areas. Later some more propositions were put forwards to have a better coordination of the troops in multinational operations.

Beginning with UN Truce Supervision Organization (UNTSO) in 1948 and UN Military Observer Group in India and Pakistan (UNMOGIP) in 1949 a number of UN peacekeeping operations were conducted many of which have already concluded. Some well known operations of the UN peacekeeping have been the UN Good Offices Mission in Afghanistan and Pakistan (1988-90), UN Iraq-Kuwait Observation Mission and others like operations missions to Angola (1991), El Salvador (1991), for Referendum in Western Sahara (1991), Combodia (1991-92), Somalia I, Mozambique (1992), Somalia II (1973), Uganda-Rwanda (1993), Georgea (1993), Liberia (1993), Haiti (1993), Chad and Libya (1994), Yugoslavia (1994), Kosova (1999), Timore (1999), Sudan (2007), Libya (2011) etc. and more is reflected below in the list.

Status of UN Peacekeeping Missions

Peacekeeping by the United Nations is a way to help countries in conflict to maintain conditions for sustainable peace. Virtually it is the soldiers and military officers, civilian police officers and civilian personnel from many countries who monitor and observe peace processes in post-conflict situations and assist combating parties in implementing the peace agreements they have signed. Such assistance comes in many forms, including confidence-building measures, power-sharing arrangements, electoral support, strengthening the rule of law, and economic and social development. All operations must include the resolution of conflicts through the use of force to be considered valid under the charter of the United Nations.

The UN Charter gives the Security Council the power and responsibility to take collective action to maintain international peace and security. For this reason, the international community usually looks to the Security Council to authorize peacekeeping operations. Most of these operations are established and implemented by the United Nations itself with troops serving under UN operational command. Where direct UN involvement is

not considered appropriate or feasible, the Council authorizes regional organizations such as the North Atlantic Treaty Organisation, the Economic Community of West African States or coalitions of willing countries to implement certain peacekeeping or peace enforcement functions. In modern times, peacekeeping operations have evolved into many different functions, including diplomatic relations with other countries, international bodies of justice (such as the International Criminal Court), and eliminating problems such as landmines that can lead to new incidents of fighting.

When on 21 September, 1998 the 53rd Session of 185 member United Nations General Assembly opened in New York, its agenda included deadlocked-peace process in Cyprus, turmoil in Afghanistan, stalemate in the Middle East Peace Process, violence in Kosovo, Civil War in Sudan and Angola and continuing violence in Congo. The Secretary General, Kofi Annan, while addressing the largest annual gathering of Presidents, Kings, Prime Ministers and foreign Ministers said that conflicts in Afghanistan, Kosovo and Congo showed the importance of nations in ridding the globe of the scourge of war. Non-proliferation was one of the issues which dominated the agenda. He described the nuclear tests by India and Pakistan as a "highly disturbing development" and asked the two nations to refrain from any further testing, adhere immediately to the global test ban treaty and freeze their nuclear programme and the development of missiles. During the session the Prime Minister of India, Mr. Atal Bihari Vajpayee expressed his readiness to participate in the Comprehensive Test Ban Treaty (CTBT) subject to other countries adhering to it without conditions. He also reiterated readiness to actively participate in the negotiations to draft a 'Missile Materials Cut-Off Treaty (MMCT) at Geneva. The issue of CTBT was caught by rough weather when the American Congress refused to adopt it. On 24 June 1999 the 61-nation Conference failed to 'break an impasse over beginning substantive talks on nuclear disarmament with major nuclear States stalling a consensus on negotiations for complete elimination of all such weapons, Eight UN members-Brazil, Egypt, Ireland, Mexico, New Zealand, Slovenia, South Africa and Sweden decided to sponsor a UN resolution soon urging the 185 member General Assembly to finalize an agenda for the achievement of nuclear disarmament possible within a specified time frame.[34]

Actions for peace include the ratification of the Global Anti-Personnel Landmine, Treaty by 40 countries on 16 September 1998, achieving the trigger number of signatories that would make it binding. Landmark Convention banning Anti-Personal Mines became international law on 1 March 1999 when 86 countries ratified it--46 more than the required number; later the treaty was signed by 136 countries in Ottawa (Canada).

The Treaty bans production, storage, use or transfer of anti-personnel mines, with no exception for any type or any region of the world. Signatories to the Treaty are also required to destroy their landmine stockpiles within four years and remove the deployed mines within ten years. While United Nations Organization is the repository of the Treaty, countries like USA, China, Russia, Israel, India and Pakistan have not signed the Treaty. Over 70 countries in Asia, Europe, Africa and the America have already scattered in their territories millions of

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[34] P B Sinha and S Sinha, *Comprehensive Review of Current Events*, Part A, 1-5(1999).

mines which in the last two decades killed or injured more than a million people including a large number of civilians.[35]

Conclusion

The most cherished desire of humanity and an unending aspiration of every individual, in its wider perspective, is peace. It refers to conditions of harmonic life with liberty, good health and security as indicators of development. It has a direct nexus with enjoyment of human rights—the rights without which it is not possible either to live or to live like a human being. After the First World War many treaties-were concluded by several European countries binding them to protect social, religious and national minorities. The execution of these obligations was supervised by the League of Nations. In view of the relationship between action for establishment of peace and need for enforcement of human rights a demand was made by the representatives of Cuba, Mexico and Panama in the United Nations Conference held at San Francisco in 1945 proposing that the Conference should adopt a declaration of the Essential rights of Man. This eventually became a voice of all the people and thereby establishment of peace and promotion of respect for human rights became a common goal of the United Nations. The United Nations Charter accordingly brought the matters of peace and human rights together in its preamble as cherished goals for realisation. The principles constituting the substantive part of the UN Charter were then declared for implementation in other international instruments like the *Declaration on the Essentials of Peace*, 1949, as basic principals necessary for the endurance of peace. The International Bill of Rights is a detailed version of the principles and policies to attain the same goal, i.e., global peace. The declarations related to right to development, protection of weaker sections of the people and humanitarian law also aim at the same set goal of peace and prosperity. Any disregard of these principles is sure to bring disharmony become the main cause for prevalence of conflict and unrest. The Declaration of 1949, therefore, in addition to other UN Conventions and Declarations earnestly calls upon every nation to exercise certain restraint and take necessary positive measures for enabling people to live in peace and prepare societies to live in peace. The global view of the peace scenario is, however, even after more than six decades, a disappointment rather than an achievement. The only option left for the international human community is to sincerely implement the programmes of peace and ensure every person everywhere an equitable level playing field and dignity.

To repeat and conclude--peace is not an inalienable human right without which neither life nor enjoyment of any other rights or progress is possible. Absence of peace implies a state of destruction-destruction of humanity and everything necessary for sustaining that. Realizing this fact the UN bodies should take every possible measure to establish enduring peace.

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35 *Ibid.*

Environment friendly Hydroelectric Power Generation in Jammu and Kashmir: The Legal Perspectives under the International Environmental Law

M. Ayub Dar *
Iftikhar Hussian Bhat **

Abstract

Climate change and global warming attributed to emissions of greenhouse gases (GHGs) from human activities are a major threat to our survival and well-being. GHG emissions are the product of complex dynamic systems dictated by socioeconomic conditions and technological change. The United Nations Framework Convention on Climate Change (UNFCCC) mooted at the Earth Summit in 1992 is a landmark agreement of the global community to meet the challenge of climate change. In 1997, the Kyoto Protocol set the targets and time tables for the reduction of emissions to implement the Convention. The Clean Development Mechanism (CDM), one of the three flexibility mechanisms pronounced in the Kyoto Protocol, has the potential to garner additional sources of financing sustainable development projects including hydroelectric power projects in developing countries along with the global reduction of GHG emissions. The state of Jammu and Kashmir is bestowed with huge hydro electric energy potential which if exploited fully will provide a strong thrust to economy of the state. The State Power Development Corporation is contemplating to register its upcoming hydropower projects under the UNFCCC which would help the State to claim benefits for checking emission of greenhouse gases during energy generation. Against this background, this paper attempts to provide an overview of the legal perspectives of eco-friendly hydroelectric power generation and potential benefits that the State of Jammu and Kashmir can claim under international environmental law.

Key Words: Hydroelectric Power**,** Greenhouse Gases**,** UNFCCC, Kyoto Protocol, Clean Development Mechanism.

1. Introduction

Electricity is one of the most vital infrastructural requirement on which the socio-economic development of a country depends. Hydropower continues to be the most important economic source of commercial renewable energy worldwide and its popularity is increasing

* Professor, Department of law, University of Kashmir, Srinagar, India. (email: dar.ayub@gmail.com)

** Assistant Professor, Department of law, University of Kashmir, Srinagar, India. (email: iftikharveeri@gmail.com)

with the surge of interest in clean energy prompted by concerns about climate change.[36] The share of hydropower in the sector of renewable energy is dominant. It accounts for around 83% of the globally produced renewable electricity; the vast majority of the approximately 18% that all renewables together contribute to the total electricity generation.[37] Although hydropower is an 'old-timer' in the group of renewable energies it benefits substantially from the financial support that governments and companies mobilize in order to promote the dissemination of regenerative technologies. With little or no Carbon dioxide and other greenhouse gas emissions and high energy payback, hydropower supports clean development and is recognized as being fully renewable and sustainable.

Faced with an unprecedented crisis, the majority of the world's nations joined an international treaty in 1992 – The United Nations Framework Convention on Climate Change (UNFCCC) – to advance international cooperation to reduce the emission of greenhouse gases (GHGs). The Kyoto Protocol, which set binding targets for GHG emission reductions, was adopted in December 1997 under the UNFCCC, and was entered into force in February 2005. Under the Kyoto Protocol, developed nations and transitional economies are referred to as "Annex 1 nations" and must meet specific reduction goals for GHGs. Annex 1 nations may meet their reduction requirements through allowance trading, paying for reductions in other Annex 1 nations, or paying for reductions in a developing nation that is party to the Protocol. This last method is called the Clean Development Mechanism (CDM), and credits from CDM projects are known as certified emission reductions or CERs. The Clean Development Mechanism (CDM) has the potential to garner additional sources of financing sustainable development projects including hydroelectric power projects in developing countries along with the global reduction of GHG emissions.

Climate change mitigation projects in developing countries can yield numerous benefits, such as the transfer of technology, rural energy provision and reduction of pollutants, contributions to livelihood improvement, employment creation and increased economic activity. The Clean Development Mechanism (CDM), one of the most important instruments of international climate policy, recognizes hydropower dams as sustainable carbon offsetting projects and supports the construction of hundreds of large-scale projects (> 15 MW) in developing countries through the allotment of tradable carbon credits. With renewed global concern over climate change, carbon trading is emerging as a major business prospect for India. The State of Jammu and Kashmir is bestowed with huge hydro electric energy potential which if exploited fully will provide a strong thrust to economy of the state. The State Power Development Corporation (JKSPDC) is contemplating to register its upcoming hydropower projects under the United Nations Framework Convention on Climate Change (UNFCCC) which would help the State to claim benefits for checking emission of greenhouse gases during energy generation. Against this background, this paper attempts to

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36 UNESCO 2009: *The United Nations World Water Development Report 3. Paris* , at 118.

37 Renewable Energy Policy Network for the 21st Century: *Renewables Global Status Report 2009* Update, Paris.

provide an overview of the legal perspectives of eco-friendly hydroelectric power generation and various benefits that the State of Jammu and Kashmir can claim under international environmental law for checking GHG emissions during hydroelectric power generation.

2. Hydroelectric Power Potential of Jammu and Kashmir

Jammu and Kashmir also known as Heaven on the earth is located in the Himalayan region. A significant part of the state topography is under hilly terrain which hampers the progress and development in the state. The State has always been characterized as a relatively backward economic region. The chief characteristics of the state are the predominance of the agricultural sector, low degree of urbanization, inadequately developed infrastructure, illiteracy, high birth rates and low levels of investment. However Jammu & Kashmir is blessed with many unique features which can make it one of the fastest growing states . There is a wide scope for the development in the state in many unexplored segments which could help the state break free from its current economic stagnation.

The topography of State provides extensive network of canals and streams. The State is bestowed with huge hydro electric energy potential which if exploited fully will provide a strong thrust to economy of the state. Micro / Mini Hydropower have tremendous potential for generation of electricity in the State. The role of such hydropower projects has been well identified and accepted to supplement energy generation as short/medium term measure particularly in a State like Jammu and Kashmir. However, it demands huge investments, technical expertise, administrative reforms, congenial environment, proper regulations and management, besides competitive marketing, policy formation and private participation. The optimal exploitation of the available hydel resources in the state would not only meet the state's demand but will ensure supply of power to northern grid to boost the overall development of India. The estimated hydro power potential of the state is 20,000 Megawatts (MWs), of which 16480 MWs have been identified for the four rivers in the state: Chenab (10853.81 MW), Jhelum (3141.30 MW), Indus (1598.70 MW) and Ravi (417.00 MW). However, due to scarcity of resources, much less potential has been exploited. Out of the identified potential, only 2318.70 MWs or 14% have been exploited so far, consisting of 758.70 MWs in State Sector from 20 power projects and 1560 MWs from three power projects under Central Sector.

3. Advantages of Hydroelectric power as against the other powers

Hydropower, or hydroelectricity, is a source of energy produced by the fall of water turning the blades of a turbine. The turbine is connected to a generator that converts the energy into electricity. People have been benefiting from the power of water for more than two thousand years. Water wheels were used to grind wheat into flour as early as 100 B.C. During the 19^{th} century, the water wheel was used to produce electricity. At the end of that century, the water turbine gradually replaced the water wheel, and soil and rock dams were built to control the flow of water. Since then, the hydroelectric potential of rivers continues to be developed.

Hydropower is recognized as a renewable source of energy, which is economic, non-polluting and environmentally benign. It represents the use of water resources towards generation of pollution free and inflation free energy due to absence of fuel costs. Apart from the clean and cost- economic nature of power, the other key advantage includes an inherent

ability for instantaneous starting, stopping and load variations which helps in improving reliability of power system. Hydro power projects are generally categorized in two segments i.e. small and large hydro. Small hydro[38] refers to hydroelectric projects with capacity generation less than 25 MW, which are typically canal based or run of the river type, while large hydro refers to projects of greater than 25 MW and are located on rivers and can be either of run of the river type or associated with large dams. A planned development of hydropower projects in India started only in the post independent era, with the first 50 years after independence seeing a hydro capacity addition of 21,644 MW, most of them being large hydro. Since the development was mainly in the Central sector and the State Electricity Boards (SEBs) were more or less tuned to the central planning system, relatively less importance was given to small projects.

The important reasons to include hydropower in all renewable energy initiatives are as follows:

- **Hydropower is a renewable source of energy**

Hydropower uses the power of flowing water, without wasting or depleting it in the production of energy; therefore, all hydropower projects – small or large, run-of-river or storage – meet the definition of renewable.

- **Hydropower supports the development of other renewables**

Hydropower facilities with reservoirs provide a unique operational flexibility that allows them to respond almost immediately to fluctuating demands for electricity. Hydropower's flexibility and storage capacity makes it the best source to support the deployment of wind or solar energy.

- **Hydropower contributes to fresh water storage**

Hydropower reservoirs harvest rainfall, thereby supplying fresh water for drinking and irrigation. This fresh water storage protects aquifers from depletion, and reduces our vulnerability to floods and droughts.

- **Hydropower helps to improve the air we breathe**

Hydropower is a clean source of electricity because it produces very few greenhouse gases, no other air pollutants, and it does not generate any toxic waste by-products.

- **Hydropower helps fight climate change**

By offsetting emissions from gas, coal and oil fired power plants, hydropower can contribute in reducing air pollution and slowing down global warming. Currently, hydropower displaces the consumption of 4.4 million barrels of oil-equivalent each day.

- **Hydropower stimulates local and regional development**

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[38] Small hydro power projects are further classified as:

Micro Hydro : Up to 100 kW

Mini Hydro : 101 kW – 2 MW

Small Hydro : 2 MW to 25 MW

Hydropower facilities electricity, roads, industry and commerce to communities thereby developing the economy, improving access to health and education, and enhancing the quality of life.

- **Hydropower optimizes the performance of other energy technologies**

Through flexible, reliable and efficient operation, hydropower ensures an effective electricity network, where the performance of thermal plants is optimized and air emissions reduced.

- **Hydropower fosters national energy security**

Water from rivers is a domestic resource that is not subject to fluctuations in fuel prices; therefore, hydropower fosters energy independence and security.

- **Hydropower means clean, affordable power for today and tomorrow**

With an average life span of 50 to 100 years, hydropower projects are long-term investments that can easily be upgraded to take advantage of the latest technologies. Hydropower is an electricity source with long viability and very low operation and maintenance costs that one generation bestows onto several subsequent ones.

- **Hydropower is sustainable development**

Hydropower projects that are developed and operated in an economically viable, environmentally sound and socially responsible manner represent sustainable development at its best; that is to say, "Development that meets the needs of the people today without compromising the ability of future generations to meet their own needs."

4. International framework for Climate Change: A Hunt for active Solutions to Global Environmental Concerns

Growing international concern about the potential effects of climate change has fostered increasing research, policy initiatives and the development of innovative programs and projects around the globe to reduce greenhouse gases and to minimize the impact of climate change. Significantly reducing global greenhouse gas (GHG) emissions requires fair and effective multilateral responses committing all the world's major economies to the effort. The following multilateral efforts are underway to find solutions that will mitigate climate change.

4.1 United Nations Framework Convention on Climate Change (UNFCCC)

In June 1992, over 180 countries at the "Earth Summit" in Rio de Janeiro adopted the United Nations Framework Convention on Climate Change (UNFCCC). It is a non-binding legal framework that aims to stabilize GHG concentrations in the atmosphere at a level that would prevent dangerous human-induced interference with the climate system. UNFCCC was signed by154 States and entered into force on 21st March 1994. The Convention directs that "such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner". The UNFCCC, therefore, provides a foundation for the global response on climate change mitigation. However, UNFCCC is a non-binding framework which asks all countries to stabilize GHG

concentration in the atmosphere at a safe level. While the framework recognizes the common but differentiated responsibilities of the developed and developing countries and asks the developed countries to take a lead in reducing GHGs, the UNFCCC did not provide a binding mechanism for quantified emission reduction targets.

The UNFCCC aims at stabilization of greenhouse concentration in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. According to the UNFCCC, "such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner". The guiding principles laid down by the UNFCCC include the following:[39]

- The parties should protect the climate system on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities (CBDR). Accordingly, the developed country parties should take the lead in combating climate change and the adverse effects thereof;
- The specific needs and special circumstances of developing country parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those parties, especially developing country parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration;
- The parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost; and
- The parties should cooperate to promote a supportive and open international economic growth and development in all parties, particularly developing country parties, thus enabling them better to address the problems of climate change.

4.2 The Kyoto Protocol

While stipulating the commitments of countries as needed for implementation of the Convention, the UNFCCC laid down various other requirements. Recognizing the need for provision of financial resources on a grant or concessional basis, including for the transfer of technology, the UNFCCC defined the broad guidelines and called for modalities to be finalized by the Conference of Parties (COP) established through the Convention. After detailed deliberations in the following years, the modalities for implementation of the Convention were finalized in 1997 through an international agreement at Kyoto, Japan. The agreement, popularly known as Kyoto Protocol (1997), sets the targets and timetables for reduction of emissions by the developed countries. The Convention encourages the developed countries to stabilize their GHG emissions and the Kyoto Protocol commits them to reduce their collective emissions by at least 5 per cent. According to the Protocol, 38 developed

[39] Article 3 of the UNFCCC.

countries will have to reduce their GHG emissions to an average of 5.2 per cent below their 1990 levels over the period of 2008-2012 which is defined as the first commitment period.

The Kyoto Protocol has identified Carbon Dioxide (CO_2), Methane (CH_4), Nitrous Oxide (N_2O), Hydrofluorocarbons (HPC), Perfluorocarbons (PFC) and Sulphur Hexafluoride (SF_6) as the six main greenhouse gases for setting the targets. The Protocol allows the option to the countries to decide which of these gases will constitute their emission reduction programme. Thus, these gases are combined in a 'basket' so that reductions in each gas are credited to a single target number.

The Kyoto Protocol as further clarified through the Marrakech Accords has recognized the following cooperative mechanisms to help the developed countries (enlisted as Annex I Parties) for meeting their emission reduction targets so as to contribute in providing practical solutions to global pollution problems encompassing the entire life on earth:

1. Emission trading (ET)

Through this mechanism, countries are entitled to transfer parts of their allowable emission termed as "Assigned Amount Units (AAU)".

2. Joint implementation (JI)

Under this mechanism, countries can claim credit for emission reduction accrued from investment in other developed countries and thereby transfer of equivalent "Emission Reduction Units (ERU)" is permitted between these countries.

3. Clean Development Mechanism (CDM)

Through this mechanism, the investors from developed countries can take up emission reduction projects which help sustainable development in developing countries and thereby earn "Certified Emission Reductions (CERs)" to be used for achieving compliance of their quantified emission reduction commitments. CDM is the main mechanism introduced for the developing countries to initiate climate-friendly projects that meet their sustainable development targets while contributing to the ultimate objectives of the UNFCCC for reducing GHGs globally.

As a forerunner to CDM and JI, some pilot projects have been undertaken in developing countries through an interim mechanism entitled "Activities Implemented Jointly (AIJ)". However, under this mechanism no credit is accrued for the emission reduction.

The aforesaid mechanisms are based on the premise that the countries including the government and private organizations that find it expensive to reduce emissions in their countries can pay for emission reduction elsewhere at lesser cost. Thus, the investment cost is reduced while the target of global emission reduction is achieved. However, according to the Protocol, the credit earned through emission reduction in other countries should be supplementary to the in-country emission reduction. The emission trading regime opens a market whereby countries which are able to reduce emissions more than their agreed targets will be entitled to sell the excess credits to other countries. The Joint Implementation (JI) mechanism offers an opportunity for financing projects in other countries. For instance, if a country is unable to reduce its emissions at a lesser cost, it may choose to invest in emission reduction projects in another country. Thus, it gets the credit without incurring heavy

expenditure while the recipient country benefits from foreign investment and technology transfer. It amounts to a "win-win-win" scenario where both the countries are gainers and the global emission reductions are met.

While the Emission Trading (ET) and Joint Implementation (JI) projects are confined to developed countries with defined emission reduction targets, the Clean Development Mechanism (CDM) offers a new avenue for emission reduction in developing countries which do not have any obligatory emission reduction target.

4.3 Clean Development Mechanism (CDM)

Clean Development Mechanism (CDM) also referred to as Carbon Finance under CDM was established under Article 12 of the Kyoto Protocol in order to explore cost-effective options to mitigate the impacts of climate change. CDM is one of the flexible market-based financial mechanisms. It was introduced particularly for developing countries in achieving sustainable development and at the same time contributing to the ultimate objective of the UNFCCC (i.e. to achieve a stabilization of atmospheric GHG concentrations at a level that will prevent dangerous human induced climate system interference) and to assist developed countries in complying with their emission limitation and reduction commitments. CDM aims at assisting developing countries to implement project activities that reduce GHG emissions in return for generating certified emission reductions (CERs). The CERs generated by such project activities can be used by developed countries as credits ("carbon credits") to meet their emissions targets under the Protocol. Accordingly, the CDM is an international carbon offsetting scheme that enables industrialized countries to compensate for excess GHG emissions by purchasing carbon credits from climate protection projects in the South.

The concept of carbon offsetting in developing countries is based on two essential ideas. First, it does not matter where GHGs are emitted or reduced. The principal GHGs stay in the atmosphere long enough to mix uniformly over the entire globe. Thus, their global warming potential is independent from the location of the emitting source (IPCC 2007a).[40] Secondly, reducing GHG emissions in the developing world is less expensive than in the industrialized North. For example, reducing the emission intensity of an old inefficient thermal power plant in India is more economic than retrofitting an already very efficient thermal power plant in France. Consequently, the CDM takes advantage of *"spatially differentiated emission abatement costs"*,[41] i.e. the fact that the same amount of money can reduce more emissions in the South than in the North.

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40 Intergovernmental Panel on Climate Change: *Climate Change: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge: Cambridge University Press, 2007.

41 Bumpus, A.G. and Liverman, D.M. (2008): *Accumulation by Decarbonization and the Governance of Carbon Offsets*. In: *Economic Geography* 84 (2), at 134.

The second objective of the CDM is to promote sustainable development in the host countries of CDM projects. Article 12.2 of the Kyoto Protocol states, that: *"The purpose of the clean development mechanism shall be to assist Parties not included in Annex I in achieving sustainable development […] and to assist Parties included in Annex I in achieving compliance with their […] reduction commitments"* (UNFCCC 1998).[42] Hence, the CDM postulates a direct nexus between the implementation of climate protection projects and the promotion of sustainable development. Based on this notion, the CDM is expected to function as a 'win-win' strategy that benefits all stakeholders. Developers of CDM projects can gain income by selling carbon credits; Non-Annex I countries and local stakeholders are supposed to benefit from a project's contribution to sustainable development, while Annex I countries and their industries can meet their reduction targets more economically by purchasing inexpensive carbon credits instead of investing in more costly domestic emission reductions.

Any project involving generation of CERs, must undergo a rigorous process of documentation and approval by a variety of local and international stakeholders as specified under the CDM Modalities and Procedures. The key stages in the CDM project cycle are the initial feasibility assessment, development of a Project Design Document (PDD), host country approval, project validation, registration, emission reduction verification and credit issuance.

Various stakeholders are responsible for carrying out each activity. These stakeholders include CDM project developer (public or private party in the host country), CDM Executive Board (EB) of the UNFCCC, Designated Operational Entity (DOE) of the UNFCCC responsible for validation and verification of the project, and the Designated National Authority (DNA) which has the authority to grant host country approval for the project.

All CDM projects must satisfy certain requirements specified in either the Kyoto Protocol or the Marrakesh Accords. These requirements include, that the project

(i) Complies with the eligibility criteria (e.g. sustainable development criteria) of the host country and other parties, and receives project approval by the host country;

(ii) Provides real, measurable, and long-term benefits related to the mitigation of climate change using an approved baseline and monitoring methodology;

(iii) Delivers reductions in emissions that are additional to any that would occur in the absence of the project activity;

(iv) Does not result in significant environmental impacts and undertakes public consultation; and

(v) Does not result in the diversion of official development assistance (ODA).

Obtaining host country approval is a critical step in the CDM project cycle as without it a project is not eligible for the CDM. In order for a CDM project to receive formal host country approval, the host country must have ratified the Kyoto Protocol and have nominated a

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42 UNFCCC (1998): *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, available at: http://unfccc.int/resource/docs/convkp/kpeng.pdf (Accessed 10 January 2013).

Designated National Authority (DNA) to the UNFCCC. It is also important to note that not all projects are eligible for CDM. The key eligibility requirement, as set out in the Kyoto Protocol, is 'additionality'. Reductions in emissions must be additional to what would have happened in the absence of the CDM. Only projects that are implemented over and above the business as usual activities are able to effectively compensate emissions. In other words, a CDM project should be something that would not have happened anyway, in the absence of the CDM. Methods to demonstrate additionality have been developed by the CDM Executive Board.

A crucial and frequently applied step to demonstrate the additionality of CDM (large-scale) projects is the use of an Investment Analysis. The project developer will have to demonstrate that the CDM revenue from selling CERs is required in order to put the required return of the project above the investment threshold (i.e., the Internal Rate of Return (IRR) hurdle rate) and thus demonstrate that the project is additional. Projects with an IRR that exceeds the hurdle rate even without the CDM cash flow is, by definition, commercially attractive without the CDM and is therefore non-additional – unless other non-financial barriers can be shown that prevent commercial implementation of the project.

4.3.1 Sustainable Criteria of CDM Projects

As explained previously, the CDM project has two main objectives, (i) the project should reduce a significant amount of GHGs which are additional to the business as usual case and (ii) the project should contribute to Sustainable Development of the country and the communities. The second objective has not been given much attention and its definition remains unclear in many countries. Whether the approved projects really achieve sustainable development benefits remains an issue. However, it is generally accepted that CDM project activity in a host country could improve the following sustainability criteria:

- Social well being
- Economic well being
- Environmental well being

Since most of the projects under CDM, especially the existing large-scale projects approved or in the pipeline, are driven by the private sector and also implemented with industries in the private sectors, there is limited direct involvement of communities / households in the project implementation. As such limited economic benefits are accrued to communities / households through these projects. The limited indirect benefits reported by these projects are increased employment during the project construction and operation, improved local environment through reduced pollution (negligible), occupational health improvement, reduced drudgery of workers, and conservation of resources.

4.3.2 Types of projects eligible under CDM

- **Energy**
  - Renewable/alternate energy,
  - Energy efficiency/conservation, and
  - Fossil- fuel cogeneration
- **Waste Management**

- Landfill gas capture
- Recycling/composting
- Energy from solid waste etc.

- **Transportation**
  - Alternative fuel vehicles
  - Mass transit systems
  - Cleaner engines, CNG
- **Industrial processes** (Sugar, Cement, Fertilizer, Textile, Paper Steel, Bricks etc.)
- **Land, Land use and Forestry** (afforestation and reforestation)
- **Agricultural and livestock practices** (cattle waste, rice fields etc.)

5. Advantages for Jammu and Kashmir that can be claimed under International Legal Framework for Climate Change

The Clean Development Mechanism (CDM) comprises a multitude of technologies that are supposed to avoid or reduce the GHGs regulated under the Kyoto Protocol. The Mechanism provides a window of opportunity to finance sustainable development projects in developing countries in the area of energy efficiency, renewable energy, waste management and carbon sequestration that also have the potential to reduce Green House Gases (GHGs) in the atmosphere. Through a CDM project, additional revenue can be generated as a financial support that can help pay a proportion of the project costs. In other words, CDM revenue (through carbon trading) makes the project financially more viable which would not have been built without the financial support through CDM. Hydropower is by far the most common project type, accounting for more than one quarter of all projects in the CDM pipeline.

Considering the fact that the CDM is only up and running since 2004, the total number of hydropower projects that have requested CDM status is remarkable. India ratified the UNFCCC in June 1992, followed by the Kyoto Protocol in August. India is the second largest host of CDM projects. It has already registered about 2000 projects with the UN under the Clean Development Mechanism comprising 30 percent of the global CDM market that amounts to credits worth US$ 200 billion. The Central Government constituted the National Clean Development Mechanism (CDM) Authority in 2004 for the purpose of protecting and improving the quality of environment by making optimal use of this investment opportunity under climate change mitigation. The States like Gujarat, Andhra Pradesh, Karnataka, Uttar Pradesh, Punjab, Himachal Pradesh and a few other States have got approval for hundreds of projects for CDM accreditation from the United Nations Framework Convention on Climate Change (UNFCCC). In the State of Jammu and Kashmir also the State Power Development Corporation (JKSPDC) is contemplating to register its upcoming hydropower projects under an international climate treaty which would help J&K to claim benefits for checking emission of greenhouse gases during energy generation. The Corporation has invited global bids to engage consultants for registration of power projects for Clean Development Mechanism (CDM) benefits under the United Nations Framework Convention on Climate Change (UNFCCC). The projects are 1856 MW Sawalakote, 390-MW Kirthai stage-I, 990 MW

Kirthai stage-II, 450-MW Baghliar-II, 93-MW New Ganderbal, 48-MW Lower Kalnai, 37.5 MW Parnai, 9-MW each Dah and Hanu.

The major benefits that CDM can fetch for the State are as follows:

- A CDM project will help in capitalizing an "unvalued" commodity, i.e., "GHGs" emissions to the atmosphere
- It can be a source of earning additional revenue from the sale of carbon credits and helps improve financial viability of the project.
- It can attract "additional" private sector financing for local sustainable development priorities and as such has the potential to "catalyze" large foreign direct investment (FDI) flows.
- It can serve as an instrument for "appropriate" technology transfer.
- It can help solve local environmental issues such as air and water pollution, municipal solid waste etc.

According to experts, who have conducted the assessment, Jammu and Kashmir's annual CDM potential vis-à-vis hydropower alone is around 60 million CER, which at the current rate of 15 dollars per unit of CER credit translates to 900 million US dollars. This is out of the total CDM potential of the state which stands at 1125 million US dollars, as per the assessment.[43] The only requirement for the state to sell its carbon credits would be to get approved CDM certificate for its projects in different sectors from the United Nations. Once these projects come up the carbon credits can be sold to the developed countries, which under Kyoto protocol have an obligation to invest in green technologies in the developing countries, if not reduce emissions in their own countries.

International (Uni/bi/multilateral) funds and facilities have evolved for CDM project development and are providing base financing. Investment funds have been initiated by the World Bank covering a CDM portfolio of various types including those for communities through the WB Community Development Fund established for this purpose [44] . The Asia Development Bank has also started a CDM Facility to assist the developing country members and project developers by providing CDM-specific technical and transaction assistance in parallel with ADB loans for eligible projects and by making carbon credits available to the market. Through the CDM Facility, ADB provides capacity building and shoulders the upfront cost of CDM due diligence and regulatory requirements until a Certified Emission Reduction (CER) transaction is attained. Other unilateral funds have also been initiated by various developed countries independently and in partnerships with various organizations. These include Japanese Government Carbon Fund, US Utilities Partnership, Italian Fund, Netherlands Carbon Facility etc. These funds/facilities provide base financing for projects aimed at reducing GHG emissions from business-as-usual trends for generation of CERs and to balance out the supply and demand for CERs in the international market.

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[43] A team of researchers from the University of Kashmir led by Dr Shakil Romshoo has assessed the CDM potential of Jammu and Kashmir for various sectors.

9 www.carbonfinance.org for details see.

Various international and national companies have now placed their offices or representatives as brokers for CERs transactions as well as providing technical support in project development and the registration process. This has generated substantial competition in the CDM market in potential developing countries.

6. Conclusion

The challenges posed by the threat of climate change have also opened up multiple opportunities in terms of policy interventions, new initiatives, technology absorption, economic instruments and cooperation at the national, regional and global levels. The CDM, being a cooperative financial mechanism, has the potential to play a pivotal role in ushering the desired goal of climate change mitigation and sustainable development along with attendant benefits. The CDM can serve the interest of both the developed and developing countries. The developed countries have the opportunities for investment in developing countries for emission reduction projects at lower cost and get the credit thereof. On the other hand, the developing countries can avail the opportunities of supplementing their resources to meet the development needs and in the process contribute towards the common goal of GHG reduction. For the developing countries the over-arching priority is to achieve economic growth for meeting the basic human needs. It will necessarily require increased production and access to energy as also economic services for income generation and employment avenues. While the conventional methods of development have triggered a plethora of environmental problems including the threat of climate change, the CDM offers opportunities to adopt environmentally compatible mode of the development. While contributing towards the global goal of emission reduction, the CDM holds the promise for environmental and social gains in the developing countries through abatement of local environmental problems and associated social benefits. Hence, emission reduction activities and development pursuits could be mutually complementary. Participation of the public as well as private sectors for investment and technology transfer in emission abatement projects offers the much needed opportunities to the developing countries to replace the inefficient technologies and launch new initiatives for sustainable production and use of energy – a key component for economic growth. Unlike the conventional projects where investment is made primarily for financial returns, the CDM projects are expected to result in carbon credits as well as other environmental and social benefits in addition to financial returns. Besides, equity investment and debts in case of conventional projects, CDM projects have the added advantage of attracting ‘carbon investment’ for reduction of emissions.

Energy needs and environmental conservation remains the most critical requirement for Jammu and Kashmir. Hydropower is one of the State’s key resources and J&K intends to accelerate harnessing this potential as an integral part of its economic development. Development of hydro potential in the State is expected to usher in huge economic benefits in the form of infrastructure development, industrialization and employment generation. With increase in hydropower generation and improvement in efficiencies in transmission and distribution of electricity, J & K aims not only to provide energy at affordable cost for eco-friendly industrial development but also turn into a net energy exporter. It is important that

environmental protection is integrated in the hydropower development planning in the state. The environmental safeguards, as provided under the law, are aimed to ensure that an appropriate balance between promoting hydropower and protecting the environment is achieved. For energy planning and development to be scientifically sound, it is necessary to promote institutions whose mandate would be to build the capacity of the state in terms of producing necessary human resource and to generate reliable and accurate data for developing energy policy for the promotion of eco-friendly energy development, investment and planning. Given that the State seeks to develop along sustainable trajectories, regulatory and policy frameworks to support clean industrial development are consistent with climate objectives; it would appear that the political will attached to domestic priorities could be harnessed in support of the CDM. The CDM offers opportunities not only for sustainable development but also brings important co-benefits, such as the transfer of technology, rural energy provision, reduction of pollutants, contributions to livelihood improvement, employment creation and increased economic activity. Given that the existing framework for environmental protection regulates social and environmental externalities often created by conventional energy generation, stricter enforcement of existing environmental provisions could create an incentive for greater uptake of clean energy. Keeping in view the current power scenario in the state, there is a distinct possibility that energy shortages in the state would grow and impose a heavy economic and social cost on its people. However, if the power potential is fully exploited, the state would be in a position to meet its own demand and even bail out Central government and neighboring states by providing the surplus energy and inter alia generate huge earnings for the state that would be utilized for economic and human development.

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Constitutional Protection to Political Empowerment of Women through Panchayats: *A* Historical Step by Indian Parliament Suffers from Legislative and Judicial Constraints

Mushtaq Ahmad[*]
Mohmad Hussain[**]

Abstract

Women constitute half of the world's population. But they are the largest excluded category in almost all respects. The question of women's participation in politics began to assume special importance only since 1975 when the United Nations declared the decade as the " Women Development Decade" and adopted some resolutions for empowerment of women .The Constitution 73rd Amendment has been welcomed as the step focusing the nation's attention on the political structures and the processes of democratizing rural India and their significance for the vulnerable sections of the rural society. The role of women in Panchayati Raj Institutions (PRIs) is attracting a lot of serious attention in the present context in India. Attitudes have changed a lot today. Women are not going to remain contended now just looking after women's affairs as elected members of Panchayats, whether it be village, block or the district level. If given the chance they will play a constructive role in all the developmental activities and will step into what was hitherto considered as a man's domain. The very idea that women in such large numbers will have say in local self-government is a new concept and will not be easily accepted by the male dominated society. Difficulties are bound to be there initially but women have to come forward and reap the fruits of empowerment and development. The disabilities suffered by this deprived section of the rural society are bound to disappear in the long run. In this paper an attempt is made to discuss the steps taken at international level and followed by the Government of India for political empowerment of women through Constitution 73rd Amendment and to highlight the constraints which come in the way of such empowerment.

Keywords *: Panchyats (Rural local –self government), Indian Constitution, women members, political empowerment, constraints.*

Introduction

Empowerment of women and equality between men and women is a priority global issue. Its aim is to give everyone, regardless of gender, better access to opportunities to boost growth in all sectors and hasten the emergence of a fairer society. In other words, empowerment of women means economically independent and self relient in a society and their participatation in all developmental activities like their fellow men. Women are the greatest gift of God to humanity, possess the power to create what is good and destroy what is bad. Empowerment of women and their parity with men in all walks of life and spheres of

[*] *Associate Professor (Law), Directorate of Distance Education,University of Kashmir: e-mail: haddimushtaq@yahoo.co.in*

[**] Associate Professor Department of Law University of Kashmir, Srinagar. e-mail: hussainlawku@yahoo.com

activity, be it political, economic social or cultural , is *sine qua non* of gender justice. Justice does not distinguish between men and women[45].

'Political empowerment of women'-- an enigma to be desired, mankind has ever been willing to give women everything but equal status. This brazen conspiracy of the men folk against the women has been perpetrated since all times. Even the human rights have been given to them but grudgingly. And the irony is that the `man` is hardly ever conscious of the injustice done by him. But today a stage has arrived that she is almost an equal partner in the voyage of life. The fact is that the match of mankind is irreversibly towards an era of equality and the women is on the threshold of a life hitherto unexplored.[46] In order to transform Indian society and make it gender just, the Central government has adopted various measures from time to time including dynamic constitutional and legal provisions for their social, economic and political development. Their visibility in public life is increasing, still they face gender discrimination.

United Nation's Measures

It is often said that status and position of women in society is the best way to understand civilization. It is also said that women's rights are human rights. But when we examine power structure of a society more closely from a gender perspective even in developed countries where we have gender- neutral legislation as also gender- neutral legal system, widespread male dominance shows hidden motives of facts despite United Nations Resolutions and Declarations. The UN Commission on Status of Women was established in 1947. It consists of 45 members who hold their positions as representatives of their states. In recent years, the Commission is actively pursuing for empowerment of women and organizing various conferences relating to rights of fair sex. In spite of these activities, the Commission's role has been promotional although Economic and Social Council has authorized it to review the communications and reports concerning specific violations of women's rights. Various treaties pertaining to women prepared by the Sub-commission include Convention on Political Rights of Women (1925); Convention on Nationality of Married Women (1957); and The Convention on Elimination of all forms of Discrimination Against Women (1971).

At international level, the question of women's participation in politics began to assume special importance only since 1975 when the United Nations declared the decade as the " Women Development Decade" and adopted some resolutions for empowerment of women The Nairobi Conference(3rd International Conference on Women) held in 1985 called on the participating countries "to take steps for ensuring women's participation in politics through reservation of 35% seats in all elections". In 4th U.N (World) Conference on Women held at Beijing in 1995, it was asserted by the participating countries that "women's empowerment and their participation on the basis

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45 Gaur, *Empowerment of Women in India* iv(Law Publishers,Allahabad ,2nd edn., 2003).

46 Bhan, C & Raj, "Women's Empowerment for Gender Equality- A Functional Analysis*" 49 (11) Kurukshetra (2011).*

of equality in all spheres of society are fundamental for the achievement of equality, development and peace".[47]

In these days of globalisation, the global picture of women is most ignoble and inequitable. Women constitute 50 per cent of the world's population, and account for 66 per cent of the work done, but they have only a share of 10 per cent in the world's income and own one per cent of the world's property. They own 0.01 per cent of the means of production. Nearly 70 per cent of the women live below the poverty line. Two-thirds of them are illiterate. They constitute almost invariably a small minority of those holding elected office. In 1980, they made up of just over 10 percent of the worlds parliamentarians. The figure rose to 14.8 percent in 1988 and it came down to 12.7 per cent in1997 and the situation is by and large same till date[48].In view of the above mentioned data women constitute half of the world's population but they are the largest excluded category in almost all respects.

In different parts of the world, male prejudice in different degrees has led to gender injustice. In some developed countries too, women were accorded the right to vote very late. They had to launch a determined struggle to secure the right of adult franchise. The Women Suffrage Amendment was introduced in U.S.Congress in 1868 but it was not passed until 1920 when Nineteenth Amendment was ratified and women were granted suffrage[49] Even when women secured the right to vote, initially they did not receive in the Legislatures the recognition they deserved on the basis of their merit and ability. If the social-reform programme is to be pursued vigorously, certain attitudinal changes are urgently called for. These comprise; change of context, change of relations and change of values. Without such a comprehensive change in the existing value judgments of the present consumerist culture, the battle for gender justice cannot be won[50].

K. Ramaswamy J in *Samatha v.State of Andhra Pradesh*[51] relying on declaration of "Right to Development Convention" which has been adopted by the United Nations and ratified by India, held that right to development is a fundamental right. India being an active participant and signatory thereto, it is its duty to formulate its policies—legislative or executive, to accord equal attention to the promotion, and to protect the social, economic, civil and cultural rights of the people, in particular, the weaker sections, the poor, the *dalit* and tribes as enjoined in Article 46 read with Article 38, 39 and right to life guaranteed by Article 21 of the Constitution.

For striving to achieve equity, equality and justice for women, there is an urgent need to take up various political, economic, legal, social and other issues concerning women from time to time as per UN Declarations, Conventions, and Resolutions.

Position in India

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47 Datta, P., *"*Women in Panchayats", *50 (4)Kurukshetra (2001).*

48 Supra note 1.

5 Ashlyn K. Kuersten, *Women and the Law*: *Leaders, Cases and Documents* 228 (ABC-CLIO Santa Barbara, California, Ist edn., 2003)

50 Id. at 18.

51 (1997)8 SCC 191

After Independence, even in India several efforts have been made to increase women's political participation. The participation of women in PRIs was for the first time brought into focus in 1957 by Balvant Rai Mehta Committee ,which had recommended nomination/cooption of two women members in Panchayat(at Block level). The principle of nomination, however, did not produce the desired results[52]. Thus the running theme in the debates from 1957-89 was how to encourage the participation of women in political process. Thus the next and more significant effort was 33 percent reservation of seats for women in Panchayat and Municipalities through 73rd and 74th Constitutional Amendments.

"You can not draw the masses into politics without drawing the women into politics as well (Lenin,1921)". India is perhaps the first country to recognize this social fact underlined by Lenin and adopted concrete measures to draw women into politics at the grass-root level by giving them 33 per cent reservation in what may be called the 3rd –tier of governance-the Panchayati Raj.[53]

The main responsibility of Panchayati Raj Institutions(PRIs) is to accelerate the pace of development and involve all people , both male & female, in this process so that the felt- needs of the people and their developmental aspirations are fulfilled. Involvement and participation of women in PRIs is essential for efficient, equitable and sustainable people-centered development.`Democratic Decentralisation` or Panchayati Raj, as it is popularly known in India, aims at making the democracy real by bringing millions of people into the functioning of their representative government at the grass-root level. Democracy, governance and gender are, therefore, interrelated. Democracy is a form of political system, governance is an institution to implement its principles and gender is a part of governance, to be ensured by equal participation of men and women. One of the reasons for constitutional protection to political empowerment of women through PRIs was insufficient representation of women in all decision-making bodies starting from grassroots level.[54].

In the context of meager representation of women in the Parliament and State Legislatures vis-à-vis their population, the Constitution(73rd Amendment) Act 1992 shall be considered a significant landmark in the process of political empowerment of women. The 73rd Amendment which became a Part IX of the Indian Constitution and thereby providing 'constitutional status' to PRIs, has brought a silent revolution in the country by facilitating the entry of 33 per cent women into public life. Giving one- third reservation to women in PRIs basically aims at ensuring women's participation in political and development process for socio-economic justice at the grassroot level. Statutory

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52 Govt. of India, Report *:Study Team on Community Projects & National Extension Services* (Ministry of Rural Development and Panchayats1957(I)).

53 Hemalath, H.M., "A Hand that Cradles can also Handle the Panchayat*", 51 (5)Kurukshetra (2003).*

54 Mushtaq Ahmad, *Panchayati Raj Institutions in India: Law, Policy and Practice* 149 (Dilpreet Publishing House, New Delhi ,Ist edn., 2010).

empowerment will become a reality and relevant only when they are given adequate, planned and systematic training about their responsibilities, duties and rights which devolve on them as elected representatives.

Constitutional protection to political empowerment and their role in development

In line with efforts initiated at international level, India is the first country to provide constitutional protection to political empowerment of women and gave a statutory recognition for their participation in decision-making process in local self- government institutions. Panchayati Raj Institutions (PRIs) serve as training grounds for the growth of leadership, democratic decentralization of administration and involvement of people particularly women in accelerating the socio-economic development.

Article 243-D inserted in the Constitution by 73rd Amendment deals with reservation of seats and political offices for women in PRIs. The main features of Article 243-D are:[55]

- ❖ One- third of the total number of seats to be filled by direct election in every *Panchayat* shall be reserved for women and such seats may be allotted by rotation to different constituencies in Panchayat (Art.243-D(i));
- ❖ One-third of the total number of seats reserved for women under Clause.(i) shall be reserved for women belonging to SCs & STs (Art.243-d(2));
- ❖ One-third of the total number of offices of Chairpersons in the Panchayat at each level shall be reserved for women (Art.243-D(4)) .

Articles 330 and 332 of the Constitution provide for reservation of seats in the Lok Sabha and State Assemblies in favour of SCs and STs.The Constitution also provides that these twin types of reservation shall cease at the end of 60 years from the commencement of the Constitution i.e.; beyond January 2000. However, the reservations introduced for women in the Panchayats shall continue[56]. This is a very significant provision as the reservation for women in PRIs has been made a permanent feature.

The rights of women have the originating source in the Constitution of India; all laws emerge from and are clothed with sanctitity by the Constitution.The Constitution guarantees equal protection, equality of status, equal opportunity to men and women, freedom to practice and profession and dignified ,honourable and peaceful life with liberty under Articles 14,15,16,19 and 21 of Part III of the Constitution. These fundamental rights not only prohibit discrimination but also empower the State to make various special provisions for women and children.

As a women welfare measure, the Year 2001 in India was observed as the 'Year of Women Empowerment'. This veritably presupposes the nation's urge to hoist the status of women in the society. The 73rd Amendment may be regarded as a turning point in the history of state initiatives in regard of political empowerment of women. It had indicated a noticeable shift in the approach of the Indian state towards women. Earlier women were generally viewed as objects of development only, but this amendment made women the subjects of development and an indispensable part of the decision making process. As a result of the

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55 Article 243(D), Constitution (73rd Amendment) Act 1992 .

56 Article 243-D(5) ,Constitution (73rd Amendment) Act 1992

reservation of seats, formal participation of women in politics at the grassroots level has gone up considerably.

The powers, functions and responsibilities of the panchayats are to be determined by the legislature of the State. The legislature of a State may by law endow the Panchayats with such powers and authority as may be necessary to enable them to function as institutions of self government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats at the appropriate level, subject to such conditions as may be specified therein with respect to [a] the preparation of plans for economic development and social justice; and [b] the implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule[57]. The Eleventh Schedule mentions as many as 29 matters some of which are necessary to be enumerated here to point out that institution of panchayats is only a financially and administratively viable unit which can undertake the schemes of development and most of these items are related to socio-economic development of women and the women representatives have the scope to play a significant role in these matters in implementation ,monitoring and supervision. They are: [1] Minor irrigation, water management and watershed development, [2] social forestry and farm forestry, [3] small scale industries, including food processing industries, [4] *khadi*, village and cottage industries, [5] rural housing, [6] roads, culverts, bridges,(7) ferries, waterways and other means of communication, [8] non-conventional energy sources, [9] Poverty alleviation programme, [10] Education, including primary and secondary schools, [11] technical training and vocational education, [12] markets and fairs, [13] health and sanitation, including hospitals, primary health centres and dispensaries, [14] women and child development [15] social welfare, including welfare of the handicapped and mentally retarded and [16] welfare of the weaker sections, and in particular of the Scheduled Castes and the Scheduled Tribes[58].

The Constitution of India being a dynamic entity responds to the changes reflected by the needs of the people. The 73rd Constitutional Amendment symbolizes such a response in the contemporary context. It is not an exercise to divide power between bureaucrats and local level institution, nor even an attempt to generate rural leadership. It is a move for the exercise of higher democratic values and to recognize entities below the State as '*Constitutional entities'* with widest scope for participation. They will exercise their right to determine their politico-economic destiny at all levels,—national, state and *local*, so that socio-economic benefits may reach sufficiently to weaker sections of the society. The people may plan for social and economic development. Thus the 73rd Constitutional Amendment is an instrument of democratic decentralization at grassroots level[59].

Democratic decentralization would be rendered meaningless unless gender equity is ensured. The pace of development in any society would be slow if women who constitute about 50 per cent of the population are not facilitated to participate in the development process. India with a female population of over 450 million possesses a vast reservoir of

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57 Article 243-G, Constitution (73rd Amendment) Act 1992.

58 Eleventh Schedule ,Constitution of India,

59 Lathwal P.S., "Panchayati Raj: An Instrument of Social Justice", 3 (3) *Kashmir University Law Review*; 145-147 (1996).

women power which exceeds a combined total population of South East Asian countries.[60] The available data in respect of the first post-73rd Amendment Panchayat elections reveal that, of the total number of 2.92 million elected representatives of Panchayat, at various levels, about 10 lakh (1 million) were women, and a large majority of them were first timers[61]. Statutory empowerment will become a reality and relevant only when they are conscious about their responsibilities, duties and rights which devolve on them as elected representatives and also highlight the political empowerment of women through their representation in all legislative and decision-making bodies from grassroots level(Panchayat) to Parliament.

The historic Amendment has greatly contributed to the political empowerment of women (including SCs and STs) and has thrown open political opportunities in the Panchayait Raj Institutions to these disadvantaged sections. Despite various constraints it can safely be said that the upsurge of women power in PRIs is noticeable as Panchayats in India are gradually becoming gender sensitive. Women have started asserting themselves leading to a new kind of situation in the society. Reservation of seats has given them an unprecedented opportunity and has created condition for a sort of social revolution without much hue and cry.[62]

Conflict between Constitutional provisions and judicial response

The primary role of PRIs will be in the area of development, planning and implementation of programmes for economic development and social justice. The only danger which we visualize is from the side of the State Governments. This apprehension is because of the fact that the 73rd Constitutional Amendment has provided maximum latitude to the States to make suitable amendments in their Panchayati Raj Acts. As already mentioned the 73rd Constitutional Amendment has only provided the general guidelines for effective and efficient functioning of PRIs in India. Several details such as composition of Panchayats, their functions and more importantly, qualifications for membership and disqualifications for being chosen, as and for being, a member of a Panchayat etc., have been left by the Constitution to the discretion of the State Legislature. The Amendment has provided maximum powers to the States to make suitable amendments to their Panchayati Raj Acts as and when required, and this process has already started in some States.[63] According to Clause (b) of Article 243 F (1)—'a person shall be disqualified for being chosen as, and for being, a member of a Panchayat if he is so qualified by or under any law made by the Legislature of the State'. Accordingly some States have incorporated a new provision in their Panchayati Raj Acts viz., "a person should be disqualified for being chosen as and for being a member of a Panchayat —"*if he has more than two children after a certain date*".This is also

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60 Anon ,"*Eight Five Year Plan 1992-97",* Govt. of India Planning Commission, (2) 2000.

61 Subramanyam,K.S., *"*Empowerment of Women and Marginalised Groups in Panchayats*" 50 (7) Kurukshetra (2002).*

62 Patnaik, B.K. "Gender Economic Empowerment and Rural Poverty Alleviation" *50 (2) Kurukshetra, (*2001).

63 Mishra, S.N. and Kumar, *New Panchayati Raj in Action*, 23 (Mittal Publications, New Delhi, 1997) .

called "two-child norm". The constitutional validity of this provision was challenged on the ground that it is violative of Articles 14, 19, 21, 25 and 26 of the Constitution. This provision (i.e. two-child norm) was challenged in a number of petitions before various high courts.[64] These petitions also raised similar grounds—that it impinged on the right to life and privacy; second, it is against fundamental right to religion and personal laws; third, the impugned provision violates Article 14 of the Constitution, which provides for 'equality before law', as members of Parliament and State Legislatures face no such disqualifications and fourth, it has no nexus with the purpose which is sought to be achieved through the Act i.e., population control. But all these points of challenge were rejected and the legislative competence of the state was sustained.

This provision was challenged in more than 20 petitions alone before the High Court of Punjab and Haryana in *Fazru and Others v. State of Haryana,*[65] on the similar grounds that it impinges on the right to life; it was arbitrary and discriminatory as there was no corresponding provision disqualifying members of Parliament. The Punjab and Haryana High Court rejected these points of challenge**.** One of the objections which was raised in the Haryana Cases, was that the *two-child norm* and its violation leading to disqualification of the members (*Panches*) went against their personal law as some of the petitioners were Muslims. The claim was that there was nothing in their personal law which permitted family planning. The court answered this by stating:

"Personal Law was not a fundamental right—The fundamental right was only to practice and propagate religion. But even this fundamental right is subject to public order, morality and health."[66].

Finally, the Supreme Court in *Javed v. State of Haryana*[67], held that Sections 175(1)(q) and 177(1) of the Haryana Panchayat Raj Act, 1994 providing for disqualification to contest elections for Panchayat office bearers to those having more than two living children, were within the legislative competence of the state legislature.

The disqualification then makes it doubly discriminatory for a woman. It makes her to suffer for a consequence as she has little say on the question of having third child. Secondly, no thought seems to have been spared to the harsh truth that it is the women who is the prime target of all population control measures and the linking up of the programme with the democratization of grassroots governance raises doubts in State's seriousness in seeing women play an active role in local administration. The State authorities should always consider the reasons and objects of 73rd Constitutional Amendment in framing policies which make it possible to give constitutional guarantee to 1/3rd reservation of seats for women and

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64 See for example, *Mukesh Kumar Ajmera v. State of Rajasthan,* AIR 1997. Raj 250, where 12 elected Panches challenged Section 19(1) of the Rajasthan Panchayat Act, who were disqualified for having more than two children.

65 (1998) Punj. LR 222. *Ibid.,* at 223. See also *Javed v. State of Haryana*, AIR 2003 SC 3057, where the Supreme Court held that Sections 175(1)(q) and 177(1) of the Haryana Panchayat Raj Act, 1994 providing for disqualification to contest elections for Panchayat office bearers to those having more than two living children, were within the legislative competence of the state legislature.

66 *Id.*, at p. 226

67 AIR 2003 SC 3057

other weaker sections of the society and make their participation meaningful for socio-economic and political justice.

In *S.R.Bomai v. Union of India,*[68] the Supreme Court held that the Constitution seeks to establish a secular, socialist, democratic republic in which every citizen has equality of status and of opportutnity to promote among the people dignity of the individual ,unity and integrity of the nation transcending them from caste,sectional,religious barriers, fostering fraternity among them in an integrated Bharat.The emphasis, therefore is on a citizen to improve excellence and equal status and dignity of person. With the advancement of human rights and constitutional philosophy of social and economic democracy in a democratic polity to all the citizens on equal footing, secularism has been held to be one of the basic features of the Constitution.

The question of 'Legislative competence of State Legislature' to enact laws relating to Panchayats came up for consideration before the Karnataka High Court in an important case of *B. K. Chandrashekar* v. *State of Karnataka.*[69] The question before the court was whether under *Entry 5 of the List II of Schedule VII of the Constitution*, the State Legislature had the exclusive legislative power to make laws regarding local self-government or village administration? The Court held:

"After the 73rd Constitutional Amendment Act 1992, comprising Articles 243 to 243-O, the State Legislature can no longer claim any plenary power of legislation . Their exercise of power is subject to the provisions of Part IX of the Constitution which was introduced by the 73rd Constitutional Amendment and as such the option available to the State Legislature to constitute institutions for local self-government and define their composition, duration etc. have been taken away by the Constitutional Amendment ...In case of conflict between mandatory provisions of the Constitution and the right of the State Legislature to enact laws which fall within its legislative competence and which result in nullifying the mandate of the Constitution, Constitutional provision would take precedence."[70].

However, the experience of women from various parts of the country show that they have to face a strong culture of exclusion. There are cases of numerous "no-confidence motions" being brought against female *Sarpanch*es so that male deputy Chairpersons in PRIs could oust unwanted women office bearers.[71] There are also cases when the provision of "more than two-child norm" as a disqualifying clause has been implemented in an arbitrary manner in total violation of the law to effect a takeover until fresh elections are held. The problems of women after being elected to these institutions and the unreserved approval granted by the judiciary to the provisions that seek to implement the government's population control measures have overridden the real intent of the 73rd Constitutional Amendment. Both the judiciary and legislature underscore the need to strengthen the legislations with a view to ensuring the continued participation of women in local governance.[72]

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68 *(1994)3 SCC I*

69 AIR 1999 Kant. 461.

70 Id., at 462.

71 George Mathew (Ed.), *Status of Panchayati Raj in the States and Union Territories of India* 16-18 (Concept Publishing Co. New Delhi, 2001).

72 Sarkar ASIL; *op. cit.*, at p. 644.

It would, therefore, be clear that the main purpose of having the disqualification clause of "two children norm" is to implement the government's family planning programme rather than empowerment and participation of women in these grassroot level democratic institutions. On the one hand, the Constitutional Amendment provides for mandatory reservation of 1/3rd seats for women (including the members of seats reserved for women belonging to SCs/STs) in PRIs , but on the other, the linking up of the population control programme with the democratization of grassroots governance raises doubts about the State's seriousness in seeing women play an active role in local administration. If more than 20 civil writ petitions came before the court[73] on one point in one State only, should not a second look be given to it so that it becomes more acceptable to the court whether disqualifying clause is serving any purpose and there is proper implementation of the enactment with constitutional sanction for reservation of seats for women in PRIs.[74]

For the success of Panchayati Raj system more than the cooperation of the State Governments and the Central Government, the Judiciary has to play its effective role to make this system more vibrant. The suppression of PRIs, election disputes, disqualification of members particularly women members and chairpersons are the crucial aspects which have a bearing on the development of our future political process. Under these circumstances the judicial intervention in matters relating to Panchayats has become necessary to set the things in the right direction.

A brief spell of eighteen years is too small in the history of a nation to judge the rationale of political empowerment of the women. The disabilities suffered by this deprived section of the rural society are bound to disappear in the long run. The deprivation of the women and other weaker sections we had for long, but time has now come to cry a halt and it is for the law courts to rise up to the occasion and grant relief to a seeker of a just cause and just grievance. Decisions are there wherein the apex Court on more occasions than one stated that democratic socialism aims to end poverty, ignorance and inequality of opportunity. Rationale of 73rd Constitution Amendment was not population control but justice - socio, economic and political. For after all *dejure* equality is not the end but only means to attain *defacto* equality which alone is the ultimate object and sine-qua-non for political empowerment of women. The question arises-who deserves empowerment and for what?[75]

Issues and Constraints

Unlike other political systems, based on egalitarian values, democracy has more scope for promoting 'gender equality'. But democratic structure being influenced, reflected

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73 *Fazru v. State of Harayana,* CXVIII (1998) Punjab LR 222. There were 20 other petitions in this batch, before Punjab and Haryana High Court.

74 Sarkar Lolika, "Women and the Law*," Annual Survey of Indian Law, (vol. XXXIII-IV ILI*, New Delhi, 1997-98), p. 644.

75 Mushtaq Ahmad, "Poverty Alleviation and Rural Development: Legislative Response" *5(2) International Journal of Rural Development and Management Studies (IJRDMS) 411-21(2011).*

and determined by historical culture, social, economic and political conditions of a society, has some constraints in achieving equality in all walks of life. Almost two decades have gone since the passage of the 73rd Amendment Bill, drastic and dramatic changes were expected by increasing women's representation. The dream of feminisation of politics has been achieved in quantitative terms (only at local level), yet to be achieved in qualitative terms. For accomplishment of this objective we have to examine the impact of women in Panchayats and their problem and undertook nationwide campaign to advocate their quantitative as well as qualitative presence in such decision making bodies.

- As a result of legislative measures the traditional role of Indian women is gradually changing. However, India is still largely a traditional society where widespread gender-based biases and practices prevail. Some state legislatures have incorporated population control policies in Panchayati Raj Legislations which defeat the purpose of constitutional policy of political empowerment of women. One such policy is "*two- child norm*" as qualification for contesting election or being elected as panchayat representative. As a result of conflict between state government policies and constitutional provisions dealing with political empowerment of women through PRIs , the real empowerment has remained confined to law books rather than in practice. There is conflict between law, policy and practice which need to be addressed so that this Constitutional protection can be guaranteed for their social, economic and political empowerment.
- Given the masculine character of our society the male members have adopted the irrational attitude towards female members to defeat the reservation policy meant for political empowerment of women. Due to this indifferent attitude towards female members, a large number of women members were disqualified for initiating "no-confidence motion" against women members. This clause was also misused by male members against women members acting as chairpersons' of panchayats. There is an urgent need to analyse the impact of arbitrary and discriminatory disqualifying clauses adopted by the state legislatures in view of the Constitutional mandate of 33 per cent reservation of seats for women.
- The male members of the Panchayat, viz., bureaucracy, field level officials and functionaries have proved to be gender insensitive. The basic problems among women are illiteracy, ignorance, social and religious barriers and family obligations which prevent them from participating effectively in PRIs. The male members of the Panchayat as well as their husbands keep them away from meetings, take signature at their residence and treat them as dummy participants.
- Of late, there is a paradigm shift in development process by incorporating the 'gender concerns' as an important element of development strategy. Duly recognising the importance and involvement of women in participatory model of development, India has taken up the theme of women's empowerment as one of the main agenda items to tackle rural poverty and socio economic issues.[76] The basic idea was that PRIs can ensure greater peoples' participation in managing their affairs at local level, besides empowering the women and other weaker sections of the society. The very idea that women in such large numbers will

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[76] L.D.Rani, *WomenEnterpreneurs*,49(A.H.P,Publishing Corporation ,New Delhi,1995).

have say in local self-government is a new concept and will not be easily accepted. For this purpose there is need to organize Panchayat level legal literacy and awareness programmes to educate women at grassroots level regarding the benefits and purpose of reservation of seats in PRIs.

- From womb to tomb, women are made to pay dearly for their womanhood though protection of woman hood is a condition precedent for just world order and unless some steps are taken to make people appreciate human rights issues such as, trafficking in women and children, forced prostitution, sexual exploitation of women and children, domestic violence, women's reproductive health, plight of widows and physically challenged women, political empowerment alone is not going to change the position. We have to exhaustively deal with economic, social and also political issues relating to empowerment of women in all walks of life which could be a formal basis for equality between women and men in various sectors of the society achievable through various laws, regulations, schemes and programmes.
- Most of the women members do not know that they have been selected to represent womenfolk and work on behalf of them. So there is a need for creating feminist consciousness among them. It further includes:
  - Identifying women in trouble
  - Identifying the requirement of women of the village and try to fulfill their needs through Panchayat.
  - Raising women's social, economic and political issues in the Panchayat meetings
  - Monitoring development works like MNREGA etc.
  - Providing guidance to women about schemes and programmes launched for women beneficiaries.
  - Organising programmes for creating awareness among women in a panchayat area about their rights and duities.

Despite various constraints, one of the significant achievements of the provisions of 73rd Amendment Act concerning reservation of seats and political offices in favour of women is that it has improved their awareness and perceptional levels and had created an urge in them to assert for their rightful share in the decision-making exercise at the local level. They have begun to realize that political empowerment in the ultimate analysis holds the key for their social and economic betterment. Therefore, there is no need to be skeptical about the prospects of the constitutional safeguards provided to the women.

Conclusion

If you feel skeptical about this process because of the adverse reports regarding the pitfalls of empowering women who are not ready to take their place alongside men due to discrimination ,harassment, inexperience and illiteracy; just visit Eastern India where at least one rustic male has got a card printed describing himself as the '*Sarpanch Pati'*. A more eloquent comment on the kind of change that we are seeing would be hard to find. It may not be appropriate to expect miracles overnight in the historical and cultural context of Indian social system. The women have now to take up the cudgels and reap full advantage of the opportunities, and to participate in rural affairs through the medium of new Panchayat Raj system. By nature they are suited to take cudgels to perform this task but they have to come

out with a firm determination. If they do not, there case would go by default for ever and cannot claim that they are being discriminated.

Enacting a law is not enough for ensuring desired socio-economic transformation but an essential pre-requisite for such a change. The traditional and conservative attitude of rural community, illiteracy and ignorance, social forces, economic structure, gender- neutral legislation, irrational state policies, disqualifying clauses and existing political milieu place obstructions in their effective participation. Constitutional provisions, various laws, and judgments of courts have made their own contribution to the cause of gender justice. The women need to be properly educated and trained to fulfill their obligations as people's representatives, and actively helped to overcome obstacles they encounter. The genuine women empowerment thus obviously is not a concomitant of their numerical or quantitative presence but depends on their qualitative participation, which, in turn, flows from the gender orientation, a frame of mind, an attitude, and a perspective. However, more fundamental is the work and role of social reformers who sought to change the mind-set of orthodox tradition-bound society and usher in women's reforms in the social, economic, political and educational fields.

Pornography through Internet and Indian Legislation: An Analysis

Dr. Shakeel Ahmad*
S. M. Uzair Iqbal**

Abstract

Pornography is a verbal or visual representation of sexual acts, it is a portrayal of people as sexual objects for pleasure of others. Pornographic material is intended to arouse sexual stimulation. Pornography is looked differently by different people. Pornography corrupts one's morel senses and instigates them to participate in various sexual offences. Pornography is nothing but marketing of women's sex. On the Internet pornography is the most profitable business and the Internet is the perfect place to spread pornography. Cyber pornography is believed to be one of the largest businesses on the Internet today. The millions of pornographic websites that flourish on the internet are testimony to this. While pornography per se is not illegal in many countries, child pornography is strictly illegal in most of the countries.

In this paper the authors try to explain the different aspects of pornography through internet and lastly suggest some measures to mitigate the crime.

Keywords: Pornography, Internet, Cyber Pornography, Child Pornography and Obscenity etc.

Introduction:

The world is indeed, undergoing a new information revolution today. It not only touches every aspect of life but also make the way extensively to perform the industrial and economic function of the society. New communication system and digital technology have made dramatic changes in the way we live. A revolution has been occurred due to technological progress. Almost everybody is making substantial use of Computers and the internet is becoming an essential part of our daily life. On one hand, the information store in electronic form has many advantages like storing, retrieving, communicating but on the other hand it has opened the door to anti social and criminal behaviour in the way that would never have previously been possible. Computer systems often some new and highly sophisticated opportunities for law breaking, and they create the potential to commit the traditional types of cases in non-conventional ways. Cyber pornography is one of them.

Cyber pornography is believed to be one of the largest businesses on the Internet today. The millions of pornographic websites that flourish on the internet are testimony to this. While pornography per se is not illegal in many countries, child pornography is strictly illegal in most of the countries.

The then CJI K.G. Balakrishnan advocated placing “restrictions” on websites that exclusively circulate pornography and hate content. Earlier he suggested for outright ban on such websites but later on he added that it would not be right to place a “blanket ban” on all categories of websites[77].

1. Meaning & History:

The word pornography' deriving from the Greek word **Porne** ("Prostitute") and **graphein** (to write). The word pornography originally referred to any work or art or literature dealing with sex and

* Assistant Professor, Department of Law, AMU Aligarh 202002
** Assistant Professor (Law), AMU Centre Murshidabad (W.B) 742229.

77 Times of India; Delhi edition (Late city), dated: 9/5/2010, p- 4

sexual themes.[78] Pornography is one of the most controversial because it can he easily recognized but is often difficult to define concisely.

The Canadian dictionary of English language defines as "Sexually explicit material that sometimes equates sex with power and violence"[79]

The Encyclopedia of ethics has defined pornography as "the sexual explicit depiction of persons, in words of images, created with the primary, proximity aim and reasonable hope, of eliciting significant sexual arousal on the part of the consumer of such material."[80]

Pornography is a verbal or visual representation of sexual acts, it is a portrayal of people as sexual objects for pleasure of others. Pornographic material is intended to arouse sexual stimulation. It can lead the masturbation, just like a novel or film can lead to laughing or crying.

Pornography is looked differently by different people. Academician believes that pornography is an expression of male culture through which women are commoditized and exploited, liberal view combines a respect for free speech with the principle of "a woman's body, a woman's right[81]".

The controversy between freedom of speech expression and pornography had been a debatable issue since time immemorial. So, the responsibility lies on the lawyers, legislators and courts to determine the exact line by that, what is obscene and what is not can be determine. Pornography corrupts one's morel senses and instigates them to participate in various sexual offences. Pornography is nothing but marketing of women's sex. Women are shown as "objects" which are longing to get involved into sexual acts.[82]

Visual representation began to overtake the more traditional written form with the invention of print media and photography in the 1840's and then with the motion pictures. The move from verse to visual depiction helped to broaden the appeal of pornography beyond literate elite to embrace viewers and consumers from all social strata and walks of life. In twentieth century, the popularity of pornography continued to grow across the western world in the tom of the adult movie theaters and magazines. This was followed by availability of pornographic material via dedicated cables and satellite subscription TV channels.[83]

There is no doubt that sex sells and sells extremely well. It is evident from the fact that the pornography industry is larger than the revenues of top technology companies for e.g.: Microsoft, Google, Amazon, e-bay, Yahoo and the likes. On the Internet pornography is the most profitable business and the Internet is the perfect place to spread pornography.

2. Cyber Pornography:

Cyber pornography refers to stimulating sexual or other erotic activity over the internet. It has been traded over the internet since 1980's, it was the invention of the world wide web in 1991 as well as the opening of the Internet to the general public around the same time that led to an explosion in

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78 Choubey, R.K; An Introduction to Cyber Crime & Cyber Law; p-271; Kamal Law House, Kolkata 2009.

79 Ibid.

80 Ibid.

81 Some liberal organizations like Feminists for Free Expression (FFE) have consistently opposed censorship in any form.

82 Barua, Yogesh; Criminal Activities In Cyberworld; p-135; Dominent Publishers and Distributers, New Delhi, 2005

83 Manupatra Newsline, p.31, Aug. 2008.

online pornography.[84] The Internet decreased the hurdle of shame that comes with purchasing pornographic materials or the embarrassment of being caught with it. Pornography on Internet is available in different formats ranging from pictures and short animation films to sound files and stories. The Internet has proven popular for distributing pornography because it allows people to view pornography anonymously in the comfort and privacy of their home. There are both commercial and free pornographic sites. These sites offering photos, video clips and streaming media including live web cam access allowed greater access of pornography.

Cyber pornography is a difficult problem especially due to the difference in the acceptable limits of morality in different countries. Some of the implications of Cyber pornography on the internet are distinct from other cyber crimes as hacking, cyber frauds, implanting viruses and theft of IPRs. Unlike the latter Cyber Crimes, which threaten the very credibility of the Internet, Cyber pornography promotes the use of the internet.[85] The reason why cyber pornography has become so big an industry are two:

1) The easy, free, efficient, convenient and anonymous accessibility to pornographic material through internet.

2) The anonymity of the Cyber pornography industry, global accessibility, problems of jurisdiction, different laws and standard of morality in different countries, which have made a mockery of laws and their enforcement.

The aforesaid reasons have led to the attractive profitability of the Cyber porn industry and thus its growth there it's an important to go through the statistical data available worldwide for major countries. They are as:

Pornography Business Statistics.[86]

Country	Revenue (Billions)	Per Capita
China	$27.40	$27.41
South Korea	$25.73	$526.76
Japan	$19.98	$156.75
U.S.	$13.33	$44.67
Australia	$2.00	$98.70
U.K.	$1.97	$31.84
Italy	$1.40	$24.08
Canada	$1.00	$30.21
Philippines	$1.00	$11.18
Taiwan	$1.00	$43.41
Germany	$0.64	$7.77
Finland	$0.60	$114.70
Czech Republic	$0.46	$44.94
Russia	$0.25	$1.76
Netherlands	$.0.20	$12.13

84 Supra Notes-1, p.384

85 Verma, Dr Anita; Cyber Pornography; Army Institute of Law Journal; pp. 132-133; vol-I, 2007.

86 http://internet.filter.review.toptenreviews.com/internetpornographystatistics.html visited on 19.10.09

Brazil	$0.10	$53.17

According to top ten reviews.com statistics the whole porno-business is worth around 97 billions of US Dollars. These are the estimates of the major countries. China is leading with 27.40 US Billion dollar while Brazil with the least 10 US Billion Dollar in porno-business industry.

3. Available formats of Cyber Pornography[87]

The pornographic material is available in different formats on the Internet due to rapid development in technology, the Industry adapt latest techniques by which the material provide on internet in different formats such are as:

Image files: - The image files are the most common formats by which the pornographic material distributed on the internet. In which JPEG[88] format is one of the most common one.

Video files :- The movie camera has also been used for throughout its history and with the arrival of the film video cassette recorder the pornographic movie industry experienced massive growth with the advent of mobile with camera the MMS[89] clips can be prepared through it. Video files formats such as MPEG[90], WMV[91], AVI[92] and 3GPP(3rd Generation Partnership Project) have been used to distribute pornographic video clips 3GPP format contain large files while MPG, MPEG or DAT format reduces the size of file about 10% of its original size by which the files can be transfer easily from various sources.

Text and Audio Formats: Pornographic and erotic stories distributed as text files, web pages and in message boards and news groups have been semi popular audio porn in formats like MP3 and FLV have seen only very limited distribution. Audio porn includes recording of people having sex or reading erotic stories but these formats are not successful because people prefer watching rather than listening.[93]

So, above there are some formats on which pornographic material is available on the internet. Here it is important to note as to what the people search on the internet, about the pornography, by which search term and how many web pages containing keyword on such search term is available on the net. It is also necessary to look here as to what were discernible during as compared to 2005 about the search requests.

Top Adult Search Requests.[94]

S. No	Search Term	Search Requests (2006)	2006 change %	2005 Change %	Web Pages Containing Key Word (Millions)

87 Supra Note 6; p-388

88 JPEG Stands for Joint Photographic Experts Groups

89 Multimedia Messaging Service

90 Moving Picture Expert group

91 Window Media Video

92 Audio Video Interleave

93 Supra 7: p.39

94 toptenreviews.com/pornographystatistics visited on 9.10.09

1.	Sex	75,608.612	7%	40%	414.00
2.	Adult Dating	30,288,325	622%	80%	1.40
3.	Adult DVD	13,684,718	53%	21%	1.82
4.	Porn	23,629,211	-3%	29%	88.80
5.	Sex Toys	15,955,566	4%	1%	2.65
6.	Teen Sex	13,982,729	36%	25%	2.10
7.	Free Sex	13,484,769	0%	20%	2.42
8.	Adult Sex	13,362,995	301%	51%	1.58
9.	Sex Ads	13,230,137	382%	40%	0.28
10.	Group Sex	12,964,651	88%	33%	2.07
11.	Free Porn	12,964,651	-10%	54%	2.74
12.	XXX	12,065,000	25%	14%	181.00
13.	Sex Chat	11,861,035	97%	36%	2.21
14.	Anal Sex	9,960,074	76%	21%	2.95
15.	Cyber Sex	8,502,524	-20%	3%	1.24
16.	XXX Videos	7,411,220	71%	40%	1.44
17.	Playboy	6,641,209	-6%	24%	43.20
18.	Teen Porn	6,130, 065	7%	38%	1.97
19.	Nude	5,487,925	-26%	14%	71.30
20.	Sexy	4,344,924	21%	33%	198.00

The, above chart show the 2006 search request trends in which the word sex lead the list with 75,608,612 people make search requests on the internet, while this word contain 414 million web pages on the net.

4. Child Pornography:

To define child pornography is not an easy task. **According to UNCRC** the child pornography includes any representation of a child engaged in real or stimulated explicit sexual activities or representation of the sexual parts of a child for primarily sexual purposes.

European Union defines as "any audio visual material, which uses children in sexual context".

International Criminal Police organization (Interpol) defines child Pornography as "means of depicting or promoting sexual abuse of a child, including print and/ or audio, centered on sex acts or genital organs of children".

United States defines as "permanent record of sexual exploitation or abuse of an actual child.[95]

So, from the above definitions there is no uniform definition on child pornography. All the definitions and their legal interpretation vary from country to country. But all the definitions subscribe to the fact that the child pornography involves some form of representation or depicting children in sexual context, second it involves sexual absence of the children.

The internet is fast becoming an electronic red light area[96], because through this medium pornographic material can easily be accessed.

It would be fair to say that no other Cyber Crime issues have elicited the degree of anxiety as that over the circulation of sexual images of the minors on the internet.[97] The child pornographic picture ranges from showing Children in underwear (minimal content) to actual acts of rape Child pornography is visual recording of a crime being committed against children.[98]

The child pornography issue has garnered even further attention in recent past due to the number of high profile cases involving celebrities, who have been accused of and/ or convicted for possession of indecent picture of children. **For example** Former Pop star Michael Jackson (USA) was accused of involving in child abuse and possession of obscene picture of children and molesting children, likewise Gary Glitter and Pete Townsend in the UK.

To take a look into the definitions on child pornography that exists worldwide, Article 2 (c) of the optional protocol to the convention on the rights of the child on the sale of children, child prostitution and child pornography defines child pornography as "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". Both real and virtual children are brought in his definition.

Article 9(2) of European Union Convention on Cyber Crimes 2001 States that the term "Child pornography" shall include pornographic material that visually depicts:

(a) a minor engaged in sexually explicit conduct,

(b) a person appearing to be a minor engaged in sexually explicit conduct;

(c) realistic images representing a minor engaged in sexually explicit conduct.

Here, however, a distinction between virtual and real children is not specifically brought about.[99]

In United State of America, the **Child pornography prevention Act 1996** defined child pornography as, "any depictions, including any photography, film, video, picture, or computer generated image or picture, whether made or produced by electronic, mechanical or other means, of sexually explicit conduct, where:

a) The production of such visual depiction involves the use of a minor engaging in sexually explicit conduct

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95 Prasad R.S; Cyber Crime: An Introduction; p.159; The ICFAI University Press, Hyderabad, 2004.

96 Mishra, R.C.; Cyber Crime Impacts in the New Millennium, p.113

97 Manupatra New Line, p.32-33, August 2008.

98 Supra 17,

99 http://www.dot.gov.in/isp visited on 29.10.09

b) Such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct

c) Such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or

d) Such visual depiction is advertised; promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct".

5. Effects of Child Pornography

Effects on the Children Portrayed

The vast majority of children who appear in child pornography have not been abducted or physically forced to participate. In most cases they know the producer—it may even be their father—and are manipulated into taking part by more subtle means. Nevertheless, to be the subject of child pornography can have devastating physical, social, and psychological effects on children.

The children portrayed in child pornography are first victimized when their abuse is perpetrated and recorded. They are further victimized each time that record is accessed. In one study, 100 victims of child pornography were interviewed about the effects of their exploitation—at the time it occurred and in later years. Referring to when the abuse was taking place, victims described the physical pain (e.g., around the genitals), accompanying somatic symptoms (such as headaches, loss of appetite, and sleeplessness), and feelings of psychological distress (emotional isolation, anxiety, and fear). However, most also felt a pressure to cooperate with the offender and not to disclose the offense, both out of loyalty to the offender and a sense of shame about their own behavior. Only five cases were ultimately reported to authorities. In later years, the victims reported that initial feelings of shame and anxiety did not fade but intensified to feelings of deep despair, worthlessness, and hopelessness. Their experience had provided them with a distorted model of sexuality, and many had particular difficulties in establishing and maintaining healthy emotional and sexual relationships.

Effects on Users

The effects of pornography on users have been extensively researched but results are contentious. There are at least five possible relationships between pornography use and the sexual abuse of children:

- **Pornography use is an expression of existing sexual interests.** An individual who sexually abuses children seeks out child pornography as part of his/her pattern of sexual gratification. The offender's sexual interests cause his/her pornography use rather than the other way around.
- **Pornography is used to prime the individual to offend.** An individual deliberately views child pornography immediately prior to offending. Pornography is used in the short term to sexually stimulate the offender in preparation for offending.
- **Pornography has a corrosive effect.** An individual becomes increasingly interested in child pornography, is attracted to images of increasing severity, and becomes desensitized to the harm victims experience. Use of pornography in the long term may also increase the risk that the person will sexually abuse a child.
- **Pornography has a cathartic effect.** Viewing child pornography is the sole outlet for an individual's sexual attraction to children. Pornography use may substitute for, or even help the individual resist, engaging in hands-on offending.

- **Pornography is a by-product of pedophilia.** Pornography is created in the process of carrying out sexual abuse or is used to groom potential victims and prepare them for abuse. Pornography is incidental to the abuse suffered by the victim.

In all likelihood, the effects of child pornography vary among users, and all of the above relationships may apply depending upon the individual in question.

In **Mr. Jayesh S. Thakkar and another Vs. State of Maharashtra and other.**[100]

Hon'ble B.P. Singh, Chief Justice and D.Y. Chandrachur J: appointed a committee to prevent and control online child pornography which is a socio legal challenge. The committee recommended improving laws regarding Cyber cafes and Internet service providers.[101] In above case the court invited the petitioners Jayesh Thakkar and Sunil Thacker as special invitees to provide their inputs and recommendations on Cyber laws. The committee upon identifying Key issues made recommendations such as licensing of Cyber Café introducing identity cards for Cyber Café visitors, ensure that cyber café that have cubicles or partitions be required to ensure that minors are not allowed to use machines in cubicles or behind partition, mandatory maintaining of IP logs by Cyber Café, and so on. The Committee made several other recommendations such as connectivity and authentication at internet service provider level which provided that Internet service providers were responsible for time clock Coordination and record keeping. The report addressed the issue of protecting minor children from accessing adult sites and made a recommendation that Internet service providers must protective parental software with every Internet connection. The Committee placed a special emphasis on Lack of technical knowledge in the police and recommended special training of Cyber Cops. The report of the committee was well accepted by the courts and is being put into practice by the police and cyber cafes jointly.[102] Earlier on child pornography the IT Act was silent but the amendment made in the year 2008 the fallowing section has been inserted as;

67B. Whoever,—

(*a*) 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

(*b*) 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

(*c*) 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

(*d*) facilitates abusing children online, or

(*e*) records in any electronic form own abuse or that of others pertaining to sexually explicit act with children, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either discription for a term which may extend to seven years and also with fine which may extend to ten lakh rupees:

Provided that provisions of section 67, section 67A and this section does not extend to any book, pamphlet, paper, writing, drawing, painting representation or figure in electronic form—

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100 2001, Bombay High Court, Writ petition No. 1611, 28th September 2001.

101 Lawz, October 2008, p.32

102 Supra Note.1

(*i*) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing drawing, painting representation or figure is the interest of science, literature, art or learning or other objects of general concern; or

(*ii*) which is kept or used for bonafide heritage or religious purposes.

Explanation- For the purposes of this section "children" means a persons who has not completed the age of 18 years.

Apart from the legislation the scientists from Lancaster University, U.K. developed "anti-grooming" software, which can detect whether kids may be chatting with an adult posing as a child or a teenager on the Internet. Professor Awais Rashid, from Lancaster University, U.K., said "The software looks at a range of things, for example, the structure of sentences, the language which is being used and also things which indicate deception"[103].

In cross examination the software was installed on some computers, it correctly worked out whether it was an adult or a child using a chat room in 47 cases out of 50 including when an adult was pretending to be a child. According to the scientist it helps the police to track the paedophiles.

6. The Role of the Internet in Promoting Child Pornography

The Internet has escalated the problem of child pornography by increasing the amount of material available, the efficiency of its distribution, and the ease of its accessibility. Specifically, the Internet[104]:

- permits access to vast quantities of pornographic images from around the world
- makes pornography instantly available at any time or place
- allows pornography to be accessed (apparently) anonymously and privately
- facilitates direct communication and image sharing among users
- delivers pornography relatively inexpensively
- provides images that are of high digital quality, do not deteriorate, and can be conveniently stored
- provides for a variety of formats (pictures, videos, sound), as well as the potential for real-time and interactive experiences
- permits access to digital images that have been modified to create composite or virtual images (morphing).

7. Legal Position in various Countries:

There has been a wave of enactment and amendment around the globe to upgrade the law and meet the challenge. According to chart in to previous pages, the huge amount of pornographic material can be produced more quickly and cheaply on new media like hard disks, floppy disks and CD ROMS. On internet apart from pictures and images, full motion video clips with sound and crop complete movies are also available.[105] The most serious offences, such as child pornography, it is easier for offenders to hide and remove material. There is need to balance the interest of adults with the need to protect children. The legal response to pornography on the internet has been swift and well intentioned. The law now recognizes as publications, photographers stored on computers, digitally altered images, to merge the bodies of adults with the faces of children. While there is a lot of

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103 Times of India; Delhi edition (late city), dated: 4/6/2010, p-17

104 http://www.popcenter.org/problems/child_pornography/print/ 6/8/12

105 Supra Note 1, p.406

difficulty about fixing international standard of obscenity for pornography in general, universally abhorred by every legal system, it is possible to cooperate and achieve concrete results.[106]

As jurisdictions that heavily restrict access or outright ban pornography, various attempts have been made to prevent access to pornographic content. The mandating of internet filters to try and prevent access to porn sites has been used in some countries such as china and Saudi Arabia. Banning porn sites within nation jurisdiction does not necessarily prevent access to that site, as it may simply relocate to a hosting server within another country that does not prohibit the content it offers. Various measures have been tried for not easily accessing porn sites the results are varying success. In United States, most web sites have taken voluntary steps to ensure that visitors to their sites are not underage. Many websites provide a warning upon entry. Warning minors and those not interested in viewing porn not to view the site, and requiring one to affirm that one is at least 18 years of age and wishing to view pornographic content. Such warning pages have little effect in preventing access by minors as he/she may click the button to prove his/her age. Commercial porn sites generally restrict to view porn sites until purchasing membership through credit card. This serves as both a way to collect payment as well as age verification because usually credit card is not issued to minors.[107]

Between 1995 and 2002, nearly two dozen states considered bills that would control in some fashion access to Internet pornography. With the exception of child pornography, the legal status of accessing Internet pornography is still somewhat unsettled, though the creation and distribution of adult films and photography are legally listed as prostitution within their states.

United States:

Pornography in the American social strata is the most debatable issue over last few years. The public, lawmakers, and the courts have argued over how to control the online porn. Congress and state legislature passed several laws aimed at protecting children from exposure to so called cyber porn (Communication Decency Act, 1996, Child Online Protection Act, 1998 and Children's Internet Protection Act, 2000).

The legality of pornography has been traditionally determined by the Miller test, which dictates that community standards are to be used in determining whether a piece of material is obscene[108]. In USA the local community determines a pornographic work to meets it's standard for obscenity then it could be banned. So, it mean that a pornographic magazine may be legal in California might be illegal in Alabama. But this community standard poses a problem in the age of Internet, because its availability globally rather than the specific area.

The first attempt to regulate the pornography on the Internet was the federal Communication Decency Act of 1996, which prohibited the "knowing" transmission of "indecent" messages to minors and the publication of materials which depict, in a manner "patently offensive as measured by contemporary community standards, sexual or excretory activities or organs", unless those materials were protected from access by minors, for example by use of credit card systems. But, immediately it has been challenged by ACLU (American Civil Liberties Union) in **Reno V. ACLU[109],** In this case the U.S. Supreme Court struck down the provisions of "indecent transmission" and "patently

106 Dudeja V.D., Cyber Crime and Law enforcement, p-213, Commonwealth publishers, New Delhi 2003.

107 Supra Note 1, p.407

108 S. Hiller, Janine; Internet law and policy, Prentice hall, New and Cohen Ronnie Jersey, 2002.

109 (1997) 521 U.S. 844.

offensive display", because both of these provisions ruled the limit of Freedom of Speech guaranteed in the First Amendment.

A second attempt was made with the narrower Child Online Protection Act of 1998, (COPA) it forced all commercial distributors of "material harmful to minors" to protect their sites from access by minors. On 22 March, 2007, COPA was found to violate the First and Fifth Amendments of the U.S. Constitution and was struck down[110]

Another act intended to protect children from access to Internet pornography was the Children's Internet Protection Act of 2000 (CIPA). This act required that public libraries employ filtering software to prevent patrons from using Internet terminals for viewing images of obscenity and child pornography, and to prevent children from viewing images "harmful to minors". This Act was also challenged on the ground of First Amendment, the Lower Court restrict the enforcement of the Act. But in June 2003, US Supreme Court in **U.S. v. American Library Association**[111] reversed the lower court order and ruled that the Act was constitutional and could go into effect.

United Kingdom:

In U.K. the main legislation on pornographic material is contained in the Obscene Publication Act 1959, the Obscene Publication Act 1964 and the Indecent Displays (Control) Act 1981. Before 1976 pure textual pornography was not deemed to fit for prosecution, it's held in the trial of Inside Linda Lovelace. Child Pornography (child means under age of 18) is illegal in UK and include to possess, to make (electronic copies), and to distribute, and on the conviction 10 years custodial sentence. In U.K. child pornography is defined in different legislation likewise Protection of Children Act 1978,Criminal Justice Act 1988, further amended by Criminal Justice and Public Order Act 1994 to include pseudo photographs, the Sexual Offences Act 2003. The pornographic material for sale is allowed but only to above the age of 18 years. The possession of pornographic material/images for private use has not been an offence. It means that the citizens are allowed to access the pornographic sites except the child pornography[112].

Internet service providers started the Internet Watch Foundation in 1996 to watch for pornographic content that is in violation of British Law and report it to the police. The web filter clean feed is used by the largest Internet Service Provider (ISP) BT Group to block sites. The Government ordered all ISP's to have a clean feed system by end of 2007[113].

8. Pornography, Obscenity and Indian Legislation:

The word Pornography has not been defined in legal sense neither in India nor anywhere in the world. So, there is no uniform legal definition of the word Pornography. The reason behind is simple that where there exists no uniform standard of moral culture and ethics, there cannot exists any fixed and uniform standard of law.[114]

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110 Esposito, Lesli C. "Regulating the Internet: the new battle against Child Pornography." Western Reserve Journal of International law 30, no. 2/3 (Spring/Summer): 541-66, 1998.

111 539 U.S. 194 (2003)

112 Smith, Graham J.H,; Internet and Regulation, London, Sweet & Maxwell, 2002.

113 Ban on Violent Porn Planned, BBC News, August 30, 2005.

114 Supra Note 26., p.390

According to Justice Vijaya Kapse Tahilramani of the Bombay High Court, that merely viewing an "obscene" film in the privacy of a house is not obscenity as defined under Indian Criminal Law. Further the judge said, "It becomes an offence only when someone has in possession such objects for the purpose of sale, hire, distribution or putting it into the circulation. If the obscene object is kept in a house for private viewing, the accused cannot be charged (for obscenity)[115].

The term 'obscenity' has been effectively explained in two statutes in India, and these legislations prescribed that 'obscenity' in certain circumstances constitutes an offence. The legislations where obscenity find the words are

(i) Then Indian Penal code, 1860 and

(ii) The information Technology Act, 2000

Interestingly fact is that neither the IPC nor the information Technology Act defines what 'Obscenity' is, Section 292 of the IPC and section 67 of the IT Act, (which corresponds to section 292 of the IPC) explain 'obscenity' to means anything which is (i) Lascivious (ii) Appeals to the Prurient interests, and (iii) having the effect of depraving and corrupting or likely to do so the minds of people who are likely having regard to all the relevant circumstances to read, see or hear it.

After the amendment of IT Act in 2008, the power of government to block the porn websites is not an easy task unless it has ramifications threatening public order. Section 69A inserted in IT Act by amendment 2008 , which came into effect on 27th Oct. 2009 as it limits the power to ban websites to offences relating to five specific grounds, they are as; sovereignty and integrity of India, defense of India, security of the state, friendly relations with foreign states and public order[116].

In 1868, the test of obscenity was laid down in **Regina Vs. Hicklin,**[117] "To deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall". Lord Justice Cockburn explained. "the danger of prurient literature was that" it would suggest to the minds of the young of either sex and even to persons of more advance years, thoughts of most impure and libidinous character.

In 1973 United States Supreme Court in a Landmark judgment **Miller Vs. California**[118] Chief Justice Burger gave the basic guidelines. The three pronged test for determining whether a work is obscene or not are as following:

1) That the average person, applying contemporary "Community Standards", would find that the work, taken as a whole appeals to the prurient interest.

2) That the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by state law or applicable law.

3) Whether the work taken as a whole lacks serious literary, artistic, political or scientific value.

Indian judiciary adopted "Hicklin Test" following "harm to others" principle in several cases to maintain synthesis between law and morality.

In **Ranjid D. Udeshi Vs. State of Maharastra**[119] the court held that indecent or immoral publications are prohibited by Article 19(2) of the Indian constitution and section 292, 293, 294 of

115 Times of India; Delhi edition (late city), dated: 26/11/2010, p- 7

116 Times of India; Lucknow edition, dated: 12/2/2010, p- 1

117 (1868) 3QB 360

118 413 US 15 (1973)

119 AIR 1965 SC 881

Indian Penal Code because there obscene publications corrupt the mind of younger generation. The court also concluded that pornography is obscenity in a more aggravated form.

In this case, Justice M. Hidayatullah held that in order to determine whether any material is obscene or not, the test laid down in **Regina Vs. Hicklin**[120] should not be discarded. The Hicklin case lays emphasis on the potentiality of the mentioned object or material to deprave and corrupt by immoral influences as the critical factor to determine obscenity.

In **R.D. Udeshi case**, the test of obscenity was defined as follows: "… the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those, whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall". In this case the Supreme Court further held that what is obscene would always remain a question to be decided in each case. It was the duty of the court to consider the alleged obscene matter by taking an overall view of the entire work.

C.K. Karodkar Vs. State of Maharashtra[121] In this case the apex Court held that the standards of obscenity will not be same in all countries but it would be differ from country to country depending on the Standards of morals of contemporary society. "What is considered as a piece of literature in France may be obscene in England and what is considered in both countries as not harmful to public order and morals may be obscene in our country."

It was further held that, "what we have to see is whether a class, and not an isolated case, into whose hands, the book, Article, or stay falls suffer in their moral out look or become depraved by reading it or might have impure and lecherous thoughts aroused in their minds. The charge of obscenity must, therefore, be judged from this aspect".

The use of term "obscenity" is restricted to sexual immorality. The true test is thus not to find out what depraves the morals in any way whatsoever but what leads to deprave in only one way, i.e. by exciting sexual desires and lascivious thoughts. The question regarding "obscenity" is one of fact and depends upon various circumstances and no hard and fast rule can be laid down. It does not depend altogether on oral evidence but must be judged by the court.

Some example of cyber pornography in India:

1- A student of Air Force Bal Bharti School, Delhi was arrested in May 2001 for allegedly creating a pornographic website www.amazing-gents.8m.net. The boy, who was fed up of being teased for having a pockmarked face, would regularly upload "morphed" photographs of teachers and girls from his school onto the website. He was arrested when the father of one of the victim complained the matter before the police.

2- Lt. Col Jagmohan Singh, arrested for downloading child pornography videos and uploading them on a German website. He was posted in Western Command, Mumbai at a time of arrest on 6th May 2010. The arrest was made by the cyber crime investigation cell of Mumbai Police's crime branch, they also seized two hard disks full of child pornographic material. Army has sought the details of Singh's case from the cops so that an inquiry under the Army Act can be initiated against him[122].

A local court granted him bail on a personal bond of Rs. 25,000.00

120 3LR-QB360 (1868)

121 1970 AIR 1390

122 Times of India; Delhi edition (late city), dated: 14/5/2010, p- 19.

3- A 25 year old share trading agent was raped by her online friend, who was "blackmailing" her using some photographs, taken after she was drugged. He also threatened to release a video of rape, if she approached the police. Victim also paid 1.5 lakh Rupees in response not to make the photographs public[123].

The police arrested the accused along with his friend co-accused from Haryana's Panipat district. Both of the accused are in early 20s, and student of a degree course from IGNOU.

The recent case on Cyber Pornography booked in Chennai against Dr Prakash's. The brief of the case are as:

Fast track court sentenced orthosurgeon Dr Prakash to life imprisonment in a case relating to cyber pornography. Prakash allegedly took obscene pictures of his women patients and then uploaded them on the internet.

Fast Track Court Judge R Radha passed the sentence Under Section 6 of the Immoral Trafficking (Prevention) Act and imposed a fine of Rs 1,25,000 on him.

The other three accused - Saravanan, Vijayan and Asir, were awarded seven years rigorous imprisonment and slapped a fine of Rs 2,500 each.

Delivering the sentence after convicting Dr Prakash and three of his associates, the court said it could not pardon them as they have committed a white collar offence against women.

The court also found, that, Dr Prakash and his associates guilty under Section 506 (part II), 367 and 120-B (criminal conspiracy) of the Indian Penal Code and Section 67 of Information Technology Act. Dr Prakash was, however, acquitted from two charges under Section 307 (attempt to murder) and 376 (rape) of the IPC. The fifth accused Nixon was acquitted from the case.

Dr. Prakash was arrested in December 2001 on the charge of taking obscene photos of his women patients through hidden cameras and uploading them on two Websites www.tamilsex.com and www.realindianporn.com through his US-based brother. The case was investigated by the Vadapalani police and a charge sheet was filed.

In the year 2008 amendment made in IT Act a new section on punishment has been inserted as:

67A. Whoever publishes or transmits or causes to be published or transmitted in the electronic form any material which contains sexually explicit act or conduct shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees.

CONCLUSION

The advent of computers and the internet has been great boon to many, but at the same time it has created a number of problems for the law. On one side the internet is a place of ideas and source of all kinds of information related with political, religious scientific and technological but on the other side it is also full of different kind of pornographic material which are available in different format just a click away.

Cyber pornography is one of the largest businesses on the internet, as in previous pages the statistical data shows. The millions of pornographic website that flourish on the internet are testimony

123 Times of India; Delhi edition (late city), dated: 27/12/2010, p- 1.

to this. So, as our young mind future generation and nations assets are on stake, due to pedophiles are roaming on the net.

It will not be wrong to say that, Technology is not inherent evil, it is neutral how we use it, is key. There is a lot more positive than negative that will be coming out of internet, but we need to know how to use it and what we are getting into.

ENTRY OF FOREIGN LEGAL SERVICES IN INDIA

Rafia Hassan Khaki *

Abstract

Technological advancements have greatly enhanced the scope for Trade in Services. The boom in the service sector led to the conclusion of the General Agreements on Trade in Service (GATS) which envisages progressive liberalization of trade and investment in services through rounds of negotiation. The GATS covers various service sectors important among them is Legal Service, which has gained lot of importance in recent times because of greater market orientation with technological improvements enabling electronic transmission of certain Legal Services. This paper is an attempt to make a critical evaluation of the current regulatory regime in respect of Legal Services in India, the paper further emphasized on to devise the reformatory measures in the system of legal education to make Indian Lawyers capable of competing with the foreign lawyers.

Keywords: General Agreement on Trade in Services, Legal Services, World Trade Organization.

I Introduction

Services were considered to be non-storable, intangible and hence non-tradable until the last few decades. However, the technological advancement in the past few decades greatly enhanced the scope for trade in services. Today, the services sector is the largest and fastest growing sector of the world economy, accounting for more than 60% of the world GDP.[124] The boom in the service sector led to the conclusion of the General Agreement on Trade in Services (GATS), which came into force on January 1, 1995.

The GATS establishes a multilateral framework of principles and rules governing the trade in services with the objective of expansion of such trade as a means of promoting economic growth of all trading partners and the further development of developing countries. The GATS for the first time provides a set of generally applicable disciplines for this large and growing sector of economic activity, as well as mechanism to undertake negotiated specific commitments of market access and national treatment in specific service sectors and sub-sectors and modes of supply listed in each country's schedule of commitments.

Instead of one-short attempt, the GATS envisages progressive liberalization of trade and investment in services through periodic rounds of negotiations. In the service negotiations so for, the developing countries have made far fewer commitments which shows their reluctance to open up their services for international trade and investment. Actually the developing countries fear that this would result in deregulation, corporate take-over of their services by foreign MNC's and put curbs on

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* Munsiff/Judicial Magistrate 1st Class, Ashmuqam, Anantnag. The writer acknowledges the help and encouragement of Prof. A.S.Bhat.

124 As cited in 'WTO and India: A Critical Study of its First Decade', eds. D.K. Mittal and K.D.Raju.. (New Delhi: New Era Law Publication, 2005), at p.154

subsides, etc., which in turn would have adverse effects on costs, availability and equitable distribution of services. These concerns are not well founded and are based on misconceptions.[125]

The developing countries need to recognize the fact that liberalization of trade in service is a vital tool for promoting economic development and enhancing productivity and global competitiveness. Thus instead of resisting, they need to push through aggressively the liberalization of services' market.[126] However, before liberalizing their service trade, they need to make a comprehensive and balanced appraisal of the GATS and its implications to formulate clear cut negotiation strategies. Developing countries should access their strengths and weaknesses in the service sector and the potential benefits and costs of liberalizing the services beforehand.

The GATS covers all service sectors and all forms of trade in services except the services supplied in exercise of governmental authority. "**Legal Services**" are one of the important services covered by the GATS . The liberalization of legal services has gained a lot of importance in the recent times. As a result of massive growth in international trade and emergence of new fields of practice particularly in the area of business law, the legal service sector has experienced a steady and continuous growth in the past few decades. With more and more countries moving towards greater market orientation and with technological improvements enabling electronic transmission of certain legal services, the globalization of legal services is becoming increasingly important.

This paper aims to make a critical evaluation of the current regulatory system in India in respect of legal services; to find out whether it would be feasible for India to go for liberalization of legal services under GATS; and to devise the reforms in the system of legal education in India to make Indian lawyers capable of competing with the foreign lawyers.

II Legal Services.

Legal services refer to legal advisory and representation services, legal or juridical procedures, and the drawing up of legal instruments or documentation.[127] Most of the demand for the legal services comes from businesses and organizations involved in international trade. Business law and international law are therefore the sectors most affected by the international trade in legal services, although the possibility of entry of foreign service suppliers in more traditional sectors of service law should not be completely discounted as the sector becomes increasingly more integrated and competitive.[128]

Lawyers supplying legal service abroad usually act as foreign legal consultants (FLC's). Foreign legal consultants may provide advice on international law, the law of their home country or in the law of any third country for which they possess the required qualifications. Domestic law still

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125 Rupa Chanda 'GATS and its Implication for Developing Countries: Key Issues and Concerns' , DESA Discussion Paper No. 25, United Nations Department of Economic and Social Affairs, New York, Nov. 2002 at p.14 available at www.un.org/esa/desa/papers/2002/esa02dp.25.pdf

126 Aaditya Mattoo, 'Developing Countries in the New Round of GATS Negotiations: Towards a Pro-active Role', Vol.23 (World Economy), April 2000, No. 4, at p. 471-478, available at http://www.papers.ssrn.com/sol3/deliverycfm/1716.pdf / Abstract.

127 Govt. of India Department of Commerce, Trade Policy Division, 'A Consultation Paper on Legal Services Under GATS in Prepration for the On-going Service Negotiations', at p. 11, available at commerce.nic.in/trade/consultation-paper-legal-services-GATS.pdf.

128 Id. at p.11.

plays a marginal role in legal services trade due to barriers such as qualification requirements which are shaped along national lines.[129]

III. Liberalization of trade in legal services in India.

In India the liberalization of trade in legal services is one of the most controversial issues that has plagued the legal profession in the past few years and has been a cause of tremendous protest. These protests are ostensibly motivated by the desire of the Bar Council of India to protect the professional ethics and guard this noble profession against the evils of commercialization.[130] The current regulatory system of legal services in India[131] imposes a number of restrictions on trade in legal services in India. Actually the conception of legal services as a noble profession rather than a service resulted in formulation of a stringent and restrictive regulatory mechanism in the form of the Advocates Act, 1961 and the rules formed there under by the Bar Council of India. These regulations have been justified on the ground of public policy and as an effort to maintain the purity and dignity of the profession.[132] The judiciary has reinforced this perception of the legal profession which is reflected in the words of **Krishna Iyer J**. when he said, *"Law is not a trade, not briefs, not merchandise and so the heaven of commercial competition should not vulgarize the legal profession."* [133]

Some of the current regulations which severely restrict and hinder the development of legal profession in India by acting as barriers to the international trade in legal services are : restriction in terms of nationality,[134] residency requirement,[135] reciprocity requirements,[136] restrictions on partnership with local professionals,[137] absolute bar on advertising by lawyers,[138] limitations on the number of partners in a firm to 20,[139] restriction on foreign equity,[140] restrictions on use of international and foreign firm names[141] etc.

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129 Ibid.

130 Deepa Christopher, 'Entry of Foreign Lawyers into India: A Competition Law Issue,' AIR (2004) Journal 326, at p.330

131 The Advocates Act, 1961 at the Bar Council of India Rules, 1975.

132 *Indian Council of Legal Aid and Advise and Others v. B.C.I,* AIR (1995) SC 691.

133 *B.C.I v M.V. Dhabolkar*, AIR (1976) SC 242. However, Over the years, the view has changed and the courts now recognize the legal service as a service rendered to the consumers and have held the lawyers accountable to the clients in case of deficiency of services. See *Srimathi v. U.O.I*, AIR (1996) Mad. 427.

134 Section 24 of the Advocates Act 1961.

135 Section 17(1) and Section 24 of the Advocates Act 1961.

136 Section 47(1) of the Advocates Act 1961.

137 See Supra note 4,at p.14.

138 Rule 36 of the Bar Council of India Rules, 1975

139 Section 11 of the Advocates Act 1961.

140 See Supra note4, at p. 14.

141 Ibid.

The Bar Council of India[142] has categorically held that time is not ripe for it to liberalize the existing restrictions under the Advocates Act and the Bar Council Rules and that these restrictions are reasonable. The Bar Council of India is of the opinion that unchecked liberalization will bring more acute problems of disciplinary control, different professional ethics being pursued and that it would create disparity with the local lawyers in the matter of capacity and work. There is a strong sentiment amongst various members of the profession that permitting foreign lawyers even in a limited way would lead to the shrinking of the opportunities available to domestic lawyers because the local lawyers won't be able to compete with foreign lawyers.[143]

The BCI seems to have become a tool in the hands of a few rich law firms. It is not at all bothered about the improvement of the quality of legal services in India. The restrictions imposed upon the legal services in India are anti-competitive and preclude the people from the opportunity of forming free and informed choice.

Opening up of legal service sector by India will bring in both opportunities as well as threats. The opportunities which will be thrown open by the process of liberalization of legal services in India include:

1. First and foremost, the opening up of legal services would fetch Foreign Direct Investment (FDI) with them which in turn would be helpful and supportive in overall growth and development of our economy.

2. The entry of the foreign law firms would bring with them a fresh brand of professionalism, competence and expertise that the legal profession here has failed to develop indigenously. Our advocates would be able to nurture and enhance their skills required to resolve disputes and issues in the present era of universalisation of law. Our advocates lack necessary skills in the area of Intellectual Property Rights, Trade Marks, Patents, International Trade Law, Commercial Arbitration, etc. as compared to their foreign counterparts. We have to largely depend on foreign law firms/solicitors when our country has to fight or defend cases in international bodies like WTO, FAO, etc. on cases of antidumping measures, monopolistic trade practices, tariff issues, etc.

3. Furthermore with the entry of these foreign firms, our Alternative Dispute Resolution (ADR) mechanism, which hitherto has been an almost non-starter owing to a variety of reasons, would be able to get a boost, which would ultimately pave the way for significant reduction in number of cases pending in our courts. Also, it would encourage resolving of fresh disputes at the pre-litigation stage itself. The step would endeavor to convert our legal profession which is presently an almost unorganized one, to a well established organized one on the lines of corporate entities.

4. The entry of foreign law firms will give rise to competition in the domestic legal market. The domestic firms will strive harder to survive the competition. In this process the standard of such firms will improve. To maintain their sustainability the efficiency of the Indian law firms will increase. [144]

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142 'The Working Paper of the Bar Council of India on Seminar on Amendments to the Advocates Act, 1961, Professional Conduct Rules of the Bar Council of India & Improvements in Legal Education', held on 23rd Oct, 1999.

143 Ibid.

144 Swarinma and Riddhi Shah, 'Indian Legal Profession and Trade in Legal Services,' AIR (2007) Journal 72, at p. 75.

5. In India there are hundreds and thousands of bright and hard working law graduates who are either jobless or have little work to do. The setting up of the foreign law firms in India would certainly increase the employment opportunities for the law graduates.

6. Also, with the entry of foreign law firms there would be *quid pro quo* for our law firms to establish their offices in their countries, as also necessitated under the GATS. It must be properly ensured by concrete means that our advocates and law firms also get the same treatment in those countries whose law firms are permitted entry in India.

7. It is believed that letting foreign lawyers in India will improve the standard of Indian legal services and eventually bring down the cost of legal services.

8. Allowing foreign countries to set up law firms in our country will also help to strengthen trade relations with those countries.

9. Last, but not the least, the opening up of our legal service sector for foreign law firms would prove to be a boon for our citizens and domestic organizations as they would be able to make a choice of law firms they wish to hire for dealing/resolving their legal disputes. It is pertinent to mention here that ever since the banking, insurance, telecom, aviation, etc. sectors have been liberalized, it is the common man who has been most benefited as availability of variety of choices in the market together with abolition of monopoly of one player makes customer the king.

The above-mentioned opportunities, which lay ahead the process of liberalization of legal services advocate opening up of legal services as it will not only benefit the Indian legal profession but the entire nation at large.

The threats posed by the liberalization of legal services however can not be ignored. The effect of the opening of legal market will be a shift by Indian corporate clients to foreign law firms who offer services on a scale that Indian law firms can not presently match. Those Indian law firms that provide services in commercial law can expect to find themselves under severe competition, even forced out of business. The fear then is that foreign law firms will end up eliminating their Indian competitors and will create a situation similar to that which exists in the field of accounting. Moreover there is a stark difference between the nature of legal traditions in India and those of the foreign firms.[145]

In India, numerous restrictions are imposed on trade in legal services like restriction on number of partners in a partnership firm to 20, restriction on multi- disciplinary practicing, restrictions on limited liability partnerships, ban on advertising by lawyers. etc. Foreign firms, on the other hand, are not encumbered by such restrictions and hence Indian law firms are at competitive disadvantage to foreign law firms.

It is clear that the advantages of liberalizing legal services far outweigh the threats posed by it. It is often asserted that India has the potential to become one of the world's great legal centers in the 21st century, alongside London and New York.[146] India lawyers possess an advantage in the liberalized market over the lawyers of many Asian countries including China, Japan, and Middle Eastern

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145 Internationalization of the Indian Legal Services Market', available at www.articlebase,com/national,-state,-localarticles/internationalization-of-the-indian-legalservices-market-539874.html.

146 'Advent of Foreign Law Firms in India', available at www.legalserviceindia.com/article/158=Foreign-Law-Firms-In-India.html.

countries because Indian lawyers have command over English and India follows an adversarial legal procedure. All this goes to prove that it is wise to go for liberalization of legal services. Moreover, the fact remains that India is in the process of globalizing its economy. In the process, the legal market opening up to the international competition is rather inevitable. Instead of deliberating about the advantages and disadvantages of the legal market being opened up to foreign firms, it is more sensible to accept that the entry of foreign firms in India is only a matter of time[147]. This should be seen as an opportunity for the growth and over all development of legal profession in India.

The matter regarding entry of foreign firms and lawyers into India however requires in-depth deliberations and should be carefully considered in consultation with the Bar Council of India (BCI), All India Bar Association (AIBA), Supreme Court Bar Association (SCBA), Bar Association of India (BAI), Society of Indian Law firms (SILF) and other bodies of legal profession before a final decision is taken.

Agreed, the time is not yet ripe for throwing our doors open for foreign players to our legal sector in hush-up manner, but at least our government should take initiatives in this regard, probably like limiting the entry of foreign law firms in specified areas in the beginning and providing of mandatory tie-up with domestic law firms up to an optimal extent, so as to protect the larger interest of our legal fraternity in general and our presently nascent-level Indian law firms' community in particular. It is noteworthy to mention that a number of Asian countries like China, Japan, Singapore, Indonesia and Malaysia have ensured a smooth and peaceful entry of foreign law firms in their countries in a gradual manner. As such, they have successfully liberalized their legal service sector whilst simultaneously safeguarding the interest of their domestic legal fraternity. India must study the cases of these countries as ideal role models for ensuring an equitable transition of foreign law firms. The time has come for the Bar in India to adopt a comparative approach to the internationalization of legal services.[148]

Before opening gates to foreign lawyers and law firms, India needs to thoroughly review the present state of its legal profession particularly in context of present day needs and challenges. Many reforms are to be brought about within the system to make it capable of competing with the foreign service sector. We need to ensure that a level playing field is created for domestic and foreign law firms to compete. Without a level playing field, the domestic law firms will find it hard to survive. The level playing field will be created firstly by removal of the restrictions imposed on the Indian legal services like ban on advertising and multidisciplinary practicing, limitation on the number of partners to 20, restriction on limited liability partnerships etc. and secondly by the improvement of the system of legal education in India.

The legal education in India presents a very dismal and abhorrent picture. This is mainly because of proliferation of sub-standard law colleges which have no full time teachers or any worthwhile library and enroll hundreds of students without having any or proper infra-structural facilities. Various attempts have been made from time to time to raise the standard of legal education in India by appointment of various committees and commissions etc., to suggest reforms for the upliftment of legal education. However, no substantial results have been achieved so far, as most of

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147 Vrinda Maheshwari, 'Foreign Law Firms Entering the Indian Market-

More Pros Than Cons', available at www.chillibreeze.articles-various- law-firms-asp/22k.

148 K. Subramanian, 'And Now, Entry of Foreign Legal Consultants", The Hindu, dated December 21, 1999.

the recommendations given by the said committees and commissions are yet to be implemented and remain only the paper tigers.[149] As a result, the legal education in India is not capable of fulfilling the growing demands of the legal profession, not to speak of the demands of globalization.

The conventional role of a lawyer was to step in after the event to resolve disputes 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, expert in articulation and communication of ideas, mediator, lobbyist, law reformer, etc. These roles demand specialized knowledge and skills not ordinarily available in the existing system of legal education.[150] The expansion in business across the world has generated a need for lawyers who are global in their approach. Legal education has to play a big role in creating such lawyers. There is an urgent need for truly global legal education. The profession of law, today to a greater extent, requires lawyers to represent clients not only within but also outside national frontiers. Thus new subjects with international dimensions and comparative law studies have to be included within the legal curriculum.

The most challenging task is to strike a proper balance to ensure that students are taught a fair mix of courses that give them knowledge and training in Indian law, but at the same time prepare them for facing the challenges of globalization, whereby domestic legal mechanisms interact with both international and foreign legal systems.[151] The Working Group of National Knowledge Commission is also of the same opinion that the aim of legal education should be to create lawyers who are comfortable and skilled in dealing with the differing legal systems and cultures that make up our global community while remaining strong in one's own national legal system.[152]

Thus globalization of legal services has thrown up new challenge which demands a sea-change in the entire fabric of law teaching. We have to compete with the knowledge and skill of foreign lawyers and law firms to survive the foreign competition. Otherwise we won't be able to derive the benefits of liberalization of legal service sector and will be forced out of the business. The improvement of the standard of legal education is the need of the hour, to meet the ever-growing demands of globalization.

IV Conclusion and Suggestions

As the world is getting globalized, the gradual internationalization of legal services becomes inevitable. India also being in the process of globalizing its economy needs to liberalize its legal service sector. However, before opening up its legal services to foreign lawyers and law firms, India needs to bring about massive reforms within the system to create a level playing field for Indian counterparts to survive the foreign competition. [153]

In the light of the forgoing discussion following suggestions are made in respect of liberalization of trade in legal services in India:

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149 Rafia Hassan, Trade In Legal Services'. Unpublished dissertation. at p. 112.

150 N. R. Madhav Menon, 'Halting Progress of Legal Education', The Hindu, dated October 23, 2001

151 C. Raj Kumar, 'Globalization And Legal Education", The Hindu, Dated August 6, 2007.

152 National Knowledge Commission, Report of the Working Group on Legal Education', 2008, at p.13 Available at, http;//www. Knowledgecommission.gov.in/downloads/documents/wg-legal.pdf.

153 Id. at p. 94.

- Indian government needs to recognize the fact that as Indian economy is fast integrating into a global economy, the liberalization of legal services and the entry of foreign lawyers and law firms into India is only a matter of time. Moreover, given the innumerable advantages of liberalization, it is wise to go for the liberalization of legal services in India.
- The foreign law firms should be allowed to come in as partners in a joint venture structure i.e. the restriction imposed on the formation of partnership has to be removed. Relaxing this restraint would be useful for domestic industry as it will bring in fresh brand of professionalism, competence and expertise that the legal profession here has failed to develop indigenously.
- The limitations on the number of partners and multidisciplinary partnerships need to be removed because all over the world law firms are not encumbered by such restrictions and as a result these law firms have wide controlling, regulating and functioning power both nationally and internationally. The Indian law firms as such are at a disadvantage in comparison to law firms of foreign countries.
- The absolute ban on advertising by lawyers, as imposed by Rule 36 of Bar Council Rules is anti-competitive. Certain reasonable conditions may, however, be imposed in the public interest.
- Above all, there is an urgent need to bring about reforms in the existing system of legal education in India to produce competent and talented legal professionals capable of competing with foreign lawyers. Following suggestions are proposed with respect to improvement in the standard of legal education in India:
  - It is recommended that the law curriculum should be revised to meet the challenges of globalization by including the subjects of global importance like International Trade Law, Intellectual Property Rights, International Economic Law, etc. within the curriculum of both three year and five year legal educational systems.
  - The Indian government should encourage the collaboration and student exchange programmes with the foreign Universities to prepare the students for global practice.
  - The law schools need to improve their libraries. The internet facilities should be made available in the law libraries whereby the foreign journals and periodicals must be especially made available to the students to make them aware of the latest developments taking place world over.
  - The BCI and the UGC, the bodies regulating the legal education in India, should join hands to devise new ways and means for the improvement of the standards of legal education in India.
  - The admission to law colleges throughout the country should be strictly through a Common Law Aptitude Test (CLAT) based on the lines of Common Entrance Test (CET) for admission to other professional courses. It will help in the selection of right and committed candidates to law courses.
  - Apart from the aforesaid suggestions, it is also proposed that the Government must appoint a Committee consisting of members from the BCI, UGC, Universities, State Bar Councils, Law-firms etc. to conduct a study on liberalization of legal services in India and changes required in the system of legal education to meet the challenges of globalization.

By implementing the aforesaid suggestions and making the necessary amendments in the Advocates Act, 1961 and the Bar Council of India Rules made there under, a level playing filed will

be created for the Indian lawyers and law firms to make the maximum utilization of the benefits accruing from the process of liberalization of trade in legal services.

A HISTORICAL PERSPECTIVE AND CRITICAL APPRAISAL OF THE CONSUMER PROTECTION (AMENDMENT) ACT, 2002

Mohammad Rafiq Dar*

Abstract

*Consumer protection has always remained a concern of people in general and the state in particular right from the ancient period to the present era. In ancient India, human values were cherished and ethical practices were considered of great importance.. During medieval period much importance was given to the welfare of the people with regard to the consumer p*rotection. *During the British period, the Indian legal system was totally revolutionized and the English legal system was introduced to administer justice. The Consumer Protection Act, 1986, is one of the socio-economic legislation which has been enacted for protecting the interests of the consumers in India. Unlike existing laws which are punitive or preventive in nature, the provisions of this Act are compensatory in nature. The Act is also intended to provide simple, speedy and inexpensive redressal to the consumers' grievances, and relief of a specific nature and award of compensation wherever appropriate to the consumer. This paper examines the historical perspective of consumer protection in India from the ancient period to the modern period and it also briefly criticises the Consumer Protection (Amendment) Act, 2002. So far consumer Protection Act has been amended several times to redress the loopholes in it. Some of the most profound amendments to the Consumer Protection Act, 1986 brought about by the Consumer Protection (Amendment) Act, 2002, the subsequent repercussions of those respective amendments, the shortcomings which have still not been rectified despite the amendment and also the benefits that are resultant of certain amendments need to be analysed.*

Keywords: Consumer Protection, Consumerism, Vedic age, Caveat emptor, Attachment, Consumer Bill of Rights.

A HISTORICAL PERS PECTIVE AND CRITICAL APPRAISAL OF THE CONSUMER PROTECTION (AMENDMENT) ACT, 2002

Introduction

Consumer Protection has its deep roots in the rich soil of Indian civilization, which dates back to 3200 B.C. from the Vedic age''[154] (ancient period) to the modern period. In the

past, human values were cherished and ethical practices were considered of great importance. However, the rulers felt that the welfare of their subjects was the primary area of concern. They showed keen interest in regulating not only the social conditions but also the economic life of the people, establishing many trade restrictions to protect the interests of buyers. Since the time immemorial attempts and endeavours are being made to improve the legislative backing and the

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* Lecturer, Kashmir Law College; BSc, LLM.

154 5000B.C. to 2500 B.C. Different versions give different dates for the actual period of the *Vedic* age. However, it is said that "The Vedic age in India which is considered to be the first literary source of civilization, is seen as a glorious period of cultural evolution in the ancient world . . . The Vedas are not books of law but are the repository of culture delineating the feelings and habits of the people of the time which indicate and give vivid ideas of legal concepts in a developed civilization." Gurjeet Singh *"The problem of Consumer Protection in India: A Historical Perspective"* Consumer Protection Reporter 704 at 705, n.6 (1994 III)

enforcement machinery. Much progress has been achieved but there is yet a lot to be done in this regard. The judiciary of the state has always remained vibrant to respond to the call of the masses for the speedy and meaningful justice.

Consumer Protection in Ancient India

In ancient India, all sections of society followed *Dharma-sastras* [155] ("*Dharma*"), which laid out social rules and norms, and served as the guiding principle governing human relations. The principles of *Dharma* were derived from *Vedas.*[156] *Vedas* were considered the words of God, and law was said to have divine origin which was transmitted to society through sages.[157] Thus, *Vedas* were the primary sources of law in India. *Manu Smriti* described the social, political and economic conditions of ancient society. Manu, the ancient law giver, also wrote about ethical trade practices. He prescribed a code of conduct to traders and specific punishments to those who committed certain crimes against buyers. For example, He reffered to the problem of adulteration and said "one commodity mixed with another must not be sold (as pure), nor a bad one (as good) not less (than the property quantity or weight) nor anything that is at hand or that is concealed."[158]

The punishment "for adulterating unadulterated commodities and for breaking gems or for improperly boring (them)" was the least harsh. Severe punishment was prescribed for fraud in selling seed corn: "he who sold (for seed-corn that which is) not seed-corn, he who took up seed (already sown) and he who destroyed a boundary (mark) was punished by mutilation."[159] Between 400 and 300 B.C., there was a director of trade whose primary responsibility was to monitor the market situation. Additionally, the director of trade was made responsible for fair trade practices. The director of trade was required to be "conversant with the differences in the prices of commodities of high value and of low value and the popularity or unpopularity of goods of various kinds whether produced on land or in water [and] whether they . . . arrived along land-routes or water-routes, [and] also [should know about] suitable times for resorting to dispersal or concentration, purchase or sale."[160] According to Kautilya, 'the trade guilds were prohibited from taking recourse to black marketing and unfair trade practice." During Chandragupta's period,[161] in which Kautilya lived, good trade practices were prevalent. Every trader was required to take a license to sell. A trader from outside had to obtain permission. The superintendent of commerce fixed the whole-sale prices of goods as they entered the Customs House. He allowed a margin of profit to fix retail prices. Speculation and cornering to influence prices were prohibited. Thus, the State bore a heavy responsibility for protecting the public against unfair prices and fraudulent transactions. During Chandragupta's period, easy access to justice for all, including consumers, was also considered of great importance. The king was the central power to render justice. According to

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155 Codes of morals. They also deal with the rules of conduct, law and customs.

156 Shraddhakar Supakar, Law of Procedure and Justice in India, 38 (1986). *Veda* means knowledge. There are four *Vedas*: the *Rigveda,* the *Yajurveda,* the *Samaveda* and the *Atharvaveda.*

157 *Id.* at 39.

158 Manu, The Laws of Manu, 290 (George Buhler trans., 1990).

159 *Id*. at 394.

160 R.P. Kangle, The Kautiliya Arthasastra – Part III – A Study 116 (2000) [hereinafter Kangle Part III].

161 Chandragupta Maurya ranks as one of the India's greatest rules. The period dates back to 323 B.C.

Kautilya, "The king should look to the complaints of the people of the town and village in the second part of the day. The mobile and circuit courts worked at night, when necessity arose. They also worked on holidays in urgent matters."[162] The king was required to pay full attention to the truth and he was primarily responsible for administering justice. Everyone could approach the king's court for justice.

However, the rule of standing was strictly followed. The king only entertained cases if the aggrieved presented a valid complaint.

Consumer protection in Medieval and Modern Periods

In the medieval period, consumer protection continued to be a prime concern for the rulers. During Muslim rule, a large [number] of units of weights were used in India.[163] During the Sultanate period, the prices used were determined by local conditions. Consumers protection was of paramount importance in the medival period in India ranging from 1000 AD to 1750 AD. Several prominent Muslim rulers had ruled India during this period from the capital in Delhi. The Delhi sultanate, being the start of such a long period of Islamic rule in India, laid the foundation to the economic, financial and commercial backbone of the Indian medieval period. The most notable achievements in consumer Protection during the Delhi Sultanate were during the period of Alauddin Khilji (1296 AD to 1316 AD.) Alauddin khilji was the second ruler of the kilji dynasty. During his reign, there were unprecedented improvements in the weights and measured standardization process bringing about dramatic changes in the transparency practices of traders with consumers. Commodities were weighed and measured through standards established by the sultan and people who din not follow standards were punished through fines and even capital punishment. The sultan had judges who were omnipotent in enforcing the rights of the consumers and approaching the courts when injustice occurred was simple and without bureaucracy. During the rule of alauddin Khalji,[164] strict controles were established in the market place,. In those days, there was a mechanism for price enforcement in the market. Similarly, shop-keepers were punished for under weighing their goods.

Several generations of rulers following the khilji did not contribute much to the consumer protection cause until sher shah suri who ruled during the brief period between 1540 and 1545 AD. Sher shah suri was a visionary in matters related to commerce. He envisioned that an economy is always dependent on how well its consumers are treated. He emphasized on standardized measures and set forth decimal and centenary systems with respect to measures. He also published quality guidelines especially for produce, grocery, confectionaries and pharmaceuticals. The financial system he introduced along with the currency 'Rupiyah' forms the foundation of the monetary system of modern India. Although his reign was

brief, he is thought to be one of the most important medieval rulers who has influenced consumer protection policies of modern India.

During the reign of Akbar (1556-1605), the third Mughal Emperor of India, several significant achievements were made in matters related to consumer protection. The right of the consumer to be

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[162] Supakar, *supra* note, 3 at 114-15.

[163] Maulana Hakim Syed Abdul Hai, *India- During Muslim rule* 127 (Mohinuddin Ahmad tans. 1977).

[164] 1296 – 1316.

informed perhaps found its earliest roots during the period. All traders were required to publish details regarding the quality and quantity of their merchandise including weights, measures, adulteration if any, age, grade, and usability. This law was strictly enforced through prefects and secret service personnel employed by the emperor. Violations and deceitful behavior were dealt with the harshest of punishments including amputation of limbs. Consumers also enjoyed the right to return merchandise which did not meet the standard requirements related to quality and quantity. Akbar's contribution is notable in that his rule improved accountability and transparency in commodity transactions which were perhaps non-existent in the medieval days in India.

Although the Mughal kings that came afterwards did continue the achievements laid by their forefather, they concentrated more on literary, architectural and military pursuits. Eventually by the time the British gained control over the whole Indian peninsula, consumer issues had deteriorated into a stage that needed a rigorous revival. Nevertheless, the awareness, vision and perseverance through which the medieval rulers of India preserved the importance of consumer protection issues has been a source of fascination for international historians and economists.

British Period

In the modern period, the British system replaced the age old traditional legal system of India. However, one of the outstanding achievements of British rule in India was "the formation of a unified nationwide modern legal system."[165] During the British period,[166] the Indian legal system was totally revolutionized and the English legal system was introduced to administer justice. However, it is important to note that the traditions and customs of the Indian legal system were not ignored. " the law itself underwent considerable adaptation.

The British institutions and rules were combined with structural features [e.g. a system of separate personal laws] and rules [e.g. *Dharma,* and local custom] which accorded with indigenous understanding. The borrowed elements discarded British localisms and anomalies and rules were elaborated to deal with new kinds of persons, property and transactions."[167] To administer justice, "they were confronted with the problem of the value suitable to attach in practice to the Indian traditions and customs."[168] Despite the challenges of combining the British and Indian legal systems, "the fabric of modern Indian Law . . . is unmistakably Indian in its outlook and operation"[169] and consumer protection is not an exception to this perception.

Some of the laws which were passed during the British regime concerning consumer interests are: the Indian Contract Act of 1872, the Sale of Goods Act of 1930, the Indian Penal Code of 1860, the Drugs and Cosmetics Act of 1940, the Usurious Loans Act of 1918, and the Agriculture Procedure (Grading and Marketing Act) of 1937. These laws provided specific legal protection for consumers. For fifty-five years, the Sale of Goods Act of 1930 [SGA]

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165 Marc.Galanter, *Law and Society in Modern India* 15 (1997).

166 From 1600 to 1947. The Regulating Act of 1773 was passed by the British Parliament and one of its objectives was to bring the management of the East India Company under the control of the British Parliament and British Crown.

167 Galanter, *supra* note 41, at 48

168 Robert Lingat, *The Classical Law of India* 137 (1998).

169 Galanter, *supra* note 41, at 49.

was the exclusive source of consumer protection in India. The SGA, drafted with precision, is "an admirable piece of legislation."[170] It is also praised as a "Consumer's Charter." The main protection for the buyer against the seller for defective goods is found in Section 16 of the Act."[171]

It provides exceptions to the principle of *Caveat emptor* ("let the buyer beware") and the interests of the buyer are sufficiently safeguarded. Phrases such as "skill and judgment of the seller", "reliance on sellers' skill", and the test of "merchantable quality" provide effective remedies to buyers. Courts interpreted these rules in the consumer's favour.[172] Consumer protection was also provided within India's criminal justice system. The Indian Penal Code of 1860 has a number of provisions to deal with crimes against consumers. It deals with offenses related to the use of false weights and measures,[173] the sale of adulterated food or drinks, the sale of noxious food or drink, and the sale of adulterated drugs.''[174]

Consumer protection legislation enacted after India's independence from Britain include: the Essential Commodities Act of 1955, the Prevention of Food Adulteration Act of 1954 and the Standard of Weights and Measures Act of 1976. A benefit of these acts is that they do not require the consumer to prove *mens rea*. Rather, "the offenses are of strict liability, and not dependent on any particular intention or knowledge."[175] Criminal law in the field of consumer protection has acquired much significance, as consumers are less inclined to go to civil court for small claims. It has been said that "the functional value of criminal law in the field of consumer protection is a high one and it has a respectable pedigree."[176] Another view is that there has been an attempt to look at consumer protection as "a public interest issue rather than as a private issue" to be left to individuals for settlement in court. In addition to the remedies under contract and criminal law, consumers have rights under tort law. Based on

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170 Gordon Borrie & Aubrey L. Diamond, *The Consumer, Society and the Law* 65 (1964).

171 S.16 of Sale of Goods Act says " Subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which goods are required, so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be reasonably fit for such purpose: Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose

(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality: Provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

(3) An implied warranty or condition as to quality or fitness for a particular purpose many be annexed by the usage of trade.

4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith. Sale of Goods Act, No. 3 of 1930; India Code (1930), ch. 2 sec. 16.

172 Borrie and Diamond, *supra* note , at 66.

173 Indian Penal Code, No. 45 of 1860, ch. 13 ss 264-67.

174 2627. *Id.* at ch. 14 ss 272-76.

175 D.N. Saraf, *Law of Consumer Protection in India* 169 (1990).

176 Gordon Borrie, *The Development of Consumer Law and Policy: Bold Spirits and Timorous Souls* 3 (1984).

its numerous legal intricacies, however, tort law is not the ideal remedy for injured consumers in India. For example, the traditional doctrine of negligence imposes heavy responsibility on the plaintiff to prove each of its required elements. These traditional legal requirements naturally encourage injured consumers to pursue legal remedies under different laws.''[177] Not surprisingly, it is estimated that for about half a century from 1914 to 1965, only 613 tort cases came before the appellate courts.''[178] The orthodox legal requirements under the law of torts and contracts forced the policy makers to draft specific legislation to protect consumers. As a result, the Consumer Protection Act of 1986 was enacted with the objective of providing "cheap, simple and quick" justice to Indian consumers.

Post Independence

One could be forgiven for thinking that consumerism was largely invented by Mr. Ralph Nader, the well-known American Advocate. History of protection of Consumer's rights by law has long been recognised dating back to 1824. Every year the 15th of March is observed as the World Consumer Rights Day. On that day in 1962 President John F. Kennedy of U.S. called upon the U.S. Congress to accord its approval to the Consumer Bill of Rights.

They are (i) right to choice;

(ii) right to information,

(iii) right to safety and

(iv) right to be heard.

President Gerald R. Ford added one more right i.e. right to consumer education. Further other rights such as right to healthy environment and right to basic needs (Food, Clothing and Shelter) were added. In India we have recently started celebrating 24th December every year as the National Consumer Rights Day. In the history of the development of consumer policy, April 9,1985 is a very significant date for it was on that day that the General Assembly of the United Nations adopted a set of general guidelines[179] for consumer protection and the Secretary General of the United Nations was authorised to persuade member countries to adopt these guidelines through policy changes or law. These guidelines constitute a comprehensive policy framework outlining what

Governments need to do to promote consumer protection in following seven areas:

i. Physical safety;

ii. Protection and Promotion of the consumer economic interest;

iii. Standards for the safety and quality of consumer goods and services;

iv. Distribution facilities for consumer goods and services;

v. Measures enabling consumers to obtain redress;

vi. Measures relating to specific areas (food, water and pharmaceuticals) and

vii consumer education and information programme.

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177 *See Wormell* v. *R.H.M. Agriculture (East), Ltd*. [1987] 1 W.L.R. 1901.

178 It is said, due to the congestion of courts with heavy arrears, it may take 5 to 15 years for a claimant to wade through the different levels of courts in tort litigation in India.

179 General Assembly Resolution 39/ 85

The Consumer Protection Act of 1986

The Indian legal system experienced a revolution with the enactment of the Consumer Protection Act of 1986 ["CPA"], which was specifically designed to protect consumer interests. The CPA was passed with avowed objectives. It is intended to provide justice which is "less formal, and involves less paper work, less delay and less expense". The CPA has received wide recognition in India as poor man's legislation, ensuring easy access to justice. However, the CPA simply gives a new dimension to rights that have been recognized and protected since the ancient period. It is rightly said that "the present-day concern for consumer rights . . . is not new and that consumer's rights like the right to have safe, un-adulterated and defect-free commodities at appropriate prices has been recognized since ancient times."[180]

The experience with the operation of the CPA shows its popular acceptance and the legal preference of injured consumers to enforce their rights under it. The CPA commands the consumer's support because of its cost-effectiveness and user-friendliness. In fact, the CPA creates a sense of legal awareness among the public and at the same time, brings disinterest to approach traditional courts, especially on consumer matters. It has changed the legal mindset of the public and made them think first of their remedies under the CPA, regardless of the nature of their case. In short, the CPA has instilled confidence among the "teeming millions" of impoverished litigants. The way in which the consumer fora are flooded with cases and the mode in which these cases are being disposed off creates an impression of "judicial populism" in India in the arena of consumer justice.

The greatness of the CPA lies in its flexible legal framework, wider jurisdiction and inexpensive justice. One can find in the CPA a mixture of principles of torts and contracts. Simply speaking, it is "a shorthand term to indicate all the many different aspects of general law."[181] Basically, the CPA liberalizes the strict traditional rule of standing and empowers consumers to proceed under the CPA.[182] Consumer groups, the central or any state government are all empowered to lodge complaints under the CPA.[183]

This liberalization shows the care that has been taken to represent and fight for the cause of weak, indifferent and illiterate consumers. The novelty of the CPA is the inclusion of both goods and services within its ambit. The consumer can bring suit for defective products as well as for deficiency of services.''[184] In the event of any deficiency, all services, whether provided by the government or private companies, can be questioned under the CPA.

The CPA also liberalized rigid procedural requirements and introduced simple and easy methods of access to justice. To proceed under the CPA, the consumer need only pay a nominal fee and need not send any notices to the opposite party. A simple letter addressed to the consumer forum draws enough attention to initiate legal action. Another major procedural

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180 Singh, *supra* note 1, at 719.

181 Bill Thomas, *The Legal Framework of Consumer Protection, in Marketing and the Consumer Movement* 49 (Jeremy Mitchell ed., 1978).

182 The Consumer Protection Act, No. 68 of 1986; India Code (1986) ch. 2 sec. 1(b)(iv).

183 30. *Id.* at ch. 2 sec. 1(b)(iii).

184 31. *Id.* at ch. 2 § 1(c).

flexibility is the option the consumer has to engage a lawyer. If the consumer prefers, he can represent himself. The simple measures of action drive consumers to avail themselves of the benefits of the CPA.

The CPA initiated a legal revolution by ushering in the era of consumers and developing a new legal culture among the masses to take recourse under the CPA regardless of their grievance. The Consumer Disputes Redressal agencies, the National Commission, the State Commission, and the District Fora are working together in a way that is revolutionizing the present Indian legal system and challenging the traditional system of delivering justice. With easy access to the courts guaranteed by the CPA, consumers now wage legal battles against unscrupulous traders or service providers without any hesitation. The Indian government is also taking an active interest in protecting consumer rights and promoting effective consumer movements. In 2003, the Planning Commission of India identified "Consumer Awareness, Redressal, and Enforcement of the Consumer Protection Act of 1986" as a priority, and as a result, a national action plan was prepared.

The consumer fora created by the CPA have proven to be effective, disposing of thousands of cases with few legal formalities, and leading the way towards well-founded consumer jurisprudence in India. The traditional Indian legal system, in addition to a huge backlog of cases, is experiencing a litigation explosion in the area of consumer protection. According to one report, the total number of consumer cases pending in different fora was 359,469 cases as of June,2004."[185]

Around 45,798 cases have been filed before the national commission since its inception. At present, 8,884 cases are pending disposal.''[186] The huge backlog of consumer cases before consumer fora is forcing the Indian legal systems to think of "alternatives" for speedy disposal of consumer cases. India, home to the majority of the world's consumers, is committed to working for the welfare of consumers through new legal innovations. During the course of time new challenges and circumstances rise as a challenge before every law. But the law has to stand the tests of the time and therefore, amendment of law is undertaken. Similarly the CPA 1986 also underwent the amendments in order to provide the better solutions to the legal problems. Although, by amending laws a solution to the problem is provided but there is always a scope of improvement e.g. CPA 1986 as amended by the amendment act 2002 has brought some laurels yet there are some loopholes as well.

Highlights of the Consumer Protection (Amendment) Act, 2002

Legal terminology apart, every human being at some point or other, has donned the role of a consumer in his/her lifespan. When we buy an electric appliance for the home, get the monthly ration or buy a brand new car- we become consumers. When we pay some fees to a doctor for the medical services provided by him/her, when we pay the telephone bill or when

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185 Dep't of Consumer Affairs, Ministry of Consumer Affairs, Food and Pub. Distrib., Gov't of India, Annual Report 2004-5, ch. 5, http://fcamin.nic.in/Events/EventDetails.asp?EventId=1246&Section=Annual%20Report&ParentID=0&child_continue=1&child_check=0 (last visited Mar. 17, 2008).

186 Mahendra Kumar Singh, *Vacancies, Pending Cases Plague Apex Consumer Body*, Times of India, Mar. 9, 2007, *available at* http://timesofindia.indiatimes.com/articleshow/1738563.cms, Times of India, 9th Aug. 2007 (last visited Mar. 17, 2008).

we post a registered letter- we become consumers of the doctor, telephone department and the postal services respectively.

Thus it would not be an exaggeration to point out that the CPA, 1986, is one of the most important legislations that governs the life of every human being in his transactions with the society for availing goods and services provided by others. It not only comes into daily use but prevents the exploitation of common man, the consumer, at the hands of the affluent and moneyed business man or service provider. Hence any change or amendment whatsoever, in the Act directly affects the common people thereby needing a close scrutiny of the amendments thereto. Some of the most profound amendments to the Consumer Protection Act, 1986 brought about by the Consumer Protection (Amendment) Act, 2002, the subsequent repercussions of those respective amendments, the shortcomings which have still not been rectified despite the amendment and also the benefits that are resultant of certain amendments need to be analysed. Some major loopholes of the Act still left unplugged by the 2002 Amendments are discussed here:

1) One of the biggest achievements of the Consumer Protection (Amendment) Act, 2002, was the conferment of First Class Magistrate's powers to the Consumer Forums or Commissions.

The main problem regarding the above empowerment and the relevant provision is the fact that the Gazette notification for the conferment of First Class Magistrate's powers to the Consumer Forums or Commissions is still not issued. Thus it is practically impossible for the Forums or Commissions to exercise this power conferred by the Act.

2) Another lacuna present in the amended Act is the relatively softer approach adopted by the Act towards the judgment debtor in its certain provisions. The amendment of 2002 has not done anything concrete to fill this lacuna. For instance, S. 24 of the Consumer Protection Act, 1986, which reads as follows:-

S.24: Finality of order:-

Every order of a District Forum, State Commission or the National Commission shall, if no appeal has been preferred against such order under the provisions of this Act, be final.

Thus this provision implies that non- preferment of appeal renders the order final. Conversely, preferring an appeal means that order is not final. Hence once an appeal is preferred by the judgment debtor, he gets a stay against the execution and thus there cannot be any execution. The judgment debtors have certainly misused this provision of the Act. It is a general pattern that judgment debtors just buy time before the Forum or Commission stating that appeal has been preferred. Even if the appeal is not admitted and may take quite some time for the purpose, even if the required bank guarantee is yet not given and the stay is still not granted, the consumer cannot get the execution of the original order done. Thus justice still eludes the helpless consumer while the seller (judgment debtor) more often than not manages to get adjournment. The Act is silent regarding a 'stay order'. Even the Amendment Act of 2002 disappoints in this regard. This Section urgently calls for amendment substituting the words "appeal preferred" with the words 'stay granted'.

3) Another important confusion is created by the amended S.25 of the Act that reads as under:S.25: Enforcement of orders by the Forum, the State Commission or the National Commission:-

(1) Where an interim order made under this Act, is not complied with the District Forum or the State Commission or the National Commission, as the case may be, may order the property of the person, not complying with such order to be attached.

(2) No attachment made under sub-section (1) shall remain in force for more than three months at the end of which, if the non-compliance continues, the property attached may be sold and out of the proceeds thereof, the District Forum, or the State Commission or the National Commission may award such damages as it thinks fit to the complainant and shall pay the balance, if any, to the party entitled thereto.

(3) Where any amount is due from any person under an order made by a District Forum, State Commission or the National Commission, as the case may be, the person entitled to the amount may make an application to the District Forum, the State Commission or the National Commission, as the case may be, and such District Forum or the State Commission or the National Commission may issue a certificate for the said amount to the Collector of the district (by whatever name called) and the Collector shall proceed to recover the amount in the same manner as arrears of land revenue.

If we carefully give a perusal to the above provisions of the above section, we find that by virtue of S.25 (1) the provision of attachment is against the interim order and not the final order. But looking at the pattern of judgments, it can be clearly discerned that generally attachments are aimed at awarding compensation to the aggrieved party, mostly the consumers. Compensations are usually awarded as part of the final order and the interim order almost never awards compensation. Interim orders aim at compelling or restraining any agency for the commission or omission of some act but these interim orders are seldom used by the Forums or Commissions to attach or seal the property of any business person, manufacturer, banks, medical establishments, etc. for the simple reason that the Forums/ Commissions are not aware if there will be any compensation order against them at the conclusion of the proceedings before Consumer Protection Agencies. Since no recovery proceeding is provided under the Act, there cannot be any assessment of the dues and thus no interim attachment order. Thus a more practically feasible approach would be to replace the word interim order with all orders.

4) Also S. 25 (3) provides for issuance of a certificate to the Collector for recovery of the amount due from any concerned person. The consumers have to contact the Collector for recovery of their dues because there is no further provision as to what is the role of Consumer Forums/ Commissions after that. After a long wait for the order from the Forum, the helpless consumers still have to undergo the rigor of going to the collector for the realization of the dues. There is no clarity regarding who is responsible for the follow up with the revenue department and the stipulated time limit thereto. Thus the concerned provision of S. 25 (3) should provide for the revenue department to send the arrears to the Forum itself for reimbursement to the consumer.

Thus an amendment is required to take care of the afore-mentioned problem.

However while criticising certain provisions of the Act, at the same time it is necessary to point out certain other provisions which are the product of the 2002 Amendments and have plugged many loopholes by their progressive wording. These provisions brought about by the amendment have gone a long way in doing away the perennial problems of delay.

1) Amendment to Section 11 enhances the jurisdiction of the District Forum to entertain complaints where the value of the goods or services and the compensation claimed do not exceed rupees twenty lakhs. This will be more convenient for the complainants and also reduce the number of complaints filed with the State Commission and National Commission.

2) Section 12 is substituted to provide that every complaint filed with the District Forum shall be accompanied with such amount of fee as may be prescribed. It also provides that the admissibility of the complaint shall ordinarily be decided within twenty-one days from the date on which the complaint is received and that once admitted a complaint shall not be transferred to any other Court or Tribunal. This will help to quicken disposal of complaints.

3) The amendments to section 13 require the District Forum to refer a copy of the admitted complaint within twenty-one days from the date of its admission to the opposite party to give his version within the prescribed time. It also provides the much needed provision for ex parte order as well as dismissal of complaint on non-appearance of complainant.

It includes a new sub-section (3A) to provide that complaint shall be heard as expeditiously as possible and endeavour made to decide the complaints within the prescribed period. Adjournments would ordinarily not be granted, and if granted for reasons to be recorded in writing by the forum, an order as to the costs occasioned by the adjournment would also be made by the forum. It is also provided that in the event of a complaint being disposed of after the period so specified, the District Forum shall record in writing, the reasons for the same at the time of disposing of the said complaint.

It further includes a new sub-section (3B) to enable the District Forum to pass interim orders where required. It also includes a new sub-section (7) for the substitution of parties in accordance with the provisions of Order XXII of the First Schedule to the Code of Civil Procedure, 1908 in the event of death of the complainant or opposite party. These amendments will facilitate quicker disposal of cases and enable complainants to get immediate relief. The procedural delays will be done away with.

4) New section 19A provides that endeavour shall be made to dispose of appeals filed before the State Commission or the National Commission within ninety days from the date of admission.

These are just some of the useful amendments and the afore-mentioned list is definitely not exhaustive. In fact, all the amendments made to the Consumer Protection Act by the 2002 Amendments aim at furthering the efficiency of the Act and doing away with procedural delays which render the consumers disillusioned and dissatisfied. These Amendments have been fruitful in providing ‘protection’ to the consumers in the real sense of the term and served the purpose of the Act. It is hoped that further amendments would aim at even more efficiency and render the position of the consumers much stronger in this era of globalization and privatization where the sudden unchecked advent of Multi National Companies has to be balanced with the protection of the rights of the consumers by the legislature and the judiciary.

Conclusion

Consumer Protection is not a new concept to the rich soil of Indian civilization, which dates back to 3200 B.C. In ancient India, human values were cherished and ethical practices were considered of great importance. However, the rulers felt that the welfare of their subjects was the primary area of concern. They showed keen interest in regulating not only the social conditions but also the economic life of the people, establishing many trade restrictions to protect the interests of buyers. The rulers and the kings in the ancient and medieval India were duty conscious of the welfare of the people. The consumer issues were not complex. With the passage of time the situation changed and trade within and outside grew manifold during medieval period in India and the rulers were well aware of the consumer interests and there were laws to protect the consumers and punish the defaulters. During British rule there were many provisions regarding consumer protection available under some Acts like the Indian penal code, 1860 the Sale of Goods Act, 1930 and the Drugs and Cosmetics Act, 1940 but these provisions were not sufficient to provide the protection to the consumers. The Indian legal system experienced a revolution with the enactment of the Consumer Protection Act of 1986, which was specifically designed to protect consumer interests. The CPA was passed with avowed objectives. It is intended to provide justice which is “less formal, and involves less paper work, less delay and less expense”. The CPA has received wide recognition in India as poor man’s legislation, ensuring easy access to justice.

Baglihar Model in Sharing Water Resources: (Jurisprudent) Lessons Learnt and Apprehensions Ahead

Debasis Poddar*

Abstract

Well before International Law Commission undertook Herculean mission to codify jurisprudence vis-a-vis shared natural resources in 2002; even before the UN General Assembly adopted its first resolution on permanent sovereignty over natural resources in 1962, the Indus Waters Treaty, 1960 between India and Pakistan under the auspices of International Bank for Reconstruction and Development (which belongs to the World Bank group) had pioneered the same. Perhaps, though arguably, a decade-long process of such exercise and incidental ups and downs involved therein might have prompted the Assembly to contemplate over the matter. Unlike the Treaty of Versailles, this bilateral treaty is still alive along with Permanent Indus Commission as its operative agency, completed half century and survived consecutive armed conflicts- in 1965, 1971 and 1999 respectively- between its state parties which are engaged in mutual hostilities since independence. Whether and how far the same is out of their faith in and respect for public international law is a point apart.

The author hereby explores the treaty regime in its nitty-gritty in terms of underlying jurisprudence which is instrumental for its survival against all adversities including successive armed conflicts, diplomatic face-off, and proxy war in Kashmir valley. A focus of this effort also concentrates upon diplomatic wire-pulling and domestic compulsion under which both of them are left with no other option but to adhere to the same- not without reason that even the dispute settlement mechanism through arbitration succeeded to remedy residual difference between them. Last but not least, the author has identified potential apprehensions behind such treaty regime which are somehow pushed to backseat here till date but unlikely to be done so always and everywhere. In a nutshell, the question of state sovereignty over shared natural resources and quantum of restraints therein constitute the fulcrum of this effort. Whether and how far (international) commons jurisprudence may address the matter is a moot point to this end.

Keywords: international watercourses, water resources, commons property, riparian states, reasonable utilization, inviolability during armed conflict, water diplomacy, obligation erga omnes etc.

With more than 300 rivers, about 100 lakes, and a large and yet to be determined number of aquifers shared by two or more states, water could be a cause for disputes, as well as a catalyst for cooperation. Indeed, that has been the situation globally, particularly in the last decade. Examples of both disputes and cooperation at the international level are abundant. Some of the disputes have been peacefully resolved, while others are still awaiting resolution. Other disputes are brewing and could erupt any time. Resolution of some disputes has been achieved by the parties themselves in some instances, and through third parties in others.

***Key Words**:- Indus waters Treaty, treaty regime, law commission, ILC initiative, Multilateral treaty law.*

* Assistant Professor, National University of Study and Research in Law, Ranchi, Jharkhand <debasis.calcutta@gmail.com>

Introduction

Among all hitherto emerging concepts of international jurisprudence, that of sharing natural resources seems one, if not only, which has had subtle strategic importance in terms of bilateral relationship between states which may at times be multilateral as well. Initially limited to a juridical grandeur, development over this matter later received momentum immediately after the same was undertaken by the International Law Commission. As a matter of convenience, the Commission concentrates its focus on two specific areas of study (i) transboundary aquifer, i.e. (under)groundwater and (ii) oil and natural gas; both are *ipso facto* underground resources.[188] Prudence behind selection seemingly lies in workable consensus over the same since these underground natural resources, due to their non-static characteristics, are likely to become subject of international legal disputes to the detriment of international peace and security. Others which are posited on open surface of the ground, therefore, are not set aside. Immediately prior to this work, under the auspices of the ILC, UN General Assembly dealt with natural resources like international watercourses as well.[189]

Since early seventeenth century, treaty-making over international rivers like *Danube* seems common. Besides, there are treaty regimes vis-a-vis three inter-oceanic canals, viz. *Suez*, *Panama* and *Kiel* which are now subject of international surveillance.[190] Together these demonstrate concern on the part of international community for water resources above the ground. Even if high seas may be set aside as common heritage of mankind, all (dis)agreements on maritime delimitation are related to sharing marine resources. Way back in 1962 UN General Assembly, in the first resolution of its kind, adopted a relevant wisdom- permanent sovereignty over natural resources- which takes care of any sundry natural resource irrespective of its geo-physical position within the state.[191] Natural resources, therefore, is no *de novo* inclusion to this end.

In this effort, however, there is a conceptual departure from the ILC jurisprudence of shared natural resources in technical sense of the term. While ILC limits its initiative in liquid and gaseous substance of underground resource, the author deals with Indus river basin which is in tandem with internationalized river basins like that of *Danube*. On the contrary, focus of this effort transcends beyond territorial jurisdiction, as well and thereby hardly resembles with UN General Assembly jurisprudence in terms of permanent sovereignty of natural resources. The subject matter, therefore, seems more in tandem with earlier ILC jurisprudence on non-navigational uses of

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187 As quoted by Salman M. A. Salman, International Water Disputes: A New Breed of Claims, Claimants, and Settlement Institutions, *Water International*, Vol. 31, No. 1, March 2006, p. 2. Available at: http://waterlaw.org/bibliography/articles/Salman/InternationalWaterDisputes.pdf accessed on March 31, 2011.

188 *Vide* ILC draft articles on Law of Trans-boundary Aquifers, 2008; Supplement no. 10(A/63/10). Available at: http://untreaty .un. org/ilc/texts/instruments/english/draft%20articles/8_5_2008.pdf accessed on March 31, 2011.

189 *Vide* UN Convention on the Law of Non-navigational Uses of International Watercourses, 1997 as adopted by the GA Resolution No. A/RES/51/206, dated January 16, 1997. Available at: http://daccess-dds-ny .un. org/ do c/UNDOC/GEN/N97/761 /41 /PDF/N9776141. pdf?Open Element accessed on March 31, 2011.

190 For details, refer to Humphrey Waldock (ed.), J. L. Brierly on the Law of Nations: An Introduction to the International Law of Peace, sixth ed., Clarendon Press, Oxford, 1963, Chapter VI.

191 For details, refer to UN General Assembly Resolution No. 1803 (XVII), dated December 14, 1962. Available at: http://daccess-dds-ny. un.org/ doc/ RESOLUTION/GEN/NR0/193 /11 /PDF / NR019311. pdf? OpenElement accessed on March 31, 2011.

international watercourses which was adopted by UN General Assembly in the form of Convention in 1997. Indeed the Convention is not yet in force, but principles contained therein are jurisprudent enough and quite in vogue through (state) practices since long back. For Instance, in the South-Asian subcontinent, the Indo-Pak arrangement was initiated in early fifties and consequent Indus Waters Treaty is operative since 1960 for non-navigational uses of the river basin along with its tributaries. At bottom, however, this is sharing of natural (water) resources what flows on (and not under) the ground and therefore part of different (juridical) regime.

Sharing water resources: Sovereignty albeit in Restraint

Sharing natural resources- water or whatever- between or among two or more states requires a legal regime, be the same treaty or customary international law. What UN General Assembly offered was a set of principles drafted by the ILC as embodiment of customary international law which may be applicable as general principles of law in the absence of treaty law. A reason behind deficiency of ratification for the same (which prevented the instrument to come into force) lies in oversensitivity on the part of states in terms of their sovereignty. Indeed there is compromise in terms of their sovereignty which no state may prefer to recognize on its own. At the same time, however, this is axiomatic that attainment of international order through mutual cooperation of states and peaceful settlement of disputes between or among them constitute original object and purpose of international law.

Water, the most fundamental natural resource, is an essential requirement for one and all- be the same individual or state. Sharing water resource, therefore, is most important part of non-navigational uses of international watercourses. Sharing water in such cases is required as states were not formed in accordance with watercourses. Nor watercourses flow in accordance with territorial texture of states. Since states require water, and not vice versa, international community proposed the Convention. The same was disposed of by its stakeholders due to their narrow domestic interest. But, in a way or other, arrangement is imperative to avert international conflict as no state may afford to run devoid of water and there are many lower riparian states which cannot fulfil minimum requirement of its people without receiving river water from upper riparian states. For instance, Pakistan is by and large a semiarid country. No weapon of mass destruction but complete obstruction of Indus river basin seems sufficient to perpetrate deadly blow to its people. Any such obstruction from India ought to be lethal in its effect and the same will leave Pakistan with no other option but to invade India at it earliest convenience. Thus (non)sharing of water resources may put international peace and security in real peril.

No upper riparian state may reasonably refuse to share water with lower riparian state as natural resources of international watercourse can never be claimed by the former as its own. Permanent sovereignty is applicable to internal watercourses only and not to international ones to which all its riparian states ought to share equitable rights and obligations. Even in time of an(y) armed conflict, international watercourses and related installations are protected by the principles and rules of international law from (ab)use by belligerent states. Thus Indo-Pak (water) sharing treaty has survived three armed conflicts- in 1965, 1971 and 1999 respectively- along with the proxy war in Jammu and Kashmir valley.

In its given rationale, therefore, hypothesis vis-a-vis restraint of national sovereignty by sharing natural resources in general and water in particular suffers from fallacy as the same constitute gift of nature and necessarily meant for sharing among peoples of adjacent (read riparian) states. Similar

state practices are in vogue since long back though for navigational uses of river[192] and canal.[193-194-195] Likewise sharing resources, which are meant to be shared as gift of nature, cannot be construed to pose restraint in terms of state sovereignty as no state has ever had exclusive rights over the same. On the contrary, action or omission for exclusion of other *bona fide* stakeholder(s) from shared natural resources may at ease be construed to be aggression though non-territorial in its characteristics.

Water treaty regime: a compulsion rather than volition

In a way or other, water treaty regime seems a product of circumstantial compulsion rather than violation on the part of states. As stated earlier, such a regime is essential as the same may determine workable arrangement in terms of sharing river water and thereby prevent disputes. Also the same is essential to facilitate settlement of dispute in case divergent national interests of the watercourse states are set at loggerheads. For instance, the Indus Waters Treaty of1960 between India and Pakistan set at rest a decade-long dispute between two countries vis-a-vis sharing river water available from Indus river basin. Also there is Permanent Indus Commission under the regime to look after future point of difference which did settle such differences in 2007 as latest illustration of the same.[196] In a nutshell, as per text of the treaty, waters of three eastern tributaries, e.g. *Sutlej*, *Beas* and *Ravi* belong to India and of three western tributaries, e.g. *Indus*, *Jhelum* and *Chenab* belong to Pakistan. However, as upper riparian state, India has had right to establish hydro-electric power project on western tributaries under Article III(2)(d), read with Annexure D, of the treaty[197] and accordingly the *Baglihar* dam has been built for a run-of-the-river power project on *Chenab* river. Since beginning of the project in 1999, Pakistan put its protest and, Permanent Indus Commission- a statutory organization under Article VIII- arranged several rounds of talks during 1999-2004 on its point of difference.[198] Immediately after completion of its first phase in 2004, a Neutral Expert was appointed in 2005 and his Expert Determination was published in 2007 and thus the dispute was settled in 2010. Meanwhile the project got completed by 2008 and now there is no dispute in either side.

The matter, however, is not so easy as it seems. Success arrived after lots of setback- not without reason that it took over three years of negotiation to settle 'difference'- a moderate term used to identify something between less serious 'question' and more serious 'dispute' after the line of thought offered by Swiss Neutral Expert through his Expert Determination. An unreasonable delay in giving consent, though arguably, seems expression of agreement arrived at on the part of Pakistan under circumstantial pressure as the result is against its point of difference. On the

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192 For details, refer to International Commission for the Protection of Danube River. Available at: http://www.icpdr.org/ accessed on April 1, 2011.

193 Suez Canal Authority. Available at: http://www.suezcanal.gov.eg/ accessed on April 1, 2011.

194 Panama Canal Authority. Available at: http:/ /www. Pancanal .com/ eng/ index.html accessed on April 1, 2011.

195 Kiel Canal agencies. Available at: http://www.kiel-canal.org/english.htm accessed on April 1, 2011.

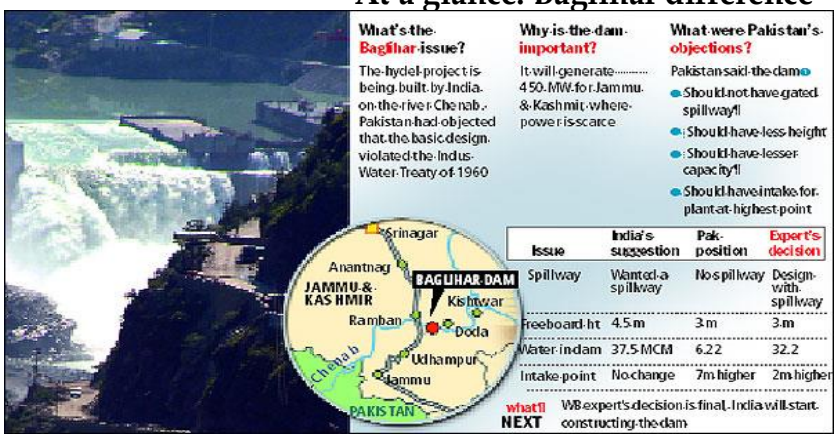
196 For details, refer to the Executive Summary of the Expert Determination on points of difference referred by the Government of Pakistan under the provisions of the Indus Waters Treaty, dated February 12, 2007. Available at: http://siteresources.worldbank.org/SOUTHASIAEXT/Resources/223546-1171996340255/BagliharSummary.pdf accessed on April 1, 2011.

197 *Vide* Indus Waters Treaty, 1960. Available at: http://siteresources.worldbank.org/INTSOUTHASIA/Resources/223497-1105737253588/IndusWatersTreaty1960.pdf accessed on April 1, 2011.

198 *Ibid*.

contrary, India agreed to do minor adjustment on its part since major claims against the project is not upheld by Determination of Neutral Expert. That does not necessarily mean roses for a state and thorns for another as the determination could have offered a role reversal as well and, in such hypothetical circumstance in future, India would have been left with no other option but to give its assent to a determination inimical to its national interest. In a nutshell, bottom-line argument highlights element of neutrality involved herein which reasonable states ought to bear in their own interest.

At a glance: Baglihar difference[199]



Back to jurisprudence of sharing water resources, Indus treaty regime demonstrates strength of such legal arrangements between or among watercourse states since that of *Danube* as the earliest illustration to this end. Despite a failure on the part of UN General Assembly to find required number of states for efficacy of the Convention, there is consistent state practice along with *opinion juris* which may be taken care of for construction of the same as custom which is also a source of international law.[200] Besides there is a set of draft articles on the law of the non-navigational uses of international watercourses etc. Text of the same was adopted by the ILC in 1994 and, in the absence of a functional Convention, the ILC draft articles has definitely had persuasive value to support pre-existing international custom vis-a-vis sharing water, if not binding in true sense of the term.[201] Irrespective of recognition under any law for the time being in force, states do and shall enter into treaty (read legal) obligation to this end in their own interest. There is *de facto* necessity of legal instruments and the same seems mother of invention for hitherto water treaties all over the world. An underlying conundrum is thereby settled beyond doubt in terms of the grand success of Indus Waters Treaty regime.

The ILC initiative on water sharing: ground reality

A relevant question may be raised on failure of the General Assembly initiative to get the Convention in force as a theoretical construct while in practice there is a series of bilateral treaties for sharing water from the tributaries of international watercourses. A plausible explanation

199 The *Baglihar* dam, position of India, Pakistan and the neutral expert. By courtesy, Indian Express. Available at: http://www.indianexpress.com/res/web/pIe/ieimages/Newpics/baguhardam-b.jpg accessed on April 3, 2011.

200 *Vide* Article 38.1, Statute of the International Court of Justice.

201 *Vide* the ILC draft articles on the law of the non-navigational uses of international watercourses and commentaries thereto and resolution on transboundary confined groundwater. Available at: http:/ /untreaty. un.org / ilc /texts/ instruments /english / commentaries / 8_3_ 1994. pdf Accessed on April 1, 2011.

may be scepticism on the part of states to internationalize the matter beyond bilateral diplomacy. Also the same may have happened as states require space for discretion to apply on case-to-case basis while Convention regime lacks such elbow space. After the set back (not to get the Convention in force), ILC left ground reality to concentrate on the trajectory toward underground surreality and thereby adopted draft articles on the law of transboundary aquifers after a decade.[202] Also there is initiative on the part of ILC toward a theoretical construct on oil and natural gas. So far as sharing waters of international watercourses are concerned, a *status quo* prevails over present lawlessness to this end.

Thus there is a sharp distinction between navigational uses and non-navigational uses of international watercourses. While navigational uses of international watercourses are generally governed by a series of multilateral treaty law drafted on the basis of customary international law, non-navigational uses of international watercourses are generally governed by bilateral treaty law in absence of customary international law. Accordingly, Indus Waters Treaty, 1960 was agreed upon by India and Pakistan and the same went well so far. The treaty regime, under the auspices of Permanent Indus Commission, has had workable solution of all water crises so far as possible. Also the *Baglihar* experience has demonstrated efficacy of dispute settlement mechanism in terms of the difference raised by Pakistan in 1999 and mutually settled by decade-long exercise through negotiation and thereafter on the basis of expert determination on the part of neutral expert. Neither ILC draft, nor General Assembly Resolution, was called for in course of dispute settlement process.

So far as non-navigational uses of international watercourses are concerned, however, there are but points of concern which may culminate in serious international disputes to the detriment of international peace and security. While the difference on *Baglihar* represents brighter side of the coin, there is a darker side. With *Baglihar* difference settled, Pakistan has instituted arbitration proceedings against India on *Kishenganga*- a hydro-electric power project construction of which is initiated on the river *Neelum* which is a tributary to *Jhelum*- under paragraph 2(b), Annexure G to the same old Indus Waters Treaty, 1960.[203] At bottom, disputes vis-a-vis sharing water resources by and large depend on bilateral diplomacy between the riparian states. If diplomatic relation goes well, there is less likelihood of dispute. Otherwise lower riparian state may (ab)use water disputes to internationalize trivial points as part of its larger agenda against upper riparian state. Thus there is more likelihood of disputes which becomes part of their water diplomacy. There is (c)overt hyperlink between water dispute and conflict as either of them may trigger another to facilitate an international conflict. History provides umpteen instances to this end.[204]

Within its given mandate, the United Nations Educational, Scientific and Cultural Organization has initiated a scheme named from Potential Conflict to Cooperation Potential under its International Hydrology Programme with an objective to facilitate mutual cooperation through capacity-building process between watercourse countries. Despite its constitutional constraint, PCCP has

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202 *Supra*, no. 2.

203 *Vide* Indus Waters Kishenganga Arbitration (Pakistan v. India), instituted before Permanent Court of Arbitration on May 17, 2010. Available at: http://www.pca-cpa.org/showpage.asp?pag_id=1392 accessed on April 3, 2011.

204 For details, refer to Peter H. Gleick, Water Conflict Chronology (as of Nov. 2008). Available at: http://www. Worldwater .org /conflictchronology. pdf accessed on April 3, 2011.

performed well in its three phases, e.g. 2001-2003, 2003-2006 and 2007-2009 respectively.[205] As stated earlier, however, water disputes between riparian states are so often than not transcend water reality to be charged with larger political surreality so much so that such initiatives may leave these Good Samaritans in deeper water.

With a decade after deadline for ratification of the Convention on non-navigational uses of international watercourses of 1997 is over, no other initiative for resurrection of the same is adopted so far. Whether and how far such a potential source of conflict may be left to bilateral tug of war is a moot point to this end

Toward a jurisprudence of commons for benefit sharing

Such a complete deadlock UN General Assembly finds on its way may be resolved through a circuitous route via human rights jurisprudence provided a technical twist in terms of interpretation is put on hitherto legal regime of sharing natural resources. After all, international watercourses cannot be construed to be a subject of sovereign jurisdiction by any of its riparian states. Sharing its water, therefore, constitutes insignia of and *sine qua non* for non-navigational uses of the same. Thus construction of international watercourse as commons property for concerned regional stakeholders may help resolve the problem.

Like administration of other commons property, here there are rights and obligations for riparian states. Though meant for living resources of international watercourses (and not for water resources as such), a literature prepared by group of organizations helps develop optimum understanding of rudimentary conservation issues of water.[206] Interestingly enough, in its draft principles, UNEP applied traits of commons property way back in late seventies and introduced concept of equitable utilization of shared natural resources along with many other principles adopted by ILC in its draft articles on non-navigational uses of international watercourses etc. of 1994. Neither the set of soft norms nor later initiative for a legal regime to bind states under treaty obligation could be eye-opener for otherwise (juris) prudent states in terms of their legal rights. The UNEP draft principles constitute precise version of customary international laws and therefore applicable to one and all such states irrespective of their consent.[207] A minute study of the same, however, reveals the Achilles' heel of the instrument. What fell short were human rights underpinnings which could have imposed accountability upon errant states for their violation of commons property which belongs

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205 For details, refer to its Mission Statement. Available at: http://www.unesco.org/water/wwap/pccp/ accessed on April 3, 2011.

206 Joint use of watercourses has always depended on cooperation among the riparian states ... The use of international inland waters has steadily expanded: new industrial, urban and agricultural demands on water quantity have risen more or less simultaneously with a dramatic decline in water quality in most international basins. Forest clearance, hydroelectric installations, irrigation and water supply works and pollution in one country can rob another of water, increase its cost of making water suitable for different uses, and destroy, degrade or deplete its vulnerable ecosystems and species.
Failure to reconcile the competing interests of upstream and downstream users has generated considerable political friction in many parts of the world. where traditional interstate basin commissions exist, they are often ill-adapted to the new challenge of water conservation and integrated environmental management.
World Conservation Strategy, prepared by IUCN-UNEP-WWF in collaboration with FAO and UNESCO, 1980. Available at: http://data.iucn.org/dbtw-wpd/edocs/WCS-004.pdf accessed on April 3, 2011.

207 For details, refer to the UNEP draft principles of conduct in the field of environment for guidelines of states in the conservation and harmonious utilization of natural resources shared by two or more states, 1978. Available at: http://www.unep.org/law/PDF/UNEPEnvironmental-Law-Guidelines-and-Principles.pdf accessed on April 3, 2011.

to peoples of the world and liability could have accrued against the world and not against state. For all practical purposes, the same may be construed to attract international liability out of transboundary harm from hazardous activities[208] along with allocation of loss from the same.[209] However, unless and until human rights are involved, likelihood of impunity with injustice looms larger than earlier. At the threshold of climate change, priority of environment over development is order of the age.

Under given circumstance, therefore, what seems required is imposition of not-so-soft supranational forum like World Trade Organization for imposition of penal sanction against errant states as and when required. Also there is a vacuum in terms of agency which has had trusteeship of environment on the part of international community. The UNEP lacks required mandate to this end. Nor the same may afford to assert while expressing voice on the part of voiceless (nature).

This effort is not meant to offer tailor-made solution for every sundry problem but for stocktaking of the lesions learnt from experience and assessing the apprehensions ahead. Indeed the author also grapples with the underlying problems involved herein though there is no claim to offer solution which the world could not do after decades of trial and error. Only a set of jurisprudent threads are left one or two of them may facilitate further research to this end.

Conclusion

A vital lesson learnt from this effort is lack of thrust upon conservation of water as the most essential resource in an age of sustainable development as a newer *mantra* in the post-Rio world.[210] Sharing its waters sans care and caution for conservation of watercourse has had environmental cost and international community ought to assess the same through environmental impact assessment. Otherwise sedimentary layer and other forms of degradation may exceed apparent benefit for its riparian states. Also there is great threat for lower riparian state to suffer in terms of quantity and quality of water for unsustainable use by upper riparian state. A joint venture administration, therefore, is essential without which water dispute may lead them to armed conflict. Even during armed conflict, watercourse ought to be sacrosanct as commons property. Besides grave breaches of humanitarian law, violation of the same ought to constitute a crime against humanity as well.

In the absence of multilateral treaty law, obligation of states to protect and preserve international watercourses may be construed to be an *obligatio erga omnes* by which all states are put under customary international law applicable to them irrespective of their consent to this end. Commons

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208 *Vide* ILC draft principles on Prevention of Transboundary Harm from Hazardous Activities, 2001. Available at: http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_7_2001.pdf accessed on April 3, 2011.

209 *Vide* ILC draft principles on the Allocation of Loss in the case of Transboundary Harm arising out of Hazardous Activities, 2006. Available at: http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_10_2006.pdf accessed on April 3, 2011.

210 The United Nations Conference on Environment and Development,With the goal of establishing a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people,
Proclaims that:States and peoples shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development.
Principle 27, read with the Preamble, the Rio Declaration on Environment and Development, 1992. Available at: http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm accessed on April 4, 2011.

property jurisprudence helps extend jurisdiction of the world over international watercourses. Thus lower riparian state may not be left alone to deal with such violation against environment.

The loophole of this concept lies in its consequent syndrome so often than not leading to a negative worldview that a commons property is (personal) property of none and may be left alone by all- the same worldview to prompt (ab)use of public property- which is likely to deprive the same of active support on the part of its beneficiaries. What seems required is affirmative action toward conservation and not mere omission from transboundary harm through degradation on the part of its riparian states- both upper and lower- for which states may report to the Economic and Social Council under supervision of UN General Assembly.

Together these reforms may set watercourses on (right) track and thereby insulate the same from riparian wrongs to the detriment of sustainability. Commons property must not suffer from common property in global public interest. The matter no longer belongs to bilateral one between riparian states as degradation of environment knows no territorial jurisdiction and is bound to harm other stakeholders in a way or other. Other stakeholders may be living resources of these watercourses, or flora and fauna in terms of food chain or otherwise, if not necessarily (hu)man being one and not only member in our larger family of life forms on the planet.

Liability of Corporations for Environmental Pollution: An Indian Perspective

S.A. Bhat*

Abstract

This article explores issues of special relevance to corporate liability for environmental harm (pollution). The term environmental harm is employed in a broad sense, including damage to human, animals, plant life, water, soil and so on. Where relevant, a distinction will be drawn between liability for harm to the environment, and liability for damage to human interests which result from harm to the environment. This article explores some essential conflicts between the legal structure of corporations, and the desire of regulators and victims seeking to hold them liable for their environmental harm. The corporate form is a construct of national legal systems. The specific structure and operation of corporations varies globally, but the basic components are legal personality, limited liability, transferable shares, management by a board and ownership by investors. Of these, it is a corporation's legal personality and limited liability which are of particular relevance to the topic of liability for environmental harm. The former ensures that corporations enjoy many of the same rights as human beings, and some of the responsibilities, but no allowance is made for the fact that they have no soul. The latter affords corporations with substantial opportunities to restrict and even avoid liability for their environmental harm.

Key words: *corporations, environment, pollution.*

Introduction

Today, the conservation, protection and improvement of human environment are issues of vital importance talked all over the world. Human environment consists of both physical environment and biological environment. Physical environment covers land, water and air. Biological environment includes plants, animals and other organisms. Both physical and biological environment are inter-dependent. , urbanisation, explosion of population, over- exploitation of resources, disruption of natural ecological balances, destruction of a multitude of animal and plant species for economic reasons are the factors which have contributed to environmental deterioration.[211] One country's degradation of environment degrades the global environment for all the countries.[212] The problem of environmental pollution has acquired international dimension and India is no exception to it.

Constitutional and Legislative Measures

Stockholm Declaration of 1972 was perhaps the first major attempt to conserve and protect the human environment at the international level. As a consequence of this Declaration, the States were required to adopt legislative measures to protect and improve the environment. Accordingly, Indian Parliament inserted two Articles, i.e., 48A and 51A in the Constitution of India in 1976.[213] Article 48A of the Constitution rightly directs that, "the State shall endeavour to protect and improve the environment and safeguard forests and wildlife of the country". Similarly, clause (g) of Article 51A imposes a duty on every citizen of India, to protect and improve the natural environment including forests, lakes, rivers, and wildlife and to have compassion for living creatures. The cumulative effect

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* Assistant Professor, Department of Law, University of Kashmir.

211 Sachidanand Pandey v. State of West Bengal', AIR 1987 SC 1109

212 V.K. Agarwal, Environmental Laws in India:Challenges for Enforcement, *Bulletin of the National Institute of Ecology, 2005*

213 Inserted by the *Constitution (Forty-second Amendment) Act, 197*6.

of Articles 48A and 51A (g) seems to be that the 'State' as well as the 'citizens' both are now under constitutional obligation to conserve, perceive, protect and improve the environment. Every generation owes a duty to all succeeding generations to develop and conserve the natural resources of the nation in the best possible way.[214] The phrase 'protect and improve' appearing in both the Articles 48A and 51A (g) seems to contemplate an affirmative government action to improve the quality of environment and not just to preserve the environment in its degraded form. Apart from the constitutional mandate to protect and improve the environment, there are a plenty of legislations[215] on the subject but more relevant enactments for our purpose are the Water (Prevention and Control of Pollution) Act., 1974; the Water (Prevention and Control of Pollution) Cess Act., 1977; the Air (Prevention and Control of Pollution) Act., 1981; the Environment (Protection) Act., 1986; Public Liability Insurance Act, 1991; the National Environment Tribunal Act, 1995, the National Green Tribunal Act., (NGT), 2010; the Wildlife (Protection) Act., 1972 and the Forest (Conservation) Act., 1980.

The Water Act provides for the prevention and control of water pollution and maintaining or resorting of the wholesomeness of water. The Act prohibits any poisonous, noxious or polluting matter from entering into any stream or well. The Act provides for the formation of Central Pollution Control Board and the State Pollution Control Boards. The new industries are required to obtain prior approval of such Boards before discharging any trade effluent, sewages into water bodies. No person, without the previous consent of the Boards shall bring into use new or altered outlet for the discharge of sewage or trade effluent into a stream or well or sewer or on land.

The consent of the Boards shall also be required for continuing an existing discharge of sewage or trade effluent into a stream or well or sewer or land.

In the *Ganga Water Pollution case*[216], the owners of some tanneries near Kanpur were discharging their effluents from their factories in Ganga without setting up primary treatment plants. The Supreme Court held that the financial capacity of the tanneries should be considered as irrelevant while requiring them to establish primary treatment plants. The Court directed to stop the running of these tanneries and also not to let out trade effluents from the tanneries either directly or indirectly into the river Ganga without subjecting the trade effluents to a permanent process by setting up primary treatment plants as approved by the State Pollution Control Board.

The Water (Prevention and Control of Pollution) Cess Act, 1977 aims to impose levy and collection of a cess on water consumed by persons carrying certain industries and local authorities to augment the resources of the Central Board and the State Boards constituted for the prevention and control of water pollution. The object is to realise money from those whose activities lead to pollution and who must bear the expenses of maintaining and running of such Boards. The industries may obtain a rebate as to the extent of 25%[217] if they set up a treatment plant of sewage or trade effluent.

The Air Act has been designed to prevent, control and abatement of air pollution. The major sources of air pollution are; industries, automobiles, domestic fires, etc. The air pollution adversely

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214 State of Tamil Nadu v. Hind Store, AIR 1981 SC 711; see also Rural Litigation and Entitle Ji: at Kendra v. State ofUttar Pordesh, AIR 1987 SC 359

215 E.g. Indian Forest Act, 1927; the Factories Act, 1948; the Atomic Energy Act, 1962;

216 *M.C.Mehta v. Union of India*, AIR 1988 SC 1037. See also *Bhavani River v. Sakthi Sugar Limited* AIR 1998 SC 2059.

217 Substituted for '70%', w.e.f. 26.1.1992.

affects heart and lung and reacts with hemoglobin in the blood of human beings and other life organisms. According to Roggar Mustress, an American Scientist, air pollution causes mental tension which leads to increase in crimes in the society.

The Air Act defines an air pollutant as any 'solid, liquid or gaseous substance including noise present in the atmosphere in such concentration as may be or tend to be injurious to human beings or other living creatures or plants or property or environment.' The Act provides that no person shall without the previous consent of the State Board establish or operate any industrial plant in an air-pollution control area. The Central Pollution Control Board and the State Pollution Control Boards constituted under the Water Act shall also perform the power and functions under the Air Act. The main function of the Boards under the Air Act is to improve the quality of air and to prevent, control and abate air pollution in the country.

The permission granted by the Board may be conditional one wherein stipulations are made in respect of raising of stack height[218] and to provide various control equipments and monitoring equipments. It is expressly provided that persons carrying on industry shall not allow emission of air pollutant in excess of standards laid down by the Board.

In Delhi, the public transport system including buses and taxies are operating on a single fuel CNG mode on the directions given by the Supreme Court.[219] Initially, there was a lot of resistance from bus and taxi operators. But now they themselves realize that the use of CNG is not only environment friendly but also economical.

Noise has been taken as air pollutant within the meaning of Air Act. Sound becomes noise when it causes annoyance or irritates. There are many sources of noise pollution like factories, vehicles, reckless use of loudspeakers in marriages, religious ceremonies, religious places, etc. Use of crackers on festivals, winning of teams in the games, and other such occasions causes not only noise pollution but also air pollution. The Air Act prevents and controls both these pollutions.

The Environment (Protection) Act, 1986 was enacted to provide for the protection and improvement of the quality of environment and preventing, controlling and abating environmental pollution. The Act came into existence as a direct consequence of the Bhopal Gas Tragedy. The term 'environment' has been defined to include water, air and land, and the inter-relationship which exists among and between water, air and land and human beings, other living creatures, plants, micro-organism and property. The definition is wide enough to include within its ambit all living creatures including plants and micro-organism and their relationship with water, air and land. The Act has given vast powers to the Central Government to take measures with respect to planning and execution of a nation-wide programme for prevention, control and abatement of environmental pollution. It empowers the Government to lay down standards for the quality of environment, emission or discharge of environmental pollutants; to regulate industrial locations; to prescribe procedure for managing hazardous substances, to establish safeguards for preventing accidents; and to collect and disseminate information regarding environmental pollution. Any contravention of the provisions of the Act, rules, orders or directions made there under is punishable with imprisonment for a term which may extend to five years or with fine upto one lakh rupees or with both. The Act is an 'umbrella' legislation designed to provide a frame work for Central Government coordination of the

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218 Height of a large tall chimney through which combustion gases and smoke can be evacuated.

219 *M.C. Mehta v. Union of India,* AIR 1998 SC 2963.

activities of various Central and State authorities established under previous laws, such as the Water Act and the Air Act.[220]

The Parliament passed the Public Liability Insurance Act, 1991 to provide for public liability insurance for the purpose of providing immediate relief to the persons affected by accident occurring while handling any hazardous substance and for matters connected therewith. The Act provides for mandatory public liability insurance for installations handling any hazardous substance to provide minimum relief to the victims (other than workers) through the mechanism of collector's decision. Such an insurance will be based on the principle of 'no fault' liability as it is limited to only relief on a limited scale.[221] Such insurance apart from safeguarding the interests of the victims of accidents would also provide cover and enable the industry to discharge its liability to settle large claims arising out of major accidents. However, availability of immediate relief under this law would not prevent the victims to go to Courts for claiming large compensation.

The National Environment Tribunal Act, 1995 was enacted to provide for strict liability for damages arising out of any accident occurring while handling any hazardous substance. The Act provides for establishment of a National Environment Tribunal for effective and expeditious disposal of cases arising from such accident. It imposes liability on the owner of an enterprise to pay compensation in case of death or .injury to any person; or damage to any property or environment resulted from an accident. The accident must have occurred while handling any hazardous substance. A claimant may also make an application before the Tribunal for such relief as is provided in the Public Liability Insurance Act, 1991.

The National Green Tribunal (NGT) was officially passed by the Central legislature or Parliament on 18 October 2010. The NGT is an Act to provide for the establishment of a National Green Tribunal for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto. The Tribunal's dedicated jurisdiction in environmental matters shall provide speedy environmental justice and help reduce the burden of litigation in the higher courts.

The Wild Life (Protection) Act, 1972 was enacted with a view to provide for the protection of wild animals, birds and plants. The Act prohibits hunting of animals and birds as specified in the schedules. The Act also prohibits picking, uprooting, damaging, destroying etc. any specified plant from any forest. The Act provides for State Wildlife Advisory Board to advise the State Government in formulation of the policy for protection and conservation of the wildlife and specified plants; and in selection of areas to be declared as Sanctuaries, National parks, etc. The Act is administered by a Director of Wildlife Preservation with Assistant Directors; and a Chief Wildlife Warden with other Wardens and their staff.

The Forest (Conservation) Act, 1986 was passed with a view to check deforestation of forests. The Act provides that no destruction of forests or use of forestland for non-forest purposes can be permitted without the previous approval of the Central Government. The conservation of forests includes not only preservation and protection of existing forests but also re-afforestation. Reafforestation should go on to replace the vanishing forests. It is a continuous and integrated

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220 Supra note 2.

221 *Public Liability Insurance Act, 199*1, the Schedule.

process.[222] The Act is intended to serve a laudable purpose and it must be enforced strictly for the benefit of the general public. It is evidently clear that there is no dearth of legislations on environment protection in India. But the enforcement of these legislations has been far from satisfactory. What is needed is the effective and efficient enforcement of the constitutional mandate and the other environmental legislations.

Judicial Contribution

The Supreme Court has contributed to the environmental jurisprudence in India through a two pronged approach of interpreting the Constitution and laying down dicta to protect the environment and also through innovating in the processes of enforcing these protections such that they do not remain empty promises. One of the first steps taken by the Supreme Court of India was the incorporation of the right to a pollution free environment to water and air for full enjoyment of 'life' in the list of rights guaranteed to an Indian citizen under the expandable vision of Article 21 of the Constitution. This was done by taking the balancing interest approach to the interpretation of the Constitution in the Subhash Kumar v. State of Bihar.[223]

Another innovation has been the development of the "Absolute Liability" principle in the case of M. C. Mehta v. Union of India[224] where Justice Bhagwati laid down a stricter principle of law than the principle of strict liability in the sense that all the exceptions to the Rylands v. Fletcher[225] rule were not held applicable in this particular principle applicable to enterprises engaged in hazardous activities and the size of the industry determined the amount of compensation payable by it. The transition has been said to be constitutionalism of the tort law.[226]

In M. C. Mehta v. Union of India[227], the Supreme Court even went so far as to say that life, public health and ecology is entitled to a priority over unemployment and rural poverty. One of the earliest cases where the Supreme Court dealt with the concept of inter-generational equity was in the case of Rural Litigation and Entitlement Kendra, Dehradun v. State of Uttar Pradesh[228]where the question that arose was regarding illegal and unauthorized mining, damaging and destroying the local environmental system and causing ecological imbalance. The Apex court held that some assets are permanent and should not be exhausted in one generation and also opined that environmental protection and maintaining ecological balance should be placed on the same standing as economical development of the economy. The Court after much deliberation ruled that the mining work should stop and held that although this would cause economical loss to the laborers but this was a price that had to be paid for protecting and safeguarding the rights of the people to live in a healthy environment with minimal disturbance of the ecological balance and without avoidable hazard to them and to their cattle, homes and agricultural land and undue affection of air, water and environment.

Of the judges who constituted the so-called 'Green Bench' in the Supreme Court at that period of time, a note-worthy mention might be made of Justice Kuldip Singh who delivered the judgement in

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222 *Anupama Minerals V. Union of India & Others,* AIR 1986 A.P. 225

223 (1991) 1 SCC 598

224 (1987) 1 SCC 395

225 (1868) L.R. 3 H.L. 330

226 Leelakrishnan P., Environmental Law in India. Butterworths India, New Delhi,(1999)

227 Supra note 13

228 AIR 1965 SC 652

the *Vellore Citizens Forum v. Union of India case*[229], in which the concept of sustainable development was applied for the first time in an Indian case. J. Singh had observed in his judgement that, "ecological protection and economical development should not necessarily be seen as radically opposite to each other, rather the answer to the balance should lie in sustainable development". With this judgement this principle was adopted to incorporate a customary principle of international law in the Indian environmental jurisprudence. This shows that the Indian Judges not only interpret law but also make laws by continually drawing on the wealth of laws bordering on the international scenario and incorporating such fresh and important principles in the Indian jurisprudence to gradually expand the plethora of laws available in India to cover any given environmental issue.

An important off-shoot of the concept of sustainable development has been that of the 'Polluter Pays' principle. It started as a principle in international environmental law where the polluting party pays for the damage done to the natural environment. This principle favors a curative approach which is concerned with repairing ecological damage, and does not bother with the idea of fault. Once a person is seen to be guilty, such person is liable to compensate for such acts irrespective of the fact as to whether he was involved in the development process or not. Remedying the damaged environment is part of the process of "Sustainable Development" and as such polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.[230] The judiciary in India recognized the Principle in the judgment delivered by the Supreme Court of India in Indian Council for Enviro-Legal Action v.UOI & Ors[231] The Court held that, "The Polluter Pays Principle means that absolute liability of harm to the environment extends not only to compensate the victims of pollution, but also to the cost of restoring environmental degradation. Remediation of damaged environment is part of the process of sustainable development." In this case a number of private companies operating as chemical companies were creating hazardous wastes in the soil and polluting the village area situated nearby without the required licenses. The Court ruled on a PIL that,"Once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on". Consequently, the polluting industries were held to be absolutely liable for the harm caused by them to villagers in the affected area, and they were ordered to take all necessary measures to remove sludge and other pollutants lying in the affected areas. The "Polluter Pays" principle as interpreted by the Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Thus we see that the Courts have been carrying out the majority of the work as the legislative initiative on these pertinent and contemporaneous matters.

Some critics have termed it as a facet of the judicial activism on part of the Supreme Court in not waiting for such laws to be passed or such international obligations to be ratified by India and instead making laws of its own initiative. But as Justice Ahmadi has put it succinctly: "When the derelictions of constitutional obligations and gross violations of human rights are brought to the notice of the Supreme Court, it cannot be expected to split hairs in an effort to maintain the 'delicate balance' of

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229 AIR 1996 SC 2718

230 Mehta M.C. , Growth of Environmental Jurisprudence in India, Environmental Justice, Governance and Law,71,(1999)

231 AIR 1996 SC 1446

power between the wings of Government; it must act and act in a positive manner that will provide relief, which is real and not illusory, to the parties who exercise their fundamental right in invoking its jurisdiction".[232]

The second aspect of Public Interest Litigation (PIL) and how it has been used to relax the traditional system of locus standi whereby when a third party approached a court for seeking relief against an injury which they did not occur/ incur themselves, the court would focus attention on the standing of the petitioner to ask for such relief instead of the subject of the petition itself. But now the Court's approach has changed and it has ruled that any member of the public having sufficient interest may be allowed to initiate the legal process in order to assert diffused individual rights. Generally, in environmental litigation, the parties affected by pollution are a varied and unidentified mass of people. By allowing for third parties to intervene and file cases, the Courts broke the first barrier in the path of effective environmental litigation in India. We will see that most of the cases decided by the Supreme Court have been initiated by third parties like NGO's or environmental activists on part of the affected people. Also the remedies provided by the Supreme Court have been improvised over the environmental litigations such that in cases where the offenders could not be brought to book by traditional methods, the Court has devised new methods to bring them to task. For example in the case of M.C. Mehta v. Union of India[233], where a petition was filed against the tanneries in Kanpur and the Kanpur Municipal Corporation to stop polluting the River Ganga, the Court published notices in leading national newspapers calling all tanneries with wastes flowing into the river in any part of India to make a representation before the court. Similarly in the case of T. N. Godavarman v. Union of India[234], the petitioner filed a petition to protect the rich forests in the Nilgiris from indiscriminate and illegal timber felling in the region but the Supreme Court expanded the petition to formulate a change in the existing forest policy in India itself.

Another important development in the environmental jurisprudence has been the personal interest shown by the Judges in getting firsthand knowledge about the environmental problems at hand by visiting the place themselves. The spot visits enable the judges to see the real situation first hand and with more resounding decisions. This method has been resorted to by Judges like J.J. Barucha, Bhagwati, and Krishna Iyer. The latter was among the first to pay a spot visit in the case of Ratlam Municipality v. Vardichand,[235] where he visited Ratlam town to assess the problem for himself and then directed the concerned authorities to take necessary steps. Sometimes though judges cannot change the course of a judgement but even then their dissenting voices may represent a sizeable section of the population. An example of this would be Justice Barucha's dissenting opinion in Narmada Bachao Andolan v. Union of India & Ors.[236] where he visited the dam site and expressed strong dissatisfaction with the rehabilitation packages doled out as well as the potential damage that might be caused to the environment.

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232 Ahmadi A.M., Judicial Process: Social Legitimacy and Institutional Viability, SCC (Jour),4, 1, (1996)

233 AIR 1988 SC 1037

234 AIR 1997 SC 1228

235 AIR 1980 SC 1622

236 AIR 200 SC 3753

An important development in the arena of environmental jurisprudence goes to the 186th report of the Law Commission of India whereby the Commission undertook to study the environmental issues at a call by the Supreme Court. In the report the Commission recommended the setting up of a separate branch of Environmental Courts in each State and the courts should consist of 3 members who were either sitting/retired Judges of a High Court or had 20 years of experience as member of the Bar with preference being given to a member who had previous experience in environmental issues. Each court would also should have an independent panel of 'commissioners' who would tender their opinion and expertise on environmental matters and would necessarily be environmental experts. The courts will have all powers of ordinary courts of law barring the constitutional power of issuing writs. But there have been various criticisms of the formation of these Green Courts, the major criticism being that the independence of these courts would be compromised because they would be nothing more than statutory tribunals formed under a statute. It would have been better if they should have been made a branch of the High Courts.[237]An argument as to why the Green Courts[238] have been formed at all in the first place is the argument that the Constitutional Courts do not have the required expertise to deal with scientific issues. Another issue with these courts has been the exclusion of environmental activists from the panel as well as the limited scope for public participation in the adjudicatory process.[239]

Criminal Liability of Officers of a Company

Liability for compensating the victims is not provided under any of the Pollution Control Laws i.e. under the Water (Prevention and Control of Pollution) Act, 1974 or the Air (Prevention and Control of Pollution) Act. 1986. But it has been provided *inter alia,* in the Supreme Court Judgment of M.C. Mehta case,[240] which shall be binding on all courts within the territory of India and, therefore, becomes a part of law of this country under Article 141 of the Constitution of India. But criminal liability is provided under each one of the aforesaid laws.

Chapter VII of the Water Act is titled 'Penalties and Procedure', and Section 41(1) of this act says that, whoever, fails to comply with certain named provisions of the Act shall, on conviction, be punishable with imprisonment for a term which may extend to three months or with fine which may extend to Rs 5,000 or with both and in case the failure continues, with an additional fine which may extend to Rs 1,000 for every day during which such failure continues after the conviction for the first such failure.

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237 Debadyuti, Environmental jurisprudence in India: A look at the initiatives of the Supreme Court of India and their success at meeting the needs of enviro-social justice. International Congress of Environmental Research in December 2008), Published in Vol. 3(4) JERAD 992-97 (April-June, 2009).

238 National Green Tribunal Act (NGT) was established in 2010, under India's constitutional provision of Article 21, which assures the citizens of India, the right to a healthy environment. The tribunal itself, is a special fast-track court to handle the expeditious disposal of the cases pertaining to environmental issues. (NGT) is a an Act to provide for the establishment of a National Green Tribunal for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto.

239 Sharma R., Green Courts in India: Strengthening Environmental Governance? , Law, Environment and Development Journal ,4/1,50, (2008) available athttp://www.lead- journal.org/content/08050.pdf .

240 Supra note 22

Sub-section (2) of this section says that, whoever, fails to comply with any direction issued by a Court under sub-section (2) of Section 33 shall, on conviction, be punishable with imprisonment for a term which may extend to three months or with fine which may extend to Rs. 5,000 or with both and in case the failure continues, with additional fine which may extend to Rs. 1,000 for every day during which such failure continues after the conviction for the first such failure.

Section 42 of the 1974 Act lays down that, whoever, does certain things specified there, like destroying, pulling down, etc.. of any pillar, post, etc., shall be punishable with imprisonment for a term which may extend to three months or with fine which may extent to Rs. 1,000 or with both.

Section 43 provides penalty for contravention of provisions of Section 24 (prohibition on use of stream or well for disposal of polluting matter, etc.) which shall not be less than six months in imprisonment but which may extend to six years and with fine, Section 44 states that, whoever, contravenes the provisions of Section 25 (about new outlets)or Section 26 (about existing discharge) shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to six years and with fine.

Section 45 provides for enhanced penalty after previous conviction and it says that if any person, who has been convicted of any offence under Section 24 or Section 25 or Section 26. is again found guilt) of an offence involving contravention of the same provision, he shall, on the second, and on every subsequent conviction, be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and with fine: provided that for the purpose of this section no cognizance shall be taken of any conviction made more than two years before the commission of the offence which is being punished.

Joint and Several Responsibility of Officers of a Company

Section 47 of the 1974 Act says that where an offence under this Act has been committed by a company, every person who, at the time of offence was committed was in charge off and was responsible to the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be Liable to be proceeded against and punished accordingly. Of course, absence of mens rea will protect the officer concerned because the proviso says that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

However, sub-section (2) of Section 47 makes it clear that not with-standing anything contained in sub-section (I), where an offence under the Act has been committed by a company and is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director or other officer shall also be deemed to be guilty of the offence. This sub-section makes it clear that even if there is no mens rea, the officer will be liable when the offence has been committed due to his neglect also.

There are similar provisions in the other two acts about criminal liability of the officers of companies and under the 1981 Act, as amended in 1987, as well as under the 1986 Act, the punishments and the penalties provided are even higher than those provided under the 1974 Act.

Collective Responsibility of Board of Directors

It should also be noted that the Supreme Court has lately evidenced its keenness about the enforcement of these provisions against the erring officials. The case on this point is UP pollution

Control Board v. Modi Distillery.[241] In this case, the Supreme Court observed that on a combined reading of the provisions contained in sub-section (1) and (2) of section 47 of the 1974 Act, there is no doubt, whatever, that the Chairman, Vice-chairman, Managing Director and Members of the Board of Directors of Modi Industries Ltd., the company owning the industrial unit Modi Distillery, could be prosecuted as having been in charge of and responsible to the company for the business of the industrial unit, Modi Distillery owned by it, and could be deemed to be guilty of the offence with which they are charged.

The Supreme Court, therefore. allowed the appeal of the UP Pollution Control Board, set aside the judgment and order passed by the Allahabad High Court, and restored the judgment and order passed by the Chief Judicial Magistrate, directing issue of process to the respondents, the chairman, vice-chairman, managing director and members of the Board of Directors of Modi Industries Ltd. The Supreme Court also directed the Chief Judicial Magistrate to proceed with the trial as expeditiously as possible in accordance with law.

Important Developments

In India, some developments in this area took place. Two of these are almost novel. They are: (1) The enactment of the Public Liability Insurance Act, 1991 which provides, for all hazardous chemical industries to insure themselves compulsorily to be able to give immediate relief to all the affected parties and (2) the scheme of labeling of environment friendly produces.

1)The Public Liability Insurance Act, 1991

This legislation can rightly be called a legislative response to Bhopal type tragedy which occurred in l984. This Act should be considered as a welcome step as it deals with very direct fallout of the Bhopal type tragedy.

The growth of hazardous industries, processes and operations in India has been accompanied by the growing risks from accidents, not only to the workmen employed in the undertakings, but also innocent members of the public who may be in the vicinity. Such accidents lead to death and injury to human beings and other living beings and damage private and public properties. Very often, the majority of the people affected are from the economically weaker sections and suffer great hardships because of delayed relief and compensation. While workers and employees of hazardous installations were protected under separate laws, members of the public were not assured of a relief except through long legal processes. Industrial units seldom had the willingness to readily compensate the victims of accidents and the only remedy available to the victims was to go through prolonged litigation in the courts of law. Some units might not have even the financial resources to provide the minimum relief.

It was felt essential, therefore, to provide for mandatory public liability insurance for installations handling hazardous stances for providing minimum relief to the victims. Such an insurance, apart from safeguarding the interests of the victims of accidents, would also provide cover to enable the industry to discharge its liability in respect of large number of claims arising out of major accidents. If the objective of providing immediate relief is to be achieved, the mandatory public liability insurance should be on the principle of "no fault'' liability as it is limited to relief only on a limited scale. However, availability of immediate relief would not prevent the victims to go to courts for claiming larger compensation.

No Fault Liability

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241 AIR 1988 SC 1128

Section 3 of the Public Liability Act provides that where death or injury to any person (other than a workman) or damage to any property has resulted from an accident, the owner shall be liable to give such reliefs as is specified in the schedule for such death, injury or damage. This section also provides that in any claim for relief, the claimant shall not be required to plead and establish that the death, injury or damage in respect of which claim has been made was due to any wrongful act, neglect or default or any person. Thus, it lays down no-fault liability. In order to enable the owner to discharge his liability under the Act, every owner is required by Section 4 to take out, before he starts handling any hazardous substance, one or more insurance policies providing for contracts or insurance whereby he is insured against liability to give any relief under Section3. Subsection (3) of Section 4, however, states that the central government may, by notification, exempt from operation of sub-section (I) any owner, namely, (a) the central government; (b) any state government; (c) any corporation owned or controlled by the central government or a state government or (d) any local authority. Of course, the saving grace is that no such order for exemption should be made in relation to such owner unless a fund has been established and is maintained by the owner in accordance with the rules made in this behalf for meeting any liability which may arise.

Looking to the laudable objective of this law, it is out of place to exempt the government or government-owned or controlled corporations of local authorities. It will be in the fitness of things that the government or its owned or controlled corporations or local authorities should be made amenable to this law and the government should not have the power to exempt them from the operation of the law. [242]It does not make any difference to the victim whether he receives injury from a private party or from a government agency.

Application for claim for relief: Section 6(1) of the Act provides that an application for claim for relief may be made:

(a) By the person who sustained injury;

(b) By the owner of the property to which the damage has been caused;

(C) Where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

(d) by any agent duly authorised by such person or owner of such property or all or any of the legal representatives of the deceased as the case may be.

Sub-section (2) provides that every application under sub-section (1) should be made to the collector and be in such form, containing such particulars and be accompanied by such form, containing such particulars and be accompanied by such documents as maybe prescribed. Section 7(1) provides that on receipt of an application under Section 6, the collector shall, after giving notice of the application to the owner and the insurer and after giving the parties (including the insurer) an opportunity of being heard, hold an enquiry into the claim or each of the claims and may make an award determining the amount of relief which appears to him to be just and specifying the person or persons to whom such amount of relief shall be paid.

The collector shall arrange to deliver copies of award to the parties concerned expeditiously and in any case within a period of 15 days from the date of the award. The owner or the insurer, as the case may be, must deposit the entire amount within 30 days of the date of announcement of the award. The collector shall have all the powers of civil courts for the purpose of taking evidence on oath;

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[242] R.B. Sing & Suresh Mishra, Environmental Law in India, Issues and Responses, Concept Publishing Company, New Delhi, 1996.

enforcing the attendance of witnesses; compelling the discovery and production of documents and material objects and for such other purposes as may be prescribed. The collector shall be deemed to be civil court for the purpose of Section 195 and Chapter XXVI of the code of Criminal Procedure, l973.

Where the insurer of the owner, against whom the award is made, fails to deposit the amount of such award within 30 days, such amount shall be recoverable from the owner/insurer as arrears of land revenue or of public demand. A claim for relief in respect of death, etc. shall be disposed of as expeditiously as possible.

Claims for Compensation Under Other Laws Not Ordered

Section 8 of the Act makes it clear that the right to claim relief under this law in respect of death or injury to any person or damage to any property shall be in addition to any other right to claim compensation in respect thereof under any other law for the time being in force. Of course, the amount of compensation recoverable under any other law shall be reduced by the amount of relief paid under this Act.

Penalties for Violation Under The Act

The penalties in case of serious lapses like contravention of any of the provisions of sub-section (1) or sub-sections (2) of Section 4. I.e. not taking of insurance policies, or failure to comply with any direction issued under Section 12. i.e. in regard to prohibition regulation of the handling of any hazardous substance or stoppage of supply of electricity, water, etc. shall be imprisonment for a term which shall not be less than one lakh rupees or with both. For the second or subsequent offence, the punishment provided is imprisonment for a term which shall not be less than two years but which may extend to seven years and with fine which shall not be less than one lakh rupees.

Of course, minor lapses like default in compliance with directions issued under Section 9 or failure to comply with orders issued under subs section (2) of Section 11 or creating obstruction to any person in discharge of his duties tinder Section 10 or sub-section (I) or sub-section (3) of section 11, shall be punishable with imprisonment which may, extent to three months or with fine which may extend to 10,000 rupees or with both.

Conclusion

The state of criminal prosecutions against polluters indicated above, points to the fact that the State Pollution Control Boards (SPCBs) need to be empowered to impose environmental civil penalties. However, a large part of the problem lies in the fact that all the environmental legislations and regulations in India, including the Water Act, 1974 and the Air Act, 1981, are currently underpinned only by the use or threat of criminal sanctions. Yet criminal prosecution is too rigid an approach to be used for all but the most serious offences. It focuses on achieving punishment rather than prevention, and requires more stringent procedural safeguards, which undermine regulatory efficiency. The problems in pursing criminal prosecution of environmental offenders also give rise to reluctance on the part of regulatory agencies to pursue more difficult cases. On the other hand, there is increasing recognition of the benefits of employing civil penalties as part of any effective system of regulation. In other countries, environmental regulatory agencies have the power to impose civil penalties for breaches of environmental regulation, as an additional tool to criminal enforcement, which can then be reserved for intentional or egregious non-compliance with the law. In the USA, civil penalties can be imposed at the discretion of a regulatory agency for an amount which reflects the circumstances of the regulatory breach, including any financial profits gained from such breach.

They can be used as an alternative rather than a replacement for criminal prosecution, but without the same degree of moral condemnation or burden of proof. The legal bases for such an approach exist as the 'Polluter Pays Principle (controlling pollution at its source), which has been repeatedly held by the Supreme Court of India as part of the law of the land. Amendments should be introduced in the pollution legislations, including the Water Act and the Air Act, to provide for specific legal authority empowering the SPCBs to impose environmental liability.

Judicial Appointments in India-A Critique

Mir Mubashir Altaf*

Abstract

One of the distinguishing features of the Indian judiciary is the fact that, it is arguably the only judiciary in the world, which has appropriated to itself, the power of even appointing its own judges. The Supreme Court of India has by virtue of its judicial interpretation, acquired the power of making appointments to the higher judiciary by introducing the system of Collegium, which is a body composed of the Supreme Court judges itself . The Collegium system, which has been working for practically more than a decade or so, has lately, come in for sharp criticism from the socio-legal circles. The main criticism is that the Collegium system is too secretive, in effective and susceptible to personal bias. In this paper, an attempt has been made to analyse the working of the Collegium system in India and to make out a case for establishing a Judicial Appointments Commission in India.

Keywords – Judiciary- Judicial Appointments- Collegium- Judicial Appointments Commission

I. Introduction

The judiciary in India has become one of the most powerful organs of the state and it has been expanding its reach even to those fields, which were exclusively within the domain of the executive and the legislature. One of the basic reasons for the rise of the judicial activism in India is attributed to the fact that the executive and the legislature have failed to live up to the expectations of the people. It was therefore, left to the judiciary to step in and set the machinery of the government in motion. The judiciary began to intervene in the policy making sphere, a power hitherto vested in the executive similarly, it resorted to law making by stepping into the shoes of the legislature thereby widening its jurisdiction and powers far beyond the contemplation of the framers of the Constitution[243]. These interventions by the judiciary, strictly speaking were not in tune with the constitutional mandate of the Judiciary. However, there was no popular resentment over these judicial overtures owing to the wide spread public faith and belief in the institution of the judiciary. Over the decades, the institution of judiciary in India has certainly acquired pre-eminence over the other branches of the government and in no country of the world has the judiciary assumed such ascendancy as in India[244]. However, in the recent past the image of the judiciary has suffered a setback; with the mounting allegations of corruption against the judiciary, questions have been raised regarding the limits of the judicial power in India and the need to make the judges

* Mir Mubashir Altaf - Bsc. LL.M (U.G.C- N.E.T, JRF) Assistant Professor (Contractual) in School of Legal Studies, Central University of Kashmir

243 See, P.P. Rao, *Legal Complexities and Judicial Reforms*. In S. Kashyap, *Reviewing the Constitution.* Shipra Publications *(*2000) P.P. 190,191.

244 See, Milon,K Banerji, *Judicial Power, Judicial Workloads and the Role of Bar in the Judicial Process-Need for supporting infrastructure* 2009(1)SCC(J) P. 7.

accountable. One of the commonly expressed concerns as regards the limits of judicial power in India revolves around the issue of judicial appointments in the Indian higher judiciary.

In India, by virtue of a series of judicial pronouncements the Supreme Court of India has wrested out the power of making judicial appointments from the executive[245]. This unique acquisition of power by the Supreme Court has been defended on the ground, that, the judiciary is best equipped to select suitable candidates for appointments to the high judicial offices. It has, also been defended on the ground that it reduces the executive interference in the matter of judicial appointments, which is an important postulate of judicial independence. Notwithstanding the noble ideals that motivated the acquisition of this power of appointing judges the fact remains that the Collegium system has failed to live up to its lofty ideals. Lately, the system of making judicial appointments through the system of Collegium has been subjected to severe criticism after allegations of corruption surfaced against some of the judges occupying high judicial offices in India. In the recent past, allegations of corruption have surfaced against many judges of the higher judiciary; Justice P.D.Dinakaran, former Chief Justice of Karnataka High Court, was accused of corrupt malpractices during his stint as a judge of the Karnataka High Court[246]. Similarly, Justice Soumitra Sen former Judge of the Calcutta High Court was accused of having misappropriated money in his capacity as a court appointed receiver before he was elevated as the Judge of the High Court[247]. Besides it, a sitting Judge of the Punjab and Haryana High Court was charge sheeted by the C.B.I for having received illegal gratification for deciding a favorable outcome of a case[248]. These instances have exposed the real magnitude of corruption plaguing some of the highest judicial offices of the country, an unfortunate fact, which is linked to the ineffectual working of the existing system of appointing judges. It is contended by many that the existing system of choosing judges through the collegium has proved ineffective in keeping out judges with doubtful integrity from occupying judicial offices. There have also been allegations of bias in the working of the collegium system. Lately, a sitting Chief Justice of Gujarat High Court, has accused a former Chief Justice of India (CJI), of stalling his elevation to the Supreme Court, accusing the former CJI of personal bias [249]. Without going into the merits of the accusation made by the High Court judge, the resultant controversy has raised concerns over

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245 See Supreme Court Advocate on Record Association v Union of India AIR 1994 SC 268; In Re: Presidential Reference AIR 1999 SC 1

246 Corruption, land-grab charges slapped on Justice Dinakaran Retrieved from http://www.hindu.com/2011/03/19/stories/2011031967450100.htm (last visited 6th September 2013)

247 Decks cleared to impeach HC judge Soumitra Sen. Retrieved from http://www.governancenow.com/news/regular-story/decks-cleared-impeach-hc-judge-soumitra-sen (last visited 6th September 2013)

248 Cash-at-judge's door scam: Charges framed against Justice Nirmal Yadav Retrieved from http://www.indianexpress.com/news/cashatjudges-door-scam-charges-framed-against-justice-nirmal-yadav/1149255/ (last visited August 5, 2013)

249 Gujarat CJ says he lost SC berth because he opposed HC judgeship for CJI Kabir's sister Retrieved from http://www.indianexpress.com/news/gujarat-cj-says-he-lost-sc-berth-because-he-opposed-hc-judgeship-for-cji-kabir-s-sister/1140908/ (last visited August 5, 2013)

the working of the Collegium system and its impartiality. These issues have led to a growing clamor for revisiting the working of the Collegium system and exploring an effective substitute[250].

However, in order to, work out an effective substitute of the Collegium system, it is imperative to keep in view the intention of the framers of the Constitution regarding the issue of appointing judges to the Indian higher judiciary. The Constituent Assembly devoted a considerable time in formulating provisions for establishing a Supreme Court in India. A Special Committee was set up by the Constituent Assembly to look into the issue of constitution and powers of the Supreme Court. The Special Committee submitted its report on May 21, 1947; it dwelt on many issues including the question of judicial appointments. It suggested, two alternative procedures for making judicial appointments, one method was that, for the appointment of the puisne judges. According to this system, the President should in consultation with the Chief Justice, make a nomination, and such a nomination would have to be confirmed by at least seven out of a panel of eleven persons, composed of some of the Chief Justices of High Courts, members of the Central Legislature and some of the Law Officers of the Union. The alternative method suggested was that the Panel should put forward three names for every vacancy, leaving the final choice to the President in consultation with the Chief Justice. The same procedure (with the necessary modification that the Chief Justice would not be consulted) was also to apply to the choice of the Chief Justice[251]. The Union Constitution Committee did not accept the recommendation of the Committee and suggested that the procedure for the appointment of the judges should be for the President to consult with the Chief Justice and other judges of the Supreme Court, and such judges of the High Courts as might be necessary. However, the Special Committee had made it amply clear that the appointment of the judges should not be left to the unfettered discretion of the Executive[252]. It was perhaps because of this reason that the framers of the Constitution made provision for consultation with the Chief Justice of India in the matter of making appointments to the higher judiciary[253]. The mode of appointing judges to the higher judiciary in India can be broadly studied in two phases; the first phase that gave executive the

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250 Recently the UPA-II government keeping in view the growing resentment over the working of the collegium system had proposed to establish a Judicial Appointments Commission in India. However, it failed to pass Constitutional amendment Bill in Lok Sabha after it had been passed in the Rajya Sabha which could have paved for establishing a Judicial Appointments Commission in India. See Parl fails to clear Bill for new system of appointing judges (Economic Times)

http://articles.economictimes.indiatimes.com/2013-09-07/news/41855036_1_collegium-system-judicial-appointments-commission-bill-constitutional-amendment-bill (Last Visited September 7,2013)

251 See, B.Shiva Rao, *The Framing of Indian Constitution-Select Documents.* N.M.Triapathi Pvt. Ltd.(1968) P. 484

252 Ibid, P. 485

253 See Shyamtha Pappu, *Appointment, Transfer and Removal of Judges,* In S.Kashyap, *Reviewing the Constitution.* Shipra Publications (2000) P. 154.

primacy in appointing judges and the Second phase wherein the judiciary wrested the power of appointing judges from the executive.

II. Primacy of the Executive

In the Indian Constitution, the method for appointment of Judges of the Supreme Court is laid down in Article 124. Clause 2 of Article 124 lays down the method for appointment of judges of the Supreme Court. It provides that

Every judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the judges of the Supreme Court and of the High Courts in the states as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:

Provided that in the case of appointment of a judge other than the Chief Justice, the Chief Justice of India shall always be consulted.

According to Article 124 (2) the judges of the Supreme Court are to be appointed by the President in consultation with the judges of the Supreme Court and the High Courts. The requirement of consultation with the Chief Justice of India was a novel feature, which was markedly different from the past practice. Previously under the Government of India Act 1919 and 1935, the appointment of judges to the federal judiciary was in the absolute discretion of the executive as there was no specific provision for consultation with the Chief Justice in the appointment process. In appointing judges to the Supreme Court and the High Courts' the Constitution provided for consultation with the Chief Justice of the Supreme Court. However, the Constitution did not provide any guidance for resolving cases where there is a conflict between the views of the President and the Chief Justice of India. During the first two decades, after the Indian independence, a convention had developed that the opinion of the Chief Justice of India, formed in consultation with the executive was to be given primacy. In the matter of appointment of the Chief Justice of India, the Constitution does not provide any specific procedure however, after the Constitution came into force, the practice to appoint the senior most judge of the Supreme Court as the Chief Justice of India was established. This practice came to be, uniformly followed, despite the fact that the Law Commission of India in its 14th Report titled *Reform in Judicial Administration,* had vehemently criticized it. The Law Commission in its report had remarked that

It is obvious that the succession to an office of this (referring to the Office of the Chief Justice of India) cannot be regulated by mere seniority. For the performance of the duties of the Chief Justice of India, there is needed, not only a judge of ability and experience, but also a competent administrator capable of handling complex matters that may arise from time to time, a shrewd judge of men and personalities and above all a person of sturdy independence towering personality who would, on the occasion arising, be a watchdog of the independence of the judiciary . . . .it is therefore necessary to set a healthy convention that appointment to

the office of the Chief Justice rests on special considerations and does not as a matter of course go the senior most puisne judge[254].

The government of the day did not take any notice of the recommendation and the practice of appointing the senior most judges to the office of the Chief Justice continued. This long-standing convention was broken on a number of occasions, most notably during the premiership of Indira Gandhi, when Justice A.N. Ray was appointed as the Chief Justice despite there being three judges senior than him. The government justified the departure from the long established convention on two bases, firstly, that the Constitution did not lay down any rule of seniority and secondly citing the aforementioned recommendation of the Law Commission of India. A literal interpretation of Article 124 of the Constitution would have meant that primacy had to be given to the views of the President and that is, exactly what the Supreme Court held in the *First Judges Case*[255] .The Apex Court after perusing the provisions related to judicial appointments in the Constitution held that the ultimate power of appointment rests with the Central government and that it is in accord with constitutional practice in all democratic countries[256]. The judgment of the Supreme Court in the First Judges case un-equivocally affirmed the primacy of the executive in the matter of making appointments to the judiciary. However, this judgment came in, for sharp criticism as the solution offered by the Apex court was not found satisfactory. The judgment was severely criticized for undermining judicial independence in India by making judges vulnerable to the executive influence[257].

III- Primacy of the Judiciary

Ultimately, the Supreme Court revisited its judgment in the First Judges case, which had given primacy to the executive. In the *Second Judges Case*[258], *the Supreme Court got an opportunity to overrule its earlier pronouncement* while doing so the Apex Court emphasized the fact that the question of primacy has to be considered in the context of achieving the constitutional purpose. According to the Court this constitutional purpose could be achieved by selecting the best suitable for the composition of the Supreme Court which is essential not only for the independence of the judiciary but also for the preservation of democracy[259]. The Supreme Court while explaining the rationale of consultation with the Chief Justice pointed out two basic reasons. Firstly, that the provision for consultation with the Chief Justice was introduced because of the realization that the Chief Justice is best equipped to know and assess the worth of the candidate and his suitability for appointment as a Supreme Court

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254 See, 14TH Report of the Law Commission on Reform in Judicial Administration. Universal's Compendium Reports of the Law Commission of India Vol. 2. Universal Law Publishing Co. (2007) P.14.39

255 AIR 1982 SC 149.

256 Ibid, P. 202.

257 See, H.M.Seervai, *Constitutional Law of India* (Fourth Edition). Universal Book Traders (2002) P. 2826.

258 Supreme Court Advocate on Record Association v Union of India AIR 1994 SC 268 P.P. 342,440.

259 Ibid, P. 425

judge and secondly, to eliminate political influence in the working of the judiciary[260]. The Supreme Court made it clear that the opinion of the judiciary symbolized by the view of the Chief Justice of India has primacy. The court emphasized the fact that the final opinion expressed by the Chief Justice is not merely his individual opinion but the collective opinion formed after taking into account the views of some other judges who are traditionally associated with this function[261]. The court laid down the requirement of forming a collegium of judges who would advise and help the Chief Justice in selecting the candidate. The Court observed that

In matters relating to appointments in the Supreme Court, the opinion given by the Chief Justice has to be formed taking into account the views of the two senior most judges of the Supreme Court. The Chief Justice of India is also expected to ascertain the views of the senior most judge of the Supreme Court whose opinion is likely to be significant in the adjudging the suitability of the candidate. .. .in matters relating to the appointments in the High Courts, the Chief Justice is expected to take into account the views of his colleagues in the Supreme Court who are likely to be conversant with the affairs of the concerned High Court. the opinion of the Chief Justice of the High Court would be entitled to the greatest weight, and the opinion of other functionaries involved in the must be given due weight, in the formation of the opinion of the Chief Justice of India. The opinion of the Chief Justice must be formed after ascertaining the views of at least two senior most judges of the High Court[262].

After the Supreme Court of India laid down the requirement of making appointments to the higher judiciary through the collegiums, many cases arose wherein the Chief Justice of India recommended candidates to the President without taking into consideration the views of other judges of the collegium. This scenario generated a lot of controversy, which necessitated further clarification of the law laid down by the Supreme Court in the Second Judges Case. In the *Presidential Reference case* also known as the *Third Judges Case*[263], the Apex Court clarified the law laid down by the Supreme Court in the *Second Judges Case*. The Supreme Court held that the meaning of the phrase 'the opinion of the Chief Justice' is 'reflective of the opinion of the judiciary' and which means that it must necessarily have an element of plurality in its formation. According to the Apex Court, the expression 'consultation' with the Chief Justice requires consultation with the plurality of judges in the formation of the opinion of the Chief Justice of India[264]. As a measure of an additional safeguard the court stated that the views of other judges constituting the collegium should be conveyed in writing by the Chief Justice of India to the government of India along with his own views[265]. The court made it amply clear that the recommendations made by the Chief Justice of India without complying with the norms and requirements of the consultation

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260 See M.P Jain, *Indian Constitutional Law* (Sixth Edition). Lexis Nexis Butterworths Wadhwa (2011) P. 204

261 Supra note 16 at P. 434

262 Ibid para 501.

263 In Re: Presidential Reference AIR 1999 SC 1

264 Ibid, P. 22.

265 Ibid, P. 17

process are not binding upon the government of India[266]. The recommendation of the Collegium is generally binding on the President. He may however, not appoint a person who for specific reasons he does not consider suitable for appointment. In such a case, the Collegium must reconsider the recommendation. On reconsideration it may drop, the name of the person not found suitable or reiterate its recommendation. In the later case, the President is bound to accept the recommendation. In case of difference of views among the members of the Collegium, the judgment provided that the view of the majority will prevail and the Chief Justice's view would not have primacy in such cases. In this context the Apex Court has pointed out that

If the majority of the collegium is against the appointment of the person, that person shall not be appointed, and we think that this is what must invariably happen. We hasten to add that we cannot easily visualize a contingency of this nature; we have little doubt that even if the two of the judges forming the collegiums express strong views, for the good reasons, that are adverse to the appointment of a particular person, the chief justice of India would not press for such appointment[267].

At present, the process of appointment of Judges of the Supreme Court is initiated by the Chief Justice of India through a collegium consisting of himself and four of the senior-most judges of the Supreme Court[268]. The main purpose underlying the law laid down by the Supreme Court in the matter of appointing the Supreme Court judges was to minimize political influence in judicial appointment as well as to minimize individual discretion of the constitutional functionaries involved in the matter of appointing judges to the higher judiciary..

According to some commentators the court's interpretation is not un-justified keeping in view the fact that the executive has, in the past used the power of appointments to undermine the independence of judges[269]. According to Lord Cooke, "the opinion in the Third Judges case looks more like a promulgation of policy than an exercise in juridical reasoning drawing inferences from the provisions of the constitution". In the words of Cooke, "the opinion of the Supreme Court in the Third Judges' case must be one of the most remarkable rulings ever issued by a supreme national appellate court in the Common law world"[270].

IV. Detractors of the Collegium System

The system of appointing the judges through the collegium has its detractors who feel that the judiciary has usurped the power of appointing the judges, which constitutionally belonged to the executive. Krishna Iyer J. has thus, remarked that

The process is innocent but in my view constitutionally unwarranted. I refer to the collegium phenomenon based on the pronouncement of a nine-Judge Bench (1998 7 SCC

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266 Ibid.

267 Ibid.

268 See, M.P.Singh, *V.N.Shukla's Constitution of India* (11th Edition). Eastern Book Company (2008) P. 473

269 Ibid P. 474

270 Lord Cooke of Thorndon, *Where Angels Fear to Tread.* In *Supreme But Not Infallible-Essays in Honour of the Supreme Court of India.* Oxford University Press (2000) P.P. 103,105.

739) which held, by a majority of one, that the independence of the judiciary demands that the selection of judges of the higher courts be made the monopoly of a batch of three senior-most judges. The executive power to appoint judges is wrested from the Cabinet and exercised by the collegium. This is a novel conquest, unique in any democracy. The selection of judges is an expert job, but judges, senior or junior, are untrained and without investigative tools and unfit for this non-judicial technical operation"[271].

There is a view that the decision in the First Judges case was constitutionally correct but it was definitely not in accordance with the constitutional convention[272]. One of the leading Indian lawyers Fali Nariman, who pleaded and ultimately won the case for the petitioner in the Second Judges cases, has queerly become one of the critics of the collegium system. Nariman is of the view that even after re-constructing Article 124(2) in the guise of judicial interpretation, the selections to the highest judicial office of the country could not be implemented in the spirit in which the doctrine was propounded. According to Nariman, the basic reason for this failure was the fact that senior most judges of the Supreme Court to put in his words "*could not always see eye to eye in matters of appointing judges"*[273]. Nariman observes that

The truth is that, although good, competent, honest men and women have been appointed to the superior judiciary under this judge evolved doctrine, many able, competent persons have been passed over for wholly unknown reasons simply because there is no institutionalized system for making recommendations; no database or referral record of high court judges who are considered suitable for appointment as judges of the Supreme Court[274].

One of the vehement critics of the collegium system, Prashant Bushan, has remarked that

This (power of appointment of judges) has been appropriated by the judiciary who has been making the appointments in an arbitrary, non-transparent and nepotistic manner. The higher judiciary has thus become a self-perpetuating oligarchy[275].

According to M.P.Singh, the solution offered by the Court, does not seem to be working well, it may have reduced the interference of the executive in the appointment of judges but it has not made any qualitative difference in the judiciary[276]. The Law Commission in its 214th Report titled *Proposal for Reconsideration of Judges Cases I, II and III* stated that the Supreme Court has virtually re-written Article 124(2) and Article 217 by these three judgments. The Commission criticized the system of collegiums, it expressed the view that the Constitution does not provide for any system of collegiums. The Commission expressed

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271 V.R. Krishna Iyer, *Needed, transparency and accountability* available at http://www.thehindu.com/2009/02/19/stories/2009021954661000. (Last Visited March 10,2013)

272 Fali S.Nariman, *Before Memory Fades-An Autobiography* 7th Reprint. Hay House Publishers(India) Pvt .Ltd (2012) P. 392

273 Ibid, P. 397

274 Ibid, P. 398

275 See Prashant Bhushan , *The Judiciary: hopes and fear*s. Retrieved April 12, 2013 from www.cjar.org.

276 See M.P.Singh, *Criteria and Procedure for Appointment of Judges*, In S. Kashyap, *Reviewing the Constitution.* Shipra Publications *(*2000) P. 160

the view that the original framework for making appointments under the Constitution should be restored[277].

V.Conclusion

The judiciary has not been able to do justice with the power of making judicial appointments, which it has appropriated to itself through judicial interpretation. If the object of appropriating this power was to make the appointment process more transparent and impartial, it has failed to achieve that purpose. The process of consultation within the collegium is not transparent at all, there are no specific guidelines which would help in the decision making process. Besides it, confining this whole exercise to a small group of judges does not seem to be the correct approach as it makes it vulnerable to accusations of personal bias. The collegium system lacks an effective mechanism to check the antecedents of judges before elevating him to the Supreme Court or the High Court. One of the other drawbacks of the collegium system has been the inordinate delay in making judicial appointments, a major flaw especially keeping in view the fact that the judiciary is grappling with the huge pendency of cases. If the reason for usurping this power was to keep out persons with doubtful integrity from occupying high judicial offices then surely this experiment has miserably failed. There are two glaring instances in the recent past, which buttress the fact that collegium system has been a failure. Firstly, the appointment of Justice Soumitra Sen as a High Court Judge on the recommendation of the collegium despite there being allegations against him of having misappropriated money as a court appointed receiver. Secondly, recommending Justice P.D.Dinakaran for elevation as a Supreme Court judge in utter disregard of serious allegations of corruption against him clearly points to the fact that the collegium system has failed to achieve its purpose of selecting judges with impeccable integrity. These instances reveal that the system of collegium is ill equipped to keep out judges with doubtful integrity from the higher judiciary. The experiment of the judiciary in wresting out the power of judicial appointment from the executive has sadly not been a success[278].

VI. Suggestions

- There is an urgent need to revamp the judicial appointment process in the higher judiciary and replacing it, with an impartial and autonomous body. An impartial and autonomous appointing authority would go a long way in strengthening the credibility of the highest court of the land as an impartial sentinel of justice.
- It is suggested that the existing mechanism of judicial appointments must be replaced by an independent and more transparent mechanism. There is a dire need of establishing a Judicial Appointments Commission, which would be responsible for making appointments to the higher judiciary.
- One of the things that work against the collegium system is the fact that it is not a broad based body but composed of small group of judges, a fact that increases the possibility

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[277] See Harikrishna Pramod and Arunima, Judicial Accountability: An Overview of the Legislative and Judicial Trends in India. 2NLIU Law Rev. (2011) P. 14.

of personal bias, which can be certainly minimized in a broad based body where the likelihood of personal bias is minimal.

- It is therefore, suggested that the proposed Judicial Appointments Commission must be a broad based body, which must have adequate representation from all the three organs of the state namely, the executive, legislature and the judiciary. It would be desirable to include members from the Bar in the Commission, inclusion of members from the legal fraternity would significantly contribute to the working of the Commission [279]
- The Law Commission of India in its 14th and 80th report has recommended that the judicial appointments should solely, be based on merit, which is also in conformity with the International practice[280]. It is, suggested that the proposed Judicial Appointments Commission should ensure that selections are based on merit in order to ensure the quality and independence of those selected for appointments to the higher judiciary.
- In order to improve the quality of the Judges, Justice J.S.Verma had suggested the constitution of an All India Judicial Service[281], for providing a better base for recruitment to the High Court and the Supreme Court. It is a worthwhile suggestion, which would significantly improve the quality of the judges of the higher judiciary.

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279 It is pertinent to mention that recently the Bar Council of India pitched for having a nominee from the Bar in the Collegium. http://www.barandbench.com/content/bci-pushes-bar-representation-collegium-system-wants-collegium-have-one-nominee-bar#.UgCzgZI3DVo (Last Visited August 5, 2013.

280 See, 14th and 80th Reports of the Law Commission of India. Universals Compendium of Law Reports. Universal Law Publishing Co. (2007), Vol. 2 & Vol. 10 at P.P. 14.39 and 80.45 respectively.

281 See J.S.Verma, The Constitutional Obligation of the Judiciary (1997) 7 SCC (Jour) 1.

NON DECLARATION UNDER THE SHARIAT ACT AND APPLICATION OF MUSLIM LAW OF WILLS

I.G. Ahmed*

ABSTRACT

In the contemplation of Muslim Jurisprudence, a will is a divine institution regulated by the Koran. It affords to the testator an opportunity to correct to a certain extent the Law of Succession. It enables him to give something to those relatives who are excluded from inheritance and to recognise services rendered to him by strangers. In Indian Muslim Law of wills there is a conflict centering on the importance of a declaration made by a muslim under the Muslim Personal Law (Shariat) Application Act,1937. It is not clear whether the legislation completely abrogates Customary Law of wills which inter alia, determines the limits of testamentary powers. An attempt is made to assess the significance of a declaration under the Shariat Act and to resolve the conflict over the precedence of Customary Law or Muslim Personal Law with regard to wills. The provisions of the Shariat Act leave room for not applying every rule of Muslim Law of wills.

KEY WORDS AND PHRASES

Muslim Law of wills, Limits of Testamentary Disposition, Customary Law of wills, Conflict between Customary Law and Personal Law of wills, Importance of a Declaration under the Shariat Application Act, Precedence of one over the other.

INTRODUCTION

A will or *wassiyya* is a gift of property postponed until after the death of the testator. It is testamentary transfer of property and is completed by the offer (*ijab*) of the transferor and the acceptance (*qabul*) of the transferee. The Indian Succession Act, 1925 defines a will as "a legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death".[282] The definition contains the following elements of a will. (1) It is a conferment of right to one's property on another. (2) This conferment of right is to take effect after the death of the testator.

There have been two divergent tendencies found in Islam pertaining to the disposition of property. A man had almost an unlimited power of disposing his property in pre-Islamic times. However, since the Koran is clear and specific about the distribution of inheritance, the undesirability of interfering with the ordinances of God was expressed. On the other hand, tradition indicates another reality, that which morally and spiritually binds an individual to make a will and indicate the limit vis-à-vis his property.[283]

The views expressed, if not anything else, are a strong indication of the importance of the will under Muslim Law. There is a conflict present that centres on the importance of declaration by a Muslim under the Muslim Personal Law (Shariat) Application Act, 1937.[2a] It is felt by some that the legislation abrogates customary law, leaving the domain of wills primarily legislation based. The difference between customary law and Muslim personal law is felt in the limit on testamentary power the latter confers. Thus a Muslim cannot by will dispose of more than one third of the surplus of the estate after the payment of funeral expenses and debts.[284] To the contrary, custom often allows an indiscriminate grant of

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* Professor of Law, Former Head and Dean, Faculty of Law, University of Calcutta.

282 The Indian Succession Act, 1925, s.2(h).

283 Fyzee, Asaf A.A., Outlines of Muhammadan Law, 4th edn., Oxford University Press, New Delhi, 1974. P. 355.

2a The Muslim Personal Law (Shariat) Application Act, 1937 s.3, hereafter Shariat Act.

284 Hidayatullah, M. and Hidayatullah, Arshad, Eds., Principles of Mohammedan Law, 18th edn., N.M. Tripathi Pvt. Ltd.,Bombay, 1977, p. 104.

property, to the detriment of near relatives. In this context, it can be noted that the matter of wills is not mentioned in Section 2 of the Shariat Act, expressly forbidding customary law in derogation of or inconsistent with Muslim Law. Thus, the question of whether a declaration under Section 3 is mandatory with respect to wills and if it will override custom remains an open one.

The aim of this research paper is to examine the importance and significance of a declaration under Section 3 of the Shariat Act. This leads into the domain of the debate between the precedence of customary or Muslim personal law with respect to Muslim law of wills. An attempt is made to understand the various implications of a declaration or nondeclaration in the matter of Muslim wills.

For a better understanding, the historical aspect as visible in previous Acts and Regulations and the constitutional aspect have also been dealt with. This paper examines the debate between custom and legislation with respect to wills.

The particular area of research dealt with in the paper is a relatively new one. Thus, there is a lack of effective writing to aid research in the subject. Moreover, the courts have but given the matter a fleeting look in judicial decisions. These constraints have imposed a limitation on the research process.

The paper is divided into seven parts. The first part introduces the importance of Muslim wills along with the problem at hand. The second part deals with the law prior to the Shariat Act, 1937. These include the Civil Courts Acts and Regulations. The effect of the Shariat Act and implications that followed are examined in the third part. The fourth part presents the reasons behind the enactment of the legislation. The fifth part explores the debate between custom and legislation under Section 3 of the Shariat Act, 1937. The sixth part deals with the constitutional backing given to the various views propounded in this regard. Finally, the conclusion represents a critique of the problem and possible solutions, if any.

II. LAW BEFORE THE SHARIAT ACT

Mohammedan law was applied to Muslims in British India as a matter of policy. It was a continuance of a tradition inherited from the Mughal rulers of India and their application of Hindu and Muslim laws to their subjects in conformity with their own views. Thus a violation of the personal laws would have been considered grievous oppression. This would appear to be magnanimity displayed on the part of the British. However, such a policy would have been facilitated for many reasons, the British having no desire to break with the past and interfere with the religious susceptibilities of the Indians, their chief objective being the encouragement of trade.[285]

Hindu law and Muslim personal law were first given recognition in British Bengal, which included the mofussils of Bengal, Bihar and Orissa, in the Warren Hastings Regulation of 1772. It must be to the credit of Warren Hastings that he was convinced that in the matters of personal status and family affairs, it would be wrong for the British Indian courts to apply a law other than the religious law of the parties. However, no mention was made in the Hastings plan to custom and usage at variance with the two personal laws it referred to.[286] Following this, the principle of invariable application of Hindu and Mohammedan laws was retained till the end of the period of the Regulations, endorsed by the Cornwallis scheme of 1793.

The legal system for the Mofussil of Bombay was prescribed by the Elphinstone Code, 1827. A distinguishing feature of the Code was the emphasis placed on customs and usage, sometimes to the detriment of the written Hindu and Muslim laws. In doing so, the fact that

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[285] Supra note 2, p. 55.

[286] Mahmood, Tahir, Muslim Personal Law, 2nd edn., All India Reporter Ltd., Nagpur, 1983, p.6.

customs had grown for several years in supersession of the law of the texts and that people attached more importance to the customs, in certain cases if there was a conflict, was recognized. In Bengal too, customs were given preference over law in practice.[287]

Undeniably, tradition in British India allowed for customs and religious practices to prevail in the provinces, the former having supremacy over the latter. As an example, Punjab and the Central Provinces both being strongholds of custom, the courts generally applied religious laws only in the absence of an established custom.[288] Such a trend was continued in the establishment and reorganization of the lower civil courts of British India. Thus the laws enforced during 1872- 1901 in Bengal, Punjab, Madras, Central Provinces, Oudh, Ajmer-Mewar and the North-West Frontier Province laid down rules for the application of custom, usage and personal laws in specified cases. The Punjab Laws Act, 1982 is prominent due to its emphasis on established custom and the relatively inferior position given to personal laws. However, the Act also recognized the power of the Legislature to modify any provision of personal law as also of customary law. A substantially identical reproduction of Section 5 of the Punjab Act was present in the Oudh Laws Act and the Ajmer-Mewar Regulation III of 1877.[289] The Madras Civil Courts Act, 1873 allowed for the superceding of a custom only in cases where a legislative enactment had altered or abolished it. An overriding effect was given to custom in case of an inconsistency in the Central Provinces Laws Act, 1875. However, the Bengal, Agra and Assam Civil Courts Act, 1887 did not make any reference to custom and usage.[290] This naturally led to an Allahabad decision which held that the Regulation excluded evidence of a custom.[291] Reinterpretation of the law was carried out in *Mohammad Ismail* v. *Lala* Sheomukh,[292] where the Privy Council laid down that personal laws were subject to local custom. This brought it in conformity with the parallel legislative provisions in other provinces. There is a view propounded to the effect that Muslim law would have continued to be applicable to the Muslims in India without the aid of the Civil Courts Acts and Regulations directing their application. This is because the existing laws continue until the new sovereign alters them. Yet the decisions like *Moonshee Bazloor Ruheem* v. *Shumsoonnissa Begum*[293] and *Bhagwan Koer* v. *J.G. Bose*[294] have hailed these legislative provisions as having been enacted for securing to the people of India the maintenance of their ancient law.

It may be mentioned here that Section 6 of the Shariat Act repeals the provisions of the Acts and Regulations. Yet, this repeal is only to the extent of their inconsistency with the provisions of the Act. It is obvious from even a plain reading of the section that it does not intend a complete abrogation of customary law. Thus the Civil Courts Acts or their equivalent in the various States are only repealed *sub modo*- in effect only in so far as they permit custom to override the Mohammedan law and the question is in relation to Sections 2 and 3 of the Shariat Act.[295] However, it is stated that if such a principle was allowed to hold sway, every branch of law would apply. This would obviously not be in consonance with the

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287 Jois, M. Rama, Legal and Constitutional History of India, Vol. II, N.M. Tripathi Pvt. Ltd., Bombay, 1984, p. 39.

288 Supra note 5, p.7.

289 Id., pp. 10-11.

290 Id., p. 11.

291 Jammya v. Divan, 23 All. 20.

292 18 IC 571 (PC).

293 11 MIA 551 (614).

294 ILR 31 Cal 11 (29).

295 Supra note 3, p 8.

intention of the new sovereign. Thus, the necessity of the Civil Courts Acts lies not so much in the authorization of the application of personal laws, but to limit and restrict their application to matters specified.[296]

The trichotomy of Rules of Decision in regard to cases involving family relations, personal status and the like was established in the lower civil courts of the country. The order of preference between the three Rules, in cases of conflict, was legislation by the State, custom and usage and thirdly, personal laws. Thus, the hierarchy itself is indicative of the importance of custom.[297]

III. LAW AFTER THE SHARIAT ACT

In the recent years one of the most important and far reaching enactments dealing with application of the Mohammedan law in India has been the Shariat Act, 1937. This short enactment of six sections aims at restoring the law of Islam to all Muslim communities residing in India. A simple reading of the Act itself indicates that its purpose is to do away with all customs contrary to the Shariat. Its applicability extends to all Muslims, regardless of the schools they belong to.[298]

Section 2 of the Act is concerned specifically with the application of personal law to Muslims. It is as follows - "Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including *talaq, ila, zihar, lian, khula and mubaraat*, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where parties are Muslims shall be the Muslim Personal Law (Shariat).[299]

It is important to note, in the light of the above section, that Muslim will is conspicuous by its absence. This leads us to conjecture that it could have been the intention of the framers to continue to allow the prevalence of customary wills, despite the Act. Such a hypothesis is lent support to by the fact that the first part of Section 2, specifically abrogates custom. Thus, it can be claimed that in the absence of a specific statement of exclusion of the custom pertaining to wills, it will remain. Yet, there is an argument propounded that weakens the above proposition. Exceptions such as agricultural land, where State laws take precedence, are specifically mentioned by Section 2. In contrast, where the word 'will' is not mentioned, it would be logical inference from this to assume that the abrogation of customary wills was expected.

Section 3 of the Shariat Act lays down that if a person belonging to a community whose customs regarding 'adoption, wills and legacies' prevail, makes a certain declaration, he will thereafter be governed in all respects by Muhammadan law. It is applicable to certain communities in Punjab and Sindh where adoption prevails; and to the Khojas in Mumbai, as regards wills.[300] It is obvious that the declaration mentioned in the section forms the crux of the matter. It would be worthwhile to thus determine the importance of a declaration in Muslim law.

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296 Bhattacharjee, A.M., Muslim Law and the Constitution, 2nd edn., Eastern Law House, Calcutta, 1994, p. 24.

297 Supra note 5, p.12.

298 Supra note 2, p 58.

299 The Muslim Personal Law (Shariat) Application Act, 1937.

300 Supra note 17, p. 59.

A fundamental concept of the entire Islamic religious law, be it concerned with worship or with law in its narrow sense, is the *niyya* or intent. Although, initially confined to the religious domain, the insistence of Islamic orthodoxy on outward performance led to the explicit formulation of intention. Thus *niyya* was translated from a state of mind to an act of will.[301] Thus, *niyya* comes near to the concept of animus aimed at producing legal effects, and expressed in a declaration of intention. However, it is submitted that declaration in Islamic law is not merely a manifestation of will. It also has a value of its own and under certain circumstances can produce legal effects even without or against the will.[302] The overwhelming precedence given to a declaration is visible in the fact that a declaration can be valid even when its import is not understood.[303]

However, the conflict arises from the fact of the centrality of *niyya* or intention to the declaration, as even an imperfect declaration accompanied by *niyya* is regarded as legally valid. In this context, the determination of whether a given declaration is compatible with the existence of a certain *niyya* claimed afterwards gains importance.[304] Over and above all this, the importance of the declaration under the Act stems from the choice it gives a Muslim to be governed by customary or Mohammedan law.[305] The choice under the Act as to wills and legacies has been judicially declared in *Ata Mohammad* v. *Mohammad Shafi.*[306] The Act lays down three qualifications for a person to utilize the provision. They are- 1. The person must be a Muslim. 2. He should be competent to contract within the meaning of Section 11 of the Indian Contract Act, 1872. 3. He should be a resident of the territories to which the Shariat Act extends.[307]

Following from this, a person who satisfies the prescribed authority as to the above three ingredients can make a declaration to enable the application of the provisions of Section 2 to the declarant and his minor children and their descendants as far as adoption, wills and legacies are concerned. This conveys the meaning that only after the declaration, custom or usage pertaining to the three' matters will stand excluded.[308]

It is perplexing that inspite of having laid down the qualifications of being a Muslim, the Act has not defined the word 'Muslim' anywhere. "Who is a Muslim?"- this question gains relevance in the light of the decision, *Karim* v. *Haider*[309] It was held that it cannot be assumed that principles of Mohammedan law applied to wills which the testator had power to make under customary law merely because the two parties were Muslims by religion. There are three divergent views on the subject. These include (i) He who believes in Mohammad as a prophet. (ii) Every person who says that there is only one God and Mohammad is the Prophet of God. (iii) According to Agnidhes and other theologians, in addition to a belief in God and Prophet Mohammad, there ought to be a number of beliefs.[310]

However, the court has adopted a less controversial approach in this matter and follows the opinion of Ameer Ali. Thus "Any person who professes the religion of Islam, in other words, accepts the unity of God and the prophetic character of Mohammad is a Muslim and is subject to

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301 Schacht, Joseph, An Introduction to Islamic Law, Oxford University Press, London, 1964, p. 116.

302 Ibid.

303 Ibid.

304 Id., p. 117.

305 Beg, M.H. and Verma, S.K. Eds., Islamic Law-Personal, 6th edn., Law Publishers, Allahabad, 1986, p. 54.

306 AIR 1944 Lah. 121.

307 The Muslim Personal Law (Shariat) Application Act, 1937. S 3.

308 Supra note 24, p. 55.

309 AIR 1928 Lah. 940.

310 Supra note 17, p. 60.

Musulman law.[311] This indispensable minimum was reiterated in *Narantakath* v. *Parakkal.*[312] *Moreover,* a person need not be born a Muslim, he could be one by conversion or profession.[313] Though this is the expected approach, it would have made for a clearer understanding and better legislative finesse if the definition of a Muslim had been included in the Act of 1937.

The second pre-requisite under Section 3 refers to the competence to contract. Thus, Section 11 of the Indian Contract Act specifies the age of majority according to the law to which the person is subject, sound mind and not having been disqualified from contracting by any law to which he is subject.[314]

IV. FACTORS INFLUENCING THE ENACTMENT OF THE SHARIAT ACT

A glance at the factors that influenced the enactment of the Shariat Act would prove helpful in determining the intention of the legislators as to its contents and whether there was a hidden political agenda behind its enactment. This would no doubt indicate the status of the debate between custom and legislation.

During the final reading of the Bill, the Muslim League leader, Muhammad Ali Jinnah, proposed a significant amendment. Its purpose was to give every Muslim the discretion to opt between Islamic and customary law. The reasons for this was that he did not personally subscribe to the traditional interpretation of the Shariat, nor was he a staunch believer of religion. More importantly, it was a move to gain the political support of the nawabs and talukdars. He advocated a method of encouraging the people and was against forcible methods.[315] Thus adoption, wills and legacies were left in the optional category.

It would be pertinent to note that the Shariat Act of 1937 was a deliberate step to de-Indianise the laws of Indian Muslims.[316] In this regard, it has been repeatedly pointed out by the Privy Council that non-Muslim Indian laws and usages that have continuously been engrafted as customs on the laws of Muslims, even though at variance with the Koran, have been Indianised. Thus, the Shariat Act was enacted to obliterate these vestiges in Indian Muslim law. The intention was to abrogate all customs at variance with the Shariat.[317]

It is submitted that what was meant to be a simple measure to restructure and reorganize the lives of Muslims in India cannot be misconstrued to mean upsetting the entire social structure, by doing away with custom.

V. CUSTOM VERSUS MUSLIM LAW

It must be stated at the beginning that Islamic law cannot be against the recognition of customs and usage. According to Abdur Rahim, "it would not be correct to suppose that Islam professed to repeal the entire customary law .... and to replace it with a code of altogether new laws".[318] Moreover, it has been laid down in the Hedaya that custom holds the same position as the *ljma* in the absence of an express text.[319]

The role of customs in any system of law cannot be understated. It is after all an expression of the will of the people. It is inevitable for any ancient legal system to develop

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311 Id. p. 61.

312 (1922) 45 Mad. 986.

313 Abraham v. Abraham, (1863) 9 M.I.A. 195; K.P. Chandrashekharappa v. Govt. of Mysore, AIR 1955 Mysore 26.

314 The Indian Contract Act, 1872.

315 Supra note 5, pp 25-26.

316 Bhattacharjee, A.M., Muslim Law and the Constitution, 2nd edn., Eastern Law House, Calcutta, 1994, p. 32.

317 Ibid.

318 Rahim Abdur, the Principles of Muhammadan Jurisprudence, S.P.C.K. Depository, Madras, 1911 p. 136.

319 Hedaya, Vol. vi, pp. 177-8.

from and with the common customs of the realm. Judicial recognition to this non-statutory source of law was given by the Privy Council as early as 1868 for Hindu law in *Collector of Madura* v. *Moottoo Ramalinga.*[320] *Customary* Muslim law was allowed to be pleaded and proved when in variation with Muslim law in 1912 in *Muhammad Ismail* v. *Lala Sheomukh.*[321] A similar attitude continued to prevail with the Privy Council in *Abdul Hussein* v. *Bibi Sona*[322] and *Roshan Ali* v. *Ashghar AIi.*[323] It is obvious that in the face of this overwhelming importance given to customs, the Shariat Act would not defeat legislative wisdom and abrogate customs senselessly.

It must be stated unequivocally that the Shariat Act does not supercede custom in all cases and in all matters. The object and purpose of Section 2 is to abrogate custom and usage in so far as they displaced the rules of Mohammedan law.[324] Local Acts continue to have effect as long as they are not inconsistent with the Central Act.[325]

In *Mukkattumbiath Ayisumma* v. *Vayyapiath Pazhae Bangalayil Mayomoothy Umma and others,*[326] the issue raised was whether the wife, petitioner, could claim her right in the tarwad property left by her husband, in the absence of a declaration by him. The death of the husband had occurred after the 1937 Shariat Act and he had expressed no intention to separate from the tarwad property. Moreover in such cases the general Islamic law was not applicable, only customary law developed out of certain historic conditions. It was held in this case that irrespective of the declaration of separation, the right in property would be available to his heirs according to Muslim law. Thus, it would appear that custom had been allotted a second position with respect to wills in the decision. Yet, it could be defended by the result, which allowed for the woman to claim her interest over and above the prevalent custom, steeped in male bias.

In 1956, it was stated by **Rajamannar** C.J. that the language of Section 2 of the Central Shariat Act and Section 2 of the Madras Amendment Act of 1949 was clear as to the limited application of Muslim personal law. There was no total abrogation of customs and usage in respect of matters other than those enumerated in the legislations.[327] The learned judge differed from the decision in *Ayisumma* v. *Mayomooty Umma* that Section 16 of the Madras Civil Courts Act was not consistent with Section 2 of the Shariat Act. It was declared that the statement made in the previous judgement was too wide. It would have been more accurate to say that the sub-clause was repealed in only the matters set out in Section 2 of the Act.[328]

It is apparent from the above that customary law is not entirely wiped out. However, such custom must be ancient and the burden of proof lies upon the 'party who sets up the custom. To hold good in law, the custom must be reasonable and considered binding by at least the majority of any given class of persons. It must have also been established by a series of well known concordant and on the whole continuous instances.[329] It has been universally accepted that a custom in order to be valid must not be injurious to public policy and not in any conflict with any express law. Moreover, it must be

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320 12 MIA 397 (436).

321 17 CWN 97 (PC).

322 AIR 1917 PC 181.

323 AIR 1930 PC 35.

324 Mohd. Aslam v. Khalilul Rahman, AIR 1947 PC 97.

325 Puthiya Purayil v. Thayath, AIR 1956 Mad. 244.

326 AIR 1953 Mad. 425.

327 Abdurahiman v. Avooma, AIR 1956 Mad. 244.

328 Id., p. 247.

329 Moulvi Mohammed v. S. Mohaboob Begum, AIR 1984 Mad. 7.

immemorial and invariable.[330] However, it is claimed that the burden of proof in pleading a custom in derogation of Mohammedan law is heavy,[331] the invariable and general presumption being that Muslims are governed by Mohammedan law.[332] ln *Abdul Hussein* v. *Sona Dero,* the onus was placed on the court to ascertain the existence and nature of the custom.[333]

Three commercial communities among the Muslims, the Khojas, Bohoras and Memons, require special attention in this raging debate between custom and legislation. Prior to the Shariat Act, both the Khojas and Bohoras were governed by customary law. On the other hand, the Cutchi Memons were under the Hindu law of succession and inheritance. After the Act of 1937, Khojas continue to retain their customary right to will away their entire property. However, questions related to the making or a revocation of a will would be determined by Muslim law. If a Khoja makes a declaration under Section 3(1), he would be governed by Mohammedan law even with respect to testamentary succession.[334]

Justice Chagla dealt with specific question as to how far the Shariat Act affected the legal position so far as it refers to the Khojas. It was clearly laid down that any established custom as to testate succession, which departs from Mohammedan law, could still be enforced by the courts. Although intestate matters would fall under the purview of Mohammedan law, customary law as per wills was still allowed to prevail.[335]

Before the Shariat Act, Sunnite Bohras were governed in matters of inheritance by the customary law, analogous to Hindu law, and not by the Shariat. This interesting community is an example of an orthodox Sunnite group, long governed by custom, which has now been made subject to its own religious laws by the operation of the Shariat *Act.*[336] In *Bai Asha* v. *Bai Biban* it was held that Sunni Bohras formerly of the territory known as Baroda State are governed by Hindu law in matters of succession and inheritance.[337] However, it has been claimed that the decision is doubtful as the judge's attention was not drawn pointedly to the Shariat Act.

Initially the Cutchi Memon community was governed by Hindu laws of inheritance and succession. By the Act of 1920, a member of this community could subject himself to Muslim law by making a declaration. In 1937, customary law as to wills continued unless a Section 3 declaration was made. The significance of the declaration in Hanafi law is in the fact that testamentary capacity can be limited to the bequeathable one third. The provision of the declaration was done away with in the Cutchi Memons Act, X of 1938. Under the present law, Cutchi Memons are governed by Hanafi law in all matters, the only exceptions being those specified in the Shariat Act. One contradictory decision, *Bayabai* v. *Bayabai*[338] *held* that the will of a Cutchi Memon must be construed according to Mohammedan law. This can be defended on the grounds that it in all probability refers to the procedure of the will and not its contents per se.

VI. CONSTITUTIONAL ASPECT

Today in India, the entire Shariat Law is divisible into : 1) Rules which are expressly applied, for example marriage, dower and dissolution of marriage. 2) Rules which are applied as a matter of

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330 Birdi Chand v. Noor Mohd., AIR 1933 Nag. 16.

331 Lala v. Rasula, AIR 1957 J&K 3.

332 Jan Mohd. V. Datu Jaffar, ILR 48 Bom. 449.

333 ILR 45 Cal. 450 (PC).

334 Supra note 2, p 74.

335 Ashraffalli Cassamalli v. Mahomedalli Rajaballi, AIR 1947 Bom. 122.

336 Supra note 53, p. 75.

337 (1956) 59 Bom. L.R. 470.

338 (1942) Bom 847.

justice, equity and good conscience, for example pre-emption. 3) Rules which are not applicable, for example criminal law, law of evidence and slavery.[339]

It is submitted that there are three primary views expressed as to the role of custom in the matter of the Muslim law of wills. It is said that custom and the need to make a declaration under Section 3 of the Shariat Act to adopt personal law are not at variance with each other. Such a view claims the protection of Article 225 of the Constitution, which provides that the law administered shall be the same as before the commencement of the Constitution. Thus the primacy given to custom prior to 1947 is only further enhanced. This argument is strengthened through Article 372, which enacts that the law in force immediately before the Constitution shall continue to be in force even after its introduction.[340] It is submitted that custom definitely falls in this category of "law in force."

In our Constitution, personal law of Muslims is recognized under List III of the Seventh Schedule. Entry 5 deals, inter alia, with wills. This would naturally allow various Central and Local Acts to interfere with the application of Muslim personal law. This is where the Shariat Act gains its legitimacy. In this context, Article 254 provides for the supremacy of a parliamentary law or existing law made on matters enumerated in the Concurrent list.[341] It is claimed by some that the effect of a custom would then be overridden by the presence of a specific law on wills.

Yet another proposition put forth is to resolve the conflict with the application of principles of justice, equity and good conscience. In this context, it can be noted that if any law that expressly directs the application of Mohammedan law, it must be applied even if it is not principles of justice, equity and good conscience of the Court. Moreover, these principles are subject to any special law.[342] In the light of the above, customary law stands to be overshadowed by specific legislations on the matter. Mention can be made of Abdurahiman v. Avooma,[343] in which the validity of the Shariat Act was upheld vis-a-vis the then Article 19(1)(f) of the constitution. It was held that the language of Section 2 of the Act was clear in that it did not abrogate all custom and usage.

VII. CONCLUSION

History is witness to the role of custom in our lives. They have always played a dominant role with respect to determining the law of the land, to the extent that most laws are framed with the corresponding custom as their support structure. Needless to say, such a respect for customary law would prevail only if it was beneficial to the larger public interest. British India remains a classic example in this respect where the primacy of customary law is visible in the efforts to maintain the social order of the Indians. The recent attempts of the Law Commission towards the codification of personal laws are yet another indication of customary recognition. In this context, it would be difficult to visualize a situation where customary and statutory laws are not in tandem, but at variance with each other.

However, this appears to be exactly the situation with respect to Muslim wills. In this tussle between custom and personal law, it must be unequivocally stated that *the custom is overridden by the provisions of Muslim personal law only to the extent of their inconsistency.* Although law is supposed to reflect the will of the people, the variance between custom and law is still felt. This can be attributed to the intention behind the framing of the Act. Jinnah, as one of the propagators of the Act, in his attempt to placate the ruling classes, might have neglected the voice of the people in this matter. Yet, there is a particular fallout of this situation that proves beneficial for the system and social structure. Customary right to will away entire property to the detriment of deserving members of the

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339 Supra note 2, p 57.

340 Supra note 24, p 55.

341 The Constitution of India, 1950.

342 Supra note 51, p. 43.

343 AIR 1956 Mad. 244.

community has been curtailed. The limit on testamentary power successfully removes all arbitrariness in this matter.

It is submitted that in a fragile legal order as ours neither custom nor statute authorizing personal law need prevail over the other. There is a delicate balance to be maintained in this matter. Thus, both custom and personal law must be allowed to prevail, to lesser or greater extents as the case may be. In the matter of wills, the statutory recognition of personal law gains legitimacy from the specificity of its objective- to abrogate all customs at variance with the Shariat.

However, it cannot be claimed that it was the intention to wipe out all custom. In fact, it would defeat legislative wisdom to suggest the elimination of all custom, especially in light of the fact that the custom is most often the true expression of the will of the people. It could prove to be the best way of regulating the situation, the longevity of the custom being proof of its efficacy.

It is hoped that there would be no grave indiscretion on the part of the enforcing authorities in giving precedence to one over the other, in this debate between personal and customary law. Complete reliance placed on the latter would not be in the interest of the people. It is undeniable that some customs are blatantly opposed to principles of equality. An entire abrogation of custom, on the other hand, would constitute disrespect of the will of the people. This statement gathers its strength from the fact that the reality of the present does not depict the legislations as representing the true will of the people. It is obvious that the ideal solution to the problem lies in the implementation of a judicious mix of both custom and personal law.

Drug Abuse in Kashmir: A socio-legal Perspective

Abstract

Existing data on drug abuse in Kashmir paints an increasingly murky picture. A large segment of population in Kashmir is affected by drug abuse, cutting across all sections of the society. Women and children are no exceptions. What pushes them to the abuse cannot generally be put in a straight jacket. However, several possible factors – the ongoing conflict, unrestricted cultivation of cannabis and poppy in Kashmir valley's fields, easy availability of prescription drugs across the counter, availability of synthetics like varnish, ink erasers, shoe polish, glue etc. are part of the wider problem. Worse still, recently in October 2010, the Jammu and Kashmir government, through a notification, repealed, among others, The Drug (Control) Ordinance, Samvat 2006 (Ordinance No. VI of 2006), the state's only law, though ineffective, supposed to control the sale, supply and distribution of drugs. This paper sets out to explore, through interviews with doctors at a city hospital and self-accounts of the respondents, the motivations for taking to drug abuse. Through an evaluation of the current legal framework in state on the subject, the paper proceeds to signal the inaction on the part of state apparatus in containing this widespread menace. In the end, the paper argues that, alongside some self-regulation, a legislative intervention, in the form of a comprehensive legislation on the subject, is called for.

***Keywords**: Drug Abuse, Kashmir, Conflict, Law, Society*

Introduction

The expression "drug abuse" defies any precise definition. However, it is increasingly viewed as the endpoint of a series of transitions from initial drug use – when a drug is voluntarily taken because it has reinforcing, often hedonic, effects – through loss of control over this behavior, such that it becomes habitual and ultimately compulsive.[344] In other words, it is a situation marked by irresistible intake of drug without paying attention to the negative and damaging consequences of such a compulsive indulgence.

With the rapid expansion of trade and commerce beyond national boundaries, the problem of drug addiction has become a global phenomenon. Though drug abuse was considered a social evil in Kashmir since times immemorial, it reached menacing dimensions only in the nineties onwards of the previous century. Today, almost a large part of population of all age groups in general and adolescent and youth in particular is under the grip of the dragon of drugs. Be it a means to tackle personal problems, or just a 'bandwagon effect,' the drugs have taken a heavy toll on youth in Kashmir. Present prevailing disturbed conditions in the valley have worsened the scenario besides phenomenal increase in other psychiatric disorders.

In Kashmir, traditionally opium and cannabis derivatives, LSD, Mandrax, cocaine, barbiturates etc. have been used by the drug addicts. But recently, the use of 'synthetics' that

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344 Barry J Everitt & Trevor W Robbins, Neural Systems of Reinforcement for Drug Addiction: From Actions to Habits to Compulsion, *Nature Neuroscience*, Volume 8 Number 11 November 2005 available at http://66.199.228.237/boundary/addiction/conditionedresponse.pdf last accessed March 11, 2013.

include stimulants like amphetamine and its derivatives, methcathinone, varnish, paint and glue as drugs for addiction has also increased. Not only this, the easy availability of prescription drugs across the counter in the market has lead to further degeneration. A significant recent shift in drug abuse patterns is the move from smoking to injecting. Heroin, buprenorphine (tidigesic/tamgesic) and dextropropoxyphene (spasmo-proxyvan) are the most commonly injected drugs in the whole of India.

Reliable statistics on drug abuse are difficult to come by in Kashmir. According to a study conducted by the United Nations Drug Control Programme in 2008, there are 60,000 substance abusers in the Valley. However, Dr Mushtaq Margoob's book, *Menace of Drug Abuse in Kashmir*, published in 2008, states that the Valley has 2.11 lakh drug abusers. The difference in figures can be because of the stigma attached to addiction, exaggeration by the addicts, downplaying of the problem from the parents etc. Any figures, therefore, should not be treated as absolutely conclusive but only an approximation.

The problem has now reached the higher echelons of society, along with the lower strata, and includes children mostly in urban areas. Daily wage earners/labourers, rag pickers, truck drivers, medical workers and youths are all equally susceptible to the menace of drug addiction. They use cough syrup, alcohol, alprax and brown sugar, and also take intra-venous injections of psychotropic drugs.

However, significantly, 80 percent of drug abusers in Kashmir comprise those who consume prescription medicines. As said above, easy availability of pharmaceuticals across the counter has contributed to the enormity of the problem. Drugs containing opioids, such as Corex and Codeine are consumed by most addicts. Benzodiazepines like Diazepam, Alprazolam and cannabis derivatives like hashish, marijuana and alcohol are also responsible for the steady surge in addiction. For many school students including girls, items of common use like polish and glue work as inhalants. The use of nicotine, iodex, diluters, sleeping pills and inhalants like boot polish, fevicol and ink-removers has been observed in female addicts who might not have the means to obtain other not-so-easily available substances.

Sociology of Drug Abuse: Excerpts from the Interviews with Doctors at Psychiatric Department, SMHS Hospital Srinagar

Dr. Zaid Ahmad Wani is a consultant with Psychiatric Department at SMHS Hospital Srinagar. Dr. Zaid says that the reasons for drug abuse in Kashmir can't be put in a straight jacket, they are various. He holds that the peer group pressure is the dominant factor contributing to the wide- scale abuse of drugs in Kashmir. "After all company (friend circle) matters," he stresses. Zaid explains, for example, a boy complains about his problems to his friends who are addicts. What the friends do, they suggest him taking to drugs, first with low doses, in order to get relief. He finds relief definitely. So naturally he will now take the drugs with high doses because of his immunity getting increased. Then a time reaches he becomes an addict. "Most of the

patients which come to our Department pertaining to drug abuse say the company influenced them in becoming a drug addict," Zaid says.

"Conflict in Kashmir has a major impact on the lives of people. A vast majority of the drug abusers are an offshoot to the prevalent conflict," Zaid says. "Though the conflict can't be said to have a direct connection with drug abuse in all cases, indirectly it has a huge impact," he believes. "Because once a traumatic event happens in a family, the other members of the family develop restlessness and other psychiatric disorders. This restlessness compels people to resort to drugs. I have met a number of patients who narrated such kind of stories," he said.

"In Kashmir, a number of people have become drug addicts because of Iatrogenesis.[345] What the people do in this part of the world, they go to a chemist or say a physician who recommends about taking a drug for relief. The practice is continued for a long time so that over a period of time it becomes difficult for a patient to give up these drugs. But then, this is also an outcome of the conflict among other factors," Zaid said.

"Another main factor which can be held responsible for drug abuse is technology. You have internet, mobile phones, cable television and what not available to the children at home, schools and in the market. This has completely devastated the lives of our young population. These teenage boys and girls imitate what they see on the TV, internet etc. There is no parental control in our homes," says Zaid.

Zaid believes that awareness among the masses about consequences will help contain the abuse. He says that the young population of the valley needs to be inculcated with ethics and morality.

"Booming tourism industry is another factor for the drug abuse. People related to the tourism industry are an easy prey to it. What happens is that the tourists both foreign as well as Indian are usually in a habit of taking drugs. So when the men in industry get in contact with them, they also tend to take drugs. This factor is also related to the Group pressure theory," Zaid says.

Dr. Yasir Ahmed, who is posted at the Institute of Mental Health and Neurosciences Kashmir, SMHS Hospital Srinagar, lays stress on 'urbanization' as one of the major driving forces for the present plague of drug abuse in Kashmir. "This urbanization has ruined a generation here," he emphatically says. "Broken homes, which are a major factor responsible for the drug abuse, are a consequence of urbanization. The present teenage generation is not under the vigil of parents. They have every freedom to do any damn thing," he says.

Dr. Yasir says that some 20 years back, the drug addicts usually belonged to the age group of 20 – 30. But what is more disturbing is that now children as young as 11 years old are also reported to take drugs.

"Free availability of drugs including the prescription drugs in the market has aggravated the problem. The State has failed to contain the abuse of drugs. If the State does not take any steps, it may run out of our hands. And we will be losing a generation to the drug abuse like we lost one to the gun," Yasir believes.

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[345] Iatrogenesis is an inadvertent adverse effect or complication resulting from a medical treatment or advice, including that of psychologists, therapists and pharmacists.

"Presently the abuse of solvents and synthetics by the youth is rampant," Yasir says. They take synthetics like varnish, ink erasers, shoe polish, glue etc. They are freely available in the market at lesser rates. The rich class takes usually cocaine which costs them 3,000-4,000 a day.

"Unemployment as such is not a factor responsible for drug abuse. There may be a few cases but not that much as projected by several quarters. Presently, most of the drug addicts are from the age group of 15- 25 which is usually the period of receiving education. So, how unemployment has a role to play. Dr Wiqar, who has worked with the state-run Drug De-addiction Centre as a medical officer, substantiates this by asserting that 60-70 percent of the cases which come to the centre are those who are in the age group of 15 to 25. "Most of them are school or college going students," he says. He says that they have information about a large number of drug abuse cases from the elite schools in Srinagar.

Self - accounts of Respondents

Shafqat Ahmed (name changed) is 25 years old. Suffering from multiple substance abuse and co-morbid Post Traumatic Stress Disorder (PTSD), he narrates how he became an addict. Some years back he had witnessed the death of his friends who were militants. They were killed by the troopers after being severely tortured. "These traumatic events shocked me. The flashbacks of the incident started to haunt me every time then and I developed sleeplessness and other psychiatric disorders. In order to cope up I took to drugs such as Cannabis, Codeine, Alprax etc.," Ahmed says.

Azhar Khan (name changed) is 27 years old. Being an eyewitness to the killing of some of his friends at the hands of troopers, he was severely tortured by them. "The death of my friends and the torture devastated me. I developed sub – syndromal PTSD. Then I started taking drugs in order to cope up. When the lesser doses of drugs didn't help I started taking more and more. A stage reached I couldn't live without drugs," he said.

Abdul Hamid (name changed) is 33 years old. Ten years back, he had taken to drugs because of some disturbances at his home. He says at the initial stage he used to take Alprax 0.5 one tablet each in the morning and evening. When the time passed it seemed one or two tablets had no effect, then he began taking more and more. A time reached even 15 tablets a day couldn't suffice. His Doctors say that besides the disturbances at home, Hamid had witnessed the killing of his militant friends. That had also an effect on him. However, the positive sign in Hamid's case is that he now repents for what he did in the past. He seems fed up from drugs. He promises not to take drugs again.

Shahid Ahmed (name changed) is 18 years old. Studying in 10th Grade, two years back he has taken to drugs because of the peer group pressure. He says he started taking drugs because of his company. "A friend was taking cannabis and I joined him. I used to take a half ciggerate of cannabis a day while my friend was taking two a day," he narrates.

Female Drug Addicts

Both Dr. Zaid and Dr. Yasir believe that, "though there is a significant number of female addicts in the Valley, the projection of the presence of them on a large scale is

only an exaggeration." According to them, no female addict has visited the Department at SMHS till now. Same remains the position at Drug De-addiction Center run by the State's Police Department.

It is believed that the social stigma the drug abuse carries in Kashmir may be preventing them from visiting the doctors formally. However, Dr. Muzaffar Khan, in-charge Police Control Room De addiction Centre in Srinagar says, after an online counseling centre was opened in Srinagar some six months ago, a number of phone calls from drug abusers were that of women. The women had complained of abusing medicines like sleeping pills. The phone line for counseling has helped women to come out of the closet, Khan believes.

Drug De-addiction Center Srinagar

Since a drug de-addiction centre has been started by the State's Police Department, a significant improvement in tackling the problem is visible. The Centre has treated over 200 patients and has had 3500 visiting patients. However, the maximum number of patients the Centre can accommodate on a daily basis is just 10. Irony is that the Centre also lacks the required number of Doctors.

Further, since the centre is located within the Police headquarters and there is a considerable fear among people about police, a lesser number of people visit it for treatment. The centre needs to be shifted to some other place. It should be separated from police headquarter.

Lax Legal Framework on the Point

Recently in October 2010, the Jammu and Kashmir Government passed an enactment repealing, among others, The Drug (Control) Ordinance, Samavt 2006.[346] The ordinance had been in place in the State since 1949 A.D. The Ordinance provided for the control of the sale, supply and distribution of drugs and extended to the whole of the State of Jammu and Kashmir. The basic reason for its repeal is, as is manifest, that the Ordinance had become redundant owing to the inaction on the part of the State Government in issuing the requisite notifications as was mandated under Sections 3, 4 and 6 of the said Ordinance. The Act provided that the Government may by notification in Government Gazette declare any drug to be a drug to which this Ordinance applies.[347] Section 4 provided that the Government may, by notification in the Government Gazette, fix in respect of any drug (a) the maximum price or rate which may be charged by a dealer or producer; (b) the maximum quantity which may at any one time be possessed by a dealer or producer; (c) the maximum quantity which may in any one transaction be sold to any person.[348] Section 4 further said that the prices or rates and the quantities fixed in respect of any drug under this section may be different in different localities or for different classes of dealers or producers.[349]

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346 Ordinance No. VI of 2006.

347 Section 3 of the Ordinance.

348 Section 4 (1) of the Ordinance.

349 Section 4 (2) of the Ordinance.

The Ordinance further provided that no dealer or producer shall (a) sell, agree to sell, offer for sale or otherwise dispose of, to any person any drug for a price or at a rate exceeding the maximum fixed by notification under Clause(a) of sub-section (1) of Section 4; (b) have in his possession at any one time a quantity of any drug exceeding the maximum fixed by notification under Clause (b) of sub-section (1) of Section 4; or (c) sell, agree to sell or offer for sale to any person in any one transaction a quantity of any drug exceeding the maximum fixed by notification under Clause(c) of sub-section (1) of Section 4.[350] The Ordinance also prescribes general limitation on quantity which may be possessed at any one time. It says no person shall have in his possession at any one time a greater quantity of any drug to which this section applies than the quantity necessary for his reasonable needs.[351]

However, no notification was issued by the government which resulted in granting of bail easily to the accused under the said Act. This lacuna even resulted in the discharge of the accused at the earliest stage.

So after the repeal of the Ordinance in 2010, there is no comprehensive state legislation on the point. The only legislation presently in vogue is The Drugs and Cosmetics Act, 1940 which is a central legislation. Though it doesn't cover the matter wholly, the Act, as is evident from its preamble, regulates the import, manufacture, distribution and sale of drugs and cosmetics. The central Act also suffers from several drawbacks. For example, Section 32 of the Act provides as under-

Cognizance of offence — (1) No prosecution under this Chapter shall be instituted except by-

(a) an Inspector, or

(b) any Gazetted Officer of the Central Government or a State Government authorized in writing in this behalf by the Central Government or a State Government by a general or special order made in this behalf by that Government; or

(c) the person aggrieved; or

(d) a recognized consumer association whether such person is a member of that association or not.

(2) Save as otherwise provided in this Act, no court inferior to that of a Court of Sessions shall try an offence punishable under this Chapter.

(3) Nothing contained in this Chapter shall be deemed to prevent any person from being prosecuted under any other law for any act or omission, which constitutes an offence against this Chapter.

On a plain analysis of this Section, it is evident that the police agencies have been assigned no role. However, of late The Drugs and Cosmetics Amendment Act, 2008 has incorporated Section 36AC to the Act which gives only limited powers to police by making certain offences under the Act cognizable and non-bailable. Yet, it is an established fact that police has a very limited role. The basic flaw of the Act lies in the fact that those who have been vested with powers under the Act to investigate and

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350 Section 5 of the Ordinance.

351 Section 6 (1) of the Ordinance.

prosecute the cases are either indifferent in doing the needful or are lacking the requisite expertise for the investigation. This is the main reason why the accused go scot-free and indulge in the affair repeatedly.

Coming to The Narcotic Drugs and Psychotropic Substances Act, 1985 (The NDPS ACT, 1985), the only full-fledged legislation dealing with the control and regulation of narcotic drugs and psychotropic substances in India, it is the Police Department which is vested with the powers to investigate and prosecute the cases. But it has been seen over the years that after a case reaches a court of law, the prosecuting agencies fail to prove their case. The main reason for the failure is the faulty investigation and lack of expertise of investigating agencies. This often leads to the acquittal of the accused. Thus leaving an adverse effect on the criminal justice system of the country and giving a free hand to the traffickers.

Furthermore, about the NDPS ACT, 1985 the basic problem lies in the ignorance of law and the technicalities involved therein on the part of the investigating agencies. For example, Section 27 of the NDPS ACT, 1985, in unambiguous terms, imposes punishment for the consumption of any narcotic drug or psychotropic substance like cocaine, morphine, diacetyl-morphine. But, in Kashmir, one can hardly find a case wherein Section 27 has been invoked.

Conclusions

Given the aforesaid, it is quite evident that drug abuse has reached a point of no return in Kashmir, cutting across all sections of society. Partly responsible is the state government for its inaction in curbing the menace and partly the society itself which appears to be in a forgotten state about the societal values and the negatives of drug abuse. The State is responsible for the malady in that neither there is any effective law on the subject nor any implementation of the already existing law. The nexus between the concerned Department (Government), the traffickers and the addicts adds the problem. Holding society responsible stems from the lack of parental control in our homes. The present all pervasive plague of drug abuse calls for creating awareness among the masses, particularly youth.

Besides, given the 2010 repeal of the state's only Drug Ordinance and the ineffectiveness of the central Act of 1940, it becomes unambiguously clear that the state lacks a comprehensive legislation on the subject. It is suggested that the state should adopt the central 'Drug Act of 1950' which has the requisite notifications issued under it. Why the State should wait and watch? Further, to reinforce the implementation of the Narcotic Drugs and Psychotropic Substances Act, 1985, the 2006 Supreme Court judgment in *Prakash Singh and Others vs. Union of India and Others* needs to be given effect to by the state government. The Court in this case said, "The investigating police shall be separated from the law and order police to ensure speedier investigation, better expertise and improved rapport with the people. It must, however, be ensured that there is full coordination between the two wings. The separation, to start with, may be effected in towns/urban areas which have a population of ten lakhs or more, and gradually extended to smaller towns/urban areas also."

And worse, the chemists who are the main culprits for the growing number of drug addicts are prosecuted under the Drugs and Cosmetics Act, 1940. The State Police is not authorized to act against chemists under the NDPS Act, 1985. It is desirable that the misuse

of prescription drugs by the Chemists should be brought within the purview of the NDPS Act, 1985 which has relatively stringent provisions. If the government does not address the problem immediately, it may assume disastrous proportions.

Burhan Majid*

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* The Article is the culmination of a research report submitted by the author as part of his Masters programme at Faculty of Law, University of Kashmir, Srinagar.

Author teaches law at Kashmir Law College, Nowshera Srinagar [burhan.mjd@gmail.com].

RIGHTS OF WOMEN UNDER INDIAN CRIMINAL JUSTICE SYSTEM

ABSTRACT

Women though constitute half of the human population, but have been treated unequally in varying degrees in various societies from the beginning of human civilization. The women are not treated equally due to various socio-political reasons. The religious customs and social evils have made her positions very weak .In early days she was treated as child procuring machine and were subject to various types of victimization like rape,sati,Female Foeticide etc.

But with the passage of time a movement was started all over the world and an attempt was made to give her honorable positions in the society. The important document in this direction was convention on elimination of all forms of discrimination against women(CEDAW).This document is a step to provide the women a right to live with human dignity and allow her to progress with man in the society. The main theme of this paper is to analyze historical position of Indian women and their rights under Indian criminal justice system.

The social change is an inevitable phenomenon of every society and the changes in Indian society has also effected the status of Indian women .Constitution of India provides number of safeguards to Indian women but these protections are not applied in letter and spirit .Article 14,42,15(3),besides the penal provisions provide adequate protection to the women, but the figures provided by the National Crime records bureau shows that all is not well with women in India. There are number of gender specific laws which help the women to uphold the dignity and how far these laws are implemented are discussed in this article. This paper discusses the various rights given to women under Indian Law.It also discuss the national and international laws protecting the Indian women .The historical position of women in india viz a viz her rights is also discussed Courts are watchdogs of every administrative action there for attitude of Indian courts and guide lines given by them is also the part of this paper. The courts time and again has laid down guidelines to curb the crime against women and Supreme Courts observations in Kundalabala is an eye opener which reads as under:-

There is constant erosion of basic human values of tolerance and spirit of live and let live.

KEY WORDS: - Women, Rights, Laws relating to women, Constitutional provisions ,Indian criminal justice system, Rights protected under Cr.p.c, Justice Verma committee report, CEDEW

Introduction

Women though constitute almost half of the human population but have been treated unequally in varying degree in various societies from the beginning of human civilization. They were not treated equally with the men in the society for different socio-political reasons. Various tough religious and social customs have left the women as weak link of the society .Their position in the society was socially backward, religiously unequal, and economically poor. They were considered simply a child procuring machine and exploited for the sexual

pleasure of the men. We have seen in the past the various types of women victimization in the shape of dowry, custom of sati, rape, assault, molestation/prostitution and in the recent past Female Feoticides, and Domestic violence.

The position of the women since long has been pitiable in all aspects of life and their subjugation by males has been throughout a matter of history. In ancient India women were treated better than their counterparts in the rest of the world. Women was enjoying the status of goddess in ancient Indian culture but later on it was reduced and she was entrusted one job i.e. to bring the progeny for the family[352].

There has been a movement all over the world to give woman a honorable position in the society. The important document in this direction is Convention on Elimination of all forms of Discrimination against Women (CEDAW). This document provides equal rights for woman and lays down that welfare of the world, and progress and peace is possible only when woman participate on equal terms with men in the development of society. The position of woman in Indian constitution has been recognized and equal rights have been guaranteed to woman to safeguard her interests.[353]

The exalted status of Indian woman in ancient days suffered setback in the medieval period. Socio economic and political factors played a major role in their suppression. Social inhibitions and discriminatory practices against them continued to exist during the enlightened and civilized imperial rule. The leadership of Independence movement was, however, committed to accord an equal status to woman and give them a place of honour and dignity in the society.

Social change is an inevitable phenomenon of every society because social conditions never remain static. Social change whether it comes through legislation or through judicial interpretation indicates the change in accepted modes of life, or perhaps a better life. The changing pattern does have an impact on the laws and life of a given society and law must keep pace with the changing socio-economic trends and political movements of the society, while at the same time preserves necessary balance between individual rights and duties. Thus the law and justice provide a potential force for the attainment of a progressive social change. The object of this paper is to highlight and analyse the various laws made by the state to protect the woman from all such acts which make her to suffer.

Despite having various laws the position of Indian woman vis-a-vis her life and safety is not good. Constitution of India, Indian Penal Code and special and local laws provide a security to the women but does it, apply in it's letter and spirit. Article 42 directs the state to make provisions for ensuring just and human conditions of work and maternity relief. Besides Article 14 of the constitution of india lays down that woman should be given equal opportunities in the matter of public employment. In order to uplift the women Article 15(3)makes a special provision enabling the state to make affirmative discrimination in favour of woman.The concern for upliftment of woman can be seen in Directive Principles of State Policy. Moreover various penal laws have provided necessary protection to the

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1 Neelam UPhadhya and Rekha Pandey,Women in India-Past and present,1990,p.6-7

353 Please see Art.15 (3), 39(a), 39(c).

women .But the crime rate graph and conviction rate shown below in the table is an eye opener to those who say that all is well with women victim of crime.

TABLE[354]

Crimes against women(IPC & SLL)	**Cases reported**	**% Total IPC crime**	**Rate of crime**	**Charge sheeting rate**	**Conviction rate**
Kidnapping and abduction of women & girls	35565	1.5	2.9	73.0	28.1
Molestation	42968	1.8	3.6	96.5	27.7
Sexual Harrasment	8570	0.4	0.7	96.4	45.8
Cruelty by Husband & in laws	99135	4.3	8.2	94.4	20.2
Importation of Girls	80	0.0	0.0	82.4	7.8
Total crimes against women(IPC & SLL)	228650	9.8	18.9	92.0	26.9

Though the Constitution has provided equality of both sexes, man and woman but biological conditions of the female and developed sense of subordination demand extra protection for them. The reason is that "woman's physical structure and the performance of certain functions place her at a disadvantage in the struggle for subsistence and her physical well being becomes an object of public interest and care in order to preserve the strength and vigor of the race. Thus the law and justice demands additional privileges and safeguards for maintaining proper socio-legal status of woman in the society.

Every day we hear on radio, T.V and electronic media, about the property rights of woman being encroached upon and several crimes are being committed against them. Crimes in relation to woman are property crimes, crimes against body, marriage etc.

WOMAN AND LAW:

To uphold the constitutional mandate given under Art.15(3), the state has enacted various legislative measures intended to ensure equal rights to women to counter social discrimination and various forms of violence and atrocities.

Although the laws are not gender specific, the provisions of law affecting woman significantly have been reviewed periodically and amendments carried out to keep pace with

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354 Crime in india 2011,National Crime Record Bureau,New Delhi

the emerging requirements. Some Acts which have special provisions to safeguard women rights are:

1. The Family Courts Act, 1954.
2. The Special Marriages Act, 1954.
3. The Hindu Marriage Act, 1955.
4. The Hindu Succession Act, 1956 with amendment in 2005.
5. Immoral Traffic (Prevention) Act, 1955.
6. The Maternity Benefit Act, 1961 (amended in 1995).
7. Dowry Prohibition Act, 1961.
8. The Medical termination of pregnancy Act, 1971.
9. The Prohibition of Child Marriage Act, 2006.
10. The Protection of woman from Domestic Violence Act of 2005.

In order to provide women adequate rights in various social institutions and to protect her dignity a National plan of action for the girl child was introduced between 1991-2000 to ensure survival, protection and development of girl child to make the future of girl child more secure.The Department of Women and Child Welfare, Government of India has prepared a comprehensive national policy for empowerment of women in 2001. The object of this policy is to bring about the advancement of development and empowerment of women in various spheres of the society.[355]

One of the important areas of law where women needs more protection is criminal law. The administration of criminal justice have taken special care for protection and upliftment of women in the society by way of providing various laws for the safety and security of the women.

The discrimination against the women unfortunately starts even in the mother's womb. This discrimination is in the shape of sex determination techniques through ultrasonography. The worst form of cruelty against the women is when society prefers the son over the daughter. This is being done by way of various techniques and the object is to eliminate the girl child in mother's womb. Sec 315 of IPC prohibits killing of child in mother's womb. The decline of the female population in the country is due to abortions committed at early stages of pregnancy. The Supreme Court has in(CEHAF) Centre for Enquiry into Health and Allied Themes V. Union Of India[356], AIR 2003.S.C 3309 sharply reacted to this phenomenon and directed the concerned authorities to strictly monitor the activities of ultrasound centers. The Supreme Court also issued directions in the said case to control female foeticide.In tune with the decisions of Apex Court and presure from women groups the state passed a law known as PNDT Act.As per the law now all the diagnostic centers have to follow certain guidelines and the violation of this Act is punishable under the law.

The other offence is outraging the modesty of women under section 354 of IPC. This provision is again to safe guard the interest of women and provides a punishment of 2 years imprisonment and fine. After the Delhi gang rape case the Government of India

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355 Dr.S.C. Tripathi and Vibha Arora,Law relating to women and children Third Edition 2008,Central Law Publication P.281.

356 AIR 2003.S.C 3309

appointed a committee to look into the present position of Section 354 as people feel that modesty of women is not well protected.

In recent years what has been observed is that a new pattern of crime against women has emerged where the acid attacks are used by miscreants to harass the women who doesn't come to terms with accused persons. The infamous Delhi rape case where the Indian women came on single platform and agitated to make the offences against the women more tough and provide a strict punishment to voilaters,the government of India introduced some new provisions in IPC by the criminal law Amendment Act 2013.The main object of these amendments were to introduce changes in Indian penal Code, Code of Criminal Procedure and Evidence Act to make laws more strict when the offences are committed against the women.Now under the new law throwing the acid and even attempting to throw acid on women have been made a separate offence where mandatory punishment of five years has been prescribed by the law.[357]Similarly few new sections have been inserted after section 354 to make and safeguard women's to dignity.[358]A new offence has been introduced where a man tries to have personal contacts with a women despite the fact that she has shown disinterest in such acts. This offence is known as stalking.

One of the major changes introduced by this new law is widening the scope and definition of offence of " Rape". Section 375 redefines rape in the light of new dimensions of this offence. The punishment for offence of rape is now mandatory i.e seven years imprisonment which shall extend to life imprisonment and fine. Similarly offence of rape committed by police or security forces shall be awarded minimum ten years and maximum life imprisonment which shall mean that the accused has to remain in jail for whole of his life.Section 376A,376B and 376C are the new sections which are for the protection of women under the new scheme.The offences of gang rape is increasing in the society and in order to control cases of gang rape a new section was introduced under which a minimum punishment of twenty years has been prescribed by the new law.[359] In order to make Cr.P.C. more women friendly some ammendments were made in law.It is a fact that women were also victims of attrocities committed against them by male donot record their complaints as the same were recorded by the men in police stations.In order to remove this diffculty section 154 Cr.P.C was ammended.Under the new law it was laid down that any complaint under the above mentioned sections shall be recorded by a women police officer/women officer.The statements should be videograaphed and recorded before magistrate under clause (a)of subsection 5A of section 164.Similarly a drastic change has been introduced in section 197 Cr.P.C. wherein there is no need to obtain sanction for prosecution if the offences has been committed under these section.[360]Some more ammendments were also made in procedural laws.

A very important change was incorporated in section 357ACr.P.C. and section 357BCr.P.C. introduced to give the compensation to the victim out of the fine recovered from

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357 Sec326A,326B IPC.

358 Sec.354-A to 345D.

359 See Sec.376D

360 Sections 166A,166B,354,354A-354D,370,375,376,376D,IPC.

the accused.A duty is now cast upon all the state run hospitals to provide medical aid to the victim of aforesaid offences and intimate the police also.[361]

The new law introduced some ammendments in the Evidence Act and have in a way changed the someof the basic principles of criminal justice system.For example now under the new law a victim of rape,molestation etc shall be presumedthat victim has not given the consent for the act.[362]Similarly the evidence of character or previous sexual experience will not be relevant in certain cases.[363]

Kidnapping and abduction are very common offences against the women and the law protects the woman against such acts under various sections of I.P.C.

There is a demand that death sentence should be awarded in certain offences committed against women.There is a growing demand that for the offence of rape death penality should be the punishment.In the absence of any empirical study we can't say that the death penalty would be effective so far as offense of rape is concerned. Even after the Dhananjee Chaterjee V. State of U.P .[364] we find that rape case too take place and are not controlled. It has been observed that the victims of rape cases do change their statements at the time of trial due to pressure or certain other considerations which led to the acquittal of the accused. In order to control this, the Verma Committee has recommended that police should get the statement of the victim recorded before magistrate under section 164 of Cr.P.C. Accordingly section 164 of Cr.P.C. must be amended to that extent. This is the age of information technology and in the name of internet and by various scientific techniques; the privacy of the women is attacked even in their private places. In order to control this, the Verma Committee has suggested for the introduction of new offence known as Voyeurism by which privacy of the women is protected.

CRUELTY

The criminal law Amendment Act 1983 incorporated section 498-A, imposing three years punishment on the husband or his relatives who subject a married woman to cruelty. The offence is described as (a) Any willful conduct which is of such a nature that is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the women, or (b) harassment of the woman when such harassment is with the view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security is on account of failure by her or any person related to her to meet such demand. Matrimonial relations between the husband and wife, their cultural and temperamental state of life, state of health and their interaction in daily life are considered as the relevant factors in deciding questions of cruelty[365].The demand for the dowry is considered as an offence under this section[366].

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361 357c,Cr.P.C

362 Section 114 of Evidence Act.

363 Section 53A.

364 2004(9)SCC 751.

365 State of karnatka v.Srinivasa,1996 Cr.L.J (kant)

366 Shankar Prasad V.state 1991 Cr.L.J.(cal).

Section 160(2) of Cr.P.C. protects women, saying that no woman shall be required to attend any place other than the place in which she resides. Hence a police officer cannot require attendance of a women but on the contrary he has to go to the place where she resides for making the investigation under section 53(2) Cr.P.C, When a person to be examined medically is female, then examination shall be made only by or under the supervision of female registered medical practitioner. When a complainant is made on oath that women or female child under 18 years has been abducted or unlawfully detained for unlawful purpose, district magistrate or Magistrate of first class may make order for immediate restoration of such woman to her liberty.[367]

Maintenance can be awarded under section 125 Cr.P.C to the not living with her husband for his negligence or refusal to maintain her when she is unable to maintain herself. Under section 416 Cr.P.C, if a woman, sentenced to death is found to be pregnant , the high court shall order the execution to be postponed and may if it thinks fit, commute the sentence to imprisonment for life.

All these provisions of criminal law are aimed at providing special protection to women keeping in view their fragile nature, natural and biological conditions as also the social conditions.

The foregoing discussion has shown that there is ample protection provided to women under law. We are talking about women empowerment and this is good enough but it should not erase the limit set up by our religion and society. The free mixing of opposite sexes is to be controlled because the same is definitely in conflict with our own traditions. The law is competent enough to deal with cases of women victimization but what is lacking is social support from society.

It has been observed laws are not implemented in the way in which they ought to be implemented. In a male dominated society often laws are not implemented in it's right prespective. The crimes against women can be controlled if the women is economically independent. But question remains to see that whether changes introduced by 2013 Act will give the women more protection or it is just one more addition to criminal statutes giving the protection of women. We have seen that after adding section 498-A IPC the courts have now off and on issuing directions to enforcement agencies to be careful while dealing the cases against them under this section. In these cases it has been observed by the courts that this section is misused by the women to harass their in-laws and husbands. No doubt the offences against the women are on increase but who is responsible for it and how it can be controlled? Can the law alone controll or do we need some other means to combat it. Law is definitely instrument of social change, but it does not work in isolation. Every law is a good law which has a backing and support of the society. The law will not alone protect the women, but it is our society which needs to come up against those who indulge in crimes against women. The social workers, educational institutions and religious leaders are duty bound to play their role in forming a society where the dignity of women is respected. Those who are supposed to enforce the law have to be humane while dealing into the cases of atrocities committed

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367 Section 98 of Cr.P.C.

against the women on the one side and should not misuse the law in its letter and spirit. Law enforcement agencies will have to contribute a lot by helping the women to fight against the crimes but challenge lies in front of women themselves who must fight the ills by empowering themselves[368].

The Supreme Court has rightly said in Kundlabala V. State of A.P. that "There is constant erosion of basic human values of tolerance and the spirit of live and let live."

We conclude by observation of justice Krishna Iyer who said "The Indian woman is sad reflection on the distance between the law in book and the law in action[369]. Empowerment by itself may not place women on an equal footing with men. The greatest need of the hour is change of social attitude towards women. Take the classic case of dowry. Women's empowerment means a lot, but the ultimate goal of the equalization of man and women would materialize only when her complimentary role is recognized in the society.

Mrs.Asma Rehman*
Prof.Syed Mohammad Afzal Qadri**
Prof.Abdul Lateef Wani***

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368 Ashok Bhan(Dr.)Voilence against woman and criminal justice KULR (2003) p.198

369 B.Muthamaa V.Union of India AIR 1979 SC 1868.

* Research scholar ,Department of law.University of Kashmir.

** Former,Dean and Head, Faculty of Law, University of Kasmir.

*** Former,Dean and Head, Faculty of Law, University of Kasmir.

Groundwater Management and Protection of Water Rights in Indian State: A Legal Perspective

Abstract

If one were to apply Rawl's Principles of Justice on the use of natural resources, it would be necessary to make sure that the least advantaged do not become even more disadvantaged by the change in use of resources. The principle demands that if inequalities have to be there, they are to be to the greatest benefit of the least advantaged. Water use practice in this country, however reveals that the water resources especially the groundwater, have been used mostly for the benefit of rich and advantaged.

This paper endeavors to analyses groundwater rights, in present legal system in India and how in such Legal framework foreign players like big Multi-National Companies (MNC's) are free to use this essential of life as a tool of business to make their fortunes, when many people in this country do not have access to the same as essential of life. Considering that water is vital resource for life, deprivation of this source is simply a violation of human right. Since most natural resources law, including the water laws were enacted by a colonial regime, before the making of constitution. They cannot naturally, share the objective of Constitution. Article 13, therefore can be used as a major Charter for reform, to ensure equitable distribution of this resource.

I must express my deep debt of gratitude to my teachers and family members, whose constant inspiration and motivation has propelled me to write about an issue concerning the very life of all.

Key Words: - Groundwater Rights, Legal Framework, International Trends, Deprivatization of Water rights, Directive principles.

Introduction:

Water like air and food is one of the vital needs for human survival. Acquisition and distribution of water has, therefore, been a matter of legal concern since ancient times. With the rise of new technologies, however, which allow large scale extraction and utilization of water, it becomes important for the state to intervene and make sure that this does not result in a skewed or inequitable distribution amongst the people. In ancient times when resource was available in plenty and demand less, the jurisprudential principle of 'discovery's' had applied- whoever discovers the resource had 'dominium' over it. This was the state of affairs in old Roman Law and the Common Law of England. The dominant owner may allow the use of resource at his will, because it was like a slave to his property, hence the principle of 'servitude' could apply. When the dominant owner allowed the use of his resource like a common property resource, the principle of 'profit a pendere' would apply. Alternatively, he could in a manner of speaking, ease out his claims over the resource, allowing for 'easement' to share the resource[370].

However, in modern times, in an economy of scarcity-when the source has been depleted, such principle of 'discovery' or 'servitude' can not be applied simpliciter. External agencies have to intervene to decide prioritization of use, or conversely, when the external agents exploit the resource, the state or law has to intervene to ensure equitable distribution. In either case, the whole issue of water rights needs to be fundamentally clear so as to be able to make appropriate decisions.[371]

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370 Chhatrapati Singh; Water Rights and Principles of Water Resources Management, ILI (1991 Ed.) p. 39.

371 Ibid.

Ground water Rights:

Rights in groundwater belong to the land owner, since it forms part of the dominant heritage and land ownership is governed by the tenancy laws of the state. As the 'Transfer of Property Act' necessitates that this right (to groundwater) can be given to any one else if the dominant heritage (land) is transferred. Conversely the Land Acquisition Act asserts that if someone is interested in getting rights over the easement (over groundwater in this case) he would have to be interested in land. In short groundwater is attached like a chattel to land property. There is no limitation on how much groundwater a particular land owner may draw.

The consequence of such a legal framework is that only the land owners can own groundwater in India. It leaves out all land-less and tribals who may have group (community) rights over land but not private ownership. It also implies that rich landlords can be water lords and indulge in openly selling as much water as they wish.

The Problem:

The rapid increase in the exploitation of ground water resources in India for irrigation, domestic, industrial requirements, livestock consumption and other uses has been recognised as a national priority problem. The magnitude of the problem is testified by the fact that the Govt. of India has set up a Central Groundwater Board.

The major challenges facing the world in 21st century is to cater for the needs of the people for clean water. The social or political unrest in any region will be triggered not by the lack of food, clothing and shelter but by shortage of water, air and surroundings. A study for the Stockholm Water Conference in 2001 showed that severe water shortages could affect one third of the global population by 2025 and will extend well beyond existing arid and semi arid countries. Water supply is already seriously inadequate in much of the equatorial Africa and Central Asia, desertification is exacerbated by over-extraction of groundwater supply, pollution has reduced the supply of portable water, irrigation which accounts for about 80% of water consumption in many developing countries is wasteful. Maintaining an adequate supply of water is likely to become increasingly important as humanity faces burgeoning populations and dwindling resources.

But unfortunately, we have made this 'essential of life' as a commodity of trade to be exploited in a legal vacuum. Major studies and contracts are being awarded to private groups. Noble terms serve to whitewash the theft of water from the poor.

Millions of people, the world over do not have access to portable water supply. But these are good times for the 'bottled water industry' which is cashing in on the need for clean drinking water and ability of the urban cities to pay an exorbitant price for the very basic human need. It is estimated that the global consumption of the bottled water is nearly 200 million litres- sufficient to satisfy the daily drinking water need of one fourth of the Indian population and about 4.5 % of the global population.[372]

In India per capita bottled water consumption is still quite low, less than five litres a year as compared to the global average of 24 litres. These are boom times for the Indian bottled industry- more so because the economics are sound, bottom line is fat and Indian Govt. hardly cares for what happens to the Nation's Water resources[373].

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372 See, Frontline, April 2006, p.9.

373 Ibid, p.23.

The corporate hijack of the water is on worldwide and is one of the important processes of our time. The World Bank and the International Monetary fund help ram it through. Water privatization has often been showed into their loan conditionalities in the past decade. The private ownership of the water is dominated by the big players like Parle Bisleri, Coca Cola, Pepsico, Parle Agro, Mohan Mekins, SKN Breweries and so on. Parle was the first major Indian Company to enter the bottled market in the country when it introduced Bisleri in India 25 years ago. The majority of the bottling water plants, whether they produce bottled water or soft drinks are dependent on ground water. They create huge water stress in the areas where they operate. Because groundwater is also the main source of drinking water in India. This has created huge conflict between the community and bottling plants.

One is compelled to think, that the existing law says that "person who owns the land owns the groundwater beneath". This means that, theoretically, a person can buy one square metre of land and take all the groundwater of the surrounding areas and the law of the land can not object to it. At the most they have to pay a nominal amount as cess.[374]e.g Coca cola's bottling plant in drought prone kala dera near Jaipur, gets its water free except for tiny cess 9 (for discharging the wastewater). It pays to the Pollution Control Board, a little over 25000 a year and extracts half a million litres of water every day at a cost of 14 paise per 1000 litres. However water is not so cheap in America, the home of Coca Cola. The cost of industrial water in the U.S was Rs. 21 per thousand litre in 1990's and what if the big dams have to pay few more thousands as fine in violation of Water Act.

The worst affected people by the over exploitation of groundwater are small and marginal farmers. In a study conducted by the Administrative staff College, it was found that depletion of groundwater table had inequitable repercussions on the small and marginal farmers of the eastern part of the Indo-Gangatic belt who in 1983 numbered about 200 million.[375]It has also been established that over exploitation of groundwater matched with the consistent deforestation is affecting rainfall in adverse fashion. Deforestation activities are perpetuated by wrong policies of the Indian Government. The Indian Forest Act, 1927 and also the policies whereby huge projects are constructed in densely forested areas contribute to the pathetic situation to a great extent.

With this realisation in mind, the Government of India mooted Ground Water (Control and Regulation) Bill in 1970 through the Ministry of Agriculture. This draft Bill was circulated to all States with an advice to enact the same into an Act with necessary incidental modifications. As the development of water is essentially a State Subject (Item 17 of List II) only the states are empowered to legislate on the matter. Till date, only the state of Gujrat has enacted the law in the shape of Bombay Irrigation (Gujrat Amendment) Act 1976, which came into force on 24th of March 1988. However, even this Act is applicable only to certain specified areas in Gujrat. The states of Tamil Nadu and Karnatka have prepared draft bills but it has not come into force yet. Since the first Bill was mooted, the lethargy exhibited by the states is indeed very alarming. The only check which exists at present is in the form of the flow of institutional finance from agencies like NABARD. However, stoppage of loans from these agencies affects the middle and lower class farmer as he is in most need of loans.. Regulation can be brought in only if there is a constitutional change i.e. if the matter is

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374 See, Water (Prevention and Control of Pollution) Cess Act 1977.

375 Pant, Niranjan, "Groundwater Depletion", Economic and Political Weekly, 7 Feb. 1987, P.219-220.

shifted to the Union or Concurrent List or if groundwater is given the status of mineral. The latter is also not very impractical as groundwater has a combination of many chemical compounds.

Once it is clear that legal regulation is essential, it is necessary to identify the areas where sanctions are needed e.g.

1. Where there is over extraction of groundwater for agricultural use
   a. Agricultural use
   b. for domestic use (rural, urban) (including livestock consumption)
   2. Where there is over extraction of water for commercial purposes
   3. Where there is dispute between two parties regarding the exploitation of water
   a. between two private parties (rural and urban)
   b. between two states (as the groundwater basin does not restrict itself to the traditional boundaries of one state necessarily)

To ensure proper and equitable distribution of groundwater, to even those who do not own land, it is necessary to separate water rights from land rights. No such legal step has been taken in India so far. The only State to have a groundwater law is Gujarat. There is no separate groundwater law. Sections have been added to the Bombay Irrigation Act (Gujrat Amendment) Act, 1976 (79). This law does not touch the issue of water rights. It merely tries to regulate water harvesting and marketing by restricting the depth of the tube wells and introduces licensing procedures. Section 94 prohibits construction of tube wells and introduces licensing procedures. Section 94 prohibits construction of tube-wells beyond 45m in depth. Beyond this special permission is required from the authorities. Section 99 of the same Act regulates wastage of groundwater. Evidently, even this introductory regulation is welcome, in a situation in which groundwater exploitation is free for all by property owners. However, a great deal of thinking and research needs to be done to come up with appropriate groundwater rules, specially from the point of view of people's water rights.

In this context the Kerala High court's decision in *Attakaya Thangal Vs. UOI*[376]becomes very relevant. This was a public interest litigation from Lakshadweep islands, in which the residents claimed that the excessive pumping of groundwater by the rich farmers was threatening the very availability of groundwater for all. They claimed, under Article 21 of the Constitution that their life opportunities were being threatened since the depleting groundwater resource was likely to become saline. The Court upheld their claim. Such a decision once again makes the right to water a natural or fundamental right under Article 21-right to life.

Theory of State and its Role in Water Resources Management: Indian perspective

The State is a complex entity, with various facets to its structure and functions. For the purposes of the analysis here only one aspect of its function, its duty and right to manage water resources would be discussed.

The Indian constitution, and Indian Law in general operate with two theories of state, the first in which the state has a positive role to play to realize people's rights and needs, this comes in through the Directive Principles of the constitution which direct the state to perform certain actions. The second characterization of the state and its role is through the fundamental rights chapter, in which the state has a negative role, that is, it does not provide but prevents those actions which violate peoples rights. The people are expected to realize the right by themselves, such as the right to freedom of expression, life, liberty, etc.

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376 1990 (1) KLT 550.

The basis for the first theory of State-as provided in the constitution, can be sought both in the socialist theories as well as in paternal liberal theories. The second theory-state as a protector and facilitator, has its roots in laissez faire liberal theory, the basis of which can be sought in Adam Smith, Hobbes or Locke.

There need be little surprise that Indian legal policy employs two theories of State. Indian economic policy too similarly employs a theory of 'mixed' economy, in which the state plays both the protector and the facilitator role. The roots of this 'mixed' policies seem to lie in the desire to get the best of both the liberal and socialist systems, by differential and selective application of the systems to different issues. The important point here is to see the implications of adopting this mixed theory of state for water rights.

If the State wishes to claim, through its statutes, such as M.P irrigation Act, that all water rights are positive (statutory) rights guaranteed by the state, then it follows that the state's role is to provide every one clean water so that the right can be realized. The water right in this case would be like the right to education, health or work, governed like all other positive rights by the directive Principles. However, we notice in India that although the irrigation and water supply laws claim water rights to be positive rights, none of the plans , projects or Five year Plans (concerning water) are governed by the Directive Principles of Indian Constitution.

It has been argued that water right is not a positive right which needs to be provided for through a statute. It is a (negative) natural right of man which all court judgments and statutes must recognize. It is a part of the right to life, and a basic need for survival. The nature of this right is one of usufruct right and not a property right. What is the role of the state in the recognition of this natural right? Like all other fundamental rights the state has to be a protector and a facilitator so that people can recognise their right. It has first of all, to protect the violation of this right. This is, it has to see that the socially stronger or the commercially better off do not usurp the rights of the socially or economically underprivileged people. It has to make sure, through its legal and administrative mechanisms, that natural right of all is protected. The Civil Rights Act (laws protecting the rights of the Schedule caste, including the right to access to water), for example, is based on this presumption of natural rights (even though the Act is not enforced effectively). If the state's role, under the natural rights theory, is to protect people from exploitation or violation of their rights, a clear consequence of the theory would be that the State itself certainly can not become the exploiter or violator of people's rights. This means that it can not plan and execute projects which result in inequitable distribution of water for the benefit of a lesser number of privileged people. All project planning must therefore, first of all, take into account the basic needs and rights of affected people. They can not be executed in the manner in which it has hitherto been carried out in India.

The only condition in which people can suspend or forgo their natural rights is in the case of genuine public interest, as for example, the soldiers in the armed forces suspend or forgo their natural rights to life at the time of war (in public interest) . But this suspension or sacrifice of natural right has to be done under strict conditions and criteria. In the case of natural resources the people can forgo their immediate claim an entrust the resources to the state, as a trustee, so that the state performs its duty to facilitate nor only realization of the rights of the existing people but also of the future generations and of nature. This public interest strictly defined and criteria of public purpose strictly specified.

International Trends in Water Rights Allocation:

In a basic sense the water rights issues in the developing and developed countries are non comparable. Whereas in the former the priority issues are access to clean drinking water for the vast majority and subsistence level availability of water for agriculture, in the developed countries the priority matter is one of 'proper' management to increase productivity and efficiency in water distribution, given that some water is available to all for drinking and irrigation purposes. Nonetheless, in so far as the Third World tends to adopt the Western modes of 'development', (neglecting its priority issues) and water management, (even for a minority of its population), the legislative strategies for this minority sector (who consume or utilize a greater amount of water) become comparable. Notwithstanding the disparities between the first and the Third World, a comparative analysis also has advantage of exposing the strength and shortcomings of various alternative legal models which the nations may or may not adopt.

A review of the legislations of various countries allows to draw two conclusion. First, there are indications that the ancient residual (Roman Law) notion of water being a private property of an individual, held under a riparian or appropriative right of enjoyment (servitude or easement) are on the decline. Second that law makers are becoming increasingly aware that water resources can not be viewed independently of the land resources, hence water management must necessarily be viewed in the light of land management. From the point of view of management, the significant fact that needs to be noted is that in many countries, such as Spain, China, Hungary and others, the Water Law does not treat surface and groundwater separately, it integrates both in comprehensive way. In India like UK or USA, the surface Water Law is different from the groundwater law, the first often is not complementary to the other. In some countries such as Czechoslovakia, Hungary and France, the notion of integration and comprehensiveness goes even further to treat land issues along with ground and surface water. Under the French and Hungarian Laws, for example river basins and whole water shed area are treated as units for protection or conservation and not the water areas alone. There is much to be said for such an integrated view. Evidently water can not be protected. Similarly forests can not be protected if its water sources are not conserved. Land desertification can not be stopped if deforestation is not curbed. Any land, forest or water, use policy and practice must necessarily take the inter-relations into account and the laws must reflect this.

De-privatization of Water Rights:

Under Common Law rights to use of water have been available only to those whose lands border on the stream or where water is found under the owner's land- restricted only to the limit that the quality and quantity of water will pass undiminished to downstream riparian owners. This, as we have seen, is also the position taken by the Indian Easement Act. In the last two decades however, drastic changes in water rights have taken places as the national economics have moved from 'economy of plenty' to 'economy of scare resources' vis-à-vis water. Jordan's Water Authority Act of 1983 declares all water to be state property, and so does the Ethopian water law of 1981.One may assume that under conditions of desertification state ownership of all water resources is inevitable for proper management. But this move from private to Public domain is not only true for deserts. In Spain the new water legislation of 1985 has brought all ground water within the fold of the state's domain. Prescription or customs is no longer a valid mode of claiming water rights. The Spanish water fixes a maximum limit of 75 years to all grants or concessions) made prior to 1985 (50 years in case of ground water). In addition, such grants are subject to review during their life span and also subject to compensation if the grant is modified to adjust it to the provisions of water plans under the law. The

Spanish water law confirms a trend which is explicit in the actions taken by a number of South American legislators, notably, those of Colombia, Chile, Peru, Ecudor and Argentina.

Conclusion:

In the present context of ecological devastation the whole question of law relating to water needs to be fundamentally re-examined. If the State is to use the law to regulate the use of resources, how can the people use the law to make the State more accountable and efficient? We need not assume that the task of building a just society, in which the resources are used in an ecologically sustainable and equitable way is over. Each historical situation demands a new effort. These need not be novel. They indeed need to have a continuity with the past laws, but they can surely break the new grounds to deal with the present crisis. The motivation and the grounds to build an ecologically sound and equitable society are in fact provided in the Indian constitution. The Directive Principles such as Article 39(b) and (c), the Fundamental Duties as well as Preamble are nothing but the specifications of the task before us. One needs only to be reminded that most natural resources law, including the water laws were enacted by a colonial regime before the making of constitution. They can not naturally, share the objective of Constitution. Article 13 is a major Charter for reform. It tells us to amend all those laws, rules and orders which violate people's fundamental rights. Have we so far examined the pre-constitutional resources law, especially the water laws, to find out whether they contradict some of the fundamental rights of the people and whether they are in keeping with the directive Principles? In such a situation it can hardly be said that our constitutional duty of legal reform, as specified by Art. 13 is over. In fact from the point of view of natural resources law the task of moving away from the colonial state to a just democratic state has barely begun.

There is also another type of legal need: the pursuit of justice. The Preamble to the Indian constitution demands that we guarantee economic and social justice to all Indians. However, a preliminary perusal of the water use practice in this country reveals that the water resources, like the forest resources have been used mostly for the benefit of the rich. The poor have borne the brunt of all developmental schemes. Also despite a sustained affirmative action by the state social justice for all has not been achieved. There are still numerous tanks, wells and embankments which the lower caste are not allowed to use, there are also commercial barriers to water use. The pursuit of water rights, hence is simultaneously also the pursuit of economic and social justice-the goals of the Preamble of our constitution. The basic issue in resource utilization is one of power over access and distribution of resources. The large irrigation canals take this power away from the people…the type of control they can have over the local tanks, ponds or wells. Channelling water by using different technologies, is therefore also at the same time channelling power or control over resources. A State which totally neglects the traditional tanks and wells technologies and goes in for large scale irrigation schemes must ensure that the redistribution of the control over resources does not result in inadequacies or a skewed separation of powers. In most irrigation or water supply schemes, nonetheless, we find that the opposite is the case. Through a neglect of the tank and well technologies and usurpation of natural water resources, the economically better off have gained more control over the resources and the poor further impoverished. In such a situation where the control over the resources is being shifted and the State is unable or reluctant to, intervene, the assertion of rights becomes all the more important. Considering that water is vital resource for life, deprivation of this source is simply a violation of human right. The pursuit of water rights is hence, also simultaneously the pursuit of human right.

Suriaya Saleem*

Capital Punishment: International and Human Rights Perspectives

Abstract

The death penalty since the ages of enlightenment up to day was always an issue around which basic values and human rights have been controversially discussed. However the current status of the death penalty, worldwide indicates that there is still a great need to continue the debate on retaining or abolishing the death penalty, in order to promote the international discourse on human rights. Developments in international instruments certainly demonstrate an enormous political will to abolish the death penalty worldwide and make the right to life a universally and unconditionally implemented standard. The main theme of this paper is to discuss the death penalty and its relation with human rights. The paper will discuss the death penalty in national and international perspectives.

Key words:-

Death Penalty, Human Rights, European Standards, Conventions on Human Rights, Legal Framework.

Introduction

Despite continuing international efforts for initiating and implementing policies aiming at complete abolition or at least at extended moratorium, the death penalty is still imposed and enforced in various regions. Today Europe represents (besides South America) the only world region where the death penalty has been abolished completely[377].Thus Europe at large has become death penalty –free zone. From a European perspective, it is essentially two major world regions where the death penalty still plays a significant role. In particular Asia and China as well as United States of America, seem firmly committed to death penalty as a response to serious crimes. However, Asia, at large, as well as American continent continue to be places where death penalty is not only available in criminal law statutes but is also imposed and enforced .Some 84 countries-according to the latest Amnesty Report International Survey – retained and enforced the death penalty at the end of 2001.That is approximately 70% of the world population still lives under the rule of death penalty. Most of the executions are reported from a minority of the retainist countries, that is China, Saudi Arabia, Iran and the US. According to Amnesty International estimates almost 90% of all known executions took place in these four countries.[378]Recently on November 20th,2012 India was among the 39 countries that voted against a UN General Assembly draft resolution

* LL.M, Law officer, Law, Justice and Paramilitary affairs Department, Kashmir

1. Hood,R.Capital Punishment,;the handbook of Crime and Punishment,New York,Oxford,1998,p.739-77.

378 Harris,D "The abolition of the Death Penalty in European Union States," in Nowak, M, xin, C. Legal expert seminar held in Beijing on 19th & 20th October, 1998 wien 2000, PP. 81-87.

which called for abolishing the death penalty, saying every nation had the 'sovereign right'' to determine its own legal system. The non-binding resolution called for a moratorium on executions with a view to abolishing the death penalty. It calls on nations to progressively restrict the death penalty's use and not impose capital punishment for offences committed by persons under age 18 or pregnant women. Among the nations voting against the resolution were Bangladesh, china, Kuwait, Libya, Pakistan and the US. After 110 nations voted in favour of the resolution while 36 abstained.[379]

The death penalty since the ages of enlightenment up to today was always an issue around which basic values and human rights have been controversially discussed. However the current status of the death penalty, worldwide indicates that there is still a great need to continue the debate on retaining and abolishing the death penalty, in order to promote the international discourse on human rights. Developments in international instruments certainly demonstrate an enormous political will to abolish the death penalty worldwide and make the right to life a universally and unconditionally implemented standard.

The Legal Framework Of Death Penalty In India

Sentence of death is the most extreme punishment provided under IPC. Regarding death as a punishment, the framers of IPC have categorically stated that it ought to be very sparingly inflicted and only in those cases where either murder or the highest offence against the state has been committed. This apart, the IPC prescribed death as an alternative punishment to which the offenders may be sentenced for the following offences;

I) Waging war against Government or attempting to wage such war or abetting of such war(S-121), abetment of mutiny committed by the officers of Defence Forces committed in consequence of that abetment(S-132);

II) Perjury resulting in the conviction and death of an innocent person (S-194);

III) Murder (S 302) and: murder by a life convict(S-303);

IV) Abetment of a suicide of a person under eighteen years of age, an insane person. delirious person, and idiot person or one in a state of intoxication (S-305):

V) Attempted murder by a life convict (S-307 (2))

VI) Dacoity with murder (S 396)

VII)Kidnapping for ransom (S 364-A)

In addition to above stated cases IPC provides for death sentence in the following conditions;-

(1) Criminal conspiracy to commit any offence punishable with death.(s120B)

(2) Joint liability extending the principle of constructive liability on all the persons who conjointly commit an offence punishable with death, if committed in furtherance of common intention or common object of all (ss-34 and 149); and

(3) Abetment of offences punishable with death(s-109)

Death Penalty Under Laws Other Than The Ipc

Besides the IPC, death sentence is also provided under the following statutes;-

1) The Indian Air Force Act 1950 ;(ss-34,37).

2) The Army Act 1950 ;(ss34,37,38,67).

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379 Frontline, November 20,2012.(Indias National Magazine)

3) The Navy Act 1957,(ss-34-39,43,44,49,50,,59);

4) The National Security Guards Act 1986; and The Indo-Tibetan Border Police Act 1992; both prescribe death sentence as an alternative punishment for defined offences committed by the members of two armed forces;

5) The Prevention of Terrorism Act 2002 (s-3) and The Terrorist and Disruptive Activities Prevention Act 1987 ;(s-3(2))

6) Commission of Sati (Prevention) Act 1987 ;(s-4(1))

7) The Narcotic Drugs and Psychotropic Substances Act 1985 ;(s-31a).

8) The Scheduled Castes and Schedules Tribes (Prevention of Atrocities)Act 1989;(s-3).

In most of these cases capital punishment is available merely as the upper limit of a full range of punitive strategies. However section 121 (Waging war against state) and section 302 (IPC) present the judge with a limited dichotomous choice between only two possibilities, death and life imprisonment and section 303 makes the death sentence mandatory[380] for a person who commits murder while under sentence of imprisonment for life. Generally, however, the only context in which capital punishment is of any practical importance is that of section 302, which provides –"Whoever commits murder shall be punished with death or imprisonment for life"[381] and shall also be liable to fine. According to the authors of the Penal Code:

Capital punishment ought to be very sparingly inflicted and they propose to employ it only in cases where either murder or the highest offence against the state has been committed……To the great majority of mankind nothing is so dear as life, and they are of the opinion that to put robbers,ravishors and mutilators on the same footing with murders is an arrangement which diminishes the security of life. These offences are almost committed under such circumstances that the offender has it in his power to add murder to his guilt…As he has almost always the power to murder, he will often have a strong motive to murder, in as much as by murder he may often hope to remove only witness of crime which he has already committed. If the punishment of the crime which he has already committed be exactly the same with the punishment of murder, he will have no restraining motive. A law which imprisons for rape and robbery and hangs for murder, hold out to ravishers and robbers a strong inducement to spare the lives of those whom they have injured. A law which hangs for rape and robbery, and which also hangs for murder, holdsout, indeed, a strong motive to deter men from rape and robbery, but as soon as a man has ravished or robbed, it holds out to him a strong motive to follow up his crime with a murder.

The Penology of transportation for life was expanded by Macaulay, the author of the Draft Penal Code in following terms:-

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380 The provision has been struck down by the supreme court in Mithu v. State of Punjab AIR 1983 SC 473.

381 51 sections of IPC provide for sentence of life imprisonment. Those sections are! Sections 121, 121-A, 122, 124-A, 125, 128, 130, 131, 132, 194, 222, 225, 232, 238, 302, 304, Part 1, 305, 307, 311, 313, 314, 326, 329, 393-A, 364, 371, 376, 388, 389, 394, 395, 396, 400, 409, 412, 413, 436, 438, 449, 459, 460, 467, 472, 474, 475, 477, 489-A, B & D and 511.

The pain which is caused by punishment is unmixed evil. It is by the terror, which it inspires so much terror in proportion to the actual pain, which is caused as the punishment of transportation in this country. Prolonged imprisonment may be more painful in the actual endurance, but it is not so much dreaded before hand, nor does a sentence of imprisonment strive either the offender or the bystanders with so much horror as a sentence of exile beyond the Black water. This feeling arises chiefly from the mystery which overhang's the fate of the transported convict. The separation resembles that which takes place at the moment of death. The criminal is taken for ever from the society of all who are acquainted with him, and conveyed by means of which the natives have but an indistinct notion, over an element which they regard with extreme awe to a distant country of which they know nothing, and from which he is never to return them with a deep feeling of terror. It is on this feeling that the efficacy of the punishment depends and this feeling would be greatly weakened if transported convicts frequently return, after an exile of seven or fourteen years, to the scene of their offences and to the society of their former friends[382].

Capital Punishment As Exclusive Or Alternative Punishment.

The judicial choice on the matter of sentence is predicated by the normative boundaries set by the measures;-

(a) Which prescribe particular punishment or punishments for specific crime situations, and
(b) Which set procedural guidelines for working the punitive norms.

Section 302 of IPC provides a choice between the death penalty and life imprisonment for the offence of murder and section 235(2) of criminal procedure code obligates the giving of a hearing on the question of a sentence after the issue of conviction is decided which makes it obligatory for the judiciary to take note of. To record ''special reasons'' in case of choice of death, provide the legal frame work relevant, for the application of death sentence.

Recording Reasons: A Procedural Safeguard

When the conviction is for an offence punishable with death or, in the alternative with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and in case of sentence of death the special reasons for such sentence. In short, the provision of S 235(2), Cr.P.C. is that once on the basis of evidence before the court, the trial judge comes to a conclusion that the guilt of the accused has been proved beyond doubt, then the judge has to inform the accused about the fact that he is going to be convicted and then give a chance to the accused to place such circumstances or factors about himself that he may think will help mitigate the case against him so that the court may consider the factors put forward by the accused to sentence him to a lower term of punishment. The provisions of section 235(2) have been held by Supreme Court to be mandatory, particularly in death penalty cases. This was the ratio of the Supreme Court in *Santa Singh v. State of Punjab*[383], where non-compliance with Section 235(2) was held to be an irregularity. The court explained the reason thus: -

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382 39th Law Commission Report, para 4, p.2.

383 AIR 1976 SC 2386.

The reason is that a proper sentence is the amalgam of many factors such as the nature of offence, the circumstances – extenuating or aggravating – of the offences or offence the prior criminal record, if any, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, sobriety, and social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of return of the offender to normal life in the community, the possibility of treatment or training of the offender the possibility that the sentence may serve as a deterrent to crime by the offender or others and the current community need if any, for such a deterrent in respect to the particular type of offence. These are factors, which have to be taken into account by the court in deciding upon the appropriate sentence. The court then considered the meaning of the term hear the accused in section 235(2), Cr.P.C. and held that the term meant that the accused and the prosecution could not only place oral arguments but also other evidences for consideration by the court to arrive at an appropriate sentence. If it was limited only to hearing oral arguments, the court noted that, "hearing would be rendered devoid of any meaning and it would become an idle formality".

In *Allauddin Mian* v. *State of Bihar*[384]. The Supreme Court once again considered the issue of effect of coalition of the mandatory provision of section 235(2) in another death penalty case. The court held that the requirement to hear the accused was based on the consideration that it should satisfy the rules of natural justice. The court elaborated: -

It is a fundamental requirement of fair play that the accused who was hitherto concentrating on the prosecution evidence on the question of guilt should on being found guilty, be asked if he has anything to say or evidence to tender on the question of sentence. This is all the more necessary since the courts are generally required to make a choice from a wide range of discretion in the matter of sentencing … … The said provision therefore satisfies a dual purpose: it satisfies the rules of natural justice by providing the accused an opportunity of being heard on the question of sentence and at the same time helps the court to choose the sentence to be awarded… … there can be no doubt that the provision is salutary and must be strictly followed.

The Supreme Court went on to state that as a general rule trial courts should, after recording conviction, adjourn the matter to a future date and call upon both the prosecution, as well as, defense to place the relevant material bearing on the question of sentence before it and thereafter, pronounce the sentence to be imposed on the offender.

In the case before the court, such procedure had not been followed. The court also found that though the murders were of two young children, the accused had not intended to kill the children. They had meant to attack the children's father. However, as he escaped from the place the children became unintentional targets of the range of assailants at the escape. Further, the motive for the offence, viz. that there was a fight between children which resulted in their being murdered was held to be obscure and not believable. Hence, following the Supreme Court's directions given in Machi Singh's case[385] the Supreme Court converted the death sentence to one of life imprisonment. However, the conviction for murder under section 302 was confirmed.

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384 AIR 1976 SC 2391-92

385 AIR 1983 SC 957.

Death Penalty Not A Rule But an Exception

When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years the judgment shall state the reasons for the sentence awarded and in the case of sentence of death the special reasons for such sentence are to be regarded by the court.

Section 354 was brought into Cr.P.C. necessitating the court to give special reasons for awarding death sentence. This was in contrast with the earlier provision which made death penalty the rule, in case the court came to the conclusion of guilt of murder against the accused, and the requirement that the court was required to give special reasons only when awarding life sentence. Thus, the amendment in 1973 in the form of present provision makes it mandatory for the court sentencing to death to record the special reasons. Thus the existing law, life imprisonment is made the normal sentence for murder and death sentence is allowed for murder and death sentence is allowed to be passed only in exceptional cases.

There is yet another procedural safeguard provided in the context of award of death sentence. Section 366, Cr.P.C provides that once the sessions court awards death sentence, then the court has to submit it to High Court for confirmation. This is meant to provide a second level of review of the evidence so that the extreme penalty may be considered afresh by a high forum. Under section 368 the High Court may confirm the sentence, or pass any other sentence warranted by law or annul the conviction. If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit commute the sentence to imprisonment for life (section 416).

Thus the sentencing discretion accorded by section 302 can be understood in two ways. The first relates to the range of sentencing alternatives, and second relates to the range of sentencing rules or guidelines to operate the choice. The IPC provides the death penalty in three distinct patterns; section 303 and 307 relate to two offences for which the death penalty is the sole form of punishment, Section 302 is the second pattern where death penalty is with only one alternative, i.e., life imprisonment, the third pattern is followed in respect of offences under sections 132, 194 (IPC) where death penalty is the maximum to be applied along with a wide range of other minimum sentences.

The principle behind existing capital offences may not show any common element at first sight, but a close analysis reveals that there is a thread linking all these offences, namely, the principle that the sanctity of human life must be protected. It is the "willful exposure" of life to peril that seems to constitute the basis of a provision for the sentence of death[386].This principle is clearly evident in the case of offences under section 302(IPC) and is reflected in the other offences also. Thus, the offence under section 121(IPC) is a capital one, because it threatens the very existence of an organized government, which is essential for the protection of human life. The offence under section 132 is again, a capital one, because it aims at the destruction of the very forces, which are intended to protect the machinery of the state in the last resort. Again, the offence under section 194(IPC) is punishable with death, on the logic that the person concerned gave false evidence with the intention of, or knowledge of likelihood of, deprivation of innocent human life. Under section 305(IPC) where the crime is really one of homicide, but committed indirectly, the offender does not take the life with his own hands, but encourages a person who can not look after his own interests, to end his life. The hand

386 35th law commission Report, Para 77, p.34.

that does the actual act of killing is merely a tool in the hands of another. The person killing himself is one around whom the law is compelled to throw its special cloak of protection[387].

The offence under section 307(IPC) is one where the attempt is not successful, the disregard of the sanctity of human life is, however, apparent here also, as is reinforced by the requirement that the act must be such that if the offender would be guilty of murder. The sentence of death however can be awarded only where hurt is caused and the person offending is already under sentence of imprisonment for life.

The offence under section-396(IPC) is a specific case of vicarious liability in respect of the sentence of death. The section requires that there must be five or more persons who are co-jointly committing "dacoity". Joint liability under this section does not arise unless all the persons are co-jointly-committing dacoity and the murder was committed in so committing a dacoity[388].

Capital Punishment For Joint Liability Offences

Liability to death sentence may arise in certain situations though the actual act of killing was done by another person. These cases may be referred to as cases of "vicarious" or "constructive liability".

The liability in joint liability cases and award of death sentence has been discussed in the various sections of IPC.[389]

The vicarious liability in all these cases is justified on the ground that the person concerned is a party to the offence, though his physical participation is indirect. The mensrea, in this context is represented by the required of "common intention" or of aid conspiracy of instigation which constitutes "abetment" or of conspiracy simpliciter, or of "common object", or "co-joint" commission of a dacoity.

"Section 149 reads as – if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly or such as the member of that assembly know to be likely to be committed in prosecution of that object, every person, who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence".

In many cases, sections 34 and 149 may overlap. However the common intention which is the basis of section 34 is different from common object which is the basis for unlawful assembly. Section 34 applies where the facts disclose an element of participation of action on part of the

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387 35th law commission Report, Para 80, p.35.

388 35th law commission Report, p.36.

389 Section 34, IPC Act done by several persons in furtherance of common intentions of all. Sections 109 to 115, IPC Abetment.

Section 120 B, IPC Punishment for criminal conspiracy.

Section 149, IPC every member of unlawful assembly is guilty of offence Commited in prosecution of common object. Section 396, IPC Dacoity with murder. According to section 396, if anyone of the five dacoits commits murder in committing dacoity, every one of them is punishable with death etc.

accused persons. The act may be different and may vary in their character, but they all are actuated by the same common intention.

"Common intention" in section 34, pre-supposes a pre-concerted plan, i.e., a prior meetings of minds though it is not necessary that there should be long interval between the plan and the act. The common intention may even be developed on the spot. The net result under section 34 is that the common intention and participation in the crime make the person concerned guilty of the offence.

Under section 149, the central fact on which the liability of the person other than the actual doer of the act depends is the "common object" coupled with the requirement expressed by the expression "knew to be likely to be committed". This expression imports, at least an expectation founded on facts, known to the members of the assembly, that an offence of the particular kind committed would be committed. The impact of section 149 lies in this, that the person whose case falls within the terms of section can't put forward the defense that he did not commit the crime with his own hands. In cases to which section 149 applies, the sentence is matter of discretion.

Capital Punishment In Practice

The practice of imposing and enforcing death penalty demonstrates that vast use is made of the death penalty. During 2001 according to Amnesty International estimates more than 3000 offenders have been executed in 31 countries and more than 5000 offenders have been sentenced to death in 69 countries. For 1996 alone, in China some 4400 executions have been recorded and more than 6100 death sentences have been confirmed .The current annual number of executions still puts China in the top rank of death penalty retaining countries. Recently in February 2013, the Asian Centre for Human Rights (APHR) has said 1,455 persons were given death penalty in India between 2001 and 2011 which meant one death sentence in less than every third day. The Asian Centre for Human Rights Report; the state of death penalty in India (2003) observed that as per the records of the National Crimes Records Bureau (NCRB) of the Union Ministry of Home Affairs,,1,455 convicts or an average of 132.27 convicts per year were given death penalty during the ten year period. During the same period ,the highest number of death penalty was pronounced in UP 370,Bihar 132,Maharashtra 125,Karnataka and Tamil Nadu 95 each, Madhya Pradesh 87,Jharkhand 81,West Bengal 79,Delhi, 71,Gujrat 57,Rajasthan 38,Kerala 34,Odisa 33,Haryana followed next with 31 death sentences ordered, followed by Assam21, Jammu and Kashmir 20, Punjab 19, Chhatisgarh 18, Uttaranchal 16, Andhra Pradesh 8, Meghalaya 6, Chandigarh and Daman and Diu 4 each, Manipur and Himachal Pradesh 3 each, Tripura and Puducharry 2 each and Goa 1.In rest of the states- Arunachal Pradesh, Mizoram, Nagaland and Sikkim and Union Territories of Andaman and Nicobar Islands, Dadra and Nagar Haveli and Lakshadweep-no death sentence was pronounced the report said. This implies that on an average one convict is awarded death penalty in less than every third day in India. Thousands of convicts remain on the death penalty row. This is established by the fact that during 2001 to 2011, sentences of 4,321 persons were commuted from death penalty to life imprisonment with the highest number of commutation in Delhi 2462, followed by up 458, Bihar 343, Jharkhand 300, Maharashtra 175, West Bengal 98, Assam 97, Odessa 68, Madhya Pradesh 62, Uttaranchal 46, Rajasthan 33, Tamil Nadu,Punjab,and Chhattisgarh 24 each, Jammu and Kashmir 18. The AHRC has called for abolition of death penalty pleading that the execution of Nathu Ram

Godse for assassinating Mahatma Gandhi has not acted as deterrent against assisnation of many prominent political leaders, including Indra Gandhi and Rajiv Gandhi. According to the National Crime Record Bureau, In 2001 a total of 36,202 murder cases were registered in India. Though the population of India increased from 1.028 billion in 2001 to 1.21 billion in 2011, the murder cases indeed reduced to 34,305 in 2011.[390]

International and European Penal Policies And The Death Penalty

The development of the European perspectives on the death penalty is first of all visible in the adoption of the 6th protocol to the European Convention on Human Rights in 1982.The 6th Protocol provides for the complete abolition of death penalty in peace time by all the member states of the European Convention. In 1994, the Assembly of the Council of Europe recommended adoption of a further protocol to the European Convention on Human Rights, which seeks complete abolition of the death penalty even in military laws and during wartime. Protocol 13 to the European Convention for the protection of human rights and fundamental freedoms, which provides for the total abolition of death penalty in all circumstances, was open for signature on 3, May 2002.

The European position towards the death penalty is characterised by the goal of complete abolition of the death penalty and the establishment of legal standards that preclude reinstatement of the death penalty in Europe .The position is grounded in the conviction that the death penalty is cruel, degrading and inhuman punishment which infringes the basic human rights expressed in Article 3 of the European Convention on Human Rights and in Article 3 of the Universal Declaration of Human Rights .In 1989,the Assembly of United Nations adopted the 2nd optional protocol ,to the International Covenant on Civil and Political Rights which states that those countries which do sign the 2nd protocol ,death penalty may not be imposed anymore. In June 1990,the Assembly of the organization of American States adopted the protocol to the American Convention on Human Rights on abolition of death penalty .In this protocol ,member countries are urged to abolish death penalty ,though an obligation to do so was not introduced .

Problems of Imposing and Enforcing the Death Penalty From A Human Rights Perspective

The assessment of legal frameworks and the practice of the death penalty from Human Rights perspective has to consider two levels. First of all, there is a need to discuss basic arguments that must be brought forward in favour of complete abolition of death penalty .Then beyond these basic arguments ,particulars of imposing and enforcing the death penalty have to be taken into account. The latter have to be considered from a Human Rights perspective on the processes of trial, sentencing, enforcement, sufferings, pain, agony and terror inflicted on an individual who is sentenced to death or executed which seems to be excessive because:--

1--There exist other less drastic and better suited means to convey messages of deterrence and moral disapproval,

2--The death sentence cannot be imposed in a consistent and non arbitrary way,

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390 Press Trust of India ,Feb 14,2013.

3--The procedure of putting a person to death is associated with additional and illegitimate suffering and terror (death row syndrome),

4--Permanent exclusion through a violent death is breaking the basic rule which demands the recognition of each person as a subject and the right for not being treated as an object.

Although ,the European Court of Human Rights until now has not explicitly commented on the compatibility of the death penalty with Article 3, of the European Convention of Human Rights, the judgement in the Soering Case [391]shows that death penalty is considered to be not compatible with Article 3,[392]as the European Court has stated in Soering Case that lengthy procedure and therefore long stays on death row make the verdict violative of Article 3. There does not therefore, seem to exist an acceptable procedure leading to death penalty and executions. Necessarily, procedures in compliance with rule of law ,adequate provisions of appeal and adequate clemency rules will lead to considerable periods of time spend on death row.

The principled way of rejecting the death penalty as an acceptable criminal penalty ---also in cases of the most serious crimes ---can be explained through a mix of normative and empirical arguments which can be traced back to the 18th and 19th centuries when---under the influence of philosophy and enlightenment and the work of Beccaria and Voltaire---the abolitionist movement became an essential part of the European Criminal Law Reform. These arguments characterise the death penalty as inhuman, cruel and unproportional punishment, which is opposed to the basics of civil and civilised society guided through the goal of continuously reducing institutionalised and legal violence. On the other hand, the death penalty is seen as an unproportional and therefore unacceptable punishment not in compliance with the principle of the rule of law. The consensus as regards objections against the death penalty that can be observed in Western Europe underline the significance of the arguments.[393]The principled way of concluding that the death penalty amounts to inhuman and cruel punishment is derived from a view on criminal penalties which accept only such punishment that acknowledges the position of all criminal defendants as subjects. With that ,criminal penalties cannot be accepted which aim at the permanent exclusion of an offender from the society .However with these ideas it is also accepted that attitude towards criminal penalties and assessment of what amounts to cruel ,inhuman or degrading punishment are subject to continuous change. But, today, everywhere, political, cultural and social achievements have been made which make the violent and permanent exclusion of criminal offenders from the community through putting him or her to death superfluous and therefore unproportional. This position is backed up by evidence that can be derived from comparative research on the deterrent properties of various criminal penalties.There exist well- developed alternatives that provide adequate protection to the public and that convey deterrent messages as well and even better than does the death penalty. With growing evidence that deterrent

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391 European Court of Human Rights 7-7-1989,series a,vol.161

392 State v. Makwanyane and Mchunu, judgement of the constitutional court of south Africa of 6 june,1995,case which declared that death penalty in South Africa to be unconstitutional on the ground of representing ,cruel .inhuman and degrading punishment.

393 The position against the death penalty taken by the major criminal law associations(association international de Droit Penal)as expressed in revue international de droit penal.la peine de Mort.the death penalty.

benefits may not be drawn from executing offenders, infringements on the right to life become clearer and more visible with every unnecessary execution. However as Schabas pointed out ,the death penalty still remains in a legal twilight zone as abolition standards have not yet reached the status of customary international law ,while on the other hand there exists a growing body of international documents which aim at abolishing and restricting the death penalty.[394]

An assessment of the death penalty is then also dependent on those standards that have been adopted by the United Nations.[395]and that are equivalent to those expressed to European standards. These standards should guarantee, that----

1—The death penalty is applied only in cases of the most serious, intentionally committed crimes which had deadly or other serious, consequences.

2—The death penalty is not imposed on juveniles /young people;

3—The death penalty is not imposed on offenders judged to lack mensrea or to be mentally retarded;

4—The death penalty is enforced only where the possibility of wrongful judgements is excluded;

5—The death penalty is imposed after a fair trial-in particular after a trial during which the possibilities of defence were available for the criminal defendant;

6—The death penalty is enforced only after automatic appeal and compulsory clemency proceedings;

7—The death penalty is enforced only if appeal procedures are finalised and the verdict became final;

8—Executions are done with inflicting the least pain possible.

These standards demand to restrict the death penalty to the most serious crimes and to guarantee the principle of equal treatment in meting out punishment as well as the demand for a fair trial.[396]

Equal Treatment, Arbitrariness and Death Penalty

It is clear from the study of the decisions of the higher courts on the life – or – death choice that judicial adhocism dominates the sentencing exercise and the infliction of death penalty suffers from the vice of arbitrariness caprice. The judges have been awarding death penalty or refusing to award it according to their own scale of values and social philosophy .It is apparent from a study of the judicial decisions that some judges are readily and regularly inclined to sustain death sentences others are similarly disinclined and the remaining waver from case to case. Even in the Supreme Court there are divergent attitudes and opinions in regard to the imposition of death sentence. If a case before one bench consisting of judges who believe in social efficacy of capital punishment, the death sentence would in all probability be confirmed but if the same case happens to be before another bench who are morally and ethically against death

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394 Schabas, W.A;the death penalty as cruel treatment and torture; capital punishment in the worlds courts(Boston ,1996) ,p.4.

395 UN safeguards guaranteeing protection of the rights of those facing the death penalty, approved by the Economic and Social Council through Resolution 1984.

396 Xia Yong;''Death penalty and the most serious crimes''—a comment from international perspective.''legal expert seminar held in Beiging on 19 and 20 october 1998 (wien,2000),pp78-80.

penalty, the death sentence would most likely be commuted to life imprisonment. Profesor Blackshield has also in his article on ''capital punishment in India'' commented on the arbitrary and capricious nature of imposition of death penalty and demonstrated forcibly, that arbitrariness and uneven incidence are inherent in and inevitable in a system of capital punishment.

Death penalty amounts to absolute and irrevocable punishment. Therefore, the death penalty is faced with the problem of selecting those criminal offences which should be eligible for such absolute punishment. The problem is therefore related to the requirement to restrict the death penalty to such criminal offences which exhibit a degree of the very same degree of seriousness and, moreover, exhibit the degree of seriousness that excludes any necessity to consider other personal or situational sentencing factors, be they of a mitigating or aggravating nature. The absolute nature of the death penalty requires, therefore, on the side of criminal offending criminal offences that correspond in terms of seriousness to the absoluteness of death. Furthermore, it must be guaranteed by way of procedural and substantive laws, that is no other factors than the criminal offence itself plays the important role in imposing and enforcing the death penalty. Seen from the traditional trends, these problems have led to restrict the death penalty only to first degree murder. This will reduce the discretionary power available to courts in imposing the death penalty. In order to reduce problems associated with discretionary justice, the goal consists of determining statutorily such offences that are so serious that all other sentencing criteria have to be found to be irrelevant, as seen from theoretical and legal perspectives . Therefore the goal consists of the attempt to reduce uncontrolled discretion of the criminal courts .

The Imposition Of The Death Penalty And The Right To Have A Fair Trial

The right to have a fair trial includes the right to have efficient defence. This right is seriously at risk in most retainist countries in particular in case of those defendants who do not have the means to be represented by their own lawyer. In this case, criminal defendants are dependent on the assignment of a defence counsel by the criminal court; however official assignment of a defence counsel is usually late during the criminal procedure and shortly before the trial,which must be regarded to be too late, insofar , efficient defence in case of serious crime, necessitates that a defence counsel is assigned immediately after arrest. The importance of this is underlined by the low and precarious educational and socio-economic position of those allegedly having committed death penalty criminal offences carrying death penalty.

The Death Penalty And The Possible Errors In Judgement

The history of all criminal justice systems demonstrates very clearly that there is always the possibility of wrong judgment and wrong convictions cannot be avoided .That is why all criminal justice systems based on the rule of law have introduced legislation that provide for opportunities to correct faulty decisions after the judgement became final. In many criminal justice systems the process of abolishing the death penalty was fuelled by debates on wrong judgements that have led to the execution of innocent people. Recent research in the U.S has confirmed the significance of the problem of executing the death penalty states. Out of this group 358 have been executed. However, between 1977 and 1997 the rest individuals convicted and sentenced to death have been freed (after spending 15 to 10 years on death row) because ultimately evidence could be produced which proved their

innocence.This amounts to approximately 1 innocent individual found among 50 persons sentenced to death.

Recently on 7th September, 2012 in India the Supreme Court has admitted the admission of error in the sentencing to death 13 convicts. A group of 14 former judges of eminence has, in appeal to the president, sought his intervention to commute the death penalty awarded to the convicts, using his powers under Article 72 of the constitution.[397]Thus the goal to reduce possible errors in judgement is usually pursued through review of death penalty cases in the Supreme Court.

The Death Penalty And The Question Of Deterrence

Until today there is no convincing evidence that crime trends could be influenced through the threat,imposition or enforcement of the death penalty.Numerous studies based on the comparison of countries and regions with or without death penalty, analysis of time series interrupted through abolition or reinstatement of the death penalty rather consistently underline that the death penalty does not have an impact on the general crime rate nor on specific type of crimes such as murder.[398]The studies carried through by Ehrlich in the seventies and exhibiting a rather strong deterrent effect of the death penalty(with estimates that up to 7/8 murders could be prevented by a single execution)have been seriously flawed by the skewed distribution of execution data. In a replication of the Ehrlich study Bowers and Pierce did not find evidence of deterrent effects when excluding the last five years from regression analysis. However, it must be underlined that those legislative bodies which create death penalty laws and empower courts to mete out the death penalty have to bear the burden of proof as regards the deterrant effect of executions. If the deterrant effect of death penalty cannot be proven ,then the death penalty have to be regarded as unproportional and to infringe therefore unnecessarily upon human life.

Conclusion

The legal framework and the practice of death penalty in retainist countries are faced with considerable problems as seen from a human rights perspective;

1—The death penalty amounts to cruel and inhuman punishment as the death penalty does not comply with today's standards on criminal penalties; the death penalty infringes on the right of life and the dignity of man;

2—In the face of the current social and economic state of development, the threat and enforcement of the death penalty is not any more, this is underlined by moves towards abolition in various countries in Central Europe and Southern Africa;

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397 Frontline,September,7,2012(Indias National Magazine)

398 Hood ,R;The death penalty. A world wide perspectives(oxford 1996),pp.180-212

3—There is no scientific evidence supporting the deterrant effects of capital punishment, long prison sentences will have at least the same degree of deterrant effect as has the death penalty. Therefore threat and enforcement of death penalties are unproportional and excessive punishment;

4—The threat of the death penalty as available in many criminal code books is seen from the goal to restrict the death penalty to the most serious crimes;

5—The offence statutes which carry the death penalty sometimes allow for the extensive discretion to the criminal court in the decision of whether to impose the death penalty or other punishment. Extensive discretion brings about problems in terms of discriminatory selection and equal treatment most probably resulting in disparity across time, across offences as well as offenders and across jurisdictions.

Ms. Rehana Shawl*

* B.Sc, LL.M, Lecturer, Kashmir Law College, Nowshera, Srinagar.

Special Economic zone: Reality and Conflict

Abstract

In this era of globalization, most developing countries are witnessing a shift away from an import substitution based development strategy to an export promotion policy. In pursuance of this policy, countries are vigorously promoting Special Economic Zone. A Special Economic Zone (SEZ) is a geographical region that has economic laws more liberal than a country's typical economic law. In India, Special Economic Zone are being established in an attempt to deal with infrastructural deficiencies procedural complexities, bureaucratic hassles and barriers raised by monetary, trade, fiscal, taxation, tariff and labour policies. Government of India in April 2000 announced the introduction, Special Economic Zone policy in the country. As of 2007, more than 500 Special Economic Zone have been proposed, 220 of which have already been created. The Special Economic Zone Act, 2005 and the Special Economic Zone Rules, 2006 were introduced to regulate and promote the development of these industrial enclaves. The Act designated the Special Economic Zones a duty free enclave to be treated as foreign territory only for trade operations and duties and tariffs. Under the Act, no license is required for import and no routine examination is to be conducted by the custom authorities of the export/import cargo. The Act provides the exemption to Special Economic Zone units and to Special Economic Zone developers from all indirect tax, including basic customs duty and import policy in forces. In this paper an attempt will be made to examine the various concerns related inevitably to SEZs like land Acquisition, environment and the judicial response towards SEZs. The paper will also examine the various provisions of Special Economic Zone Act, 2005 and will be followed by suggestions.

Keywords: Special Economic Zone, Single Window Clearance Land Acquisition, Environmental Impact Assessment.

Introduction

A dominant economic theme in the last quarter of this century has been the process of globalization and a progressive international economic integration of the world economy. The movement is towards widening international flow of trade, finance and information in a single integrated global market. Globalization has the fundamental attribute of increasing the degree of openness in most countries. The underlying rationale for globalization is free flow of trade, finance and information that will produce best outcome for growth and human welfare.[399]

In India several attempts have been made to liberalize the system of economic management. In 1980s the Indian Govt. focused on reorganizing low-efficient state run enterprise and partial disinvestment, relaxing the control on private enterprise and foreign capital, introducing competitive mechanism, reducing protection for domestic industries,

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399 Chakravarthy, S., "*Competition Policy and the WTO- for Developing Countries, Productivity*",vol.40 No2, July-Sep,1999,p175.

promoting and importing advance technological equipment from abroad etc. In 1991, the reformative trade and industrial policy eliminated licensing requirement for private domestic and foreign investment in certain industries and relaxed the restriction under the Monopolies and Restrictive Trade Practice, Act on expansion, diversification, mergers and acquisition by large firms and industrial houses. Special Economic Zones came in pursuance of this export lead growth strategy. SEZ is conceived of as an engine to economic growth of the country. It is meant to attract investment into the country. It generates foreign exchange through export of goods and service. It is expected to provide huge employment opportunities. Thus SEZ were announced by the Govt. of India in April 2000 as part of the Export-Import policy of India. The policy provided for setting up of SEZ in the public, joint sector or by state Governments. The Special Economic Zone Act, 2005 and the Special Economic Zone Rule, 2006 were introduced under this policy to regulate and promote the development of these industrial enclaves. In this paper, an attempt is made to analyze the provisions of SEZs Act, 2005. The author would be analyzing impact of SEZs on land Acquisition Act, Environmental laws. The issues that mainly addressed in this paper are:

- What is the role of judiciary in interpreting the provisions of SEZ.
- Is land Acquisition Act 1894 sufficient to deal with the situations raised by SEZ.
- Are environmental laws applicable in SAZ.

Special Economic Zone or SEZ refers to a totally commercial area specially established for the promotion of foreign trade. A SEZ is a geographical region that has economic laws more liberal than a country's typical economic laws. Usually the goal is to flourish foreign investment. In other words SEZ are specially delineated enclaves treated as foreign territory for the purpose of industrial, service and trade operations, with relaxation in custom duties and a more liberal regime in respect of other levies foreign investments and other transactions.[400]In SEZ all undertaking other than the small scales industrial undertaking engaged in the manufacture of items reserved for manufacture in the small scale sector are required to obtain an industrial license and undertake an export obligation of 50% of annual production. This condition of licensing is however, not applicable to those undertakings operating under 100% Export Oriented Undertaking Scheme, the Export Processing zone (EPZ) or Special Economic Zone Schemes (SEZs).

The Salient Features of the Indian SEZ

- The Indian SEZ policy provides for development of these Zones in the government, private, or joint sector. This is meant to offer equal opportunities to both Indian and international private developers.
- 100 percent FDI is permitted for all investments in SEZ, except for activities included in the negative list.
- SEZ units are required to be positive net foreign exchange earners and are not subject to any minimum value addition norms or export obligation.
- Goods flowing into the SEZ area from a domestic tariff area (DTA) are treated as export, while goods coming from SEZ into a DTA are treated as import. In addition to the

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400 Essar Steel v. union of India AIT 2009 p 460-HC.

duty exemption, the units in the India SEZ do not have to any income tax from the first 5 year and only pay half their tax liability from the next two. SEZ developers are enjoying a 10 year, "tax holiday". The size of an SEZ varies depending on the nature of the SEZ. At least 50 percent of the area of multi-product or sector-specific SEZs must be used for export purpose. The rest can include Mall, hotels, education institution etc. Besides providing state-of-art infrastructure and access to a large, well trained and skilled work force, the SEZ policy also provides enterprises and developers with a favorable and attractive range of incenentives.

- Facilities in the SEZ may retain 100 percent foreign-exchange receipts in Exchange Earners Foreign Currency Account.
- 100 percent FDI is permitted for SEZ franchisees in providing basic telephone service in SEZs.
- No cap on foreign investment for small-scale sector reserved items which are otherwise restricted.
- Exemption from industrial licensing requirement for items reserved for the small-scale-industrial sector.
- No import license requirement.
- Exemption from customs duties on the import of capital goods, raw materials, consumables spares etc.
- Exemption from central Exercise duties on procurement of capital goods, raw material, and consumable spares, etc. from the domestic market.
- No routine examination by customs for export and import cargo.
- Facility to realize and repatriate export proceeds within 12 months.
- Profit allowed to be repatriated without any dividend-balancing requirement.
- Exemption from Central Sales Tax and Service Tax.

Incentives for SEZ developers

The incentives for developers of SEZ include:

- Exemption from duties on import/procurement of goods for the development, operation and maintenance of SEZs.
- Income Tax exemption for 10 years in 15 years.
- FDI to develop township within SEZ with residential, educational, health care and recreational facilities permitted on a case by case basis.[401]

In *Muthoot Technopolies v. The Tahasildar, kanayannur Taluk*[402] ,wherein the Kerala High Court in a review petition held the co-developer in Cochin SEZ is not eligible for the benefit of exemption under the provision of Kerala Building Tax Act. In this case the petitioner has taken on lease a portion of the land coming within the Cochin SEZ, where they have constructed a commercial complex; the petitioner has no case that it has been issued a letter of approval as provided for Sec. 3(13) of SEZ Act 2005. The mere fact that they have

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401 Jona Aravind Dohramann, "*Special Economic Zone in India-An Introduction*", ASIEN 106 (January 2008), S.60-80.

402 Judgment delivered by Antony Dominic, judge kerela High Court on 30 January 2008. Available at :http// indian kanoon.org/search/? Forminpu t= judgment+oln+SEZ.

constructed the building within the Cochin SEZ will not confer on them the statutes of a co-developer.

In *Reliance Industries Ltd. V. Designated Authority*[403], the Supreme Court observed that the SEZs are given several relaxations of customs and other duties including anti-dumping duty.

Requirement for establishment of SEZ

The SEZ can be setup jointly or individually by the Central Government, a state government or any other body, including a foreign company for the purpose of:

1. Manufacturing goods,
2. rendering service,
3. for both of these reasons, or
4. as a Free Trade and Warehousing Zone(FTWA)[404]

Any person, who intends to set up a SEZ, may after identifying the area, make a proposal to the state govt. concerned for that purpose.[405]

The SEZ Rules specify the minimum land area that is required for selling up an SEZ in general. This requirement depends on the type of SEZ to be established.[406]

Section 3(3) provides that "notwithstanding anything contained in Sub-Sec.(2) any person, who intends to set up SEZ, may, after identifying the area, at his option, make a proposal directly to the Board of Approval for the purpose of setting up the SEZ. Where such proposal has been received directly from a person under this sub-section, the Board may grant approval and after receipt of such approval, that person concerned shall obtain the concurrence of the state Government within the prescribed period."

In *Mohan Lal Sharma v. Union of India*[407], the Court observed that any person who intends to set up SEZ, after identifying area is entitled to make a proposal to state Govt. concerned for the purpose of setting up SEZ. On the receipt of such a proposal the state govt. has to consider question as to whether proposal put forth is visible or not. State Govt. cannot turn down the proposal on the ground that better proposal for setting up SEZ are likely to be received under scheme of contract Act of 2005.

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403 2006 (10) 3 SCC 368.

404 Section 3 of Special Economic Zone Act, 2005.

405 Section 3(2) of Special Economic Zone Act,2005.

406 (a) Multiproduct (sec7 para 2) SEZ Rues, 1ooo Hectors or more,
(b) Sector-specific electronic hardware or soft, IT, gems & jewellary, biotechnology,nonconventional energy, etc. - 100 Hectors or more,
(c) Free trade &warehousing Zone 40- Hectors or more.

407 AIR 2007 Raj. 245.

Court further held it is not necessary that before permitting any person to set up SEZ tenders should be invited or advertisement should be published as would be in case of disposal of ordinary property belonging to the state.[408]

In *Sasikumar P. v. State of Kerala*[409], the question was whether possession of the minimum requirement extend of 25 acres of land is a condition precedent for making application under the SEZ Act, the Kerala high court observed that under the provision of the SEZ Act, although minimum extend of land has prescribed in rule 3 of the SEZ Rule, 2006, possession of the property does not appears to be a condition precedent to make a proposal for establishing a SEZ.

Development commissioner

The central Govt. may appoint any of its officers not below the rank of Deputy Secretary to the Government of India as the Development Commissioner of one or more SEZs.[410] According to Sec.12 of SEZ Act he is required to be incharge of the SEZ and to exercise administrative control and supervision over the officers and his assistant employee. He is directly responsible to the Central Govt. The Development Commissioner is also something like a link person between the central and the state govt. He is required to guide the entrepreneurs in setting up unit in the SEZ and to ensure and take suitable steps for the promotion of export from the SEZ.[411] Furthermore, he has to monitor the performance of the SEZ. In *Ahmed Ehteshem kawkab v. The Govt. of India*[412], in this case the validity of appointment of Development Commissioner under the SEZ Act was in question before the High Court of Andhra Pradesh, it was held that director, Software Technology Park of India, Hyderabad, could not be equated to an officer not below the rank of deputy secretary. Therefore, the appointment of Director STPI as development commissioner was held invalid.

Constitution of Administrative Authorities and bodies for Regulating the SEZ &SEZ Units

The SEZ Act provides for the constitution of the following authorities and bodies to regulate the SEZs and SEZ Units.

1. Board of Approval
2. Development Commissioner
3. Approval committee
4. SEZ Authority.

Single Window Clearance Mechanism

The major feature of the Act is that it claims to provide expeditious and single window clearance mechanism. The responsibility for promoting and ensuring orderly development of SEZs is assigned to the Board of Approval. It is to be constituted by the central govt. while

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408 Ibid at p. 254.

409 Decided by Kerala High Court on 23 February, 2010.Avaiable at http://wwwindiankanoon .org/doc/69531/

410 Sec. 11 (1) of SEZ Act 2005.

411 Sec. 12 of SEZ Act 2005.

412 Decided by Anil R. Dave CJ, AP High Court on 18 Sep.2009.

the central govt. may suo motu set up a zone, proposal of the state govt. and private developers are to be screened and approved by the board. Matters that itself falls within the purview of single window clearance viz., setting up of unit in SEZ, cancellation of letter of approval to entrepreneur, setting up and operation of offshore banking unit, setting up of international financial service center, single application form, return etc. It also includes agency to inspect, single enforcement officer or agency for notified offences, investigation inspection search or seizure.[413]

Designated courts

In SEZ courts will be set up by the State govt. to try all suits of civil nature and notified offences committed in the SEZs. Affected parties may appeal to the High Court against the order of the designated courts.[414]

Land Acquisition for Special Economic Zone

The most contentious issue surrounding SEZ is land. For the establishment of SEZ large extend of land is acquired under the land Acquisition Act, 1894. The acquisition under this Act can be conveniently divided into three broad categories:

(i) Acquisition for the benefit of general purpose or national purpose.

(ii) Acquisition for economic development and industrial growth.

(iii) Acquisition for planned development of urban areas.

In acquisition falling under first category, the general public are the direct beneficiaries. In the second category the beneficiaries are industrial or business houses and third category, the beneficiaries are individual members of public. At present irrespective of the purpose, all cases of acquisition, the land losers get only monetary compensation. There is a general feeling among the land losers that their land are taken away, to benefit other classes of people, that their land are given to others for exploitation or enjoyment, while they are denied their land and their source of livelihood.[415] Under this said Act the farmers are being paid disproportionate money which is not in lieu of current land price.[416] The Act does not address the issues of rehabilitation and resettlement to the affected persons and families. Thus a Land Acquisition (Amendment) Bill, 2012 was introduced but still pending in the Cabinet. In *Bondu Ramaswamy v. Bangalore Development Authority,*[417] the Supreme Court emphasized the need for revisiting the century old land Acquisition Act. The Supreme Court held:

Our suggestion and observation are intended to draw attention of the government and development Authorities to some probable solution to the vexed problem associated with

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413 Secs.13-22 of the SEZ Act 2005.

414 Secs.23-24 of the SEZ Act 2005.

415 Bondu Ramaswamy v. Bangalore Development Authority (2010)7SCC p151.

416 The example could be seen in case of farmers from kalinganagar in Orissa where the money give was disproportionate to high as 1:10 with respect to the market rate.

417 (2010)7 SCC 129.

Land Acquisition, existence of which can neither be denied nor disputed, and to alleviate the hardship of land owners. It may be possible for the govt. and development authorities to come up with better solution.

The Apex court also observed:

Where the acquisition is for industrial or business houses (for setting up industrial or SEZ etc.), the Govt. should play not only the role of a land acquirer but also the role of the protector of the land losers. The land acquisition collector should become Grievance Settlement Authority. If the govt. or development Authorities acts merely as facilitators for industrial or business houses, mining companies and developers or colonizers, to acquire large extent of land ignoring the legitimate rights of land owners, it lead to resistance, resentment and hostility towards acquisition process.

The Supreme Court in *Sagunthala (dead) through Lrs v. Special Tehsildar*[418] ruled that the purpose for which land is being acquired will be one of the most important factor in determining its market value as well as award of compensation. While announcing enhancement of the compensation to the land owners from Rs. 75,000/ per acre, awarded by the Madras High Court, to Rs. 1,75,00/ per acre, the court noted, the purpose for which the acquisition is being made is an important factor.

An extent of 196 acres of land were acquired for the purpose of expansion of Tamil Nadu Magnesite limited, a state owned company various notifications under 4(1)of land Acquisition Act 1894 were issued in the month of February, March and May 1984. In connection with giving compensation for the acquisition, the land acquisition officer had fixed the market value at the rate of Rs. 18,000/ per acre for irrigated dry land and Rs. 15,000/ per acre for unirrigated dry land in a ward no.1 to 9 and 11 of 1986. As the claimants felt aggrieved by and dissatisfied with the award, they asked for reference under Sec 18 of the land Acquisition Act. The reference court after considering the documentary and oral evidence, treated the land as potential house sites and fixed the market value at Rs. 1,75,000/ per acre.

With this judgment the Apex Court by implication has held that SEZ land is acquired for a commercial purpose and therefore, the market value of such land has to be determined accordingly. The land acquired for public purpose may have a different market value.

Environmental issues relating to SEZs.

Industry is the central to economics of the modern societies and indispensable motor of growth. It is essential to developing countries, to widen their development base and meet the growing needs. Industry extracts material from the natural resources base and insert both product and pollution to the human environment. It has the power to enhance to degrade the environment, it invariably does both.[419] The negative environment impacts of industrial activity were perceived as localized problems of air, water and land.[420]Under the existing laws, environmental impact assessment (EIA) is mandatory for certain projects. ESI ascertain the likely impact on the environment of the proposed project. SEZ are exempted from

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418 AIR 2010 SC. 984.

419 Our Common Future _ The World Commission On Environmental and Development, 206 (1987).

420 Id. At 203.

mandatory EIS and thus projects involving setting up of port, airport and power plant in the SEZ will be exempted from the requirement of public hearing as mandated under the EIA. [421] The units, which are classified as non-polluting industries, do not require a consent letter. The development commissioner can give clearance without consulting the pollution control board. The units are permitted to submit a compliance report for maintaining prescribed pollution standards. Although the development commissioner has power for random check, the units within the SEZ are free to follow their own methods to maintain environmental standards. In *Ranuha V. Union of India*, the court directed the respondents to immediately stop developing the land in question allotted to them within the revenue limits of the village Navinal ,Shiracha, Talluka,Mundra falling within Mundra port and SEZ till prior environmental clearance is granted to Mundra port and SEZ by Ministry of Environment and Forest, Government of India. In Karnataka Industrial Area Development Board V. C. kenchappa[422], the respondents had filled the writ petition against the appellant seeking direction from the court to refrain from converting the lands of the respondents for any industrial purpose as their would came them great hardship and would have an adverse impact on the environment of the village. Supreme Court allowed the appeal and emphasized that before acquisition of land for development, the consequences and adverse impact of development on environment must e properly comprehended and the lands be acquired for development that they do not grave impair the ecology and environment . The court further directed that obtaining clearance for industrial project from the State pollution Control Board and Department of ecology and environment before putting up the industry shall be considered mandatory.[423]

Conclusion

When the govt. undertakes a project or policy in a democratic country then the people have reasonable expectation to be benefited without any kind of detriment to any section of the society. SEZ policy is not out of this test. The current approach to SEZ land Acquisition Act 1894 with the state as its heart fails the test of Solcial justices . After all underlying philosophy behind is to generate more employment and advance to the cause of equitable development. The present trend to set up SEZs shows that agricultural land are taken up for establishing industry even the approach to SEZ land Acquisition Act 1894 with the State at its heart fails the test of social justices. In *Bondu Ramaswamy V. Bangalore Development Authority*, [424]the Supreme Court emphasized the need for revisiting the century old land Acquisition Act.

The Environmental Impact Assessment Notification 2006 has ignored the SEZ Act 2005, the SEZ Rules 2006 and SEZ policy there are sharp inconsistencies with regard to the clearance process and decision making authorities under the EIA norms and the single window clearance process under the SEZ legislation also SEZ is exempted from public hearing under Environmental Impact Assessment Notification.

Suggestions:

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421 Environmental Impact Assessment notification 2006. Sec.3.

422 (2006)6 SCC 371.

423 Id. At 203.

424 Supra note 19.

1. Corporate social responsibility is a concept that suggests that corporations have a duty of care to all of their stakeholders in all aspects of their business operations. The corporations should be obliged to make decisions based not only on finance or economic factors but also on the social, environmental and consequences of their activities.

2. SEZ must be put under the scanner of sustainable development as it is being emphasized world wide that development be it social, economic or political must bear substantial value. SEZ must be so formulated that they can ensure production of goods and service in a continuous basis, avoidance of sectoral imbalance, restraint from over exploitation of natural resources, maintenance of biodiversity, atmospheric stability, achievement of distributional equity, adequate provision of natural resources, maintenance of biodiversity, atmospheric stability, achievement of distributional equity, adequate provision of social service and the like. If these aspects are taken care of with comprehensive and proper deliberation than SEZs can generate sustainable value.

3. Government should have increase trade duties and tariff in SEZ for the purpose of revenue.

4. Government should see the problems of farmers affected by the adverse effect of SEZ.s

Gulafroz Khan*

* lecturer , DDE University of Kashmir, hazaratbal, Srinagar

Development of Medical Services under Consumer Protection Act- Vis-à-vis Recent Judicial Trend in India

ABSTRACT

Earlier, the Liability of doctors would be fixed only when negligence on their part was proved. However, over the last one decade or two, there have been huge strides in the area of medical jurisprudence. What, in fact, happened is that the dilatory procedure, technicalities involved and expensive nature of remedy under tort law, and the consequent indifferent approach to the patient care forced the world community to prescribe newer norms of consumer protection vis-à-vis the medical negligence. In India also, the transition lead to the Supreme Court's liberal interpretation of the word 'service' in the Consumer Protection Act, 1986, a landmark social-welfare legislation in the country. The case of Indian Medical Association against V.P Shantah and others, where in the Supreme Court refused to grant a protected status to medical services and treated them at par with other services of consumer nature, is a milestone on the point. This paper is an attempt to analyze the whole phenomenon of medical negligence in India and the extent of liability therefore vis-à-vis the current judicial trend. Besides pointing towards certain flaws in the supreme court's Indian Medical Association judgement and the overall inconsistent judicial approach in the area, the paper argues that a consistent judicial approach is called for to protect the poor patient from the apathy of the men in white.

Keywords*:* Consumer Protection, Medical Negligence, Medical Profession, Medical Service

Introduction

Medical profession, which is one of the noblest professions, is not immune to negligence which at times results in death of the patient or complete or partial impairment of limbs or culminates into misery. There are instances wherein most incompetent or ill/ under- educated doctors, on their own volition, have made prey of innocent patients. The magnitude of negligence or deliberate conducts of the medical professionals have many a times led to litigation. Needless to mention here that a person engaged in some particular profession is supposed to have the requisite knowledge and expertise needed for the purpose and a duty to exercise reasonable care in the conduct of his duties. Medical profession is considered to be the most pious profession wherein a doctor is placed only second to Almighty God for rendering humanitarian service.[425]

However, the dilatory procedures, technical bottlenecks, the expensive nature of the remedy for tort liability dissuade people either in filing a suit in tort and pursuing it, to fill. This is also revealed by the analytical survey of tort litigation in India during the period of 1975-1985 made by prof. Galanter. During this ten year period a total of 416 reported tort cases were decided by the High Courts and Supreme Court, out of which 360 cases were related to claims under Motor Vehicles Act and only three to mal practices. This situation even prevailed in respect of consumer sales and services, in most countries of the world. The

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425 Rajiv Kumar Khare: *Law of Torts, Medical Negligence and Consumer Protection* (Published by Centre of Consumer Studies and Indian Institute of Public Administration, 2010) at 22.

sale of spurious goods, adulteration, sub-standard servicing has become a common practice resulting in sufferings of common people. It was in this backdrop that U.N General Assembly in 1985 passed Consumer Resolution[426]. By this resolution guidelines were adopted to provide framework of governments particularly those of developing countries for strengthening Consumer Protection policies and legislations. It was in this background Consumer Protection Act (herein after called CP Act) 1986 was passed in India. The Act provides for the protection of consumer interest through speedy and inexpensive means. The medical services have been brought within the scope of C P Act 1986, by a Supreme Court judgment of 1995.[427]

Professional Services

Medical profession no doubt, belongs to a noble profession. But this profession is distinguished from an occupation on the ground that unlike a medical profession, an occupation is substantially the production or sale or arrangement for the production or the sale of the commodities. The word profession used to be confined to three learned professions i.e the Church, Medicine and Law.[428] With the increase in the number of the professions the distinctive features have rather blurred. As far as professional liability is concerned, seven[429] specific occupations have been conferred the status of profession[430].

The professional man should possess certain minimum degree of competence and exercise reasonable care in the discharge of his duties. The courts have required from a professional man a duty in tort, as well as, in Contract to exercise reasonable care in giving advice or performing services to his clients. The cover of immunity enjoyed by certain professions has been narrowing. Medical practitioners do not enjoy any immunity and have been made liable in tort as well as in Contract for being negligent or not exercising reasonable care in the exercise of their professional duty. The courts have at the same time taken note of the factors that intervene in medical services, beyond the control of doctors and have also left room for chances of failure in medical services. Thus, the standard of care required of a doctor was prescribed in *Mc. Nair in Bolen v. Friern Hospital Management Committee*[431] in the following words:

"…….where you get a situation which involves the use of some special skill or competence, the test as to whether there has been negligence or not is not the test of the man on the top of a 'Claphan Omnibus', because he has got this special skill. A man need not possess the highest expert skill. A man need not possess the highest expert skill it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."

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426 Consumer Protection Resolution no. 39/248 dt. 9-4-1985.

427 *Indian Medical Association v. Shantha and others,* 1995 (II) CPR 412, delivered at 13th Nov. 1995.

428 See *Commissioner of Inland Revenue v. Max,* 1919 (1) KB 647 at 657.

429 These are Architects, Engineers and Quantity Surveyors , Surveyors, Accountants, Solicitors, Barristers, Medical Practioners and Insurance Brokers.

430 Roger P.D. Stewart: *Jackson and Powell on Professional Negligence* (Sweet and Maxwell editor, 3rd Edition, 1992) at 1-10 and 1-13.

431 1957 (1) WLR 582 at 586 .

In India the Supreme Court has laid down the standard of care required of a doctor when it said,

"A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge of the purpose. Such a person when consulted by a patient owes him certain duties, viz, a duty of care in deciding what treatment to give or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for the negligence to the patient. The practitioner must bring to his task a reasonable degree of care. Neither the highest nor the very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires."[432]

Thus, the law laid down reasonable and just standard of care as a requirement to defend action for negligence. It moderates the interest of both medical practitioners, by not requiring the highest standard of care and that of the patient by not letting the medical practitioner free to show carelessness amounting to negligence. We have heard of cases of removal of a wrong limb or a wrong eye, or performance of an operation on a wrong patient or giving injection of a drug to which the patient is allergic without looking at the outpatient card containing the information, or use of wrong gas during the course of administering anesthesia, or leaving swabs or other items of operation such as, scissors and scalps inside the patient after the surgery. These are cases of gross negligence and need to be dealt with severely.[433]

Development of Medical Services in India: Conflicting Judicial Trends

In the present dynamic world, it is impossible to make available the services without charging any fee or without understanding the commercial viability of a service oriented organization. This does not necessarily mean that we generate profits by exploiting the users or prefer profiteering. The Consumer Protection Act tries to regulate any deficiency in service or defects in goods rendering to a consumer. It may be required to be compensated by award of the just equivalent of the value or damage for loss. The definition has indeed been kept very wide and only two types of services have been kept out of the ambit of this Act. They are services rendered free of charge and services rendered under a contract of personal service.

It is only the recipient of services for consideration who is entitled to avail of remedies provided by Consumer Protection Act in the event of any deficiency in them. The provisions of the consideration are therefore the basic requirement for involving the jurisdiction of Consumer protection Act. It is in this background that various conflicting judicial decisions have been pronounced.

In *CUTS .v. State of Rajasthan*[434] the National Commission held that the persons who avail themselves of the facility of medical treatment in government hospitals are not consumers and the said facility offered in government hospitals cannot be regarded as services rendered for consideration. It was argued before apex commission that the taxes paid by the citizens should be treated as a consideration for the services rendered by the

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432 *Lakshman Bala Krishna Joshi v. Trimbak Bapu Godbole and Another* 1969 (1) SCR 206 at 213

433 A. M. Matta: *Medical Negligence and Consumer Protection Law- Recent Trends*, KULR 1996 Vol (III), at 98.

434 1991 (1) CPR 64.

government through its doctors. After all, doctors are paid from the consolidated funds of the Government which infact is the revenue collected from the citizens of the India.

Guided by the pronouncement of the Supreme Court[435], the National Commission held that the legal position must now be taken to be well settled that unlike a 'fee', 'tax' in its true nature is a levy made by a state for the general purposes of the government and it cannot be regarded as payment for any particular or special service. The commission further held that it is undoubtedly true that the Government in the welfare state is under a duty to provide various forms of facilities to citizens and the expenditure incurred thereon will have to be met from out of the consolidated funds of the state, it cannot be said that a tax levied for the general purposes of the state constitutes consideration for any specific facility, benefit or services provided by the states.

The decision of the National Commission in CUTS case was not considered in consonance with spirit of the Consumer Protection Act by the consumerists and voluntary organizations. Since people lack resources for undergoing treatment in private hospitals, they have no option but to avail of services provided in Govt. Hospitals or by Charitable institutions free of charge. Thus one of the objective to provide cheap remedy to consumers was frustrated by this interpretation.[436] The above decision was criticized by various consumer activists and organizations for the reason that in a welfare state the taxation performs an altogether different role. The amount collected is used not only on meeting expenses on traditional functions of the government but also on social welfare functions. It was in this perspective that the problem had to be approached and resolved. This was unfortunate that at one stroke the commission had provided exemptions to a vast number of governmental acts from liability under the Consumer Protection Act. This decision has "sounded the death knell of emerging consumer jurisprudence in the country but nevertheless has been followed in later cases.

The report of the working group, constituted to suggest suitable amendments to the Consumer Protection Act suggested[437]

"*Some services like health services in hospitals run by Government and local bodies and services provided on mandatory basis by local bodies, housing schemes need to be brought within the purview of the Act as they affect the lives of the citizens."*

The second controversy concerns applicability of the CP Act to private doctors, hospitals and nursing homes which too, has started primarily due to the conflicting decisions pronounced by the some of the state commissions. In *Gulam Abdul Hassan .v. katta Pullaiah Chowdary*[438] the main issue involved was whether the services made available by a doctor for consideration to a potential user could come under the definition of the term service under the Act? The A.P state commission answered the question in the affirmative. The state commission accordingly observed that "if a doctor makes available his service to potential

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435 *Commissioner Hindu Religious Endowments Madras v. Sri lakashmi Indra* 1989 3 SCR 437.

436 Farooq Ahmed: *Medical Mal Practices and Consumer Protection: Paradox or Parallax,* KULR 1999 Vol (1), at 69 - 72.

437 Ministry of Civil Supplies and Public Distribution Constituted a High power working group on 7/1/1992 to consider various suggestions to make Consumer Protection Act and MRTP Act more effective.

438 1991(I) CPR A.P 499.

users for a consideration that is no reason why such services shall be excluded from the definition of 'service' under the Act."

The above decision of the A.P High Court was followed by the Kerala state commission in *Vassantha P. Nair .v. Messra Cosmopolitian Hospitals (p) ltd*[439] and ultimately found favour with the National Commission in *Cosmopolitan Hospitals .v. Vassantha P. Nair*[440]. *The* National commission by its decision in the above case had endeavored to set at rest, at least for the time being, the controversy concerning the governance of the private medical practitioners, hospitals and the nursing homes by the CP Act 1986.

But this decision of the National commission in *Cosmopolitan Hospitals case* evoked strong criticism from the whole medical fraternity; it was also followed by a large number of similar decisions by various state commissions where medical professionals have been found guilty of professional misconduct / negligence. Though the National Commission in above case has authoritatively resolved the controversy regarding the applicability of the CP Act to members of the medical profession whose services are hired for the consideration, the matter was still being agitated by members of the profession before HC's and the SC's. It was argued that the dichotomy of private hospitals and Government hospitals is not justified. Such discrimination in applying the CP Act to private hospitals and excluding Government hospital from its ambit is violative of Article 14.

These arguments are considered by the division bench of Madras HC in *Dr. C.S. Subramanian v. Kumarsawamy and others*[441] and the court held that the services rendered to a patient by a medical practitioner or a hospital by way of diagnosis and treatment , both medical and surgical, would not come within the definition of "service" under section 2(1) (0) of the CP Act, 1986 and the patient or his representatives-in-interest will not fall within the definition of "consumer" in section 2(1) (d) of the Act. The word 'consumer' and 'service' defined should be construed to comprehend consumers or services of commercial and trade oriented nature only in the context of an unfair or restrictive trade practice and not otherwise. The court said even if, for arguments sake, a patient undergoes treatment or avails the services of a medical practitioner or hospital in respect of diagnosis and treatment, it answers the description of the consumer and that the services rendered to him qualify as 'services' for the purpose of the Act, such service other than paramedical service, would fall within the exclusionary clause "contract of personal service" under section 2 (1) (0) of the Act and as a result would be outside the purview of the CP Act, 1986.

This judgment of the Madras High Court shook the consumer and consumer bodies throughout the country. Legal luminaries raised doubts about its correctness and wisdom. Unsatisfied with the reasoning furnished by the Madras HC for its conclusion the issue was brought before the apex *court in Indian Medical Association .v. V.P. Shantha and others.*[442]

The apex court overruled the Madras HC's judgment in Dr. C.S. Subramanian case and upheld the judgment of the national commission in M/S *Cosmopolitan Hospitals and Another .v. Smt Vassantha P.Nai*r and removed all the doubts that were entertained in respect of

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439 1991 (II) CPJ Ker 444.

440 1992 (I) CPJ 302 NOC.

441 1994 (II) MLJ 438.

442 Supra note 3 at, 412 - 429.

inclusion or exclusion of medical services within the ambit of the CP Act. The court refused to grant a protected status to medical services and treated them at par with other services of consumer nature.

It was held that the medical practitioners, though belonging to the medical profession are not immune from a claim for damages on the ground of negligence. The fact that they are governed by the Indian Medical council Act and are subject to the disciplinary control of the Medical council of India and / or state medical council is no solace to the person who has suffered due to their negligence and the right of such a person to seek redress is not affected.

The court expressed its inability to subscribe to the view that merely because medical practitioners belong to the medical profession they are outside the purview of the CP Act and that the services rendered by them are not covered by section 2(1) (0) as construed by it earlier *in Lucknow Development authority .v. M.K .Gupta cas*e,[443] It found no reason to cut down the width of that part so as to exclude the services rendered by the medical practitioner from its ambit under section 2 (1) (0). The court in this case said that "…it applies to any service made available to the potential users."

The court disagreed with the Madras High Court and held that a relationship between the medical practitioner and a patient carries within it certain degree of mutual confidence and trust and therefore the services rendered by a medical practitioner can be regarded as services of the personal nature but since there is no relationship of master and servant between the doctor and the patient, the contract between the medical practitioner and his patient cannot be treated as a "contract of the personal service" but is a "contract for services" and consequently not covered by the exclusionary part of the definition of "services" contained in section 2(1) (0) of the Act. In a contract for service one is not subject to the detailed direction and control but exercises professional or technical skill and uses his own knowledge and discretion as is the case with the doctor patient relationship. A contract of service, on the other hand, implies relationship of master and servant and involves an obligation to obey orders in the work to be performed and as to its mode and manner of performance. The parliamentary draftsman was well aware of this difference while choosing the expression "contract of service" instead of "contract for service" in the exclusionary part of the definition of "service" in section 2(1) (0) of the Act.

The court while diverting to the second part of the exclusionary clause which relates to services rendered free of charge said that the doctors and the hospitals who render service without charge would not fall within the ambit of "service" under section 2(1) (0) of the Act. This constitutes the first category of the service. The payment of a token amount for registration purposes would not alter the position. In the second category where the doctor or the hospital renders services on payment basis to all the persons they would clearly fall within the ambit of section 2(1) (0) of the Act. In the third category where free services is provided to some patients belonging to poor class but the bulk of service is rendered to the patient on payment basis, the expenses incurred for providing free services being met out of the income for services rendered to the paying class, such services to the paying patients undoubtedly fall within the ambit of section 2 (1) (0) of the Act. In as for as patients who

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443 1994 (I) SCC 243.

receive medical services without charges from the third category of the hospitals or doctors the services are not covered by the exclusionary clause of section 2(1) (0) of the Act. The reason being that all persons who avail the services by doctors and hospitals of this category are required to be treated on the same footing irrespective of the fact that some of them pay for the service and others avail the same free of charge. The expenses involved in such free services are met out of the charges recovered from paying patients by doctors and hospitals working on commercial lines. In such a situation the person belonging to "poor class", who are provided services free charge are the beneficiaries of the service which is hired or availed of by the "paying class." The beneficiaries fall within the scope of consumer under section 2 (1)(0) of the Act.

Any deficiency in the service of the medical practitioner or a hospital whether diagnostic, surgical or treatment which results in injury to the patient would give rise to liability of the former to the latter. The compensation awarded is for the loss or injury suffered by the consumer due to negligence of the opposite party. A determination about deficiency in service has to be made by applying the same test as is applied in an action for negligence. This interpretation is supported by the reliefs that can be granted on a complaint filed under the Act in respect of deficiency in service. One of the alternative reliefs that can be granted is:

"*payment of such amount as may be awarded as compensation to the consumer for any loss or injury suffered by the consumer due to negligence of the opposite party."*[444]

Thus, the cardinal test for liability of medical practitioner under the CP Act is the same as is applied by civil courts in case of liability for negligence in case of tort.

The Supreme Court has upheld the liability of medical practitioners and denied them any special status or immunity on whatever grounds. The argument that such liability of medical practitioners would result in huge increase in medical expenditure on account of insurance charges which the medical practitioner would be forced to effect and an increase in defensive medicine was rejected by the court. The argument that the medical practitioners may refuse to attend to medical emergencies and that there will be no safeguards against frivolous and vexatious complaints[445]. And consequent blackmail could not carry any weight with the court. The court found sufficient safeguard against frivolous and vexatious litigation in the Act itself.[446]

The ruling of the Supreme Court that the medical services rendered by doctors etc. in governmental hospitals or nursing homes free of charge do not fall within the definition of 'service' does not convince in logic. After all in such cases we are not invoking provisions of the sale of Goods Act, relating to conditions and warranties in respect of goods sold. Under CP Act, it is not only the goods but also the services made available to the potential users that are covered for the purposes of the consumer interest. In cases falling under the CP Act, the

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444 Section 14 (I) (d).

445 These apprehensions were based on Lord Dennings observations in M.R in *White House v. Jordan and another*, 1980 ALL ER 650 at 658 in respect of situation in U.S.A.

446 *K. Jayaraman v. The Poona Hospital and Research Centre and Ors* ,1994 lawteller 542 as the complainant could not prove any damage suffered by him in the respondents hospital. No negligence was proved.

test of liability continues for negligence which need not occur only in those cases where services are rendered on payment but may take place in free services as well.

There is no justification in a welfare state to exonerate a medical practitioner from liability for negligence while serving in a government hospital or nursing home simply on the ground that his salary is being paid by the government and user of such services does so free of charge. The Supreme Court rejected this argument on technical grounds. However if the exclusionary clause in so far as it excludes free service from the ambit of services under section 2(1)(0) of the CP Act is challenged there are sufficient arguments for declaring it ultra vires Art 14 of the constitution and also in breach of the D.P's of state policy. [447]

Once the injury through medical negligence is equated with the injury through an industrial or motor accident, it becomes easier to argue that 'payment for services' should not be the criterion for liability of medical practitioners under the CP Act. After all medical negligence is tantamount to criminal act simultaneous being a criminal wrong. In civil law liability has even been admitted without negligence. In strict liability no proof of negligence is required. Hence it should be no defence to an action for liability under the CP Act that the services was provided free of charge. It is after all a tort (civil) liability through a speedier and an inexpensive remedy; the beneficiaries intended definitely are the poor people. It would be ridiculous if this remedy is denied to them on account of their poverty. If sweets distributed free among the children by a philanthropist are found to be contaminated due to his carelessness resulting an injury to a children, can he escape liability simply because he did not charge for sweets. The answer is in negative. In the same manner, a doctor working without charge or working in a governmental hospital where medical services are not at all charged for, should not be allowed the defense of 'free service' to an action for compensation under the CP Act, particularly when we are committed to social welfare state. Holding otherwise would give a license to medical practitioners working in Governmental hospital, to play with the lives of poor people. This is perhaps one of the reasons why standard of medical services in governmental hospitals has deteriorated.

Recent Judicial Trend

Explaining the nature of deficiency in some more cases by the various consumer forums and by Supreme Court, various other methods have been brought within the purview of medical services like surgical operations, inefficient treatment, lack of care etc. For instance, in *Suresh Nanda .v. Dr. Anoop Kumar,*[448] wife of the complainant died after undergoing laparoscopic surgery, no pre-operative blood tests and other clinical tests like ECG were conducted and she was not declared fit to undergo surgical procedure. The respondent who was a surgeon not a physician or medical specialist was not fully competent to declare her fit for surgery particularly with regard to cardiac parameters. Opposite party failed to establish pre-operative test which were necessary to declare her fit. Result was she died. Commission held him liable and said this omission is a glaring act of deficiency in service on part of respondent doctor. Compensation of Rupees 5,20,000 along with cost of rupees 50,000 was

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447 Articles 38 and 47 of the Indian Constitution.

448 2012 (2) CPR 52 NC.

awarded. In one more recent case, *Kusum Sharma v. Batra Hospital* [449] the Supreme Court has settled the law relating to medical negligence. Mr. Dalveer Bandari, J., scrutinizing the cases of medical negligence both in India and abroad specially that of the United Kingdom has laid down certain basic principles to be kept in view while deciding the cases of medical negligence. According to the court, while deciding whether the medical professional is guilty of medical negligence, the following well-known principles must be kept in view:

1) The medical professional is expected to bring a reasonable degree of skill and knowledge must exercise a reasonable degree of care. Neither the very highest nor the very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.

2) A medical practitioner would be liable only where his conduct falls below that of the standards of the reasonably competent practitioner in his field.

3) In the realm of diagnosis and treatment there is a scope of genuine differences of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.

4) The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving a lesser risk but higher chances of failure. Just because a professional looking to the gravity of the illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount the negligence.

5) Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

6) It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessarily harassed or humiliated so that they can perform their professional duties without fear and apprehension.

7) The medical practitioners at times have also to be saved from such class of complainants who use criminal process as a tool for pressurizing the medical professional / hospitals particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.

8) The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and the welfare of the patients have to be paramount for the medical professionals.'

Very recently, *in Dr. Balram Prasad v. Dr. Kunal Saha,*[450] the Supreme Court awarded Rs.6,08,00,550 as a compensation to a US based NRI doctor for the death of his wife on the charge of gross medical negligence of four doctors and Kolkata's AMRI hospital. The Supreme Court made a far reaching observation, "*that the doctors, hospitals, the nursing homes and other connected establishments are to be dealt with strictly if they were found to*

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[449] 2010 (3) SCC 480.

[450] 2013 STPL (WEB) 850 SC 53 available at http://www.stpl-india.in/SCJFiles/2013_STPL(Web)_850_SC.pdf accessed on November 7, 2013

be negligent with the patients who come to them pawning all their money with the hope to live a better life with dignity. The patients irrespective of their social, cultural and economic background are entitled to be treated with dignity which not only forms their fundamental right but also their human right. We, therefore, hope and trust that this decision acts as a deterrent and a reminder to those doctors, Hospitals, the Nursing Homes and other connected establishments who do not take their responsibility seriously."

This historic judgement will have a major impact on medical negligence and standard of medical care in India. It is a strong message to all negligent doctors and unscrupulous hospitals that are reaping innocent patients everyday across India.

Earlier also, in May 2009, the Apex court had awarded a record compensation of Rs 1 crore to wheelchair-bound Infosys engineer Prashant S Dhananka for medical negligence in a surgery by Hyderabad's Nizam Institute of Medical Sciences (NIMS), which damaged his spinal cord. He died in 2011. In *Nizam institute of Medical science .v. Prasanth S. Dhananka,*[451] the complainant 20 years of age suffering from fever visited NIMS. He was advised to undergo through ultrasound guided biopsy for neurofibroma. Later the tumor was excised after an operation. Immediately after the surgery the complainant developed acute paraplegia with a complete loss of control over lower limb. He was ultimately discharged from the hospital in completely paralyzed form. The complainant filed an application before NC making NIMS vicariously liable and made a total claim of Rs. 4, 61, 31,152 including the amount paid to various hospitals. The NC directed the NIMS to pay Rs.14 lakhs to the complainant and compensation of Rs. 1.5 lakhs to the complainant's parents jointly. But the appeals were filed before the SC against the order of NC by NIMS disowning any liability and by the complainant asking for an enhancement of compensation.

While determining compensation to the complainant and his parents, the SC referred to *Harjot Ahluwalia (Minor) v. Spring Meadows Hospitals*[452] wherein it was held that the parents of the child having hired the services of the hospital, were also the consumers within the meaning of section 2 (1) (d) of the CP Act, and (ii) that they would also be entitled to the award of compensation due to negligence of doctors and the hospital.

Supreme Court held that complete investigation prior to the actual operation had not been carried out. The second question as to whether the consent required for the excision of the tumour had been taken from the complainant or his parents, it observed that since in the written submission which had been filed, a copy of the consent form of NIMS had been appended but not the actual consent taken from the complainant. SC noted that an implied consent for the excision of the tumour could not be inferred. SC ruled that in a case involving medical negligence, once the initial burden has been discharged by the complainant by making out a case of negligence on the part of the hospital or the doctors concerned, the onus shifts to the hospital or to the attending doctors and it is for the doctors to satisfy the court that there was no lack of care or diligence.

Conclusion and Suggestions

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451 2009 (II) CPJ 61 SC.

452 1998 (2) SCR 428.

Medical profession belongs to noble profession. As a professional man, doctor should possess a certain minimum degree of care and competence and should exercise reasonable care in the discharge of his duties. Medical practitioners are not immune from liability as they are liable in tort as well in contract for being negligent in not exercising reasonable care in the discharge of their duties after all, human life is to be respected and protected with concerned care. The law at the same time has laid down reasonable and just standard of care as a requirement to defend an action for negligence. it is noted that the professional negligence has been put on a higher pedestal, requiring thereby higher degree of skill and care to be exercised by the medical professionals. The journey of the law relating medical negligence has not been smooth. But for *V.P. Shantha, Jacob Mathew and Kusum Sharma cases,* the approach adopted by the courts/forums has shown inconsistency. This inconsistency leads to uncertainty in the minds of the defrauded consumers and make them little complacent about exercising their rights owing to apprehensions of their success at doorsteps of consumer forums/courts.

The Supreme Court's ruling that the Medical practitioners and the hospital providing the service free of charge are not liable under Consumer protection Act do not fall within the purview of the definition of Consumer under section 2 (1) (o) does not fit into the present day theory of social welfare. The ruling to that extent needs reconsideration. In any case if the exclusionary clause of section 2 (1) (o) of the Act, is thrown a challenge on grounds of its anti social and anti welfare nature, it is likely to fall like a house of cards.

Moreover, the two types of services i.e, services rendered free of charge and services rendered under a contract of personal service have been kept out of ambit of this Act, but it is only recipient of services for consideration who is entitled to avail of the remedies provided by Consumer protection Act in the event of any deficiency in them. The provision of the consideration is therefore the basic requirement for invoking the jurisdiction of the Act. It is submitted that in order to avail the benefit of this Act the word consideration should be so interpreted as to cover the meaning given to it under Section 2 (d) of the Indian Contract Act, 1872.

The recent Supreme Court's judgment has provided breathing space for medical practitioners. This should be utilized to reduce unethical practice, to improve doctor- patient relationship and to strive for service to the humanity. Therefore to achieve this, following suggestions are recommended.

- The Supreme Court in recent judgment states that Statutory Rules or Executive Instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or State Governments in consultation with the Medical Council of India.
- The 'Continuing Medical Education' [CME] workshops should be arranged by Medical Council of India / State Medical Council to refresh the knowledge of medical practitioners and to increase awareness among medical practitioners regarding newer technologies and developments in medical sciences, which will be beneficial to the patients and society at large.
- Medical Council of India should be strengthened and allotted more powers, including the creation of an independent investigating mechanism, to implement the different Acts and Rules as framed by Government of India.
- A panel should be formed by Medical Council of India / State Medical Council at each district level which will look after medical negligence cases. The panel should consist of three

members from medical profession, one from judiciary and one from social activist group. The private complaint regarding medical negligence should proceed to this panel first, which will study the matter in details. The same judicial procedure is to be followed as followed in cases of disciplinary control over medical practitioners and it must be time bound inquiry. After inquiry, if the medical practitioner is found guilty of medical negligence, it will provide punishment in the form of temporary or permanent erasure of the name of medical practitioners from the medical Register. The result of the inquiry will be informed to the complainant and the complainant will decide whether to file a case against the medical practitioner in court or not. This should also provide scientific basis for investigating agencies to proceed further as per law of the land.

- The role of disciplinary committee which looks after the violation of code of medical ethics is crucial as it is necessary in changing scenario to hold inquiry, *suo moto* regarding unethical practice among medical practitioner and take necessary action.
- Health education and awareness programme for people should be conducted and propagated through media so that common man should be educated regarding intricacies of human body, disease and treatment. This will help in reducing the litigation cases against medical practitioners.
- The limit of penalty imposed on opposite party, if the complaint made against medical practitioners is found to be frivolous or vexatious (as per the amendment in section 26 of the CPA in 1993) should be exceeded from present Rs.10000/- to Rs.50000/- so that frivolous complaints will be reduced.
- To prevent unnecessary defamation of the medical practitioners in society, a blanket ban should be placed on print media as well as on electronic media, so that the name of the doctor and hospital on whom allegations are made regarding medical negligence should not be exposed till he/she is found guilty and is convicted by the court of law.

Unanza Gulzar*

* Unanza Gulzar, lecturer at Kashmir Law College Nowshere, Srinagar. (Email id: Unanzagulzar@gmail.com).

Constitutional mandate of Comptroller & Auditor General of India (CAG)

Abstract

With the Comptroller and Auditor General of India (CAG) coming into limelight owing to its increased activity and dynamic approach, it becomes prudent to discuss the mandate officially allocated to CAG in the Indian Constitution. In the present write-up, an endeavour is made to analyse the mandate given by the 'law of the land' to the Indian state Auditor i.e CAG of India. This issue arose after recently retired CAG of India Mr. Vinod Rai took to the cudgels of Indian politico-administration. The CAG of India spread its functionality in areas which were till now untouched, thereby keeping the public authorities on their toes, who are at the helm of affairs. Recently, the institution of CAG of India has taken Indian Politico-administration by storm and its dynamic approach has been the nightmare for Congress led Government at the Centre. The CAG Audit reports have highlighted Corruption cases like never before in the Indian politico-administration. This has drawn some unpleasant and unsolicited remarks that are being made against the institution of CAG of India itself. The question marks over the institution of CAG are raised like, Is CAG a necessary evil or a bulwark of transparency?[453] The CAG Audit reports were followed by severe criticism, recently made in the media and the other public platforms. In the light of this debate, the paper examines and analyses the constitutional mandate of the supreme audit institution of the country i.e, the CAG of India.

Keywords: Comptroller and Auditor General, CAG report, Constitution, 2G spectrum scam.

Introduction

The Comptroller and Auditor General of India (CAG) is a constitutional body created under Article 148 of the Indian Constitution. The CAG carries out Auditing of accounts and transactions to ascertain whether Government fund has been spent for the intended purpose and no gross misuse of available fund was done by spending authorities. Auditing is done for the Legislative organ through which Executive organ of the Government becomes accountable to the people. In this sense, the CAG works as the custodian and guardian of public money. CAG ensures the fair expenditure of people's money therefore it acts as watchdog in politico-administrative functions. The institution of the CAG is created by the constitution in order to assist the Parliament in ensuring parliamentary supremacy over the executive.

The Comptroller and Auditor General of India. Constitutional Position

The Constitution of India and the CAG's Duties, Powers and Conditions of the service Act (DPC Act 1971) elaborates the CAG's duties, powers and jurisdiction with regard to the accounting and auditing functions of the government, comprising the Union, state and all

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453 Economic and political weekly, Vol. XLVII NO 43 Oct. 27, 2012.

Union Territories of the country.[454] Financial control of the administration is the bulwark of parliamentary democracy and for exercising financial control an independent audit agency is an essential pre-requisite. The office of the Comptroller and Auditor General of India is a Constitutional device to ensure parliamentary accountability, federal supervision and expert administration control over expenditure in the financial administration. For this the Constitution of India provides for a Comptroller and Auditor General of India (CAG) being appointed by the president.[455] The oath of office under the Constitution requires him/her to uphold the Constitution and the laws and to discharge the duties without fear or favour, affection or ill-will. The Constitution assures to the Comptroller and Auditor General constitutional independence and has also placed him beyond fear or favour of the Executive, whose transactions he is expected to audit. The CAG is an independent constitutional authority, not a plaything appended to parliament. When on May 30, 1949 the Draft Constitution was being discussed in the constituent Assembly, T. T. Krishnamachri moved a specific amendment adding 'Comptroller' to the title of the Auditor General for reasons which he believed to be 'fairly simple.' The C&AG's job was not merely audit but also to control the expenses of the government. It is for this reason that Ambedkar with his canny constitutional insights into financial accountability described "this dignitary or officer (as).....probably the most important officer in the constitution of India..... If this functionary is to carry out his duties-and his duties, I submit, are more important than the duties even of the judiciary- he should certainly be as independent as the judiciary..... I feel he should have far greater independence than the judiciary itself." Ashoka Chanda observes, "The Constitution of India redesignated the Auditor General as Comptroller and Auditor General, and made him along with the judges of the Supreme Court, an officer of the Constitution. The change in designation envisaged a system of control over exchequer issues hitherto absent in the financial administration of India."[456] This is an office about which Dr. Ambedkar said in the constituent assembly that it is "probably the most important office in the Constitution of India." About the duties of this office, Dr. Ambedkar said they are "far more important than the duties even of the judiciary" of its status he said it was deserving of "far greater independence than the judiciary itself."[457]

Under Articles 148 to 151 of the Constitution, the independence of the CAG is ensured, his salaries and allowance and the administrative expenses of his office, including salaries of officers and staff, are charged on the Consolidated Fund of India. He submits his reports as a result of audit to the President/Governor of the State who causes them to be laid before Parliament/the State Legislature as the case may be. These reports are remitted to the Central/State Public Accounts Commitees (PACs) which has to examine them. The members of the Public Accounts Commitee (PAC) both at the Centre and States, have no time to

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454 Parliament of India passed CAG DPC Act on 15 December 1971. The Act consists of 4 chapters with 26 Sections in total dealing with the Duties, Powers & Functions of the CAG of India.

455 Subhash C. Kashyap, Our Constitution,1994, p.220.

456 Ashok Chandra, Indian Administration, 1958 , p.244.

457 Dr B.R Ambedkar while addressing the floor of constituent Assembly debate on 30 May, 1949.

examine all paras and reviews of the audit reports and therefore a selective approach is adopted to examine them.

What is unfortunate, is that the CAG does not have any legal power to enforce action on his findings, to enforce recovery of loss of Government money, stores or property due to negligence of delinquent officials. He has no power of compelling Departments to take disciplinary or criminal action against defaulting officers. The CAG's (DPCS) Act, 1971 provides that the departmental officers should produce records asked for by audit and give replies to queries raised by audit. If, however, the departmental officers do not comply with these provisions, the CAG has no power to enforce compliance except to make mention of it in his audit reports. The position in audit matters in other countries like Japan, New Zealand, France, South Korea, China, Thailand, Australia, etc. where the supreme audit institutions have been vested with wide powers of investigation, enforcing recovery of loss of government money or property, imposing surcharge and compelling departments to take disciplinary or criminal action, as the case may be, against delinquent public servants.[458] The CAG of India is the CAG of the Union Government and also of the States. The State Accountant General (AG) under the CAG does not have any legal status. The State AG should be given the legal status equivalent to a Judge of the High Court, even though working within the general superintendence of the CAG of India as in other countries like the USA, Germany, Canada, Australia and the UK which have separate Auditor Generals in provinces. This suggestion is in line with the provision in the 1935 GOI Act and in the original draft of Constitution and the recommendation of the National Commission to Review the Working of the Constitution (NCRWC) 2002.[459]

Role of CAG of India under the Principle of "Can Attack Government".

Off late, the role of CAG in Indian context has gained the momentum ever since the dynamic approach adopted by the CAG of India. This has resulted in very significant observations and revelations about the gross misuse of Government Funds both at the Centre and State level in India. "It is shocking but true, every year the central government keeps increasing the expenditure on social sectors through transfer of funds to states and districts via its flagship schemes to help the poorest of the poor. It now transpires that it cannot audit that expenditure and hence has no direct way of knowing if the money is being spent for the purpose it is earmarked for. The Comptroller and Auditor General of India (CAG) has revealed that while it is mandated with auditing every rupee spent by the government of India, as many as over Rs. 80,000 crore of the tax payers' money spent in 2008-09 remained unaudited. The unaudited fund is almost 50 per cent of the plan expenditure,"[460] says the recently retired CAG of India Mr. Vinod Rai. Programmes like the Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA), Sarva Shiksha Abhiyan (SSA),

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458 Government Accountability and Public Audit- Re-engineering the Comptroller and Auditor General of India. pp 298-305 by B.P Mathur, Uppal Publishing House New Delhi, 2007.

459 ibid p 304.

460 CAG of India, MR. Vinod Rai in a Conference World Economic Forum. (Davos, Switzerland) March 14, 2012.

the Mid-Day Meal Scheme and National Rural Health Mission (NRHM), however, are being implemented through parallel channels of public private partnership (PPP), NGOs and Panchayati Raj Institutions (PRIs). Under the changed pattern, the government transfers central plan assistances directly to state and district level autonomous bodies, which is outside the budget of State government. Thus such accounts remain unaudited and unaccounted.

The Recent CAG reports has created a political storm and the ministers are sacked like never before in the Indian political system. The audit reports of 2G scam, NRHM scam, MGNREGA scam, Farmer loan waiver scam and recently Coalgate scam submitted by the institution of CAG have severely dented the image of the present Government all across the globe.[461] Observing this dynamic, dedicated and innovative approach assumed by the CAG of India, recently in year 2011, the International Atomic Energy Agency (IAEA) and World Intellectual Property Organisation (WIPO) appointed Vinod Rai the present CAG of India as its External Auditor.[462] *The office of the Comptroller and Auditor General is an essential instrument for enforcing the accountability of the executive to Parliament. It is wrong, as in the coal blocks and other recent cases, to cast aspersions on the CAG for pointing out the omissions and commissions of the government. The office of the CAG has done what it is expected to do as a guardian of national finance. Unfortunately the issue has got politicised with the leading opposition party upping the ante.* [463] However, the CAG of India has done its best to deal with the irregularities in the financial administration in India.[464]

Role of the CAG:- A Critical View in the light of "Cannot Attack Government"

While performing the watchdog function, the CAG enters into trivial and insignificant matters which are not necessary in many cases. CAG'S attitude towards spending authority has become negative. He starts finding faults and makes an issue of even insignificant matters. Hence the role of CAG has became as that of bloodhound. Watchdog function is positive in nature and is done with ease. Whereas bloodhound role is investigative or negative in nature. According to critics of CAG in India CAG is a fact finding work and not a fault finding mechanism.

The role and function of the CAG has recently been the subject of controversy, in regard to two issues: The first is, whether in exercising his function of audit, the CAG has the jurisdiction to comment on extravagance and suggest economy, apart from the legal authority for a particular expenditure. The traditional view is that when a statue confers power or discretion upon an authority to sanction expenditure, the function of audit comprehends a scrutiny of the propriety of the exercise of such power in particular cases, having regard to the interests of economy, besides its legality. But the governments departments resent on the

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461 India Today Jan, 25 2013. Yet another scam scam in UPA regime? CAG unearths misuse of armer loan waiver scheme funds.

462 The Hindu newspaper, October 1, 2011. CAG goes Global, yet another Jewel in crown for CAG of India.

11 "The Meaning of the Attack on the CAG" **Economic & Political Weekly. Vol - XLVII No. 37, September 15, 2012 | B P Mathur**

464 Simon Denyer "India's Cheif Auditor leads battle against Corruption**"** **Washington Post** Dec. 28, 2012.

ground that such interference is incompatible with their responsibility for the administration. "Auditors do not know and cannot be expected to know very much about good administration; what auditors know is auditing---which is not administration; their prestige is highest with others who do not know much about administration. Auditing is a necessary but highly pedestrian function with a narrow perspective and very limited usefulness."[465]

Another issue is whether the audit of the CAG should be extended in industrial and commercial undertakings carried on by the Government through private limited companies, who are governed by the articles of their association or to statutory public corporations or undertakings which are governed by statue. It was rightly contended by a former Comptroller and Auditor General (Mr. V.N Koul) that in as much as money is issued out of the consolidated fund of India to invest in these companies and corporations on 'behalf of the government, the audit of such companies must necessarily be right and responsibility of the CAG, while, at present, the CAG can have no such power unless the articles of association of such companies or the governing statues provide for audit by the Comptroller and Auditor General. The result is that the report of the CAG does not include the result of the scrutiny of the accounts of these corporations and the public accounts committee or Parliament have little material for controlling these important bodies, spending public money. This defect has been partially remedied by the Act of 1971 which enjoins the CAG to audit and report on the receipts and expenditure of 'Government companies' and other bodies which are 'substantially financed' from the Union or state revenues, irrespective of any specific legislation in this behalf. However, critics are of the view that the CAG's audit of Public undertakings is an effective instrument of parliamentary control, but the form, content and the approach of this audit have affected the efficiency and profitability of the public undertakings in India. The CAG report on the Bofors issue created a storm and the government in its turn attacked the report as well as the office of the CAG. The Deputy leader of the Lok Sabha, N. K .P. Salve, advocated the rejection of the report as such and went to the extent of personalizing the issue in a speech in the Parliament by calling the incumbent CAG, Mr. T.N. Chaturvedi, an outstanding civil servant, "that Charlie".[466] Coming to the recent controversy of 2G Spectrum scam, the CAG report has been severely criticised in year 2012 on the basis of presumptive loss report. The CAG of India presented a report in which it was estimated that Government has lost the Revenue of about 1.76 lakh crore rupees on the improper auction license bid of 2G Spectrum telecommunication.[467] However later on, it was found by the Government that no such loss was incurred after the fair auction bid of 2G license was held. The CAG is alleged to have entered into the domain of policy decision making, which is not a good sign of fruitful democracy.

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[465] P.H Appleby, Re-examination of India's Administrative system. p.28.

[466] It so happened the National Front Government of V.P Singh which came into power in January 1990, gave him the second highest national award, Padma Vibhushan on the eve of Republic Day.

[467] Economic Times Nov. 15, 2011. 2G scam presumptive loss of RS 1.76 Lakh Crores a "Mathematical Mistake."

Conclusion

The service rendered by the CAG is of inestimable value to safeguard the interests of the tax-payer. CAG is the supreme overseer of the government's financial activities on behalf of Parliament. Unlike Finance Ministry, the CAG of India does not control public expenditure. He only offers an objective-oriented mechanism which is conducive to popular control of public expenditure. "For the Comptroller and Auditor General to be criticised on the floor of the house would tend to undermine his special position under the constitution and would make it difficult for him to discharge his duties without fear or favour."[468] In a country like India where public expenditure is increasing at a fast pace year after year, there is both for the widening and for the intensifying of the role of the Comptroller and Auditor General for the better realisation of the democratic ideas embodied in the constitution. However, the role of the CAG should be of watch-dog's and not a blood –hound. For the past two years, the CAG has been pushing the Finance Ministry—its nodal ministry for crucial changes in the 1971 Audit Act. The accounting watch-dog's concern is that its mandate to summon files and examine the way public money is spent has not kept pace with new modes of governances that have emerged, especially since liberalisation. The CAG wants the DPC Act 1971 to clarify its powers to audit new forms of government economic activity such as public-private partnerships and joint ventures and new conducts of expenditure not envisaged when the law was first framed—such as the routing of money for the Sarva Shiksha Abhiyan, the NRHM and the MGNREGA through Panchayati Raj institutions and the non-governmental organisations. By some estimates, more than Rs. 80,000 crore is spent this way every year beyond the reach of the CAG's regular audit. Because the CAG doesn't audit this expenditure, Parliament too does not get to review how well this money is being utilised.[469] The CAG is not a spending authority. It must sense the necessity of every expenditure. There may be the chances of Funds spent beyond the sanctioned limit. However this extra spending may be important for achievement of purpose. CAG must consider this point and should examine the accounts with positive mindset by understanding the concerns of spending authority. No doubt, the CAG should not ignore the gross violations and deviations and should point out every irregularity otherwise the purpose of auditing will be defeated. Therefore the approach of CAG in India should be balanced one. The CAG must scrutinise the accounts for effective control over fund and simultaneously should not involve himself into insignificant matters. To conclude with it can be said that citizens have every right to know that tax payers money is being spent by the government to implement various schemes and programmes. If the funds spend by the government do not come under the scrutiny of the Comptroller and Auditor General of India, then it is nothing but a 'lacuna'.

Tajamul Yousuf *

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468 Jawahar Lal Nehru, while discussing about CAG on the floor of Parliament on Nov- 19, 1952.

469 The Hindu July 24, 2011, p1.

* **BSc.,LLM (NET) Lecturer, Kashmir Law College. Nowshera Srinagar 190006. e-mail:- tajamulyousuf.llm@gmail.com**

Indian Legal Profession and the Entry of Foreign Law Firms: An Overview

Abstract

Society is dynamic and so are its institutions which keep on changing according to the circumstances prevailing in the society. We have reached such a stage that a man in our contemporary society is not only being governed by laws during his life but even before and after it as well.[470] *And beauty of law lies in its changing nature. So the change in the profession of law in India over the decades was obvious even otherwise leaving other side the effects of globalization which has now overshadowed everything. Globalization should not be looked upon only to curse it, instead we ought to feel the blessings brought by it. However, we must not forget that globalization holds for lawyers both 'promise and peril'. In 90's some lucrative and rewarding fields emerged in the profession of law which attracted the creamy talent in the society. The profits increased manifold within very short span of time. Albeit, it could not sustain for long and we witnessed the closure of one of the world's 100 biggest law firms by revenue in 2009. It is heartening to observe that the whole world is now open to us but it is followed by a bitter reality that we could be hunted even in our hometown by the mighty and influential global law firms if we are not able to compete with them.*

An attempt is being made here to give the readers an overview of efforts made jointly by Indian Bar and Bench to secure the presence of local legal professionals, which are comparatively less skilled and thus at disadvantageous position against the mighty and influential foreign lawyers and law firms, and to offer the locals to tape all the benefits emerging from one of the potential contemporary legal markets of the world.

Introduction

Law in whatsoever form has from the earliest time regulated human behaviour in society. The functioning of the law is as dynamic and organic as the society. Therefore, one cannot even think of that the legal profession will remain inactive. In fact, India has the world's second largest legal profession[471] which consists of approximately 11 lakh (1.1 million) registered advocates[472] and has undergone several changes ever since its origin in the British colonial rule.

There were changes in the court system and its staffing from time to time which culminated in the present system. In ancient India, law in general meant '*Dharma*' which was regarded as divine revelation and thus supreme. The *Dharmic* rules pertaining to civil and criminal matters were contained in *Manusmriti*. In case of any civil or criminal incident, the justice was administered by the

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470 For example, there are people who claim rival rights like right to conceive or right to abortion and also we claim a right to exhume the body of a dead person to prove certain allegations.

471 http://www.legalserviceindia.com/articles/lprof.htm visited on 2-2-13 at 8.52 a.m.

472 According to BCI data (2010) quoted in Globalization, Lawyers, and India: Towards a Theoretical Synthesis of Globalisation Studies and the Sociology of the Legal Profession.

arbitrators in three grades[473] before the regular system of local courts. There were in total not less than five forums to agitate a single case.

The present Indian judicial system owes much to the judicial system developed by the Britishers during their control over India in 17th century. It has always more or less remained dominantly influenced by the British legal system which is one of the oldest legal systems in the world.[474]

In British India, the legal profession was not organized due to disinterest of Britishers. The first court was established by the Governor Aungier in 1672 at Bombay.[475] The advocates, in the present adversarial litigant system who plead the cases of disputing parties, are altogether different from pleaders of that time. There were no legal practitioners prior to the establishment of the Mayor's Courts[476] in 1726 in Madras and Calcutta. In all Mayor's Courts, the attorney's role to protect the rights of litigants was approved in 1791. However, the right of attorney to appear before the court was not absolute but could be sent home if found guilty of misconduct.[477] There were certain weaknesses in the court of Mayor and in order to overcome them, the Supreme Court of Judicature at Fort William in Calcutta was established in 1774.[478] The establishment of Supreme Court superseded the then prevalent judicial system in India. Similar Supreme Courts were established through the Royal Charters issued on 26th December, 1800 and on 8th December, 1823 in Presidency towns of Madras and Bombay respectively by the King George III. The advocates and attorneys eligible for practice in these courts were only to be the British barristers and solicitors and thus Indians were kept out of profession. The language of court was English. Subsequently barristers began to attend the work of the Courts as advocates resulting into the giving up of pleadings by the attorneys and started instead working as solicitors. Like England, the practice of law by the two grades became distinct and separate. In contrast to the Mufassil towns,[479] the Courts in Presidency towns were empowered to approve, admit, enroll as well as remove the advocates and attorneys. The Court was all powerful to prohibit even a barrister from practicing in the Court on certain reasonable grounds. Law as a profession was not available to everyone but in fact 'attorneys were not admitted without recommendation from a high official in England or a Judge in India.'[480]

In the mufasil areas, the local *vakils* were allowed to continue but there was no organization, cadre or code for them till Regulation VII was issued by Lord Cornwallis in 1793. There was monopoly of a small priestly class in the profession of law. Law was dissociated from religion only in

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473 First of kinsmen, secondly of men of the same trade, and thirdly, of townsmen.

474 The British legal systems is being regulated since the middle of the 13th century initially through –

(a) The Statute of Westminster I, chapter 29 (1275);

(b) The London Ordinance of 1280; and

(c) The Ordinance of 1292, de Attomatis et Apprenticiis.

475 http://www.barcouncilofindia.org/about/about-the-legal-profession/history-of-the-legal-profession/ visited on 2-2-13 at 8.52 a.m.

476 The Mayor's Courts were Crown Courts established in the three presidency towns of Calcutta, Bombay and Madras.

477 Mr. Jones was the first dismissed attorney.

478 The Supreme Court of Judicature at Calcutta was established by a letter patent issued on March 26, 1774.

479 where legal profession was established, guided and controlled by legislation.

480 http://www.barcouncilofindia.org/about/about-the-legal-profession/history-of-the-legal-profession/ visited on 06-02-2013 at 08.22 a.m.

1833 when Law Commission was appointed to ascertain and codify the laws of India. The monopoly ended and law[481] as a profession became a civil institution available to all individuals irrespective of their caste and creed.[482]

In early days of the east company there was no uniform judicial system. *Vakil* was a very broad term and in a sense was used for a lawyer too but it did not represent exclusively a class of legal practitioners. In Muslim India, the same term was being used for 'an agent or ambassador who represented his principal for varied reasons.'[483] *Vakils* were neither licensed nor trained as professionals. The practice of law carried on by them in the *Diwani* Courts was neither recognized nor controlled. At that time, in order to become a *vakil*, one's character and his competence in the English language were the only relevant factors. The continuity of *vakils* mainly served the purpose of interpreting the local customs.

The efforts were made for the first time in 1793 to create a regular legal profession for the companies' courts by enacting the Bengal Regulation VII. It was also an effort to regulate the profession of law. Only the men of character and education were admitted to work diligently and faithfully so that trust of clients can be upheld.[484] It is worth to mention that the Charter of 1726 which introduced Royal Courts in India did not make provisions for the regulations of the legal practitioners.

All the three Supreme Courts at Calcutta, Madras and Bombay were abolished along with the then existing Sadar Diwani Adalats in the Presidency Towns. In 1862, three High Courts[485] 'were established at Calcutta, Bombay and Madras' to 'combine Supreme Court and Sudder Court traditions' so that 'the legal learning and judicial experience of the English barristers with the intimate experience of civil servants in matters of Indian customs, usages and laws possessed by the civil servants' could be united.[486] The monopoly of barristers to appear before the Supreme Courts was ended after so many years when *vakils* were allowed to practice before the High Courts. After the foundation of High Courts, there were six kinds[487] of legal practitioners brought into one system under the jurisdiction of the High Courts by the Legal Practitioners Act, 1879. This Act consolidated and amended the law relating to legal practitioners. The advocates were allowed to enroll in any high court and to practice in all the Courts subordinate to the high court concerned. They were also empowered to practice in any court in British India.

The Provincial autonomy was established in India under the Government of India Act, 1935, which also provided for the establishment of the Federal Court which was the second highest Court in the Indian judicial hierarchy.[488]

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481 The study of law was accepted as a separate faculty in 1935 first at Calcutta and then spread to Madras and Bombay.

482 B.B Misra, The Indian Middle Classes (1961); p 172

483 Id at pp. 162-163.

484 Similarly, to regulate the legal profession in the Compan's courts in Bengal, Bihar, Orissa, Madras, and Bombay different regulations were passed.

485 Additional High Courts were established in Allahabad (1886), Patna (1916), and Lahore (1919). All the High Courts were empowered to make rules for the qualifications of proper persons, advocates, vakils and attorneys at Bar.

486 These High Courts were having original and appellate jurisdiction in civil, criminal, admiralty, vice-admiralty, testimony, intestate, and matrimonial matters.

487 Advocates, Attorneys (Solicitors), Vakils of High Courts, Pleaders, Mukhtars and Revenue Agents.

488 The Federal Court was having the distinction of being the first Constitutional Court as well as the first all-India Court of extensive original, appellate and advisory jurisdiction.

These developments and opportunities improved the reputation and practice of Indian laws and lawyers but all these years Indians associated with the profession of law were suffering which used to get intensified whenever any change was being introduced.

After the independence, on the recommendations of Law Commission of India, the administration of legal profession was changed and the law relating to legal practitioners was amended and consolidated under the Advocates Act, 1961. This Act provided for the Constitution of Bar Councils and an All-India Bar to create only one class of persons i.e advocates to practice the profession of law in the whole country.

In the financial year 2009-2010 India touched new heights and became 'the world's most powerful new economic destination'. Juhi Garg has marvelously depicted the shining economic success story of India in her article "Leaping tiger: the rise and rise of India's legal market"[489] in the following words:

The figures speak for themselves. India's gross domestic product expanded at an annual rate of 8.60 per cent in the last quarter. India's stock markets surged by more than 1800 points in one month, with at least 30 initial public offerings in the works by the end of September 2009.

Foreign direct investment in the country rose by 55 per cent in July 2009 year over year and foreign direct investment equity inflows during financial year 2009-10 hit US$26 billion. India-led mergers and acquisitions touched US$40 billion in the first half of 2010 while Indian transactions accounted for a sixth of the total Asian deals of US$242.1 billion from a total of 5078 deals; a rise of 21 per cent in the first half of this year from a year ago.

The economic activities like large cross border deals which were considered the most beneficial to the Foreign Law Firms (FLFs) were on ever increase. The stunning rise in corporate activity had a profound impact on Indian legal profession as well and created an unprecedented scope for non-litigious practice of law. A sizable number of foreign clients involved in these financial transactions prompted many American and British law firms to establish their offices in India to serve their non-Indian clients in their activities within and outside India by 'drafting documents, reviewing and providing comments on documents, conducting negotiations and advising clients on international standards.' Accordingly, two American[490] and one British[491] law firm approached the Reserve Bank of India under Section 29 of the Foreign Exchange Regulation Act, 1973 (FERA) during the period 1993 to 1995. The RBI allowed them on certain conditions but since then a fierce debate is going on whether foreign law firms should be allowed or not to enter the Indian legal profession. There are strong and persuasive arguments on both sides. The courts in hierarchy were approached but the issue is yet to see the final solution.

Views of Three Constitutional Benchs

To settle down the issue permanently, two separate writ petitions involving basically the same question were filled against the RBI order. The first petition was filed in the public interest before the Bombay High Court in 1995 by *Lawyers Collective,* a registered society[492] whose members are

489 http://www.lawcouncil.asn.au/lca/index.cfm?B041D6FB-E485-9479-86CA-E22DA6E690A1

490 White & Case and Chadbourne & Parke

491 Ashurst Morris Crisp

492 The society is duly registered under the Societies Registration Act, 1860 as well as under the Bombay Public Trust Act, 1960.

Advocates[493] and students of law. It took almost twelve years to decide the petition. There were fifteen respondents involving ten Senior Advocates and six law firms, amongst others. The case was thoroughly argued and the much awaited judgment was first reserved on 4th December 2009 and finally delivered on 16th December 2009. There was no appeal against the judgment.

The second petition was filled before the Madras High Court in the year 2010, seeking the issuance of a Writ of Mandamus under Article 226 of the Constitution of India. Both the courts were basically confronted with interpretation of the expression '*to practice the profession of law*' under Section 29 of the Advocates Act, 1961. The findings of both the courts were same except the Madras High Court went one step ahead of Bombay High Court. However, the order of the Madras High Court was challenged before the Supreme Court by the Bar Council of India through an SLP under article 136 with the main contention that Madras High Court's judgment is in complete disagreement with that of the Bombay High Court's order.

For the precision and proper understanding we will discuss all the three events one by one.

1. ***Lawyers Collective v. Bar Council of India[494]***

This petition invited the consideration of the honourable High Court to decide the following two questions –

I Whether the permissions granted by the Reserve Bank of India to the foreign law firms to establish their liaison offices under Section 29 of the Foreign Exchange Regulation Act, 1973 are legal and valid?

II Assuming such permissions are valid, whether these foreign law firms could carry on their liaison activities in India only on being enrolled as advocates under the Advocates Act, 1961?

Senior Advocate C.U. Singh represented the petitioner registered society 'Lawyers Collective'. On the first issue, he successfully pleaded that the permission granted by RBI to respondent foreign law firms is bad in law because of the two reasons –

Firstly, foreign nationals intending to practice any profession including law in India can be granted permission under Section 30[495] of the Foreign Exchange Regulation Act, 1973 and not under Section 29.[496]

Secondly, enrollment as advocates under the Advocates Act, 1961 was mandatory to carry on the profession of law even in non-litigious matters.

Mr. Singh argued that the RBI could not have granted permission to the foreign law firms as they were not enrolled as advocates under the Advocates Act, 1961. On the second issue, Mr. Singh submitted that the expression `to practice the profession of law' includes both practise in litigious matters as well as non-litigious mattes because the right to practise the profession of law cannot be confined to physical appearances in Courts / Tribunals / other authorities, but necessarily includes

493 Enrolled with different Bar Councils in India.

494 WRIT PETITION NO.1526 OF 1995

495 It deals with prior permission of Reserve Bank required for practising profession, etc. in India by nationals of foreign States

496 Section 29 of FERA requires a prior permission of the Reserve Bank for carrying on any activity of a trading, commercial or industrial nature in case of a person resident outside India (whether a citizen of India or not) or a person who is not a citizen of India but is resident in India or a company (other than a banking company) which is not incorporated under any law in force in India or any branch of such company

even giving legal advise to a client, drafting documents and providing any other form of legal assistance.

Mr. Singh argued that the Advocates Act, 1961 is a complete code to regulate the profession of law and the cumulative effect of section 24 and section 29 of the said Act is that any person intending to practise the profession of law must be enrolled as an advocate on any State Bar Council.

In support of his argument that 'to practice the profession of law' includes practice in both litigious as well as non-litigious matters, Mr. Singh referred to several foreign as well as national judicial decisions. A brief description of some of them follows:

New York County Lawyers Association (Roel)[497]

In this case the Court of Appeals of New York has *inter alia* held:

"...Whether a person gives advice as to New York law, Federal law, the law of a sister State, or the law of a foreign country, he is giving legal advice. Likewise, when legal documents are prepared for a layman by a person in the business of preparing such documents, that person is practicing law whether the documents are prepared in conformity with law of New York or any other law…"

Legal Practice Board v. Wilhelmus Van Der Zwaan[498]

The Supreme Court of Western Australia in this case has held:

"The expression 'administration of law' in section 77 is to be read as meaning "the practice of law" or "the practice of the law". The practice of the law includes the giving of legal advice and counsel to others as to their rights and obligations under the law, and the preparation of legal instruments by which legal rights are either obtained, secured or given away, although such matters may not then, or ever, be the subject of proceedings in a court. If the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the person giving such advise possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct, constitutes the practice of the law.

Ex. Capt Harish Uppal v. Union of India[499]

The Supreme Court of India has held that "...The right of the advocate to practice envelopes a lot of acts to be performed by him in discharge of his professional duties. Apart from appearing in the courts he can be consulted by his clients, he can give his legal opinion whenever sought for, he can draft instruments, pleadings, affidavits or any other documents, he can participate in any conference involving legal discussions, he can work in any office or firm as a legal officer, he can appear for clients before an arbitrator or arbitrators etc. Such a rule would have nothing to do with all the acts done by an advocate during his practice. He may even file *vakalat* on behalf of a client even though his appearance inside the court is not permitted… The right to practise, no doubt, is the genus of which the right to appear and conduct cases in the court may be a specie..."

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497 3 N.Y. 2D 224

498 (2002) WASC 133

499 (2003) 2 Supreme Court Cases 45

Pravin C. Shah v. K.A. Mohd Ali[500]

This time Court did not made any fresh observation but upheld once again the observations made in *Ex. Capt Harish Uppal's* case.

By referring to foreign as well as national judgments, Mr. Sing tried to explain to the court that the expression 'to practice the profession of law' includes practice in both litigious as well as non-litigious matters. The Advocates Act, 1961 is a complete code to regulate all the persons whether practicing litigious or non-litigious side. The Bar Councils were constituted to put check on those who practice law. Mr. Singh argued that if foreign law firms are not enrolled as advocates but are allowed to establish liaison offices in India that too under section 30 of the 1973 Act, they are not only free to defy the provisions of Advocates Act and other regulations made by the Bar Council of India, meant to maintain the nobility of the profession, but they (foreign law firms) have also an unfair advantage over the Indian advocates as well. In theses premises Mr. Singh prayed for the declaration that existence of foreign law firms is illegal and contrary to law.

On behalf of the Union of India, Senior Advocate, Mr. Rajinder Singh informed the court that as of now, there is no proposal to allow foreign lawyers to practice Indian law in Indian Courts. Mr. Singh did not subscribe to the petitioner's contention that persons practicing on non-litigious side are also governed by the Advocates Act. His disagreement was based on the logic:

Firstly, the Advocates Act prescribes the mode and the manner of enrolling advocates only who want to practice the profession of law before Courts, Tribunals and other authorities and not regarding those who want to practice on non-litigious matters.

Secondly, he pointed out that the Act provides for the punitive action against advocates practicing on litigious side only and not regarding others.

Mr. Rajinder Singh was of the opinion that if the petitioner's contention that Advocates Act governs both the categories of persons is accepted, then no bureaucrat will be able to draft a document or give an opinion.

Mr. Rajinder maintained that Advocates Act govern only one class of persons and supported his view by citing the examples of (1) retired Supreme Court Judges, (2) persons who are permitted to act as petition writers in the criminal courts and (3) persons nominated as *amicus curie*, who need not to be on the rolls of the Bar Council.

Similarly, he referred to, Civil Code Manual 1986, Section 13 of the Family Courts Act, 1984 and Consumer Protection Regulations, 2005 where to engage a legal practitioner is only optional.

One of the main contesting foreign law firms, namely White & Case, was represented by Senior Advocate Mr. Navroz H. Seervai. He not only subscribed to the view that the Advocates Act, 1961 is not applicable to the persons practising non-litigious matters but also went one step further by saying that the Act will be *ultra virus* to the Constitution if applied to all the persons whether practicing litigious or non-litigious matters.

He identified the legislative power of the Parliament in enacting the 1961 Act to Entries 77 and 78 in List I to the Seventh Schedule to the Constitution, which relate to constitution and organization of the Supreme Court and the High Courts as well as the persons entitled to practice before the Supreme Court and the High Courts. Therefore, concluded that the 1961 Act would apply only to

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500 (2001) 8 Supreme Court Cases 650

persons practising litigious matters before the Supreme Court and the High Courts. The said Act would not apply to the persons practising in non-litigious matters and application to both will render the Act as *ultra virus* to the constitution.

Mr.Seervai referred to the decision of the Supreme Court in the case of *O.N. Mohindroo v. Bar Council*[501], wherein it was *inter alia* held:

"10. *... the Act [of 1961] is a piece of legislation which deals with persons entitled to practise before the Supreme Court and the High Courts. Therefore, the Act must be held to fall within entries 77 and 78 of List I. As the power of legislation relating to those entitled to practise in the Supreme Court and the High Courts is carved out from the general power to legislate in relation to legal and other professions in entry 26 of List III, it is an error to say, as the High Court did, that the Act is a composite legislation partly falling under entries 77 and 78 of List I and partly under entry 26 of List III.*"

Mr. Seervai gave reference of two more decisions of the Supreme Court[502] to support his contention that the right to practise the profession of law under the 1961 Act is related only to the advocates practising before Courts / Tribunals / any other authority and not to the persons practising in non-litigious matters.

Mr. Seervai pointed out that Section 29 of the 1961 Act is merely declaratory in nature as it provides that from the appointed day there shall be only one class of persons entitled to practise the profession of law. Further, it is not Section 29 which confers the right to practise the profession but Section 33 which provides that advocates enrolled under the 1961 Act alone are entitled to practise. Therefore, the 1961 Act cannot be applied to persons practising in non-litigious matters.

Mr. Seervai's another argument was that the law relating to the legal practitioners entitled to practice in certain courts in the Provinces of India was consolidated and amended by the Indian Bar Councils Act, 1926 which was repealed by the 1961 Act. Therefore, in the absence of any intention to the contrary, it must be held that the 1926 Act as well as the 1961 Act provide for the rights and obligations of the legal practitioners practising the profession of law before the Courts / Tribunals / other authorities.

Going a step ahead, Mr. Seervai proposed that even if it is accepted that the expression 'to practice the profession of law' applies to persons practising in litigious matters as well as non-litigious matters, still the liaison activities carried on by the White & Case cannot be said to fall in any of these two categories. Therefore, the permission granted by RBI under Section 29 of the 1973 Act cannot be faulted.

The rival arguments made by the different councils raised several questions which were answered by the court pleasingly. The RBI's permission to establish liaison offices in India was declared 'the core dispute' by the court and decided first what were the liaison activities carried on by the foreign law firms in India? The court held that since the Head Office and the branch offices of the foreign law firms are engaged in providing various legal services to their clients worldwide, the liaison activity carried on in India would obviously be the same.

Regarding the contention of the foreign law firms that they never had and has no intention to practise the profession of law in India, the court considered, whether the foreign law firms could carry

501 AIR 1968 S.C. 888

502 The Bar Council v. The State of U.P. (1973) 1 SCC 261 and In Re lily Isabel Thomas; AIR 1964 SC 855

on the practise in non litigious matters in India by obtaining permission from R.B.I. under section 29 of the 1973 Act?

Court's reply was in negative. It explained by the analogy that the foreign law firms engaged in practising the profession of law in the foreign countries cannot be said to be engaged in industrial, commercial and trading activities and the activity carried on by their liaison offices in India are not different. So the activities of these firms at liaison offices in India or at branch offices or at their Head Office are activities relating to the profession of law though on the non-litigious side. The court analysed Section 29 of the 1973 Act and held that it relates to granting permission for business purposes and not for professional purposes therefore no permission could have been granted to these foreign law firms under section 29 of the 1973 Act. The Court cited the judgment in *M.P. Electricity Board v. Shiv Narayan*[503] wherein it was held that there is a fundamental distinction between the professional activity and the activity of a commercial character and to compare the legal profession with that of trade and business would be totally incorrect.

The court disapproved the action of RBI to permit the foreign law firms to establish their liaison offices particularly when such permission was rejected by the Foreign Investment Promotion Board (FIPB)[504], to whom they had approached earlier for the permission.

Then the second main issue, whether the foreign law firms by opening liaison offices in India could carry on the practise in non litigious matters without being enrolled as Advocates under the 1961 Act, came for consideration.

In order to decide the issue the court first quoted Sections 29, 30, 33 and 35 of the 1961 Act and then inferred from the Statement of Objects and Reasons[505] of the 1961 Act that it is intended to apply to –

2. persons practising the profession of law in any part of the country; and

3. persons practising the profession of law in any court including the Supreme Court.

Thus, court safely concluded that the 1961 Act is intended to apply not only to the persons practising before the courts but also to persons practising in non litigious matters outside the court. Besides the Statement of Objects and Reasons, the court referred to Section 29 of the 1961 Act which specifically provides that from the appointed day, there shall be only one class of persons (Advocates) entitled to practise the profession of law whether before any court / authority or outside the court by way of practise in non litigious matters.

Then court referred to Section 33 and held that it debars any person from appearing before any court or authority unless he is enrolled as an advocate. The court made it clear that the bar contained in section 33 has nothing to do with the persons entitled to be enrolled as advocates under section 29. A person enrolled as an advocate under section 29 of the 1961 Act, may or may not be desirous of appearing before the courts. He may be interested in practising only in non litigious matters. Therefore, the bar under section 33 from appearing in any court (except when permitted by court under Section 32 of the 1961 Act or any other Act) unless enrolled as an advocate does not bar a person from being enrolled as an advocate under section 29 for practising the profession of law in non

503 (2005) 7 SCC 283

504 A High Powered body established under the New Industrial Policy

505 The main objects and reasons of the Act are to establish All India Bar Council; A common roll of advocates; Advocate on the common roll having a right to practise in any part of the country and in any Court, including the Supreme Court.

litigious matters. The court said that it has been already held by the Supreme Court in the case of *Ex-Capt. Harish Uppal* that the right to practise is the genus of which the right to appear and conduct cases in the court may be a specie. Therefore, it cannot be inferred that the 1961 Act applies only to persons practising in litigious matters and would not apply to person practising in non litigious matters, hence, the contention of foreign law firms is wrong.

Regarding the plea that the 1961 Act does not contain any penal provisions for persons practicing in non-litigious matters and, therefore, it cannot be applied to them, the court held that the very object of the 1961 Act and the Rules framed there under by the Bar Council of India are to ensure the maintenance of high standards in professional conduct and etiquettes. This is expected from all the persons practicing the profession of law irrespective whether they practice in litigious matters or in non litigious matters. The Section 35 is very clear in general terms by providing the punishment to an advocate who is found guilty of professional or other misconduct. Similarly, section 45 provides for the imprisonment of the persons practising illegally in courts and before other authorities. The court pointed out that once it is held that the persons entitled to practise the profession of law covers all the persons whether practising in litigious matters or non-litigious matters, then, the question of restricted application of penal provisions contained in section 35 or 45 does not arise. Regarding the reference[506] of the decision of the Supreme Court in the case of *O.N. Mohindroo,* the court held that it is true that the Supreme Court in that case has held that the 1961 Act is enacted by the Parliament in exercise of its powers under entries 77 and 78 in List I of the Seventh Schedule to the Constitution, however, it cannot be said that the 1961 Act is restricted to the persons practising only before the Supreme Court and High Courts because of the fact that entry 77 and 78 in List I refers to the persons practising before the Supreme Court and the High Courts. As already noted, practising the profession of law involves a larger concept whereas, practising before the courts is only a part of that concept. If the literal construction put forth by Mr. Seervai is accepted then, the Parliament under entries 77 & 78 cannot legislate in respect of advocates practising before the District Courts / Magistrate's Courts / other Courts / Tribunals / authorities and consequently, the 1961 Act to the extent it applies to advocates practising in courts other than the High Courts and Supreme Court would be *ultra vires* to the Constitution. The court refused to accept such a narrow construction on the analogy that once the Parliament invokes its power to legislate on advocates practising the profession of law, then the entire field relating to advocates would be open to the Parliament to legislate and accordingly the 1961 Act has been enacted to cover the entire field. The court also rejected the references of all cases relied upon by the counsel by saying that the questions to be decided in this case were not issues directly or indirectly considered by the Supreme Court in those cases. Therefore, does not support the case of the contesting foreign law firms.

Regarding the contention of the counsel for Union of India, Mr.Rajinder Singh, that no bureaucrat would be able to draft or give any opinion in non-litigious matters without being enrolled as an advocate, the court held that 'there is a distinction between a bureaucrat drafting or giving opinion, during the course of his employment and a law firm or an advocate drafting or giving opinion to the clients on professional basis. Moreover, a bureaucrat, drafting documents or giving opinion is

506 The reference was made in support of the contention that the 1961 Act applies only to persons practising the profession of law before Courts / Tribunals / other authorities.

answerable to his superiors, whereas, a law firm or an individual engaged in non litigious matters, is answerable to none.

2. *A.K. Balaji v. Government of India*[507]

After the decision of Bombay High Court on 16 December 2009, foreign lawyers are not permitted to set up liaison offices in India but fast growing economy of India could not let them refrain from practicing in India instead they devised new ways to practice law in India indirectly. They developed tie-ups and associate offices to do their work in five star hotels by coming India on short trips by using visitor visa. It is well known now that the London-based Clifford Chance and Baker & McKenzie both have 180 lawyers each for India-related practice. Since last few years even these firms are recruiting directly from Indian law firms or by campus recruitments in National Law Schools. So the foreign law firms were doing what otherwise they were prohibited to do. They only changed their modus operandi which resulted into additional violations of immigration norms and tax laws. This state affairs if continues will prove even more detrimental to the interests of India.

In order to check all this, a writ petition[508] was filed before the Madras High Court by an advocate, A.K. Balaji,[509] This writ petition was against 31 foreign law firms,[510] one LPO namely Integreon, which is one of the largest LPO's in India and eight Government respondents including the Bar Council of India, Union Law Ministry, External Affairs Ministry and the RBI. The petition was argued by A. R. L. Sundaresan, Senior Advocate and son of former Supreme Court Judge A. R Lakshmanan.

As a whole the petition was a challenge to the entry of foreign law firms, but since the issue was already decided by the Bombay High Court comprehensively so there was not much to decide by this court. The only issue that was neither raised nor answered by the Bombay High Court was for consideration before the Madras High. The issue was whether a foreign law firm, without establishing any liaison office in India visiting India for the purpose of offering legal advice to their clients in India on foreign law, is prohibited under the provisions of the Advocates Act. More specifically the issue was whether a foreign lawyer visiting India for a temporary period to advise his client on foreign law can be barred under the provisions of the Advocates Act?

The Bench of Chief Justice M Y Eqbal and Justice T S Sivagnanam delivered its judgment on 21.02.2012. The Bench first discussed the ratio decided by the Bombay High Court and then the rival contentions made by the councils. After giving anxious consideration to the matter, both on facts and on law, the court gave some relief to the foreign lawyers or foreign law firms by carving out three exceptions to a blanket ban imposed by the Bombay High Court on any legal activity by them and held :-

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507 Writ Petition No.5614 of 2010

508 The writ was filed under Article 226 of the Constitution of India for the issuance of a Writ of Mandamus directing the Government respondents to forebear the Foreign Law Firms or foreign lawyers, who are illegally practising the profession of Law in India.

509 Mr. Balaji is one of the representatives of the Association of Indian Lawyers, a Calcutta based organization having its branch offices in Chennai.

510 The foreign law firms against whom writ petition has been filed include UK's Allen & Overy, Clifford Chance, Linklaters and Freshfields. WilmerHale and Shearman & Sterling are among the US law firms.

(i) Foreign law firms or foreign lawyers cannot practice the profession of law in India either on the litigation or non-litigation side, unless they fulfil the requirement of the Advocates Act, 1961 and the Bar Council of India Rules.

(ii) However, there is no bar either in the Act or in the Rules for the foreign law firms or foreign lawyers to visit India for a temporary period on a 'fly in and fly out' basis, for the purpose of giving legal advise to their clients in India regarding foreign law or their own system of law and on diverse international legal issues.

(iii) Moreover, having regard to the aim and object of the International Commercial Arbitration introduced in the Arbitration and Conciliation Act, 1996, foreign lawyers cannot be debarred to come to India and conduct arbitration proceedings in respect of disputes arising out of a contract relating to international commercial arbitration.

(iv) The B.P.O. companies providing wide range of customised and integrated services and functions to its customers like word-processing, secretarial support, transcription services, proof-reading services, travel desk support services, etc. do not come within the purview of the Advocates Act, 1961 or the Bar Council of India Rules. However, in the event of any complaint made against these B.P.O. companies violating the provisions of the Act, the Bar Council of India may take appropriate action against such erring companies.

3. *Bar Council of India v A.K. Balaji and Ors*[511]

Both the courts were unanimous in interpreting the term 'to practice the profession of law' to include both practices in litigious as well as non-litigious matters. However, the Madras High Court was invited to decide on the virgin issue of giving advice on foreign law as well. The court was of the view that since there is no provision either in Advocates Act or in the Rules framed by the BCI which restrict the entry of foreign lawyers into India therefore, foreign lawyers or law firms are free to visit India for a temporary period on a *fly in and fly out* basis, for the purpose of giving legal advice to their clients in India regarding foreign laws.

The Bar Council of India was not satisfied with the judgment and took the matter to the Supreme Court through the Petitions for Special Leave to Appeal (Civil) under article 136. The main contention of the petitioner was that the Madras High Court's judgment is in total disagreement with its Bombay counterpart over which no appeal was filled to the Supreme Court. The Division Bench of Justice R. M. Lodha and Justice Anil R. Dave agreed with both the findings of the earlier two High Court judgments regarding the interpretation of the term 'to practice the profession of law' and RBI was not justified in granting the permission to open liaison offices in India under Section 29 of the FERA and passed an Interim Order on 4thJuly 2012 to that effect.

Conclusion

Gone are the days when practice of law was purely a profession. Attempts have been made to declare it as a service so that service providers could be held responsible for the deficiency in service.

511 (Petitions for Special Leave to Appeal (Civil) Nos. 17150-17154/2012)

No more can practice of law be confined to national bounds but in fact it will bloom in every village of the globe by transgressing all the national borders in pursuance of WTO agreements. However, the interim order against the entry of foreign law firms by the Supreme Court may not give such a look to a common man. But the Supreme Court's order must be appreciated for identifying and allowing to reconcile the two conflicting ideas that on the one hand foreign lawyers cannot be given free hand to practice the profession of law in India and on the other hand the Government's policy to make India an International Arbitration hub should not suffer retardation.

Mubashir Ahmad Malik*

* Lecturer (contractual); Faculty of Law; University of Kashmir; Srinagar – 190006

Administration of Justice and role of forensic science in India: An Appraisal

Abstract:

Forensic evidence is generally accepted by court of law and scientific community for appreciation of evidence. Such evidence must pass the test of admissibility as per Indian Evidence Act, 1872 as used in court rooms. Any wrong, unreasoned and careless opinion may cause miscarriage of justice either to prosecution or to accused. One of the accepted mode of appreciating evidence before courts is through working of forensic science. It is an established fact that proper application of rule of law based on meticulous investigation guide judges and courts to determine the truth in a given case which helps to uphold right quality of criminal justice and so. Courts must warrant that justice is done and no innocent is convicted by incorrectly appreciating forensic evidence. The present paper delineate the ambit and scope of dual relationship that exists between forensic science and administration of criminal justice system and stress on present juncture of role of forensic science vis-à-vis its effects on functioning of criminal justice in India while keeping in view extent of advancement in technology and skyrocketing rise in crimes. The present paper discuses challenges of globalization on working of forensic science and discusses its use and abuse.The conclusion of paper emphasises the impact of forensic science in criminal justice administration and in the light of this statement a lot of spadework is yet to be accomplished for road ahead in field of forensic science in India with its attendant impact on J & K.

Keywords: ***Forensic Science, Technological advancement,*** **Criminal Justice Administration,** ***Survey.***

Introduction:

"If forensic evidence is not objectively tested, analyzed, and interpreted by adequately trained scientists, the search for truth will potentially be compromised, if not defeated."

— BETTY LAYNE DESPORTES, DEFENSE LAWYER AND CHAIRWOMAN OF JURISPRUDENCE SECTION OF THE AMERICAN ACADEMY OF FORENSIC SCIENCES

The basic principle of criminal justice system is to protect the innocent from wrongful conviction and ensure punishment to culprits who have committed the crime. The criminal justice system nevertheless has the potential to sacrifice values of truth and justice.[512]

In scientific community which is also known as "practical scientific world", only competence and rigorous honesty of the individuals holding such perilous positions preserves the philosophical basis of the criminal administration of justice. This system works if, only, morally honest individual takes over the top berth in a just society. A Greek philosopher *Plato* said that '*a positively gathered society of morally just individuals is a great society'*. Law and society both reflect and shape each other. Law is not abstract and remote from everyday life, but affects one's person in multiple ways which might not seem immediate or obvious.[513]

512 Rawls,John, 'Justcie as fairness,2001 ed.,pp 39-40.

513 Honegan, Bryan, " Adventure in law & Justcie',2003 ed., and Potter,H., 'The Quest of Justice',2005.

A profound relation exists between forensic science and criminal administration of justice. The criminal law recognized the importance of forensic science, after the rapid advancement in scientific investigation that helped in detection of crime and criminals like we have advance science in detecting crime and criminals with the help of fields like DNA fingerprinting and cyber forensics is the most significant development of 20th century.[514]

We know law is not an outcome of sordid process but judges and courts determine the truth through their logical and legal verdicts where in the chief object or legal goal remain to find out the truth for the criminal justice dispensation system. The cardinal objective of criminal justice system is that truth must prevail and that innocent person is protected from a wrongful verdict. In other words, when truth is established by forensic expertise, justice is established by the joint efforts of investigating agencies, prosecutors, media, forensic scientists, and judges.[515] Thus Indian forensic laboratories have to become sound in their approach of finding the truth about the commission of crime and put forth their reliable expert evidence to be appreciated by courts.

Since experience depicts that globalization has brought unprecedented scientific advancements and has placed luxuries and comforts of world at our command but at the same time has come with a whole new crop of problems and challenges. At threshold of globalization of 21st century, India and world over impact of globalization has raised vital issue of tackling criminals and new breed of hi-tech crimes, for which forensic laboratories can play their pivotal role and that object can be attained by utilizing advanced tools and techniques of investigations. The destiny of unending rising tide of crime has burdened the criminalistics, law makers to think for viable solution to counter hi-tech crime.

Dr. P Chandra Sekharan[516] , a noted forensic expert conducted a detailed study of functioning of forensic Science laboratory of J & K in 1998 observed:

" Whereas the quality of work transacted in the laboratory is quite satisfactory, the level of research work is anything but adequate , library is poorly furnished, annual reports for last 20 years have not been submitted at all and the level of interaction with academicians and counterpart FSLs across the country is below normal".

The present researcher submits that present position of FSL, Srinagar, J & K is still in pathetic condition and nothing has been done so far except allotment of a piece of land in year 2008 and construction of new FSL building completed in 2012, at Bemina, Srinagar. It has been reiterated by the state government that this new FSL will have high tech forensic techniques like DNA profiling, cyber forensics and like but in this regard nothing has been done so far.

Earlier, the sad state of affair have been highlighted by *Mr. Masud A, Chaudhary* [517] by lamenting on *"what has been gained over the years needs to be consolidated and what is amiss is required to be injected. It is no time for us to get bogged down by our lapses in the*

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514 Singh, Yashpal & Zaidi,H. Muhammad, ' DNA tests in criminal investigation, Trail & Paternity Disputes (Justice through Science),2006 ed. Alia Law Agency, P- 2.

515 Nordy,James," Forensic Science,2nd Ed.P

516 Source: SOUVENIR (2001), FSL, Crime & Railways, J & K.

517 Former IGP, FSL, Crime & Railways ,J & K and Source: SOUVENIR (2001),

past. It is the time for a resolute and unflattering march forward….lot of spadework is required to be done on ground in order to make FSL a powerful agency in crime detection".

INDEPENDENT CRIME LABORATORIES: THE NEED FOR

In order to have fully capable forensic laboratories researches and commentaries show in India that if crime laboratories are made independent of control of police administration in all its functioning, that may prove a boon in its development. This approach is evident from one of the most controversial recommendations in the National Academy of Sciences' report on forensic science, "Strengthening Forensic Science in the United States: A Path Forward (NAS Report),"[518] concerns the removal of crime laboratories from the administrative control of law enforcement agencies.[519]According to the NAS Report: The best science is conducted in a scientific setting as opposed to a law enforcement setting. Because forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.[520]

For decades, scholars have commented on the "inbred bias of crime laboratories affiliated with law enforcement agencies"[521]—as have courts,[522] legislators,[523] prosecutors,[524]

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518 NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009) [hereinafter NAS REPORT]. The report's recommendation for an independent federal entity, the National Institute of Forensic Science, is also controversial.

519 Id. at 24 ,The report also states: "Scientific and medical assessment conducted in forensic investigations should be independent of law enforcement efforts either to prosecute criminal suspects or even to determine whether a criminal act has indeed been committed. Administratively, this means that forensic scientists should function independently of law enforcement administrators." Id. at 23.

520 Id. at 23–24.

521 James E. Starrs, The Seamy Side of Forensic Science: The Mephitic Stain of Fred Salem Zain, 17 SCI. SLEUTHING REV. 1, 8 (1993); see also Paul C. Giannelli, The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories, 4 VA. J. SOC. POL'Y & L. 439, 441 (1997) ("Too many experts in the criminal justice system manifest a police-prosecution bias, a willingness to shade or distort opinions to support the state's case."); Randolph N. Jonakait, Forensic Science: The Need for Regulation, 4 HARV. J.L. & TECH. 109, 160 (1991) ("Another [problem] is the failure of forensic scientists to shield themselves from possible bias."); Andre A. Moenssens, Novel Scientific Evidence in Criminal Cases: Some Words of Caution, 84 J. CRIM. L. & CRIMINOLOGY 1, 6 (1993) (stating crime labs "may be so imbued with a pro-police bias that they are willing to circumvent true scientific investigation methods for the sake of 'making their point.'"); James E. Starrs, The Ethical Obligations of the Forensic Scientist in the Criminal Justice System, 54 J. ASS'N OFFICIAL ANALYTICAL CHEMISTS 906, 910 (1971) (noting that lab personnel "inevitably become part of the effort to bring an offender to justice. And as a result, their impartiality is replaced by a viewpoint colored brightly with prosecutorial bias."); Symposium on Science and the Rules of Legal Procedure, 101 F.R.D. 599, 642 (1983) (statement of Professor Joseph L. Peterson) (noting the factors that "raise a legitimate issue regarding the objectivity of laboratory personnel").

522 See R v. Ward, [1993] 96 Crim. App. 1, 68 (U.K.) ("Forensic scientists may become partisan.").

523 See Rodney Ellis, Editorial, Want Tough on Crime? Start by Fixing HPD Lab., HOUS. CHRON., Sept. 5, 2004 ("When crime labs are operating within a police department, examiner bias can undermine the integrity of scientific results."). Ellis was a Texas state senator at the time he wrote the editorial. See id.

investigators,[525] and reporters.[526] The NAS Report is not the first to acknowledge the problem of bias. The National Academy of Sciences' 1996 DNA Report observed that "Laboratory procedures should be designed with safeguards to detect bias and to identify cases of true ambiguity."[527] Similarly, the ABA Standards on DNA Evidence contain a provision on bias.[528] The problem of bias in crime laboratories is not unique to the United States.

According to a British court:

"Forensic scientists may become partisan. The very fact that the police seek their assistance may create a relationship between the police and the forensic scientists. And the adversarial character of the proceedings tends to promote this process. Forensic scientists employed by the government may come to see their function as helping the police."[529]

One commentator concluded that the miscarriage of justice in Britain constituted "unequivocal evidence that the pro-prosecution orientation of government scientists . . . had not adequately been countered in England."[530] Some commentators have proposed independent laboratories as the remedy for this problem,[531] and in 2002, the Illinois

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524 See Scott Bales, Turning the Microscope Back on Forensic Scientists, 26 LITIG. 51, 55 (2000) ("But whether nefarious or innocent, too close a connection between scientists and the law enforcement officers with whom they work creates a real danger of infra text accompanying biased testimony."). As an assistant U.S. attorney, Justice Bales served on the team that produced the 1997 I.G. Report on the FBI lab. See notes 38–39. He is now a justice on the Arizona Supreme Court.

525 See M.A. Thomson, Bias and Quality Control in Forensic Science: A Cause for Concern, 19 J. FORENSIC SCI. 504, 509–10 (1974) ("Is the witness who has his job and salary controlled by the State completely free from pressure, conscious or unconscious, to be entirely impartial?"). Captain Thomson was an Air Force investigator at the time he wrote this article. See id. at 504 n.1.

526 See Steve Mills et al., When Labs Falter, Defendants Pay: Bias Toward Prosecution Cited in Illinois Cases, CHI. TRIB., Oct. 20, 2004, at 1; Ruth Teichroeb, Crime Labs Too Beholden to Prosecutors, Critics Say, SEATTLE POST-INTELLIGENCER, July 23, 2004, at A13.

527 NATIONAL RESEARCH COUNCIL, THE EVALUATION OF FORENSIC DNA EVIDENCE 85 (1996). The report adds: "Bias in forensic science usually leads to sins of omission rather than commission. Possibly exculpating evidence might be ignored or rejected."

528 AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: DNA EVIDENCE 67 (3d ed. 2007) [hereinafter ABA DNA STANDARDS] ("Cognitive bias (e.g., observer effects) occurs because people tend to see what they expect to see, and this typically affects their decision in cases of ambiguity."), available at http://www.abanet.org/crimjust/standards/dnaevidence.pdf.

529 R v. Ward, [1993] 96 Crim. App. 1, 68 (U.K.).

530 Ian Freckelton, Science and the Legal Culture, 2 EXPERT EVID. 107, 112 (1993); see also David E. Bernstein, Junk Science in the United States and the Commonwealth, 21 YALE J. INT'L L. 123, 171 (1996) ("Many reformers in the United Kingdom believe that a large percentage of the problems that have arisen in the forensic science context are attributable to the fact that English forensic science is almost solely the province of the state."); Paul Roberts, Forensic Science Evidence After Runciman, 1994 CRIM. L. REV. 780, 784 (commenting that "forensic scientists who run with the hounds cannot be expected to give a savaged fox the kiss of life") (citing Russell Stockdale, Running with the Hounds, NEW L.J. 772 (June 7, 1991)).

531 See BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 257 (2000) (stating laboratories should "function as an independent third force within the criminal justice system"); Giannelli, supra note 4, at 457–62

Governor's Commission on Capital Punishment proposed the establishment of an independent state crime laboratory.[532] The Commission in majority believed that "the overall quality of forensic services would be improved if the laboratory personnel were truly independent."[533] In contrast, the Department of Justice[534]and the National District Attorneys Association oppose the NAS recommendation of independent laboratories.[535]

Therefore, one understands that law enforcement influence over laboratory decisions is a serious problem. In an ideal world, independent crime laboratories would be the solution. Crime laboratories, however, have historically developed within police agencies, and decades of entrenchment make it difficult to remove laboratories completely from law enforcement control.[536] This does not mean, of course, that the status quo should be preserved. If located within law enforcement agencies, forensic laboratories should be as autonomous as possible and should be run in accordance with scientific norms, including procedures to protect against all types of bias. The NAS Report was not the last messenger. Within months of the report's release, the Supreme Court wrote that "*[f]orensic evidence is not uniquely immune from the risk of manipulation."*[537]

FORENSIC ANALYISIS: INTERNATIONAL SCENARIO

To ensure a more fair and accurate criminal justice system, it is critical to improve the reliability, objectivity, and independence of forensic analysis the expert examination or testing of physical evidence to determine its connection to a crime and forensic expert testimony in criminal investigations and trials.

(arguing for labs associated with a medical examiner system); see also Ellis, supra note 6 (stating "crime labs should operate as a separate and independent third party force in the criminal justice system").

532 REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT52 (2002), available at http://www.idoc .state .il.us/ccp/ccp /reports/commission_report/ chapter_03.pdf [hereinafter CAPITAL PUNISHMENT COMM.] ("An independent state forensic laboratory should be created, operated by civilian personnel, with its own budget, separate from any police agency or supervision."). The proposal was never adopted.

533 Id.

534 Strengthening Forensic Science in the United States: A Path Forward: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 111th Cong. 13 (2009) (statement of Kenneth E. Melson, Acting Dir., Bureau of Alcohol, Tobacco, Firearms, and Explosives) ("DOJ also questions whether full independence of laboratories from law enforcement is advisable or feasible. . . . To be separated completely from interaction with investigative partners would likely cause missteps in decision-making that could result in either loss and/or destruction of evidence, or important analyses left undone.").

535 National District Attorneys Association, NDAA Comments Provided to the Consortium of Forensic Sciences Regarding the National Academy of Sciences Report [hereinafter NDAA Statement] ("NDAA does not believe, as some have suggested, that all forensic labs must be 'independent,' that is, housed outside of a law enforcement or prosecution agency.").

536 See Risinger et al., ("The establishment of freestanding government forensic laboratories, though occasionally advocated, would require such a revolution in thinking and organization, and diminish so many established bureaucratic empires, that it would take a generation of patient lobbying to have a chance of success.") (citation omitted).

537 Commonwealth v. Melendez-Diaz, 129 S. Ct. 2527, 2536 (2009) (citing the NAS Report).

As such, forensic science laboratories that lack internal procedures and standards to prevent bias create the greatest danger to achieving justice.

Brandon Mayfield's case

In the case of Brandon Mayfield, experienced FBI fingerprint analysts found that Mayfield's fingerprints matched the fingerprints that tied to the 2004 Madrid train bombings. The FBI crime laboratory declared with one-hundred percent certainty that Mayfield's fingerprints matched fingerprints tied to the crime, but they were mistaken. After spending time in jail, Mayfield was found to be innocent and was released. The FBI was mistaken in its analysis. The mistakes made by experienced analyst show that tools such as fingerprint analysis, assumed by many to be objective barometers of truth, involve subjective interpretations. Although scientists have developed a good understanding of the sources of inadvertent bias and have incorporated effective safeguards in other areas of science, most forensic science laboratories—including the FBI laboratory—do not provide adequate safeguards to prevent bias and error in testing and analysis. In recent decades, the use of forensic science in criminal investigations and trials has skyrocketed. No other forensic science technique has received as much attention as DNA analysis. To date, DNA has exonerated more than two hundred people in the United States. These exonerations are a reminder that our system is flawed, and they have shed light on serious problems with the criminal justice system, including forensic science. While many assume that forensic science is a near- perfect tool for discovering the truth in criminal cases, a recent study found that false or misleading forensic expert testimony is a leading contributing factor in wrongful convictions.[538] In fact, forensic evidence was presented by the State in 113 of the first two-hundred cases in which the defendant was later exonerated by DNA testing.[539]

There are many cases where individual analysts' erroneous or misleading analysis and testimony have led to wrongful convictions. Some cases exemplify the most egregious errors and show intentional misconduct. These cases demonstrate the strong need for oversight of all forensic laboratories. One of the most notorious examples is **Fred Zain**, a former crime lab analyst in West Virginia and Texas, who fabricated test results in over one hundred cases during the late 1970s and throughout the 1980s.[540] Many of the people convicted because of his work went on to serve lengthy prison sentences, including five who were later exonerated through DNA testing.

In Texas, investigators discovered forensic pathologist **Ralph Erdmann** faking autopsies, but not before his testimony was used in twenty or more death penalty convictions.[541] The misleading testimony of former Illinois analyst **Pamela Fish** has been implicated in the wrongful convictions of at least seven men.[542] While these examples of deliberately false testimony are troubling, the bigger concern is inadvertent error. Fortunately,

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538 Brandon L. Garrett, Judging Innocence, 108 COLUM. L. REV. 55, 60 (2008).

539 Garrett, supra note 1, at 76.

540 Paul C. Giannelli, The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories, 4 VA. J. SOC. POL'Y & L. 439, 442 (1997).

541 Craig M. Cooley, Reforming the Forensic Community to Avert the Ultimate Injustice, 15 STAN. L. & POL'Y REV. 381, 401 (2004).

542 Id. at 402.

the same reforms that prevent misconduct also reduce the risk of unintentional mistakes. To increase the reliability, objectivity, and independence of forensic analysis and forensic expert testimony in criminal trials, and to increase fairness and accuracy in the criminal justice system, The Justice Project of America[543] recommends that states create an oversight commission to set and enforce quality standards for forensic labs, develop internal structures and policies in forensic labs to prevent bias in testing and analysis, make forensic labs institutionally independent from law enforcement and prosecutorial agencies, improve training and certification standards for forensic analysts, and increase funding to implement these essential changes. Without these reforms, the integrity of the criminal justice system is threatened.

INDEPENDENT FSLs: A realistic solution

Law should ensure that all forensic laboratories are independent from law enforcement and prosecutorial agencies. In most states, police agencies or other public safety agencies have jurisdiction over the operation of public forensic laboratories.[544] Due to the nature of their location within law enforcement or prosecutorial agencies, forensic science laboratory employees often have close, collegial relationships with law enforcement and prosecutors conducting investigations of crimes. In addition, many forensic analysts come from law enforcement backgrounds. As a result, analysts sometimes see their role as part of the crime-fighting team as opposed to being a fully objective agent of science.[545] In some circumstances, the nature of forensic analysis will be unaffected by such factors. However, in other types of analysis—those types of forensic analysis with a significant subjective element—the risks of inadvertent bias cannot be ignored.[546] States must address the issue of inadvertent bias on the part of analysts. Forensic science lab analysts must be fully objective agents of science. Analysts must operate without bias or favor. In its report, the Illinois Commission on Capital Punishment recommended that labs should operate as an "independent third force in the criminal justice system."[547] The operation of forensic laboratories as part of law enforcement or prosecutorial agencies is at odds with this needed objectivity. Making forensic science laboratories structurally independent from law enforcement and prosecutorial agencies is a reform that is needed to effectively guarantee an environment of impartiality and objectivity. The real harm of inadvertent bias is that: "Juries tend to regard forensic evidence more highly than they regard witnesses because it is purportedly more objective. But forensic scientists work so closely with the police and

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543 www.justiceproject.org

544 Giannelli, supra note 3, at 469-71. Virginia and Arkansas are notable exceptions.

545 See Andre A. Moenssens, "Novel Scientific Evidence in Criminal Cases: Some Words of Caution," 84 J. CRIM. L. & CRIMINOLOGY 1 (1993) (discussing pro-police and pro-prosecution biases);

546 D. Michael Risinger, Michael J. Saks, William C. Thompson, and Robert Rosenthal, The Daubert/Kumho Implications of Observer Effects in Forensic Science, 90 CAL. L. REV. 1, 6 (2002).

547 ILLINOIS GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT, REPORT OF GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 53 (2002).

district attorneys that their objectivity cannot be taken for granted."[548] A handful of states are leading the way on making labs independent from law enforcement and prosecutorial agencies. Maryland, for example, gives the Department of Health and Mental Hygiene jurisdiction over the regulation of forensics laboratories.[549] The State Crime Laboratory in Arkansas operates independent of law enforcement or the Attorney General and the executive director is accountable directly to the governor.[550] Virginia also has an independent Department of Forensic Science.[551] Other states should follow the lead of these states. Forensic laboratory independence is an essential part of addressing bias, as it effectively protects the neutrality of forensic testing and testimony, thereby enhancing the fairness and accuracy of the criminal justice system.

ROLE of FSLs: In Legal Backdrop

Attorneys and judges have not been successful in their attempts to prevent the introduction of bad forensic evidence in the courtroom.[552] Courts often admit forensic evidence with little scrutiny of its reliability. This failure is not necessarily caused by any bias or prejudice on the part of the court or the attorneys in the case. Rather, judges and attorneys often simply do not have the scientific background to make educated decisions about the reliability of evidence.[553] This is especially significant given the weight that jurors are likely to put on forensic evidence. One study found that "about one quarter [of jurors who] were presented with scientific evidence believed that had such evidence been absent, they would have changed their verdicts from guilty to not guilty."[554] The traditional standard for admissibility of expert testimony, as stipulated by the Supreme Court, is that the techniques used to gather and test the forensic evidence must be "generally accepted" by those in the field.[555] The number of wrongful convictions caused by erroneous forensic testimony have shown this standard to be an insufficient safeguard. Ultimately, judicial safeguards alone are simply unable to effectively protect against faulty forensic evidence. As a result, statutory reform is vital to ensure the reliability of forensic evidence in criminal cases.

Daubert's Case

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548 Belinda Luscombe, When the Evidence Lies, TIME, May 21, 2000, at 38.

549 MD. CODE ANN., HEALTH-GEN § 17-2A-02 (West, Westlaw through all chapters of the 2008 Regular Session of the General Assembly effective through June 1, 2008). Crime laboratories in Maryland are operated by law enforcement, but are regulated and licensed by the Secretary of the Department of Health and Mental Hygiene.

550 ARK. CODE ANN. § 12-12-304 (West, Westlaw through end of the 2008. First Ex.Sess., including changes made by the Arkansas Code Revision Commission received through March 26, 2008).

551 VA. CODE ANN. § 9.1-1100 (West, Westlaw through End of 2007 Reg. Sess. and includes 2008 Reg. Sess. c. 1, 2, 8, 21, 49, 51, 56, 57 and 72).

552 Paul Coverdell National Forensic Sciences Improvement Act of 2000, Pub. L. No. 106-561, 114 Stat. 2787 (amended 2002).

553 See Jane Campbell Moriarty and Michael J. Saks, Forensic Science: Grand Goals, Tragic Flaws, and Judicial Gatekeeping, 44 NO. 4 JUDGES JOURNAL 16 (Fall 2005).

554 See Andre A. Moenssens, "Novel Scientific Evidence in Criminal Cases: Some Words of Caution," 84 J. CRIM. L. & CRIMINOLOGY 1 (1993) (discussing pro-police and pro-prosecution biases).

555 Joseph Peterson, John Ryan, Pauline Houlden, and Steven Mahajlovic, The Uses and Effects of Forensic Science in the Adjudication of Felony Cases, J. FORENSIC SCI. 1730, 1748 (1987).

In 1993, the United States Supreme Court issued the landmark ruling of Daubert v. Dow Pharmaceuticals, ruling that "general acceptance" is not sufficient as a precondition for the admissibility of scientific evidence under the Federal Rules of Evidence. Rather, the Court explained, the Rules assign the trial judge with the task of ensuring that expert testimony "rests on reliable foundation and is relevant to the task at hand." The Federal Rules of Evidence, in turn, were modified to clarify the Supreme Court's decision in Daubert:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[556]

Frye & Daubert Comparison

When compared with the Frye standard, Daubert made admissibility easier for relatively new, well- grounded science which might not yet have achieved wide acceptance. Conversely, for poorly grounded sciences which nonetheless had come to be widely accepted, Daubert raised the threshold and made admissibility harder (because such fields fall short on Daubert's more objective criteria).[557] Furthermore, Daubert places the determination of reliability in the hands of judges with the implication "that the trial judge, after applying various measures, would know scientific reliability when he or she saw it."[558] Daubert created an important precedent. The Daubert standard was used to challenge the dependability of expert evidence presented by plaintiffs in civil cases.[559] Commentators hailed this ruling as a powerful improvement from the Frye standard, but enthusiasm muted when it became clear that courts would aggressively apply the standard in civil cases while rarely applying it in criminal cases. Following Daubert, the quality of expert testimony in civil cases increased dramatically. Judges were much less enthusiastic about applying the Daubert standard to criminal cases. When criminal defendants challenged the reliability of forensic evidence on the grounds of the Daubert standard, judges consistently ruled in favor of the government, maintaining broad admissibility of 'expert' testimony.[560] One scholar observes a "troubling gap in the way judges apply Daubert and Rule 702 in civil cases and criminal cases. Judges have excluded a lot more evidence in civil cases since Daubert and

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556 FED. R. EVID. 702.

557 DAVID FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: FORENSICS (WEST GROUP 2006 STUDENT ED.).

558 Thomas Bohan, Scientific Evidence and Forensic Science Since Daubert: Maine decides to sit out on the dance, 56 ME. L. REV. 101, 112 (2004).

559 D. Michael Risinger, Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?, 64 ALB. L. REV. 99, 100 (2000).

560 For Wisconsin, the admissibility test is spelled out in State v. Peters, 192 Wis. 2d 674, 534 N.W.2d 867 (Ct. App. 1995). For Virginia, the test is spelled out in Spencer v. Com., 240 Va. 78, 393 S.E.2d 609 (1990). Georgia admissibility standards are governed by Ga. Code Ann. § 24-9-67. The admissibility standard in Utah was originally explained in Phillips By and Through Utah State Dept. of Social Services v. Jackson, 615 P.2d 1228 (Utah 1980).

there has been surprisingly little change in criminal cases."[561] Courts' unwillingness to play gatekeeper in criminal cases means that Daubert has not prevented the introduction of unreliable forensic evidence in criminal cases. State laws on admissibility also vary widely. Some states continue to follow the Frye standard for admitting expert testimony while other states have opted to employ the Daubert standard in their courts. Four states, Wisconsin, Virginia, Georgia, and Utah, have created their own, non-Frye, non-Daubert rules.[562] Traditional types of forensic evidence are easily admitted into court under either standard and most jurors consider it highly trustworthy. Thus, it is imperative to do what is possible to ensure that it is, in fact, trustworthy.

KUMHO: AN EXTENSION OF DAUBERT

Kumho Tire Co. v. Carmichael is another important U.S. Supreme Court case ruling on the issue of expert testimony.[563] Kumho makes clear that Daubert applies to all kinds of expert testimony, not only scientific testimony:

It would prove difficult, if not impossible, for judges to administer evidentiary rules under which a "gatekeeping" obligation depended upon a distinction between "scientific" knowledge and "technical" or "other specialized" knowledge. There is no clear line that divides the one from the others…We conclude that Daubert's general principles apply to the expert matters described in Rule 702.[564]

Kumho has important implications for forensic science. In amicus briefs for the case, forensic scientists, realizing that much of their work was not based on well-researched and established foundations, asked the court not to extend Daubert beyond the realm of science. Forensic scientists hoped to find refuge (and continued admissibility) by refraining from calling what they did "science."[565] In Kumho, the Supreme Court rejected this argument, and the stage was set for the foundations of forensic science to be evaluated more rigorously by the courts. Regrettably, the lack of judicial gatekeeping with respect to forensic science following Kumho makes clear that forensic scientists had no reason to be as worried as they were. In the context of prosecution proffered forensic identification expertise, "[t]here is almost no expert testimony so threadbare that it will not be admitted…"[566] Case law and the record of exonerations illustrate that judges are simply unable to effectively keep faulty forensic evidence out of the courtroom. And history has shown that defense lawyers are often unable to judge the reliability of forensic testimony. Consequently, lab results are almost always accepted prima facie without regard to whether the laboratory lacks appropriate standards, independent oversight, or adequately trained and qualified analysts. Statutory forensic science reform is vital to ensure the reliability of forensic evidence in criminal cases and to protect against wrongful conviction.

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561 Telephone Interview with Michael J. Saks, Professor of Law and Psychology, Arizona State University (Jul. 20, 2007).

562 Bohan,.

563 Kumho Tire Co. Ltd. v. Carmichael 526 U.S. 137 (1999).

564 Id. at 149.

565 Saks, supra note 51.

566 Moriarty and Saks, supra note 41, at 29.

Role of Forensic Evidence

The collection of forensic evidence and the application of forensic sciences have become essential to criminal investigations and prosecutions. Forensic evidence fulfills several roles in criminal investigations that is (Fisher, 2004):

- To prove a crime has been committed or establish key elements of a crime.
- To place the suspect in contact with the victim or with the crime scene.
- To establish the identity of persons associated with a crime.
- To exonerate the innocent.
- To corroborate a victim‘s testimony.
- To assist in establishing the facts of what occurred.

Numerous books and articles have been written on how forensic evidence has led to the arrest and prosecution of offenders (Block, 1969; Corwin, 2003; Evans, 1996; Lee, 2002; Lee & Tirnady, 2003; Platt, 2003; Ragle, 2002; Ramsland, 2001; Ramsland, 2004; Snow, 2005). All these publications describe individual cases in which forensic evidence was essential to their eventual solution. These publications are filled with interesting anecdotes, such as the first offender who was identified through fingerprints (for stealing billiard balls in 1902) and the thief identified because he left his fingerprints on an FBI bulletin when he robbed an agent‘s house (Platt, 2003; Ragle, 2002).

In addition to print media, several television programs—most notably, the CSI series with its spinoffs—have captured the imagination of the public. In these shows, cases are presented, forensic evidence collected, analyses completed, and arrests made within a short span of an hour. These shows have created the CSI effect on the public‘s perceptions about how crime investigations are conducted and the role of forensic evidence. On the positive side, the CSI series has drawn attention to the importance of crime labs at the International, National, State, and local levels, while on the negative side, it creates an illusion that forensic analysis has virtually unlimited capabilities and is quickly accomplished.

Admissibility of forensic evidence before jury:

There are two very important rules which determine and govern the admissibility of forensic evidence as evidence in courts of law. The first rule is the Frye Rule that is based on “general acceptance principle” espoused in case of Frye V. United States[567] it states that:

“ *And while court will go all long way in admitting expert testimony deduced form a well-recognised scientific principle or discovery ,the thing from which deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs*

The rule given in Frye’s case was again qualified in the case of Daubert V. Merrell Dow Pharmaceuticals,Inc. [568] in which court enunciated that a trail judge must ensure that any & all scientific testimony or evidence admitted is not only relevant but reliable.

In Melendern-Diaz V. Massachusetts[569] , the court in this case stated that crime laboratory reports may not be used against criminal defendants at trail unless the analyst

567 293 F 1013, 1014 (1923).

568 509 U.S. 579 (1993).

responsible for creating them give testimony and subject themselves to cross-examination. This is because forensic evidence is not unique immune from risk of manipulation.

Forensic Science in criminal justice administration is to be studied within the ambit of legal and political context which should demand higher standards of performance. Forensic labs must keep themselves up-to date with changes in law sphere, political and social environment of forensic science and how the criminal justice system might respond to the changes when we see changing nature of crime.

The ***raison d'etre*** for use of forensic science in criminal investigation is that when a crime occurs, collaboration between forensic science and administration of criminal justice must launch means for establishing nexus between crime and criminal. The boom of technology has established its foundation in a way by developing modern mind-set of society in all spheres including crime and also helped forensic science with more modern method of solving crime tallying with modern standards of 21st century.

Indian Position:

Due to lack of emphasis on the use of forensic science in criminal investigation and trails, it has been observed that the development of forensic science has been very slow India when comparing to other developed jurisdiction like USA & UK. And which has led it not being utilised widely and has in turn contributed to its underdevelopment in state of Jammu & Kashmir.

Forensic Science relates to authentication of evidence and crime scenes in order to determine if a crime is what it purports to be or is alleged as being using science .Forensic science is based on a principle of known as **Locard's Exchange Principle** which states that:

"*There is no such thing as a clear contact between two objects. When two bodies or objects come in contact, they mutually contaminate each other within minute fragments of materials"*[570]

This principle was developed by Dr.Edmond Locard in Lyon, France in 1900's which is considered as cornerstone of forensic science and proposes that every contact between two bodies, objects or surfaces leaves a trace of physical evidence or material known as fragmentary or trace evidence from which conclusive evidence can be retrieved. Therefore, it means that Locard's principle is grundnorm of forensic science that criminal always brings something to the scene of a crime and leaves something behind and often takes something away with them.

It is admitted fact that Criminal justice system in India encompasses a hub of courts and tribunals that deal with criminal law and its enforcement. It is the system that maintains law and order situation in a society, deterring and mitigating crime and punishing those who violate laws with criminal sanction and rehabilitation efforts.[571]

In view of above statement, one understands that importance of forensic science can't be ignored. Forensic Science's most important use is that it carves out the ability of evidence to adequately represent the facts of a given case. It is cogent role of forensic science that tends

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569 (No. 07-591)69 Mass. App 1114 (2009).

570 Forensic Science (Article by the University of Griffths) 18th NOV 2010.

571 Frase,R.S. & Wiedner, R. Criminla Justice System –Strutural and theoretical components of criminal Justice System in operation: The importance of viewing Criminal Justice System as a system(2006).

to mould means to analyse and simplify crime scenes, evidence and personal testimony in order to create a visualisation of how a crime occurred. There are ways to analyse crime viz; crime scene investigation; crime scene reconstruction; the assumption of integrity of evidence; forensic investigation and analysis; producing forensic evidence as evidence; then admissibility of forensic evidence in court of law.

Conclusions:

The techniques of scientific analysis like DNA testing, cyber forensics, Norco-analysis etc. have established as credible means of knowing the truth and as reliable means of investigation under criminal administration of justice throughout the world. India has begun to adopt these techniques slowly but steadily in her administration of criminal justice system. Keeping in view this development changes are discernible in prosecution and procedure of investigation in India in a broader way. It is nevertheless, not touched the level as achieved in countries like USA, UK etc but the process is on . in this respect forensic evidence has been used as clinching evidence in a number of cases by apex court. However, the effective use of FSL report is far from satisfactory. It is mainly due collection of evidence in partial and that too by casual IO‘s to the FSL in a defective and delayed. In J & K FSL is ill equipped due to lack of proper technology and broad based infrastructure. In order to tide over this problem it is suggested to undertake the following corrective measures:

a. Protection of scenes and collection of evidences must get priority by having swift SOCO (Scene of crime officer) in each police station and ground spread of forensic science services to all police stations should get priority.

b. Good ethics and professionalism need to be infested amongst law enforcement agency and FSLs.

c. The prosecution and judges also need some spells of training in the nature and effectiveness of forensic science and about latest developments.

d. To make FSLs independent of police administration as evidenced in advanced countries of the world.

e. SOC should be necessarily visited by forensic team and if possible for keeping the sanctity and avoid greater chances of tampering of each and every case, a judicial magistrate or responsible forensic officer of higher rank should also accompany to SOC.

f. A major thrust of forensic research must concentrate on creation of data banks like of DNA profiles and most distinctive properties of evidence, which ought to be collected, stored and disseminated to facilitate the task efficiently by establishing hi tech laboratories so that alarming rate of crime in India is arrested and negotiated.

Peerzada Yasir Latif Handoo*

* Lecturer, Faculty of Law, University of Kashmir. Email: yasir-thinktank25@yahoo.com.

Monopoly of Creative Rights: An Overview of the Copyright Act, 1957

Abstract

The objective of intellectual property law is to protect the creation of the human intellect. It consists of information in tangible form susceptible to copying in unlimited number of times at different locations all over the world. The very foundation and philosophy of copyright law or the moral basis of protecting the knowledge-based creations, is the maxim, "thou salt not steal". According to the great social jurist, Dean Roscoe Pound, the task of any law in society is, "balancing and harmonizing of competing interests". In the opinion of another jurist Ihering, law does not exist for individual as an end in itself, but survives with the good of the society in view. Copyright law, therefore, involves a delicate balancing between the monopolistic proprietary interest of the author/creator and the society's interest in easy access to the copyright work. The law does not permit to appropriate what has been produced by the labour, skill and capital of another. An artistic literary or musical work is the brain child of the author, the fruit of his labour and so, considered to be his property. So high priced by all civilized nations that it is thought worthy of protection by national laws and international conventions. The Indian Copyright Act, 1957 has been enacted to provide protection to copyright holder against infringement by unauthorized users and at the same time has provided a leeway to different people to exploit such works as fairuse without creating any risk to the protected rights of copyright-holders. The present paper is an exercise to evaluate the blend of monopolistic copyright and its public use as it obtains in contemporary situation.

Key words: Patent, trademark, copyright, design, trade secret, literary and artistic and dramatic public domain, assignment, licence, piracy, adaptation, moral right etc.

1. Introduction

The brain and the brawn are the twin blades of the scissors of the activity of living beings. However as the life became more complex for a variety of reasons, the role of brain became more and more crucial. Human beings can therefore be justifiably happy that they are instinctually the most developed species of the animal kingdom. Man's ingenuity is, in fact, at the back of the most of the progress that the world has witnessed over time. [572]

There is no doubt that even unskilled labour can become more efficient and can also turn out better products if they are mentally alert. Greater mental abilities in people enable qualitative change in the labour force by facilitating human capital formation, stressed by many, including Schultz, as an essential ingredient of economic progress.[573]

Intellectual Property has received special consideration in modern times. However, Intellectual Property protects applications of ideas and information that are of commercial value. The subject is growing in importance, to the advanced industrial countries in particular, as the fund of exploitable

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[572] KRG Nair & Ashok Kumar, " *Intellectual property Rights*" , Allied Publisher Limited (1994) at p-1

[573] Schultz, T.W.(1961), " Investment in Human Capital," American Economic Review, Vol.52, No.1 quoted in Ibid.

ideas become more sophisticated and as their hopes for a successful economic future come to depend increasingly upon their superior corpus of new knowledge and fashionable conceits. There has recently been a great deal of political and legal activity designed to assert and strengthen the various types of protection for ideas.[574]

The fact that Intellectual Property gives a right to control the activities of others has a number of implications, often inadequately understood. The right owner does not need the right merely to exploit a market for its goods or services. There are different types of Intellectual property Rights, for example, patents for inventions, copyright for literary and artistic works and associated and trade marks and names for goodwill attaching to market symbols which cover distinct subject matters and have different objectives.[575] Intellectual Property is nothing but legal concept of ownership applied to intangibles. It is not a property right (as understood for tangibles) but monopoly right limited in time and space. They allow the creator of a work or an inventor the exclusive right to commercially exploit his creation or invention for a limited period of time. After the end of the statutory period, they fall in public domain. The IP right can also be sold, licensed or otherwise disposed of by the right-holder. The TRIPs Agreement covers within its ambit: (i) copyright and related rights;(ii) trademarks (including services marks); (iii) geographical indications; (iv) industrial designs;(v) patents;(vi) lay out designs (Topographies) of integrated circuits; and (vii) trade secrets. It has also introduced the IP protection for plant verities.[576]

2. What is copyright?

Copyright is a right given against the copying of defined types of cultural, informational, and entertainment productions. Classically, these have been (in international jargon) 'literary and artistic works'- the creation of authors, playwrights, composers, artists and film producers. At least the outstanding works in each of these categories are marked by their individuality - that distinctness which results from the creator's myriad choices made in the course of constructing the work in the chosen medium.[577]

3. The objective of copyright

The objective of the copyright is to encourage authors, artists and composers to produce original works by rewarding them with exclusive rights for a limited period. After the expiry of the period, the work would vest in the public domain where any person could produce it without any prior permission of the author. The copyright ,therefore, benefits on the one hand, author, artists, composers and the like, and on the other hand, the public at large. The copyright law achieves the dual purpose by preventing persons from unfairly appropriating the benefits accruing from the works of others and at the same time preventing creators from having perpetual monopoly over the creation. Copyright protection is essential to encourage exploitation of copyrighted works for the benefit of the public by entrepreneurs, like publishers, film producers, sound recording producers after obtaining an

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574 W.R.Cornis, *Intellectual Property Rights: Patent, Copyright, Trade Mark and Allied Rights,* Universal Law Publication(2001) at p-5

575 Id. At p-6

576 S.K.Verma, " New Vista of Human Creative Activities and Their Protection under Copyright Law—A Human Approach"- Lecture delivered at the National Seminar organized by the Faculty of Law, Kumaun University, Almora on Sept. 10-11, 2005

577 Id. At p-7

assignment of a particular right from the owner of the copyright. The entrepreneur having invested a huge sum of money in his activities would obviously wish to recover the capital invested and earn profits. Therefore he has to be protected from unauthorized reproduction or duplication by piracy If no legal protection is afforded to the entrepreneurs, then a pirate would reproduce the work at a fraction of the original cost of the production and would sell the same at prices lesser than what the original producer would charge. Such acts of the pirates can totally ruin the producer who holds a valid assignment from the author, composers etc. In areas like cinematography and sound recording, piracy can put the producer to a loss of crores of rupees.

4. Copyright Piracy in India : Extent and Domain

The copyright piracy has been prevalent in every country including India which can be breifly illustrated by the following examples:

- The book piracy trade has moved far beyond the Sunday bazaar at Darya Gunj…estimates suggests that the trade is worth a whopping Rs. 30 crore in Delhi alone, with retailers of pirated books finding roots in every prominent market,[578]
- Recently raid in Palika Bazar turned violent, 3 policemen got hurt- they managed to seize three gunny bags containing pirated video CDs.[579]
- US-based Cambridge International Forecast has estimated a whopping trade loss of $295 million due to piracy in India during 1998. Counterfeiters in India brought in an estimated of $66 million to the American motion pictures industry the same year, computer programmes in business applications and entertainment software were estimated to have lost $193 million,[580]
- The Delhi police has seized 25,000 works worth over Rs. One crore during raids at various places in the Capital,[581]
- In a special drive to curb software piracy, Nasscom will offer Rs. 50,000 reward to anyone who provides information that would lead to legal action against companies using software. It has joined hands with Business Software Alliance(BSA) to initiate this anti-piracy initiative.[582]
- For the first time since video piracy assumed the shape of an illegal industry, the intelligence agencies have collected evidence to prove the involvement of the underworld don, Dawood Ibrahim, in the piracy business flourishing in the capital. And is estimated to be worth Rs.2000 crore.[583]

The above are only tip of iceberg to show the gravity of the copyright violation in India particularly in the capital. The present paper is the modest attempt to highlight the need of copyright law in order to protect the creative works of the authors of the various works and to analyze the scope of the present copyright law.

5. Brief history of the copyright law in India

In ancient days creative persons like artists, musicians, and writers made, composed or wrote their work for fame and recognition than to earn a living, thus, the question of copyright never arose. The importance of copyright was recognized only after the invention of the printing press which enable the production of the books in larger quantities practicable. In India, the first legislation of its

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578 Times City, The Times of India, dt. 8.8 2005

579 Times of India, dt.8.9 2001

580 The Times of India,dt.12.10. 2000

581 The Times of India, dt.13.7.2001

582 The Times of India, dt.2.12.2000

583 The Times of India, dt11.9.2001

kind, the India Copyright Act was passed in 1914 which virtually incorporated the U.K.Copyright Act, 1911.

The question whether or not India, as a civilized nation had, prior to colonization of nation or institutions any legal protection of creative artists, has not been asked for; this makes even tentative approaches to answer quite ambitious at this stage. Legal and social historians of ancient and medieval India have yet to attend to this aspect.[584] Even otherwise, it is mistaken to begin an account of copyright law in India with the British Act of 1911 and its organic transplantation into Indian Law. It appears that the first statute on copyright was enacted during the East India Company's regime in 1847.[585] But there is no credible and authentic knowledge available of the 1847 period onwards upto the Imperial Copyright Act, 1911.

The necessity of the new enactment was discussed by Hon'ble Justice V.R.krishna Iyer in *Indian Performing Right Society Ltd. V. Eastern India Motion Picture Association*[586] in the following words:

The creative intelligence of man is displayed in multiform ways of aesthetic expression but it often happens that economic system so operate that the priceless divinity which we call artistic or literary creativity in man is exploited and masters, whose works are invaluable are victims of piffling payments. World opinion in defence of human right to intellectual property led to international conventions … .calculated to protect works of art. India responded to this universal need by enacting the Copyright Act, 1957.

The basic features of the 1957 Act are in harmony with the provisions of Berne Convention and the Universal Copyright Convention. India is a member to both the Conventions. This Act is divided into 15 chapters containing 79 sections.

The Act provides:

1. a statement of works which will enjoy the protection of law;
2. a definition of the person who enjoyed the right;
3. assignment of copyright;
4. legal remedies for enforcing the rights; and
5. registration and statutory arbitration in case of disputes.

Chapter I,III, IV and V contain law of copyright and its ownership; chapter XI deals with infringement; chapter IX is devoted to international copyright law; chapter X stipulates registration of copyright and prescribes remedies. Chapter II, VI, VII and X deal with powers and functions of the Registrar of Copyright and Copyright Board. Chapter VIII deals with the rights of broadcasting authorities. Despite all this, the Act was not sufficiently farsighted. For instance, it does not protect the right of the performers adequately. But the fact remains that the country had its own law of copyright for the first time in contemporary history; and for weal or woe, it represents the law-policy choices made by its independent legislatures.

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584 Upendra Baxi, " Copyright Law and Justice in India", 28JILI(1986)p.498

585 Id. At p.499

586 AIR 1977 SC 1443

6. The Amendment of 1983 and 1984

The new sections 32A and 32B were inserted by these amendments which envisaged 'Compulsory licenes' for publication of copyrighted foreign works in any Indian language for the purpose of systematic and organized instructional activities at a low price with the permission of Copyright Board on certain conditions. Another significant change was the insertion of section 19A which empowered Copyright Board to order revocation of the assigned copyright upon a complaint where either the terms are 'harsh' or where the publication of the work is unduly delayed. The 1984 amendment also prescribed stringent punishments for the piracy and effective procedure to prohibit it.[587]

7. The amendment of 1994 and 1999

The 1994 and 1999 amendments bring Indian law in conformity with the Uruguay Round Agreement on Trade-related Aspect of Intellectual Property (TRIPs Agreement). These amendments have also enlarged the scope of the protection of computer programs and restricted the rights of foreign broadcasting organizations and performers and confer powers on central government to apply chapter VIII to broadcasting organizations and performers in certain other countries under new sections 40A and 42A respectively.

The Copyright Act, 1957 as amended in 1999 governs the copyright. The works are classified into three classes under the Act:

1. Literary, dramatic, musical and artistic works. Works which express in prints or writing are the literary work. Dramatic works includes choreographic work. Musical work includes any graphical notion consisting the music, painting sculpture, drawing, photograph, architecture work, craft work are included in the artistic work.

2. Cinematograph film: it includes any work of visual recording in any medium making a moving image produced any means.

3. Sound recording which can be produced regardless of the medium.

The rapid change taking place in the field of computer technology led to the certain new work and material. The traditional communication media, print, sound, visual, are included in one,i.e. multimedia. So looking into the new technologies the computer programs and computer databases are also included into the classes of work[588].

8. Infringement of copyright

Section 51 of the Copyright Act, 1957 defines 'infringement' in general terms which may be summed up as:

a. Doing anything without licence for which the owner of the copyright has exclusive rights;

b. Permitting for profit without licence any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work; and

c. Making for sale or hire, selling or offering for sale or hire, distributing, exhibiting in public or importing into India any "infringement copy of the work"

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[587] Supra note. 13 at p.505

[588] Under the Copyright Act some rights available are included:
Reproduction right 2. right of distribution 3. Right of rental 4.
Translation right 5. Right of Adaptation 6. right of communication to
the public 7. right of Sale and 8. Moral right

However, bringing one copy in India for private and domestic use of the importer is permitted.

Section 2(m) of the Act defines 'infringing copy' means reproduction of copy or import in contravention of provisions of the Copyright Act of any of the following:

a. Reproduction of literary, dramatic, musical or artistic work otherwise than in form of cinematographic film;

b. Copy of the cinematographic film by any means;

c. Recording embodying ' sound recording' by any means;

d. Sound recording or visual recording of a programme or performance where ' broadcast reproduction right ' or performer's right ' subsists.

9. Acts which do not constitute infringement

The Copyright Act recognizes certain acts which are done by a person other than owner do not amount to infringement such as—

1. Fair scholar use;
2. Educational use;
3. Media reporting;
4. Use of state produced material;
5. Making of records of literary, dramatic or musical work;
6. Performance of such work;
7. Use by public libraries;
8. Use of engraving, etc.
9. Cinematograph film—Use by makers and exhibitors;
10. Use relating to artistic work

10. Few Important Judicial decision on copyright

R.G.anand v. Delux Films (1978) 4 SSC 118

The Apex Court, while dealing with the law relating to the copyright and its infringement, after careful consideration and elucidation of the various authorities laid down the following important propositions:

1. There can be no copyright in an idea, subject-matter, theme, plots or historical or legendary facts and violation of the copyright in success is confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work;

2. The court should determine whether or not the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. If the defendant's work is nothing but a literal imitation of the copyrighted work with some variations here and there it would amount to violation the copyright;

3. One of the surest and the safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.

With regard to the infringement the Apex Court added:

"Infringement of a copyright is a trespass on a private domain owned and occupied by the by the owner of the copyright, and therefore, protected by law, and infringement of copyright; or piracy which is a synonymous term in this connection, consists in the doing by any person without the

consent of the owner of the copyright, of anything the sole right to do which is conferred by the statute in the owner of the copyright".[589]

Barbara Taylor Bradford v. Sahara Media Entertainment [590]

The Calcutta High Court examine various aspect of the copyright Act . The plaintiff filed a suit for infringement restraining the defendant from telecasting the serial 'Karishma'. One of the question examined by the court was the concept of originality and the idea /expression dichotomy. Following the ratio in R.G.Anand the court summarized the policy of copyright law thus:

"The law protect originality of expression but not of the central idea, not merely because the balancing of two conflicting policies. The two policies are as follows: The first is the law must protect originality of artistic work, thereby allowing artists t reap the fruits of their labour and stopping unscrupulous pirates from enjoying those fruits. The second policy is that the protection must not become an over protection, thus, curbing down future artistic activity. If mere plots and characters were to be protected by copyrights, no original artist could write anything 'original' at all, on a similar plot or on similar characters.

Eastern Book Co. v. D.B.Modak[591]

The Supreme Court after a ling gap examined the concept of originality . Appellants, the publishers of law report by name 'Supreme Court Cases' claimed copyright in the copy edited judgments published by them and alleged infringement of the same by the respondent in their publication 'Grand Jurix". Regarding the standard of originality after examining English and Indian cases the court opined:

"The originality requirement in derivative work is that it should originate from the author by application of substantial degree of skill, industry or experience. Precondition to copyright is that work must be protected independently and not copied from another person. Where a compilation is produced from the original work, the compilations more than simply a re-arranged copyright of original, which is often referred to as skill, judgment and labour or capital. The copyright has nothing to do with originality or literary merit. Copyright material is that what is created by the author by his skill, labour and investment of capital, may be it is derivative work. The court have only to evaluate whether work is not the end-product of skill, labour and capital which is trivial or negligible but substantial. The court need not go into evaluation of literary merit of derivative work or creativity aspect of the same.

11. Remedies

The owner of the Copyright under the Act has three types of remedies available to him in case of infringement. These are:

A. Civil remedies;
B. Criminal remedies;
C. Administrative remedies.

(A)Civil Remedies

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589 Ibid.

590 2004 (28) PTC 474(Cal)

591 (2008) 1 SCC 1

This type of remedy provides for a right to the creator to seek injunction, damages and accounts. The law requires that owner of the copyright must be a party to the proceeding.[592] When the infringer had no knowledge of infringement of copyright or had sufficient ground that no copyright existed in the work only injunction and profits are the remedies. In such cases court does not award ant damages[593] and permits seizure of the equipments used to make infringing copes. Therefore, damages in case of infringement usually depends upon the fact of *mens rea* being present while duplication in being done.

(a) Injunction

To secure immediate protection from a threatened or continued infringement the court may pass an injunction pending further orders or final trial. For obtaining an injunction the plaintiff has to establish a *prima facie* case and prove that the balance if convenience is in his favour and that if the interim injunction is not granted it will cause irreparable injury to him. The injunction may be of two types, (1) temporary injunction ; and (2) permanent injunction.

(b) Damages

The next civil remedy available to a person is award of damages. The objective behind award of damages is to compensate the sufferer in some measure and make good the loss he may have suffered because of infringement of his copyright, since damages are dependent upon loss suffered by the copyright owner.

(c) Account

A plaintiff can claim account of profits from the defendant. Two types of damages may be claimed by the plaintiff, one for infringement of copyright and other as ownership of all infringed copies of his work. The plaintiff will have to take proceeding for the recovery of possession thereof or in respect of conversion. As an alternative to damages, a claim may be made for account of profits. The idea is to arrive at a fair conclusion while determining the damages since an order on accounts can not be passed if there is no profit. A copyright owner has to choose between damages and accounts. He is not entitled to both the remedies, since both are alternative and incompatible.

(B) Criminal Remedies

The infringement of copyright has been declared as an offence[594] **,** punishable with imprisonment which may extend from a minimum period of six months to a maximum of three years and with a fine of Rs.50,000 to Rs. 2 lakh. The purpose of criminal proceeding is to punish the persons who have infringed copyright and *mens rea* is an essential part of any criminal offence which is manifested here in the form knowledge under the copyright law. The law gives power to the police to seize all copies of the infringed work without any warrant once cognizance of the case has been taken by the Magistrate[595] **.**

(C) Administrative Remedies

Administrative remedies consist of moving to the Registrar of Copyright for passing an order for the ban on the import of infringing copies into India[596]. And the delivery of confiscated infringing copies to the owner of the copyright falls under administrative remedies.

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[592] Sec.61, Copyright Act, 1957

[593] Id., sec.58

[594] Id.,sec.63

[595] Id.,sec.64

[596] Id.,sec.53

Conclusion

The object of the copyright law is to protect the author of the copyright work. A review of the legal frame work of Indian Copyright law shows that structurally the law is well founded and is flexible enough to respond to challenges that advancement of the technology may warrant. There are adequate civil and penal provisions envisaged in the Act to safeguard the interest of the creators. The need for trained and well equipped specialized police force for detection and enforcement of crimes relating to violation of intellectual property rights and there is also need for judicial mindset in dealing with intellectual property right violation cases. However the recent judgments of the higher courts show that the courts are very seriously taking up the issues and giving high weightage to the rights of owner of the copyright.

Dr. Eqbal Hussain*

* Associate Professor, Faculty of Law, Jamia Millia Islamia, New Delhi-110025.

MEDICAL AID AS A RIGHT TO LIFE

Abstract

Right to life describes the belief that a human being has an essential right to live, particularly that a human being has the right not to be killed by another human being. This right is covered by Art.21 which is a very familiar fundamental right applicable to all persons. This paper is an attempt to analyse the widening scope of right to life interpreted by the Supreme Court acting itself as a saviour of mankind by applying its judicial activism. The paper further makes a special emphasis on the right to Medical Aid as a part of right to life including several policies of medical aid framed by the Government.

Keywords: Right to Health, Medical Aid, Right to life.

INTRODUCTION

The Right to life means to lead a meaningful and dignified life. It does not have a restricted meaning. Article 21 of the Constitution of India, is a very familiar fundamental right and is applicable to all persons. It says that, *no person shall be deprived of his life and personal liberty except according to procedure established by law*. The right to protection of life and personal liberty is the main object of Art. 21 and is a right guaranteed against state action as distinguished from violence of such rights by private individuals. In other words, in case of violation of such rights (which are guaranteed under part III of constitution of India) by private individuals, the person aggrieved must seek his remedies under general law. Article 21 being one of the fundamental rights guaranteed by the constitution, the same cannot be taken away by statutes. Even the Supreme Court in *Behram v. state of Bombay*[597] held that the fundamental rights have been put into our constitution on grounds of public policy and in pursuance of the objectives declared in the preamble though these rights are primarily for the benefit of individuals and hence there can be no question of fundamental rights being waived. The scope of Article 21 after the post Gopalan case[598] has been expanded or modified gradually through different decisions of the Apex Court. The Supreme Court in *Francis Coralie Mullin v. Union Territory of Delhi*[599] *and others*, held the Article 21 requires that no one shall be deprived of his life or personal liberty except procedure established by law and this procedure must be just, fair and reasonable and not arbitrary, whimsical or fanciful.

The expanded scope of Article 21 has been explained by the Apex Court in the case of *Unni Krishnan v. State of A.P*[600]. The Apex Court provided the list of some of the rights covered under Article 21 on the basis of earlier pronouncements and some of them are listed as: the right to go abroad, the right to Privacy, the right against solitary confinement, the right against hand cuffing, the right against delayed execution, the right to shelter, the right against custodial death, the right against public hanging and Doctor's assistance.

Maintenance and improvement of public health, improvement of means of communication, providing human conditions in prisons, maintaining sanitary conditions in slaughter houses have also been included in the expanded scope of Article 21. This scope further has been extended even to innocent hostages detained by militants in shrines who are beyond the control of the state. The Apex

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597 1995 (1) Scr 613.
598 Air 1950 Sc 27
599 1981 Scr (2) 516
600 1993 Scr (1) 59

Court in *S.S. Ahuwalia v. Union of India and others*[601], held that in the expanded meaning attributed to Article 21 of the Constitution, it is the duty of the State to create a climate where members of the society belonging to different faiths, caste and creed live together and, therefore, the State has a duty to protect their life, liberty, dignity and worth of an individual which should not be jeopardized or endangered. If in any circumstance the state is not able to do so, then it cannot escape the liability to pay compensation to the family of the person killed during riots as his or her life has been extinguished in clear violation of Article 21 of the Constitution. The Supreme Court by taking resort of Article 21 of the Indian Constitution evolved itself as a saviour of mankind. On the basis of judicial pronouncements of the Art.21 the scope of the Article 21 has been widened. The following different rights have been included in it:

1. Right to life extends to livelihood;
2. Right to free legal aid ;
3. Right Against Handcuffing of under trials;
4. Right Against Police torture;
5. Right to live with human dignity;
6. Right to get pollution free environment;
7. Right to education;
8. Right to shelter; and
9. Right Against Sexual harassment

RIGHT TO MEDICAL AID

Health is the supreme concern of every human being because a healthy mind lives in a healthy body. Access to medicine is a constituent of sound health. In the Constitution of India there are several provisions in respect of right to health. Thus our supreme law of the land i.e. the Constitution has given good response to health issues. Our constitution is not blind on health issue. It is again evident from the Preamble where social justice comes before economic and political justice.

However in Part IV of the Indian Constitution which deals with the Directive Principles of the State Policy there are several provisions which deal with right to health. Article 38 (1) says that "The state shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice social, economic and political shall inform all the institutions of the national life." Further under Article 47, a duty has been caste on the state to raise the level of nutrition and the standard of living and to improve public health. This Article says that "the state shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the state shall endeavour to bring about prohibition of the consumption except for medical purpose of intoxicating drugs and of drugs which are injurious to health." Article 48A is also related to health indirectly and it says that "the state shall endeavour to protect and improve the environment and to safeguard the forest and wildlife of the country.

The Constitution incorporates provisions guaranteeing everyone's right to the highest attainable standard of physical and mental health. The Supreme Court has held that the right to live with human dignity, enshrined in Article 21, derives from the directive principles of state policy and therefore includes protection of health. Further, it has also been held that the right to health is an integral part of

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[601] 2006 (2) Bomcr 157

the right to life and the Government has a constitutional obligation to provide health facilities. Failure of a Government hospital to provide a patient timely medical treatment results in violation of the patient's right to life. Similarly, the Court has upheld the state's obligation to maintain health services.

Public interest petitions have been filed under Article 21 in response to violations of the right to health. They have been filed to provide special treatment to children in jail ; on pollution hazards ; against hazardous drugs ; against inhuman conditions in after-care homes ; on the health rights of mentally ill patients ; on the rights of patients in cataract surgery camps ; for immediate medical aid to injured persons ; on conditions in tuberculosis hospitals ; on occupational health hazards; on the regulation of blood banks and availability of blood products ; on passive smoking in public places ; and in an appeal filed by a person with HIV on the rights of HIV/AIDS patients.

In *parmanand katara v. union of India*[602], the Supreme Court has considered a very serious problem existing at present in a medico legal case (such as accident). The doctors usually refused to give immediate medical aid to the victim waiting for the legal formalities to be complied with, the injured die for want of medical aid pending the completion of legal formalities. The Supreme Court has now very specifically clarified that preservation of life is of paramount importance. The court held that it is the professional obligation of all doctors, whether *Government or Private,* to extend medical aid to the injured immediately to preserve life without waiting legal formalities to be complied with by the police under Cr.P.C.

The court further held that once the life is lost, status quo ante be restored. It is the duty of the doctor to preserve life whether the concerned person is a criminal or an innocent person. Article 21 casts on the state an obligation to preserve life. It is the obligation of those who are incharge of the health of the community to preserve life so that the innocent may be protected and the guilty may be punished. Social laws do not contemplate death by negligence which amounts legal punishment. No law or state action can intervene to delay the discharge of this paramount obligation of the members of the medical profession. The obligation being total, laws of procedure whether in statutes or otherwise which would interfere with the discharge of this obligation cannot be sustained and must, therefore give away. The court directed that in order to make everyone aware of this position the decision of the court must be published in all journals reporting decisions of this court and adequate publicity highlighting these aspects should be given by the national media. The medical council must send copies of the judgement to every medical college affiliated to it. This is a very significant ruling of the court. Hence it is submitted that if this decision of the court is followed, in its true spirit it would help in saving the lives of many citizens who die in accidents because no immediate medical aid is given by the doctors on the ground that they are not authorised to treat medico-legal cases[603].

Right to Health Care as a Fundamental Right

The Supreme Court in *Paschim Banga Khet mazdoor Samity & ors v. State of West Bengal & ors*[604], while widening the scope of Art. 21 and the Government's responsibility to provide medical aid to every person in the country observed that in a welfare state, the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an obligation undertaken by the Government in a welfare state. The Government discharges

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602 Air 1989 Scc 2039

603 Dr. J. N. Pandey, "*The Constitutional Law Of India*", 47th Edition, P.254

604 1996 Scc (4) 37

this obligation by providing medical care to the persons seeking to avail of those facilities. Article 21 imposes an obligation on the state to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The Government hospitals run by the state are duty bound to extend medical assistance for preserving human life. Failure on the part of a Government hospital to provide timely medical treatment to a person in need of such treatment, results in violation of his right to life guaranteed under Article 21. The Court made certain additional direction in respect of serious medical cases as:

i. Adequate facilities to be provided at the public health centres where the patient can be given basic treatment and his condition stabilized.

ii. Hospitals at the district and sub divisional level should be upgraded so that serious cases may be treated there.

iii. Facilities for given specialist treatment should be increased and having regard to the growing needs, it must be made available at the district and sub divisional level hospitals.

In a welfare state the primary duty is to provide adequate medical facilities for the people. The Government discharges this obligation by running hospitals and health centres to provide medical care to those who need them.

Article 21 imposes an obligation on the state to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The petition filed by *the Seven Hills Healthcare Private Limited (SHHPL) v. Brihanmumbai Municipal Corporation (BMC)*[605] where the Bombay High Court held that, it is the right of the poor to get free medical aid. The hospital with 1, 500 beds have a duty to reserve 20% for poor patients to be treated at concessional rates. No poor man in this city should suffer for the lack of medical aid. Also Justice PB Majmudar and Justice RM Sawant added that "free medical aid is more important than free legal aid"[606]

Guidelines for Doctors to Protect Life of Accident Victims

The Supreme Court in its land mark judgment in *Paramanand Katara v. Union of Indi*a[607] laid down the following guidelines for doctors, when an injured person approaches them:

1. *Duty of a doctor when an injured person approaches him:* Whenever, a man of the medical profession is approached by an injured person, and if he finds that whatever assistance he could give is not really sufficient to save the life of the person, but some better assistance is necessary, it is the duty of the man in the medical profession so approached to render all the help which he could, and also see that the person reaches the proper expert as early as possible.

2. *Legal protection to doctors treating injured persons:* A doctor does not contravene the law of the land by proceeding to treat an injured victim on his appearance before him, either by himself or with others. Zonal regulations and classifications cannot operate as fetters in the discharge of the obligation, even if the victim is sent elsewhere under local rules, and regardless of the involvement of police. The 1985 decision of the Standing Committee on Forensic Medicine is the effective guideline.

3. *No legal bar on doctors from attending to the injured persons*: There is no legal impediment for a medical professional, when he is called upon or requested to attend to an injured person needing his medical assistance immediately. The effort to save the person should be the top priority, not only

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[605] Air 2012 Bom Hc

[606] Right To Poor To Get Free Legal Aid, Express News Service, Mumbai Sat. 17 2011.

[607] Air 1989 Sc 2039

of the medical professional, but even of the police or any other citizen who happens to be connected with the matter, or who happens to notice such an incident or a situation

Different Policies of Government with respect to Medical Aid

Dr. Ambedkar Medical Aid Scheme

The Scheme is meant to provide medical treatment facility to the patients suffering from serious ailments related to Kidney, Heart, Liver, Cancer and Brain or any other life threatening diseases including Knee surgery and Spinal surgery to SC persons whose annual family income is less than Rs.50,000/- p.a. and will be implemented through the different Hospitals. 75% of the total cost of the treatment will be released to the Hospital concerned directly with maximum ceiling limit of Rs. 1, 00,000/- in each case, in the form of crossed cheque/ DD, out of which 50% of the total estimated cost will be paid as first instalment in advance, directly to the Hospital before surgery. The remaining amount will be released after the surgery and or on submission of final bills duly certified by the Medical Superintendent of the concerned Hospital. Further, Medical aid from the Foundation and other sources should not exceed the total estimated cost of treatment. A certificate in this regard should be obtained from the Medical Superintendent of the concerned Hospital. The estimation certificate accompanied with the proposal should contain the date fixed for surgical operation.

Concessions and Facilities given to Senior Citizens

The Government of India had declared the National Policy on Older Persons as early as 1999 covering all aspects required to be taken into account for real welfare of Older Person. It covered various aspects in favour of Older Persons one of them is health care and nutrition. The Policy declared the Older Persons as respected Citizens requiring strengthening of their legitimate place of Elders in the Society and to take all actions to help them to live their last phase of life with Purpose, Dignity and Peace. It recognized the Older Persons as a Resource of the Country. It sought the cooperation of all Government & non-Governmental Organizations including the most powerful Media-our Fourth Estate. Health Care was given higher priority. Public Hospitals were asked to provide separate doctors/counters for Senior Citizens to avoid long waits.

Social security programmes at a glance

Social security programmes were launched, at the national level, in the 1980s with an old age pension scheme. Currently, there are four major national social security schemes some of them are:

National Maternity Benefit Scheme, which provides Rupees 500 to pregnant women of families living below the poverty line.

• Rural Group Insurance Scheme, which provides a maximum life insurance of Rupees 5,000 (now 30000) covering the main earning members of families living below the poverty line on a group insurance basis; The Government pays half the premium of Rupees 50-70.

Conclusion and Suggestions

The above narrative suggests a potential role for a creative and sensitive judiciary to enforce constitutional social rights. The analysis of the litigations reaching the Supreme Court have given rise to the Court articulating and recognising the specific rights to health, education and food. This has been largely due to the kind of petitions brought before the court, the campaigns behind these

petitions and the arguments of constitutional social rights that were raised. These judgments show that the Supreme Court has refashioned its institutional role to readily enforce social rights and even impose positive obligations on the State. There has been some concern about the legitimacy and accountability of such overt judicial activism but the Court, however, continues to justify its interventions by asserting that it is temporarily filling the void created by the lack of strong executive and legislature branches.

The public health system must be greatly expanded and strengthened across the nation. We need to take health services closer to the homes of the families. Despite the very unambiguous reiteration of the right to emergency health care by the Courts, the legal framework has not been developed sufficiently to give effect to this right.

There are few provisions in some legislation which incidentally cast an obligation to provide emergency medical treatment. For instance, the Motor Vehicles Act, 1988 (Section 134) imposes a duty on the driver of the vehicle, on the doctor and the hospital who are approached in case of a motor vehicle accident. Obviously, such piecemeal measures are not sufficient. Some specific legislation is needed.

Despite the recognition of the need for a legal framework to give effect to the right to medical aid, and recommendations it has not been formalized. It has continued to be deliberately overlooked by the law-makers, at the great social cost of patients being deprived of medical aid at the most critical hour.

Insha Hamid*

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In the life of a newly set up educational institution eight years are indeed too short a period to give hopes for any phenomenal growth. Unflinching dedication and extraordinary will can however do wonders and change this justifiable presumption. This is exactly what has happened in the Kashmir Law College established in the Valley in 2005 amid all sorts of adversities which this beautiful State has unfortunately been facing for quite some time. I had a chance to visit the institution last year and found that the institution, headed by one of the top law brains of the Valley in recent years Professor Abdus Salam Bhat, has achieved a high standard of legal education. In these days of mushroom growth of law schools across the Nation, this is indeed an appreciable exception.

I remember the days when due to non-availability of good legal education at home students from Kashmir used to come to Aligarh or Delhi in search of excellence. Both at the Aligarh Muslim University and at the Delhi University Law Faculty I had a galaxy of brilliant law students from the Valley who are now donning high academic positions in and outside the State. Years later, Kashmir is

* Amity University Institute Of Advanced Legal Studies.
(Inshah7@Gmail.Com).

now by itself quenching the thirst of excellence-seekers in the field of legal education, which is highly gratifying for me and for the entire Nation indeed.

A few years ago the Kashmir Law College, then still in its infancy, had launched a periodical titled Kashmir Journal of Legal Studies, and it is now ready to bring out its third issue in three years. Glancing through its first two issues, I am indeed surprised to find that a journal of such a high standard can be produced in a rather underserved corner of the country where the available research facilities must be lagging behind those in metropolitan cities. The subjects selected by the contributor to this journal are of topical interest and their input is really educative.

The second issue of the journal had surpassed the excellence of the first and, I am sure, the third will win more laurels for the institution and for those who are so nicely managing it. The issues of this journal will be a welcome addition to all law libraries in the country.

I wish this journal pyramidal heights and academic standard par excellence.

Professor Tahir Mahmood*

* Institute of Advanced Legal Studies, Amity University
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