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The Development of Feminist Jurisprudence

Margaret Thornton [1]

Abstract

This paper had its genesis in an invitation to visit Pune, India, to give a presentation on feminist jurisprudence and to suggest how its perspectives might be incorporated into the teaching of law. The paper shows that the development of feminist jurisprudence has had a chequered career in the West over the last two decades. A brief overview of the experience will be presented, which will be shown to differ according to whether one is focussing on research and publication, teaching and the curriculum, or legal practice. The uneven trajectory of social change may help to inform feminist legal debates and the teaching of feminist jurisprudence among those contemplating the inclusion of such material in their law curriculum. I draw particularly on the Australian experience, which bears many similarities with other common law countries..

Introduction: From Practice to Theory

Feminism is not susceptible to a simple definition as it possesses many strands, and feminists themselves differ widely regarding issues of substance and method. Nevertheless, the feminist movement is grounded in the idea that the lives of women and girls should not be determined solely by gender, that women and girls should be able to exercise a modicum of choice in their lives, and that they should be entitled to dignity of the person. Consequently, feminism, inspired by a vision of the way things might be, is pre-eminently a pragmatic and reformist movement which seeks to make things better for women in all spheres of life. Following on the heels of practice is academic feminism. Critiques of the gendered construction of knowledge have been central to the feminist project in the academy. What has been progressively established in respect of the master discourses of all academic disciplines is that the accounts that have been presented as universal and true are in fact partial because they focus almost exclusively on

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1 Professor of Law and Legal Studies, La Trobe University, Melbourne. This paper was presented at the Winter Workshop on Law, Development and Gender Justice, ILS Law College, Pune, India, 11–20 January, 1998. I would like to thank Dr Jaya Sagade for organising the workshop. I would also like to thank Ms Vaijayanti Joshi, the Principal of ILS Law College, Ms Laxmi Paranjape and Ms Sathya Narayan, as well as Dr Sagade, for their hospitality. (1998) 9 *Legal Educ Rev* 171. Also available at https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjTuNGmlJ3NAhUOlxQKHWL9CgAQFggdMAA&url=http%3A%2F%2Fwww.ler.edu.au%2FVol%25209_2%2FThornton.pdf&usg=AFQjCNFYnKKLI0ml-VtYPSfF344XMquTog&sig2=z0nkD2oqxpbhfjTKoj6LjQ

masculinist knowledge. Therefore, the threshold question of academic feminism has been how can rational claims to universality be made if the experiences and perspectives of women are omitted? Feminist sociologists and anthropologists were in the vanguard in developing critiques of knowledge in the new discipline of Women's Studies in the 1970s, for the social sciences generally accepted by then that gender was a legitimate category of analysis. At first, the gatekeepers of the academy were prone to dismiss feminist scholarship as "politics", or not "real" scholarship, but Women's Studies helped to give feminism a degree of academic respectability, despite the initial struggles.

From the outset, feminist scholarship was very much concerned with praxis, or the interrelationship between theory and practice. The point is illustrated by the ongoing attempts by feminists to draw attention to and disrupt the philosophical and political separation between public and private life. Indeed, one of the early aphorisms of the feminist movement was: "The personal is the political", which suggested that everything that occurred in the home and had been formerly occluded by the carapace of the private should be a matter of public concern. The feminist gaze on the private sphere has permitted not just a critique of family law and domestic violence, but it has also enabled the exploration of the symbiotic relationship between private and public spheres, that is, the ways in which women's responsibility for children, the sick and the elderly, as well as their responsibility for housework, has facilitated the participation of men in paid work, in civil society, and public life. While law is less overtly hostile than in the past, the legal academy has continued to be resistant to feminist scholarship because it challenges the well-entrenched liberal myths that the legal person is genderless, that one's life course is determined by personal choice, and that law has universal applicability. The correlative myths of law's neutrality, objectivity and non-partisanship are also deep-seated and, indeed, central to cherished legal concepts such as the rule of law and equality before the law. The ideological role of law in maintaining social cohesion and transmitting dominant values has been deeply destabilised by the subversive nature of feminist scholarship.

What is Feminist Jurisprudence?

Jurisprudence does not have a precise denotation but involves manifold ways of theorising about law. In the West, this theorisation has been conducted at a high level of abstraction and has been understood largely as the prerogative of a few highly esteemed men, such as the well known legal positivists, Hart, Kelsen and

Dworkin. Feminist jurisprudence, a term coined as recently as 1978,[2] has completely disrupted the conventional model of jurisprudence. Informed by the reformist and experiential grounding of feminism, feminist jurisprudence has eschewed the rarefied abstractions of analytical jurisprudence. Indeed, feminist jurisprudence can be loosely understood as encompassing the entire corpus of feminist writing about law. In light of its amplitude, feminist jurisprudence cannot be said to possess a single identifiable theory or perspective, any more than mainstream jurisprudence. Nevertheless, liberal feminism has been the most influential strand and that which is most commonly identified with feminist legal scholarship.

Although initially sceptical, mainstream (masculinist) jurisprudes themselves have more recently been prepared to acknowledge the impact of feminist scholarship, along with other contemporary legal movements, such as Law and Economics, Critical Legal Studies, and Law and Literature.[3] In light of the pluralistic and multifaceted nature of feminist jurisprudence, I can do no more than identify some of the main trends in this overview.

Liberal Feminism

Liberal values, rooted in the Eighteenth Century Enlightenment and modernity, include respect for equality, freedom, and autonomy. These values have been conventionally understood as concepts that have meaning only in the public sphere. Because of the traditional assignation of women to the private sphere, the conventional realm of inequality and necessity within Western thought, the relevance of the values of freedom and equality to the lives of many women has remained elusive.[4]

Despite antipathy from the mainstream, the reformist or practical dimension of legal feminism has been significant in highlighting and endeavouring to remedy gender inequities in rape, domestic violence, homicide, family law, employment law, and so on. Since the 1970s, legal scholars have campaigned for change and written about the gendered anomalies in the law. It made strategic sense to base claims on entitlements to equal rights within the prevailing liberal paradigm, despite the resultant contradictions and ambiguities.[5]

2 LC McClain, "Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence (1992) 65 *Southern California Law Review* 1171, at 1173.

3 For example, G Minda, Jurisprudence at Century's End (1993) 43 *Journal of Legal Education* 27

4 M Thornton ed, *Public and Private: Feminist Legal Debates* (Melbourne: Oxford University Press, 1995); K O'Donovan, *Sexual Divisions in Law* (London: Weidenfeld and Nicolson, 1985).

5 See, for example, R Kapur and B Cossman, *Subversive Sites: Feminist Engagements with Law in India* (New Delhi: Sage, 1996).

In setting out to remedy inequitable laws and to effect some semblance of sexual equality in both private and public life two decades ago, legal feminists were keen to assist courts and other key institutions grapple with new ways of seeing things. The focus was on "letting women in", or accommodating the feminine within existing paradigms. Again, this was a strategic choice, as the desire was to maximise the attainment of justice for women; there was too much to be done to allow attention to be deflected by struggles that activists perceived to be academic and peripheral. For example, there was scant regard for the ways that notions of "sex/gender" (concepts that flow into one another) are socially and historically situated.[6] Thus, while feminist legal scholars critiqued certain laws as anomalous and discriminatory, they generally accepted the prevailing liberal form of law, such as the necessity of proving a causal link between an individual complainant, a cognisable harm, and an identifiable wrongdoer. The need for an identifiable wrongdoer in the case of *systemic* discrimination, for example, may mean that it is impossible for a complainant to grove the necessary causal nexus. The uneasy relationship between the subjective, particular and experiential focus of feminist legal methods and the universality of traditional legal methods already posed practical problem for feminist reformism.[7] The need to accept prevailing paradigms inevitably posed a dilemma or blunted the critical edge of feminism.[8]

A site of contestation for feminist reform also manifested itself in the homogenisation of the category "women". For women to make out claims of inequality and sex discrimination, it had to be shown that they were in the same or similar circumstances to men, but were treated less favourably because they were women. The limitations and, indeed, absurdity of the formalistic approach became increasingly apparent in the gymnastics necessary to satisfy a requirement of comparability. In one infamous American Supreme court case, the paradigmatic female condition of pregnancy was analogised with the male medical conditions of prostatectomy, haemophilia, circumcision and gout.[9] In the absence

6 M Gatens, A Critique of the Sex/Gender Distinction, in S Gunew, A *Reader* in *Feminist Knowledge* (London: Routledge, 1991). For a discussion of American Supreme Court cases, for example, see TE Higgins, "By Reason of their Sex": Feminist Theory, Postmodernism, and Justice (1995) 80 *Cornell Law Review* 1536.

7 For a critique of conventional legal methods, see MJ Mosanan, Feminism and Legal Method: The Difference it Makes (1986) 3 *Australian Journal of Law and Society* 30. For a consideration of feminist legal methods, see KT Bartlett, Feminist Legal Methods (1990) 103 *Harvard Law Rev* 820

8 However, as Carol Smart points out, alternative accounts could emerge in women's writings and feminist groups, if not in court. See C Smart, *Feminism and* the *Power of Law* (London & New York: Routledge, 1989) at 88

9 *Geduldig v Aiello* 417 US 484 (1974), per Brennan J. Some feminists, such as Wendy Williams, continue to support the symmetrical approach. *See* WW Williams, Notes from a First Generation [1989] *University of Chicago Legal Forum* 99*;* WW Williams, Equality's Riddle: Pregnancy and the Equal Treatment/ Special Treatment Debate (1985) 13 *New York University Review of Law and Social Change* 325

of comparability, it was reasoned, unfair treatment on the ground of pregnancy did not constitute sex discrimination. Comparisons of this kind induced many feminists to espouse difference, that is, to accept that the category "women" was essentially different from the category "men", and that gender difference should be celebrated, not disguised. Carol Gilligan's psychological thesis that women — as a class — speak with a "different voice"[10] resonated with the experiences of women in practice, as well as in the legal classroom and the academy.

Post-Liberalism

By the mid-1980s, some feminist legal scholars had begun to move beyond a focus on equality and the idea of reforming discrete aspects of law, to thinking about how the nature of law itself was gendered. The work of the American legal theorist, Catharine MacKinnon, was particularly influential, but other scholars began to ex lore the possibility of feminist jurisprudence in the 1980s.[11] The new approaches struck a chord with many feminist legal scholars, generating debates, seminars, colloquia, and a flurry of publishing activity. Mainstream law journals began to publish articles by feminist legal scholars, signalling a qualified degree of acceptance of feminist jurisprudence within the academy. Special issues of law journals began to be devoted to feminist jurisprudence, and then specialised feminist law journals appeared.[12] With the appearance of feminist courses in the law curriculum, monographs and collections of essays devoted to feminist jurisprudence became increasingly attractive to publishers.

The proliferation of feminist jurisprudence encouraged more sophisticated theoretical analyses, although the practical aims of feminism and the desire for equality have continued to be central to liberal legalism. Nevertheless, some feminist theorists became frustrated with the ad *hoc* nature of the gains made and began to focus on the masculinist nature of legal knowledge. I choose to use the word "masculinist" rather than "male" or "masculine" to emphasise the element of social construction, and to avoid the implication that there is some predetermined

10 In *a Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass: Harvard University Press, 1982).

11 For example, P Cain, Feminist Jurisprudence: Grounding the Theories (1989) 4 *Berkeley Women's Law Journal* 191; C Smart, *supra* note 8; M Thornton, Feminist Jurisprudence: Illusion or Reality? (1986) 3 *Australian J Law & Society* 5; H Wishik, To Question Everything: The Inquiries of Feminist Jurisprudence (1986) 1 *Berkeley Women's Law Journal* 64; A Scales, Towards a Feminist Jurisprudence (1981) 56 *Indiana Law Journal* 375

12 There are presently at least two dozen such journals published in Australia, Canada and the United States, including: Australian Feminist Law Journal, Canadian Journal of Women and the Law; Columbia Journal of Gender and Law; Feminist Legal Studies (UK); Yale Journal of Law and Feminism. More than twenty feminist law journals are published in the United States alone. See M Minow, The Young Adulthood of a Women's Law Journal (1997) 20 *Harvard Women's Law Journal* 1

or "male" character to law.[13] Thus, women may share masculinist values, just as men may share feminist values. The term "masculinist" can therefore be used to describe women in the academy, in the legal profession, and elsewhere, who defer to the orthodox myth that legal knowledge is neutral, objective and fair.

The major problem that emerged was that feminist legal scholars who were themselves largely white, middle class and heterosexual, sought to create, it was argued, a new legal subject in their own image. Non-English speaking, indigenous, immigrant, lesbian, disabled, and working class women began to attack the depiction of woman as possessing a single, identifiable "essence", for they did not see themselves reflected in the image. White feminists have been taken to task for prioritising gender over race,[14] and for their "ethnocentric universality" in representing Third World women as homogeneous and powerless.[15] The attack on what came to be known as "essentialism" sent shock waves through the feminist movement. No longer was it possible for a White woman to refer to women collectively as "we"; the category "woman" had been shattered into a thousand fragments.

The attack was salutary in that even the most obtuse of White Western feminists was jolted into an irrevocable consciousness regarding the enormous importance of differences between women. But a conundrum presented itself: how could there be a politically viable women's movement without a unitary category of women? This conundrum caused an unfortunate fissure to manifest itself between academic and reformist feminism. On the positive side, a significant body of feminist work began to appear from postcolonial, critical race, Aboriginal and lesbian theorists, although the essentialising tendency of these terms themselves has been noted. Mary John has said of postcolonialism, for example, that it has "turned into a universalizing description of the contemporary predicaments of the

13 I have elaborated on this distinction in my study of women in the legal profession: M Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Melbourne: Oxford University Press, 1996). See also W Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 1995) at 167ff

14 For example, J Huggins, A Contemporary View of Aboriginal Women's Relationship to the White Women's Movement, in N Grieve and A Burns eds, *Australian Women: Contemporary Feminist Thought* (Melbourne: Oxford University Press, 1994); A Parashar, Essentialism or Pluralism: The Future of Legal Feminism (1993) 6 *Canadian J Women and the Law* 328; M Mahoney, Whiteness and Women in Practice and Theory: A Reply to Catharine MacKinnon (1993) 5 *Yale J Law and Feminism* 217; AP Harris, Race and Essentialism in Feminist Legal Theory (1990) 42 *Stanford Law Rev,* 581; M Kline, Race, Racism, and Feminist Legal Theory (1989) 12 *Harvard Women's Law J* 115.

15 CT Mohanty, Under Western Eyes: Feminist Scholarship and Colonial Discourses in CT Mohanty, A Russo and L Torres eds, *Third World Women and the Politics of Feminism* (Bloomington: Indiana University Press, 1991); GC Spivak, *Outside in the Teaching Machine* (New York: Routledge, 1993); GC Spivak, *In Other Worlds: Essays in Cultural Politics* (New York: Routledge, 1988).

globe as a whole".[16] Some scholars are presently engaged in a project to disrupt the "cliche-ridden discourse of identity" by exploring the ways in which identities are formed.[17] The characteristics of identity, including race and gender, can themselves no longer be regarded as unqualified or fixed givens. The challenging issue in the legal context is to explore the role of law in producing and reproducing social differences.

Postmodernism

The attack on essentialism signalled the increasing acceptance of postmodern critiques of foundational and unitary causal accounts. Postmodern feminism cannot be defined in terms of a single theory, for it includes a range of perspectives that reject universality, objectivity and the idea of a "single truth". Indeed, feminism itself may be understood as a form of postmodernism because of its multifaceted assault on universalism and orthodoxy. Self-conscious postmodernism has involved a move away from "theorising in grand style", in which one or more causal factors are identified as the explanation for major social phenomena, such as women's oppression or "patriarchy". The attack on Catharine MacKinnon's work, which has focussed on the sexualisation of dominance, is illustrative. This work was, and continues to be, highly influential among mainstream theorists and the media, as well as feminist scholars across a wide spectrum of disciplines, but has come to be criticised for being one-dimensional, and disempowering for women.[18] Hence, to counter the potentially disabling effects of theorising women's lives in terms of sexualised dominance, some feminists have sought to present more positive images of women as resisters.[19] While not denying that many women are subject to exploitation in their lives, postmodernism rejects subordination as a fixed characteristic of women's identity. Instead, a fluid approach is favoured which

16 ME John, *supra* note 1, at 1. But compare S Suleri, Woman Skin Deep: Feminism and the Postcolonial Condition, in KA Appiah and HL Gates eds, *Identities* (Chicago & London: University of Chicago Press, 1995).

17 KA Appiah and HL Gates, Editors' Introduction, in KA Appiah and HL Gates, *supra* note 16, at 1. See also G Prakash ed, After *Colonialism: Imperial Histories and Postcolonial Displacements* (Princeton, NJ: Princeton University Press, 1995).

18 For example, K Abrams, Sex Wars Redux: Agency and Coercion in Feminist Legal Theory (1995) 95 *Columbia Law Review 304;* C Smart, *supra* note 8, at 76–82.

19 For example, S Marcus, Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention in J Butler and JW Scott eds, *Feminists Theorize the Political* (London: Routledge, 1992). The issue of resistance has been complicated by a conservative backlash which has resulted in attacks on women for having formally complained of sexual harassment or assault; they have been accused of being "over-sensitive" and of destroying the lives of "good" men who have momentarily erred. See, for example, H Garner, *The First Stone: Some Questions about Sex and Power* (Sydney: Picador, 1995), which sparked a major controversy in Australia. *See* also, J Mead ed, *Bodyjamming: Sexual Harassment, Feminism, and Public Life* (Sydney: Vintage Books, 1997). But compare K Abrams, *supra* note 18, at 343–44.

takes account of resistance, as well as exploitation. Thus, a multidimensional and more complex picture of women's lives is produced.

Poststructuralism, which may be subsumed beneath the rubric of postmodernism, focuses particularly on the constructionist role of language.[20] Hence, the term "deconstruction" is also favoured. Influenced by Saussure, Lyotard and other French (generally male) theorists,[21] feminist legal scholars have been responsive to the idea of "multi-narratives" and "local discourses", including the body as a site of meaning.[22] Jacques Derrida's focus on the interrelationship between the dualistic norm and its "other" have been productive in feminist and postcolonial scholarship. To illustrate, the dominant side of a string of dualisms central to Western intellectual thought; for example, man, mind and objectivity, has been consistently privileged over their feminised counterparts, namely, woman, body and subjectivity.[23] Derrida's work shows that connotations of subordination rigidly attaching to the latter can be disrupted by strategies such as experimenting with the performative possibilities of metaphor, or focussing on the boundary between the norm and the "other" so that conventional notions of power are challenged.[24] Drucilla Cornell, building on the work of Luce Irigaray, in addition to that of Derrida, advocates the development of an ethical relationship to the Other so that the metaphors associated with otherness can be engaged with and given new meanings through a process of mimesis.[25]

Other feminist legal scholars have been attracted by Foucault's critique of power.[26] Power is a variable that has largely been invisible within liberal legalism, albeit central to feminist critiques of patriarchy, domination and subordination. Foucault's particular insights are, first, power should not be understood only in

20 For discussion, see, for example, M Davies, *Asking the Law Question* (Sydney: Law Book, 1994); C Weedon, *Feminist Practice and Post-Structural Theory* (Oxford: Blackwell;1987).

21 *See*, for example, L Irigaray, *This Sex Which is Not One* (Ithaca, NY: Cornell University Press, 1985); T Moi ed, *The Kristeva Reader* (Oxford: Blackwell, 1986).

22 For example, P Cheah, D Fraser and J Grbich eds, *Thinking through the Body of the Law* (Sydney: Allen & Unwin, 1996); I Karpin, Reimagining Maternal Selfhood: Transgressing Body Boundaries and the Law (1994) 2 *Australian Feminist Law Journal* 36; R Mykitiuk, Fragmenting the Body (1994) 2 *Australian Feminist Law Journal* 63

23 For an overview of gendered dualisms, see F Olsen, Feminism and Critical Legal Theory: An American Perspective (1990) 18 *International Journal of the Sociology of Law* 199

24 For example, J Derrida, *Margins of Philosophy* trans Alan Bass (Chicago: University of Chicago Press, 1982).

25 D Cornell, *Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law* (New York & London: Routledge, 1991) at 147 ff. See also L Irigaray, *supra* note 21, at 76.

26 M Foucault, *Power/Knowledge: Selected Interviews and Other Writings*, 1972–1977 ed C Gordon, trans C Gordon et a1 (New York Harvester Wheatsheaf, 1980) at 98. For an example of Foucauldian feminist scholarship, see A Howe, *Punish and Critique: Towards a Feminist Analysis of Penality* (London: Routledge, 1994).

terms of an institutional centre, for attention should also be paid to the capillaries, or micro-political sites; secondly, power should be understood as circulating and diffused, rather than as fixed so that wherever power is located, it invites resistance and destabilises conventional notions of authority; thirdly, power is thoroughly imbricated with the production of knowledge. While some feminist scholars have criticised Foucault for failing to accord sufficient weight to institutional power, and to gender, his work has possessed an appeal because of its positive and productive potential. That is, it provides a means of theorising power that avoids the traps of victim feminism and nihilism.

A Note of Caution

In a brief overview, it is impossible to do justice to the rich tapestry of feminist legal scholarship that has proliferated in the past decade.[27] My intention has been merely to highlight the diversity and dynamism of feminist jurisprudence and to capture something of the ambiguous relationship that feminists have with law which, as for formerly colonised peoples, can be simultaneously liberatory and oppressive. The short but dramatic history of feminist jurisprudence also reveals that there is not one model of scholarship, but many, just as there are many models of masculinist jurisprudence. The message of poststructuralism is that all texts, including the supposedly authoritative texts of law, as well as feminist theorisations in regard to those texts, are subject to rereading and reinterpretation, which signals the likelihood of many more *shifts* and turns within a dynamic interrelationship. However, there is undoubtedly a danger in jumping on the latest theoretical bandwagon, and attacking yesterday's theorists, until one is oneself toppled from the cutting edge. Ann Scales cautions against what can amount to a feminist form of destructiveness.[28] Diversity among theorists should be accepted and viewed as positive, no less than the reality of diversity among women.

The major concern regarding fragmentation is that it could threaten the political and reformist imperative of feminism, thereby inducing a resiling from earlier gains.[29] Indeed, it may ahead have deflected energy from resisting the "new economy".[30] The new economy involves a contraction of the public sphere and the

27 For a somewhat different conceptualisation of the stages of feminist legal scholarship, see N Naffine, Assimilating Feminist Jurisprudence (1993) 11 *Law in Context* 78; N Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (Sydney: Allen & Unwin, 1990).

28 A Scales, Disappearing Medusa: The Fate of Feminist Legal Theory (1997) 20 *Harvard Women's Law Journal 34.*

29 But compare A Parashar, *supra* note 14, at 348.

30 HW Arthurs and R Kreklewich, Law, Legal Institutions, and the Legal Profession in the New Economy (1996) 31 *Osgoode Hall Law Journal* 1.

welfare state, the privatisation of public goods, globalisation, and a preoccupation with efficiency, economic rationalism and profits, all of which have become the hallmarks of conservative governments in Western Europe, Canada, Australia, New Zealand and the United States. It would also appear that the conjunction of "modernisation" and globalisation have had negative ramifications for many women in developing countries that are presently wholeheartedly embracing the market.[31] It has been suggested that the centralising tendency of postcolonial states tends to reinforce women's marginal socio-economic status,[32] thereby highlighting the need for constant feminist vigilance as the configurations of corporate power subtly shift.

The danger is that a preoccupation with micropolitical sites can cause feminist legal theorists to lose sight of the "big picture". The unpopularity of Marxist and socialist feminism, following the collapse of Communist regimes in Eastern Europe, has stifled the discourse of class which, like power, is virtually invisible within legal discourse. With the suppression of class, a crucial tool of analysis has disappeared in respect of women's inequality, particularly in developing countries. A socialist critique can highlight the way the changing morphology of capitalism ensures that women workers are retained as a low-paid, expendable workforce. Thus, while the postcolonial subject can be empowered through postmodern analytical tools, she may want to maintain a bridge to selective universals, which have fallen out of favour. As Jordan and Weedon observe:

The postmodern critique of universals, metanarratives, essential subjectivity and the fixing of meaning has much radical potential but it is not without its dangers. Many postmodern thinkers and writers decidedly privilege plurality and pleasure over power and effective resistance. The postmodern celebration of difference becomes dangerous once it is divorced from the structural power relations that produce it.[33]

As law is intimately concerned with the structures of power relations, it is essential not to lose sight of those structures and how best to manage them. The prevailing neoconservatism is so detrimental for many women workers that it may be necessary for them to organise as a class for reasons of what Gayatri Spivak calls "strategic essentialism". In the face of a common threat, the key issue

31 For example, Naihua Zhang with Wu Xu, Discovering the Positive within the Negative: The Women's Movement in a Changing China in A Basu with the assistance of CE McGrory eds, *The Challenge of Local Feminisms: Women's Movements in Global Perspective* (Boulder, Col & Oxford: Westview Press, 1995).

32 B Cossman and R Kapur, Women and Poverty in India: Law and Social Change (1993) 6 *Canadian J Women and the Law* 278, at 300.

33 G Jordan and C Weedon, *Cultural Politics: Class, Gender, Race and the Postmodern World* (Oxford: Blackwell, 1995) at 563–564.

for feminists is not likely to be who can speak for whom, but who can speak at all?

Challenging Curricular Knowledge

Scholars who have worked on a piece or pieces of the jigsaw that make up the trajectory of feminist jurisprudence have sought to incorporate some of the pieces into their teaching. There are two obvious ways that have been utilised to develop feminist jurisprudence within the law curriculum: either by setting aside a special course, or by integrating feminist perspectives into the curriculum as a whole. I shall outline these two approaches, which may be of interest to those contemplating curricular changes.

Separatism

A dedicated elective, such as Women and Law, Gender and Law, Sex Discrimination, Sexuality and Law, or Feminist Jurisprudence, permits a detailed treatment of issues which disproportionately impact on women. The disruption of the category "woman" has rendered the phrase "Women and Law" obsolete. Even the "second generation" phrases may now be supplanted by trendier postmodern titles, such as Law and Culture.

Although an elective does carry with it the likelihood of preaching to the converted, it usually allows considerable latitude in respect of the syllabus, including topics selected, theoretical perspectives favoured and degree of focus on legislation, case materials, policy analysis, commentary, and creative texts, without regard to a specific doctrinal area of knowledge. A typical course might begin with readings on equality or some provocative instances of inequality in order to stimulate the interest of students, and to establish the aims of the course. The primary topics within the feminist jurisprudential "canon" have tended to involve violence, the family, and reproductive and economic rights, closely parallelling the history of the reformist agenda.[34] The concern with reproductive rights has mirrored the general feminist view that a woman has a right to control her own body. While the focus was initially on laws criminalising abortion,[35]

34 For critical studies of the discrimination against Indian women arising from the conjunction of family law and religion, see Kapur and Cossman, *supra* note 32; A Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality* (New Delhi: Sage, 1992).

35 Nivedita Menon points out that the question of the *right* to abortion has not been problematic in India, but it is the selective abortion of female foetuses that has made the issue one of concern to feminists. See N Menon, Abortion and the Law: Questions for Feminism (1993) 6 *Canadian Women and the Law* 103. For a discussion of the way the issue has permitted "First World" intervention into the "Third World", see R Luthra, The "Abortion Clause" in U.S. Foreign Population Policy in AN Valdivia ed, *Feminism, Multiculturalism and the Media: Global Diversities* (Thousand Oaks, Cal: Sage, 1995).

Issues of embodiment, including sexuality, lesbianism, the nature of desire, and sex work, have received more attention in recent years, parallelling the popularity of postmodern discourses. Nevertheless, violence against women (particularly, sexual assault, wife battering, and homicide) has continued to be of perennial concern to feminists everywhere,[36] as has motherhood and child care. Economic rights have related primarily to the inequities in paid employment — the lack of equal opportunity, conditions of work, pay, as well as the way concepts, such as skill, merit and authority, have been constructed in masculinist terms.[37] Sexual harassment in the workplace has been an issue of ongoing interest and concern.[38]

More recently, there has been something of a turning away from issues pertaining to violence and the family. Instead, we find a greater focus on the public sphere and civil society, including the meaning of citizenship. This public turn has been prompted, in part, by the widespread contraction of the welfare state in Western Europe, Canada, Australia and New Zealand, as well as republican debate in Australasia. A look at women in legal education, the legal academy and the legal profession has also moved onto some syllabi, reflecting feminist theorists' desire to look in the mirror and interrogate their own practices.

The variations in theoretical, methodological and pedagogical approaches are legion, as already suggested. An interdisciplinary focus challenges the autonomy of law and disturbs the positivist paradigm. The law and literature movement, for example, has encouraged the deconstruction of legal texts themselves, as well as the use of creative writing — drama, poetry, novels, feminist crime fiction, and autobiography. The inclusion of creative literature within a law course disrupts the idea that the juridical voice is the only *authentic* and *authorised* voice in law. While a focus on Law *and* the Humanities is productive, *Law as* a *Humanity* goes further.

An historical approach has been favoured by many, for it conveys a fluid sense of the way in which gender has been constructed, as well as an understanding of the struggles that have been undergone.[39] Nevertheless, an historical narrative can carry with it a danger of progressivism, that is, the idea that life is always getting better for women and that it is only a matter of time before the ideal end state is

36 For example, K Rosa, *Women of South Asia* (Colombo, Sri Lanka: Friedrich Ebert Stiftung, Gala Academic Press, 1995) at 41–42 *et passim;* P Diwan and P Diwan, *Women and Legal Protection* (New Delhi: Deep & Deep, 1994).

37 M Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Melbourne: Oxford University Press, 1990).

38 The trailblazing work of Catharine MacKinnon in this area has to be acknowledged. See CA MacKinnon, *Sexual Harassment of Working Women* (New Haven: Yale University Press, 1979).

39 For example, A Basu with the assistance of CE McGrory, *supra* note 31.

reached. It can convey the impression that it is simply a question of there being enough women present for institutional change to occur, as in the legal profession or the academy.[40] A progressivist approach, which emphasises legal enactments, also downplays the effect of other social institutions, and may deflect attention away from factors that serve to immunise cultural and religious practices from scrutiny, practices that have all too often shielded beneath the rubric of "private".[41]

The pedagogy of feminist jurisprudence challenges the liberal separation between public and private spheres in a very direct way, in that students often speak frankly about their lives and the topics under discussion in a way that is rare in the legal classroom. Discussion as to why affectivity is conventionally excluded from legal discourse can be illuminating for students. It can also be painful if it means that a consideration of violence, rape, or incest resonates with their personal experience. Some teachers of feminist jurisprudence have been keen to encourage the sharing of the experiential in the belief that feminist theory is necessarily grounded in the micro-experiences of individual women. Other teachers, caught by the objective allure of legal positivism, are less comfortable with this methodology. Again, there is no "right" or "wrong" approach; teachers must be guided by what they are comfortable with in conjunction with the dynamic of a particular class.

Various experimental approaches have been adopted regarding the writing component of courses in feminist jurisprudence, given that the lecturer still has a formal obligation to assess students. For example, students may keep a journal in which they write their own impressions and analyses of class discussions in order to emphasise the subjectivity of knowledge. Feminist jurisprudence also lends itself to creative and imaginative research projects. Students can achieve a high level of satisfaction by completing an original project which they have themselves devised. While a single semester does not allow sufficient time to carry out extensive fieldwork, small projects based on media studies, archival material, or interviews are feasible. In addition, feminist jurisprudence provides scope for the exploration of a wide range of topics based on conventional library research which address critical issues in regard to constitutionalism, education, development, and so on. To reduce the competitive individualism that typifies legal pedagogy, group projects are recommended as a means of encouraging a more collaborative approach to learning.[42] As an alternative to essay writing, in a setting where interdisciplinarity is highly desirable the use of film or other creative media might be explored.

40 M Thornton, *supra* note 13.

41 A Parashar, Reconceptualisations of Civil Society: Third World and Ethnic Women, in Thornton, *supra* note 4.

42 For other suggestions, see Commission on Women in the Profession, American Bar Association, *Elusive Equality:* The *Experiences of Women in Legal Education* (Chicago: American Bar Association, 1996).

It may be possible to develop a more advanced feminist legal theory subject in order to pursue selective issues in greater depth, although this is dubious in an economic rationalist environment. Original in-depth research can nevertheless be encouraged through higher degree candidature.

Integration

In the alternative pedagogical approach, feminist jurisprudence is not treated as a separate optional subject but is integrated into the law curriculum. Such an exercise may be initiated either through institutional curriculum reform or at the government level.[43] Integration means that all students study feminist ideas in order that they might be sensitised to the ways in which gender has operated and continues to operate as an organising principle within law, religion, culture and public life, most particularly to the detriment of Third World, Aboriginal, lesbian and poor women. While a separate subject is desirable to complement the integrated approach and to allow depth of treatment, integration means that gender issues are less easily "ghettoised" and relegated to the realm of the "other". It also means that hostile and resistant colleagues must confront the question of whether they are continuing to teach warped notions of legal knowledge.

There are drawbacks to the integrationist approach, however, in that the core, or foundational, subjects which conventionally include property, contract, torts and commercial law, and which uphold the capitalist imperative, are privileged over those concerned with the affective and the corporeal, such as family law, human rights and discrimination law, as well as subjects focussing on gender and sexuality. That is, it is somewhat paradoxical from a feminist perspective that those areas which permit the least space for the feminine and affectivity have the highest institutional value attached to them. Not only are those subjects likely to be compulsory, while the latter are likely to be optional, but the compulsory cluster are very adept at sloughing off unruly knowledges through a focus on the technocratic, a process I have termed "technocentrism".[44]

43 Following an intense period of media focus on "gender bias in the judiciary" in 1993, the Australian Government funded the preparation of "gender sensitive" materials for law schools on the themes of Citizenship, Work, and Violence. The Citizenship materials were prepared by Professor Sandra Berns, Ms Paula Baron and Professor Marcia Neave, and the Work and Violence materials by Professor Regina Graycar and Associate Professor Jenny Morgan. The writer chaired the overseeing committee. See R Graycar and J Morgan, Legal Categories, Women's Lives and the Law Curriculum OR: Making Gender Examinable (1996) 18 *Sydney Law Review* 431. The materials are available on line at http://uniserve.edu.au/law.

44 M Thornton, Technocentrism in the Law School: Why the Gender and Colour of Law Remain the Same (1998) 36 *Osgoode Hall Law Journal* 369.

Large quantities of doctrinal law — which admitting authorities may require to be assimilated and examined — leave little space, it will be argued, for alternative perspectives. Unsympathetic colleagues may seek to hide behind the convenient rubric of "academic freedom" or the necessity of "getting through the course" to evade the discomfort of confronting the sexed, raced and heterosexed nature of legal knowledge. Anxious to establish their expertise as good technocratic lawyers and to present themselves as such in the market place, students may also be resistant to feminist knowledge. To be acceptable to the mainstream, therefore, feminism may be forced to relinquish its oppositional stance in favour of blandness; the "success" of the integrationist effort then involves a questionable assimilationist element.

Some topics within the canon of common law jurisdictions lend themselves more easily than others to the development of feminist perspectives, reflecting the historical trajectory of feminist concern, such as family law, labour law, and criminal law, as already outlined. Many courses on legal theory, or jurisprudence, now include at least a segment on feminist jurisprudence as a "perspective" on law, along with "Law and Economics" and "Critical Legal studies".[45] Subjects such as constitutional law, contracts, torts, corporations, and taxation are more of a challenge because the legal person has been invariably conceptualised as neutral and degendered. As pointed out, however, the primary mission of feminist jurisprudence has been directed to deconstructing this assumption of neutrality and exposing the masculinist partiality of law, which means that there is an ever-expanding feminist literature from which the innovative teacher can draw. I shall briefly gesture in the direction of the possibilities of feminist jurisprudence in the more traditional and intransigent areas of the curriculum.

Constitutional law has presented a challenge for feminist scholars because it is suffused with a powerful rhetoric of universality. Indeed, I would contend, the very point of maintaining a high level of abstraction in constitutional discourse is to keep particularity at bay, whether it be in regard to sex, race, sexuality, or other dimension of identity. The concerns of citizenship have thereby come to be equated with those of benchmark masculinity. Nevertheless, this *modus operandi* of constitutional law can be deployed productively as a site of critique in the classroom. Articles 14–16 of *Constitution* of *India 1950,* which guarantee equality and proscribe discrimination, provide an obvious mode of entry for feminist critique, as is the case with the Fourteenth Amendment of the United States

45 For example, S Bottomley, N Cunningham and S Parker, *Law in Context,* 2nd ed (Sydney: Federation Press, 1997); R Hunter, R Ingleby and R Johnstone eds, *Thinking About Law: Perspectives on the History, Philosophy and Sociology of Law* (Sydney: Allen & Unwin, 1995).

Constitution, and S 15 of the Canadian *Charter* of *Rights and Freedoms*. In contrast, the Australian Constitution makes no reference to equality, although there has been an attempt to read such a prescript into the Constitution.[46] Nevertheless, it is important that any critique transcends issues of gender inequality to consider questions pertaining to constitutionalism, citizenship,[47] relations with the state,[48] and the meaning of democracy.[49] In the context of "the nation", race, culture, class, religion and postcolonialism intersect with sex/gender in important ways.[50]

In the teaching of contract law in the West, the most notable omission has typically been any reference to either of the most fundamental forms of contract, that is, the social contract or the marriage contract.[51] Thus, to start off a contract course with these unique forms of contract is to problematise and expose the masculinist underpinnings of law. Specific forms of written gendered contract, such as nuptial and pre-nuptial contracts, challenge the notion of separate spheres.[52] Indeed, comparing commercial with non-commercial contracts highlights the way law underpins and facilitates capitalism and market activities, while diminishing those values associated with the private *quasi* domestic sphere. The intersection between imperialism, race, class and sex could also be theorised within a framework that problematises this liberal separation between public and private.

In view of the key role played by corporations in today's global and postcolonial world, it is desirable to go behind their facilitative role in teaching "corporations law" to consider the impact of the intersection of gender and race. A study of the law of corporations includes not just the relentless search for profits and power but the ways in which corporations themselves are bureaucratised and hierarchised, with women and the racially disfavoured invariably occupying the pyramidal base, and a few privileged men dominating the apex.[53]

46 *Leeth v Commonwealth* (1992) 174 CLR 455, per Deane, Toohey and Gaudron JJ.

47 For example, M Thornton, Embodying the Citizen in Thornton, *supra* note 4.

48 For example, MA Baldwin, Public Women and the Feminist State (1997) 20 *Harvard Women's Law Journal* 47.

49 TE Higgins, Democracy and Feminism (1997) 110 *Harvard Law Rev,* 1657.

50 For example, H Bhabha ed, *Nation and Narration* (London & New York: Routledge, 1990).

51 For example, C Pateman, *The Sexual Contract* (Cambridge: Polity Press, 1988); K O'Donovan, *Family Matters* (London: Pluto, 1993); P Goodrich, Gender and Contracts, in A Bottomley ed, *Feminist Perspectives on the Foundational Subjects of Law* (London: Cavendish Publishing, 1996).

52 C Dalton, Deconstructing Contract Doctrine (1985) 94 *Yale Law Journal* 997; MJ Frug, Re-reading Contracts: A Feminist Analysis of a Contracts Casebook (1985) 34 *American University Law Review* 1065.

53 See, for example, S Berns and P Baron, *Company Law and Governance: An Australian Perspective* (Melbourne: Oxford University Press, 1998); A Belcher, Gendered Company: Views of Corporate Governance at the Institute of Directors (1997) 5 *Feminist Legal Studies* 57; S Corcoran, Does a Corporation have a Sex? Corporations as Legal Persons in N Naffine and RJ Owens eds, *Sexing the Subject of Law* (Sydney: LBC Information Services, 1997); KA Lahey and SW Salter, Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism (1985) 23 *Osgoode Hall Law J* 543.

Rebelling against a simple transmission of orthodox legal rules, feminist scholars have carried out critical and transformative work in conventional areas of law, including tort law,[54] property law[55] taxation law[56] and evidence law.[57] A philosophical exploration of notions of property and labour allow focus to be directed to the value attached to "women's work", which is universally undervalued as Marilyn Waring has compellingly shown.[58] Feminist critiques of the issues of dower, dowry and family property would also appear to be fertile fields in the Indian context.[59] Clearly, it is possible to include imaginative teaching materials that encourages law students to confront and think more deeply about the enterprise in which they are engaged in every area of knowledge.

Apart from being conscious of the differences between women, I would also add a few general caveats. First, to ensure as far as possible, that selected cases and materials depict women and "others" in diverse and positive roles — as authoritative actors and agents of legality, that is, as lawyers, judges and legal commentators. Secondly, to present positive experiences and resistant possibilities for women and "others". While violence and depressed economic circumstances represent the reality for many women, the representation of women as the invariable victims of law can be disabling and dispiriting for students. Thirdly, to avoid the "essentialist" tag by including material that is inclusive of and sensitive to diversity among women, and which acknowledges the multifaceted nature of women's experiences. The possibility of dislodging the Eurocentric, heterosexist, able-bodied, middle-class hegemony of feminist legal scholarship is tantalising, but it has to be recognised that these descriptors apply to law generally.

Conclusion: What About Legal Practice?

In my overview of feminist jurisprudence, I have sought to convey a semblance of the intellectual vibrancy and diversity that has characterised this approach to law

54 For example, J Conaghan, Tort Law and the Feminist Critique of Reason and P Peppin, A Feminist Challenge to Tort Law in Bottomley, *supra* note 51; L Bender, An Overview of Feminist Torts Scholarship (1993) 78 *Cornell Law Rev* 575.

55 For example, A Bottomley, Figures in a Landscape: Feminist Perspectives on Law, Land and Landscape and K Green, Being Here: What a Woman Can Say About Land Law, in Bottomley, *supra* note 51.

56 For example, J Grbich, Taxation Narratives of Economic Gain: Reading Bodies Transgressively (1997) 5 *Feminist Legal Studies* 131; Writing Histories of Revenue Law: The New Productivity Research (1993) 11 *Law in Context* 57; The Tax Unit Debate Revisited: Notes on the Critical Resources of a Feminist Revenue Law Scholarship (1991) 4 *Canadian J Women and Law* 512.

57 For example, R Hunter, Gender in Evidence: Masculine Norms *v.* Feminist Reforms (1996) 19 *Harvard Women's Law Journal* 127; R Hunter & K Mack, Exclusion and Silence: Procedure and Evidence in N Naffine & RJ Owens, *supra* note 53.

58 M Waring, *Counting for Nothing: What Men Value and What Women are Worth* (Wellington: Allen & Unwin, 1988).

59 For example, Diwan and Diwan, *supra* note 35.

within the academy. I have made some suggestions for effecting change to the law curriculum, although I recognise that such proposals are likely to bring resistance in their wake. Contestation can occur at many sites. Legal positivism, for example, which remains in the ascendancy in most law schools, as well as in legal textbooks, despite disavowals, is very effectively able to disqualify countervailing knowledges with its claims to being apolitical and ahistorical.[60] However, it is legal practice, particularly corporate practice, that represents a significant site of resistance — a site, furthermore, that significantly, but subtly, shapes legal education.

While approximately fifty per cent of law students and thirty per cent of lawyers in Australia are women (a picture that is reflected in other parts of the Western world), this "letting in" is by no means synonymous with an acceptance of either the reformist or the critical dimensions of feminist jurisprudence.[61] Women lawyers have been accepted in increasing numbers over the last two decades in an endeavour to satisfy the unstoppable demand for the delivery of legal services at both the national and the international levels. As a result, they have tended to be slotted into increasingly bureaucratised mega-firms. Endowed with minimal autonomy, they are expected to serve the needs of corporate capital, certainly not a feminist agenda for reform. The corporate law firm, with its norms of hierarchy and depersonalisation, quickly sheds the social, the subjective and the affective. Although the corporate law firm in Australia is now likely to have sexual harassment and maternity leave policies in place, such policies invariably fall short of the rhetoric in practice. Indeed, the evidence of the influence of feminist jurisprudence in legal practice, particularly corporate legal practice, would seem to be minimal. Corporate law firms are compelled to serve the interests of their corporate clients. If not, those clients will transfer their business elsewhere. Billable hours and the maximisation of profits leave little time for feminist reflexivity.

Legal practice is being transformed by corporatism and economic rationality, key characteristics of the "new economy", whereby the welfare state is being progressively dismantled, and public services are being privatised and contracted out. The latter include public sector legal services where many women have felt that they could practise law in a manner that accorded with feminist principles. This scenario is characteristic of corporatism and the "new economy" — neoconservative phenomena presently spreading around the globe like wildfire.

Thus, in the West, it would seem that a paradoxical situation has arisen. That

60 Thornton, *supra* note 44.

61 Thornton, *supra* note 13.

is, although feminist jurisprudence might be at the cutting edge of legal theory in the academy, there is a marked disjuncture between it and legal practice. The oppressive nature of corporate global capitalism is difficult to resist and I can proffer no simple solution. Nevertheless, I draw attention to this challenging dimension of modernisation for debate and discussion in law schools in the ongoing struggle for gender justice and human rights.

❑

‘Greatest happiness of the greatest number’ is *“motto”*of the Government policies: A Study’

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Abstract

Greatest happiness of the greatest number is a dynamic concept in Modern India which is becomes parameter of every action of the State. Government Policy is keeps importance for development to County and fulfils the desire of people in the Society. Policy means course of action adopted by a government, business, individual and people. That is essence and reform in legal, economic and political society. Part IV of the Constitution of India the Directive Principle of State policy is Direct to negative fundamental right for citizens which is promote to consider by government when make the policies. It is kinds of fundamental rights. Through the government Policy State is provide the atmosphere for the people to improve their living status, education, participation in country, equality and justice etc. and standard policy making base of good governance. I consider this paper the "***principle of greatest happiness of greatest number"*** is more discussing topic with government policies. India is symbol of unity in diversity and many linguistic and religious persons lived here and various scheme running by government for the interest of people like that**,** ***Ujjwala Yojana,*** Gramodyauday se Bharat udya, Swaksh Bhart Abhiyan, Beti Padho Beti Bachao Scheme etc.,that the policies are targeting to provide, pleasures and avoid pains of people and protect rights of people and individual. We can say, the principle of greatest happiness of the greatest number is soul of democracy and maintained rule of law. If all government policies are enforced in an actual manner so structure of India will be become good, glorious, strong and healthy.

Key words : Rule of law, Rights, Democracy[1], and Government Policy, enforcement.

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1 According to Abraham Lincoln, “is government by the people in which the supreme power is vested in the people and exercised directly by them or by their elected agents under a free electoral system”.

Introduction

In the spring of 1776, in his first substantial (though anonymous) publication, A Fragment on Government, Jeremy Bentham invoked what he described as a fundamental axiom, it is' the greatest happiness of the greatest number that is the measure of right and wrong'[2].Bentham defined happiness in terms of psychological experience, as 'the sum of pleasures and pains'. This philosophy is known as 'Utilitarianism', because of its emphasis on the utility of behavioral consequences. 'Happyism' would have been a better name, since this utility is seen as contribution to happiness.The theory is better suited for judging general rules, such as the rule that mothers should care for their sick children. It is fairly evident that adherence to this rule will add to the happiness of a great number. Following such rules is then morally correct, even if consequences might be negative in a particular case. This variant is known as 'rule-utilitarianism'[3].

Rule-utilitarianism has been seen as a moral guide for legislation and has played a role in discussions about property laws and the death penalty. The principle can also be applied to wider issues in public policy, such as the question of what degree of income-inequality we should accept. The argument is that inequality is not bad in and of itself; it is only so if it reduces the happiness of the average citizen. The greatest happiness principle can also be used when making decisions about health care and therapy. Treatment strategies can be selected on the basis of their effects on the happiness of the greatest number of patients[4].

In a passage written in August 1822, Bentham says the right and proper end of government in every political community is the greatest happiness of all the individuals of which it is composed. Say in other words, the greatest happiness of the greatest number. In speaking of the correspondent first principle, call it the greatest-happiness principle[5].

Base of the principle of greatest happiness of the greatest number

"The basic idea behind hedonistic thought is that pleasure is the only thing that is good for a person. This is often used as a justification for evaluating actions in terms of how much pleasure and how little pain (i.e. suffering) they produce.

2 J. H. Burns and H. L. A. Hart, " A Comment on the Commentaries and A Fragment on Government", in The Collected Works of Jeremy Bentham [hereafter CW] (London, 1977), p. 393

3 RuutVeenhoven, "Happiness as an aim in Public Policy" John Wiley and Sons, Inc. 2004, Hoboken, N.J., USA. ISBN 0471459062 page no 2

4 Ibid.

5 Chief Bowring "Constitutional Code Rationale", in First Principles (as in n. 34), p. 232 vol. 9, p, 5.

In very simple terms, a hedonist strives to maximize this total pleasure (pleasure minus pain). The nineteenth-century British philosophers John Stuart Mill and Jeremy Bentham defended the ethical theory of Utilitarianism, according to which we should perform whichever action is best for everyone. Conjoining hedonism, as a view as to what is good for people, to utilitarianism has the result that all action should be directed toward achieving the greatest amount of happiness for the greatest number of people. Though consistent in their pursuit of happiness, Bentham and Mill's versions of hedonism differ." In Indian government has followed/ adopted the principle of greatest happiness of the greatest number when making their policy and rule.

The principle of greatest happiness of the greatest number with the government policies -

UjjawalaYojana[6](2007)

UjjawalaYojana a Comprehensive Scheme,which is related for Prevention of Trafficking and Rescue, Rehabilitation and Re-Integration of Victims of Trafficking for Commercial Sexual Exploitation[7]. The Scheme shall have the following main components: -

1. Prevention
2. Rescue
3. Rehabilitation
4. Re-Integration
5. Repatriation

The implementing agencies may seek assistance for one or more the components as mentioned under the scheme. While applying for a particular component(s), the implementing agencies should provide justification for selecting the specific components and the location of projects[8].

Pradhan Mantri Ujjawala Yojana (PMUY)

The Union Government launched Pradhan Mantri Ujjawala Yojana (PMUY) for providing free of cost LPG (cooking gas) connections to women from BPL Households. It was launched by Prime Minister Narendra Modi from Maldepur

6 http://wcd.nic.in/sites/default/files/ujjawala.pdf visited date 15/5/2016

7 Government of India Ministry of Women and Child development

8 Ibid.

Morh, Ballia in Uttar Pradesh. The tagline for the scheme is "Swachh Indhan, Behtar Jeevan". Key facts Under PMUY, each of the beneficiaries will receive monetary support of about 1,600 rupees to get a connection of cooking gas[9].

It includes administrative cost, pressure regulator booklet and safety hose the scheme seeks to empower women and protect their health by shifting them from traditional cooking based on unclean cooking fuels or on fossil fuels to clean cooking gas. It is being implemented by Union Ministry of Petroleum and Natural Gas[10]. It is for the first time this ministry is implementing a welfare scheme. The identification of eligible BPL[11]families will be made in consultation with the State Governments and the Union Territories. It will be implemented over three years' time frame in the 2016-2017, 2017-18 and 2018-19.

Indradhanush[12]

Mission Indradhanush was launched by Ministry of Health and Family Welfare (MOHFW) Government of India on 25th December, 2014. The objective of this mission is to ensure that all children under the age of two years as well as pregnant women are fully immunized with seven vaccine preventable diseases[13].

Mission Indradhanush was launched to speed up the process of immunization. It aims to immunize all children against seven vaccine preventable diseases namely diphtheria, whooping cough (Pertussis), tetanus, polio, tuberculosis, measles and hepatitis B by 2020. The target of full coverage is set to be achieved by the year 2020 and launched by Union Health Minister JP Nadda on 25th December 2014[14].

Deen Dayal Upadhyay Gram Jyoti Yojana[15]

DDUGJY[16] is a Government of India scheme aimed to provide continuous power supply to rural India. It is one of the key initiatives of Modi Government and it aims to supply 24x7 uninterrupted power supplies to all homes. The government plans to invest Rs 75,600 crore for rural electrification under this scheme. The scheme will replace the existing Rajiv Gandhi Grameen Vidyutikaran Yojana[17].

9 http://currentaffairs.gktoday.in/current-affairs/government-schemes visited date 07/05/2016
10 http://www.petroleum.nic.in/docs/PM_UJJAWALA_AND_OTHER.pdf visited date 15/5/2016 11:52 am
11 *Below Poverty Line (BPL)*
12 http://financialservices.gov.in/PressnoteIndardhanush.pdf Visited date 08/05/2016
13 http://www.nhp.gov.in/1mission-indradhanush_pg visited date 08/05/2016
14 Ibid.
15 www.ddugjy.in visited date 15/5/2016 11:57 am
16 DeenDayalUpadhyay Gram JyotiYojana
17 http://pib.nic.in/newsite/PrintRelease.aspx?relid=123595 visited date 15/5/2016 11:59am

Deen Dayal Upadhyay Grameen Kaushalya Yojana[18]

DDU-GKY is a government of India youth employment scheme. It was launched by on 25 September 2014 by Union Minsters NitinGadkari and Venkaiah Naidu on the occasion of 98th birth anniversary of PanditDeendayalUpadhyay. It aims to target youth, under the age group of 18–35 years[19].

Pandit Deendayal Upadhyay Shramev Yojana

A dedicated ShramSuvidha Portal that would allot Labour Identification Number (LIN) to nearly 6 lakhs units and allow them to file online compliance for 16 out of 44 labour laws an all-new Random Inspection Scheme utilizing technology to eliminate human discretion in selection of units for Inspection, and uploading of Inspection Reports within 72 hours of inspection mandatory universal account number enables 4.17 crore employees to have their provident fund account portable, hassle free and universally accessible Apprentice ProtsahanYojana, will support manufacturing units mainly and other establishments by reimbursing 50% of the stipend paid to apprentices during first two years of their training Revamped RashtriyaSwasthyaBimaYojana, introducing a Smart Card for the workers in the unorganized sector seeded with details of two more social security schemes.

The 4 main features of the portal are:

1. Unique labour identification number (LIN) will be allotted to Units to facilitate online registration.
2. Filing of self-certified and simplified Single Online Return by the industry. Now Units will only file a single consolidated Return online instead of filing 16 separate Returns.
3. Mandatory uploading of inspection Reports within 72 hours by the Labour inspectors.
4. Timely redressal of grievances will be ensured with the help of the portal[20].The Prime Minister said that in the Nation's development, the phrase **"ShramevJayate"** had as much significance as **"SatyamevJayate.**[21]**"**

18 http://rural.nic.in/netrural/rural/sites/downloads/right-information-act/rti_ddugky.pdf visited date 08/05/2016

19 The Ministry of Rural Developmentddugkysop.in visited date 15/5/2016 12:03pm

20 http://vikaspedia.in/social-welfare/unorganised-sector-1/schemes-unorganised-sector/pandit-deendayal-upadhyay-shramev-jayate-karyakram visited date 18/5/2016 11:44pm

21 http://pmindia.gov.in/en/news_updates/pms-remarks-at-the-pandit-deendayal-upadhyay-shramev-jayate-karyakram/ visited date 18/5/2016 11:52pm

Atal Mission for Rejuvenation and Urban Development (AMRUT)[22]

The AMRUT scheme would focus on water supply, sewerage facilities and management, storm water drains to reduce flooding, strengthening of public transport facilities and creating public amenities like parks and recreation clubs[23].

Swadesh Darshan[24]

Under Swadesh Darshan, integrated development of theme based circuits has been taken up for holistic and inclusive development which can provide engaging and complete tourism experience to both domestic including low budget tourists and foreign tourists. The Scheme envisages enhancement of tourist attractiveness in a sustainable manner by developing world class infrastructure in the circuit destination that is launched by ministry of Tourism. This policy scheme is clear example of greatest happiness principle.

Mahatma Gandhi Pravasi Suraksha Yojana-MGPSY[25]

Mahatma Gandhi Pravasi Suraksha Yojana is a special social security scheme which includes Pension and Life Insurance, introduced by Ministry of Overseas Indian Affairs for the overseas Indian workers in possession of Emigration Check Required (ECR) passports. It is a voluntary scheme designed to help workers to meet their three financial needs: saving for retirement, saving for their return and resettlement, and providing free life insurance offering coverage for death from natural causes[26].

Udaan Project[27]

The Special Industry Initiative Jammu &Kashmir 'Udaan' Scheme is to provide skills and enhance employability of 40,000 youth over a period of five years in key high growth sectors[28]. The scheme is being implemented by the National Skill Development Council (NSDC) and the corporate sector in ppp[29] mode. The scheme of Udaan is promote of skill of youth which is indicate to pleasure of individual.

Udaan also aims to provide a platform that empowers girl students and

22 amrut.gov.in/writereaddata/AMRUT%20Guidelines%20.pdf visited date 18/5/2016 11:48pm

23 Ibid.

24 http://tourism.gov.in/sites/default/files/News/Final%20Swadesh%20Darshan%20Brochure16_3_2015_compressed.pdf visited date 18/5/2016 11:57pm

25 www.mea.gov.in/mgpsy.htm visited date 18/5/2016 10:22pm

26 Ibid.

27 nsdcudaan.com/visited date 18/5/2016 11:59pm

28 http://www.skilldevelopment.gov.in/udaan.html visited date 19/5/2016 12:05 am

29 Public private partnership in India, http://www.pppinindia.com/ visited date 08/05/2016

provides them with better learning opportunities. Human resource development (HRD) ministry programme is designed to provide a comprehensive platform to deserving girl students aspiring to pursue higher education in engineering and assist them to prepare for the IIT-JEE while studying in Classes 11 and 12.

Sukhanya Samridi Account

The objective behind this initiative is to address the gender imbalance & create positive environment in favor of girl child. It is the part of "Beti Bachao-BetiPadhao".

Benefits of the scheme are

1. Highest interest rate of 9.2%
2. Exempted from Tax u/s 80c
3. The maturity of account is 21 years from date of opening account or marriage of girl child whichever is earlier.
4. Initial deposit of Rs. 1000 and thereafter any amount in multiple of Rs. 100 can be deposited to maximum of 1.5 lakhs. Launched By Prime Minister Narendra Modi on 22nd January 2015.

Swachh Bharat

Swachh Bharat Abhiyan is a national campaign by government of India aims to accomplish the vision of clean India by 2nd October 2019. Launched by by Prime Minister Narendra Modi on Second October 2014. A performance ranking on Swachh Bharat Abhiyan of 476 cities in the country, based on the extent of open defecation and solid waste management practices, released by the Ministry of urban development recently.

Top 10 cities are, Mysore, Tiruchirapalli, Navi Mumbai, Kochi, Hassan, Mandhya, Bengaluru, Thiruvanathapuram, Halisahar, Gangtok.

Bal Swachh Abhiyan

The BalSwachhta Mission is a part of the nationwide sanitation initiative of 'Swachh Bharat Mission' launched by the Prime Minister on 2nd October, 2014. Speaking at the launch of Bal Swachhta Mission, Smt. Maneka Sanjay Gandhi said that children can play a very important role in achieving a Swachh Bharat. She said that they can become ambassadors of cleanliness and motivate others to keep their homes, schools, and surroundings clean. Bal Swachhta Abhiyan is a mission

launched on 14th of November 2014 to increase awareness about the cleanliness of the children all over the India[30].

Pradhan Mantri Jan Dhan Yojana

Pradhan Mantri Jan-Dhan Yojana (PMJDY) is National Mission for Financial Inclusion to ensure access to financial services, namely, Banking/ Savings & Deposit Accounts, Remittance, Credit, Insurance, Pension in an affordable manner The objective of "Pradhan Mantri Jan-Dhan Yojana (PMJDY)" is ensuring access to various financial services like availability of basic savings bank account, access to need based credit, remittances facility, insurance and pension to the excluded sections i.e. weaker sections & low income groups.

Benefits of schemes are

1. Interest on deposit.
2. Accidental insurance cover of Rs.1 Lakh
3. No minimum balance required
4. Life insurance cover of Rs.30,000
5. Overdraft facility after 6 months.
6. Access to Pension, insurance products.
7. RuPay Debit Card.
8. Overdraft facility upto Rs.5000/- is available in only one account per household[31].

It is launched by Prime Minister Narendra Modi on 28th August 2014.

Only a few including Jan Dhan and Swachh Bharat have caught "imagination" of the country in the first two years of the Narendra Modi government while most of its other schemes have escaped notice, a CMS study finds out. In all, there are about 40 schemes being implemented since Modi took power in May 2014, including those from earlier governments. Nearly Rs 1000 crore has been spent over the last two years by the NDA government to publicise these programmes.

30 Press Information Bureau Government of India Ministry of Women and Child Development14November-2014 11:53 IST, Smt. Maneka Sanjay Gandhi launches the nationwide BalSwachhta Missionhttp://pib.nic.in/newsite/PrintRelease.aspx?relid=111387 visited date 19/5/2016 12:17am

31 http://www.pmjdy.gov.in/scheme visited date 19/5/2016 12:24am

Pradhan Mantri Fasal Bima Yojana[32]

The Pradhan Mantri Fasal Bima Yojana (Prime Minister's Crop Insurance Scheme) was launched by Prime Minister of India Narendra Modi on 18 February 2016. It envisages a uniform premium of only 2 per cent to be paid by farmers for Kharif crops, and 1.5 per cent for Rabi crops. The premium for annual commercial and horticultural crops will be 5 per cent. Prime Minister Narendra Modi has asked for integration of all land records with Aadhaar at the earliest, emphasizing at his monthly PRAGATI (Pro-Active Governance And Timely Implementation) meeting on 23 March 2016 that this is extremely important to monitor the successful implementation of the Pradhan Mantri Fasal Bima Yojana or crop insurance scheme[33].

The objective of the scheme is to give impetus dying to agriculture practice. If farmers bear any financial burden due to unexpected weather, then Krishi Ambani BimaYojana will help them.

Pradhan Mantri Sansad Adarsh GramYojana

The scheme is based on the concept of rural development of Mahatma Gandhi which revolved around creating model villages for transforming Swaraj (self rule) into su-raj (good governance). The objective is to create a holistic development of all adopted villages by the MPs in all aspects- human, personal, social, economic and environmental development, including provisionof basic amenities, services, security and good governance[34].

Under this scheme, MPs shall be responsible for developing the socio-economic and physical infrastructure of three villages each by 2019, total of eight villages by 2024. The first Adarsh Gram must be developed by 2016 and more by 2019. Total of 6433 Adarsh Grams of 265000 Gram Panchayat will be created by 2024. This scheme is launched by by Prime Minister Narendra Modi on 11th October 2014.

Soil Health Card Scheme

The Government has launched this scheme to provide every farmer a soil health. The card will carry crop wise recommendations of nutrients/ fertilizers required for farmers to improve productivity. Budget allotted **Rs.100 crore** for issuing cards.

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32 https://en.wikipedia.org/wiki/Agricultural_insurance_in_India visited date 19/5/2016 12:34am

33 Ibid.

34 http://www.mapsofindia.com/my-india/society/sansad-adarsh-gram-yojna-to-develop-2500-villages-by-2019 visited date 19/5/2016 12:49am

Digital India

The Government of India has launched the Digital India programme with the vision to transform India into a digitally empowered society and knowledge economy. Digital India is based on three key areas –

1. Digital Infrastructure as a Utility to Every Citizen
2. Governance & Services on Demand
3. Digital Empowerment of Citizens[35]

Pillars of Digital India –

1. Broadband Highways
2. Universal Access to Phones
3. Public Internet Access Programme
4. e-Governance – Reforming government through Technology
5. e-Kranti – Electronic delivery of services
6. Information for All
7. Electronics Manufacturing – Target NET ZERO Imports
8. IT for Jobs
9. Early Harvest Programmes,launched by by Prime Minister Narendra Modi on 1st July 2015.

Skill India

The Skill India focuses on creating jobs for youth, the government has decided to revamp the antiquated industrial training centers that will skill over 20 lakh youth annually and creating 500 million jobs by 2020. Launched by Prime Minister Narendra Modi on 15th July 2015(on occasion of world youth skills day).

HRIDAY (National Heritage City Development and Augmentation Yojana)[36]

The Ministry of Urban Development, Government of India, launched the (HRIDAY) scheme on 21st January, 2015, with a focus on holistic development of heritage cities. With duration of 27 months (completing in March 2017) and

35 http://articles.economictimes.indiatimes.com/2015-07-01/news/64004371_1_digital-india-programme-swachh-bharat-mission-knowledge-economyvisited date 19/5/2016 12:55am

36 The Ministry of Urban Development, Government of India, launched the *National Heritage City Development and Augmentation Yojana* (*HRIDAY*) scheme.

a total outlay of Rs.500 Crores, the Scheme is being implemented in 12 identified Cities namely, Ajmer, Amravati, Amritsar, Badami, Dwarka, Gaya, Kanchipuram, Mathura, Puri, Varanasi, Velankanni and Warangal[37].The Modi government is considering Bentham principle and provides maximum pleasure of maximum people of India.

BetiBachao, BetiPadhaoYojana[38]:

Beti Bachao, Beti Padhao (Save girl child, educate girl child) is a Government of India scheme that aims to generate awareness and improving the efficiency of welfare services meant for women. The scheme was initiated with an initial corpus of Rs 100 crore Launched by by Prime Minister NarendraModi on 22nd January 2015. The trend of decline in the Child Sex Ratio[39] defined as number of girls per 1000 of boys between 0-6 years of age, has been unabated since 1961. The decline from, 945in 1991 to 927 in 2001 and further to 918 in 2011is alarming, the decline in the CSR is a major indicator of women disempowerment. CSR both, pre-birth discrimination manifested through gender biased sex selection, and post birth discrimination against girls[40].

Social construct discrimination against girls on the one hand, easy availability, affordability and subsequent misuse of diagnostic tools on the other hand, have been critical in increasing Sex selective elimination of girls leading to low Child Sex Ratio. Since coordinated and convergent efforts are needed to ensure survival, protection and empowerment of the girl child, Government has announced BetiBachaoBetiPadhao initiative. This is being implemented through a national campaign and focused multi sectoral in 100 selected districts low in CSR, covering all States and UT[41]s. this is a joint initiative of Ministry of Women and Child Development, Ministry of Health and Family Welfare and Ministry of Human Resource development[42].

Make in India

Make in India is the BJP-led NDA government's flagship campaign intended to boost the domestic manufacturing industry and attract foreign investors to

37 http://hridayindia.in/ visited date 14/5/2016 11:45pm
38 www.betibachaobetipadhao.co.in/ visited date 14/5/2016 11:33pm
39 CSR (Child Sex Ratio)
40 Supra note 22
41 Union territories
42 http://wcd.nic.in/BBBPScheme/main.htm visited date 14/5/2016 11:21pm

invest into the Indian economy. The Indian Prime Minister, Mr. NarendraModi first mentioned the key phrase in his maiden Independence Day address from the ramparts of the Red Fort and over a month later launched the campaign in September 2014 with an intention of reviving manufacturing businesses and emphasizing key sectors in India amidst growing concerns that most entrepreneurs are moving out of the country due to its low rank in ease of doing business ratings[43].

India is a country rich in natural resources. Labour is aplenty and skilled labour is easily available given the high rates of unemployment among the educated class of the country. With Asia developing as the outsourcing hub of the world, India is soon becoming the preferred manufacturing destination of most investors across the globe. Make in India is the Indian government's effort to harness this demand and boost the Indian economy. India ranks low on the “ease of doing business index”. Labour laws in the country are still not conducive to the Make in India campaign. This is one of the universally noted disadvantages of manufacturing and investing in India[44].

Number of Sectors is 25 for example Automobiles,Automobile Components,A viation,Biotechnology,Chemicals, Construction, Defence manufacturing, Electrical Machinery, Electronic Systems, Food Processing, IT and BPM Leather, Media and Entertainment, Mining, oil and Gas, Pharmaceuticals, Railways etc.

Startup India

The Prime Minister of India, Shri Narendra Modi had this year in his Independence Day speech announced the “Start-up India” initiative. This initiative aims at fostering entrepreneurship and promoting innovation by creating an ecosystem that is conducive for growth of Start-ups. The objective is that India must become a nation of job creators instead of being a nation of job seekers. The Prime Minister of India will formally launch the initiative **on January 16, 2016** from Vigyan Bhawan, New Delhi. The event will be attended by a vast number of young Indian entrepreneurs (over 2000) who have embarked on the journey of entrepreneurship through Start-ups[45]. Startup India scheme is very importance in life of young person. Which is originates new platform to encourage and protect frustrated person in India.

43 http://www.mapsofindia.com/government-of-india/make-in-india.html visited date 19/5/2016 10:18pm
44 Ibid.
45 http://startupindia.gov.in/actionplan.php visited date 19/5/2016 10:42pm

Swaraj Abhiyan

The Supreme Court of India has issued Directions relating to the implementation of the National Food Security Act, 2013 on Part-II of the SwarajAbhiyan Judgment[46] Before the Bench of Justices Madan B Lokur and NV Ramana the Petitioner Swaraj Abhiyan submitted the following suggestions

(i) All households should be provided with 5 kg food grains per person per month irrespective of whether or not they fall in the category of priority households as defined in Section 2(14) of the NFS[47] Act read with Section 10 thereof. The provision for food grains should be in addition to and not in derogation of any other entitlement in any other government scheme.

(ii) Households that do not have a ration card or family members left out of existing ration cards should be issued special and temporary coupons on production of an appropriate identity card or any other proof of residence.

(iii) Each household affected by the drought should be provided 2 kg of dal (lentil) per month at Rs. 30 per kg and one liter of edible oil per month at Rs. 25 per litre through the Public Distribution System. In this regard, reference was made to a similar scheme which is said to be working quite well in Tamil Nadu.

(iv) Children affected by the drought should be provided one egg or 200 gms of milk per day (6 days a week) under the Mid-Day Meal Scheme.

In addition to this, theMid-Day Meal Scheme should continue during the summer vacation period in schools so that children are not deprived of their meals, including eggs or milk, as the case may be[48].

The Bench has criticized the Government for bringing into force a statute without putting in place the implementation machinery "We might mention that the Union of India usually brings into force a statute without putting in place the implementation machinery. This is clearly demonstrated by the fact that the mechanism for enforcing several provisions of the NFS Act has not been established or constituted. This is completely inexplicable. We fail to understand how a statute enacted by Parliament can be given effect to without appropriate

46 http://www.livelaw.in/swarajabhiyan-part-ii-sc-issues-directions-implementation-national-food-security-act-2013/ visited date 13/5/2016 10:15 pm

47 National Food Security Act, 2013

48 Ibid.

rules and regulations being framed for putting in place the nuts and bolts needed to give teeth to the law or setting up mechanisms in accordance with the provisions of the statute. It is perhaps this tardiness in execution said the Bench[49].

Conclusion

The researcher has concluded that the Bentham's principle of greatest happiness of greatest number is very popular and implemented in modern India for example the Modi led government has so far implemented about 40 public welfare schemes including the ones introduced by congress. Swachh Bharat and Jan Dhan grabbed more eyeballs across clusters, regardless of party in power across states. In terms of visibility, of the five idea- based schemes, Digital India and Make in India performed better than Smart City or Startup India or even Bullet Train. Those schemes which involved local civil society, engaged individuals across age groups and the ones which are visible on the ground have caught attention of people across the country, according to study, hardly 3% of respondents are aware of some 25 schemes out of the 40 being implemented. Today we can say that, utilitarianism as a base of government policies fulfills desire of individual as well as public interest.

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49 Ibid.

Advertising Self-regulation: Indian Perspective

Prof. (Dr.) Manoj Kumar Padhy[1]*

I. Introduction

Advertising is multidimensional. It is a form of mass communication, a powerful marketing tool, a component of the economic system, a means of financing the mass media, a social institution, an art form, an instrument of business management, a field of employment and profession. Apart from being the lifeline of the free economy in a democratic country like India, advertising is the lifeblood of free press and electronic media. Because of enormous power of persuasion, it has become indispensable for business enterprises of every size and service providers. It is also useful for consumers as it helps them in getting promptly relevant and necessary information about all competing brands and their merits, about their price, potential performance and above all about their use and thereby saves the "search cost" of products which consumer needs for their personal use.

While advertising plays a vital role in modern competitive world affecting almost every segment of the society, there are many dark shades in it. Many advertisements are fraudulent, misleading or deceptive, unethical, obscene and indecent. According to critics of advertising, it insults human intelligence and does no good to the society. Further some of the advertisements are in bad tastes and annoying. F. Scott Fitzgerald has ridiculed advertising by describing it "as a racket whose constructive contribution to the humanity is exactly minus zero"[2] We read and see a number of advertisements which contain indecent portrayal of woman intended to appeal to the vulgar taste of peoples. Such advertisements create undesirable attitudes of sexism and may have the effect of depraving and corrupting the society especially the young ones. Children are more vulnerable to unethical or false or misleading advertising because they are neither of the age of discretion nor possessed of sufficient intelligence to distinguish between right and wrong.

The State has a legitimate and compelling interest to regulate the advertising sector. Critics of state intervention however, either oppose such interventions in the advertisement sector or argue for the minimalist role of the state in

1 * Professor of Laws, Faculty of Law, Banaras Hindu University, Varanasi.

2 F. Scott Fitzgerald, *The Crack Up* 76 (New Directions, United States, 1945).

the field of advertising on the following grounds: *firstly*, operation of market forces and *secondly*, comparative advantages of self-regulatory measures over government regulation. For such reasons many self-regulation instruments are there in India. To mention few of them: Norms of Journalistic Conduct Regarding Advertising; Codes of the Advertising Standard Council of India; Code for Commercial Advertising on *Doordarshan*; All India Radio Code for Commercial Advertising; Federation of Indian Chambers of Commerce and Industry: Norms of Ethics and Code of Fair Business Practices etc. These codes are enforced through the commitment and cooperation of advertisers, advertising agencies and the media. With this background an attempt has been made in this article to discuss about advertising self-regulation and to examine its efficacy.

II. Meaning and Nature of Advertising Self-Regulation

Advertising Self-regulation means the strict adherence of standards by the advertising industry laid down by and on behalf of all advertising stakeholders. It involves the enforcement of those standards through the commitment and cooperation of advertisers, agencies and media. Each country's self-regulatory takes into account its cultural, commercial and legal traditions. It can be differentiated from the law enforcing instrument on the ground that it does not provide legal prescriptions. It is subordinate to and complements legislative controls on advertising and provides an alternative, low cost and easily accessible means of resolving disputes relating to advertising. It provides a flexible and sensitive means of dealing with matters of taste and decency that are difficult to judge in law but which can fundamentally affect consumer confidence in advertising. It does not prejudice consumer's rights under law. Self-regulatory bodies do not duplicate the work of other regulatory bodies. Complaints are not generally pursued, if they should be resolved in the courts or if any of the parties has initiated or is contemplating legal action. A decision by a self-regulatory body does not deprive a consumer or an advertiser of the right to take further action or prejudice any rights under the law.

III. Origin and Development of Advertising Self-Regulation

Self-regulation is not of recent origin. Medieval guilds practiced self-regulation by inspecting markets and measures, judging the quality of merchandise and laying down rules for their trade. Advertising self-regulation can be traced back to

the poster industry in 1880s. The first code of advertising was launched in 1925 by the Association of Publicity Clubs. The 'Systematic Scrutiny of Advertising Claims' operated from 1926, when the newly established Advertising Association set up an advertising investigation department to "investigate abuses in advertising and to take remedial action". In 1937, the International Chamber of Commerce developed an International Code of Advertising Practice. It was the first international marketing code which has provided a benchmark for many national systems of self-regulation.

Late in 1960's the British advertising industry developed a self-regulatory system for advertisements which was rested largely on the support of the industry itself. The Committee of Advertising Practice and Advertising Standards Authority came into existence in 1961 and 1962 respectively. In 1974, a new improved mechanism for self-regulation was introduced in the form of the Advertising Standards Board of Finance. In 1984, the European Directive on Misleading Advertising implemented to allow the ASA to remain the principal regulator for misleading advertising in non-broadcast media, but with statutory reinforcement through the Office of Fair Trading (OFT). Today, the system covers non-broadcast advertising, sales promotion and many aspects of direct marketing. It is supported by a range of other self-regulatory initiatives, including the various preference services run by the Direct Marketing Association, the Quality Standard for Mail Production and its recognition system and "admark", a safe harbor scheme covering advertising on the internet.

The system of advertising self-regulation is well developed in the U.S.A. There is an increasing amount of self-regulation of advertising industry by a variety of private groups, e.g., the Association of National Advertisers (ANA), the American Association of Advertising Agencies (AAAA) and the American Advertising Federation (AAF). One of the oldest group efforts concerned with advertising self-regulation is the National Better Business Bureau (NBBB) which was established in 1911. To increase the efficiency of this operation, a new organization was developed in 1970, the Council of Better Business Bureau (CBBB) and the National Bureau (NB). In 1971, a new inter-industry organization was developed. The first component of this organization was National Advertising Division (NAD) of the CBBB. The second was a new independent National Advertising Review Board (NARB). In addition, the CBBB sponsors the children's Advertising Review Unit (CARU). The CARU publishes self-regulatory guidelines for children's Advertising and monitors children's advertising for ethical offences.

IV. Advertising Self-regulation in India

(A) Advertising Standards Council of India (ASCI)

The Advertising Standards Council of India is a voluntary Self-Regulation council, registered as a not-for -profit Company under the Indian Companies Act. The sponsors of the ASCI, who are its principal members, are firms of considerable repute within Industry in India, and comprise Advertisers, Media, Advertising Agencies and other Professional/ Ancillary services connected with advertising practice. The ASCI is not a Government body, nor does it formulate rules for the public or the relevant industries. The ASCI has laid down codes and guideline as a self-regulatory measure to regulate commercial advertisements.

The Advertising Standards Council of India[3] adopted an advertising Code in 1985. The purpose of the Code is to control the content of advertisements[4].

The objectives of the Code is to achieve fair advertising practices in the best interest of the ultimate consumer[5] and to ensure the truthfulness and honesty of representations and claims made by advertisements and to safeguard against misleading advertisements; to ensure that advertisements are not offensive to generally accepted standards of public decency; to safeguard against the indiscriminate use of advertising for the promotion of products which are regarded as hazardous to society or to individuals to a degree or of a type which is unacceptable to society at large; to ensure that advertisements observe fairness in competition so that the consumer's need to be informed on choices in the market place and the canons of generally accepted competitive behaviour in business are both served.

3 The Advertising Standards Council of India was incorporated on 21st October 1985 under Section 25 of the Companies Act, 1956, as a not for profit body. Membership of the Advertising Standards Council of India is open to firms and companies in the following category :
(a) Advertisers of goods and/or services.
(b) Proprietors of publishers of newspapers, periodicals and other media that carry the advertisements of goods and/or services.
(c) Advertising agencies.
(d) Outdoor contractors, film/video/TV/radio/producers/distributors/ block makers/printers/and such other types of allied and ancillary trades and professions who assist in the creation or placement of advertising or are in any manner concerned with advertising.

4 For the purpose of this Code an advertisement is defined as a paid-for communication, addressed to the Public or a section of it, the purpose of which is to influence the opinions or behaviour of those to whom it is addressed. Any communication which in the normal course would be recognized as an advertisement by the general public would be included in this definition even if it is carried free-of-charge for any reason.

5 For the purpose of this Code a consumer is any person or corporate body who is likely to be reached by an advertisement whether as an ultimate consumer, in the way of trade or otherwise.

The responsibility for the observance of this Code for Self-Regulation in Advertising lies with all who commission, create, place or publish any advertisement or assist in the creation or publishing of any advertisement. All advertisers, advertising agencies and media are expected not to commission, create, place or publish any advertisement which is in contravention of this Code. This is a self-imposed discipline required under this Code for Self-Regulation in Advertising from all involved in the commissioning, creation, placement or publishing of advertisements.[6]

As noted above the object of the Code of Advertising Practice is to ensure the truthfulness and honesty of representations and claims made by Advertisements and to safeguard against misleading advertisements.[7] To this end the Code lays down following standards on the content of advertisements: *Firstly*, Advertisements must be truthful. All descriptions, claims and comparisons which relate to matters of objectively ascertainable fact should be capable of substantiation. Advertisers and advertising agencies are required to produce such substantiation as and when called upon to do so by the Advertising Council of India; *secondly*, where advertising claims are expressly stated to be based on or supported by independent research or assessment, the source and date of this should be indicated in the advertisement; *thirdly*, advertisements shall not contain any reference to any person, firm or institution without due permission; nor should a picture of any generally identifiable person be used in advertising without due permission;[8] *fourthly*, advertisements shall also not distort facts nor mislead the consumer by means of implications or omissions. Advertisements must not contain statements or visual presentations which directly or by implication or by omission or by ambiguity or by exaggeration are likely to mislead the consumer about the product advertised or the advertiser about any other product or advertiser; *fifthly*, advertisements should not be so framed as to abuse the trust of consumers or exploit their lack of experience or knowledge. In particular no advertisement should contain any claim so exaggerated as to lead to grave or widespread disappointment in the mind of consumers.

To ensure the observance of the Code the ASCI has set up a Consumer

6 This Code applies to advertisements read, heard or viewed in India even if they originate or are published abroad so long as they are directed to consumers in India or are exposed to significant number of consumers in India.

7 Chapter-I, ASCI.

8 If and when required to do so by the Advertising Standards Council of India, the advertiser and the advertising agency shall produce explicit permission from the person, firm or institution to which reference is made in the advertisement.

Complaints Council (CCC). The Council conducts as many as meeting within a period starting from April 1 to March 31 of every year. The CCC has to work within the procedure laid down in at all meetings. In all complaints reasonable opportunity is to be given to the advertiser/agency to comment or/ and provide substantiation. This system obviously lacks the deterrence of penal sanctions, that a legally - enforceable regulatory measure would contain, but the advertising industry argues that censure by their peers is a sufficient enough deterrent to advertisers in most cases

It has been observed that the Code lacks the deterrent or penal sanctions and the pressures that the Council can exert are primarily ethical. Moreover, though its members have voluntarily submitted themselves to the Code, unlike Medical Council of India or the Bar Council of India which are statutory bodies set up by Acts of Parliament, the ASCI has no statutory or judicial powers. As a result, on occasions, even members themselves might choose not to accept the Code or decisions of the Council, let alone non-members who have no obligation of any sort to accept the Code and abide by it. In view of the foregoing it is humbly submitted that the Government should work more closely with the ASCI to turn it into a regulatory body, like the Telecom Regulatory Authority of India and provide it with more powers to regulate advertising standards in the country.

(B) The Press Council of India's Norms of Journalistic Conduct

The Press Council of India has been established with the objects of preserving the freedom of press and of maintaining and improving the standards of newspaper and news agencies in India. In order to further these objectives the Council formulated a code of conduct for newspapers agencies and journalists. It is based on the principle that the fundamental objective of journalism is to serve the people with news, views, comments and information on matters of public interest in a fair, accurate, unbiased, sober and decent manner. To this end, the press is expected to conduct itself in keeping with certain norms of professionalism, universally recognized. Few norms are enunciated below: i) Newspapers/journalists shall not publish anything which is obscene, vulgar or offensive to public good taste; ii) Newspapers shall not display advertisements which are vulgar or which, through depiction of a woman in nude or lewd posture, provoke lecherous attention of males as if she herself was a commercial commodity for sale; iii) Whether a picture is obscene or not, is to be judged in relation to three tests; namely a) Is it vulgar and indecent? b) Is it a

piece of mere pornography? c) Is its publication meant merely to make money by titillating the sex feelings of adolescents and among whom it is intended to circulate? In other words, does it constitute an unwholesome exploitation for commercial gain? Other relevant considerations are whether the picture is relevant to the subject matter of the magazine. That is to say, whether its publication serves any preponderating social or public purpose, in relation to art, painting, medicine, research or reform of sex; and iv) The globalization and liberalization does not give license to the media to misuse freedom of the press and to lower the values of the society. The media performs a distinct role and public purpose which require it to rise above commercial consideration guiding other industries and businesses. So far as that role is concerned, one of the duties of the media is to preserve and promote our cultural heritage and social values etc.

It further provides that i) No advertisement shall be published, which promotes directly or indirectly production, sale or consumption of cigarettes, tobacco products, wine, alcohol, liquor and other intoxicants; ii) Newspaper shall not publish advertisements, which have a tendency to malign or hurt the religious sentiments of any community or section of society; iii) Advertisements which offend the provisions of the Drugs and Magical Remedies (Objectionable Advertisement) Act as amended in 2002, or any other statute should be rejected; iv) Newspapers should not publish an advertisement containing anything which is unlawful or illegal, or is contrary to public decency, good taste or to journalistic ethics or propriety; v) Journalistic propriety demands that advertisements must be clearly distinguishable from editorial matter carried in the newspaper; vi) Publication of dummy or lifted advertisements that have neither been paid for, nor authorized by the advertisers, constitute breach of journalistic ethics specially when the paper raises a bill in respect of such advertisements; vii) Deliberate failure to publish an advertisement in all the copies of a newspaper offends against the standards of journalistic ethics and constitutes gross professional misconduct; viii) There should be total co-ordination and communication between the advertisement department and the editorial department of a newspaper in the matter of considering the legality propriety or otherwise of an advertisement received for publication; ix) The editors should insist on their right to have the final say in the acceptance or rejection of advertisements,

especially those which border on or cross the line between decency and obscenity; x) Newspapers to carry caution notice with matrimonial advertisements carrying following text[9]- "Readers are advised to make appropriate thorough inquiries before acting upon any advertisement. This newspaper does not vouch or subscribe to claim and representation made by the advertiser regarding the particulars of status, age, income of the bride/bridegroom"; xi) An editor shall be responsible for all matters, including advertisements published in the newspaper. If responsibility is disclaimed, this shall be explicitly stated beforehand; xii) Tele-friendship advertisements carried by newspapers across the country inviting general public to dial the given number for 'entertaining' talk and offering suggestive tele-talk tend to pollute adolescent minds and promote immoral cultural ethos. The Press should refuse to accept such advertisements; xiv) Classified advertisements of health and physical fitness services using undignified languages, indicative of covert soliciting, are violative of law as well as ethics. The newspaper should adopt a mechanism for vetting such an advertisement to ensure that the soliciting advertisements are not carried; xv) Advertisements of contraceptive and supply of brand item attaching to the advertisement is not very ethical, given the social milieu and the traditional values held dear in our country. A newspaper has a sacred duty to educate people about precautionary measures to avoid AIDS and exhibit greater far sight in accepting advertisement even though issued by social welfare organization; (xvi) Employment News which is trusted as a purveyor of authentic news on government jobs should be more careful in accepting advertisements of only *bonafide* private bodies; (xvii) While accepting advertisements of educational institutes newspapers may ensure that such advertisements carry the mandatory statement that the concerned institutes are recognized under the relevant enactments of law; xviii) Advertisements play extremely vital role in shaping the values and concerns of the present day society and as more and more lenient view is taken of what is not the norm, the speedier may be acceptability of such matters in 'public perception' but at what cost is the essential point for consideration. It should be borne in mind that in the race to be globally relevant we do not leave behind the

9 The Hon'ble High Court of Delhi in connection with FAO No 65/1998 of *Smt Harjeet Kaur Vs Shri Surinder Pal Singh* directed the Press Council of India to instruct the newspaper to publish classified/ matrimonial advertisement by advising them to alongside publish the said Caution Notice in their newspapers.

values that have earned India the unique place it enjoys globally on moral and ethical plane.

It is important to note that complaints or reports on contraventions of the Code are enquired into by the Inquiry Committee of the Press Council of India and the latter on consideration of the records of the case and the report of the Inquiry Committee and its recommendation passes on appropriate order.

One of the functions of the Press Council of India is to monitor the advertisements published in the newspapers. However, the PCI is largely a paper tiger without any biting teeth. The newspapers often violate the Code either in the name of modernization or globalization. Newspapers are flooded with obscene advertisements; women are being portrayed like commodities, in relation to the products which are not even remotely connected with them. Front page of the newspaper, contains tall claims, about 'hair gain' to 'weight losses' without adequate or proper tests. The PCI at maximum can censor the advertisement or pass an order to withdraw the impugned advertisement without imposing any punishment or penalty. It is therefore, submitted that the PCI should be given more biting teeth for not only issuing an order for 'corrective advertisement" but also to take action against the newspaper for publishing advertisements in violation of the Code.

(C) Codes for Commercial Advertising on Doordarshan and All India Radio

The Doordarshan and the All India Radio are major sources propagating the commercial and non commercial information and penetrate thousands of viewers and listeners everyday across the country. Commercial advertising on Doordarshan and the All India Radio is not regulated by any specific legislation. Instead, Codes of self-regulation have been put in place to regulate advertising on such media.[10]

(a) Code for Commercial Advertising on Doordarshan

The Code ensures that advertising[11] on Doordarshan shall be so designed as to confirm to the laws of the country and should not

10 For details of the Code. See, J.P.B. Sawant and P.K. Bandhopadhyay, *Advertising Law and Ethics* 238-256 (Universal Law Publishing Co. Pvt. Ltd., Delhi, 2002).

11 "Advertisement" includes any item of publicity for goods or services inserted in the programme telecast by Doordarshan with a view to increase sales.

offend morality, decency and religious susceptibilities of the people. Further, no advertisement in Doordarshan shall be permitted which - (i)derides any race, caste, colour, creed and nationality; (ii) is against any of the directive principles, or any other provision of the Constitution of India; (iii) tends to incite people to crime, cause disorder or violence, or breach of law of glorifies violence or obscenity in any way; (iv) presents criminality as desirable; (v) adversely affects friendly relations with foreign States; (vi) exploits the national emblem, or any part of the Constitution or the person or personality of a national leader or State Dignitary; (vii) relates to or promotes cigarettes and tobacco products, liquor, wines and other intoxicants; (viii) in its depiction of women violates the constitutional guarantees to all citizens such as equality of status and opportunity and dignity of the individual. In particular, no advertisement shall be permitted which projects a derogatory image of women. Women must not be portrayed in a manner that emphasizes passive, submissive qualities and encourages them to play a subordinate, secondary role in the family and society. The portrayal of men and women should not encourage mutual disrespect .Advertiser shall ensure that the portrayal of the female form is tasteful and aesthetic, and is within the well established norms of good taste and decency.

In order to maintain the sanctity of the News channels the code emphasizes that no advertisement message shall in any way be presented as News. Further, no advertisement shall be permitted the objects whereof are wholly or mainly of a religious or political nature; advertisements must not be directed towards any religious or political end or have any relation to any industrial dispute. As far as the advertisements for the services are concerned, they should not concerned with (i) unlicensed employment services; (ii) Sooth-sayers etc., and those with claims of hypnotism; (iii) Betting tips and guide books etc, relating to horse racing or other games of chance.

The items advertised should not suffer from any defect or deficiency as mentioned in Consumer Protection Act, 1986. No advertisement should contain references which are likely to lead the public to infer that the product advertised or any of its ingredients has some special or miraculous or super natural property or quality, which is

difficult of being proved, e.g. cure for baldness, skin whitener etc. No advertisement should contain the words 'Guarantee' or 'Guaranteed', etc. unless the full terms of the guarantee are available for inspection by the Director General, Doordarshan, and are clearly set out in the advertisement and are made available to the purchaser in writing at the point of sale or with the goods.

The Code also contains rules relating to advertisements of products or services directed towards children. It provides that no advertisement for a product or service shall be accepted if it suggests in any way that unless the children themselves buy or encourage other people to buy the products or services, they will be failing in their duty or lacking in loyalty to any person or organisations. An advertisement which leads children to believe that if they do not own or use the product advertised they will be inferior in some way to other children or that they are liable to be condemned or ridiculed for not owning or using it will not be accepted by Doordarshan.

The Code does not permit advertisements of talismans, charms and character reading from photographs or such other matter as well as those which trade on the superstition of general public shall be permitted. It also does not allow any advertisement which is likely to bring advertising into contempt or disrepute and forbids such advertising as may take advantage of the superstition or ignorance of the general public.

It should be recognized that general rules of conduct in advertising are in the form of guidelines to be followed by Doordarshan Kendras and advertisers and advertising agencies. Ultimate decision making power in respect of suitability or otherwise of an advertisement for telecast, however, lies with the Director General, Doordarshan and his decision in this regard is final. Similarly, Doordarshan time is sold to the Advertiser/Advertising Agencies at the sole discretion of the Director General, Doordarshan, according to the prescribed rates.

When Director General receives any complaint or report on contravention of the Code, he/she may in first instance refer the same to the Advertisers' Association(s) concerned with request for

suitable action. If complaints under the Code cannot be satisfactorily resolved at Association(s)'s level, they shall be reported to the Director General, who will then consider suitable action. For any complaints under the Code received by Doordarshan concerning a party outside the purview of the various member Association(s), the Director General will draw attention of such party to the complaint and where necessary, take suitable action on his own.

(b) All India Radio Code for Commercial Broadcasting

Commercial Broadcasting Service of All India Radio has been serving as an effective instrument for advertisers to publicize their goods and services since its inception in November 1967. All India Radio, as a public service broadcasting organization has a responsibility to ensure that the advertisements, either in terms of content, tone or treatment, do not mislead the listener/ consumer or are not repugnant to good taste. After a year of inception of the service the AIR adopted a Code for Commercial Broadcasting in 1968. The Code has been revised and enlarged since then and covers almost all aspects of commercial advertising. Its contents resemble the provisions of the Television Code discussed above. In fact the Television Code itself is an adaptation of the All Indian Radio Code according to the nature and impact of such media. The Radio Code, like the Television Code contains general rules of conduct in advertising and lays down procedure for the enforcement of the Code, which is similar to one, envisaged in the Television Code. According to the Code the Director-General All India Radio shall be the sole judge of the suitability or otherwise of all advertisement or a sponsored programme for broadcast and his decision in this regard shall be final. Director General will draw attention of such party to the complaint and where necessary, take suitable action of his own.

(c) Advertising Code for Cable Operators

In recent years there has been haphazard mushrooming of cable television networks all over the country. There has been a 'cultural invasion' in many quarters since the programmes available on these satellites channels are predominantly western and totally alien to our culture and mode of life. To check the menace of unsocial, immoral,

anti-business and unethical advertising, an Advertising Code has been adopted under the Cable Television Networks (Regulation) Act, 1995. This Code is different from the other Codes discussed above in as much as it attracts penal liability on being contravened. Section 6 of the Act prohibits the transmission or re-transmission of any advertisement through a cable service which is not in conformity with the prescribed Advertisement Code. Rule 7 framed under the Cable Television Network Rules, 1994 (revised up to 2000) lays down the Advertising Code as under :

(1) Advertising carried in the cable service shall be so designed as to confirm to the laws of the country and should not offend morality, decency and religious susceptibilities of the subscribers;

(2) No advertisement shall be permitted which: (i) derides any race, caste, colour, creed and nationality; (ii) is against any provisions of the Constitution of India; (iii) tends to incite people to crime, cause disorder or violence or breach of law or glorifies violence or obscenity in any way; (iv) presents criminality as desirable; (v) exploits the national emblem, or any part of the Constitution or the person or personality of a national leader or a State dignitary; (vi) in its depiction of women violates the constitutional guarantees to all citizens. In particular, no advertisement shall be permitted which projects a derogatory image of women. Women must not be portrayed in a manner that emphasizes passive, submissive qualities and encourages them to play a subordinate, secondary role in the family and society. The cable operator shall ensure that the portrayal of the female form, in the programmes carried in his cable service is tasteful and aesthetic and is within the well-established norms of good taste and decency; (vii) exploits social evils like dowry, child marriage; (viii) promotes directly or indirectly production, sale or consumption of[12] (a) Cigarettes, tobacco products, wine, alcohol, liquor or other intoxicants; (b) Infant milk substitutes, feeding bottle or infant foods.

12 Inserted by G.S.R. 710(E), dated 8th September 2000 (w.e.f. 8-9-2000).

(3) No advertisement shall be permitted the objects whereof are wholly or mainly of a religious or political nature; advertisements must not be directed towards any religious or political end.

(3a) No advertisement shall contain references, which hurt religious sentiments.[13]

(4) The goods or services advertised shall not suffer from any defect or deficiency as mentioned in Consumer Protection Act, 1986.

(5) No advertisement shall contain references which are likely to lead the public to infer that the product advertised or any of its ingredients has some special or miraculous or supernatural property or quality which is difficult to being proved.

(6) The picture and the audible matter of the advertisement shall not be excessively 'loud'.

(7) No advertisement which endangers the safety of children or creates in them any interest in unhealthy practices or shows them begging or in an undignified or indecent manner shall not be carried in the cable service.

(8) Indecent, vulgar, suggestive, repulsive or offensive themes or treatment shall be avoided in all advertisements.

(9) No advertisement, which violates the standards of practice for advertising agencies as approved by the Advertising Agencies Association of India, Bombay from time to time shall be carried in the cable service.

(10) All advertisements should be clearly distinguishable from the programmes and should not in any manner interfere with the programme viz, use of lower part of screen to carry captions, static or moving alongside the programme.

V. Conclusion

The Codes discussed above supplement the law, fill gaps where the law does not reach and often provide an easier way of resolving disputes than by civil litigation or criminal prosecution. For this reason they have received wide

13 *Ibid.*

coverage and popularity. At the same time despite their good intentions and wide coverage these codes have been criticized in recent times. The major criticism is the lacking of proper enforcement mechanism i.e without any sanction and without any remedy. Self-regulation tends to break down when a number of firms in the industry find it in their interest to depart from joint standards. It has been observed that consumers have not much confidence in business self-regulation because voluntary standards are usually drawn up by business without canvassing the viewpoint of consumers. What is needed in fact is a closer and constructive partnership between the government and self-regulatory enforcement agencies to secure the better compliance of the self-regulatory codes by the advertisers, advertising agencies and the media.

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Capital Punishment : A critical study of *Mahindra Nath Das v. UoI.1* (2013)

*Samir Mukhopadhyay**
*Anurag Deep***

Abstract

[Capital punishment and its impact on human rights have consistently been the most vital and intricate issue of criminal, constitutional as well as international law. It has become fashionable to put 'capital punishment' in the pigeon hole of 'Human Rights violation'. One can find intellectuals and media making casual remarks that capital punishment should be abolished as it has been abolished in more than half of the world. Second assertion is that inordinate delay in disposal of mercy petition automatically and necessarily lead to commutation of death sentence to life imprisonment. This paper concentrates on second issue of delay in disposal of mercy petition, its implication on punishment. The idea that the inordinate delay leads to violation of 'procedure established by law' under article 21 is good so far as human rights jurisprudence is concerned but is not good for a country like India where justice for victim is not only notoriously delayed but is illusive also. In cases like Mahendra Nath Das where a murderer kills another person when on bail, life imprisonment instead of capital punishment instills a sense of injustice among victims and common citizen. In this case, all the material facts from the point of view of criminality of the case is critically examined, further punishment awarded, constitutional validity, human right aspects and finally, a critical analysis of the judgment pronounced is made in this case. It also discusses whether it is desirable at all for the Supreme Court to take such cases for scrutiny where delay is caused in disposing of mercy petition by the President as this gives an unending opportunity to the convict or the representative of the convict to move to Supreme Court on some pretext or other just to cause delay and waiting for an opportune moment to get a positive verdict on such mercy petition. The same happened in case of Md Yakub Memmon who was hanged on July 30, 2015 after exhausting mercy, review, curative and late night petitions.]

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(2013) 6 SCC 253, date of judgment 01.05.2013.

PERSPECTIVE

The constitutionality, proportionality and desirability of capital punishment, as well as the power of the President under Article 72 of the Constitution of India has come under judicial review in a number of occasions. The matter is yet more important on such cases where delay was caused in communicating the decision of the President while disposing of the mercy petition of the convict. The matter has also come before the Supreme Court in a large number of cases, where the convict pleaded that the death sentence should not be executed in such cases where there was an inordinate delay in disposal of the mercy petition of the convict. There are inconsistent opinions of the Supreme Court on this issue. In some cases, the Supreme Court opined that a period may be fixed for the disposal of the result of the mercy petition filed by the convict and if there is delay beyond that reasonable period, all the death sentences would automatically be converted into life imprisonment. There are also other views where the Supreme Court has held although it is expected that the mercy petition of the convict should be disposed of within a reasonable time but the delay alone cannot be the sole ground for commutation of death sentence into life imprisonment.

This issue has come before the Apex Court in the case of *Mahindra Nath Das* v. *Union of India.*[2] Justice Singhvi gave the verdict. In the said judgment,[3] extensive references have been given from various previous judgments of the Apex Court including the decision of *Devender Pal Singh Bhullar* v. *State of NCT of Delhi.*[4] In fact, the *Bhullar* case was decided by the same Bench just about three weeks before the pronouncement of the present judgment. In *Bhullar's* case, the delay in communication of the mercy petition of the convict was not considered to be a valid reason as the case was of a terror convict and the petition was rejected. But in the case under discussion, the same Bench of Justice G. Singhvi and Justice S.J. Mukhopadhaya have opined in the different way.

Mahindra Nath Das case is unique in nature in various ways.

Firstly, **Two Presidents: Two opinions:-** Probably this is the only case where the President of India in the beginning opined commutation of death sentence into life imprisonment and later on, the other President in Office has taken a reverse view in a sense that when a review application was filed by the Ministry of Home Affairs (MHA), the next President has decided to send the convict to gallows by

2 *Ibid.*

3 The case has been unanimously decided by Division Bench of Justice S.J Mukhopadhaya and Justice G. Singhvi.

4 2013(5)SCALE 575 , date of judgment 17.04.2013, sometime referred as *First Bhullar case*. This case was overruled by *Navneet Kaur* v. *State of Nct of Delhi*, (Second Bhullar case) Decided on 31.03.2014.

rejecting the mercy petition of the convict. There has been no such instance at the disposal to suggest that two different Presidents opined differently at two different point of time regarding the mercy petition of the same convict waiting for the execution of the death sentence as confirmed by the Supreme Court of India.

Secondly, One Convict: Two murders: - This case is also unique in a sense that the convict here has not committed a single murder but he has committed the heinous act on another occasion. In fact, he was released on bail while he was serving life term for the first murder offence. In the first murder case, the person was awarded the sentence of life imprisonment. He was released on bail and during that time, he has committed the second murder which leads to pronouncement of death sentence by the trial court, subsequently confirmed by the concerned High Court and also the Apex Court of the country.

Thirdly, **Same Bench: Two opinions: -** Just prior to the decision of the present case, the same Bench sat to decide the case of *Devender Pal Singh Bhullar (supra)*. The judgment in this case was passed on 12/04/2013. In this case, after detailed deliberation, the Supreme Court has held that the President was right in rejecting the mercy petition of Bhullar. Barely, three weeks after the *Bhullar* judgment, the judgment in the case of *Mahindra Nath Das (supra)*, was pronounced and there, the Apex Court with the same Bench has taken a different view allowing the appeal of the convict. Of course, the Judges have given detailed reasons for exonerating Das, yet the matter has caught the attention of the legal researchers and the issue is hotly discussed amongst various stake holders of judicial circle.

Fourthly, **Terrorist cases: Other cases: -** the Supreme Court has opined that the sole reason for rejecting Bhullar's petition is that it is a case of a terrorist whereas the case of Das is not related to terrorist activities and it is an individual case of murder. The question comes whether the Supreme Court can make such distinction while disposing of the matter on the basis of terrorist case or other than terrorist case. This issue has also received attention from various circles including media.

Fifthly, Later murder early judgment: Former murder later judgment: - The case is also unique because it is to be noticed that the first murder by Mahindra Nath Das was committed on 24/12/1990 – the judgment of the trial court for the same was passed on 11/11/1997. The second murder was committed on 24/04/1996 i.e., almost $5^{1/2}$ years after the first murder but the trial court judgment was passed on 18/08/1997 i.e., 3 months before the first trial court judgment.

Sixthly, Abolitionist-Retentionist debate: *Mahindra Nath Das* case is illustration that if capital punishment is abolished, which punishment would be appropriate if a murder commits another murder. In case of absence of capital

punishment, life imprisonment remains the only punishment. This generates a sense of injustice that a murderer who murders again gets another life imprisonment. If s/he gets capital punishment, it gives peace to the mind of the relations of the victim and satisfies the ends of justice.

Criminality aspect of the Mahindra Nath Das **case**

Mahindra Nath Das, the appellant was first prosecuted for an offence committed under section 302 of IPC on the allegation that he has killed one Rajen Das, the then Secretary of Assam Motor Workers Union on 24/12/1990. This was the first crime committed by the convict as brought on record. He was brought before the justice by the State and was convicted by the trial court of Kamrup, Guwahati in Session Case No. 80(K) of 1990 vide order dated 11/11/1997. The trial court has awarded the sentence of life imprisonment on the present convict. While the convict was enlarged on bail in the aforesaid Case No. 80(K) of 1990, the appellant convict was said to have killed one Hara Kanta Das, a truck owner on 24/04/1996. The details of the case as given in the Supreme Court judgment is reproduced below: [5]

> ...in the morning hours, around 7 a.m., on April 24, 1996, Hara Kanta Das was taking his morning cup of tea on the corner tea stall of M.G. Road and Chamber Road, Guwahati along with others. The appellant arrived at the scene with a sword like weapon and with it dealt blows to Hara Kanta Das who fell down on the ground. The appellant amputated the right hand and thereafter severed the head of Hara Kanta Das (the deceased). With the head of the deceased in one hand and the blood dripping weapon in the other hand, he moved majestically towards Fancy Bazar Police Out Post. The occurrence was witnessed by persons standing there of whom PW 3, Kalu Das, PW5, Gaya Prasad and PW 8, Gauri Sankar Thakur were examined as eye witnesses. Ratan Rai, PW 1, the sweeper rushed to the police station to inform about the incident. There he found the appellant entering into the Police Out Post. PW 2, Rateshwar Barman was on duty. The appellant asked PW 2, where he should keep the head and the weapon and placed them in the verandah of the police station. The weapon was seized and marked as Ext.1 after conducting inquest over the head. After taking the head to the scene of occurrence where the body was lying, another inquest was conducted and the body was sent to the Doctors for conducting post mortem examination. PW9, Dr.Pratap Ch.Sarmah, conducted the post mortem examination and sent report,

5 (1999) 5 SCC 102 at 104.

> Ext.14. PW 9 noted that the head of the deceased was severed from the body which was having as many as nine injuries on it.

He was tried in Case No. 114 (K) of 1996 and the trial court has convicted him and he was sentenced to death on the premises that "the murder was most foul and gruesome" and therefore comes under rarest of the rare.

Here is a case where the convict has not only committed a single murder but has committed multiple murders. On the first occasion, he has murdered Rajen Das and convicted and was serving the sentence of life imprisonment for the said murder. He came out on bail while on trial and then, he has committed the second murder. Both the judgments in the case of the convict show that in both the cases, there was culpable homicide amounting to murder. In English Law, there is difference b/w Culpable Homicide amounting to murder and Culpable Homicide not amounting to murder.

Mens rea aspect

In England, the *mens rea* aspect of the murder is called as "malice aforethought". However, this phrase is misleading because it gives the impression that the act must be result of an aforethought i.e., a plan which if executed is a crime by itself. In a number of cases, the House of Lords has confirmed that the meaning of the said phrase is intention. The concept of *mens rea* is of the utmost importance as the presence or absence of the same would determine whether an unlawful killing would fall under culpable homicide amounting to murder or culpable homicide not amounting to murder. Culpable homicide not amounting to murder, in England, is known as Manslaughter which means an unlawful homicide without malice aforethought.

The English **Judge Coke** has defined murder as: [6]

> Murder is when a man of sound memory, and of the age of discretion, unlawfully killed within any county of the realm any reasonable creature in ***rerum natura*** under the King's peace, with malice aforethought, either expressed by the party or implied by law, [so as the party wounded, or hurt, etc. die of the wound or hurt, etc. within a year and a day after the same]

The way the heinous crime of 2nd murder was committed proves beyond any doubt that there was presence of intention in the mind of the convict while committing the act. In the instant case, murder was committed in a very gruesome manner, it was extremely heinous, cruel and a cold-blooded murder. The manner

6 Smith and Hogan's *Criminal Law*, 489,(Oxford University Press, 13th,2011).

in which, it was committed was highly atrocious and shocking to any public conscience. The convict, after giving blows with a sword to the deceased person, when he (deceased) fell down, the accused first amputated his hand and thereafter, he severed the head of the deceased from the body. Not only that, the convict has carried the severed head through the road by holding it in his hand to the Police Station. The trial court has sarcastically commented it "majestically". He went to the Police Station by holding it in one of his hand and the blood – dripping weapon in the other hand. The entire gruesome act depicts an extreme depravity on part of the convict. Hence, there was presence of *mens rea* in this heinous act of the convict.[7]

Actus reus aspect

The *Actus reus* part has already been discussed in the earlier paragraphs. The medical report shows that there was as many as nine injuries on the body which was severed by the convict from the head of the deceased. The deceased Hara Kanta Das was taking his morning tea on the road side tea stall and the convict has attacked him with sword like weapon and has given blows and thereafter, amputated first the right hand and thereafter, the head of the deceased person. The entire part of the *Actus reus* clearly shows that this *Actus reus* is the result of the *Mens rea* of the convict and thus ultimately resulted in the death of the second deceased person Hara Kanta Das.

Causal Relation aspect

Not only that there was *Mens rea* and *Actus reus* in the present case, there was a clear causal relationship established amongst all the acts committed by the convict. If the entire chain of acts committed by the convict are examined, it could be found that there is a golden thread running amongst all the events. The initial *Mens rea* was developed in the convict by way of intention. The intention has been translated into action by procuring a sword like instrument and thereafter, the convict has attacked the deceased person in the tea stall in the morning hour. This shows the convict was aware of the timing when the deceased usually comes for taking tea in the road side tea stall. The intention here later on, led to *Actus reus* aspect which leads to a chain of operations. The *Actus reus* in the instant case *inter alia* includes the hitting of the accused on the vital part of his body, putting down the deceased on the road through the impact of the sword carried by the convict, amputating the right hand of the deceased and thereafter, severing the head of the deceased from the rest part of his body. Not only that, after severing the head, the accused has carried the head in one hand and the blood – dripping weapon

7 *Supra note* 1 at para 6.

in the other hand and he carried these things magistically as if it was a shield or memento to the police out post. The entire aspect of the killing right from the beginning to the end shows that between each and every corresponding acts, there is causal relationship which starts right from the formation of *mens rea* and ends in reaching to the police out post. The golden thread ran all along amongst all the acts and thereby it shows that it is a well thought execution of criminal act by the accused.

Crime of M.N. Das: Whether conduct crime or consequence crime

It is a well known fact that a true conduct crime is very rare. Smith and Hogan has given an example of conduct crime by refering perjury. The term was interpreted widely by Glanville Williams. He includes rape and abduction in this type of crime. Of course, there is gray area but the generally adopted principle of the distinction between conduct crime and consequence crime is that where the crime is made through conduct like perjury is a conduct crime whereas the crime which resulted in wounding or abducting etc. are popularly known as result crimes or the consequence crime. In England, Criminal Attempts Acts 1981 has already been in vogue and since passing of that legislature, all indictable offences are potentially treated as conduct crime. The matter has been clearly explained by Smith and Hogan in *Criminal Law.*[8]

Seeing from this point of view, definitely, the present crime of M.N. Das is a result crime and not just a conduct crime.

8 "A case may be made that the law should always have regard only to the conduct and not to the result. Whether the conduct results in harm is generally a matter of chance and does not alter the blameworthiness and dangerousness of the actor. But the law has not gone so far. If D hurls a stone being reckless whether he injures anyone, he is guilty of an offence if the stone strikes V but of no offence – not even an attempt – if no one is injured. From a retributive point of view, it might be argued that D should be equally liable in either event. This could be achieved by the creation of general offences of reckless endangerment. On utilitarian grounds, however, it is probably undesirable to turn the whole criminal law into 'conduct crimes'. The needs of deterrence are probably adequately served in most cases by 'result crimes'; and the criminal law should be extended only where a clear need is established. ……. It has been argued that in some offences it may be that the *actus reus* can take different forms (result or conduct) depending on the circumstances. Thus, theft can be committed where D assumes only one of the rights of the owner over his property (conduct crime) or where he assumes them all (result crime). This ambiguity is all the less satisfactory because the different categorization of a crime as a conduct or result crime may have implications for procedure, in terms of the form of the indictment, and for jurisdictional issues. …….The fact that an offence is a 'conduct offence' does not mean that it should automatically be classified as a 'continuing' offence. The term 'conduct' is being used to distinguish the type of crime from a 'result' crime. The conduct crime of perjury is completed once the testimony leaves the lips of the witness. It is not a continuing crime in any real sense. Identifying the starting and finishing points of the *acus reus* will be important in ensuring that the element of *mens rea* coincides in time, and may again be significant for procedural purposes of charging, in terms of the specific dates and actions alleged in the indictment and the territorial jurisdiction of the courts.

Whether M.N. Das has special intent or oblique intent

The manner in which, the murder was committed in the second case has already been explained and discussed in the earlier paragraphs. The entire gamut of the acts of the convict shows that there was a special intention on part of the convict to commit the heinous crime of murder and under no stretch of imagination, it can be obliterated from the offences committed by the convict. In the first murder, there was an intention to kill for which, the person was convicted with a sentence of life imprisonment. In the second murder again, there was a special intention to kill the deceased person and there is no evidence on record to justify that there was no direct intention so that there can be diminished responsibility.

For the murder of the second person i.e. Hara Kanta Das, the accused was tried by the Session Court and vide Case No. 114 (K) of 1996, dated 18/08/97 the accused was convicted and was sentenced to death on the premises that the accused's act of murder was most foul and gruesome. The judgment of the trial court was challenged by the accused in the Appeal No. 254 (J) of 1997 and 2(J) of 1998. Both the appeals were dismissed by the High Court of Guwahati vide judgments dated 03/02/1998 and 12/12/1998 respectively and the death sentence awarded by the Session Court vide dated 18/08/1997 was confirmed by the High Court. The appellant convict filed a petition against this case before the Supreme Court of India and the case was decided by the Supreme Court in 1999 in Criminal Appeal No. 700 of 1998 on 14/05/1999. We will now discuss the nitty-gritties of the present case as decided by the Supreme Court in 1999.

Defence Counsel on criminal issue

Defence Counsel made following arguments -

i. as mitigating circumstances, it was stated that the appellant was a young man of 33 years and having three unmarried sisters and aged parents.

ii. the appellant was not well at the time of occurrence of the incident.

iii. the case was not properly investigated at the trial stage and

iv. there was no material whatsoever to show that the appellant has become a menace to the society at large.

v. Mahindra Nath Das should be given life imprisonment instead of capital punishment.

State Counsel on criminal issue

The counsel for the State contended as under-

i. the murder was committed in a very cruel and gruesome manner

ii. such act does not deserve any leniency.

iii. The convict came pre determined and duly armed with sword and killed the deceased who was taking the morning tea in the road side tea stall.

iv. It is a case fit for confirming of the death sentence.

Death sentence: Judicial policy

The Supreme Court has noted as below:

> The principles with regard to awarding punishment of death are now well-settled by judgments of this Court in *Bachan Singh v. State of Punjab*,[9] *Machhi Singh v. State of Punjab*[10] and *Kehar Singh* v. *State (Delhi Administration)*[11]. Briefly stated, the principles are: that on conviction under Section 302 IPC the normal rule is to award punishment of life imprisonment and that the punishment of death should be reserved only for the rarest of rare cases. Whether a case falls within 'the rarest of rare' cases has to be examined with reference to the facts and circumstances of each case. The Court has to take note of the aggravating as well as the mitigating circumstances and conclude whether there was something uncommon about the crime which renders the sentence of imprisonment for life inadequate and calls for a death sentence. The Court is also expected to consider whether the circumstances of the crime is such that there is no alternative but to impose death sentence after according maximum weightage to the mitigating circumstances which speak in favour of the offender. These principles have been applied by this Court in innumerable cases.[12]

Here the Supreme Court has discussed at length the submission given by the Counsel of the appellant and it has also discussed all such referred case in thread bare before coming to any conclusion. The Court has also discussed *Ronny*

9 AIR 1980 SC 989.

10 (1983) 3 SCR 413.

11 (1988) 3 SCC 609.

12 (1999) 5 SCC 102 at para 8.

v. *State of Maharashtra.*[13] There the Supreme Court commuted the death sentence to imprisonment for life. In *State of Himachal Pradesh* v. *Manohar Singh Thakur*[14] the Supreme Court set aside the order of the High Court and sustained the order of conviction as passed by the Trial Court. The Supreme Court opined that the case does not justify death penalty. In *Allauddin Mian* v. *State of Bihar*[15] the Supreme Court laid down: [16]

> That unless the nature of the crime and the circumstances of the offender reveal that the criminal is a menace to the society and the sentence of life imprisonment would be altogether inadequate, the Court should ordinarily impose the lesser punishment and not the extreme punishment of death which should be reserved for exceptional cases only.

In the case of *Shankar* v. *State of Tamil Nadu*[17] it was observed that there the crime indulged was gruesome and cold-blooded. The death sentence in that case was confirmed by the Supreme Court. The Court held that culpability of the accused-appellant has assumed extreme depravity and therefore according to the Court the case deserves noting less than death penalty. The Court in *Mahendra Nath Das* observed in the final paragraphs: [18]

> Now coming to the facts of this case, the circumstances of the case unmistakably show that the murder committed was extremely gruesome, heinous, cold-blooded and cruel. The manner in which the murder was committed was atrocious and shocking. After giving blows with a sword to the deceased when he fell down, the appellant amputated his hand, severed his head from the body carried it through the road to the police station (majestically as the trial court puts it) by holding it in one hand and the blood dripping weapon on the other hand. Does it not depict the extreme depravity of the appellant? In our view it does.

There was no scope for different interpretation as the matter was first examined in the stage of trial court and subsequently, both High Court and Supreme Court have sustained the order of the Trial Court.

13 (1998) 3 SCC 625.
14 (1998) 6 SCC 158.
15 AIR 1989 SC 1456.
16 *Ibid.*
17 (1994) 4 SCC 478.
18 (1999) 5 SCC 102 at 105-108.

Punishment Aspect of the case

It is everybody's knowledge that in India, the Adversarial System of Criminal Justice Administration has been followed in India. There is a strong argument against this system, so much so that the group opposing this system says that Adversarial System is responsible for lower conviction rate in India. It is of common knowledge that taking the advantage of such lacunae in the present Adversarial System, a good number of criminals are escaping from the clutches of the Justice and thereby convictions. There is enough check for an innocent and if somebody is convicted in such a case it seems, capital punishment is a type of balancing act.

Constitutional Aspect in the case

Now we come to the most important aspect i.e. scrutinizing the present Supreme Court judgment which was passed on 01/05/2013 from legal and also from constitutional perspective. The constitution has clearly vested the pardon power with the President and he is supposed to examine the case and to take a decision after being satisfied of the facts of the case. In the instant case, the convict submitted a petition under Article 72 before the President and prayed for commutation of death sentence into life imprisonment immediately after issue of the judgment dated 14/05/1999.[19] A similar petition was also filed under Article 161 before the Governor of Assam. The Governor rejected the petition and thereafter, the mercy petition addressed to the President was forwarded by the Government of Assam to the Ministry of Home Affairs (MHA) in June, 2000. On 20/06/2001, the MHA recommended to the President that the mercy petition should be rejected. The case thereafter, was pending before the office of the President of India till September, 2004 and again, MHA submitted before the President on 19/04/2005 with the recommendation that the mercy petition of the convict may be rejected.

The President passed an order on 30/09/2005 whereby Shri A.P.J. Abdul Kalam, the President commented "his mercy petition in my view, be accepted and

19 "72. Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.-
(1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence-
(a) in all cases where the punishment or sentence is by a Court Martial;
(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;
(c) in all cases where the sentence is a sentence of death.
(2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or comute a sentence passed by a Court martial.
(3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State, under any law for the time being in force

his death sentence commuted to life long imprisonment (i.e. for the rest of his life)" . In fact, on 30/09/2005, the mercy petitions of the (1) Mahindra Nath Das, (2) R. Govindaswamy, (3) Piara Singh, (4) Satnam Singh, (5) Sarabjit Singh and (6) Gurdeep Singh were accepted and of (1) Sushil Murmu, (2) Santosh Yadav, (3) Molai Ram were rejected.

The requisitions for the said files was sent by MHA to the President Office on 07/09/2010 and the files were returned on 24/09/2010. Thereafer, MHA referred to the observations made by the Court and requested vide letter dated 18/10/2010 to reject the mercy petitions of the convict. The President vide her order dated 08/05/2011 has approved the recommendations of the MHA and rejected the mercy petition of the convict and the convict was informed regarding the rejection of his mercy petition.

The convict appellant, thereafter, moved before the Division Bench of the High Court questionning the rejection of the mercy petition by the President. The High Court of Guwahati has referred a plethora of cases and thereafter, observed as below: [20]

> 32. We may now come to the last and the crucial question whether or not in the facts and circumstances of the present case, the prayer for commuting the death sentence to the life imprisonment can be accepted. ..... in view of law laid down by Constitution Bench in Triveniben,[21] delay is a factor which has to be seen in the light of subsequent circumstances, coupled with the nature of offence and circumstances in which the offence was committed, as already found by the competent court while passing the final verdict. ..... If delay is considered along with dastardly and diabolical circumstances of the crime, in absence of any further supervening circumstances in favour of the petitioner, no case is made out for vacating the death sentence. ..... As held in *Sher Singh* (last portion of paragraph 19 and 20), while death sentence should not, as far as possible, be imposed but in rare and exceptional class of cases where sentence is held to be valid, the same cannot be allowed to be defeated by applying any rule of thumb.

20 *Supra note* 1 at para 32.

21 In *Triveniben* v *State Of Gujarat* [decided on 11 October, 1988 followed by detailed judgement on 07.02.1989 para 23, AIR 1989 SC 142, 1988 (3) Crimes 771 SC (1988) 4 SCC 574] where the operative part of the judgement of five judges constitution bench says that 'Undue long delay in execution of the sentence of death will entitle the condemned person to approach this Court under Article 32'.

The high court also noted why capital punishment is still in statute book:[22]

> We have already noticed reasons for which retention of death sentence was upheld by the Hon'ble Supreme Court in *Jagmohan Singh* and *Bachan Singh* by distinguishing the American Judgments and taking into account the study conducted by the Law Commission of India in its 35th Report and conditions prevailing in the Country. It was noted that in the perspective of prevailing condition of India, the Parliament has repeatedly rejected all attempts to abolish death sentence.

On the point of *just desert* the high court observed:[23]

> We have also referred to judgment of the Hon'ble Supreme Court in *Munna Choubey* wherein it was stated that under punishment may harm the justice system and undermine the public confidence in efficacy of law, there was need to maintain proportion in punishment and crime and to protect the society, adequate punishment was necessary. Thus, mere delay is a significant factor, cannot itself be a ground for commuting the death sentence to life imprisonment in absence of any further circumstance justifying such a course when offence and circumstances are rarest of rare.

The Court analyzed the case *Triveniben* and principle of law laid down there and not found any ground for vacating the death sentence. The Court opined that the Judgments in *Madhu Mehta* and *Daya Singh* also do not lay down any further principle as precedent. The Supreme Court in this case refused to accept the view taken by some of the High Courts i.e., Madras, Rajasthan and Bombay that delay alone was conclusive for commuting death sentence to life. Such interpretation is contrary to law laid in *Triveniben*.

Defence Counsel (1) on constitutional issue: - Before the Supreme Court, in the present case, the learned counsel for the appellant stated that even the conviction of the appellant has become final, 12 years delay was caused in disposal of the said mercy petition and it was sufficient ground for commutation of the sentence of death into life imprisonment. He relied upon the decision of *Vivian Rodrick* v. *State of West Bengal,*[24] *Madhu Mehta* v. *Union of India,*[25] *Daya Singh* v. *Union of India*[26] and *Shivaji Jaising Babar* v. *State of Maharashtra.*[27] The learned

22 *Ibid.*
23 *Ibid.*
24 (1971) 1 SCC 468.
25 (1989) 3 SCR 775.
26 (1991) 3 SCC 61.
27 (1991) 4 SCC 375.

counsel further submitted that the High Court has misunderstood the ratio of judgments in *Madhu Mehta's* case and *Daya Singh's* case and thereby erroneously held that the principle as laid down in *Triveniben's* case cannot be invoked in the appellant's case for commutation of the sentence of death into life imprisonment.

Defence Counsel (2) on constitutional issue:- The other senior counsel for the intervener i.e. People's Unity for Democratic Rights (PUDR) has argued that the delay in this case is over one decade in disposal of the mercy petition by the President and this alone is sufficient cause for commutation of death sentence into life imprisonment.

State Counsel on constitutional issue: - The ASG appearing on behalf of the Government has pointed out that the second murder committed by the convict was barbaric, gruesome. He has given the reason of delay before the court and requested that the death sentence in this particular fact of the case does not deserve to be commuted into life imprisonment.

Thereafter, the Supreme Court has discussed at length their own decision in Bhullar's case.[28]

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28 *Mahindra Nath Das* v. *UoI* Cr. Appeal No. 677 of 2013
Bhullar's case, this Court considered the following questions:
"(a) What is the nature of power vested in the President under Article 72 and the Governor under Article 161 of the Constitution?
(b) Whether delay in deciding a petition filed under Article 72 or 161 of the Constitution is, by itself, sufficient for issue of a judicial fiat for commutation of the sentence of death into life imprisonment irrespective of the nature and magnitude of the crime committed by the convict and the fact that the delay may have been occasioned due to direct or indirect pressure brought upon the Government by the convict through individuals, groups of people and organizations from within or outside the country or failure of the concerned public authorities to perform their duty?
(c) Whether the parameters laid down by the Constitution Bench in Triveniben's case for judging the issue of delay in the disposal of a petition filed under Article 72 or 161 of the Constitution can be applied to the cases in which an accused has been found guilty of committing offences under TADA and other similar statutes?
(d) What is the scope of the Court's power of judicial review of the decision taken by the President under Article 72 and the Governor under Article 161 of the Constitution, as the case may be?"
.....the Court held:
"(i) the power vested in the President under Article 72 and the Governor under Article 161 of the Constitution is manifestation of prerogative of the State. It is neither a matter of grace nor a matter of privilege, but is an important constitutional responsibility to be discharged by the highest executive keeping in view the considerations of larger public interest and welfare of the people.
(ii) while exercising power under Article 72, the President is required to act on the aid and advice of the Council of Ministers. In tendering its advice to the President, the Central Government is duty bound to objectively place the case of the convict with a clear indication about the nature and magnitude of the crime committed by him, its impact on the society and all incriminating and extenuating circumstances. ..... Although, he/she cannot overturn the final verdict of the Court, but in appropriate case, the President or the Governor, as the case may be, can after scanning the record of the case, form his/her independent opinion whether a case is made out for grant of pardon, reprieve, etc.

In the first *Bhullar* case the Court has considered and examined the argument of Shri K.T.S. Tulsi, counsel for the petitioner, and Shri Ram Jethmalani and Shri Andhyarujina, Senior Advocates, who assisted the Court as Amicus. The issue there whether the long delay of 8 years can be treated as sufficient for commutation of the sentence of death into life imprisonment.

Scope of Judicial Review

The Court continued: -

> 40. We are also of the view that the rule enunciated in *Sher Singh's* case, *Triveniben's* case and some other judgments that long delay may be one of the grounds for commutation of the sentence of death into life imprisonment cannot be invoked in cases where a person is convicted for offence under TADA or similar statutes. Such cases stand on an altogether different plane and cannot be compared with murders committed due to personal animosity or over property and personal disputes. The seriousness of the crimes committed by the terrorists can be gauged from the fact that many hundred innocent civilians and men in uniform have lost their lives. At times, their objective is to annihilate their rivals including the political opponents. They use bullets, bombs and other weapons of mass killing for achieving their perverted political and other goals or wage war against the State. While doing so, they do not show any respect for human lives. Before killing the victims, they do not think even for a second about the parents, wives, children and other near and dear ones of the victims. The families of those killed suffer the agony for their entire life, apart from financial and other losses. It is paradoxical that the people who do not show any mercy or compassion for others plead for mercy and project delay in disposal of the petition filed under Article 72 or 161 of the Constitution as a ground for commutation of the sentence of death. Many others join the bandwagon to espouse the cause of terrorists involved in gruesome killing and mass murder of innocent civilians and raise the bogey of human rights.[29]

29 *First Bhullar case,* 2013(5)SCALE 575 , date of judgment 17.04.2013 at para 40.

The Court also dealt with the scope of judicial review in such matters and observed:

> 41. While examining challenge to the decision taken by the President under Article 72 or the Governor under Article 161 of the Constitution, as the case may be, the Court's power of judicial review of such decision is very limited. The Court can neither sit in appeal nor exercise the power of review, but can interfere if it is found that the decision has been taken without application of mind to the relevant factors or the same is founded on the extraneous or irrelevant considerations or is vitiated due to *malafides* or patent arbitrariness.[30]

Conflicting views of Supreme Court

The conflicting opinion of *T.V. Vatheeswaran's* case, *Sher Singh's* case and *Javed Ahmed's* case were considered in details by the Supreme Court in *Triveniben's* case. There, the Apex Court was of the opinion that a convict can approach the Apex Court under Article 32 for undue long delay in execution of the death sentence and the Supreme Court is empowered to examine the decision of the President and the manner and ways by which, he disposes it of. In that case, it was held that the Apex Court can only examine the nature of delay caused and the circumstances that ensued after sentence was confirmed finally by the Judicial Process. It was also held that the Apex Court will have no jurisdiction to reopen the conclusions reached by the court while maintaining the sentence of death. The court may consider the question of inordinate delay in the light of all circumstances of the case and may come to a conclusion whether the death sentence to be executed or to be commuted to life imprisonment. The court further held that no statutory period could be fixed to make the death sentence inexecutable and overruled the decision taken in *Vatheeswaran's* case.

In the present case, the Supreme Court has observed that the President who has rejected the mercy petition when it was placed before her on the second occasion was not aware of the decision of her predecessor in the same case i.e., order of President Abdul Kalam dated 30/09/2005. To this extent, the MHA has failed to brief properly the successor President as the record shows that she was not aware of the decission already taken by her predecessor. The court held that in the present case, 12 years of delay in disposal of the mercy petition was sufficient

30 *Ibid* para 41.

ground for commutation of death sentence into life imprisonment. In *Daya Singh's* case, the Supreme Court observed that any rule of general application cannot be lead for delay in disposal of the mercy petition of a convict. In some case, it was laid down that delay of 2 years would automatically entitle a convict for conversion of his death sentence into life imprisonment but this was not good law and in *Daya Singh's* case, the Supreme Court did not approve it. Finally, in the present case of *Mahendra Nath Das*, the Supreme Court has commuted the death sentence into life imprisonment thereby giving respite to the convict.

The decisions of the Supreme Court comprising the Bench Justice S.J. Mukhopadhaya and Justice G. Singhvi, both in *Bhullar's* case and *Mahendra Nath Das's* case have come under scrutiny. Experts have criticised the Bhullar's decision[31] that "A second, somewhat distinct but related claim is that a prolong delay in execution amounts to double punishment for the same crime, first, by imprisoning the accused and then by executing him." However, a three judge bench in *Shatrughan Chauhan* v *UOI* [32] refused to accept the ratio of *Bhullar* judgement being *per incuriam* and held that 'There is no good reason to disqualify all TADA cases as a class from relief on account of delay in execution of death sentence. Each case requires consideration on its own facts.'(para 64). *Bhullar* judgement has been over ruled by the Supreme Court, *Navneet Kaur* v. *State Of Nct Of Delhi,* (*Second Bhullar case*) Decided on 31.03.2014.

Conclusion and Amendment proposed

Finally, let us examine the reasons behind the *Bhullar's* judgment and that of our present case i.e. Mahindra Nath Das. There is no doubt that in the *Bhullar's* case, the main emphasis was on the nature of crime i.e. the terrorist act of the accused. In *Bhullar's* case, the court was of the view that commutation of death sentence into life imprisonment cannot be invoked in cases where a person is convicted for offences under TADA or similar statues. According to this court, such cases definitely stand on an altogether different footing and such cases cannot be compared with the murders committed due to personal animosity or over property dispute or even personal dispute. The terrorist act was extreme depravity on part of the accused and they are totally oblivion of the result of their act of crime for which, family of the victim and the society as a whole have to suffer. The court

31 Smt. Aparna Chandra, Assistant Professor,NLU, Delhi http://barandbench.com/content/bhullar-bogey-human-rights-and-death-due-process#.UY_oJbX-FDQ (visited on 09.09.2013).

32 MANU/SC/0043/2014 : 2014 (1) SCALE 437.

sarcastically commented: [33]

> It is paradoxical that the people who do not show any mercy or compassion for others plead for mercy and project delay in disposal of the petition filed under Article 72 or 161 of the Constitution as a ground for commutation of the sentence of death. Many others join the bandwagon to espouse the cause of terrorists involved in gruesome killing and mass murder of innocent civilians and raise the bogey of human rights.

Due to inconsistency in various judgements especially *first Bhullar case*(2013) to *Mahendra Nath Das case*(2013) to *second Bhullar case* (2014) the demand for abolition of death penalty has again getting momentum. We do not agree with the observations of criticism of capital punishment. India has already become a terrorist target and to some extent a terrorist hub for criminal activities across the borders and on day in and day out, we have to face such type of activities. It is a very important matter to ponder about that while in the U.S., after the incident of 9/11, there one or two noticeable terrorist act against the U.S. Govt. or citizens for the past 12 years [barring an incident of marathon race bomb attack in some U.S state]. This shows that the U.S. Government is hyper active and ruthless in tackling the terror activities. Proper supports are also received from the Judiciary of U.S. on this aspect. Unfortunately, in our country, since the Bombay blast incident in 1993, terrorist activities have almost become an annual feature and whenever a criminal is caught and if there is clinching evidence against him and if the criminals are brought to justice, the bogey of human rights and other similar associations take the cause of the convict, totally forgetting the suffering and pains of the victims and the members of their family. Unfortunately, such right groups are being assisted by the top lawyers.

It is difficult to agree with approach of Supreme Court in constitution bench judgement in *Triveniben* and full bench judgement in *Shatrughan Chauhan*. *Mahindra Nath Das* judgement which was a division bench judgement has to follow them. *Mahindra Nath Das* judgment sends a very wrong message to a large number of prospective criminal who have committed heinous act of murder and specially rape and murder.

Of late, we are flooded with the incident of rapes and murders right from

33 *Devender Pal Singh* v. *NCT, Delhi*, W.P. (Crl.) D 16039 of 2011.

the *Nirbhaya* rape and murder case of December, 2012 to other similar cases where the convict on his own motion to satisfy his lust has raped and killed small child. If there is a general classification between the murder cases i.e. terrorist murder cases and individual murder cases and individual murder cases are put on different footing on the basis of delay in disposal of Presidential consent, it would erode the confidence of general public from the judiciary. There is strong possibility that citing those cases, arguments will be made before different judicial fora right from trial court to Supreme Court. In the present case QoL as framed for adjudication is that whether delay in disposal of mercy petition would lead to a cause of action for converting death sentence into life imprisonment. There is every possibility that these judgments will be later on quoted stating that when the Presidential assent can be discussed classifying the murder convict in two different groups, why not, the same approach should be taken by the courts right from the level of trial court to the Apex Court. We do not find much of the justification in this judgment as we feel it will open the flood gate of all such cases where the mercy petitions were rejected and the cases are not of terrorist one. Law commission of India, as reported, is also of the view that for murder cases no capital punishment be awarded and for terrorism cases capital punishment should continue. For developing country having poor law and order situation, capital punishment must exist for rarest of the rare cases and delay in disposal of mercy petition, should, not lead to commutation of capital punishment to life imprisonment.

Authority of the Supreme Court in scrutinizing the decision of President dealing with mercy petition :- The other important point is to be noted that the mercy petitions are addressed to the President only on those cases where the death sentence has been confirmed by the Supreme Court. In the past few years, we have never come across a situation where the death sentence was pronounced by the trial court and confirmed by the High Court and the said sentence was executed without moving a petition to the Supreme Court either by the convict or by the members of his family or by various Legal Right groups. It means that all cases of capital punishment pass through the strict judicial scrutiny right from the level of trial court to the High Court and sometimes, further through the Division Bench of the High Court. That being the situation, the Supreme Court gets its opportunity to examine the matter in proper perspective and it is to be admitted that Supreme Court confirmed the death sentence only on such case which is “rarest of the rare”, in nature.

We do not suggest that Supreme Court should have no power to look into the decision of the President. The decision of the President should be as per procedure established by law and procedural due process should also be followed in as much as the decision should be taken by following a procedure which is fair, just and reasonable. The court is empowered to examine such issue. But under no stretch of arguments, it should be open to the court to examine the delay in disposal of mercy petition by the President. Causing delay in such cases would definitely is not a healthy situation but one has to consider the way of functioning of the administrative machinery in our country. It will be too much to expect that the President must dispose all cases of mercy petitions within two years failing which, death sentence in such cases would automatically be converted into life imprisonment. Before examining the delay caused in the office of the President of India, the Supreme Court may look into the pendency list of cases in its court only. There should be a chronological sequence of all cases pending before Supreme Court giving the date and the year since which it was pending. We are sure that there are a good number of cases which are pending adjudication at the level of Supreme Court for decade or more. The people living in the glass house should not throw pebble to others.

There is no justification on part of the Supreme Court in examining the delay caused in the office of the President and thereby giving an escape route to the criminals of highest order who are convicted for the heinous crime of murder. The present situation is an example of double murder case and the most depravation way the same was caused, has already been discussed in earlier paragraphs and hence, such cases should not get further leniency by the Supreme Court as this will justify the famous observations of Mukherjee J. in the case of Govindswamy (supra) :-

> If in spite thereof, we commute the death sentence to life imprisonment, we will be yielding to spasmodic sentiment, unregulated benevolence and misplaced sympathy.

The present accused deserves nothing less than the marching order to move towards gallows.

Proposed Amendment in Art. 72: -

It is suggested that Clause (4) to be incorporated in Art. 72 of the Constitution of India and the same should read as below:

(4) Notwithstanding anything contained in this Article, no Court of Law including the Supreme Court shall have the power to consider the Constitutional validity of the decision so taken under this Article.

The amendment will have to stand judicial scrutiny as judicial review is part of the basic feature of the constitution of India. The action under article 72 is an executive action which could very well be subject matter of judicial review. The right course seems to be that the executive ought not to delay mercy petition. Any delay in disposal of mercy petition as per *triveniben* and *santosh chauhan* is violation of article 21. Supreme Court has to guard any such violation. Therefore, the Ministry of Home Affairs, would be justified in making a standing monitoring committee to oversee that there is no inordinate delay in disposal of mercy petition, at the office of President of India.

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Young Persons and Pornography: Legislative and Judicial Approach

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The child is considered to be the asset of the nation and not an inanimate object. In the children lies the future of the nation. They are the edifice for the strong nation, robust society and safe future. Therefore they should be properly cared, nurtured and developed; not only physically, but emotionally and morally. However the trends in the society exhibit their moral, mental and physical exploitation. They are the bait and victim of the sexual lust. On account of their incapacity to understand the designs of the corrupt minds, they are gradually dragged to the vicious cycle of pornography. This happens after they are either subjected to sexual misuse or exposed to obscene literature and indecent exposure. Therefore the innocent souls need special protection, so that they should not fall a prey to the degrading social environment.

International Efforts

At the International level, the efforts were initiated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959. The Universal Declaration of Human Rights declares that the childhood is entitled to special care and protection[1].

The International Covenant on Civil and Political Rights provides that children are entitle to protection of measures as are required keeping in view their status from the family, society and the State[2].

The International Covenant on Economic, Social and Cultural Rights provides that the children and young persons are entitled to special protection and assistance, especially from the economic and social exploitation. They should not be employed in the avocations which are harmful to their morals or health or likely to hamper their normal development[3].

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1 Article 25(2)
2 Article 24
3 Article 10

However the convention on the rights of the child was adopted by the General Assembly in 1989[4] wherein it was recognized that the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.

It mandates that the States Parties should ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.

Therefore the States Parties should

(a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child;

(b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;

(c) Encourage the production and dissemination of children's books;

(d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;

(e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being[5].

Under the convention the States Parties have to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse[6].

The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing[7].

4 General Assembly Resolution 44/25 of 20-11-1989
5 Article 17
6 Article 19
7 Article 27

Indian Legal Regime

On account of this realization the Indian Constitution mandates that the tender age of the children should not be abused and they should get the opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity whereby their childhood is protected against exploitation and moral and material abandonment[8]. However there is reportedly growing cases of sexual abuse of children[9]. The formation of the National Commission for the Protection of the children[10] is a forward looking step but lot needs to be done in redressing the complaints of child abuse which takes place within the precincts of home.

Furthermore there are plethora of legislations in India which recognize that the obscene and pornographic material should be confiscated so that it may not fall in the hands of the younger generation leading to their physical and mental depravation.

Indian Posts Office Act, 1898

The Act prohibits the person to send by post any indecent or obscene printing, painting, photograph, engraving, book or card or any other indecent or obscene article or any postal article having any obscene or indecent matter or the cover thereof[11]. Furthermore the Act envisages the power on government to intercept, detain or dispose of any matter sent by posts during times of public emergency or in the interest of public safety or tranquility[12].

Indian Penal code

The Act provides that if any person produces, possesses, sells, hires, distributes or circulates any obscene object, it is an offence punishable on first conjunction with imprisonment for up to two years and with a fine of up to two thousand rupees[13]. The word 'obscene' means any object like book, pamphlet, paper, writing, painting, figure, representation or any other object comprising of any matter which tends to deprave and corrupt the minds of those persons who read; see or hear the matter contained or embodied in it[14].

8 Article 39
9 *M.H.Kakkad v. Naval Dubey*, 1992 AIR SCW 1480; see also, *Sakshi v. Union of India*, 1999(6) SCC 591
10 The Commission for Protection of Child Rights Act,2005
11 Sec.20, Indian Posts Office Act,1898
12 *Ibid,* Sec. 27
13 *I.P.C,* Sec. 292
14 *Ibid,* Sec. 292(1)

Another provision of Indian penal code makes it an offence if any person sells, lets to hire, distributes, exhibits or circulates to any person under the age of 20 years any such obscene object. The said person shall be punished on first conviction with imprisonment of either description for a term which may extend to three years or with fine which may extend to two thousand rupees, and in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to seven years also with fine which may extend to five thousand rupees[15].

The Law Commission in its 109threport considered the question to reform the law relating to indecent advertisement and displays in India. The Law Commission expressed that indecent advertisement of various types find display in the streets or are published in newspapers, periodicals and other media, and that these could harm the morals of society, apart from their being derogatory to the honour and dignity of the fair sex. The definition of obscenity seems to take in all publications that can be reasonably objected to on the score of possible evil effects on the morals of listeners or readers of obscene matter.

The commission recommended that in order to avoid controversy, it appears desirable that section 292(2)(a) of the Indian Penal code should be amended by inserting after the word "paper", the word "writing". After this amendment, the section would cover obscene advertisements in writing, particularly those in periodicals and posters. The commission also recommended to insert section 293-A in the Code. This section should provide that the provisions of sections 292 and 293 shall apply to a person who publicly displays any indecent matter, as they apply to a person who commits any offence under these sections in relation to obscene matter falling within those sections.

Criminal Procedure Code, 1973

The provision of the Cr. P.C provides power to the District Magistrate, Sub-divisional Magistrate or Magistrate of the first class, who upon information and after such inquiry as he thinks necessary has reason to believe, that any place is used for the deposit or sale of stolen property, or for the deposit, sale or production of any objectionable article, or that any such objectionable article is deposited in any place, to issue a warrant to any police officer above the rank of a constable to enter such place; to search the same and to take possession of any property or article found therein which he reasonably suspects to be stolen property or objectionable article. The objectionable articles are forged documents; obscene

15 *Id.*, Sec. 293

objects referred to in section 292 of the Indian Penal Code; and instruments or materials used for the production of any of the articles[16].

The code further envisages that where any newspaper, or book, or any document, contain any matter the publication of which is punishable under section 124A or section 153 A or section 153B or section 292 or section 293 or section 295A of the Indian Penal Code , the State government may, by notification, stating the grounds of its opinion, declare every copy of the issue of the newspaper containing such matter, and every copy of such book or other document to be forfeited to government[17]; and then any police officer can seize the same wherever found.

The code further provides that when an executive Magistrate of the Ist class receives information that there is within his local jurisdictions any person who, within or without such jurisdiction either orally or in writing or in any other manner intentionally disseminates or attempts to disseminate or abets the dissemination of ... or makes, produces, publishes or keeps for sale, imports, exports, conveys, sells, lets to hire, distributes, publicly exhibits or in any other manner puts into circulation any obscene matter such as is referred to in section 292 of the Indian Penal Code ;and the magistrate is of opinion that there is sufficient ground for proceeding, the Magistrate may, require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for his good behaviour for such period, not exceeding one year. It further provides that no proceeding shall be taken under this section against the editor, proprietor, printer or publisher of any publication registered under, and edited, printed and published in conformity with, the rules laid down in the Press and Registration of Books Act, 1867 with reference to any matter contained in such publication except by the order or under the authority of the State Government or some officer empowered by the State Government in this behalf[18].

It further provides that the court may order the destruction of all the copies of the thing which are in the custody or remain in the possession or power of the person convicted under sections 292, 293, 294 of the Indian Penal Code[19].

The Young Persons (Harmful Publication) Act, 1956

This Act imposes certain restrictions on the press on the grounds of public policy. This Act prevents the dissemination of certain publications harmful to young

16 *Ibid*, Sec. 94
17 *Id.*, Sec. 95
18 *Id.*, Sec. 108
19 *Id* .,Sec. 455(1)

persons. The word 'Harmful Publication' means any book, magazine, pamphlet, leaflet, newspaper or other like publication which consist of stories told with the aid of pictures or without the aid of pictures where such publication as a whole would tend to corrupt a young persons into whose hands it might fall, whether by inciting or encouraging him to commit offence or acts of violence or cruelty or in any other manner whatsoever[20].

Young person means a person under the age of twenty years[21]. Under this Act, it is an offence to print, publish, sell, hire, distribute, publicly exhibit or circulate any book, magazine, pamphlet newspaper or other publication portraying the commission of offences, acts of violence or cruelty or incidents of a repulsive nature in such a way as to corrupt a young person whether by inciting or encouraging him to commit offences or acts of violence or cruelty or in any other manner. The said person can be held guilty and a penalty of imprisonment for upto six months or a fine or both can be imposed on him[22].

The Protection of Children from Sexual Offences Act, 2012

This Act provides that a person commits sexual harassment upon a child when such person with sexual intent…shows any object to a child in any form or media for pornographic purposes; or repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or entices a child for pornographic purposes or gives gratification there for[23].

It further provides that if any person uses a child in any form of media (including programme or advertisement telecast by television channels or internet or any other electronic form or printed form, whether or not such programme or advertisement is intended for personal use or for distribution), for the purposes of sexual gratification, which includes -

(a) representation of the sexual organs of a child;

(b) usage of a child engaged in real or simulated sexual acts (with or without penetration);

20 Sec. 2(a), the Young Persons (Harmful Publication Act), 1956

21 *Id.*, Sec. 2(b)

22 *Id.*, Sec. 3

23 Sec. 11, THE Protection of Children from Sexual Offences Act, 2012

(c) the indecent or obscene representation of a child, shall be guilty of the offence of using a child for pornographic purposes[24].

Such person shall be punished with imprisonment of either description which may extend to five years and shall also be liable to fine; 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 be liable to fine[25].

The Act further provides that any person who stores any pornographic material in any form involving a child for commercial purposes shall be punished with imprisonment of either description which may extend to three years or with fine or with both[26].

It further provides that if any person abets any offence under this Act and the act abetted is committed in consequence of such abetment, he shall be punished with punishment provided for that offence[27].

It further provides that if any person attempts to commit any offence punishable under this Act or to cause such an offence to be committed, and in such attempt, does any act towards the commission of the offence, he shall be punished with imprisonment of any description provided for the offence, for a term which may extend to one half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine or with both[28].

The Act further provides that any personnel of the media or hotel or lodge or hospital or club or studio or photographic facilities, by whatever name called, irrespective of the number of persons employed therein, shall, on coming across any material or object which is sexually exploitative of the child including pornographic, sexually-related or making obscene representation of a child or children through the use of any medium, shall provide such information to the Special juvenile Police Unit, or to the local police[29].

The Act further lays down the procedure for media while handling such case as under:

1. No person shall make any report or present comments on any child in any form

24 *Ibid*, Sec. 13
25 *Id.* ,Sec. 14
26 *Id.*,Sec.15
27 *Id.*, Sec. 17
28 *Id.*, Sec.18
29 *Id.*, Sec. 20

of media or studio or photographic facilities without having complete and authentic information, which may have the effect of lowering his reputation or infringing upon his privacy.

2. No reports in any media shall disclose, the identity of a child including his name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure of identity of the child.

3. The publisher or owner of the media or studio or photographic facilities shall be jointly and severally liable for the acts and omissions of his employee.

4. Any person who contravenes the provisions shall be liable to be punished with imprisonment of either description for a period which shall not be less than six months but which may extend to one year or with fine or with both[30].

The Act further provides that the Central government and every State government, shall take all measures to ensure that the provisions of this Act are given wide publicity through media including the television, radio and the print media at regular intervals to make the general public, children as well as their parents and guardians aware of the provisions of this Act; and mandates that the officers of the Central government and the State governments and other concerned persons including the police officers are imparted periodic training on the matters relating to the implementation of the provisions of the Act[31].

The Indecent Representation of Women (Prohibition) Act, 1989

This Act is framed for the prohibition of indecent representation of woman through advertisement, or in publications, writings, figures or in any other manner. The term Indecent representation of women means the depiction in any manner of the figure of a woman, her form or body or any parts thereof in such a way as to have the effect of being indecent, or derogatory to, or denigrating women, or is likely to deprave, corrupt or injure the public morality or morals[32]. The Act prohibits the advertisements containing indecent representation of women[33]. Furthermore the Act also prohibits the publication or sending by post of books, pamphlets etc. containing indecent representation of women. Under this Act no person is authorized to produce or sell or let to hire, distribute, circulate or send by post any book, drawing, painting, photograph etc., which contains indecent

30 *Id.,* Sec. 23

31 *Id.,*Sec.43

32 Sec. 2(c), Indecent Representation of Women (Prohibition) Act, 1989.

33 *Ibid,* Sec.3

representation of women in any form[34]. The Act also contains provisions for penalizing any person who contravenes the provisions of the Act and such person shall be punishable on first conviction with imprisonment of either description for a term which may extend to two years and with fine which may extend to two thousand rupees; and in the event of a second or subsequent conviction with imprisonment for a term of not less than six months but which may extend to five years and also with a fine not less than ten thousand rupees but which may extend to one lakh rupees[35].

Indian Judicial Approach

In *KedarNath v. Bihar*[36], the Supreme Court held that only the words having the pernicious tendency, or intended to create disturbance of law and order would be penal in the interests of public order.

In *NeelamMahajan Singh v. Commr. of Police*[37],hon'ble*Justice Jaspal Singh* opined that the standards of contemporary society in India are fast changing; and the adults and adolescents have available to them larger number of classics novels, stories and pieces of literature which have a content of sex, love and romance. The court found that in order to consider a book as obscene it is necessary that any passage or whole part should tend to deprave and corrupt persons who are likely to read the matter contained in it

In *C.T. Prim v. The State,*[38]hon'ble *Justice Debabrata Mookerjee* opined that subject matter of the book relates to the contemporary life in the west and it is not necessary for a reader to know only the worst side of the life in some other part of the world. The court found that the books are meant to pander to the prurient taste of the public and appeal to their basic instincts

In *Public Prosecutor v. A.D. Sabapathy,*[39] the court found that the writer of the articles have mentioned about the film stars as prostitutes. The court observed that in order that an article should be obscene, it must have the tendency to corrupt the morals of those in whose hands the article may fall. No doubt, the articles are indecent and disgusting to the cultured minds but the articles will not have the tendency to deprave the moral of any person, young or old.

34 *Ibid,* Sec. 4
35 Sec.6
36 AIR 1962 SC 955
37 1996 CrLJ, 2725
38 AIR 1961 Calcutta 177
39 AIR 1958 Madras 210

In *Uttam Singh v. The State*[40] *(Delhi Administration),*a strict standard was applied against the accused for selling a packet of playing cards portraying on the reverse lucidly obscene naked pictures of men and women in pornographic sexual postures.

In *State of U.P v. KunjiLal*[41], the court opined that the books which were published by the accused were alleged to be translations in Hindi of the works of old eminent writers, the inclusion of nude pictures of women in the books which had no connection with the subject matter discussed in the books and which were not in the original books was intended not to impart healthy sexual education to the masses but to obtain greater circulation by pandering to lascivious, prurient or sexually precocious minds.

In *Ranjit D. Udeshi v. The State of Maharashtra,*[42]owners were charged for the sale of unexpurgated edition of *"Lady Chaterley's Lover"* which was held by the court to be quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and lascivious character.

In *Samersh Bose v. AmalMitra*[43], *Justice R.S. Pathak* opined that in this case that in order to determine the question of obscenity it is the duty of the judge to understand the view point of the author by keeping himself in the place of the author and thereafter he should keep himself in the place of readers and try to appreciate what kind of possible influence the book is likely to have on the minds of the readers. The book was not to be judged by comparison with other books. The effect of the book should be such that it likely to deprave or corrupt these minds into whose hands the book is likely to fall.

The court found that the subordinate court had confusion between vulgarity and obscenity. A vulgar writing is not necessity obscene. Vulgarity may arise a feeling of disgust and revulsion but does not have the effect of depraving, debasing and corrupting the morals.

In *Sukanta Halder v. The State,*[44] Hon'ble *Justice R.P. Mookerjee* opined that in order to determine whether a particular object is obscene or not would depend on various circumstances. Such matters as would tend to stir in persons, into whose

40 AIR 1974 SC 1230
41 AIR 1970 All. 614
42 AIR 1965 SC 881
43 AIR 1986 SC 967
44 AIR 1952 Calcutta 214

hands such matter is ordinarily expected to reach, sex impulse and lustful thoughts can be declared as obscene.

In *Promilla Kapur v. Yash Pal Bhasin*[45], the court appreciated the work done by the author in highlighting the plight of the call –girls in her book, "The Indian Call Girls" as it was result of serious study done on the subject of call girls; and opined that mere fact that some sort of vulgar language has been used in some portions of book in describing the sexual intercourse would not be deemed to obscene.

In the *State v. Dina Nath,*[46] the court opined that the article deals with matters of sex and reproduces the most past passages and stories published in several books and journals. There was no doubt that some passages deal with intimate matters of sex; but the passages cannot be considered to be obscene as these passages in the article cannot deprave and corrupt those minds who are open to such immoral influences.

In *Sreeram Saksena v. Emperor*[47], Hon'ble *Justice Henderson* held that a picture of a nude woman is not per se obscene, unless there is something in it as would shock or offend the taste of any ordinary or decent minded persons. When there is nothing in it to offend an ordinary decent person it is impossible to say that it is obscene. Unless the pictures of nude female forms are incentive to sensuality and excite impure thoughts in the minds of ordinary persons of normal temperament who may happen to look at them, they cannot be regarded as obscene. For the purpose of deciding whether a picture is obscene or not one has to consider to a great extent the surrounding circumstances, the pose, the posture, the suggestive element in the picture, the person into whose hands it is likely to fall etc. No hard and fast rule can therefore be laid down for the determination of the matter.

In *Ajay Goswami v. Union of India*[48], the petitioner filed a writ petition involving a substantial question of law and public importance on the fundamental right of the citizens, regarding the freedom of speech and expression. The petitioner's grievance is that the freedom of speech and expression enjoyed by the newspaper industry is not keeping balance with the protection of children from harmful and disturbing materials. It was contended by the petitioner that the minors should be protected from that material which is of obscene and criminality in nature.

It was observed by the court that in order to justify prohibition of a particular

45 1989 CrLJ 1241
46 AIR 1956 Punjab 85
47 AIR 1940 Calcutta 290
48 AIR 2007 SC 493

expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. It was further observed that the fertile imagination of anybody especially of minors should not be a matter that should be agitated in the court of law. Any hypersensitive person can subscribe to many other Newspapers of their choice, which might not be against the standards of morality of the concerned person.

Position in USA

The problem of obscenity and depravation of morals of the younger generation is not only a concern in the East but is equivocally a cause of concern in the forward looking West. In the USA ample provisions have been incorporated in the US Code dealing with it.

Obscenity

The provisions concerning obscenity are included under Title 18 of the US code[49] and provide that whoever knowingly sells or possesses with intent to sell an obscene visual depiction shall be punished by a fine or imprisoned for not more than 2 years, or both[50]. The term visual depiction includes undeveloped film and videotape, and data stored on a computer disk or by electronic means which is capable of conversion into a visual image, and also includes any photograph, film, video, picture, digital image or picture, computer image or picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means.

It further prohibits the mailing or delivering a letter from post office or by any letter carrier containing an article, instrument, substance, drug, medicine or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion, or for any indecent or immoral purpose[51]. It further prohibits the importation or transportation of any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; or any

49 18 USC 1460
50 *Ibid*., Sec. 1460
51 Id., Sec. 1461

written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made. Any person receiving or taking any such material shall be fined under this title or imprisoned not more than five years, or both, for the first such offense and shall be fined or imprisoned for not more than ten years, or both, for each such offense thereafter[52].

It further prohibits the mailing upon the envelope or outside cover or wrapper of which, and all postal cards upon which, any delineations, epithets, terms, or language of an indecent, lewd, lascivious, or obscene character are written or printed or otherwise impressed or apparent. Any person knowingly deposits for mailing or delivery, anything declared to be non mailable matter, or knowingly takes the same from the mails for the purpose of circulating or disposing of or aiding in the circulation or disposition of the same, shall be fined or imprisoned not more than for five years, or both[53].

It further prohibits the broadcasting of any obscene, indecent, or profane language by means of radio communication; and the person doing so shall be fined under this title or imprisoned not more than two years, or both[54].

It further prohibits the production for the purpose of sale or distribution of any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, and any person doing so shall be fined or imprisoned for not more than five years, or both[55].

It further provides that engaging in the business of producing with intent to distribute or sell, or selling or transferring obscene matter, or who knowingly receives or possesses with intent to distribute any obscene book, magazine, picture, paper, film, videotape, or phonograph or other audio recording, which has been shipped or transported in interstate or foreign commerce, shall be punished by imprisonment for not more than 5 years or by a fine under this title, or both[56]. It further provides that any person who knowingly produces, distributes, receives, or possesses with intent to distribute, a visual depiction of any kind, including a

52 *Id*., Sec. 1462
53 *Id*., Sec. 1463
54 *Id*., Sec. 1464
55 *Id*., Sec. 1465
56 *Id*., Sec. 1466.

drawing, cartoon, sculpture, or painting, that depicts a minor engaging in sexually explicit conduct; and is obscene; or depicts an image that is, or appears to be, of a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; and lacks serious literary, artistic, political, or scientific value; or attempts or conspires to do so, shall be subject to the penalties provided in section 2252A(b)(1), including the penalties provided for cases involving in prior conviction[57].

In addition to above provision there is another provision which provides that any person who knowingly possesses a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that depicts a minor engaging in sexually explicit conduct; and is obscene; or depicts an image that is, or appears to be, of a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; and lacks serious literary, artistic, political, or scientific value; or attempts or conspires to do so, shall be subject to the penalties provided in section 2252A(b)(2), including the penalties provided for cases involving a prior conviction[58]. It further provides certain defenses to a charge of violating sub section(b) that the defendant possessed less than 3 such visual depictions; and promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any such visual depiction took reasonable steps to destroy each such visual depiction; or reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction[59]. It further provides that a person who is convicted of an offense involving obscene material under the chapter shall forfeit to the United States such person's interest in any obscene material produced, transported, mailed, shipped, or received in violation of the provision; or any property, real or personal, constituting or traceable to gross profits or other proceeds obtained from such offense; and any property, real or personal, used or intended to be used to commit or to promote the commission of such offense[60]. It further provides that whoever knowingly utters any obscene language or distributes any obscene matter by means of cable television or subscription services on television shall be punished by imprisonment for not more than 2 years or by a fine, or both[61].

57 *Id.*, Sec. 1466A
58 *Id.*, Sec.1446(A) (a& b)
59 *Id.*, Sec.1446(A) (d)
60 *Id.*, Sec.1447
61 *Id.*, Sec. 1468

Postal Service[62]

The provisions relating to postal service are included under Title 18 of the US code and these provisions provide that whoever uses or attempts to use the mails or Postal Service for the transmission of any matter declared by this section to be non-mailable, shall be fined under this title or imprisoned for not more than ten years or both[63]. It further provides that whoever, being an editor or publisher, prints in a publication entered as second class mail, editorial or other reading matter for which he has been paid or promised a valuable consideration, without plainly marking the same "advertisement" shall be fined under this title[64]. It further provides that whoever willfully uses the mails for the mailing, carriage in the mails, or delivery of any sexually oriented advertisement, or willfully violates any regulations of the Board of Governors issued under such section; or sells, leases, rents, lends, exchanges, or licenses the use of, or, , uses a mailing list maintained by the Board of Governors under such section; shall be fined or imprisoned for not more than five years, or both, for the first offense, and shall be fined or imprisoned for not more than ten years, or both, for any second or subsequent offense[65].

Sexual Exploitation and other abuse of children[66]

The provisions relating to sexual exploitation and other abuse of children are included under Title 18 of the US code and these provisions provide that any person who knowingly mails, or receives, distributes transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any child pornography; or knowingly or reproduces or advertises, promotes, presents, distributes, or solicits any child pornography for distribution through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer; or any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains an obscene visual depiction of a minor engaging in sexually explicit conduct; or a visual depiction of an actual minor engaging in sexually explicit conduct; or either sells or possesses with the intent to sell or to view any child pornography that has been mailed, or shipped or transported using any means or facility of interstate or

62 18 USC 1717
63 *Id.*, Sec. 1717.
64 *Id.*, Sec. 1734.
65 *Ibid*, Sec. 1735
66 18 USC 2252 A

foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; or distributes, offers, sends, or provides to a minor any visual depiction, including any photograph, film, video, picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, where such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct shall be punished with imprisonment for not less than 5 years and not more than 20 years[67].

Protecting Children in the 21st Century Act[68]

This Act has also been provided in Title 15 of the US code and provides for the Internet safety which includes issues regarding the use of the Internet in a manner that promotes safe online activity for children, protects children from cybercrimes, including crimes by online predators, and helps parents shield their children from material that is inappropriate for minors[69]. It further provides that the Federal Trade Commission shall carry out a nationwide program to increase public awareness and provide education regarding strategies to promote the safe use of the Internet by children that includes identifying, promoting, and encouraging best practices for Internet safety; or establishing and carrying out a national outreach and education campaign regarding Internet safety utilizing various media and Internet-based resources; or facilitating access to, and the exchange of, information regarding Internet safety to promote up-to-date knowledge regarding current issues; and facilitating access to Internet safety education and public awareness efforts, the Commission considers appropriate by States, units of local government, schools, police departments, nonprofit organizations, and other appropriate entities[70]. It further provides that the Assistant Secretary of Commerce for Communications and Information shall establish an Online safety and technology working group comprised of representatives of relevant sectors of the business community, public interest groups, and other appropriate groups and Federal agencies to review and evaluate—

1. the status of industry efforts to promote online safety through educational efforts, parental control technology, blocking and filtering software, age-appropriate labels for content or other technologies or initiatives designed to promote a safe online environment for children;
2. the status of industry efforts to promote online safety among providers of electronic communications services and remote computing services

67 *Id.,* Sec. 2252A(1,2,3,4,5&6)
68 15 USC 6551
69 *Ibid.*, Sec. 6551
70 *Ibid.,* Sec. 6552

by reporting apparent child pornography under section 13032 of title 42, including any obstacles to such reporting;

3. the practices of electronic communications service providers and remote computing service providers related to record retention in connection with crimes against children; and
4. the development of technologies to help parents shield their children from inappropriate material on the Internet[71].

It further provides that within 1 year after the working group is first convened, it shall submit a report to the Assistant Secretary, the Committee on Commerce, Science, and Transportation of the Senate, and the Committee on Energy and Commerce of the House of Representatives that describes in detail its findings, including any information related to the effectiveness of such strategies and technologies and any information about the prevalence within industry of educational campaigns, parental control technologies, blocking and filtering software, labeling, or other technologies to assist parents; and includes recommendations as to what types of incentives could be used or developed to increase the effectiveness and implementation of such strategies and technologies[72].

Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, or the 'CAN-SPAM Act of 2003'[73]

This Act has been provided in Title 15 of the US code and address to controlling the assault of non-solicited pornography and marketing. The Congress has shown a great concern regarding the increase in such problem, because

1. Electronic mail has become an extremely important and popular means of communication, relied on by millions of Americans on a daily basis for personal and commercial purposes. Its low cost and global reach make it extremely convenient and efficient, and offer unique opportunities for the development and growth of frictionless commerce.
2. The convenience and efficiency of electronic mail are threatened by the extremely rapid growth in the volume of unsolicited commercial electronic mail. Unsolicited commercial electronic mail is currently estimated to account for over half of all electronic mail traffic, up from

71 *Id.*, Sec. 6554(a)
72 *Id.*, Sec.6554(b)
73 15 USC 7701

an estimated 7 percent in 2001, and the volume continues to rise. Most of these messages are fraudulent or deceptive in one or more respects.

3. The receipt of unsolicited commercial electronic mail may result in costs to recipients who cannot refuse to accept such mail and who incur costs for the storage of such mail, or for the time spent accessing, reviewing, and discarding such mail, or for both.
4. The receipt of a large number of unwanted messages also decreases the convenience of electronic mail and creates a risk that wanted electronic mail messages, both commercial and noncommercial, will be lost, overlooked, or discarded amidst the larger volume of unwanted messages, thus reducing the reliability and usefulness of electronic mail to the recipient.
5. Some commercial electronic mail contains material that many recipients may consider vulgar or pornographic in nature.
6. The growth in unsolicited commercial electronic mail imposes significant monetary costs on providers of Internet access services, businesses, and educational and nonprofit institutions that carry and receive such mail, as there is a finite volume of mail that such providers, businesses, and institutions can handle without further investment in infrastructure.
7. Many senders of unsolicited commercial electronic mail purposefully disguise the source of such mail[74].

Therefore the Congress determined that—

1. There is a substantial government interest in regulation of commercial electronic mail on a nationwide basis;
2. Senders of commercial electronic mail should not mislead recipients as to the source or content of such mail; and
3. Recipients of commercial electronic mail have a right to decline to receive additional commercial electronic mail from the same source[75].

The Act prohibits predatory and abusive commercial e-mail. It authorizes the Sentencing Commission to enhance sentence—

those convicted under section 1037 of title 18 who—

74 *Id.*, Sec. 7701(a)
75 *Id.*, Sec. 7701(b)

I Obtained electronic mail addresses through improper means, including

a) harvesting electronic mail addresses of the users of a website, proprietary service, or other online public forum operated by another person, without the authorization of such person; and

b) randomly generating electronic mail addresses by computer; or

II. knew that the commercial electronic mail messages involved in the offense contained or advertised an Internet domain for which the registrant of the domain had provided false registration information; and

a) those convicted of other offenses, including offenses involving fraud, identity theft, obscenity, child pornography, and the sexual exploitation of children, if such offenses involved the sending of large quantities of electronic mail[76].

It further prohibits the person to initiate the transmission, to a protected computer, of a commercial electronic mail message, or a transactional or relationship message, that contains, or is accompanied by, header information that is materially false or materially misleading[77]. The term "transactional or relationship message" means an electronic mail message the primary purpose of which is to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender; or to provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient; or to provide notification concerning a change in the terms or features of; or notification of a change in the recipient's standing or status with respect to; or at regular periodic intervals, account balance information or other type of account statement with respect to, a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender; or to provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or to deliver goods or services, including product updates or upgrades, that the recipient is

76 *Id*., Sec. 7703(2)

77 *Id*., sec. 7704(1)

entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender[78].

It further prohibits any person to initiate the transmission to a protected computer of a commercial electronic mail message if such person has actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that a subject heading of the message would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message[79]. It further makes unlawful for any person to initiate the transmission to a protected computer of a commercial electronic mail message that does not contain a functioning return electronic mail address or other Internet-based mechanism, clearly and conspicuously displayed, that—

i) a recipient may use to submit, in a manner specified in the message, a reply electronic mail message or other form of Internet-based communication requesting not to receive future commercial electronic mail messages from that sender at the electronic mail address where the message was received; and

ii) remains capable of receiving such messages or communications for no less than 30 days after the transmission of the original message[80].

However it provides that if a recipient makes a request using a mechanism provided pursuant to paragraph (3) not to receive some or any commercial electronic mail messages from such sender, then it is unlawful—

i. for the sender to initiate the transmission to the recipient, more than 10 business days after the receipt of such request, of a commercial electronic mail message that falls within the scope of the request;

ii. for any person acting on behalf of the sender to initiate the transmission to the recipient, more than 10 business days after the receipt of such request, of a commercial electronic mail message with actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that such message falls within the scope of the request;

iii. for any person acting on behalf of the sender to assist in initiating

78 *Id*., sec. 7702 (17)

79 *Id*., Sec. 7704(2)

80 *Id.*, Sec. 7704(3)

the transmission to the recipient, through the provision or selection of addresses to which the message will be sent, of a commercial electronic mail message with actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that such message would violate clause (i) or (ii); or

iv. for the sender, or any other person who knows that the recipient has made such a request, to sell, lease, exchange, or otherwise transfer or release the electronic mail address of the recipient (including through any transaction or other transfer involving mailing lists bearing the electronic mail address of the recipient) for any purpose other than compliance with this chapter or other provision of law81.

It also makes unlawful for any person to initiate the transmission of any commercial electronic mail message to a protected computer unless the message provides clear and conspicuous identification that the message is an advertisement or solicitation; or clear and conspicuous notice of the opportunity under paragraph (3) to decline to receive further commercial electronic mail messages from the sender; and a valid physical postal address of the sender82. It further prohibits the transmission of any sexually oriented material to a protected computer. However it does not apply in such cases where the recipient has given prior affirmative consent to receipt of the message83. It provides that any person who violates this provision shall be fined, or imprisoned fornot more than 5 years or both84.

It further envisages that it is unlawful for a person to promote that person's trade or business, property, or services sold, offered for sale, leased or offered for lease, or otherwise made available through that trade or business, in a commercial electronic mail message the transmission of which is in violation of section 7704(a)(1)85.

It empowers the attorney general of a State, or an official or agency of a State which has reason to believe that an interest of the residents of that State has been or is threatened or adversely affected by any person who violates paragraph (1) or (2) of section 7704(a), who violates section

81 *Id*., Sec. 7704(4)
82 *Id*., Sec. 7704(5)
83 *Id*., Sec. 7704(5)(d)
84 *Id*., sec. 7704(5)(d)(5)
85 *Id*., Sec. 7705

7704(d), or who engages in a pattern or practice that violates paragraph (3), (4), or (5) of section 7704(a), of this title, may bring a civil action on behalf of the residents of the State in a district court of the United States of appropriate jurisdiction-

(A) to enjoin further violation of section 7704 of this title by the defendant; or

(B) to obtain damages on behalf of residents of the State, in an amount equal to the greater of-

(i) the actual monetary loss suffered by such residents; or

(ii) the amount determined under paragraph (3)86.

The amount under this paragraph is the amount calculated by multiplying the number of violations (with each separately addressed unlawful message received by or addressed to such residents treated as a separate violation) by up to $250. It further provides that for any violation of section 7704 of this title (other than section 7704(a)(1) of this title), the amount determined under subparagraph (A) may not exceed $2,000,000 87.

Video Voyeurism Prevention Act, 2004

This Act[88] provides that whoever with the intent to capture an image of a private area of an individual without their consent, and knowingly does so under circumstances in which the individual has a reasonable expectation of privacy, shall be fined or imprisoned for not more than one year, or both[89].

Wire or Radio Communication[90]

It provides that whoever knowingly by means of telephone, makes (directly or by recording device) any indecent communication for commercial purposes which is available to any person under 18 years of age or to any other person without that person's consent, regardless of whether the maker of such communication placed the call; or permits any telephone facility under such person's control to be used for an activity prohibited shall be fined not more than $50,000 or imprisoned for not more than six months, or both[91].

86 *Id*., Sec. 7706(f)(1)
87 *Id*., Sec. 7706(f)(3)
88 18USC 1801
89 *Id*., Sec. 1801
90 18 USC 223
91 *Id*., Sec. 223(b)

It provides that whoever uses any interactive computer service to send or to display to a specific person or persons under 18 years of age any comment, request, suggestion, proposal, image, or other communication that is obscene or child pornography, regardless of whether the user of such service placed the call or initiated the communication; or knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity shall be fined or imprisoned for not more than two years, or both[92]. It further provides that no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider[93].

It provides that no provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1) [94].

It provides that a provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections[95].

It further provides that whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, or imprisoned for not more than 6 months, or both[96].

92 *Id*., Sec. 223(d)
93 *Id*., sec. 230(c)(1)
94 *Id*., Sec. 230(c)(2)
95 *Id*., Sec.230(d)
96 *Id*., Sec. 231(a)(1)

The Judicial Approach

In *Memoirs v. Massachusetts*[97], the Attorney General of Massachusetts, brought a civil equity action for an adjudication of obscenity of Cleland's Memoirs of a Woman of Pleasure (Fanny Hill), and appellant publisher intervened. Following a hearing, including expert testimony and other evidence, assessing the book's character but not the mode of distribution, the trial court decreed the book obscene which is not entitled to the protection of the First and Fourteenth Amendments. The Massachusetts Supreme Judicial Court affirmed, holding that a patently offensive book which appeals to prurient interest need not be unqualifiedly worthless before it can be deemed obscene.

In *John Kois v. Wisconsin*[98], the U.S. Supreme Court affirmed the conviction of Milwaukee editor-publisher John Kois, whose underground newspaper, Kaleidoscope, had published two small photographs of pictures of nudes and a sexually-oriented poem entitled "Sex Poem" in 1968. The Supreme Court ruled that in the context in which they appeared ,the photographs were rationally related to a news article which they illustrated, and were thus entitled to Fourteenth Amendment protection; and that the poem "bears some of the earmarks of an attempt at serious art" (whether successful or not), and thus was not obscene under the Rothtest ("whether or not the 'dominant' theme of the material appeals to prurient interest"). In the words of the concurring opinion of Justice *William O. Douglas*, "In this case, the vague umbrella of obscenity laws was used in an attempt to run a radical newspaper out of business and to impose a two-year sentence and a $2,000 fine upon its publisher. If obscenity laws continue in this uneven and uncertain enforcement, then the vehicle has been found for the suppression of any unpopular tract. The guarantee of free expression will thus be diluted.

As alluded to Justice Douglas' opinion, by this time *Kaleidoscope* had already been driven out of business.

In *Stanley v. Georgia*[99]*, Robert Eli Stanley*, a suspected and previously convicted bookmaker, was searched by police with a federal warrant to seize betting paraphernalia. They found none, but instead seized three reels of pornography material from a desk drawer in an upstairs bedroom, and later charged *Mr. Stanley* with the possession of obscene materials, a crime under Georgia law. This conviction was upheld by the Supreme Court of Georgia. The Supreme Court of

97 383 US 413 (1966)
98 408 US 229 (1972)
99 394 US 557 (1969)

the United States, however, per Justice *Marshall*, unanimously overturned the earlier decision and invalidated all state laws that forbid the private possession of materials judged obscene, on the grounds of the Ist and 14th Amendments. Justices *Stewart*, *Brennan*, and *White*, contributed a joint concurring opinion.

Ginsberg v. New York[100] was a 1968 Supreme Court of the United States' decision. The Warren Court ruled that material that is not obscene may nonetheless be harmful for children, and its marketing may be regulated. Under New York Law it was illegal to willfully sell to a minor under 17 of age, any picture or any magazine which depicts nudity as it is harmful to minors. Ginsberg and his wife operated Sam's Stationery and Luncheonette in Bellmore, Long Island. In it they sold magazines including those deemed to be "girlie". He was prosecuted from two informants in which he personally sold two 16 year old boys the "girlie" magazines. He was tried in Nassau County District Court and found guilty. The court had found that the pictures were harmful to minors under the law. The Conviction was upheld by the Appellate Term of the Supreme Court of New York and was denied an appeal to the New York Court of Appeals. Justice *Brennan* delivered the opinion of the court which rejected Ginsberg's argument that New York had deprived minors of their liberty. The court found that it was well within the State's power to protect minors and that just because the material is not classified as obscene to adults, it may still be regulated for minors.

Manual Enterprises v. Day[101],is a decision by the United States Supreme Court which held that magazines consisting largely of photographs of nude or near-nude male models are not obscene within the meaning of 18 U.S.C. § 1461. It was the first case in which the Court engaged in plenary review of a Post Office Department order holding obscene matter "nonmailable".

The case is notable for its ruling that photographs of nude men are not obscene, an implication which opened the U.S. mail to nude male pornographic magazines, especially those catering to gay men.

In Smith v. California[102], *Eleazar Smith*, proprietor of a Los Angeles bookstore, was convicted of violating a city ordinance that made it unlawful "for any person to have in his possession any obscene or indecent writing, or book in any place of business where books are sold or kept for sale. California municipal and superior courts contended that Smith was criminally liable because of the possession of

100 390 US 629 (1968)
101 370 US 478(1962)
102 361 US 147 (1959)

the obscene material, even though he had no knowledge of the contents of the book; as in the law's definition there was no acknowledgement of the scienter, i.e. intent or knowledge of criminal activity, and so the ordinance imposed a strict criminal liability. The appellant appealed on the grounds that if the law were in fact constructed this way, it would come into conflict with the Due Process clause in the Fourteenth Amendment of the United States Constitution. The Court held that the free publication and distribution of books are protected under the Constitution's guarantee of freedom of the press, and that a bookseller, such as Eleazar Smith, plays a key role in this publication and distribution. The court also cited that legal doctrines and devices are not capable of application under the Constitution if they would have the effect of inhibiting freedom of expression by making citizens afraid or reluctant to exercise that freedom. Further, although the Constitution does not protect obscene material, the court deemed that the ordinance imposed an unconstitutional limitation on access to constitutionally protected material. This opinion was based on the belief that if booksellers were to be criminally liable without knowledge of content, they would restrict the books they sold to those that they had personally inspected. This would inevitably decrease the number of books being sold, and thus a limitation of public access would be imposed by States on books that were not obscene as well as obscene material. The court also was of the opinion that the ordinance contained no acknowledgement of the scienter, which was necessary for one to be criminally liable for possessing obscene material. The court's decision concluded that constitutional barriers may exist to restrict a State's power to prevent distribution of obscene materials. Further, the court found that the higher difficulty of restricting distribution of obscene material (because the bookseller is not criminally liable) was not reason enough to require a different decision. It closed saying that it was of great importance to protect freedom of speech and press from State interference, and the ordinance in question was exactly that, and thus it was deemed unconstitutional. The Court made it clear that the issue of obscenity did not factor into its decision. What mattered was that the ordinance made booksellers criminally liable for the mere possession of obscene books in their stores, without having proof that the bookseller had knowledge of the contents. This was found to be in violation of the Due Process Clause of the Fourteenth Amendment.

Roth v. United States[103], was a landmark case before the United States Supreme Court which redefined the Constitutional test for determining what constitutes obscene material unprotected by the First Amendment. The facts of the case are

103 353 US 476 (1957)

as, Samuel Roth, who ran a literary business in New York City, was convicted under a federal statute criminalizing the sending of "obscene, lewd, lascivious or filthy" materials through the mail for advertising and selling a publication called American Aphrodite ("A Quarterly for the Fancy-Free") containing literary erotica and nude photography. The Court granted a writ of certiorari and affirmed the conviction. The case came down as a 6-3 decision, with the opinion of the Court authored by *J.,William Brennan*. The Court repudiated the Hicklin test and defined obscenity more strictly, as material whose "dominant theme taken as a whole appeals to the prurient interest" to the "average person, applying contemporary community standards." Only material meeting this test could be banned as "obscene." However, J., *Brennan* reaffirmed that obscenity was not protected by the First Amendment and thus upheld the convictions of Roth for publishing and sending obscene material over the mail.

Position in United Kingdom

England has incorporated many laws, which though not directly directed to print media but still governs the working of the print media. The important legislations regulating the print media autonomy are as follows.

The Obscene Publication Act, 1959

It deals with the prohibition of the publication, distribution, circulation, selling, letting on hire or offering for sale any article or matter which tend to deprave and corrupt persons in whose hands this may fall. In this Act “article means any description of article containing or embodying matter to be read or looked at or both, any sound record, and any film or other record of a picture or pictures[104]. Any person engaged with aforesaid activities can be convicted with imprisonment for a term not exceeding six months or with fine not exceeding one hundred pounds[105].

The Obscene Publication Act, 1964

The Obscene Publication Act, 1964 made amendments in the *Obscene Publication Act*, 1959. It added that the possession of an obscene article for publication for gain shall also be punishable[106]. It further provides that a person cannot be convicted for such offence if he proves that he did not examined the article and had no reasonable cause to suspect that such things made him liable to

104 Sec. 1(2) , The Obscene Publication Act, 1959

105 *Id.*, Sec. 2(1)

106 Sec. 1(1), Obscene Publication Act, 1964

be convicted of an offence against that action[107]. The Act also applies to any thing e.g., photographic negatives, duplicator stencils or mould which is intended for the manufacture or the use for the reproduction of obscene articles[108].

The Children and Young Persons (Harmful Publications) Act, 1955

It prohibits certain publication, which can be harmful to young persons and children. Any written publication which carries acts of cruelty, incidence of repulsive or horrible nature or instances of commission of crimes which as a whole can corrupt a young person or children can be classified as a harmful publication[109]. The Act puts a restriction on publication of harmful publications e.g., selling, letting on hire, printing, possession, etc. If any person engages himself in any of the aforesaid activities he can be convicted with imprisonment which may extend to four months or with fine of hundred pounds or with both[110].

The Indecent Advertisement Act, 1889

This Act makes the action of affixing or inscribing any picture or printed or written matter which is of indecent or obscene nature so as to be visible to a person, in any street or footpath or affixing on a public urinal or delivering to any person in street or footpath or exhibiting to public view in the window of a house or shop[111]. Such person is liable,to a penalty not exceeding 20 pound or to imprisonment for a term not exceeding one month. Any person who gives or delivers to any other person any such pictures or printed or written matter with intent that it should be so affixed, inscribed, delivered or exhibited is liable, on summary conviction, to penalty not exceeding 50 pound or to imprisonment for a term not exceeding 3 months[112]. All the advertisements which signify or relate to sexual acts are classified as indecent.[113]

The Slander of Women Act, 1891

It imposes a restriction on the publication of words which impute unchasty or adultery to any woman or girl.[114]

Vagrancy Act, 1824

107 *Id.*, Sec. 1(3)(a)
108 *Id.*,2(1)
109 Sec. 1, Children and Young Persons (Harmful Publication) Act, 1955
110 *Id.*, Sec. 2(1)
111 Sec. 3, Indecent Advertisement Act, 1889
112 *Id.*, sec. 4
113 *Id.* ,sec. 5
114 Sec. 1, The Slander of Women Act, 1891

The Vagrancy Act prohibits the person wilfully exposing to view, in any street, road, highway, or public place, any obscene print, picture, or other indecent exhibition. Such person shall be deemed a rogue and vagabond, within the true intent and meaning of this Act and it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses,) to the house of correction for any time not exceeding three calendar months[115].

Indecent Displays (Control) Act, 1981

This Act prohibits an act of public display at a public place or the display which is visible from a public place of any indecent matter by any person and the act of making the display by a and any person causing or permitting the display to be made can be punished[116].

However the display included by any person in a television broadcasting service or other television programme service, in an art gallery or museum and visible only from within the gallery or museum, by or with the authority of, and visible only from within a building occupied by, the Crown or any local authority, in a performance of a play, or in a film exhibition shall not be an offense.

The Post Office,1953

This Act also imposes a restriction on the transmission by post of any indecent or obscene painting, photograph, book or written communication[117]. If any person contravenes this provision, he can be convicted with imprisonment for a term not exceeding twelve months or with fine not exceeding ten pounds.[118]

Postal Service Act 2000

This Act classifies the sending by post a postal packet which encloses any indecent or obscene print, painting, photograph, lithograph, engraving, cinematograph film or other record of a picture or pictures, book, card or written communication, or any other indecent or obscene article, or which has on the packet, or on the cover of the packet, any words, marks or designs which are of an indecent or obscene character as an offence[119].

115 Sec. 5, Vagrancy Act, 1824
116 Sec.1(1), Indecent Displays (Control) Act, 1981
117 Sec.11(1)(b) , Post Office Act, 1953
118 *Id.*, sec.11(2)
119 Sec.85 , Postal Service Act, 2000.

The Cinematograph Act, 1952

India is one of the largest producers of motion pictures in the world. Since they offer the cheapest and most easily accessible form of entertainment to the illiterate masses, motion pictures attract an average audience of a few million people each year.

The statutory basis for censorship of films in India is to be found in the Cinematograph Act, 1952, which is the most important legislative enactment governing this medium. The object of this Act is to ensure control of cinematograph exhibitions with particular regard to the safety of those attending them and to prevent the presentation to the public of improper and objectionable films.

Under this Act, Central Board of Film certification has been entrusted with such duty to examine every film and sanction it either for unrestricted exhibition, or for exhibition restricted to adults. The Board is also empowered to refuse to sanction a film for public exhibition[120]. The Act also provides for the certification of Films. The Board after examining the films considers that the film is suitable for unrestricted public exhibition or not suitable for such exhibition, or it is suitable for public exhibition restricted to adults, it shall grant to the person applying for a certificate in respect of a film 'U' certificate in the former case and an 'A' certificate in the latter case[121].

The Board can also issue 'UA' certificate for children with parents and 'O' certificate for professionals but before certifying the film has to see that the film or any part of it is not against the interest of the security of the state, friendly relation with foreign states, public order decency or morality or involves defamation, contempt of court or is likely to incite the commission of any offence[122].

Information Technology Act, 2000

The Information Technology Act, 2000 deals with cybercrimes. The terms cybercrime or cyber offence is neither defined nor is this expression used under the Act. The Act contains a provision which says that any person who, by any means of a computer resource or a communication device, sends; any information that is grossly or has menacing character, or any information which he knows to be false, but sends for the purpose of causing: annoyance, inconvenience; danger; obstruction; insult; injury; enmity; hatred or ill-will, persistently by making use of such computer resource or a communication device; or any electronic mail or

120 Sec. 4, Cinematograph Act, 1952.

121 *Id., Sec. 5A*

122 *Id.,* Sec. 5 B

electronic mail message for the purpose of causing annoyance, inconvenience; or to device or to mislead the addressee or recipient about the origin of such messages must be punished with imprisonment for a term which may be extend to three years and with fine[123]. Communication device means cell phones, personal digital device or combination of both or any other device used to communicate , send or transmit any text, video, audio or image[124].

The Act further states that if any person who, intentionally, or knowingly captures, publishes, or transmits the image of a private area of any person without his or her consent, under circumstances violating the privacy of that person must be punished with imprisonment which may be extend to three years or with fine not exceeding two lakh rupees, or with both[125].

Any person who with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people; or introduces or causes to introduce any computer containment and by means of such conduct causes or is likely to cause death or injuries to persons; knowingly or intentionally accesses a computer resource without authorization or by means of such conduct obtains access to any information, data or computer database where access is restricted for reasons for the security, of the State or foreign relations or any restricted information, data or computer database, with reason to believe that such information which may be used to cause or likely to cause injury to the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign nations, to the advantage of any foreign nation, group of individuals or otherwise, commits the offence of cyber terrorism[126]. Any person committing or conspiring to commit cyber terrorism can be punished with imprisonment which may be extend to imprisonment for life[127].

The Act further makes a provision which says that if any person who publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it must be punished with imprisonment which may extend to three years and with fine which may extend to five lakh rupees[128].

123 Sec. 66A, Information Technology (Amendment) Act, 2008
124 *Id.*, Sec. 2(1)(ha), inserted by the Information Technology (Amendment) Act, 2008.
125 *Id.*, Sec. 66E
126 *Id.*, Sec. 66F(I)
127 *Id.*, Sec. 66F(2)
128 *Id.*, Sec. 67

The Act further says that if any person publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually explicit act or conduct or creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner or records in any electronic form own or that of others pertaining to sexually explicit act with children must be punished with imprisonment of either description for a term which may extend to ten lakh rupees[129].

The Protection of Children from Sexual Offences Act, 2012

This Act provides that a person commits sexual harassment upon a child when such person with sexual intent utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or makes a child exhibit his body or any part of his body so as it is seen by such person or any other person; or shows any object to a child in any form or media for pornographic purposes; or repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or entices a child for pornographic purposes or gives gratification there for[130].

It further provides that any person uses a child in any form of media (including programme or advertisement telecast by television channels or internet or any other electronic form or printed form, whether or not such programme or advertisement is intended for personal use or for distribution), for the purposes of sexual gratification, which includes—

(a) Representation of the sexual organs of a child;

(b) Usage of a child engaged in real or simulated sexual acts (with or without penetration);

(c) The indecent or obscene representation of a child, shall be guilty of the offence of using a child for pornographic purposes[131].

However, any person uses a child or children for pornographic purposes shall be punished with imprisonment of either description which may extend to five

129 *Id.,* Sec.67(B)

130 Sec. 11,The Protection of Children from Sexual Offences Act, 2012

131 *Id.,* Sec. 13

years and shall also be liable to fine 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 be liable to fine[132].

The Act further provides that any person who stores any pornographic material in any form involving a child for commercial purposes shall be punished with imprisonment of either description which may extend to three years or with fine or with both[133].

It further provides that any person abets any offence under this Act and the act abetted is committed in consequence of such abetment, shall be punished with punishment provided for that offence[134].

It further provides that any person attempts to commit any offence punishable under this Act or to cause such an offence to be committed, and in such attempt, does any act towards the commission of the offence, shall be punished with imprisonment of any description provided for the offence, for a term which may extend to one half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine or with both[135].

The Act further provides that any personnel of the media or hotel or lodge or hospital or club or studio or photographic facilities, by whatever name called, irrespective of the number of persons employed therein, shall, on coming across any material or object which is sexually exploitative of the child including pornographic, sexually-related or making obscene representation of a child or children through the use of any medium, shall provide such information to the Special juvenile Police Unit, or to the local police[136].

The Act further laid down procedure for media while handling such case:

1. No person shall make any report or present comments on any child from any form of media or studio or photographic facilities without having completed and authentic information, which may have the effect of lowering his reputation or infringing upon his privacy.
2. No reports in any media shall disclose, the identity of a child including his name, address, photograph, family details, school, neighbourhood or any

132 *Id.*, Sec. 14
133 *Id.*, Sec. 15
134 *Id.*, Sec. 17
135 *Id.*, Sec. 18
136 *Id.*, Sec. 20

other particulars which may lead to disclosure of identity of the child.

3. The publisher or owner of the media or studio or photographic facilities shall be jointly and severally liable for the acts and omissions of his employee.

4. Any person who contravenes the provisions of sub-section (1) or sub-section (2) shall be liable to be punished with imprisonment of either description for a period which shall not be less than six months but which may extend to one year or with fine or with both[137].

The Act further provides that the Central government and every State government, shall take all measures to ensure that the provisions of this Act are given wide publicity through media including the television, radio and the print media at regular intervals to make the general public, children as well as their parents and guardians aware of the provisions of this Act; the officers of the Central government and the State governments and other concerned persons including the police officers are imparted periodic training on the matters relating to the implementation of the provisions of the Act[138].

Communications Decency Act, 1996

This Act has been provided under Title 18 of the US code and provides that any person by means of a telecommunications device knowingly makes, creates, or solicits, and initiates the transmission of, any comment, request, suggestion, proposal, image, or the communication which is obscene, lewd, lascivious, filthy or indecent, with intent to annoy, abuse, threaten, or harass another person makes a telephone call or utilizes a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person shall be imprisoned with fine or imprisonment for not more than two years or both[139].

The Act further provides that in providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it[140].

137 *Id.*, Sec. 23
138 *Id.*, Sec. 43
139 Sec. 502, Communications Decency Act, 1996
140 *Id.*, sec. 641

Video Recordings Act, 1984

This Act prohibits the display of video work which depicts human sexual activity or acts of force or restraint associated with such activity; mutilation or torture of, or other acts of gross violence towards, humans or animals; human genital organs or human urinary or excretory functions; criminal activity which is likely to any significant extent to stimulate or encourage the commission of offences[141].

Concluding Observations

The protection of children remains the prime concern of all the nations, irrespective of the state of development. India is lagging behind the developments in this regard in comparison to USA or UK as is highlighted in the debate above and needs to strengthen its laws so as to safeguard the interests of the future generations. The parental control has to increase and the parents should be advised and trained to keep a check on the children. The information technology has increased many folds but the State as well as the parents have to bear the twin responsibility of secure the corruption of the young and tender minds from obscenity. The judiciary also has to rise to the occasion and give a strict interpretation to the laws dealing with obscenity especially concerning the children so that they can be protected from moral and ethical corruption.

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141 Sec. 2, Video Recordings Act, 1984

Child born out of rape: crisis unheard

*Prof. (Dr.) Bibha Tripathi**

Rape, a *mala in se* offence, has been studied as multidisciplinary subject matter. It has led several amendments in procedural and substantive laws[1]. Societal reactions have forced civil society in general and policy makers and penologists in particular to advocate for stringent punishment to deter the accused and others having proclivity to commit the offence. Little efforts are also being made to compensate the victim of crime and to restore her so that she could be rehabilitated in the society to live her remaining life, free from mental agony and trauma[2]. Though there are some organizations and groups who are extremely skeptic over the provisions of victims' restoration. There is another problem resulting either from proved cases of rape or from rapes under false promises of marriage etc, of pregnancy through rapes[3].

The paper is an attempt to deal with those cases in which a victim becomes pregnant and to discern the laws and policies applicable in such case viz; whether the child must be aborted or it could be given birth? If it takes birth than what will be the fate of paternity? What would be his legal and social status and what would be the fate of his life if at any stage he/she comes to know that he/she is a result of rape[4]?

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1 See, criminal law amendment act, 1980 & 2013

2 See, Bodhisattva Gautam *v.* ShubhraChakravartyAIR 1996 SC 922, and Delhi Domestic Working Women's Forum *v.* Union of India (1995) 1SCC 14 case.

3 See, Shauna R. Prewitt, Giving Birth to a "Rapist's Child": A Discussion and Analysis of the Limited Legal Protections Afforded to Women Who Become Mothers Through Rape,TheGeorgetown Law Journal Vol. 98:827*Approximately 25,000 women become pregnant through rape each year. In response, many states have passed special laws, devised streamlined procedures, or both, to aid pregnant women who seek abortions or wish to place their rape-conceived children for adoption. However, few states have passed laws to aid the large numbers of raped women who choose to raise their rape-conceived children. Without such laws, in most states, a man who fathers through rape has the same custody and visitation privileges to that child as does any other father of a child. Moreover, as a result of this legal void, raped women and their children are left to face substantial and potentially terrible consequences. This Note argues that the absence of these laws stems from the societal images and other rhetoric concerning the pregnant raped woman that depict raped women as hating their unborn children and viewing their rape pregnancies as continuing their rape experience. These societal constructions have created a biased "prototype" of the pregnant raped woman and of the prototypical rape pregnancy experience by which all pregnant raped women are judged. Women who raise their rape-conceived children depart from the prototype and are, as a result, viewed with suspicion. Legal protections, such as alternate custody rights, are then denied to them because, being viewed as "imposter" rape victims, it is thought that there is nothing special about these women or their conceptions requiring any change in the manner in which custody and visitation determinations are made.*

4 See, National Charter for Children, 2003, and the provisions contained in Juvenile Justice (Care and Protection of Children) Act, 2000 and the Maharashtra Juvenile Justice (Care and Protection of Children) Rules,

The theme of the paper struck in mind when on June 9, 2013 The Hindu, published news that law is silent on protection of the child of rape victim[5]. It was a case of 19 year old rape victim, who was abandoned by her family. She prayed before the Delhi High Court that the court should pass a direction to the government of Delhi to take care of her child after the birth till he or she attains the age of majority. The court passed no order of relief as the statute book is silent on protection of the child of a rape victim from the trauma during the formative age. TheDelhi Government assured the High Court that she will be shifted to a shelter home for the delivery of her child, but said nothing regarding what will be done after the delivery and who will take responsibility of the child born out of rape.

To get them aborted

Such victims of rape are left with a single option of abortion of that child. There is no scope of victims' choice to refuse abortion. But if unfortunately abortion is not permissible under Medical termination of pregnancy act, 1973 it is presumed that the lady as well as the child would be left to live under everlasting trauma. Sometimes the victim voluntarily exercises her right to get the child aborted and sometimes opines contrary. But in both the cases she has to fight a legal battle. There are some narratives available on internet exploring the feelings and emotion of those children who are born out of rape[6]. There are some cases also decided on the point of abortion.

In Km. Mahima vs State and ors[7] in order to preserve her honour and her repugnance to have a child born out of rape she moved an application before the learned Magistrate for permission to terminate her pregnancy and for preservation of fetus and DNA test for the purpose of evidence that she was raped by the accused-respondent, it was ultimately permitted by the High Court.

But the Suchita Srivastava and another *V.* Chandigadh Administration[8], case is also relevant to be discussed here, because in this case the Supreme Court opined

5 Law is silent on protection of the child of rape victim, The Hindu, June 9, 2013

6 See http://www.afterabortion.org .So most people's position on abortion in cases of rape is based upon faulty premises: 1) the rape victim would want an abortion, 2) she'd be better off with an abortion, and 3) that child's life just isn't worth having to put her through the pregnancy. I hope that my story, and the other stories posted on this site, will be able to help dispel that last myth see also, rebecca@ rebeccakiessling.com, www.pamstenzel.com. see also, Margot Wilson, "Take This Child": Why Women Abandon Their Infants in Bangladesh Journal of Comparative Family Studies, Vol. 30, No. 4 (AUTUMN 1999), pp. 687-702 http://www.jstor.org/stable/41603662 .Accessed: 06/02/2014

7 106 (2003) DLT 143

8 Decided on 28 August, 2009 by K.G.Balkrishnan, P. Sathasivam and B.S. Chauhan JJ.

that a mentally retarded woman victim of rape carrying pregnancy of more than 20 weeks and not willing to get it aborted, cannot be asked to get it aborted. The court directed that the best medical facilities be made available so as to ensure proper care and supervision during the period of pregnancy as well as for post-natal care. Since there is an apprehension that the woman in question may find it difficult to cope with maternal responsibilities, the Chairperson of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities (constituted under the similarly named 1999 Act) has stated in an affidavit that the said Trust is prepared to look after the interests of the woman in question which will include assistance with childcare. In the said affidavit, it has been stated that this Trust will consult the Chandigarh Administration as well as experts from the Post Graduate Institute of Medical Education and Research (PGIMER) in order to ensure proper care and supervision.

It is submitted here that such assurance as a kind of charity is not possible in all cases. Therefore, the state must think to resolve the issue through proper policies and initiatives.

To give them in adoption

Another issue related with such type of children was highlighted by the Aurangabad bench of Bombay High Court[9] ruling that children born to rape victim mothers too have the right to be given in adoption or to get foster care through rehabilitation as per the procedures set for it. More often such children born to unwed mothers in rape cases are treated akin to 'recovered property' in a criminal case and have to languish till the court case dealing with the rape matter is settled or the court intervene. This ruling has eased the way for their legal adoption.

The ruling was given by a two-judge bench of justices R M Borde and R V Ghuge in a petition filed by Snehankur Adoption Centre of Ahmednagar run by non-government organization Snehalaya. The adoption centre had, as per the set procedures, applied to the child welfare committee of the district to seek declaration from it that two male infants-Raghav and Jaideep- were legally free for adoption placement. The two infants were born to two minor unwed mothers who were victims of sexual violence. The Child Welfare Committee was trying to get report from Probation Officer for declaring child as abandoned and certifying him as

9 Snehalaya'sSnehankur Adoption Centre *V.*The Child Welfare Committee and State of Maharashtra MANU/MH/1176/2013, the ratio decidendi was that"No such procedure of calling report from Probation Officer is envisaged for granting certification in favour of Adoption Agency in case child is surrendered." *see also* TNN | AUG 22, 2013, 06.26AM IST child born out of rape can be given in adoption

legally free for adoption. The two infants were later surrendered to the adoption centre for proper rehabilitation. Therefore, the court opined that the Committee had fallen in error in adopting procedure in calling report from Probation Officer.

"Property" involved in a crime

The committee rejected the application and instead directed the adoption centre to get police clearance or an order from the court that was hearing the rape case of the two minor rape victims. The committee's decision was challenged by the petitioners. Interestingly, the High Court ruled that children born to unwed girls who have been raped cannot be considered "property" involved in a crime. The court also noted that fundamental right to life of children included the right to be rehabilitated and have a family. The judges asked the committee to be sensitive in such cases.

The HC said neither the police nor the trial court had any role to play in declaring that the children born to a girl who was raped are free for adoption. Rejecting the state's claims that the agency could have taken recourse to alternative legal remedies, the High Courtsaid its intervention in the case was necessary. Raghav was born in January to a 16-year-old girl allegedly raped while Jaideep's mother was a 13 year-old girl allegedly gang-raped by four persons. The Aurangabad bench judgment now eased adoption of such children as it says the police and the court hearing the rape case have no say in adoption matter for which there are separate norms and procedures.

The two judgments of different high courts have highlighted two stands, first, there is no specific direction regarding the care and protection of such children, and secondly, such children could be given in adoption according to the rules applicable for the same.

Pregnancy through rape

A U.S. Representative Todd Akin made a claim about children conceived in rape. He suggested that they simply do not exist. But now it is considered asa false belief that pregnancy can almost never result from rape and it was widespread for centuries[10]. Now it is an established fact that any female capable of ovulation may become pregnant after rape by a fertile male[11]. Now there seems no controversy

10 Wikipedia, the free encyclopedia, pregnancy from rape, visited on 1-7-2013

11 Holmes, Melisa M.; Resnick, Heidi S.; Kilpatrick, Dean G.; Best, Connie L. (1996). "Rape-related pregnancy: Estimates and descriptive characteristics from a national sample of women". *American Journal of Obstetrics and Gynecology***175** (2): 320–4; discussion 324–5, Wikipedia, the free encyclopedia, pregnancy from rape, visited on 1-7-2013

over the issue that is it after all possible that there could be any pregnancy through rape[12]?

Right of putative father

Women who conceive as a result of rape, do in fact exist, a different question has arisen and recently received critical commentary in a number of news articles and editorials: Do men who father children through rape, and whose victims take their pregnancies to term, have parental rights vis-à-vis those children? It can also be put in another way that the question is whether a rapist might go into court and demand visitation with, or even custody of, a child whose existence is the product of the rapist's sexual assault on the child's mother?

It is the relationship between that child and the man whose violence against the child's mother led to the child's conception that is also a subject matter of discussion in the paper. A man who rapes a woman and through that rape causes his victim to become pregnant should be given any right or not if once pregnant, the victim in the scenario decides to take the pregnancy to term (or finds herself pressured into doing so). The victim then gives birth to the child, and decides to remain his or her parent, rather than surrendering the child for adoption. The paper attempts to find out the laws and policies dealing with such critical issues in the light of rights of child and his/her mother as well as the putative father. In a case the accused person filed an application for presenting the victim and the child for the DNA test to decide the paternity of the child[13] the High Court refused to entertain the application.

Some people might take the position that any man who fathers a child, no matter what the circumstances, ought to have parental rights vis-à-vis that child, at least as a presumptive matter. Alternatively, if he abuses the child or neglects him or her, then he may thereby forfeit his parental rights. In other words, if he either willingly relinquishes his status as a parent or behaves in a manner that demonstrates a lack of parental fitness, his parental rights may be properly suspended or even terminated.

12 U.S. Representative Todd Akin said of pregnancy from rape that "[i]t seems to me, from what I understand from doctors, that's really rare . . . . If it's a legitimate rape, the female body has ways to try to shut that whole thing down." Akin thereby claimed that there is a biological mechanism in women that precludes conception from rape . . . . The context of Akin's remarks, as readers may recall, was the debate over whether women who conceive in rape should have legal access to an abortion. Akin's answer was no, in part because, to his mind, the category of such women represents a virtual null set.

13 SisuBhuvan *v.* state of kerala,Crl.MC.No. 2957 of 2007 This Crl.M.C. has been filed by SisuBhavan, Sisters of Nazareth, which is an Orphanage recognized as per Annexure A certificate issued by the Central Adoption Resource Agency, Ministry of Social Justice and Empowerment, Government of India for submission of applications to competent Courts for declaration of foreigners as guardians of Indian children under the Guardians and Wards Act,. 1890.

This argument concludes that contributing genetically to the creation of a child triggers the existence of parental rights that entitle the father to the enjoyment of those rights in the absence of strong countervailing factors (or voluntary relinquishment). The rape of the child's mother prior to the child's existence might constitute such a factor, but one would have to analyze the question on a case-by-case basis to make an informed determination[14].

Right of the child born

If a child takes birth due to any of the reasons, than the question of his Human Right begins regarding his opinion as to whether he should not have been brought into the world or whether he could have knowledge of his father[15] or whether he could have a right to choose the custody of father or mother in case of dispute. These are the urgent questions to be answered immediately either through a specific law or policy adopted on children born out of such rapes.

Double victimization of Rape victim

One can easily understand the pregnant rape victim as feeling doubly victimized, because she has not only suffered an outrageous violation of her bodily

14 See more at: http://verdict.justia.com/2012/12/12/do-rapists-have-the-right-to-parent-children-conceived-in-rape#sthash.WegxVJv9.dpuf

15 Frank Möller, Rwanda Revisualized: Genocide, Photography, and the Era of the Witness, Alternatives: Global, Local, Political,Vol. 35, No. 2 (Apr.-June 2010), pp. 113- Sage Publications, Inc.Stable URL: http://www.jstor.org/stable/40645290 Accessed on 08-08-2014 07:28 see also, www/http/the guardian.com./profile/Lindsey Hilsum,visited on 15/07/2015,Lindsey Hilsum, Rwanda 20 years on: the tragic testimony of the children of rape, Saturday 7 June 2014,When JosianeNizomfura was 12, she wanted to get a glimpse of her father, so she sneaked out of school and went to the public trial where her mother was testifying against him for rape.LevineMukasakufu had never told Josiane the circumstances of her birth. "I couldn't face it, so she found out from the neighbours," she said. Levine – a tiny, delicate woman like a brightly coloured bird in her traditional wrap skirt – is one of the half a million women raped during Rwanda's 1994 genocide When Levine discovered that her daughter had watched her testify, she beat her all night long. It was one of many assaults. After failing to abort the baby, she frequently lashed out at Josiane when she was a child. "If she misbehaved at all I would say, 'she's like her father, she's an Interahamwe'. The UN initially estimated that 5,000 children were born of rape in the 1994 genocide, but the Survivors' Fund – a British charity working in Rwanda – believes the number might be nearer 20,000. Unlike genocide orphans, children of rape do not qualify for government assistance and many live in poverty. Aid programmes have tended to concentrate on the plight of the raped women, paying little attention to the children, who have grown up feeling rejected by their mothers and stigmatised by the wider community. Marie JoséeUkeye, a therapist who counsels 22 raped women and 12 children in Kibilizi, says the children have behavioural problems that can only be overcome through years of group therapy. "The adolescent girls are ashamed and often take on the suffering of their mothers, while the boys have explosive fits of temper," another narrative is of Olivier Utabazi who was19years old and his mother, EpiphaneMukamakombe was of 44years, outside their home in Kibilizi. The son of rape was knowing well that he is her only close surviving relative, after her family were killed in the genocide. Olivier says he understands why his mother was cruel to him, but remains haunted by the father he cannot bring himself to hate. He opined that,"On the one hand I blame him because he raped my mother and did not help her bring me up," he said. "But on the other hand, I do not know if he was really a bad man."

integrity in the rape itself, but she now may also experience herself as unwillingly enduring an enormous physical and emotional burden that will facilitate the rapist's propagating his genes into the next generation. A situation of denial of abortion and rapists' rights[16] can simultaneously emerge at one point of time if the lady decides to give birth in place of abortion.

There are number of cases where a child is born and the victim has sought maintenance by the putative father. The putative father further denies accepting the child as his child and refuses to maintain. The court has opined in such cases that the child is entitled for maintenance[17].

In India, in a judgment[18], a family court ordered a man to pay maintenance to his child born out of his love affair before his marriage to another woman. Here, the child's mother had entered into a relationship with the man in 2004 after he promised her marriage. In 2007, a city court convicted him to seven years of imprisonment, but the high court acquitted him in the case of rape, ruling that the relationship was "consensual".KainiRajan *V.* State of Kerala[19]is a case where victim had acquaintance with the accused and it was known to her family too. She filed a case of rape after 10 months when she delivered a child, but DNA test was not conducted when the paternity was challenged by the accused. Therefore, the Supreme Court set aside the order of conviction and opined that Version of victim, in rape commands great respect and acceptability, but, if there are some circumstances which cast some doubt in mind of Court of veracity of victim's evidence, then, it is not safe to rely on uncorroborated version of victim of rape. This case is referred to show that there can be number of such cases where an unwed mother is having child and there is no legal remedy to be given to such children.

Sant Ram @ Sadhu Ram *v.* The State[20] is a case where a father was convicted for raping his own daughter, who became pregnant and delivered a male child. The option of abortion was not available to her because she was 20 weeks pregnant

16 Iulia Filip, Rapist Given Paternity Rights to Victim's Child, Wednesday, August 21, 2013Last Update: 12:22 PM PT, in Boston (Cn) - A rape victim sued Massachusetts to stop it from subjecting her to "a court-ordered 16-year unwanted relationship with her attacker" by giving him paternity rights over the child born from the rape. "An estimated 35,000 babies are born from rape every year," the complaint stated. "No state court has ever issued an order such as the one at issued here. Granting the plaintiff's requested relief will inhibit state court judges in Massachusetts and elsewhere from similarly depriving rape victims of their liberty, personal autonomy and due process."

17 Chaya vs K.G. Channappa Gowda 1993 CriLJ 767

18 Family court orders maintenance for child born of love affairPTI | Dec 25, 2013, 06.21PM IST

19 MANU/SC/0966/2013

20 MANU/DE/2302/2013

when the case was brought to the notice. The Delhi High Court not only maintained the conviction under section 375 and 596 IPC but also imposed fine of Rs. 2,00,000, 1,00,000 for the victim and 1,00,000 for the child. It is submitted here that the case of Sant Ram is quite surprising from the point of view of victim and her child. Mere compensation of Rs. 1, 00,000 each is not sufficient to take care of them. A strong initiative by the government is urgently required.

There is another very recent judgment of the apex court namely ABC *v.* NCT Delhi[21] where the mother was well educated, gainfully employed and financially secure. She gave birth to her son in 2010, and has subsequently raised him without any assistance from or involvement of his putative father. In that case the court allowed the mother as her sole guardian and quoted all relevant provisions of the world in general and India in particular. The ABC case is deliberately referred in the article to mention that in this case the putative father was already married with someone else and the court was of the opinion that dragging him in the guardianship issue will badly affect his family. Therefore, since he has not shown any concern to the child born out of wedlock, the mother should be held responsible and entitle for all rights related with the child.

Probability of reconciliation between the rape victim and the accused

Amongst all the options, the probability of reconciliation between the rape victim and the accused either through mediation or through marriage has neither received approval from the feminist scholars nor from the public in general. Therefore, the concept of delivery of justice assumed by the Hon'ble Supreme court has not accepted the option of reconciliation as viable option under the broader shade of restorative justice[22].

Remedial measures to the victim and her child

Last but not the least; we must discuss the provisions related with care and protection of those children born out of rapes. Some organizations are there at national as well as international level to take care of the children but apart from that it is felt that there should be some remedial measure launched by the government to take care of the children. In western countries, there are some crisis centers running to provide care, protection and counseling to the aggrieved victims. Likewise centers should also run in India in this regard.

Concluding observations

21 Decided on 6th July, 2015

22 State of M.P *v.* Madanlal, decided on, July 1, 2015

It is submitted through the paper that the raped women may be forced to do number of things right from abortion to adoption or abandonment or joint custody, including sharing decision making about schooling, healthcare, and religious upbringing, and may even be required to give their children the surnames of the rapist fathers. Thus, raped women and their children face substantial and terrible consequences as a result of these women's decisions to give birth to and raise their children. Yet, despite these severe consequences, there is dearth of laws and policies especially in India to cope up with the problems. So, the concerned ministry should think that legislating or laying down policies on children born out of rape as well as determining the Human Rights of raped victims and putative fathers is too important to neglect and too urgent to delay.

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Compensation to Victims: A Peacemaking - Restorative Perspective

Dr H.S.RAI[1]

Over the last few decades a number of scholars exposed the numerous flaws inherent in mainstream criminology and criminal justice practices such as an over emphasis on criminals and their treatment or punishment without regard for contextual factors such as the unequal distribution of property and powers in society, crimes' negative impacts on well being, victims safety and health, rehabilitation of direct and indirect victims etc. Focus on individual offender has been at the neglect of certain institutional arrangements in society that contribute to high crime rate. The victims of crime who are the silent sufferers of the consequences of crime have hardly any support for mitigating their plight in contemporary criminal justice system. The State has stepped into the shoes of the victim and sought retribution in his place for the maintenance of law and order, peace and smooth progress of the society, the hardship which a victim faces after the crime go unnoticed and he has to still bear with all such turbulent experiences.

In recent years there have been proposals and programs that foster meditation, conflict resolution, reconciliation and community. They are part of an emerging criminology that seeks to alleviate suffering and reduce crime. These Perspectives assume that criminal justice system should be more balanced and remedial, and move away from criminal justice to restorative justice. Restorative justice encounters involving victims and offenders discussing what happened, why it happened and what reparation can be made have prompted victim wellbeing and offender rehabilitation. Interest in peacemaking and restorative justice has been growing now days. The failure of the punitive justice model, excessive use of incarceration and the alienation of victims and lack of response to their needs have generated support for this new way of thinking.

In this background an attempt has been made in this paper to understand the victims compensation as restorative technique and to highlight the position of the victims' restitution under our criminal justice system. Attempt are also been made to know Peacemaking criminology and restorative justice perspective, which have paved the way to alert lawmakers and criminal justice administration that there are alternatives to ceaseless war on crime.

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Peacemaking criminology:

Peacemaking criminology has been heralded as a process of peacefully preventing and responding to law breaking which are the byproducts and symptoms of maladjusted communities. Rather than being based on retribution and punishment peacemaking criminology is based on principles of non violence, conflict resolution, rehabilitation, restorative justice and social justice[2]. It argues that the current criminal justice system is a failure because it is rooted in the same problem it wants to eliminate – violence. And by that way the State itself perpetuates crime through harsh policies of social control such as the death penalty, lengthy prison sentences for offenders and the criminalization of non violent self harming offences[3]. It offers for a non violent criminology which can embrace humane, progressive, community-based strategies such as meditation, restitution and alternative dispute resolution[4].

Important propositions of the peacemaking criminology are:

- Crime is suffering and crime can only be eliminated by ending the suffering.
- Crime and suffering can only be ended through the achievement of peace.
- Human transformation will achieve peace and justice.
- Human transformation will occur if we change our social, economic and political structure.

Restorative justice:

It is a new way of thinking about crime and society's response to it. Restorative justice is a theory of justice that emphasizes repairing the harm caused by criminal behavior which is balanced and remedial. Restorative justice rests on three major propositions.

i) Justice requires that we work to restore those who have been injured.

ii) Those most directly involved and affected by crime should have the opportunity to participate as fully in the response as they wish.

iii) While the government is responsible for preserving a just social order, in

2 Richard Quinney,"The Way OF Peace: on Crime Suffering, and Service"in Harold Pepinsky and Richard Quinney (ed),*Criminology as Peacemaking,* Bloomington ,Indiana University Press.

3 M. Braswell(peacemaking Boogie) *Justitia,* (2004),3(1),p6

4 C. Bartollas M. Braswal, "Cprrectional treatment, Peacemaking, and the new age movement",*Journal of Crime and Justice*,16, (1993)p43.

> community's role in establishing and maintaining a just peace must be given special significance.

Thus restorative justice attempts bringing together offenders and victims and expects offenders to accept responsibilities for their actions. It promotes victim healing through reconciliation and offender rehabilitation through treatment, restitution and reparation[5]. Restorative justice is a peace making strategic for over hauling the criminal justice system. Restorative justice is centrally concerned with restoration but restoration is not solely backward looking, it is equally concerned with the construction of a better society in the present and the future.

Victims of Crime in Mainstream Criminology:

The crime is on the increase and with the increase; the number of victims are also increasing. One of the off heard criticisms against the present criminal justice system is its step motherly treatment to the poor crime victim. The victims set criminal law in to motion and then go to oblivion. The traditional Law does not comprehend the duty of State to alleviate the suffering of the innocent victim and/or their families for the loss of life, liberty, property, reputation and for bodily or mental injury in consequence of a crime. Victim is reduced to the status of being merely an informer and witness. Criminal law, traditionally assumes that the claims of the victims are sufficiently satisfied by conviction and sentence of offender.[6] This claim of criminal law seems to be unjust, unfair and inequitable[7] when society and State are resorting to every possible measure for correction and rehabilitation of offender and not displaying any concern for victim. Thus, the Criminal Justice System today is basically concerned with criminals, whether it is their conviction, treatment, reformation or rehabilitation. As Justice Krishna Iyer pointed out rightly:

> A law mode the whole spectrum of our criminal jurisprudence is obtained to perceive and permeate the interests of the accused of crime and to neglect the victim as a ponderous necessarion. This unmindful and untoward trendy thrust towards the accused of crime has left complaint the unknown martyr of crime.[8]

Not only was the victim's right to compensation ignored but also the right to participate as the dominant stakeholder in criminal proceedings was taken away

5 Ness Van , W. Daniel and Heetderks Strong *Karen,Restoring Justice,* 2nd ed.(2002) Cincinnati, Anderson

6 K.D. Gaur, "Justice to Victims of Crime", *Indian Bar Review*, Vol 29 2002 p. 257.

7 *Ibid*, See also K.I. Vibhute, *"Victimology: An International Perspective"*, 1990, 14, *CULR* p- 145.

8 Justice *V.* R. Krishna Iyer, *Of Law and Life*, Sahibabad, Vikas Publishing House, (1979) p. 145.

from him. He has no right to lead evidence, he cannot challenge the evidence through cross-examination of witnesses nor can he advance arguments to influence decision-making. However in the recent past, the forgotten victim has resurrected and there has been a phenomenon increase in the emphasis on the victim's rights. Recalling that millions of victims of crime and of abuse of powers are neither well protected nor are their reparatory rights adequately recognized and protected under criminal justice system, the United Nations General Assembly in 1985 adopted a Declaration on the Basic Principles of Justice for the Victims of Crime and Abuse of Power, on recommendation of the sixtieth U.N. Congress on the Prevention of Crime and Treatment of Offenders.

When the Victim's movement was initiated; it built a platform of victim right on six principles.[9] These declared that:

a) Victims have a right to protection from intimidation and harm.

b) Victims have a right to be informed concerning the criminal justice process.

c) Victims have a right to due process in criminal Court proceeding.

d) Victims have a right to preservation of property and employment.

e) Victims have a right to treated with dignity and compassion.

f) Victims have a right to reparation.

Compensation to Victims of Crime:

The emergence of compensatory justice in criminal jurisprudence in the light of fast developing victimology is a novel and positive development regarding better administration of justice. There are arguments that principle of restitution or compensation only serves civil justice ends and in non-criminal in form, but compensation aspect of restitution is a logical extension of the symbolic compensation already offered criminal punishment. Compensation to the victim of Crime in criminal proceedings is not a procedural flaw but it is an attempt to minimize to a particular extent some of the immediate costs of victimization suffered by some individuals it retains the equity between the injured and the injurer.[10] As justice should not only be done but it must seem to have been done. The according of punishment to the offender is just farmer part of justice i.e., the

9 Frank Schmalleger, *Criminal Law Today* , Prentice Hall Upper Sudde River NJ p. 483.

10 See Salomon Raja, "Focus of Victimology", First Biennial Conference of the Indian Society of Victimology, Hand Book of Abstract (1994).

justice requires something more to be done.[11] It demands realization that victims of crimes should also be compensated for the loss and injury which he has suffered due to offence which the criminal has committed. In due course of time such an insistence for reparation/compensation to victim of crime tempted a number of countries to enact laws to introduce appropriate statutory provisions or scheme as an integral part of the criminal justice system, to give aid and compensation to victims of crime.[12]

Victims Compensation in Indian Criminal Justice System:

Until 2009, there was no comprehensive legislation or a well-designed statutory scheme in India that allowed a victim to seek compensation from either the perpetrator or the State. However, a careful look of the Code of Criminal Procedure, 1973 and the Probation of Offenders Act, 1958 discloses that few sections contained therein can be invoked to compensate victim of crime and thereby to render to some extent justice to victims of crime. Section 357 of the Code of Criminal Procedure[13] is the main provision dealing with compensation to victims of crime. It empowers the Court i.e. Trial Court, Appellate Court, High Court or the Court of Session even in revision, to pass an order for payment of compensation out of fine imposed[1]. The above idea relating to payment of some recompense to the victim is supplemented by Section 358 and section 359 of Cr.P.C. and section 5 of Probation of Offender Act, 1958, though the above said laws seemingly inadequate and fragmentary in nature. Some of the most important lacunas in the above laws relating to compensation to victims of crime are that,

i) There is no provision under which the State may be asked to compensate

11 Sammaioh Mundrathi, Law on Compensation, To Victim of Crime and abuse of power (2002), p. 25.

12 See K.I. Vibhute, "Victimology : An International Perspective," 1990, 14 *CULR* p145.

13 Section 357 (1), the Code of Criminal Procedure, 1973.: When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied- (a) in defraying the expenses properly incurred in the prosecution, (b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court recoverable by such person in Civil Court; (c) when any person is convicted of any offence for having cause the death of another person or of having a betted the commission of such an offence, in paying compensation to the person who are, under Fatal Accident Act, 1855, entitled to recover damages from the person sentenced for the loss resulting to them from such death; (d) when any person is convicted of any offence which is includes theft, criminal misappropriation, criminal breach of trust, or cheating, or having dishonestly received or retained, or having voluntarily assisted in disposing of, stolen property knowing or having reason to believe that same to be stolen, in compensation any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.
Section 357 (3):when a Court imposes a sentence, of which fine does not form a part, the Court may when passing judgment, order the accused person to pay by way of compensation, such amount as may be specified in order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced

the victims of crime. Its application depends in the first instance, on conviction of the offender for which he is charged. It is a barrier to recover compensation. Compensation is a remedial institution and it should depend upon the suffering of injury.

ii) The order of payment of compensation to victim always rests with the discretion of the Court which may refuse it, even without mentioning the reason for the same. By no way Section 357 creating any right in favour of victim to claim and receive compensation.

iii) The amount of compensation which may award is flexible enough to make it real and truly compensation. The amount so awarded, cannot exceed that of the fine so imposed. The Magistrate power to impose a fine is itself limited. The economic position of the offender which is taken into account before ordering the compensation is also restricting the amount of compensation.

iv) Recovery of compensation will have to wait till the expiry of the period allowed for appeal.

v) There is no adequate machinery for enforcing payment of compensation. If the offender defaults in payment of compensation and he lacks economic stamina, the victim may not get anything.

There is no bar on subsequent civil suit for compensation once the question has been dealt with under criminal proceedings of the same is likely to give rise to multiplicity of suits and cases.

However, the recent amendment to the Code of Criminal Procedure[14] addressed the victim's right to compensation. It is a step forward. Sub-section (1) of Section 357A of the Code discusses the preparation of a scheme to provide funds for the compensation of victims or his dependents who have suffered loss or injury as a result of a crime and who require rehabilitation.

Sub-section (2) states that whenever the Court makes a recommendation for compensation the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the above-mentioned scheme. It is significant that the Legal Services Authority, comprising of technical experts, has been entrusted the task of deciding the quantum of compensation, since they are better equipped to calculate/quantify

14 Code of Criminal Procedure Amendment Act, 2008

the loss suffered by a victim. However, the provision loses its teeth because the discretion remains with the judge to refer the case to the Legal Services Authority.

It is a positive development that in sub-section (3) the trial court has been empowered to make recommendations for compensation in cases where-

- Either the quantum of compensation fixed by the Legal Services Authority is found to be inadequate; or,
- Where the case ends in acquittal or discharge of the accused and the victim has to be rehabilitated.

Thus, there is scope to further extend compensation to victims in these cases that end in acquittal or discharge beyond rehabilitation to compensation for loss. Sub-section (4) of Section 357A states that even where no trial takes place and the offender is not traced or identified; but the victim is known, the victim or his dependents can apply to the State or the District Legal Services Authority for award f compensation. We see a shift towards state funded victim compensation as has been established in the United Kingdom and the United States. This is an extremely progressive development that takes into account practical reality of an overburdened criminal justice system, which is unable to identify all offenders and prosecute them.

Sub-section (5) says that on receipt of the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months. It is pertinent that a time frame has been provided within which the Legal Services Authority should conduct its enquiry and award compensation. A period of two months, as specified in the proposed amendment, would ensure speedy delivery of justice to the victim and specification of a time period would create accountability and prevent dilatory measures. Moreover, it should be noted that the section speaks of 'adequate compensation'; thus ensuring the quantum of compensation awarded should be just and fair.

Further, sub-section (6), states that, in order to alleviate the suffering of the victim, the State or District Legal Services Authority may order immediate first-aid facility or medical benefits to be made available free of cost or any other interim relief as the appropriate authority deems fit. It is a positive that the section speaks of "*alleviating the suffering*" of the victim and seeks to help the victim recover in the after-math of the crime and ensure that the victim does not have to wait till the end of the trial to recover these costs. The statutory recognition of the right to interim relief is an important step and an urgent need of the hour.

Furthermore, Section372 of the Code of Criminal Procedure has been amended, containing the following proviso:

Provided that the victim shall have a right to prefer an appeal against any order passed by the court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court.

Thus, now undoubtedly the Code of Criminal Procedure contains significant provisions regarding power of the Court to provide compensation for reparation to the victim of an offence. Unfortunately, the Courts in India have rarely resorted to these provisions.[15] The Apex Courts carried the same impression in *Hari Krishan and State of Haryana v. Sukhbir Singh*[16] and recommended in advisory tone to all Courts to exercise this power liberally to meet the ends of justice in a better way. The Court highlighted that this power of Courts to award compensation is not ancillary to other sentences but it is in addition thereto. The Court expressed its view stating that:

> Cr.P.C. contains the provisions but Court has seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the Court to award compensation to victim while passing judgment of conviction. This power was intended to do something to reassure the victim that he or she is not forgotten in criminal justice system. It is a measure of responding appropriately to crime as well as reconciling the victim with the offender. It is to some extent, a constructive approach to crime. It is indeed a step forward in our Criminal Justice System.[17]

Further the Supreme Court in *Sarwan Singh v. State of Punjab*[18] has elaborately highlighted the need and objectives of compensation to the victim of crime and held that if the accused is in a position to pay the compensation, there could be no reason for the Court for not directing such compensation.

The Apex Court in *Mangilal v. State of M.P*[19], emphasized the need of natural justice in Section 357 (3) of Criminal Procedure Code. The Court held that if the appellate Court intends to award compensation and opportunity of hearing has

15 Law commission of India in its forty-first Report has clearly admitted such fact.

16 AIR 1988 SC 2127

17 Id

18 AIR 1978 SC 1525;see also, *Surinder Singh v. The State* (1976) 78 P.L.R. 867,

19 AIR 2004 SC 1280; See also *Shan Chandulal v. Patel Batdevbhai*, 1980 Cri. L.J., *Arjunan v. State*1997 Cri. L. J. 2327 (Mad.) *S. Kannan v. D.V. Padmaja*, 1997 Cri. L.J. 3994; *Mukehsbhai Narubhai Patel v. State of Gujrat*, (1997) 1 Guj LH 876

to be granted so that the relevant aspect likes the need to award compensation, capacity of accused to pay and several other relevant factors can be taken note of.

While exercising the power under Section 357 of Cr.P.C. another important question comes before the Court regarding quantum of fine and compensation. In *Hari Krishnan and State of Haryana v. Sukhbir Singh*,[20] the Court while advocating its frequent and liberal use, however, cautioned that such compensation must be reasonable fair and just, depending upon the fact and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the veracity of the claim and the ability of the accused to pay. In *Adamaji Umar v. State of Bombay*[21] the Apex Court stated that while 'passing a sentence' the Court has always to bear in mind the necessity of proportion between an offence and the penalty. Similarly in *Palaniapa Gounder v. State of Tamil Nadu,*[22] the Supreme Court observed that the first concern of the Court, after recording an order of conviction, ought to determine the proper sentence to pass. The sentence must be proportionate to the nature of the offence and the sentence, including the sentence of fine, must not be unduly excessive.

In *State v. Pandurang Sinde,*[23] where accused was convicted for murder u/s 302 of I.P.C. and sentenced by Court of Sessions to transportation for life with fine of Rs. 500/-. On appeal, the High Court of Bombay expressed its disapproval of combining the punishment of fine with transportation for life and observed;

> Where the Session judge has sentenced the accused to transportation for life for an offence of murder, he cannot impose a sentence of fine. The sentence of fine for an offence of murder is wholly in opposite.

The Apex Court adopted a similar posture, in *Pallaniappa Gounder v. State of Tamil Nadu,*.[24] and *Sarwan Singh v. State of Punja.*[25] The judicial attitude is however, reflected somewhat differently in *Guruswami v. State of Tamil Nadu*,[26] where it was observed that in case of murder it is only fair that proper compensation should be provided to the dependents of the deceased. A similar attitude was adopted by the judiciary in *Arun Garg v. State of Punjab*,[27]and *Rachhpal Singh v. State of Punjab*[28].

20 AIR 1988 SC 2127.
21 AIR 1952 SC 14.
22 AIR 1977 SC 1323.
23 AIR 1956 Bom. 711.
24 AIR 1977 SC 1323.
25 AIR 1978 SC 1525.
26 AIR 1979 SC, 1177.
27 2004 (4) Crimes 233 (SC).
28 2002 (3) Crimes 36 (SC).

Further, *Madhukar Chandar v. State of Maharastra*[29] is an important one wherein the accused, a young agriculturist, caused the death of his sister's husband by stabbing. The trial Court sentenced him to undergo life imprisonment which was reduced by the High Court to rigorous imprisonment for ten years. While reducing the sentence, the Court observed;

> "True justice will be achieved if the old mother and their children will receive some sustenance which the deceased would have otherwise provided."

In *Ramesh Kumar v. Ram Kumar*,[30] the High Court of Punjab and Haryana acquitted one of the accused since he compensated the heir of the deceased. On appeal Apex Court rejected the plea of High Court and observed;

> The entire system of administration of criminal justice is reduced to a mockery. If the judgment of High Court is upheld, it is as if a person who can afford to make a gift of land or money to the heirs of the victim may get away even with a charge of murder. Courts are to dispense justice, not to dispense with justice. And justice to be dispensed is not palm tree justice or idiosyncratic justice. The order of the H.C. would be liable to be set aside.

Again in *State of Haryana v. Prabha,*[31] the Supreme Court similarly observed that there was no justification for substituting monetary compensation in lieu of substantive sentence[32].A similar attitude was adopted by judiciary in *State of Maharashtra v. Hindurao Daulu Charapale*[33], *Dwarka Das v. State of Rajasthan*[34] and *State of Maharashtra v. Harisnchandre Tukaram Awatade*.[35]

Thus one can find that at times, the judiciary is interested in compensating the victim adequately whereas on the other hand does not favour the compensatory measures alone as a supplement to imprisonment. Even the time factor is considered unjustified factor in resorting to compensatory measures. The liberal and reformist approach of the judiciary also does not go well with the approach of the Apex Court as they are apprehensive of the hidden dangers in this philosophy i.e., lest the larger pocketed accused can easily walkover the rights of the poor sections.

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29 1993 Cri. L. J. 3281.
30 AIR 1984 SC 1029.
31 1988 Cri. L. J. 87.
32 *Brij Lal v. Prem Chand,* AIR 1989 SC 1661.
33 1997 Cri. L. J. 1649.
34 1997 Cri. L. J. 4601.
35 1997 Cri L. J. 612.

Conclusion:

From the above discussion it becomes amply clear that earlier the criminal justice system was offender specific where the victim had no role to play except being an informant or a witness. All the efforts were directed for or against the offender, be it may his punishment or reformation. Half late, it has been realized that the punishment to the offenders is only one side of a coin and the major thrust should be in the rehabilitation of the victim which has always remained neglected. It is not only unjust and inequitable from the point of view of victims of crimes and their competitive claims of reparation but is also the negation of the Rule of Law[36]. There is no reason to such reluctance towards victims upon whom the criminal justice system depends heavily for the reporting and detection of offence and for the purposes of evidence in Court. There cannot be two opinions about the need and continuation of the offender-reform-oriented philosophy and therapeutic correctional approach in the penal administration in vogue but equal attention should be paid to victims of crime.

Restorative justice has emerged as a new form of justice in arena of administration of criminal justice which offers a more constructive approach to restoring ties between the victim of an offence, the offender and the community as a whole. It does not eliminate denunciation and reaffirmation of social norms but it does tend to make justice more compassionate and more sensitive to the suffering of the individuals affected by crime. It is an alternative to the adversarial system of justice and an antidote to punitive policies.

Although, peacemaking criminology is an emerging concept and difficult to speak about yet it is so vital for the well being of society and for the notion of complete justice that it is impossible to remain silent about it. It offers a realistic cause for crime and a practical response to crime. It broadens the vision of the criminologist to the structure and processes of the social system. It engages the criminologist in the call to action for social change and in the plan for constructing alternatives to oppressive punishment. Peacemaking rightly acknowledges that although we do not control what life bring us we do have a choice in how to respond to whatever life bring us. We can begin to change ourselves first, then others by our example, and finally our system of justice.

36 See the Committee on Reforms of Criminal Justice System, chaired by Justice *V.S. Malimath* ('Malimath Committee'), which submitted its report in March 2003, was uncharacteristically candid in its lamentation that "People by an large have lost confidence in the Criminal Justice System..... victim fell ignored and are crying for attention and Justice.....there is need for developing a cohesive system, in which all parts work in coordination to achieve the common goal".see also: The Law Commission of India, One Hundred and Fifty Second Report on Custodial Crime (1994)

Compensation to victims of crime has a potential to become a restorative technique to seek non violent solution to crime. It took to bring victim and offender together to promote a peaceful restitution. The victim compensation law of India is more holistic in their approach of addressing the plight of victims. However, the infrequency with which these provisions are invoked by lower judiciary in a bid to achieve victim justice and to alleviate the suffering of the victim would render these provisions redundant .To effectuate any progressive victim compensation reforms, there is a need for a sensitized judiciary that recognizes the importance of victim compensation. Consequently, the High Courts must orient and train the Judicial Officers towards compensatory criminal jurisprudence and restorative justice. Ultimately, the efficacy of the law and its social utility depends largely on the manner and the extent of its application by the courts. A good law badly administered may fail in its social purpose and if overlooked in practice, will fail in purpose and utility.

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Accountablity of Medical Professionals & Consumer Protection Law : A Study

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Consumerism is a movement or policies aimed at regulating the products or services, methods or standards of manufacturers, sellers and advertisers in the interest of buyer, such regulations may be institutional, statutory or embodied in a voluntary code adopted by a particular industry[1]. The contemporary era is an era of consumerism where consumers determine the sale of products and services. Especially in relation to services any professional rendering a service for a price can be made accountable for the deficiency in service which inter-alia include any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under law or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service. India at the time of freedom from the colonial power inherited economy and development in a bad shape. In order to give an impetus to the economical growth, the local industrialists were given the chance to develop and grow which led to concentration of wealth and economic power in the hands of few. The traders and sellers became all powerful and started impinging upon the valuable rights of the consumers on whose purchasing power they were thriving[2].

Service oriented consumerism

Though there were plethora of legislations regulating products but their prime concern remained the quality and quantity of the products rather than consumers[3]. The exploitation of the consumers led to the passage of the Consumer Protection Act in 1986 which opened a golden era in the history of legislation in safeguarding the interest of the consumers. The Act has become the vehicle for enabling people to secure speedy and inexpensive redressal of the grievances of as the consumer[4]. Thus the consumer protection has been a movement from the archaic notion of common

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1 II Encyclopedia Britannica, 108

2 O. P Garg, *The Consumer Protection Act*, 1986, 18 (Vinod Publishing House, Delhi, 3rd reprint, 1991)

3 IPC,1860; Indian Contract Act, 1872; Sale of Goods Act, 1930; Drugs and Cosmetics Act, 1940; Drugs Control Act,1950; Bureau of Indian Standard Act, 1986, etc.

4 R. N. P Chaudhary, *The Consumer Protection Law Provision and Procedure*. XVII (Deep and Deep Publication, New Delhi, 2005)

law 'caveat emptor' to a social welfare as well as social service state concept of a 'caveat venditor'. The consumer protection movement has been ubiquitous in the world including India that there ought to be a duty cast upon the seller as well as service provider to provide goods free from all defects and services which should not be deficient in nature. 'Caveat venditor', let the seller beware, is a departure from the exploitative practices of the few rather it is a protection of the interest of the majority. This piece of legislation is undoubtedly a people centric and people friendly movement which is a result of a long drawn battle.

The definition of the consumer as given in the aforesaid Act is wide enough to include any person who purchases any goods for himself or for any user except for commercial purpose; and also includes any person who hires or avails of any service for his personal use or any beneficiary. In addition to it, the definition of service is of wider amplitude as it includes service of any description which is made available to potential user except any service free of charge or under a contract of personal service[5]. In all developed economies, the concept of "services" has assumed great importance. A modern society lives and thrives upon the "services" of numerous kinds which have become indispensable for comfortable and orderly existence of human beings[6].

The Supreme Court has elaborately discussed the scope of the definition of service in the case of *Lucknow Development Authority v. M.K.Gupta*[7] , wherein it is very rightly pointed out that the word 'any' in wider sense extends from one to all; and the word 'potential' includes not only actual users but those who are capable of using it and is applicable not only against statutory authorities but against private bodies whosoever provides 'service'.

Consumer Disputes Redressal Agencies have been flooded with complaints relating to "services". This has been primarily on account of vast services provided by private and public sector organization to all section of population. However the most controversial issue relating to applicability of Consumer Protection Act is its enforcement against the professionals. The main argument put forth on behalf of all the professionals like Doctors, Engineers, Advocates, Accountant, etc., is that they are governed by their own code of ethics and that they belong to respectable profession.

5 Sec. 2(1) (0), Consumer Protection ACT, 1986.

6 D. N. Saraf, "Some Facts of Consumer Protection through Consumer Dispute Redressal Agencies", 34(1) JILI 41(1992)

7 (1994) 1 SCC 243

Medical Service and Consumers

Medical profession is a profession of antiquity and the privileged one blessed with celestial powers enjoin this profession to bring smiles on the human faces fallen to miseries. Initially, medical profession was professed by person believed to have magical wand to cure ills but gradually it became scientific and well formulated on sound criterion and analysis. It has traversed from social service concept to economy based service concept, wherein the modern luxurious life style has swayed this profession and they are charging the price for the service. There cannot be any second opinion that the preservation of human life is of paramount importance. That is so on account of the fact that once life is lost, the status of quo ante cannot be restored as resurrection is beyond the capacity of human being[8]. The doctor- patient relationship in contemporary world has undergone a sea change and each and every instance of medical negligence strikes a death knell to this relationship. Declining credibility of medical professional has caused spurt in litigation for medical negligence[9]. The awareness and education in the society has made people conscious of their rights, and as a result measures for damages for negligent acts in Torts, civil suits and criminal proceedings are on the increase[10]. The people are no more prepared to attribute the mishaps to destiny but to fight out the case administratively, politically and judicially.

Determination of Medical Negligence

The standard for determination of medical ethical and working can be attributed to *Hippocratic oath, charaksamhita* and code of ethics prepared by the Medical Council of India[11] which pin point the do's and don'ts for the doctors. Since the medical professionals provide the service to the patient for a price, hence the patient being a consumer can sue the doctor in consumer forum in case there is any deficiency in rendering of the service to the patient. The standard prescribed for the doctors by Medical Council of India as well as the general standard of reasonable prudence serve as the yardstick in determining deficiency in service by the doctor.

In India the doctors are rendering service in the government hospitals

8 Dr. Mustafa Alam Naqvi, *Consumer Protection ACT, 1986 and Professional Obligation*,132-133 (Allahabad Law Agency, Faridabad, 1st edition, 2005)

9 Medical Services and Consumer Protection Act, CUTS International, Jaipur, accessed on 3rd of May, 2015

10 Dr. Vinay Kapoor and Dr. Purnima Khanna, " Medical Negligence under Consumer Law-Judicial Response", XV MDULJ II (A) 5-6 (2010).

11 In*dian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002*

where a token fee is charged as a registration fee for seeking the service based on purely social service concept as well as the doctors are rendering service in private clinics where a huge amount is charged for availing the benefit of the doctors' expertise. This paradoxical working methodology coupled with the non-mentioning of medicinal and surgical treatment in the list of services enumerated in the definition of service create doubts as to whether their service can fall within the ambit of service and whether a case can be entertained by a consumer forum[12].

However, in one land mark judgment, it was held that the activity of providing medical services for payment carried on by the hospitals and members of the medical profession falls within the scope of expression 'service' and in the event of any deficiency in the performance of such service, the aggrieved party could invoke the remedies provided under the Act by filing a complaint before the consumer forum having jurisdiction[13].

A patient is entitled to seek relief from Consumer Dispute Redressal Machinery for medical services under certain circumstances;

i) The services hired or availed of or agreed to be hired or availed by the patient.

ii) The services should have been rendered by the medical practitioner to the patient.

iii) The services should have been hired or availed for consideration.

iv) The services hired or availed suffer from deficiency.

v) The services have not been rendered free of charge[14].

The cleavage of judicial opinion was set at rest by the apex court in *Indian Medical Association v. V.P. Shantha*[15] wherein it held that services rendered at a Government Hospitals, Health centre or dispensary where services are rendered partially on payment of charges and partially free of charge, the persons rendering such services would fall within the ambit of the expression "service" under sec 2 (1) (0) of the Act. The benefit of exclusion from the concept of service shall be available only when the service is provided free of charge.

The relationship between a doctor and a patient carries within certain degree of mutual confidence and trust. Therefore the services rendered by the doctors are regarded as services of personal nature. Since there is no relationship of master

12 Cosmopolitan Hospital *v. V.* P. Nair, (1992) 1 CPJ 302 (NC).

13 Ibid.

14 Ibid at 237-238

15 AIR 1996 SC 550

and servant between them, and the said service cannot be treated as a contract of personal service rather a "contract for service". The service rendered by doctor to his patient is not covered by exclusionary part of the definition of service. The major area where the case of medical negligence often debated is the area concerning the surgical treatment wherein the recourse to the tests of *res ipsa loquitor* and reasonable prudence are made by the courts for determining the cases of medical negligence. During surgical treatment the left out swabs, scissors, towel or other foreign elements inside the body of the operated person very comfortably pinpoints negligence on the part of the medical professionals[16]; but in other cases of complications, it is difficult to determine the medical negligence unless there is clear out recording in the medical records because except for the medical records there is no methodology to determine the procedure that went wrong[17].

Medical mistake could result in finding for medical negligence. Use of wrong drug or a wrong gas during the course of administering anesthesia would lead to imposition of liability. The delegation of responsibility by a doctor to some other person also results into negligence, e.g., delegation of duty by a senior doctor to a junior doctor[18].

The liability of a doctor does not arise when some sort of injury is being suffered by patient but it arise when that injury is the result of the conduct of the doctor due to lack of reasonable care. In order to prove the breach of duty on the part of doctor, the burden of proof is always on the complainant. Such burden can be discharged only by leading cogent and necessary evidence and it is not in all cases that such presumption can be drawn about negligent act of the doctor on account of unsuccessful operation[19]. Although in an action in negligence the onus of proof normally rests on the complainant. In a case where a general duty of care arose and there was a failure to take a recognised precaution and that failure was followed by the very damages which that precaution was designed to prevent, the burden of proof lay on the defendant to show that there was no breach of any duty and the injury suffered by the complainant did not result from that breach. Whether a patient suffered injury after there had been a departure from the orthodox course of treatment, the court had to take into consideration whether doctor had taken all proper factors into account prior to taking action in

16 Achutrao Haribhau Khodwa *v.* State of Maharastra, AIR 1996 SC 2377; Harvinder Kour *v.* Sushma Chawla, 2001(3) CPJ 143

17 Sethu Raman Subramanium Iyer *v.* Triveni Nursing Home, (1998) 2 CPJ 110 (NC).

18 V Balakrishna Eradi, *Consumer Protection Jurisprudence*, 436-437 (Lexis Nexis Butterworths, 2004).

19 Dr. Amrit Lal Gupta v Dev Raj, (2000) I CLT 114

order to determine whether that departure was justified[20]. The liability of doctor may be civil or criminal or both. A doctor can be held guilty or liable for criminal liability if there is a very high degree of negligence on his part. Whereas the civil liability for medical negligence is concerned, there is no difference among a private nursing Home / Government Hospital / Dispensary / Health Centre which is rendering medical services, provided their services is within the ambit of this Act[21].

Judicial Attitude

Judiciary has been assigned a place of eminence under Indian Constitution. It has opened new vistas on consumer Protection in the area of service provided to potential users. A perusal of cases demonstrates how issues concerning medical services have been responded to by different forums and courts of India.

In *Achutrao Haribhau Khodwa v State of Maharastra*[22], Supreme Court held that:

A medical practitioner has various duties towards his patient and he must act with reasonable degree of skill and knowledge and must exercise a reasonable degree of care. This is the least which a patient expects from a doctor. The skill of medical practitioner differs from doctor to doctor. As long as doctor acts in a manner acceptable to the medical profession and attends on the patients with due care skill and diligence and patient still does not survive or suffer a permanent ailment, it would be difficult to hold the doctor to be guilty of negligence but if doctor acts negligently and carelessly, then in such a case an action would be maintainable.

In *Dr. M. P Subramaniam v Dr. B Krishnarao*[23], the National commission held that doctor can be held guilty of medical negligence only when he falls short of standard of reasonable medical care. When there are genuinely two possible schools of thought about management of clinical situation, the court could do greater disservice to the community or the advancement of medical science than to place a hallmark of totality upon one form of treatment.

In *C. Shivakumar v Dr. Jatin Arthur* [24], the complainant, a 23 years old boy

20 *Clark v. Maclenna,* (1983) I All ER 416

21 *Prasanth v Nizam's Institute of Medical Sciences, Hyderabad*, 1(1999) CPJ 43 (NC)

22 (1996) 2 SCC 634

23 (1996) 2CPJ 233 (NCDC)

24 1998(3) CPR 436

approached Dr. John for blockage in passage of urine who look him to another clinic for operation. After the operation there was over bleeding from the male organism and ultimately he had to be admitted to Jipmer Hospital. The Hospital authorities reported the matter to the police as his organism had been cut off and only a stump has been left and passage of urine was only through an artificial hole made at Jipmer Hospital resulting in permanent impotent. The court awarded compensation of Rs. 8 lakhs. In *Dalbir Singh v, State of Haryana*[25], Supreme Court observed that all those who are professionals must be kept under constant reminders of their duty to adopt utmost care and also of the consequences be falling them in cases of dereliction and one of the most effective ways of keeping such persons under mental vigil is to maintain deterrent element in sentencing such persons in the forms of penalty, therefore any leniency shown to them in that sphere would tempt to commit frivolous and frolic act. He must constantly inform himself that he cannot afford to have a single moment of laxity or inattentiveness, when he is attending to his duties.

In Rishi v Pushpa[26], organ of the pregnant woman was removed during termination of pregnancy, it was held to be a case of criminal negligence. In another case where fifty two persons were operated for cataract in a free eye camp and out of which fourteen person lost their vision due to negligence of doctor, staff and defective functioning of equipment used for operation, the doctor concerned and hospital were held jointly and severally liable[27]. *In M. Chinnayan v. Sri Gokulam Hospital*[28], the complainant was suffering from bleeding uterus and was given two unit of blood transfusion before hysterectomy which was found to be contaminated with HIV virus. The negligence and deficiency in service was proved beyond doubt and the complainant was awarded Rs. 4 lakh as compensation. *In Marpin F. D' Souza v Mohd. Ishfaq*[29], S C issued directions to the consumer courts, "Whenever a complaint is received against a doctor or hospital by the consumer fora or by criminal court then before issuing notice to the doctor or hospital against whom the complaint was made, the consumer forum or criminal court should first refer the matter to a competent doctor or a committee of doctors specialized in the field relating to which medical negligence is attributed and only after that doctor or committee reports that there is a prima facie case of medical negligence, should issue notice to the concerned doctor or hospital".

25 AIR 2000 SC 1677
26 111(2005) CPJ 193 Del.
27 Sarvat Ali Khan v R. Gogi, 111(2007)CPJ 179(NC)
28 III (2007) CPJ 228 (NC)
29 I (2009) CPJ 32 (SC)

However, a subsequent Bench of Supreme Court through an illuminating judgment[30], came to the rescue of the consumers by holding that the general directions issued in *D' Souza* case are, with great respect, inconsistent with the directions given in Mathew[31] case, which is a larger bench and also inconsistent with the principle laid down in another land mark case of *Indian Medical Association*[32]. This judgment gave a great relief to the consumers and consumer activists dealing with medical negligence cases. The cases of medical negligence can be exemplified by leaving of foreign body in abdomen[33], Child born after sterlization[34], non-removal of kidney stone as advised[35], legs of child burnt[36], Loss of leg[37], Kidney damaged by wrong transfusion[38], Scissors found in body on cremation[39], sponge left in abdomen[40], uterus removed without justification[41], etc, and the list is endless. A perusal of these cases make it amply clear that the medical professionals have not been given a free rein to do as they please and the treatment of the doctors at par with other human beings instead of giving them special privilege[42].

In *State of Punjab v. Shiv Ram*[43], the couple filed an appeal in the Supreme Court against the State of Punjab and the lady surgeon on account of the birth of a female child despite tubectomy operation. The State pleaded that the pregnancy occurring after sterilization may be attributed to natural causes as reflected in medical science literature, the supreme court over-ruling the decisions pronounced by the high court and the courts below opined that they were wrong in making assessment and awarding damages. However the court gave the suggestion that the State government should popularize family planning programmes and should provide some solace to the people.

In Kus*um Sharma v. Batra Hospital*[44], an appeal was filed against the decision

30 *V. Krishna Rao v. Nikhil Super Specialty Hospital*, 111 (2010) CPJ I SC
31 *Jacob Mathew v. State of Punjab* , (2005) 6 SCC I
32 *Indian Medical Association v. V. P Shantha*, (1995) 6 SCC 651
33 *Smt Roshni Pritam v. Dr. R. T Kulkarni*, 111(1996)CPJ 441 (Karnataka)
34 *State of Haryana v. Smt. Santra*, 1(2006)CPJ 53 (SC)
35 *Kidney Stone centre v. Khem Singh*, 11(2001) CPJ 436 (Chandigarh)
36 *P. N. Ashwani v. Manipal Hospital, Banglore*, 1(1997) CPJ (Karnataka)
37 *Gugusewak Singh v. Dr. Jaskaran Singh*, 111(1996) CPJ 3000 (Punjab)
38 *Jaspal Singh v. P. G. I Chandigarh*, 11(2000) CPJ 439
39 *Nihal Kaur v. Doctor, PGI Chandigarh*, 11(2000) CPJ 112
40 ALeyamma Verghese v Dewan Bhadur Dr. V Verghese, 111(1997)CPJ 165 (Kerala)
41 *Lakshmi Rajan v. Malar Hospital Ltd.*, 111(1998)CPJ 586 (TN)
42 Varsha Narasimhan, " Supreme Court and Medical Negligence- Necessary or Licence to kill", Juris on line, 2009, accessed on 25th June, 2014.
43 AIR 2005 SC 3280
44 (2010) 3 SCC 480

of National Commission rejecting the complaint for compensation in favour of the appellant, wife of the deceased, on account of deficiency in service and medical negligence in the treatment of the deceased. The deceased, Mr. R.K.Sharma, was senior operation manager in Indian Oil Corporation, who was operated in the Batra Hospital for the benign tumour of the left adrenal. However during the operation the pancreas of the deceased was damaged and was treated for that. He was operated again and afterwards received number of treatments at his own will without following the proper advise of the operating hospital. He later on developed complications and breathed his last on the way to hospital. The Supreme Court quoted with approval the points in determination of medical negligence as under:

I. The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.

II. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

III. In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.

IV. 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 lesser risk but higher chances of failure. Just because a professional looking to the gravity of 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 to negligence.

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. Relying on these observations the court upheld the decision of the national commission in dismissing the complaint of the appellant.

In *Balram Prasad v. Kunal Saha*[45], the supreme court has aptly debated and discussed the quantum of compensation to be paid in cases of medical negligence

45 (2014) 1 SCC 384

as reasonable compensation. In this case various appeals were filed in the supreme court by the doctors, Advance Medicare Research Institute and the husband of the deceased challenging the reasonableness of compensation determined by the National Commission on the basis of the remand of the case titled, Malay Kumar Ganguly *v.* Sri Kumar Mukerjee[46]in determining the rival claims , the apex court determined the reasonable compensation under various heads as under:

Loss of the income of the deceased	Rs. 57200550
For medical treatment	Rs. 700000
Travel and hotel expenses	Rs. 650000
Loss of consortium	Rs. 100000
Pain and suffering	Rs. 1000000
Cost of litigation	Rs. 1150000

The supreme court justified the compensation under loss of income on the ground that the deceased was a foreign national earning around S 30,000 per month, the other expences were determined depending upon the bills and vouchers produced and the past precedents by the court especially the compensation for pain and suffering which was determined in *Nizam Institute of Medical Sciences v. Prasanth S. Dhanaka*[47]. Therefore a high amount of compensation was justified by the apex court.

Conclusion and Suggestions

Supreme Court by uploading the constitutional validity to the Consumer Protection Act, 1986, has bestowed recognition and credibility to the adjudicatory process of consumer courts in settling consumer disputes[48]. Court has also set at rest the controversy relating to the applicability of the Act to the medical profession by categorically holding that "the service rendered to patient by a medical practitioner would fall wit in ambit of service under the Act[49]. The Consumer Protection Act is not a magic stick to provide relief to the consumer. Though judiciary is playing promotional role to protect the interest of the consumers but the people need to be educate so that proper recourse could be taken. The Consumer Protection Act is proving out to be double edged weapon for medical professionals. Proper judgment, precautions, patient detail, diagnostic test, treatment given and consent

46 (2009) 9 SCC 221

47 (2009) 6 SCC 1

48 *State of Karnataka v. Vishwa Bharti House Co-operative Society*, AIR 2003 SC 1043

49 Professor M. K. Blachandran, "Contentious judgments and their Impact on Consumer and Consumer courts", 1-2, 8(I) ALR 20012

from patient or his guardian can save a doctor from litigation. Doctors are human being, hence can commit an error while examining patient. Doctors should not be frequently called upon to answer charges having criminal or civil consequences as it would frustrate and render ineffective the functioning of the medical profession as a whole and if the medical professionals are checked by threat of action, the consequences will be devastating for the people and no doctor would take a risk, a justifiable risk in the circumstances of a given case[50]. Furthermore these decisions have made the medical professionals extra-cautious and they are making the patients undergo multiple tests which is putting extra economic burden on the ever suffering patients. The courts have shown no hesitation to give verdict if there appears to be an act of negligence on part of the doctor. In fact a balance needs to be struck between the medical needs of the public and care and attention by the doctors. It has been rightly observed by the apex court[51] that it would not be conducive to the efficiency of the medical profession if no Doctor could administer medicine without a halter round his neck. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessary harassed or humiliated so that they can perform their professional duties without fear and apprehension. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurizing the medical professionals/hospitals particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners. 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 welfare of the patients have to be paramount for the medical professionals. State should immediately focus its attention towards accumulation of plethora of complaints against corporate and super specialty hospitals, fleecing the patients that are pouring in, relating to unethical, unfair and unprofessional practices and after taking stock of the situation initiate necessary remedial measures.

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50 Juthika Debbamma, Neha Gupta, N. K. Aggarwal, " Consumer Protection ACT – Blessing or curse to Medical Profession", Delhi Psychiatry Journal, 302-305, vol.12 no.2,Oct.2009

51 Supra note 44

E-Commerce and Copyright Regime: An Analysis

Dr. Sanjiv Kumar Sinha[1]*

Legal recognition of the practices of e-commerce has come from the initial adoption of UNCITRAL's Model Law of Electronic Commerce by the United Nation's General Assembly. Its purpose is to encourage the use of electronic commerce and to provide nations with model legislation governing the use of alternatives to paper based methods of communication and storage in information[2]. It is based on functional equivalent approach and extends notions such as writing, signature and origin of traditional paper based requirements to a paperless world. It also gives legal acceptance to electronic records and digital signature.

India became the 12th country in the world to adopt the UNCITRAL's Model Law on Electronic Commerce on October 12, 2000. The Information Technology Act, 2000 is based on the Model Law on Electronic Commerce[3].

In the early 1960s, computers were increasingly used to disseminate information across geographical space. Though telegraph, telephones, telex and facsmile were still relied upon options, nevertheless the big corporations opted for Electronic Data Interchange (EDI). It refers to the progress by which goods are ordered, shipped and tracked computer-to-computer using standardised protocol EDI permits the "electronic settlement and reconciliation of the flow of goods and services between companies and consumers".

EDI began in the 1960s as a computer-to-computer means of managing inventory, bill presentment, shipment, orders, product specifications and payment. EDI is made possible because trading partners enter into master agreements to employ electronic messaging permitting computer-to-computer transfers of information and validating computer-to-computer contracts. But due to lack of universal standards made it difficult for companies to communicate with many of their trading partners.

In late 1970s, the American National Standards Institute (ANSI) authorised a committee called the Accredited Standard Committee (ASC) X-12 (consisting of government, transportation and computer manufacturers) to developed a standard between trading partners. The standard was called ANSI X-12).

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2 The legal frameworks & challenges, www.unescap.org/tid/publication/tipub 2348_part I*V*.pdf

3 http:// www.uncitral.org/uncitral/en/uncitral_texts/

In 1986, under the aegis of United Nations organisation from different sectors collaborated and developed an internationally approved standard structure for transmitting information between different trading partners ,called the United Nations Electronic Data Interchange for Administration, commerce and Transport (UN/EDIFACT). It ensures transmission compatibility of electronic business documents globally.

The EDI was like a business-to-business (B2B) model involving a company and its various vendors performing commercial transactions using proprietary networks. By late 1980s computers required the status of 'personal computer' i.e became part of private domain of an individual. It was EDI at the individual level supported by the public networks known as Internet.

Hence, e-commerce evolved out of EDI and should be considered as a next logical step in the development of commercial processes involving commercial transactions.

Definitions of e-commerce:

E-commerce is a 'commerce based on bytes'. Simply e-commerce is the commercial transaction of services in an electronic format. In general terms, e-commerce is a business methodology that addresses the needs of organisations, traders and consumers to reduce costs while improving the quality of goods and services and increasing the speed of service delivery. It may also be referred to as the paperless exchange of business information using Electronic Data Interchange, Electronic Fund Transfer etc. E-commerce is not only about simple transactions of data but also general commercial acts such as publicity, advertisements, negations, contracts and fund settlements[4]. The World Trade Organisation (WTO)[5]. Ministerial Declaration on E-Commerce defines e-commerce as:

"The production, distribution, marketing, sales or delivery of goods and services by electronic means."

The six main instruments of e-commerce that have been recognised by WTO are telephone, fax, TV electronic payment and money transfer systems, EDI and the internet.

According to European Commission[6], E-Commerce encompasses more then the purchase of goods online. It includes a disparate set of loosely defined

4 Sharma, Vakul, Legal dimensions of cyberspace JILI 2004.p.51

5 . www.wto.org

6 http://europe.eu.ing.

behaviours, such as shopping, browsing the internet for goods and services gathering information about items to purchase and completing the transactions. It also involves the fulfilment and delivery of those goods and services, and enquiries about the status of orders.

But Directive on E-commerce[7] defined the term 'commercial communication' instead of defining 'E-Commerce' under Article 2 (f) as any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession.

The Gartner Group[8]. defines e-commerce as an evolving set of –

a) Home-grown or packaged software application that link multiple enterprises or individual consumers to enterprises for the purpose of conducting business.

b) Business strategies aimed at optimizing relationships among enterprises and between individual and enterprises through the use of information technologies.

c) Business processes (such as procurement or selling or order status checking or payment) that, by definition, cross boundaries, and

d) Technologies and tools that enable these applications, strategies and processes to be implemented and realised.

Types of E-Commerce Models:

E-Commerce can be categorised in four ways:

1. Business to Business (B 2 B);
2. Business to Consumer (B 2 C);
3. Consumer to Business (C 2 B); and
4. Consumer to Consumer (C 2 C).

1. Business –to- business (B 2 B)

It is a business platform involving two independent or even dependent business entities. It acts as a business facilitator, negotiator and dealmaker, which facilitates negotiates and clinches deal between independent or dependent business units.

7 2003/31/EC

8 www.Gartner.com

2. *Business- to- consumer (B 2 C)*

It is also a business platform, involving a business entity and consumers. It is a retail version of e-commerce-selling goods or services through web based shops. It is based on the concept of 'shopping at convenience'. It is also known as e-tailing.

3. *Consumer- to- Business (C 2 B)*

It is kind of retail marketing platform, where a business entity seeks or rather chases consumers actively. It is a pro-active version of e-commerce in the sense that it is 'customer chaser', offering customers deals, packages or bundle of products at competitive prices. Moreover, it negotiates or bids by offering best possible deals to the customers. It also referred to as 'reverse auction'.

4. *Consumer-to-Consumer (C 2 C)*

It represents a consumer business platform, where one consumer acts resource person selling goods in an online medium to other customers at a price. This may also be called as consumer 2 consumer auctions.

A very basic formulation of the way that the copyright laws of most nations relate to electronic communications is that 'there will be a copyright infringement when individual copies a work held in electronic format without the authority of the copyright holder[9].'

E-commerce has opened up entirely different dimensions affecting copyright and related issues of intellectual property rights. They are[10]

1. **Fixation**: Fixation along with originality and creativity is an important criterion for obtaining copyright in the USA. In India the Copyright Act is silent on the requirement of fixation. Section 17 (cc) of the Copyright Act mentions that where a person has delivered any address or speech in public that person would be the first owner of copyright. There is no mention that the speech should be reduced to writing for obtaining such protection. However, commentaries on the copyright Act have indicated that copyright in a lecture will exist only if it has been reduced to writing[11]. In the realm of online communication, many works are transient as

9 Berene Convention, Art.9(1):'authors of literary and artistic works...shall have the exclusive right of authorizing reproduce on these works, in any manner or form'

10 Partha Sarathi misra ' E-commerce & Its Copyright issues', http://ssrn.com

11 Narayanan P., Copyright and Industrial Designs, Eastern, Law House, 2010, pp.20 and 30

they are stored temporarily on the Video RAM ("VRAM") of the display monitor. It is unclear whether such temporary storage would amount to fixation and consequently whether copyright protection would extend to such work Indian law.

2. **Publication**: Publication means available to the public through issue of copies or by communicating the work to the public. The date of publication is important as the term of copyright begins from such date. In case the work is put on the web, it would amount to a publication as per the Indian law. However, a question would arise on the place of publication. If any work is published in India and some other country simultaneously, the work is deemed to be published in India, unless the other country affords copyright protection of a shorter period than that granted under Indian law. In such event, the work is deemed to be published in that other country. When a web site is set up, it is simultaneously accessible throughout the world. If any country offers a period of copyright protection which is less than under the Indian law, then all work published via Net may be deemed published in such other country. If this country does not grant any protection to India copyright, the India may not recognize such copyright.

3. **Parallel Imports**: Under the Copyright Act, parallel import is not permitted it is for domestic use. The terms "import" and "importer" have not been defined in the Copyright Act but Courts have held "import" to mean bringing into India from outside India[12]. The Copyright Act may allow every person in India to download one copy for domestic use.

4. **Rights Management Information (RMI)**: RMI is information that identifies the work, the author of the work, the owner of any right in the work, and any numbers or codes that represent such information. RMI would allow the copyright owner to trace the copy and know if the copy is an infringing copy or not. The WIPO Treaty makes it obligatory for signatories to provide protection against removal and alteration of any electronic RMI without authority. India has made it mandatory to display particulars of the work and the copyright owner on the container while publishing any sound recording and cinematograph film[13]. It is however, silent on electronic rights.

5. **Fair dealing and implied license**: While surfing the net, the content of the web

12 Gramophone Company of India Ltd. V Birendra Bhadhur Pandey, AIR 1984 SC 667.

13 . Sec. 52 (A) of the Act.

site is stored on the VRAM of the computer. It may amount to reproduction and such unauthorized reproduction may be considered as an infringement. The Copyright Act[14] allows the lawful possessor of computer programs to make copies or adapt the program in order to use it for the intended purpose. It also allows the possessor to create backup copies purely as at a temporary protection against loss, destruction or damage. Thus, Keeping a temporary copy of the program in RAM or VRAM would be permissible under the Copyright Act. Section 52 of the Copyright Act which deals with acts not amounting to infringement of copyright, lays down that any fair dealing with respect to literary, dramatic, musical or artistic work for the purposes of private use including research or criticism or review would not constitute infringement. Thus, reproduction of the copy in RAM or VRAM may be claimed for personal use and may be deemed as fair dealing.

6. **Domain Names**: Recently, many companies have faced problems as cyber squatters hijacked their trademarks as domain name. In a recent case, the trademark 'tanishq' was registered by a Tata group company, Titan Industries. A cyber squatter hijacked the domain name tanishq.com. Indian court have clearly said that domain names are similar to trademarks[15]. However, if the cyber squatter is a non-resident, the company may be able to obtain protection if such trademark is registered in that country, and if the trademark is not registered, then under the common law remedy relating to passing off [16].

7. **Meta tags**: A very popular method to find information on the Internet is by using search engines. A search engine uses key words to find information. For example, if a user wants to find the site of 'MTV' and does not know the URL, he uses a search engine and types in the key words 'MTV'. Some search engines use 'Meta-tags' to find and index web pages. Meta-tags are the key words that are encoded into the HTML, but do not appear on the web page. When any user searches for 'MTV' all the sites with 'MTV' in the Meta-tag would turn up as hits.

Protection to e-commerce

Copyright law has been adapted to protect Internet items, just as it has been adapted through the years to protect various other new mediums. It protects original work or work that is fixed in a tangible medium, meaning it is written, typed, or recorded[17].

14 Sec. 52 (aa).
15 Yahoo *v.*Akash Arora(1999)High Court of Delhi.
16 Ibid
17 . Supra, note 3 at p. 114

International Conventions

International copyright law rested on the Berne Convention for the Protection of Literary and Artistic Works and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 1995. Since 1974, the international copyright instruments have been managed by a special United National agency-the World Intellectual Property Organization (WIPO). WIPO's objective, is to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with other international organizations[18].

The Berne Convention:

The first attempt to harmonize copyright law at a global level dates back to adoption of the Berne Convention in 1886. The Convention established a minimal level of copyright protection for the member nations to follow and adopted the "national treatment policy". The treaty also established that the International Court of justice in the Hague ("Hague Court") would exercise jurisdiction over disputes between member nations, but the Treaty left nations free to declare their immunity from the jurisdiction, and many states have done so.

The TRIPS Agreement:

The General Agreement on Tariffs and Trade ("GATT") has also addressed copyright issues, in parallel to WIPO. As copyright was becoming increasingly important in shaping international trade with the advent of the information society, the 1994 Uruguay Round of GATT produced TRIPS-the Agreement on Trade-Related Aspects of Intellectual Property Rights. The same Round also instituted the World Trade Organization (WTO). The TRIPS Agreement adopts portions of the Bern, Rome and Paris Conventions in enunciating norms for intellectual property laws. Article 9.1 of TRIPS Agreement provides that, "Members shall comply with Articles 1 through 21 of the Bern Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this agreement in respect of the right conferred that Convention or of the right derived there from". So it is clear that the approach taken in the copyright provisions of the TRIPS Agreement is to adopt the regime of copyright protection provided in the Bern Convention. Article 10.1 provided that, "Computer programs, whether in source or object code, shall be protected as literary works under the Bern Convention." Article 10.2 further provides that, " Compilation of data or other material, whether in machine

18 Study of intellectual Property Rights, the Internet and Copyright www.iprocommission.org/papers/pdfs/study.../sp5 story study.pdf

readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such."

World Intellectual Property Organization: (WIPO):

WIPO is an organization of the United Nations (UN). Before its establishment, there were many organization established under certain individual organs like the Assembly of Paris Union, the Executive Committee and the international Bureau of Bern which were later united in an organization called 'Bureau Internationaux Reunis Pour La Protection de la Propriete Intellectuelle' known as 'BIRPI'[19]. WIPO's activities are of four kinds: registration, promotion of inter-governmental cooperation in the administration of intellectual property rights, specialized program activities and latterly, dispute resolution facilities. In 1996, member countries found it necessary to form a treaty to deal with the protection of copyright evolvement of new technology[20].

WIPO Copyright Treaty, 1996:

This treaty was adopted by the Diplomatic Conference at Geneva on December 20, 1996.It is a special agreement within Article 2 of the Bern Convention. It is related to digital technology and the Internet. The WIPO copyright treaty is a special agreement amongst the member countries to grants authors more extensive rights than those granted by the Bern Convention. Article 4 of the treaty provides that, "Computer programs are protected as literary work within the meaning of Article 2 of the Bern Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression." [21] Article 5 further states that "compilations of data or other material, in any form, which by reason by the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or material itself and is without prejudice to any copyright subsisting in the data material contained in the compilation. "WIPO Copyright treaty generally covers all kinds of computer programs and not just the object code or source code of computer programs as it was in TRIPS Agreement[22]. So it can be said that ignoring the minor changes adopted by WIPO Copyright Treaty, it is not inconsistent with the TRIPS Agreement[23].

The Digital Millennium Copyright Act (DMCA):

19 Jain.Pankaj & Rai.Pandey Sangeet, Copyright &Trademark Laws relating to Computers.(2005)p.85
20 Supra.note 10
21 Ibid.at p.86.
22 Ibid
23 Id

The Digital Millennium Copyright Act (DMCA) was adopted in October 1998 to implement the United States' treaty obligations under the WCT and the WPPT and to "move the nation's copyright law into the digital age.[24]" The DMCA:

1. makes it a crime to circumvent anti-piracy measures built into copyrighted material, while permitting the cracking of copyright protection devices to conduct encryption research, assess product interoperability, and test computer security systems, and providing exemptions from anti-circumvention provisions for non profit libraries, archives, and educational institutions under certain circumstances;
2. Outlaws the manufacture, sale, or distribution of code cracking devices used to illegally copy software;
3. Protects Internet service providers from copyright infringement liability for simply transmitting information, and limits the liability of non profit institutions of higher education-when they serve as online service providers and under certain circumstances-for copyright infringement by faculty members or graduate students, while requiring service providers to remove material from their systems that appears to constitute copyright infringement; and
4. Requires that "web casters" pay licensing fees to record companies.[25]

Indian Perspective*:*

Section 13 and 63 of Indian Copyright Act. 1957 literary works, pictures, sound recording and other creative works are protected from being copied without the permission of the copyright holder. It is yet unclear how copyright law governs or will govern these materials as they appear on the Internet[26] . The Copyright Act,1957 does not deal with the liability of ISPs at all. Till now, position in India was indefinite with respect to liability for copyright infringing third party content. With the advent of IT (Amendment) Act, 2008 there is a significant clarification regarding the scope of immunities are not only available with respect to offences under the IT Act, 2000 but even for the liabilities arising under any law. Section 79 of the IT Act exempts ISPs from liability for third party information or data made available by him if the ISP had no knowledge of the offence committed or if the ISP had exercised 'all due diligence' to prevent any infringement. Amended Section

24 Copyright and the Internet- Global Internet Policy Initiative, http://www.internetpolicy.net/prac ces/ 20041200copyright.pdf

25 The Digital millennium Copyright Act-Overview, http://www.gseis.ucla.edu/iclp/dmca1.htm.

26 Copyright software & internet, nopr.niscair.res.in/bitstream/.../1/JIPR%2013(1)%20(2008)%2035-42.pdf

79 states that subject to the exceptions, an intermediary shall not be liable for any third party information, data, or communication link made available or hasted by him. The liability of ISPs find mention in Section 79 of the Information Technology Act, 2008 as follows;

(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hasted by him.

(2) The provisions of sub-section (1) shall apply if-

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or tempo stored or hasted; or

(b) the intermediary does not-

(i) initiate the transmission,

(ii) Select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission;

(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

The exceptions are:

1. The intermediary has conspired or abetted in the commission of the unlawful act; or

2. Upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner. Means in the above two situation, the ISPs will be made liable.

The amendments to Section 79 of the IT Act contains non obstinate clause i.e. "Notwithstanding anything contained in any law for the time being in force" and accordingly it gives a protective shield to ISP against liability arising due to some other legislation. At the same time the amended section 81 has a proviso- "Provided

that nothing contained in this Act shall restrict any person from exercising any right conferred under the Copyright Act, 1957 or the Patents Act, 1970." The interpretation of this section is that it is to keep the primacy of the Patent Act and the Copyright Act over legislation is Copyright Act over the Information Technology Act. We can Correlate the section 79 and 81 by inferring that other legislation is Copyright Act. Both the section counter each other but a careful and finer study will justify that the section 79 has been amended to give more relaxation to ISPs[27] .

Basically, section 79 of the amended act has been framed in accordance with EU Directives on E-Commerce to determine the extent of responsibility of intermediaries for third party data or content. The objective of the directive is to promote free flow of information between the member states. The EU Directive provides for the liability of the intermediaries in a very detailed manner, which includes not only intellectual property rights and associated liabilities but also general content liability. The motivation behind the EU Directive on electronic commerce information society services (ISS), ensure legal certainty and consumer confidence through the coordination of national laws, and clarify legal concepts for the proper functioning of the internal market, in order to create a legal framework to ensure the free movement of ISS between Member States. Under the E-Commerce Directive, an ISP is exempt from liability when it serves as a "mere conduit" (Article 12) or provides "temporary caching" (Article 13) for the sole purpose of making the transmission of content more efficient, is of a mere technical, automatic and passive nature, and where the ISP has neither knowledge nor control over the content being transmitted or stored. The conditions under which a hosting provider is exempted from liability, as stated at Article 14(1)(b) from the basis for the development of "notice and take down" procedures by copyright owners to ISPs to remedy instances of infringement[28] .

Copyright on Databases

In India databases are protected as literary works. In US if author is creative in selecting and arranging the data and does not merely display the data as facts will be registered. In UK a database which lacks creative input and requires only modest skill and labour acquire the right of unfair extraction for a period of 15 years only. While data created by full creativity copyright protection is given i.e. life of author plus 70 years. Compilation of data are themselves not protectable can be the subject of protection when there is the necessary selection coordination and

27 Fair Use in the Digital Era, webworld.unesco.org/infoethics2000/documents/paper_correa.rtf
28 Ibid

arrangement and combined it with the abstraction, filtration and comparison test[29]. Through internet the work of authors can be displayed in different jurisdictions and which is very difficult to detect. So the display rights can be easily violated over Internet.

Specifically Section 43 of the Indian Information Technology Act. 2000 imposes liability "to pay damages by way of compensation not exceeding one crore rupees to the person so affected" if "any person without permission downloads, copies, or extracts any data, computer database or information from such computer, computer system or computer network." The section defines "database" as the "representation of information, knowledge, facts, concepts, or instructions prepared in a formalized manner." Computer database means a representation of information, knowledge, facts, concepts or instruction in text, image, audio, video that are being prepared or have been prepared in a formalized manner and have been produced by a computer, computer system or computer network[30] . Though this section can be applied for electronic databases, its effectiveness is still to be tested for granting protection to databases or data on the Internet.

In India, a member of the Berne Convention and TRIPS Agreement, the requirement of originality in selection or arrangement of the contents of the database is required to attract copyright protection. Furthermore, the Copyright Act provides that copyright shall subsist in original works of authorship. Under Section 2(0) of the Copyright Act, "computer database" is included in the definition of "literary work"[31] .

Case Stydy *:*

In the Google & T-Series Case, the Indian IRP regime has not witnessed any case with regards to the present issue but recently in the year 2007, T-Series brought a case against You-Tube and its parent company Google Inc. for earning profits at the expense of its rightful copyright owner by allowing its subscribers to upload T-Series copyrighted materials without obtaining any license or permission from T-Series. T-Series with its rapid expansion had a forward looking approach to the copyright law & was the plaintiff in this case. The facts giving rise to the actions brought by T-Series is that the users of you-tube posted certain materials on www.youtube.com, which were under copyright of T-Series. In the ordinary course of events,

29 Copyright Infringement in Cyberspace And Network Security: A Threat To E-commerce, www.legalserviceindia.com/.../1462-**Copyright-Infringement-in -Cyberspace-&-Network-Security** .html

30 See Explanation on (ii) of Sec on 43 of the Information and Technology Act, 2000.

31 Database & its implication on, http://www.unc.edu/courses/2006spring /law357c/001/projects/dougf/nod1.html

T-Series should have proceeded against the user who posted such materials. Under Sec. 51 of the Indian copyright Act, this could be taken as infringing the copyright by the user. However, Sec. 63 of the Act also includes within its scope abetment of infringement. Thus, as is the usual trend in such cases, instead of suing the user, which would prove to be fruitless in terms of the ability to pay compensation, T-Series under its parent company Super cassesates Industries Limited (SCIL) brought an action against You Tube & its parent company Google Inc. at the Delhi High Court. The Delhi High court passed an interim order of injunction restraining You Tube from reproducing, adapting, distributing & displaying on their websites or otherwise infringing in any manner any audio visual works in which SCIL owns exclusive, valid and subsisting copyright. The injunction was passed on the grounds that You Tube and Google incurred pecuniary benefits by making the copyrighted songs of T-Series available for free of cost on their website, which contained advertisements, without obtaining any license or permission from SCIL who earned profit from selling these copyrighted songs in market in the form of DVDs & CD's.

In Himalaya Drug Company *v.*Sumit[32] the plaintiff in this action was an Indian company carrying on business in the field of manufacturing and marketing herbal medicinal products. In connection with its business, the plaintiff had compiled a herbal database which was posted on its web site. An Italian infringer illegally copied the herbal database and posted the same on its own web site hosted by a US server. The Indian company sued the Italian infringer through its us server/ISP, claiming:

- That the herbal database compiled by it was an original literary work under the Indian Copyright Act;
- That the Italian infringer had unauthoringly copied the original database and thereby violated the Plaintiff's rights of distribution and communication to the public;
- That the infringing copies of the defendant's web site were accessible to Internet users in Delhi; and
- That the High court of Delhi had the jurisdiction to entertain and try the suit in exercise of its personal jurisdiction over the overseas defendant.

The High Court of Delhi granted an ex parte injunction against the defendant

32 [2006PTC112(Del)],

restraining it from reproducing the Plaintiff's copyright in its herbal database. Thereafter, the plaintiff served a copy of the order on the US based ISP and requested it to deny access to or disable the infringing web site in accordance with the Digital Millennium Copyright Act which contains notice and take down provisions on fulfilment of certain conditions. Upon receiving the notice, the US ISP/server removed the impugned web site.

CONCLUSION

E-Commerce is growing worldwide. Economics of scale and scope are also easier to obtain online than offline. The development and growth of online means of transmission of copyrighted works over the Internet has thrown up a superfluity of issues of immediate relevance to the Indian business interests and it is essential for India to amend the present Copyright Act to strengthen the protection.

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'Access and Benefit Sharing' and Nagoya Protocol: The Myth and Reality

*Dr. Ravi Kant Mishra**

Introduction

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (the Protocol),[1] was negotiated with the aim of providing for 'fair and equitable sharing of the benefits arising from the utilization of genetic resources',[2] and has been hailed as marking the 'end of bio-piracy' - providing new recognition for farmers, rural agricultural communities, and traditional knowledge holders[3]. This optimistic perspective gives priority to the production of law at the expense of analysis of its content and construction.[4] Therefore in search of a more textured interpretation of the developments in Nagoya, this paper proposes that the provisions of the Protocol should be interpreted in the context of the broader political economy of intellectual property. It can be understood in the real sense that the access and benefit sharing (ABS) regimes which was codified by the Nagoya Protocol was specifically designed to 'regularize' traditional knowledge and local customary rights over genetic resources with the dominant rights based international intellectual property (IP) regime which is composed of the World Trade Organization (WTO), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and the World

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1 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity, Nagoya, 29 October 2010, retrieved from http://www.cbd.int/abs/text/ [Nagoya Protocol] (last accessed on Dec. 13, 2015 at 08:00 hrs). See also, for details, Convention on Biological Diversity, Rio De Janeiro, 5 June 1992, 31 *Int'l Leg. Mat.* 818 (1992) [CBD].

2 Nagoya Protocol, 2010, Article 1.

3 "Statement on Close of UN Biodiversity Summit in Nagoya, Japan", Friday 29 October, 2010, available at http://www.greenpeace.org/international/en/press/releases/Statement-on-Close-of.UN-Biodiversity-Summit-in-Nagoya-Japan/ (last accessed on Dec. 17, 2015 at 22:00 hrs.); For details, see also KabirBavikatte and Daniel F. Robinson, "Towards a People's History of the Law: Bio cultural Jurisprudence and the Nagoya Protocol on Access and Benefit Sharing", *Law, Environment and Development Journal,* Vol.7 No.1,2010, p. 35.

4 The North-South divisions that have dogged the climate regime also define the ideological territory of the CBD, not least regarding the key issue of finance. *See* Dinah Shelton, 'Equity', *in* Daniel Bodansky et al, *The Oxford Handbook of International Environmental Law,* Oxford University Press, 2007, pp.639-662 at p. 650.

Intellectual Property Organization (WIPO).[5] However, the irony is this that instead of creating equal rights for local and indigenous communities, this Protocol has successfully succeeded in creating a set of stringent, conditional and subservient obligations attached to conventional intellectual property rights (IPRs), which in turn has put these communities in a state of legal dependency. It is assumed that the Nagoya Protocol provides a significant gain for the developing states towards the shifting narrative of international negotiations, the ABS system which it propagates in international law categorically excluded the local and indigenous communities from legal rights to intellectual and 'genetic resources'[6]. The Nagoya Protocol has been emerged from a process of 'regime-shifting', whereby developing states have reacted to the strengthening of the international IP regime by raising concerns about IPRs in an 'expanding list of international venues'.[7]Throughout the developing world TRIPS has resulted in the expansion of the allocation of property rights over genetic resources and associated knowledge. However there has been a failure to allocate equivalent rights to traditional agricultural communities. It is interesting to note that the developing states have asserted sovereign rights over genetic resources through the CBD at the same time as investing in industrial knowledge protection standards under TRIPS. Thus removing legal control over the use and exploitation of genetic and intellectual resources from indigenous communities and creating a state of dependence of those communities on the beneficence of the state.[8]It cannot be denied that the ABS structures (as found in Nagoya Protocol) may have improved the material comfort of some indigenous communities, they can also be seen as 'institutionalizing the absence of property rights for traditional knowledge holders.'[9] The problems encountered by benefit sharing schemes in identifying rights-holders and benefit recipients, and delimiting contributions to knowledge, highlight the inherently political and arbitrary character of the ownership approach to knowledge protection and reveal the broader relationships of power and exploitation that underlie the international intellectual property system. As Brush has written,'case studies of access and

5 Marrakesh Agreement Establishing the World Trade Organization, Marrakesh, 15 April 1994, 1867 *U.N.T.S* 154,33 *I.L.M.* 1144 (1994)[WTO Agreement] convention/pdf/trtdocs_wo029.pdf [WIPO Convention].

6 For details, see, Ravi Kant Mishra, "Protection of Biological Diversity and Environmental concerns in India", in Naveen Kumar (eds), *Forest and Environment in India: Law, History, Culture and Modern Approaches,* Guwahati, EBH Publishers, 2015, pp. 19-30.

7 Laurence R. Helfer, "Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking", *Yale Journal of International Law,* Vol. 29 No.1, 2004.

8 Graham Dutfield, "Sharing the Benefits of Biodiversity: Access Regimes and Intellectual Property Rights, Science Technology and Development", Discussion Paper No.6, Center for International Development and Belfer Center for Science and International Affairs (Cambridge, MA: Harvard University, 1999).

9 Infra note 19 at p. 376.

benefit sharing efforts under the Convention on Biological Diversity indicate that new property based schemes for farmers and communities are unworkable and likely to forestall more viable approaches to address the needs of conserving genetic resources and improving rural livelihoods.'[10] By situating the Nagoya Protocol within the international political economy of intellectual property and benefit sharing, this paper demonstrates that the Protocol is understood best, not as a new horizon for local and indigenous agricultural communities, but as part of a 'reification' process of dominant IPR norms.[11] The issues surrounding protection of traditional knowledge[12] (TK) and genetic resources are intertwined; however, in the interests of concision the present paper will focus mainly on ABS system and Traditional Knowledge of the indigenous farmers. This is justifiable by the integral nature of knowledge to the productive use of genetic resources and the centrality of knowledge to the legal concepts of inventive step, novelty and individual owner ship that lie at the heart of the international IPR system.

Nagoya Protocol: Institutionalisation of Exclusion

The Nagoya summit was introduced with the intension to clarify both provider and user state a set of responsibilities in terms of both access requirements and benefit-sharing provisions. The Nagoya Protocol represents a move towards legalization of many of the 2002 Bonn Guidelines, particularly in relation to provider state obligations, the creation and legalization of user state obligation and but it is interesting to note that effective compliance procedures of such are missing or are inadequate. Despite the relatively detailed nature of the document, there is widespread use of 'escape clauses' and submission to national control('in accordance with domestic legislation') with in the core substantive provisions of the Protocol. This is a result of pressure from developed country parties and international organisations such as WIPO in the negotiation process.[13]

Access and Benefit Sharing

The Protocol lays out extensive provisions on access in its Article 6 (Access to Genetic Resources). However, the focus here appears to be limiting the scope

10 Stephen B. Brush, "Farmers' Rights and Protection of Traditional Agricultural Knowledge", CAPRi Working Paper No.36 (Washington, D.C.: International Food Policy Research Institute, 2009), p. 34.

11 Christopher May, *The Global Political Economy of Intellectual Property Rights: The New Enclosures*, London and New York: Routledge, 2010, p. 148.

12 See for details, Ravi Kant Mishra, " IPR Management of Indigenous Knowledge in Meghalaya: A Need for a Thorough Look", *Sri Lanka Journal of International Law,* Vol. 22 No. 2, pp. 69-116.

13 Evanson Chege Kamau, "Facilitating or Restraining Access to Genetic Resources? Procedural Dimensions in Kenya", *Law, Environment and Development Journal,* Vol. 2 No.1, 2009, pp. 154-55.

of the indigenous Communities and Knowledge holders upon which developing state government can set access with justification that any recognition of holders of traditional knowledge will be mediated by the provider state. Regarding benefit sharing, Article 5 of the Protocol(Fair and Equitable Benefit Sharing), requires that 'benefits arising from the utilization of genetic resources as well as subsequent applications and commercialization shall be shared in a fair and equitable way with the Party providing such resources'. Such sharing shall be provided for by legislative, administrative or policy measures, and in 'accordance with domestic legislation' be extended to indigenous and local communities. The benefits shall be either monetary or non-monetary.

Compliance and Disclosure

Provider state obligation to provide equitable benefit sharing is weak, whilst the highly qualified provisions in Articles 15 and 16 relating to user state obligations refer primarily to access. While this provides a compromise between state interests and reaffirms state sovereignty over biodiversity, the interest of knowledge-rich agricultural communities is categorically neglected. The provisions on compliance and monitoring see a significant regression regarding precision, largely as a result of resistance from user countries. The Protocol imposes, in Articles 15 and 16, obligations on user countries to take 'appropriate, effective and proportionate legislative,administrative or policy measures' to provide that genetic resources (and traditional knowledge) utilized within its jurisdiction. Article 17 mandates the establishment of 'checkpoints' to instigate monitoring and tracking of Protocol requirements. However, the Protocol has omitted a list of potential checkpoints, merely requiring that a checkpoint be situated within a body that is 'effective' and has functions 'relevant' to the subject matter of the Protocol. The listing of patent offices as potential checkpoints could have increased pressure in the international trade regime to include a mandatory disclosure requirement.[14] The internationally recognized certificate of compliance referred to in Article 17.2 is 'only partially outlined',with the list of minimum criteria reduced from earlier drafts, and a lack of clarity on whether it is mandatory or voluntary and whether a lack of certification would constitute a violation of the treaty.[15]Compliance procedures are suggested for the national level, and currently provides little assurance for provider states that user countries will 'up their game' significantly (virtually no user countries have yet made any move to create mandatory compliance procedures). Each

14 Supra note 3

15 Supra note 13.

party is required to designate a national 'checkpoint'; disclosure of use of genetic resources is made at 'any stage of research,development, innovation, pre-commercialization or commercialization'[16] rather than the immediate notification widely considered imperative.[17]Documents accepted as evidence include the proposed certificate of compliance, which as mentioned above is severely lacking in detail. The substantive content of disclosure focuses primarily on access requirements, and as mentioned above includes no obligation to disclose benefit-sharing arrangements.[18]There are currently no international compliance procedures. The mandatory (international)obligation to disclose the origin of genetic material,much discussed prior to the Nagoya negotiations and included in earlier drafts, was abandoned in the final document.[19] Article 30 specifies that such procedures are to be agreed at the first Conference of Parties, but it is merely specified that such measures are to include 'advice and assistance,where appropriate', so they appear unlikely to be of a more 'legal' character than the weak dispute settlement provisions of the CBD.[20] The legal recognition of holders of traditional knowledge are at the mercy of national legislation which has so far proved to be large lyineffectual. A multilateral system of benefit-sharing inclusive of all major users of genetic resources and associated information is essential to ensure even marginally improved legal protection for farmers and agricultural communities in developing countries,primarily because of the inability of provider countries to impose extraterritorial measures on users.[21]

Convention on Biological Diversity and Access and Benefit Sharing

The Convention on Biological Diversity[22] (CBD) developed the Access and

16 Nagoya Protocol, 2010, Article 17.1 (a) (iv).

17 Joshua D. Sarnoff and Carlos M. Correa, "Analysis of Options for Implementing Disclosure of Origin Requirements in Intellectual Property Applications", United Nations, Geneva, 2005, UNCTAD/DITC/TED/2005/14, submission to Convention on Biological Diversity, *Analysis of Options for Implementing Disclosure of Origin Requirements in Intellectual Property Applications*, 22 Dec 2005, UNEP/CBD/WG-ABS/4/INF/2.

18 Supra note 13.

19 Draft Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Status as of Noon, 27 Oct 2010.

20 The CBD mandates negotiation, good offices and mediation by a third party. Failing this, parties are referred to standard dispute settlement procedures of international law: arbitration or the ICJ. CBD, See for details, note 14, Article 27

21 Phillipe Cullet, *Intellectual Property Protection and Sustainable Development*, New Delhi: LexisNexis Butterworths, 2005, p. 158.

22 United Nations Framework Convention on Climate Change, May 9,1992,31 I.L.M. 851 (1992). 8The CBD entered into force upon the thirtieth ratification on December 29 1993. As of April 1997, 164 countries and the European Union have ratified the CBD and an additional eighteen countries have signed it. On December 29, 1994, the UN General Assembly declared December 29, the date of entry into force of the convention, International Day for Biological Diversity.

Benefit Sharing[23] procedures as a response to the inequities of TRIPS by introducing some regulation in the transfer of genetic resources,but at the same time they have also created a legal 'buffer zone'[24] between traditional communities and IPRs enjoyed by entities in developed countries. CBD creates two types of legal claimants with states on one-side and local/indigenous peoples on the other resulting in the long standing struggles between indigenous groups and nation-states. Indeed, the enthusiasm of state parties to obtain some control over the flow of biological resources and the increased role of the state in benefit-sharing schemes has created a 'two-tiered' knowledge protection system whereby collective and indigenous forms of knowledge and innovation are dependent on their acquisition under conventional IPRs. Under this two-tiered system, developing states have attempted through the TRIPS Council and CBD to insert a 'disclosure of origin' requirement in international patent law.

Nagoya Protocol and CBD

The ABS regime after Nagoya Protocol fails miserably to challenge the hyped institutionalized exclusion of local and indigenous peoples from knowledge protection. The political economy of intellectual property has severely constricted the terms upon which legal recognition can be granted to farmers and rural communities. Discourses are 'ways of thinking which may overlap and reinforce each other and close off other ways of thinking'.[25] In a context of globalized 'technical' IPR standards hostile to community and farmer's rights and non-monetized transactions, and progressive tightening of national standards through bilateral treaties, any argument for making IP practice more equitable can only be made in terms of modifying the existing international IPR framework.[26] Further dissemination of dominant IPR norms becomes self-generating as benefit sharing

23 In many respects, UNCED was a conference about equity: how to allocate future responsibilities for environmental protection among states that are at different levels of economic development, have contributed indifferent degrees to particular problems, and have different environmental and developmental needs and priorities. The objectives of the CBD reflect the application of this principle, in that they include "fair and equitable" sharing of the benefits arising out of the use of genetic resources. See, for further details, Sands, supra note 19 at p. 304 and CBD, supra note 24, Arts. 1 & 15(7).

24 For details, see Supra Note 6 (Ravi Kant Mishra) at pp. 20-21.

25 Cris Shore and Susan Wright, "Policy: A New Field of Anthropology", *in* Cris Shore and Susan Wright (eds), *Anthropology of Policy: Critical Perspectives on Governance and Power*, London: Routledge, 1997, p. 18.

26 The necessity for a comprehensive global system managing the ecosystems and biodiversity is derived from two basic factors: the multiplicity of biological resources provides fundamentally important services for the welfare of the whole global community, and the owner-guardians of these vital resources remain generally uncompensated for the benefits provided. For details, see generally, Frank G. Muller, "Does the convention on Biodiversity Safeguard Biological Diversity", *Environmental Values,* Vol. 9 (1), 2000, pp. 55-80.

becomes dependent on access granted to bio-prospectors. It is in this limited discursive space where negotiations to construct the Nagoya Protocol took place. The relative success or failure of the Protocol for local and indigenous communities therefore depends on the extent to which rules regarding access and benefit-sharing can be made to 'stick' on both user and provider countries and on the IPR regime through processes of legalization. The distributive inequities of the TRIPS approach to IP law, which prioritizes the end-producer of knowledge and excludes community and freely-exchanged forms of knowledge embodied within the social interactions of traditional agricultural communities and indigenous peoples, has been challenged over years by agricultural communities, civil society and some state governments.

Even within CBD negotiations,the underlying concepts of IPR law are seen as necessary to promote innovation. Therefore, rather than providing normative legal change which would increase the recognition of the knowledge contributions of traditional agricultural communities, the Nagoya Protocol reasserts the position of dominant forms of IP protected within TRIPS. This is done through a limitation of recognition to a subsidiary obligation of existing IPR holders to provide some form of 'benefit' to communities further back in the value-chain. The forms of legalization found within the Protocol appear insufficient to ensure that even these notional benefits are adequately distributed; furthermore, the existence of the Protocol as the sole institutionalized response to TRIPS in the field of traditional knowledge and genetic resources serves to obstruct more equitable responses that would seek to either undo TRIPS (in providing systems of free exchange)or provide equal rights to communities and indigenous peoples (through formation of Farmers' Rights). It now appears likely that any *sui generis* system of knowledge protection constructed incompliance with TRIPS will consist of some combination of access and benefit-sharing provisions.

Concluding Observation

An examination of the political economy of intellectual property exposes the shifting and constantly renegotiated boundaries between communities, the state and the private sector. Collective local and indigenous knowledge about genetic resources passed throughout communities and generations is likely to prove much more reliant. The lack of a statement on international disclosure and the omission of key enforcement tool such as benefit-sharing ombudsmen have created a Protocol lacking key aspects of legalization. The Protocol is constructive in some respects, notably in its achievement of an incrementally enhanced level of formality

and legality and its ability to introduce a higher level of clarity.[27] However, these are largely symbolic gains, in the sense that they are effectively mere political commitments without the ability to definitively shape state behavior if there is no corresponding disclosure obligation in patent applications. The ability of international law to communicate shared values, create expectations about future behavior, and structure decision-making contexts, is 'parasitic on the capacity of law to provide determinate outcomes to normative problems'.[28] In many ways, the most important issues have been left unresolved. This is no great fault of the Protocol; indeed, it is merely a predictable result of the structure of the current international law-making environment.

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27 Supra note 13.

28 MarttiKoskenniemi, *From Apology to Utopia: The Structure of International Legal Argument,* Cambridge University Press, 2005, p. 597.

Rethinking Health Services in India: An Urgent Need for Accountability

*Dr. P.K. Rana**

Introduction

Health is a vital indicator of human development and human development is the basic ingredient of economic and social development. Health is highly influenced by the health care facilities available in a country to its population. The non-provision of health care facilities is considered as the violation of basic human right i.e. the right to life. 'Health Services', therefore are not mere charity or the privilege of a few but a right to be enjoyed by all. Worldwide, nations are seeking viable answers to the question of how to offer a healthcare system which leads to improvements in the health status of their citizens. It is a crying need throughout the world that man has the right to ask for proper health care but when man is denied this right, we rarely think that it is a human rights violation. The health of a nation is the sum total of the health of its citizens. Thus, the survival of any human society is inextricably related with the health of its population. Likewise, developmental parameter also involves both economic development, which includes national income and per capita income, and human development which covers health indices, Infant Mortality Rate (IMR), nutritional standard, life expectancy and literacy.

The term health, implies more than an absence of sickness. Medical area and health facilities not only protect against sickness, but also ensure stable manpower for economic development. Facilities of health and medical care generate devotion and dedication, which helps the worker gives his best, physically as well as mentally, in productivity. It enables the worker to enjoy the fruits of his labour, to keep him physically fit and mentally alert for leading a successful, economic, social and cultural life. The medical facilities are, therefore, part of social security, and like gilt-edged security, would yield immediate returns in the increased production, or at any rate reduce absenteeism on grounds of sickness, etc. Health is thus, defined by World Health Organization as "a state of complete physical mental and social well being and not merely the absence of disease or infirmity". From the definition itself, it is clearly indicated that conditions of life of the individual should incorporate physical, mental and social well-being and must be devoid of

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disease and infirmity. Thus, this pioneering institution (WHO) has played the best supportive role for more than fifty years in guiding health policy development and action at the global and national levels, with an overall objective of ensuring and attaining the highest standards of health care to all the people around the world.

The goal of extending the benefits of sustainable health over an expanding life span, to all members of the human family, is the cardinal tenet of public health. Since ancient times human beings and societies have tried to formulate rules and protocols that would enhance chances of sustained good health[2]. Health is considered as a fundamental human right indispensable for the exercise of other human rights[3]. The right to health is recognized by numerous international and regional institutions. This paper concentrates on the international and regional institutions. This paper concentrates on the international covenants as well as national momentum is guaranteed under the constitution for the growth of right to health by the Courts in India.

International Legal Spectrum on Health Care Services

The health of every individual counts for the economic development of a country. The health service is a vital part of every modern society and the general health of an individual is equally significant. As the health of an individual greatly affects the economic growth and social welfare of the country, it is indicated that health and human rights are interdependent. The goal of extending the benefits of sustainable health over an expanding life span, to all members of the human family, is the cardinal tenet of public health. The declaration of Human Rights eloquently upholds the right to life as an inalienable entitlement of all human rights.

Article 25 of the Universal Declaration of Human Rights states that:

"Every one has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care, and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control".

Article 12 of the International Covenant of Economic, Social, and Cultural Rights 1966, interalia, states that:

2 Vijaya Kumar Yadavendu, 'Changing Perspectives in Public Health from Population to an Individual, Economic & Political Weekly,XXXVIII,49,December 6,2003.

3 Mohd.YousufBhat, Environment & Human Rights, Reference Press, New Delhi,2005

"The State parties to the present Convention recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health".

The International Covenant on Civil and Political Rights 1966, the UN Declaration on Elimination of All Forms of Discrimination Against Women 1979 and the Convention on the Rights of the Child provide, inter alia, for the protection of health care rights of persons including women, children and other disadvantaged sections of society.

Apart from the above, a number of international agencies have lent support to public participation in health care. To this end the World Health Organization, Alma Ata Declaration[4], clearly states that:

The people have the right and duty to participate individually and collectively in planning and implementation of their health care.

According to the World Development Report[5], public-private deliberation is not just desirable but in fact, critical to the success of reforming the health system. Community participation is the key element of the international action plan,(known as Agenda 21) designed for being about sustainable development for the 21st century. This plan has been endorsed by over 150 nations at the Earth Summit held at Rio in 1992. Further the forth International Conference on Health Promotion, held in 1997,in Jakarta reaffirmed the importance of community participation as a key element of health for all.

From the above, it is evident that the World Health Organization has not only given a wider definition to 'health' but also brought the vision of health care for all by 2000',articulated by the World Health Assembly and the Alma Ata Declaration. Further, all the resolutions / declarations adopted by the UN and other agencies together constitute the global health policy.

The Millennium Development declaration was a visionary document, which sought partnership between rich and poor nations to make globalization a force for good. Its signatories agreed to explicit goals on a specific time line. The Millennium Development Goals (MDGs) set ambitious targets for reducing hunger, poverty, infant and maternal mortality, for reversing the spread of AIDS, tuberculosis and malaria and giving children basic education by 2015. These also included gender equality environmental sustainability and multi-sectoral and international partnerships. The 10th anniversary of the declaration was used to review progress

4 Alma Ata Declaration adopted in 1978

5 See more in details, World Development Report,1997

and suggest course corrections to meet the 2915 deadline. The glittering banquets, the power lunches and the rhetoric at the formal meetings, attended by many celebrities, ambassadors of different nations, international charities and the media, in New York belied the stark reality in many poor countries. While the declaration and the MDGs were a clarion call and mobilized many governments into concerted action, a review of the achievements to date and projections for 2015 suggest some success and much failure. Most rich nations failed to meet the targets o promised aid. While progress has been made, much more needs to be done[6].

In India, it is generally an accepted fact that even though science and technology contributed much to the field of medicine, health care services did not reach rural areas which are mainly covered by Primary Health Care Systems. A health care system has two components, namely public health care and private health care. In the public health care system the responsibility is on the government to protect the public from both communicable and non communicable diseases. Public health is the art and science of preventing disease, promoting health and prolonging quality life[7]. Public health is one of the most important areas of human development but sadly it is one of the most neglected in Modern India. The health services in rural areas are very meager and even the meager health services which are available do not percolate to remote corners of the rural areas[8]. It is also observed that the health care facilities in rural areas are not enough to meet the growing demand of the people. It is not enough that high rate of absenteeism of health providers are found in primary health centers.

While the public health is in such a bad shape, in cities the growth of five star health care centers with facilities that match some of the best in the world, is very high. Importance is given to the maintenance and strengthening of private health care service at the expense of the public care system. So private health care is expanding rapidly in comparison to other European and Latin-American Countries. While public health facilities are highly inefficient, private health services are virtually unregularised. Fraud, other medication, unnecessary surgery and enormous fees are the bread and butter of the private health sector. Many private practitioners are prescribing irrationally and giving patients a long list of totally unnecessary and expensive medicines for fairly routine problems. In Mumbai alone, about 65 percent of deliveries performed in the private sector

6 K.S.Jacob,Millennium Development Goals & India, The Hindu,Visakhapatnam, dt.20.10.201. at P.10

7 T.Jacob John,Public Health Priorities, The Hindu dt.25.5.2004

8 Santosh Rajagopal,A Vision for the Public health Sector. The Hindu,dt.30.3.2004

end up with a caesarean, compared with only 9 percent in public sector[9]. Thus, it is due to these reasons that patients are either forced to borrow money to pay the medical expenses in the private hospitals or kept away from treatment. Because of all this, India is not in a position to fulfill the Health For All (HFA) promise given in the Alma Ata Conference even in 2005 and is considered **the most in health care** in the world.

Indian Legal Framework for Protection of Health Care

In India, the right to health care and protection has been recognized since early times. Independent India approached the public as the right holder and the state as the duty-bound primary provider of health for all. As our country is a founder member of the United Nations, it has ratified various International Conventions promising to secure health care rights of individuals in society. In this context, Art-51, of the constitution of India provides for promotion of international peace and security[10]. The preamble to the Constitution of India, which strives to provide for a welfare state with socialistic patterns of society under Article 21 of the Constitution, guarantees the right to life and personal liberty. Though it does not expressly contain the provision of right to health but it has been settled by the apex court in a good number of cases. Further,arts-38[11],42[12],43[13] &47[14] of our Constitution provide for the promotion and protection of health of the individual members in the society.

In addition to the International and constitutional provisions, the Parliament in India has enacted a good number of laws that protect the health interests of the people in general. These include the Indian Penal Code,1860, the Fatal Accidents Act,1855,the Indian Medical Degrees Act,1916,Dangerous Drugs Act,1930, Drugs and Cosmetics Act,1940, the Dentists Act,1948,Drugs (Control) Act,1950,Pharmacy Council of India Regulations,1952,Prevention of Food Adulteration Act,1954,Drugs

9 Jean Dreze, Health Checkup the Hindu dt. 12.3.2004. See also Kalpana Sharma How healthy is our System The Hindu dt.8.6.2004 and Rup Chinai and Rahul Goswami, Are We Ready for Medical Tourism ? the Hindu Magazine dt. 17.3.2005

10 See Article 51© of the Constitution of India

11 For the promotion of the Welfare of the people, the State shall strive to secure a social order in which justice, social, economic and political shall inform all the institutions of the national life

12 The State shall make provision for securing just and humane conditions of work and for maternity relief

13 Social security just and humane conditions of work and leisure to workman are part of his meaningful right to life and to achieve self-expression of his personality and enjoy the life with dignity see more in details Air India Statutory Corporation *v.* United Labour Union, AIR 1997 SC 645

14 It is the primary duties of the State to raise the level of nutrition and the standard of living and to improve public health

and Magic Remedies (Objectionable Advertisements) Act,1954, the Indian Medical Council Rules,1957,the Medical Termination of Pregnancy Act,1975, the Dentists Code of Ethics and Regulations,1976,the Consumer Protection Act,1986,the Consumer Protection Rules,1987,the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act,1994,the Transplantation of Human Organs Act,1994 etc.

It is pertinent to discuss here that although the Parliament has enacted the Indian Medical Council Act in 1956 and other corresponding legislations governing various branches of medicine such as the Indian System of Medicine, Dentists, Homoeopaths etc, they have only provided for the registration and regulations of the conduct of doctors, hospitals and nursing homes, and have failed to protect the interests of persons who have suffered on account of negligence or deficiency on the part of medical professionals. This field left untouched by the Medical Council Acts(s) is covered by the law of trot in general, and now by the Consumer Protection Act 1986. It is worthwhile to remember that the existence on the statute book of the Indian Medical Council Act has not stood in the way of such grievances being agitated before the ordinary civil courts, by the institution of civil suits claiming damages for negligence as against the concerned hospital or medical doctors. Prior to the enactment of the Consumer Protection Act 1986, the field of medical negligence is perhaps not possible, rather it would remain a somewhat word.

Despite Constitutional and statutory provisions safeguarding the patients against medical negligence, the growing incidence of medical negligence is disturbing. Although reliable official statistics on medical negligence are not available in our country, it has been observed that a many times the victims of such negligence are not financially well off due to which they are forced to avail the medical aid from the government run hospitals / dispensaries or charitable hospitals. However, these hospitals have been kept out of the purview of the Consumer Protection Act,1986.

Health providers in India may be broadly classified into five categories:

i) Government run hospitals and dispensaries, clinics, primary health care centers and sub-centre;

ii) Private hospitals and nursing homes;

iii) Charitable hospitals;

iv) Hospitals run by or under the authority of or connected with medical institutes or medical colleges; and

v) Hospitals or dispensaries run under the miscellaneous statutes such as the Employees' State insurance Act 1948, the Plantation Labour Act 1951, and hospitals or dispensaries run by the employer such as CGHS dispensaries, Railway hospitals and health centers; and Army, Navy or Air Force hospitals.

Apart from the above mentioned recognized categories of health providers, in our country, there are private practitioners without any formal qualifications[15] such as, *hakims, vaidyas, quacks, tantriks* and others who are very much popular in rural and semi-urban sectors and people, who are living in those areas, fall as an easy prey.

All said, we have to raise some questions that should make all socially committed people react positively and creatively when there is an instance of health related human right violation and when a poor man becomes the victim:

- Do our poor people know that they have the right to health care?
- Do they know that they can demand a Government doctor to traet them?
- Does the common man know that a mentally ill person can not be illegally confined without his consent?
- Does he know that he can demand for basic facilities in a Primary Health Centers ?

If the common man can answer all these questions the poor man will get a better deal in health sector.

Focusing Judicial Creativity on Right to Health

The Indian Judiciary played a very active role by entertaining Public Interest Litigation (PLI) which provides an opportunity to the judiciary to examine the socio-economic and environmental conditions of the oppressed, poor and the downtrodden people through PIL. Under Article 32 of the Constitution, the Supreme Court has directed the government to implement the fundamental right to life and liberty and execute protection measures in the public interest. Likewise,

15 D.K.Joshi *v.*State of U.P & others.(2000) 5 SCC 80.In this case, the Apex Court directed the district Magistrate and Chief Medical Officer of all the districts in Uttar Pradesh to identify and take appropriate action against all the persons practicing medicines without recognized qualifications. The medical Council of India may give wide publicity to the judgments so that the states may also follow the procedure for preventing the entry of quacks in practicing the life and health of the individuals

the court also pointed out that fundamental rights are intended to foster the ideal of political democracy and to prevent the establishment of authoritarian rule but they are of no value unless they can be enforced by resort to courts. But it does not mean that directive principles are less important than fundamental rights or they are not binding on the various organs of the State[16]. The Supreme Court, while widening the scope of Art.21 of the Constitution in

Paschim Banga Khet Mazdoor Samity others v. State of West Bengal & another[17]7 held that in a welfare state, primary duty of the government is to secure the welfare of the people and more over it is the obligation of the government to provide adequate medical facilities for its people. The government discharges this obligation by providing medical care to the persons seeking to avail 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 art.21. The petitioner should, therefore, be suitably compensated for the breach of his right guaranteed under art.21 of the Constitution.

It is true that no state or country can have unlimited resources to spend any amounts on its projects. Similarly, providing medical facilities to an employee by the state can not be unlimited and this point has arisen in the case of *State of Punjab v. Ram Lubhaya Bagga*[18], where medical services under a policy continue to be given to an employee, to get treatment in any private hospital in India, but the amount of reimbursement may be limited. Such a policy does not leave this limitation to the free will of the director, but it is done by a committee of technical Experts. The Supreme Court held that if no scale or rate to exorbitant scales, the state would be bound to reimburse the same. The principle of fixing of rate and scale under such a policy is justified, and can not be held to violate art.21 or art.47 of the Constitution. The Court further held that the State can neither urge nor say that it has no obligation to provide medical facilities. If that were so, it would be *exfacie in violation of art.21*.

It is primary duty of the state to provide for secured health to its citizens. No doubt the government is rendering this obligation by opening government

16 Akhila Bharatiya Soshit Karmachari Sangh *v.* union of India (1981) 1 SCC 246

17 (1996) 4 SCC 37

18 (1998) 4 SCC 117

hospitals and health centers, but to be meaningful, they must be within the reach of its people, and sufficient liquid quality. Since it is one of the most sacrosanct and valuable rights of a citizen, and an equally sacrosanct and sacred obligation of the state, every citizen of this welfare state looks towards the state to perform this obligation with top priority including by way of allocation of sufficient funds. This in turn will not only secure the rights of its citizens to their satisfaction, but will benefit the state in achieving its social, political and economical goals. This sacred obligation shall be carried out by the health professionals whenever they are attaining, the life of the accident victims with due care and diligence. In light of the above statement, the Supreme Court, in its land mark judgment in *Pt.ParmanandKatarav. Union of India & others*[19] ruled that every doctor whether at a government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life. No law or state action can intervene to avoid/delay the discharge of the paramount obligation cast upon members of the medical profession. The obligation being total, absolute, and paramount, laws of procedure whether in statutes or otherwise which would interfere with the discharge of this obligation can not be sustained, and must, therefore, give way. Similarly again the Supreme Court in *State of Karnataka v. Manjanna*[20] deprecated the tendency of refusal to conduct medical examination of rape victims by doctors in rural government hospitals unless referred by the police. The Court observed: "We wish to put on record our disapproval of the refusal of some government doctors, particularly in rural areas, where hospitals are few and far between to conduct any medical examination of a rape victim unless the case of rape is referred to them by the police." The Court added that such a refusal to conduct the medical examination necessarily results in a delay in the ultimate examination of the victim by which the evidence of rape may have been washed away by the complainant herself or be otherwise lost. The Court, therefore, directed that the state must ensure that such a situation does not recur in the future.

A three judge bench of the Supreme Court in *Consumer Education and Research Centre & others v. union of India*[21] ruled that right to health and medical care, to protect health and vigour while in service or post-retirement, is a fundamental right of a worker under art.21, read with art.39(e),41,423-48-A. All related articles and fundamental human rights are intended to make the life of the workman meaningful and purposeful. Lack of health denudes him of his livelihood.

19 AIR 1989 SC 2039
20 AIR 2000 SC 2231
21 (1995) 3 SCC 42

Compelling economic necessity to work in an industry exposed to health hazards due to indigence to bread-winning for himself and his dependants should not be at the cost of the health and vigour of the workman[22]. The Court further that the jurisprudence of personhood or philosophy of the right to life envisaged in art.21 of the Constitution enlarges its sweep to encompass human personality in full bloom to sustain the dignity of a person and to live a life with dignity and equality. The expression 'life' assured in art.21 does not connote mere 'animal existence' or continued drudgery through life. It has a much wider meaning, which includes right to livelihood, better standard of living, hygienic conditions in the work place, leisure facilities and opportunities to eliminate sickness and physical disability of the workmen. The health of the worker is an integral facet of the right to life. In that case, health insurance while in service or after retirement was held to be a fundamental right and even private industries are enjoined to provide health insurance to the workman.

Though the Supreme Court of India in a series of judgments has declared the right to health care to be a fundamental right, it has not been given due recognition by the state. What is also quite unfortunate is that in a country where poor and marginalized are more in numbers and these people can not afford paid services in any government and private hospitals, the state should develop novel health insurance policies at nominal rate.

Conclusion and Suggestions

Even after six decades of independence no effective steps have been taken to implement the constitutional obligation upon the state to secure the health and strength of people: It has rightly been said that nutrition, health and education are the three inputs accepted as significant for the development of human resources. But these sectors get adequate attention only when community becomes affluent to meet the heavy expenditure involved in each.

The focus on improvement in health continues to employ perspectives of curative medicine rather than concentrate on public health approaches, clean water , sanitation, nutrition, housing education, employment and social determinants seem to receive a lower priority despite their known impact on the health of population. Feudal social structures continue to oppress millions of people. Health and economic indices of the Scheduled Castes and Tribes have much lower rates of health and greater poverty. Patriarchal society much burden on girls and women,

22 I bid

especially in rural India. Without changes in social structures, improvements in health and economic status will remain a distant dream for the many millions who live in the margins of a resurgent India[23].

For achieving the Constitutional obligations and also objective of "Health Care for All" there is a need on the part of the Government to mobilize non-governmental organizations (NGOs) and the general public towards their participation for monitoring and implementation of health care facilities. To this end the Government should formulate legislations and health policies facilitating the participation of the public in health care.

❑

23 Supral Note 6

A Critical Study on Current State of International Climate Change Law vis-à-vis Climate Change Law of India

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Abstract

Climate change is a common concern of humanity, since climate is an essential condition, *which sustains life on earth. Climate change presents many challenges at the legal level. To meet this challenge, existing international, national and local systems must harmoniously implement a strong international climate change regime through a portfolio of traditional and innovative legal mechanism that swiftly transform current behavioral practices in emitting greenhouse gases. The objective of this research paper is to examine critically the current state of international and Indian climate change law in combating to the urgent global threat posed by climate change. The findings of this paper are made by employing doctrinaire and empirical research methodology with the help of analytical and dialectical legal reasoning. In doing so, this paper will provide recommendations on the necessary reforms to achieve a more effective legal response to this global phenomenon in future both international and domestic levels.*

Key words : *Climate change, green house gases, international climate change regime, International climate change law and Indian climate change law*

Introduction

Climate Change is a serious global environmental concern. It is primarily caused by the building up of Green House Gases (GHG) in the atmosphere. The global increases in carbon dioxide concentration are due primarily to fossil fuel use and land use change, while those of methane and nitrous oxide are primarily due to agriculture. Global Warming is a specific example of the broader term “Climate Change” and refers to the observed increase in the average temperature of the air near earth’s surface and oceans in recent decades. Its effect particularly on developing countries is adverse as their capacity and resources to deal with

the challenge is limited. Scientific studies have shown that the global atmospheric concentrations of carbon dioxide, methane and nitrous oxide which are the most important GHGs, have increased markedly as a result of human activities since 1750 and now far exceed pre-industrial values.

Although the climate change issue has often led to polarizing debates, it is premised on a basic question: what do we do with the information in front of us? The complexity, global scale, and importance of the climate issue has been authoritatively addressed by the Intergovernmental Panel on Climate Change (IPCC or Panel), a specialized body, jointly established in 1988 by the World Meteorological Organization (WMO) and the United Nations Environment Program (UNEP) with a mandate to prepare scientific assessments on various aspects of climate change.

The IPCC have produced a range of projections of what the future increase in global mean temperature might be. The IPCC's projections are "baseline" projections, meaning that they assume no future efforts are made to reduce greenhouse gas emissions. The IPCC projections cover the time period from the beginning of the 21st century to the end of the 21st century. The "likely" range (as assessed to have a greater that 66% probability of being correct, based on the IPCC's expert judgment) is a projected increased in global mean temperature over the 21st century of between 1.1 and 6.4 ^{0}C.[1]

This paper will not try to explore the province of climate change science as it would be more fully described by my learned natural scientist.

Climate change law is a new and rapidly developing area of law. The law of climate change is being constructed at the intersection of several areas of law, including environmental law, energy law, business law, and international law. Any effort to address climate change also raises issues about the proper role of state, local, and federal governments, as well as their relationship to one another.

This paper will critically examine the global benchmark on climate change law vis-à-vis legal, regulatory and policy frameworks of India which are directed towards mitigation and adaptation of climate change regime.

Current State of Global Climate Change Law

There are lots of legally binding international treaties, soft law (declarations – some of them are considered as a part of customary international law even *jus*

1 IPCC (2007) "3. Projected climate change and its impacts". In Core Writing et al. (eds.). Summary for Policymakers. Climate Change 2007: Synthesis Report: Contribution of Working Groups I, II and III to the Fourth Assessment Report of the IPCC: Cambridge University Press

cogens thereby binding obligations on all States). Among the treaties and soft laws following are worth mentioning:

Table No 1: International Treaties and soft laws

Declaration/Treaties	Year of adoption
Stockholm Declaration on Human Environment	1972
Rio Declaration on Environment and Development	1992
Programme of Action for Sustainable Development (Agenda 21)	1992
UN Secretary-General's report on Human Rights and Environment as part of Sustainable Development	2004
Africa Convention on the Conservation of Nature and Natural Resources	2003
Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean and its Protocols	1975/1995
Cartagena Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region	1983
Convention Concerning the Protection of the World Cultural and Natural Heritage	1972
Convention for the Control of Transboundary Movements of Hazardous Waste and their Disposal (Basal Convention)	1989
Convention on Biological Diversity	1992
Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)	1991
Convention on International Trade in Endangered Species of Wild Fauna and Flora	1973
Convention on Long-Range Transboundary Air Pollution	1979
Convention on the Conservation of Migratory Species of Wild Animals	1979
Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter	1972
Energy Charter Treaty	1994

International Convention for the Prevention of Pollution from Ships and its Protocol	1973/1978
International Convention for the Prevention of Pollution of the Sea by Oil	1954
Kyoto Protocol	1997
Vienna Convention for the Protection of the Ozone Layer and its Protocol (Montreal Protocol on Substances that Deplete the Ozone Layer)	1985/1987
Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat)	1971
Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade	1998
Stockholm Convention on Persistent Organic Pollutants	2001
UN Convention on the Law of Sea	1982
UN Convention to Combat Desertification	1994
UNGA Resolution 37/7 World Charter for Nature	1982
UNGA Resolution 55/2 UN Millennium Declaration	2000

Apart from these, there are number of established norms of International Environmental Law (such as States have the *sovereign right to exploit their own resources*, *t*he duty of a State to notify and consult with other State in case there is possibility to damage the environment of other State by its activities, right to a decent and healthful environment, principles of polluter pays, precautionary principles and sustainable development, environmental impact assessment, inter-generational equity, common heritage of mankind and common but different responsibility) which are very much relevant in standard setting in combating the global Climate Change.

In this present research paper, important is assigned to those international law that directly deals about climate change and allied mitigation and adaption matter.

United Nations Framework Convention on Climate Change

The United Nations Framework Convention on Climate Change (UNFCCC) is an international environmental treaty (currently the only international climate policy

venue with broad legitimacy, due in part to its virtually universal membership) negotiated at the UN Conference on Environment and Development (so called the Earth Summit) held in Rio de Janeiro from 3 to 14 June 1992. The objective of the treaty is to "stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." Eradication of poverty, avoiding risks to food production, and sustainable development are three integrated principles deeply embedded in the Convention.[2]

The treaty itself set no binding limits on GHG emissions for individual countries and contains no enforcement mechanisms. In that sense, the treaty is considered legally non-binding. Instead, the treaty provides a framework for negotiating specific international treaties (called 'protocols') that may set binding limits on greenhouse gases.

The UNFCCC was adopted on 9 May 1992, and opened for signature on 4 June 1992 and finally entered into force on 21 March 1994. As of March 2014, UNFCCC has 196 state parties. Parties to the Convention are classified as:

- Annex I: 43 Parties to the Convention including the European Union (classify as industrialized (developed) countries and "economies in transition" (EITs))
- Annex II: 24 Parties to the Convention including the European Union (members of the Organization for Economic Cooperation and Development). They are required to provide financial and technical support to the EITs and developing countries to assist them in reducing their greenhouse gas emissions (climate change mitigation) and manage the impacts of climate change (climate change adaptation).
- Annex B: Annex I Parties with first or second round Kyoto greenhouse gas emissions targets apply over the years 2008-2012 Doha climate talks, an amendment to Annex B was agreed upon containing with a list of Annex I Parties who have second-round Kyoto targets, which apply from 2013-2020. The amendments have not entered into force.
- Least-developed countries (LDCs): 49 Parties and are given special status under the treaty in view of their limited capacity to adapt to the effects of climate change.

2 Ministry of Environment & Forest, Government of India. (2012) India – Second National Communication to the UNFCCC, Executive Summary: New Delhi. Available at http://www.envfor.nic.in/sites/default/files/India Second National Communication to UNFCCC Executive Summary. pdf Retrieved 25.07.15

- Non-Annex I: Parties not listed in Annex I of the Convention are mostly low-income developing countries. They may volunteer to become Annex I countries when they are sufficiently developed.

The parties to the convention have met annually from 1995 in Conferences of the Parties (COP) to assess progress in dealing with climate change. In 1997, the Kyoto Protocol was concluded and established legally binding obligations for developed countries to reduce their GHG emissions.

One of the first tasks set by the Convention was for signatory nations to establish national greenhouse gas inventories of GHG emissions and removals, which were used to create the 1990 benchmark levels for accession of Annex I countries to the Kyoto Protocol and for the commitment of those countries to GHG reductions.

The convention states that "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." Article 3(1) of the Convention states that Parties should act to protect the climate system on the basis of “common but diffentiated responsibilities”, and that developed country Parties should “take the lead” in addressing climate change. Under Article 4, all Parties make general commitments to address climate change through, for example, climate change mitigation and adapting to the eventual impacts of climate change.

The Convention specifies the aim of developed (Annex I) Parties stabilizing their GHG emissions at 1990 levels, by the year 2000. The Convention treats developed countries and developing countries differently. It is very clear from the preamble that developed countries have contributed “the largest share of historical and current global emissions of GHGs”, and have higher per capita emissions levels than developing countries. Because these gases stay in the atmosphere for a significant time, the developed countries’ historic contribution to GHG emissions has lasting cumulative effects. Thus, in ratifying the Framework Convention, developed countries agreed to adopt policies and measures that will demonstrate that they “are taking the lead” in addressing climate change. Still, the Convention requires all parties, both developed and developing, to establish, implement, and periodically update national programs to mitigate climate change.

Kyoto Protocol

Table No 2: Contributions & actions of major emitters: implications for the rest of the world[3]

S. No.	Indicator	China	US	EU	Japan	Australia	Canada	India
1.	GDP Per Capita, PPP (2013)	11,907	**53,042**	35,502	36,449	43,544	43,247	**5,412**
2.	Aggregate Emissions (2010, Gt of CO2 eq.)	**8.287**	5.433	3.701	1.171	**0.373**	0.499	2.009
3.	Per Capita Emissions (2010, mt)	6.2	**17.6**	7.4	9.2	16.9	14.7	**1.7**
4.	Peaking year/ Base year & Reduction	2030	26%-28% reduction over 2005 levels; Previous Announcement included 17% reduction by 2020 & 83% reduction by 2050 over 2005 levels	40% reduction over 1990 levels by 2030; 80%-95% reduction over 1990 by 2050	Changed their earlier commitment of 25% reduction over 1990 by 2020 to 3.8% reduction over 2005 by 2020 (translates to 3% increase over 1990 by 2020)	5% reduction over 2000 by 2020 (unconditional); 15% reduction over 2000 by 2020 (global agreement including major economies); 25% reduction over 2000 by 2020 (450 ppm)	17% reduction over 2005 levels by 2020	Not Announced
5.	Emissions Intensity (2010, CO2 kg/$ PPP GDP)	**0.7**	0.4	**0.2**	0.3	0.4	0.4	0.4
6.	**Renewable Energy as % of Total Energy (TARGET)**			**20% of total energy mix from RE by 2020, of this 10% (min) to come from bio-fuels**				

3 Source: World Bank, CEEW Analysis)

7.	Renewable Energy as % of Electricity Generation (2011)	17.0%	11.3%	20.7%	11.8%	**9.1%**	**62.2%**	17.4%
8.	**Renewable Energy as % of Electricity Generation (TARGET)**	**Targets not declared as a proportion of electricity mix. 12 FYP targets include 104 GW of wind, 260 GW of hydro & 35 GW of solar by 2015**	**10% of electricity from RE by 2015, 15% by 2016-17, 17.5% by 2018-19 & 20% by 2020**		**Revised previous target of 13.5% of RE in electricity by 2020 & 20% by 2030**	**20% of electricity from RE by 2020**	**No target at present**	**100 GW of Solar Energy by 2022**
9.	Non-Fossil Fuel Energy as % of Total Energy (2011)	11.7%	16.3%	25.5%	10.4%	**5.2%**	26.5%	**27.7%**
10.	**Non-Fossil Fuel Energy as % of Total Energy (TARGET)**	**20% from non-fossil fuel sources in primary energy generation by 2030**						
11.	Non-Fossil Energy as % of Electricity Generation (2011)	19.1%	31.6%	49.5%	19.6%	**9.5%**	**77.5%**	20.6%
12.	LULUCF (2012, Gt of CO2 eq.)		**-0.941**	-0.303	-0.075	0.015	**0.41**	
13.	Agriculture (2010, Million mt of CO2 eq, CH4 + N2O)	**140.2**	503.7	273.7	**55.3**	116.4	60.0	611.7
14.	Transportation (2011, Million mt CO2 eq.)	623.3	**1638.1**	897.3	219.7	**86**	166	169.9

The Kyoto Protocol is an international treaty, which extends the 1992 UNFCCC that commits State Parties to reduce GHG emissions. The Protocol was adopted in Kyoto, Japan, on 11 December 1997 and entered into force on 16 February 2005 following Russia's ratification. The Protocol contains binding GHG emission limits for developed countries. There are currently 192 Parties (Canada withdrew effective December 2012). Among major developed countries, only the United States is not a party.

The Kyoto Protocol implemented the objective of the UNFCCC to fight global warming by reducing GHG concentrations in the atmosphere to 'a level that would prevent dangerous anthropogenic interference with the climate system. The Protocol is based on the principle of common but differentiated responsibilities; it puts the obligation to reduce current emissions on developed countries on the basis that they are historically responsible for the current levels of greenhouse gases in the atmosphere.

The Protocol's first commitment period started in 2008 and ended in 2012. A second commitment period was proposed in 2012, known as the Doha Amendment, in which 37 countries have binding targets: Australia, the European Union (and its 28 member states), Belarus, Iceland, Kazakhstan, Liechtenstein, Norway, Switzerland, and Ukraine. Belarus, Kazakhstan and Ukraine have stated that they may withdraw from the Protocol or not put into legal force the Amendment with second round targets. Japan, New Zealand and Russia have participated in Kyoto's first-round but have not taken on new targets in the second commitment period. Other developed countries without second-round targets are Canada (which withdrew from the Kyoto Protocol in 2012) and the United States (which has not ratified the Protocol because "it exempts 80% of the world, including major population centers such as China and India, from compliance, and would cause serious harm to the U.S. economy)[4]. Only certain European states have committed to further CO2 reductions than in first period. These targets add up to an average five percent emissions reduction compared to 1990 levels over the five-year period 2008 to 2012.

4 Desai, S. (December 2001) Tyndall Centre Working Paper 12: The climate regime from The Hague to Marrakech: Saving or sinking the Kyoto Protocol?, Norwich, UK: Tyndall Centre Under the Protocol, only the Annex I Parties have committed themselves to national or joint reduction targets (formally called "quantified emission limitation and reduction objectives" (QELRO) – Article 4.1). Parties to the Kyoto Protocol not listed in Annex I of the Convention (the non-Annex I Parties) are mostly low-income developing countries, and may participate in the Kyoto Protocol through the Clean Development Mechanism.

The targets apply to the four GHGs: carbon dioxide (CO2), methane (CH4), nitrous oxide (N20), sulphur hexafluoride (SF6), and two groups of gases, hydrofluorocarbons (HFCs) and perfluorocarbons (PFCs). The six GHG are translated into CO2 equivalents in determining reductions in emissions. These reduction targets are in addition to the industrial gases, chloroflurocarbons (CFCs), which are dealt with under the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer.

In several large developing countries and fast growing economies (China, India, Thailand, Indonesia, Egypt, and Iran) GHG emissions have increased rapidly[5]. For example, emissions in China have risen strongly over the 1990-2005 period, often by more than 10% year. Emissions per-capita in non-Annex I countries are still, for the most part, much lower than in industrialized countries. Non-Annex I countries do not have quantitative emission reduction commitments, but they are committed to mitigation actions. China, for example, has had a national policy programme to reduce emissions growth, which included the closure of old, less efficient coal-fired power plants. Emission limits do not include emissions by international aviation and shipping.

Some of the principal concepts of the Kyoto Protocol are:

- Binding commitments for the Annex I Parties.
- In order to implement the objectives of the Protocol, the Annex I Parties are required to prepare policies and measures for the reduction of greenhouse gases in their respective countries. In addition, they are required to increase the absorption of these gases and utilize all mechanisms available, such as joint implementation, the clean development mechanism and emissions trading, in order to be rewarded with credits that would allow more greenhouse gas emissions at home.
- Minimizing Impacts on Developing Countries by establishing an adaptation fund for climate change to finance concrete adaptation projects and programmes in developing countries that are Parties to the Kyoto Protocol.
- Accounting, Reporting and Review on order to ensure the integrity of the Protocol.
- Establishing a Compliance Committee to enforce compliance with the commitments under the Protocol.

5 PBL (16 October 2009), "Industrialized countries will collectively meet 2010 Kyoto target". Netherlands Environmental Assessment Agency (PBL) website.

- If an Annex I country is not in compliance with its emissions limitation, then that country is required to make up the difference during the second commitment period plus an additional 30%. In addition, that country will be suspended from making transfers under an emissions trading program.[6]

Each Annex I country is required to submit an annual report of inventories of all anthropogenic greenhouse gas emissions from sources and removals from sinks under UNFCCC and the Kyoto Protocol. These countries nominate a person (called a "designated national authority") to create and manage its greenhouse gas inventory. Virtually all of the non-Annex I countries have also established a designated national authority to manage their Kyoto obligations, specifically the "CDM process". This determines which GHG projects they wish to propose for accreditation by the CDM Executive Board. The CDM was designed to limit emissions in developing countries, but in such a way that developing countries do not bear the costs for limiting emissions.

At the 16th Conference of the Parties held in 2010, Parties to the UNFCCC agreed that future global warming should be limited below 2^0C relative to the pre-industrial temperature level. Kyoto Parties can use land use, land use change, and forestry (LULUCF) in meeting their targets. LULUCF activities are also called: "sink" activities. Changes in sinks and land use can have an effect on the climate[7]. Forest management, cropland management, grazing land management, and revegetation are all eligible LULUCF activities under the Protocol. Annex I Parties use of forest management in meeting their targets is capped.[8]

On 8 December 2012, at the end of the 2012 UN Climate Change Conference in Doha, Qatar (COP18/ CMP8), an agreement was reached to extend the Protocol to 2020 and to set a date of 2015 for the development a successor document, to be implemented from 2020.

There is a hope that the coming the UN Climate Change Conference, that will be held in Paris, France in December 2015 will bring certain concrete steps for GHG emissions limits. The conference objective is to achieve a legally binding and universal agreement on climate, from all the nations of the world and to reduce GHG emissions to limit the global temperature increase to 2^0 C above pre-industrial

6 UNFCCC; "An Introduction to the Kyoto Protocol Compliance Mechanism". Retrieved 30 October 2014

7 Baede, A.P.M.(Ed.). (2007) "Annex II", Glossary: Land use and Land-use change, in IPCC AR4 SYR

8 Desai, S. (December 2001) Tyndall Centre Working Paper 12: The climate regime from The Hague to Marrakech: Saving or sinking the Kyoto Protocol?, Norwich, UK: Tyndall Centre, p.9

levels.[9] During previous climate negotiations, countries agreed to outline actions they intend to take within a global agreement by March 2015. These commitments are known as Intended Nationally Determined Contributions (INDCs)[10]. At the time of writing the paper only 19 state Parties to the Convention including European Union have been submitted their INDCs.[11] [12]

The INDCs combine the top-down system of a United Nations climate agreement with bottom-up system-in elements through which countries put forward their agreements in the context of their own national circumstances, capabilities and priorities, within the ambition to reduce global greenhouse gas emissions enough to keep global temperature rise to 2 degrees Celsius.[13] [14]

The INDCs will not only contain steps taken towards emission reductions, but also aim to address steps taken to adapt to climate change impacts, and what support the country needs-or will provide to address climate change. After the initial submission of INDCs in March 2015, an assessment phase follows to review and if needed adjust submitted INDCs before the 2015 UNCCC.[15]

Several INDCs are expected to be submitted during March 2015, with a second wave possible during September 2015 as INDCs submitted after October 1, 2015 will not be included in the UNFCCC synthesis report to the 2015 UNCCC[16] India submitted its INDCs to the UNFCCC in October 2015, committing to cut the emissions intensity of GDP by 33-35 per cent by 2013 from 2005 levels. On its submission, India wrote that it needs "at least USD 2.5 trillion to achieve its 2015-2030 goals, and that its 'international climate finance needs' will be the difference over what can be made available from domestic sources".[17]

9 UNFCCC (2013); "Schedule of Events" (PDF). United Nations Framework Convention on Climate Change. Retrieved 12 November 2014

10 Wikipedia (2015); Intended Nationally Determined Contributions. Available at http://www.en.wikipedia.org/wiki/Intended_Nationally_Determined_Contributions?oldid=656656939 Retrieved 28.07.15

11 Down to Earth (2015) Switzerland, EU are the first to submit 'Intended Nationally Determined Contributions'. Available at http://www.downtoearth.org.in Retrieved 28.07.15

12 UNFCCC (2015); "INDC – Submissions". Available at http://www4.unfccc.int Retrieved 22.3.2015

13 WRI (2015); "What is an INDC? | World Resources Institute". Available at http:// www.wri.org Retrieved 22.0.2015

14 WRI (2015); "What is an INDC? | World Resources Institute". Available at http:// www.wri.org Retrieved 22.0.2015

15 CDKN (2015); "Intended Nationally Determined Contributions (INDCS): sharing lessons and resources; Climate and Development Knowledge Network". Cdkn.org. Retrieved 15.4.2015

16 CDKN (Feb. 2015) India's Intended Nationally Determined Contributions: Renewable Energy and the Pathway to Paris: Policy Brief. CEEW: New Delhi. Available at http://www.ceew.in/pubications Retrieved 23.07.15

17 India's Intended Nationally Determined Contribution: Working Towards Climate Justice. Available at http:// www 4.unfccc. int/submissions/ INDC/Published%20 Documents/ India /1/ INDIA% 20INDC%20 TO%20UNFCC.pdf Retrieved 20.02016

Other Important International Treaty

The *Montreal Protocol on Substances that Deplete the Ozone Layer, 1987* (a protocol to the Vienna Convention for the Protection of the Ozone Layer) is an important an international treaty though it does not directly deal with the climate change. The Protocol is designed to protect the ozone layer by phasing out the production of numerous substances that are responsible for ozone depletion. As a result of this agreement, the ozone hole in Antarctica is slowly recovering. Climate projections indicate that the ozone layer will return to 1980 levels between 2050 and 2070.[18] In comparison, effective burden sharing and solution proposals mitigating regional conflicts of interest have been among the success factors for the Ozone depleting challenge, *where global regulation based on the Kyoto Protocol has failed to do so*. As of 23 June 2015, the two ozone treaties have been ratified by 197 parties, which include 196 states and the European Union, making them the first universally ratified treaties in United Nations history.[19]

The treaty is structured around several groups of halogenated hydrocarbons that have been shown to play a role in ozone depletion. Furthermore, the phasing out of ozone-depleting substances has helped to fight climate change since many of these chemicals are also powerful greenhouse gases. According to a recent study, the phasing out of substances under the Protocol led to more reductions in greenhouse gases than what is foreseen under the Kyoto Protocol. If further measures are to materialize - accelerated phase out of HCFCs – additional climate benefits could be reaped, possibly as much as taking out again the entire reduction potential of Kyoto. There is a Multilateral Fund for the Implementation of the Montreal Protocol to assist developing country parties to the Protocol whose annual per capita consumption and production of ozone depleting substances (ODS) is less than 0.3 kg to comply with the control measures of the Protocol.

Another important international treaty in this regard is the *Convention on Long-range Transboundary Air Pollution, 1979* (CLRTAP), which is intended to protect the human environment against air pollution and to gradually reduce and prevent air pollution, including long-range transboundary air pollution. It is implemented by the European Monitoring and Evaluation Programme (EMEP), directed by the United Nations Economic Commission for Europe (UNECE). The Convention (which now 51 Parties) was the first international legally binding instrument to deal with problems of air pollution on a broad regional basis. It was signed in 1979 and entered into force in 1983. Since 1979 the Convention

18 UNEP; "Exemption Information – The Ozone Secretariat Web Site". Available at http://www.ozone.unep.org Retrieved 28.07.15

19 UNEP (2015); "Status of Ratification – The Ozone Secretariat". Ozone.unep.org

has addressed some of the major environmental problems of the UNECE region through scientific collaboration and policy negotiation. The Convention has been extended by eight protocols that identify specific measures to be taken by Parties to cut their emissions of air pollutants.

Besides, the CLRTAP, the Convention on Environmental Impact Assessment in a Transboundary Context, 1991 *(Espoo Convention)* sets out the obligations of Parties to assess the environmental impact of certain activities at an early stage of planning. It also lays down the general obligation of States to notify and consult each other on all major projects under consideration that are likely to have a significant adverse environmental impact across boundaries. As of April 2014, the treaty had been ratified by 44 states and the European Union. The Convention has been amended twice. The first amendment was adopted in Sofia in 2001and it entered into force on 26 August 2014. It has opened the Convention to accession upon approval by UN Member States that are not members of the UNECE.[20] The Convention was also instrumental in the creation of Strategic Environmental Assessment and has been supplemented by a Protocol on Strategic Environmental Assessment.[21]

Apart from these, the *Energy Charter Treaty*, 1994 (ECT) is an international agreement which establishes a multilateral framework for cross-border co-operations in the energy industry. The treaty covers all aspects of commercial energy activities including trade, transit, investments and energy efficiency. The treaty is legally binding, including dispute resolution procedures.[22]

In this paper, the *Protocol on Energy Efficiency and Related Environmental Aspects* (PEEREA) is our concerned which was signed along with the ECT. The ECT focus on four broad areas: Energy Trade, Investment, Energy Efficiency, Dispute Settlement, and Energy Transit. The treaty has been signed or acceded to by 51 countries and the European Union.

The ECT in Article 19 requires that each Contracting Party "... shall strive to minimize in an economically efficient manner, harmful Environmental Impacts arising from energy use." Building on the provisions of the Treaty, PEEREA requires its participating states to formulate clear policy aims for improving energy efficiency and reducing the energy cycle's negative environmental impact.

20 UNECE (2014); "Introduction to Espoo Convention". Available at http://www.unece.org/env/eia/eia.html Retrieved 20.7.2015

21 UNECE (2015); "The 1979 Geneva Convention on Long-RANGE Transboundary Air Pollution". Available at http://www.unece.org/env/lrtap_h1.html Retrieved 20.7.2015

22 Europa. The Energy Charter Treaty – A Legal Document. http://europa.eu/legislation_summaries/enery/external_dimension_enlargement/127028_en.htm Retrieved 28.07.15

In contrast to other activities in the Charter process, the emphasis in the work on energy efficiency is not legally binding, but rather on practical implementation of a political commitment to improve energy efficiency. This is promoted through policy discussions based on analysis and exchange of experience between the member countries, invited independent experts and other international organizations.

Recent years witnessed the emergence of a body of literature and authoritative statements analyzing climate change from a human rights perspective. This was a welcome shift, changing the focus from states to individuals. Climate change negotiations, according to this perspective, can no longer be a forum for state trade-offs and climate change is no longer a mere issue squarely belonging to science and politics but an essentially human process with demonstrable human cause and effect. Report of the Office of the UN High Commissioner for Human Rights (OHCHR) published in January 2009 (A/HRC/10/61) is an illustration of this trend. It found that climate change will potentially have implications for the full range of human rights.

Current State of Climate Change Law of India

India has reasons to be concerned about climate change. Its large population depends upon climate-sensitive sectors like agriculture and forestry for its livelihood. Any adverse impact on water availability due to recession of glaciers, decrease in rainfall and increased flooding in certain pockets would threaten food security, cause dieback of natural ecosystems including species that sustain the livelihood of rural households, and adversely impact the costal system due to sea-level rise and increased extreme events. This aside, achievement of vital national development goals related to other systems such as habitats, health, energy demand and infrastructure investments would be adversely affected.[23] India's Second National Communication to the UNFCCC has given a detailed account of impact assessment on water resources, forests, Indian agriculture, and human health and found that the global climate will definitely impact drastically in these areas and India is vulnerable to the climate change.[24]

On 10th May 2010, India released its GHG Emissions Inventory for 2007, with the aim of enabling informed decision-making and to ensure transparency. Until now, the only official emissions estimates available were for the year 1994. With

23 Ministry of Environment & Forest, Government of India. (2012) India – Second National Communication to the UNFCCC, Executive Summary: New Delhi. Available at http://www.envfor.nic.in/sites/default/files/India Second National Communication to UNFCCC Executive Summary. pdf Retrieved 25.07.15

24 ibid

this publication, India has become the first "non-Annex I" (i.e. developing) country to publish such updated numbers.

India also announced its intent to publish its emissions inventory in a two-year cycle going forward, which is much more frequent than the requirement under its NATCOM commitments. India will be the first developing country to do so. According to the results, India's emissions are less than a fourth of the USA and China. Results also show that the emissions intensity of India's GDP declined by more than 30% during the period 1994-2007 due to the efforts and policies that India has proactively put in place. Despite its already low emissions intensity, India intends to do even more. India has announced its intent to further reduce the emissions intensity of its GDP by 20-25% between 2005 and 2020, even as it accelerates infrastructure development and the growth of its manufacturing sector.[25]

Climate Change Laws of India

India is a State party to major international treaty concerning global environment protection in general and climate change in particular, such as UNFCCC, Kyoto Protocol, Montreal Protocol, Convention on Biological Diversity, UN Convention to Combat Desertification and many others.

India has a rich and well developed environmental law. The Indian Constitution is one among the few constitutions in the world that has provisions on environmental protection. Articles 48A (Protection and improvement of environment and safeguarding of forests and wild life), 51 A (g) (Fundamental duty toward protection and improvement of natural environment), 21 (Protection of life and personal liberty) are testimonial in this regards.

Climate change presents many challenges at the legal level. At present, *India does not have a separate statute on climate change*. There are certain legal, regulatory and policy frameworks which can be used in the mitigation and adaptation efforts of climate change. In addition to these, many concepts in Indian environmental jurisprudence can be used to address the concerns raised by climate change (detail of those jurisprudence are discussed in next sub-heading). National legislations are briefly discussed in the following paragraphs.

Environment Protection: The *Environment (Protection) Act* was enacted in

25 Ministry of Environment & Forests, GOI (30 June, 2010); India: Taking on Climate Change Post-Copenhagen Domestic Actions. Available at http://www.moef.nic.in/downloads/public-information/India Taking on Climate Change.pdf Retrieved 25.07.15

1986 with the objective of providing for the protection and improvement of the environment. The Act is 'umbrella' legislation. It empowers the Central Government to establish authorities under Section 3(3) charged with the mandate of preventing environmental pollution in all its forms and to tackle specific environmental problems that are peculiar to different parts of the country. By exercising the power conferred by the Act, the Central Government issued many Rules and Notices concerning divergent facet of environment protection, such as Coastal Regulation Zone, Eco-marks Scheme, Eco-sensitive Zone (29 such notification till date), Environmental Clearance, Environmental Standards, Hazardous Substances Management, Loss of Ecology, Noise Pollution, Ozone Layer Depletion, Water Pollution, etc. The important notifications are highlighted below:

Table No 3 showing Notifications [26]

Subject matter of Notification	**Year of notification**
Island Protection Zone	2011
Costal Regulation Zone	2011
Costal Management Zone	2009
The criteria for labeling Cosmetics as Environment Friendly Products	1992
The Scheme on Labeling of Environment Friendly Products (ECOMARK)	1991
Eco-sensitive Zone[1]	
Environmental Impact Assessment	2011 / 2009 / 2008 / 2007 / 2006 / 1994
Environmental Standards[2]	
Plastic Waste (Management & Handling) Rules	2011
E- waste (Management & Handling) Rules	2011
The Rules for the Manufacture, Use, Import, Export and Storage of Hazardous micro-organisms Genetically engineered organisms or cells	2010

26 Source: Ministry of Environment, Forest & Climate Change, Govt. of India

Batteries (Management & Handling) Rules	2010
The Plastics (Manufacture, Usage & Waste Management) Rules	2009
The Hazardous Waste (Management, Handling & Transboundary Movement) Rules	2008
Fly ash in construction activities, Responsibilities of Thermal Power Plants and Specifications for use of ash-based products/ responsibility of other agencies	2007
The Municipal Solid Wastes (Management & Handling) Rules	2001
Dumping and disposal of fly ash discharged from coal or lignite based thermal power plants on land	1999
The Recycled Plastics Manufacture and Usage Rules	1999
Prohibition on the handling of Azodyes	1997
The Chemical Accidents (Emergency Planning, Preparedness & Response) Rules	1996
The Bio-Medical Waste (Management & Handling) Rules	1988
The Manufacture, Storage and import of Hazardous Chemical Rules	1989
Loss of Ecology (Prevention & Payments of Compensation)	1996
Noise Pollution (Regulation & Control) Rules	2000
The Ozone Depleting Substances (Regulation & Control) Rules	2000
Water Quality Monitoring Order	2005

1 29 such notification for declaring eco-sensitive region/zone

2 46 such notifications such as for cement plant, petrochemical, electroplating, pesticide, hotel, sulphuric plants/industries, etc.

Air Pollution: The *Air (Prevention and Control of Pollution) Act* was enacted in 1981 and amended in 1987 to provide for the prevention, control and abatement of air pollution in India. Under this Act revised notification concerning National Ambient Air Quality Standards was issued.

Energy Conservation and Efficiency: The Energy Conservation Act, 2001 as amended by Amendment Act of 2010 to provide for efficient use of energy and its conservation and for matters connected therewith or incidental thereto. Under this Act, large energy-consuming industries are required to undertake energy audits and an energy labeling program for appliances has been introduced.

The *Electricity Act, 2003* as amended in 2007, to better coordinate development of the power sector by providing a comprehensive framework for power development. Under the Act and the *National Tariff Policy 2006,* the central and the state electricity regulatory commissions must purchase a certain percentage of grid-based power from renewable sources. The National Tariff Policy (NTP) 2006 was amended in 2011 to prescribe that solar-specific Renewable Energy Procurement Obligation (RPO) be increased from a minimum of 0.25% in 2012 to 3% in 2022. In addition, there is also the *Energy Conservation Building Code, 2007* dealing the matter.

Forests Conservation and Wildlife: The *Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006,* recognizes the rights of forest-dwelling Scheduled Tribes and other traditional forest dwellers over the forest areas inhabited by them and provides a framework for according the same. *The Forest Conservation Act, 1980* was enacted to help conserve the country's forests. It strictly restricts and regulates the de-reservation of forests or use of forest land for non-forest purposes without the prior approval of Central Government. To this end the Act lays down the pre-requisites for the diversion of forest land for non-forest purposes.

The *Indian Forest Act, 1927* consolidates the law relating to forests, the transit of forest-produce and the duty leviable on timber and other forest-produce.

The Government of India enacted *Wild Life (Protection) Act, 1972* with the objective of effectively protecting the wild life of this country and to control poaching, smuggling and illegal trade in wildlife and its derivatives. The Act was amended in January 2003 and punishment and penalty for offences under the Act have been made more stringent. The objective is to provide protection to the listed endangered flora and fauna and ecologically important protected areas.

National Environment Tribunal and National Green Tribunal: In 1995 the Central Government established the National Environment Tribunal [through the *National Environment Tribunal Act, 1995)* to provide for strict liability for damage arising out of accidents caused from the handling of hazardous substances.

The National Green Tribunal has been established on 18.10.2010 under the *National Green Tribunal Act, 2010* for effective and expedious 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. It is a specialized body equipped with the necessary expertise to handle environmental disputes involving multi-disciplinary issues. The Tribunal shall not be bound by the procedure laid down under the Code of Civil Procedure, 1908, but shall be guided by principles of natural justice.

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 Tribunal is mandated to make and endeavour for disposal of applications or appeals finally within 6 months of filing of the same. Initially, the NGT is proposed to be set up five places of sittings and will follow circuit procedure for making itself more accessible. New Delhi is the Principal Place of Sitting of the Tribunal and Bhopal, Pune, Kolkata and Chennai are the other 4 place of sitting of the Tribunal.

Water Pollution: The *Water (Prevention and Control of Pollution) Act* was enacted in 1974 to provide for the prevention and control of water pollution, and for the maintaining or restoring of wholesomeness of water in the country. The Act was amended in 1988. The *Water (Prevention and Control of Pollution) Cess Act* was enacted in 1977, to provide for the levy and collection of a cess on water consumed by persons operating and carrying on certain types of industrial activities. This cess is collected with a view to augment the resources of the Central Board and the State Boards for the prevention and control of water pollution constituted under the Water Act. The Act was last amended in 2003.

Territorial Waters, Continental Shelf: The *Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976,* to preserve and protect the marine environment and to prevent marine pollution within Continental Shelf and Exclusive Economic Zone.

Public Liability Insurance: The main objective of the *Public Liability Insurance Act, 1991* is to provide for damages to victims of an accident which occurs as a result of handling any hazardous substance. That Act applies to all owners associated with the production or handling of any hazardous chemicals.

Biodiversity: The *Biological Diversity Act, 2002* was born out of India's attempt to realize the objectives enshrined in the UN Convention on Biological Diversity (1992) which recognizes the sovereign rights of states to use their own Biological Resources. The Act aims at the conservation of biological resources and associated knowledge as well as facilitating access to them in a sustainable manner and through a just process. For purposes of implementing the objects of the Act it establishes the National Biodiversity Authority in Chennai.

Apart from these, the Central Motor Vehicles Rules, 1989, Disaster Management Act, 2005, the Merchant Shipping Act, 1958 and other general legislation also supplemented the relevant rules in specific subjects.

In addition to preceding laws, India has a rich tradition of judicial activism in environmental justice through the mechanism of public interest litigation and creative and progressive judicial creativity. The result is a body of environmental jurisprudence emerged. This body of jurisprudence is byproduct of applying accepted international norms as mandated by Constitution of India in case by case basis but crystallized firmly. In turn, the judicial interpretation has strengthened the Constitutional mandate. Notable amongst the fundamental norms recognized by the courts as summed up by Divan and Rosencrany, viz. every person enjoys the *right to a wholesome environment*, enforcement agencies are under an obligation to strictly enforce environmental laws, government agencies may not plead non-availability of funds, inadequacy of staff or other insufficiencies to justify the non-performance of their obligations under environmental laws, the '*polluter pays*' principle, the '*precautionary principle*', government developmental agencies charged with decision making ought to give due regard to ecological factors including (a) the environmental policy of the Central and State government; (b) the *sustainable development* and utilization of natural resources; and (c) the *obligation of the present generation to preserve natural resources and pass on to future generations as environment as intact as the one we inherited from the previous generation, stringent action* ought to be taken against contumacious defaulters and persons who carry on industrial or development activity for profit without regard to environmental laws, the *power conferred under an environmental statute may be exercised only to advance environmental protection and not for a purpose that would defeat the object of the law, t*he *State is the trustee of all natural resources which are by nature meant for public use and enjoyment*. [27]

27 Divan & Rosencranz. (2009) *Environmental Law and Policy in India.* New Delhi: Oxford.

Climate change and India's actions

Table No 4: Cumulative and Per Capita Emissions of the EU, the US, China and India in 2030[28]

Region	Cumulative Emissions in 2030 (Gt of CO2 eq.)	Projected Population in 2030 (Billion)	Per Capita Emissions in 2030 (m.t. CO2 per capita)	% of Allowed Emission
EU	3.4	0.596	5.66	9.40%
US	4.6	0.379	12.06	12.70%
China	12	1.574	7.62	33.30%
India	3.4	1.502	2.25	9.40%
Remaining countries	12.68	4.198	3.02	35.20%
36 Gt of CO_2 emissions has been assumed to be the annual budget for 2030				

India's emissions are estimated to be of the order of 1331.6 million tonnes of the carbon dioxide equivalent GHG emissions in 2007. The emissions indicate an annual growth of 4.2% from the levels in 1994. Whereas India's CO2 emissions are only about 4% of total global CO2 emissions and much less if the historical concentrations are taken into account. Still India has been conscious of the global challenge of Climate Change.

In pursuance of the obligations cast on parties to the UNFCCC, India has undertaken to communicate information about the implementation of the Convention, taking into account the common but differentiated responsibilities and respective capabilities and their specific regional and national development priorities, objectives and circumstances. The elements of information provided in the communication include a national inventory of anthropogenic emissions by sources and removals by sinks of all GHGs, a general description of steps taken to implement the Convention including an assessment of impacts and vulnerability and any other relevant information. India has submitted the Second National Communication (NATCOM) to the UNFCCC in 2012.

28 Source: CEEW Analysis

India's development plans are crafted with a balanced emphasis on economic development and environment. The planning process, while targeting an accelerated economic growth, is guided by the principles of sustainable development with a commitment to a cleaner and greener environment.

National Environment Policy, 2006 outlines essential elements of India's response to Climate Change. A high level advisory group on climate change viz. the *Prime Minister's Council on Climate Change* was constituted in June 2007 and reconstituted in November 2014 to coordinate national action plans for assessment, adaptation and mitigation of climate change.

On 30th June 2008, India announced and launched its **National Action Plan on Climate Change** (NAPCC). The NAPCC, guided by the principles of sustainable development (SD), outlines existing and future policies and programs addressing climate mitigation and adaptation. The plan identifies eight core "national missions" (*Jawaharlal Nehru National Solar Mission, National Mission for Enhanced Energy Efficiency, National Mission on Sustainable Habitat, National Water Mission, National Mission for Sustaining the Himalayan Ecosystem, National Mission for Sustainable Agriculture, National Mission for a "Green India",* and *National Mission on Strategic Knowledge for Climate Change)* running through 2017 and emphasizes the overriding priority of maintaining high economic growth rates to raise living standards, the plan "identifies measures that promote our development objectives while also yielding co-benefits for addressing climate change effectively." The NAPCC also describes other ongoing initiatives, including: Power Generation, Renewable Energy and Energy Efficiency.

The Government of India (GOI) has also constituted an *Executive Committee on Climate Change* in January, 2013, under the chairmanship of Principal Secretary to Prime Minister to assist the Prime Minister's Council on Climate Change in evolving a coordinated response to issues relating to Climate Change at the national level and to monitor the implementation of the eight National Missions and other initiatives under the NAPCC.

In addition to the NAPCC, the GOI has taken several other measures (such as *National Clean Energy Fund, State Action Plan on Climate Change, National Implementation Entity,* A*uto Fuel Vision and Policy 2025, Fuel Consumption Standards for Cars, Climate Change Action Programme, Indian Network for Climate Change Assessment, Montreal Protocol and Ozone Cell under the* Ministry of EF&CC , Expert Group on Low Carbon Strategies for inclusive growth, National Tariff Policy and preparedness for REDD+) to promote sustainable development and address the

threat of climate change. The initiatives operate at the national and sub national level and span domains that include climate change research, clean technology research and development, finance, and energy efficiency and renewable energy policy and deployment. [29]

Concluding remarks

The view that human activities are likely responsible for most of the observed increase in global mean temperature ("global warming") since the mid-20th century is an accurate reflection of current scientific thinking. Human-induced warming of the climate is expected to continue throughout the 21st century and beyond. In this regard, Gerrard apt says though his observation is centered around the US Climate Change Law, "The three words that best characterize the current state of climate change law are fragmention, uncertainty, and insufficiency"[30]

The Kyoto Protocol has been based criticized from many fronts notably the idea of climate justice (this has particularly centered on the balance between the low emissions and high vulnerability of the developing world to climate change, compared to high emissions in the developed world) and there has not been any global consensus on the crucial issue of limiting emissions of GHGs. On the other hand, the first period Kyoto emissions limitations can be viewed as a first-step towards achieving atmospheric stabilization of GHGs.

In this critical juncture, it is need to take the success model of Montreal Protocol, in particular effective burden sharing both by developed and developing countries and solution proposals mitigating regional conflicts of interest in keeping in mind the principle of common but differentiated responsibility of protection of global commons and economic and social development and poverty eradication of the developing countries.

The existing legal tools fall even shorter of the mark. On the other side, almost all of these efforts are focused on mitigation of emission levels; none seriously grapples with adaptation to the climate change.

The rest of the world is waiting for the US tumult to subside. Though China has overtaken the US as the largest GHG emitter, the US is still responsible for the

29 Ministry of Environment, Forest & Climate Change, GOI (December, 2014); India's Progress in Combating Climate Change, Briefing Paper for UNFCCC CoP 20, Lima, Peru. Available at www.indianenvironmentalportal.org.in/files/file/India's%20Progress%20in%Combating%20climate%20change.pdf Retrieved 25.07.15

30 Gerrard, Michael.B. (Winter 2010) Introductory Comments: The Current State of Climate Change Law, Sustainable Development Law & Policy, Vol. 10, Issue 2, Climate Law Reporter 2010

largest portion of the GHGs that have accumulated in the atmosphere. It is difficult for leaders abroad to adopt strong climate controls when the biggest historical emitter still hasn't.

It is clear that leadership in climate change has not been forthcoming from some of the largest emitters. Therefore, countries such as India, likely to be acutely impacted by climate change would need to develop a strategy on two formats: pressing major emitters to increase their mitigation targets; and ramping up its own ambition to reduce the vulnerability of its own population to climate change risks. Therefore, it is imperative that discussion around technology partnerships and financial mechanisms be an important pillar of any new climate agreement. Additionally, it may be useful to formulate a comprehensible legal framework just like the Climate Change Bill, 2012 with necessary amendments in domestic level to combat climate change in the line of the UNFCCC and Kyoto Protocol and other related environmental treaties.

The finding of the intrinsic link between human rights and climate change is of special relevance to a country like India. The adverse impact of climate change on a range of fundamental rights enshrined in the Constitution is already observed. This places a constitutional obligation on India to address climate change impacts from a human rights perspective.

Last but not the least, it is too much to expect global community in general and India in particular to remove all the fragmented, uncertainty and insufficiency in one swoop, but the need for real progress is urgent.

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The Juvenile Justice (Care and Protection of Children) Act, 2015

Dr. Ranjana Ferrão[1]

ABSTRACT

The Delhi gang rape in December, 2012, the Shakti Mill rape case in Mumbai in July, 2013 and the Guwahati rape case in September, 2013 involving child offenders had also triggered a debate across the country about the inadequacy of punishment awarded to children who committed heinous crimes. Increasing cases of crimes committed by children in the age group of 16-18 years in recent years make it evident that the current provisions and system under the Juvenile Justice (Care and Protection of Children) Act, 2000, are ill equipped to tackle child offenders in this age group. The data collected by the National Crime Records Bureau establishes that crimes by children in the age group of 16-18 years have increased, especially in certain categories of heinous offence. A weak law could not be a determent and therefore to address the increasing trend of crimes by children, the new Law has been introduced. This Article throws light on the new Juvenile Justice Act which is the only law in India which will legally validate an investigation into the 'mental ability' of a 'child'. This investigation will have the acts committed by a juvenile at its starting point and will tend to ascertain mental capability of comprehending the outcome of such acts. The 2015 Act replaces the Juvenile Justice (Care and Protection of Children) Act, 2000. A juvenile who is aged between 16 and 18 years and accused of a heinous offence may be tried under the IPC and not the JJ Act if, after a preliminary inquiry, the Juvenile Justice Board feels that the crime was committed with full knowledge and understanding of the consequences. This Article analyzes the provisions of the new Juvenile Justice L*aw.*

Introduction

All children are born innocent. Just like young plants a child which takes routes in the environment where it is placed. Howsoever good the breed, if the sampling is placed in the wrong setting or an unwarranted place there would not

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be desired growth. Such is the position with the human child.[2] Our country has 472 million children. Out of which only 1.2 per cent of all of them have committed crimes. In 2013 of all the children arrested for crimes committed under the Indian Penal Code, 2.17 per cent were accused of murder and 3.5 per cent of rape. India has reduced the age criminal liability for juvenile to 16 years. The reason for amending the law was the crime rate of crimes committed by juveniles is very high. The crime rate of juveniles in India is just two per cent. Reduction of age to define a juvenile, will not only prove to be regressive, but would also adversely affect India's image as a champion of human rights.

History of the Juvenile Justice Law

India pawed the way for first juvenile legislation in the year 1986. The Juvenile Justice Act, 1986, defined juveniles as; male children above the age of sixteen years were considered to be adults, whereas girl children were treated as adults on attaining the age of eighteen years. The Government raised the age limit from sixteen to eighteen years for both boys and girls in the Juvenile Justice (Care and Protection of Children) Act, 2000. The Juvenile Justice (Care and Protection of Children) Act, 2000 was meant with an objective of care, protection, correction and reformation of the child. As the Title of the Act reads it was not meant to punish the child. This Act could not prevent the crimes committed by juveniles. The 16th December, 2012, incident spouted a national debate and protests for the need of amendment of the existing law. On one hand it may be argued that this 16 December incident was not on account of the provisions of the aforesaid Act, but on account of failure of the administration in implementing its provisions. After debating and analyzing the Parliament repealed the law and passed the Juvenile Justice Act, 2015. The law received its assent from the President of India on 31st December, 2015 and was made applicable from 1st January 2016.

The Juvenile Justice (Care and Protection of Children) Act, 2000

Juvenile Justice (Care and Protection of Children) Act, 2000, was enacted after years of deliberation and in conformity with international standards as laid down in the U.N. Convention on the Rights of the Child, 1989, the Beijing Rules, 1985, the Havana Rules and other international instruments for securing the best interests of the child with the primary object of social reintegration of child victims and children in conflict with law, without resorting to conventional judicial proceedings which existed for adult criminals. Article 15(3) of the Constitution empowers the State to enact special provisions for women and children, which reveals that the

2 S. K Rao, *Social Justice and Law*, National publishing House, Delhi, 1974 p.4

Juvenile Justice (Care and Protection of Children) Act, 2000, was in conformity with the provisions of the Constitution.

The age of eighteen has been fixed on account of the understanding of experts in child psychology and behavioral patterns that till such an age the children in conflict with law could still be redeemed and restored to mainstream society, instead of becoming hardened criminals in future. There are, exceptions where a child in the age group of sixteen to eighteen may have developed criminal propensities, which would make it virtually impossible for him/her to be reintegrated into mainstream society, but such examples are not of such proportions as to warrant any change in thinking, since it is probably better to try and re-integrate children with criminal propensities into mainstream society, rather than allow them to develop into hardened criminals, which does not augur well for the future.

There are many cases where juveniles are not treated fairly. The age of the juvenile has been wrongly represented. They have been treated like adults and sent to jails, instead of being produced before the Juvenile Justice Board or even before the Child Welfare Committees to be dealt with in a manner provided by the Juvenile Justice (Care and Protection of Children) Act, 2000. This is due to the officials not being able to administer the law effectively. To prevent such unjust situations the Supreme Court of India in *Abuzar Hossain vs. State of West Bengal*[3] held that the accused can raise the claim of juvenility[4] at any stage of the proceedings and even after the final disposal of the case.

The law contemplates a non-adversarial inquiry against the juvenile where the prime focus is not on the crime committed but on the reasons that had led the juvenile to such conduct. No regular trial as laid down under the provisions of the Criminal Procedure code can be conducted on a Juvenile.[5]

Juvenile Justice Board is vested with the discretion to impose punishment beyond three years.[6] Juvenile Justice (Care and Protection of Children) Act, 2000, provides for a wide range of reformative measures under Sections 15 and 16 for children in conflict with law from simple warning to 3 years of institutionalization in a Special Home. When a child who is 17 years who commits a serious offence is brought before the Juvenile Justice Board such a juvenile would have to undergo a sentence of three years, which could spill beyond the period of one year when he attained majority.[7]

3 [(2012) 10 SCC 489]

4 See Section 7A

5 Mithu Vs. State of Punjab (1983) 2 SCC 277;Dadu Vs. State of Maharashtra (2000) 8 SCC 437

6 See Section 15

7 See Section 15(1)(g)

In exceptional cases, provision has also been made for the juvenile to be sent to a place of safety where intensive rehabilitation measures, such as counseling, psychiatric evaluation and treatment would be undertaken. Juvenile Justice Board will not maintain secrecy of the identity of the child and will not maintain records of the crime committed by the child.[8]

Grey Areas of Juvenile Justice (Care and Protection of Children) Act, 2000

The State is creating a class of citizens who were not only prone to criminal activity, but in whose cases restoration or rehabilitation was not possible. The present law which sets the age of juvenile at 18 years was fixed arbitrarily. If this age limit is reduced criminality amongst children would reduce. In many cases children between ages of sixteen to eighteen years were, being exploited by adults to commit heinous offences who knew full well that the punishment therefore would not exceed three years.

Juvenile Justice Board should be vested with the discretion to impose punishment beyond three years in cases where a child, having full knowledge of the consequences of his/her actions, commits a heinous offence punishable either with life imprisonment or death.

The present law fixes all juveniles, irrespective of the gravity of the offences, in one bracket. A serious attempt would have to be made to grade the nature of offences to suit the reformation contemplated by the Acting order to prevent repeated offences by an individual, it was necessary to maintain the records of the inquiry conducted by the Juvenile Justice Board, in relation to juveniles so that such records would enable the authorities concerned to assess the criminal propensity of an individual. Records of such juveniles would need to be maintained to prevent repeated offenders. [9]

Efforts to Pass a New Legislation

The 16th December, 2012, incident sprang national wide protests. People demanded amendment of the Juvenile Law. They also demanded the juvenile involved in the crime not to be given benefit of juvenile law. The Government appointed J.S. Verma Committee to study the issue and recommend changes. Report of Justice J.S. Verma Committee on “Amendments to the Criminal Law” submitted that the Juvenile Justice (Care and Protection of Children) Act, 2000, as

8 See Section 19

9 See Section 19

amended in 2006, and the Juvenile Justice (Care and Protection of Children) Rules, 2007, are based on sound principles recognized internationally and contained in the provisions of the Indian Constitution. The Committee did not recommend the reduction in the age of juveniles in conflict with law and maintained it at 18 years.

The issue of reduction in the age of juveniles from 18 to 16 years, as it was in the Juveniles Justice Act of 1986, was also raised in the LokSabha on 19th March, 2013, during the discussion on the Criminal Law (Amendment) Bill, 2013, but was rejected by the House.

Efforts of the Supreme Court of India

There were five judgements of the Supreme Court, namely Rohtas (1978), Raghbir (1981) Abujar Hussain (2012), Salil Bali (2013)and Subramaniam Swamy (2014) which have been set aside by the proposed Bill. In each of these judgements, it was categorically provided that all children should be dealt with under the juvenile justice system.

Advocates and other citizens filed numerous petitions in the Supreme Court of declare Juvenile Justice (Care and Protection) Act, 2000 as unconstitutional and ultra vires. The Supreme Court has on many occasions opined that persons under 18 years of age must be treated as juveniles and should be given separate treatment for offences committed, and the fact is that our justice should be about rehabilitation and not about retribution.

They wanted to strike down the provisions of Section 2(k) and (l) of the above Act, bring the said Act in conformity with the provisions of the Constitution[10] make changes in the Juvenile Justice (Care and Protection of Children) Act, 2000, to bring it in line with the United Nations Standard Minimum Rules for administration of juvenile justice. Offences like rape and murder, juveniles should be tried under the normal law. The investigating agency should be permitted to keep the record of the juvenile offenders to take preventive measures to enable them to detect repeat offenders and to bring them to justice.[11]The Juvenile arrested in the Nirbhaya case should not be released and kept in custody or any place of strict detention, after he was found to be a mentally abnormal psychic person.[12]Supreme Court of India clubbed the above Writ Petitions in *Salil Bali .v. Union of India* and held that the implementation of the various enactments relating to children would possibly yield better results.

10 Writ Petition (C) No. 42 of 2013, Kamal Kumar Pandey & Sukumar Vs. Union of India and Writ Petition (C) No. 182 of 2013, Hema Sahu Vs. Union of India,

11 Writ Petition (Crl.) No. 6 of 2013, Shilpa Arora Sharma Vs. Union of India

12 Writ Petition (Crl.) No. 6 of 2013 and Writ Petition (C) No. 85 of 2013

Salil Bali vs. GOI, the Supreme Court, while upholding the constitutional validity of the Juvenile Justice (Care and Protection of Children) Act,2000 had observed that the Act of 2000 was in tune with the provisions of the Constitution and the various declarations and conventions adopted by the world community represented by the United Nations. Recognising children's vulnerability in the same judgement, the Supreme Court had held that children were amongst the most vulnerable sections in any society. Upholding 18 years as the age of juvenility, it was also observed that the age of eighteen has been fixed on account of the understanding of experts in child psychology and behavioural pattern and that till such an age the children in conflict with law could still be redeemed and restored to mainstream society, instead of becoming hardened criminals in future. Acknowledging rehabilitative spirit of the juvenile justice legislation, it said that the essence of the Juvenile Justice Act, 2000 and the Rules framed thereunder in 2007, was restorative and not retributive, providing for rehabilitation and re-integration of children in conflict with law into mainstream society. Opining that the difficult cases of children between 16 to 18 years should also be dealt with within the juvenile justice system, it clearly observed that there are exceptions where a child in the age group of 16-18 years may have developed criminal propensities, which would make it virtually impossible for him/her to be reintegrated into mainstream society, but such examples were not of such proportions as to warrant any change in thinking, since it was probably better to try and re-integrate children with criminal propensities into mainstream society, rather than to allow them to develop into hardened criminals

In *Dr. Subramanian Swamy & Ors v. Raju Thr. Member Juvenile*[13] the petitioner prayed that the true test of "juvenility" is not in the age but in the level of mental maturity of the offender. The Supreme Court had observed that there was a considerable body of world opinion that all persons under 18 ought to be treated as juveniles and separate treatment ought to be meted out to them so far as offences committed by such persons were concerned. The avowed object was o ensure their rehabilitation in the society and to enable the young offenders to become useful members of the society in later years. India has accepted the above position and legislative wisdom has led to the enactment of the Juvenile Justice Act, 2000 in its present form. The Supreme Court of India held that the removal of unwise laws from the statute books appeal lies not to the Courts but to the ballot and to the processes of democratic Government.

In *Kamal Kumar Pandey* and *Sukumar v. Union of Indi*a issued notice to the Government Ministry of Home Affairs and the Ministry of Law and Justice,

13 W.P. (Crl.) No.204 of 2013

Government of India, to take steps to see that the Act operates in conformity with the Constitution.[14]

The existing juvenile system is not only reformative and rehabilitative in nature but also recognises the fact those 16-18 years is an extremely sensitive and critical age requiring greater protection. Hence, there is no need to subject them to different or adult judicial system as it will go against Articles 14 and 15(3) of the Constitution

Debate in Legislative Assembly for Passing Juvenile Justice Act, 2015

The Minister of Women and Child Maneka Gandhi introduced the Bill. She introduced the Bill with a historic speech.

"According to police data, 50% of all sexual crimes were committed by 16-year-olds who know the Juvenile Justice Act so they can do it."[15]The Juvenile Justice (Care and Protection of Children) Act, 2000 has been in operation for more than a decade. In the 14 years of implementation of the Act, several issues have risen, which have constrained its effective implementation. Some of these issues are; An increase in heinous offences committed by children. There is an increase in the number of reported incidents of abuse of children in institutions, inadequate facilities in homes. There are delays in decisions by Child Welfare Committees and Juvenile Justice Boards leading to high pendency of cases. There is Lack of clarity regarding roles, responsibilities and accountability of Child Welfare Committees and Juvenile Justice Boards. Delay in adoption. There are Inadequate provisions to counter offences against children; and lack of direction on what to do with children who are in orphanages but are unadoptable. The proposed Bill attempts to address these issues and strengthen the implementation of JJ system by clarifying roles and responsibilities of statutory bodies and defining procedures. The Bill has a child-friendly approach in all matters related to children brought under its purview and provides for various rehabilitation and reintegration measures. The Bill consists of 111 sections which are distributed across ten chapters."

Mr. Shashi Tharror objected to the passing of the Bill and stated;

"What does justice seek to serve? Does the State exercise its punitive powers in order to be revengeful to extract an eye for an eye, to punish in a manner that can only be described as primitive? Or, do we hope to use the justice mechanism as a

14 Writ Petition (Civil) No.42 of 2013 has been filed by Kamal Kumar Pandey and Sukumar, Advocates

15 http://www.livelaw.in/governments-plan-try-juveniles-adults-rape-cases-rejected-parliamentary-committee/

corrective to wean people from error and to rehabilitate the young? This question is all the more necessary in the case of children who commit crimes because they are not often sufficiently, mentally or emotionally developed to understand the gravity of their wrong doing. Are we as a society now starting to take revenge on children?"the problem with such an approach is two-fold. First of all, it treats children as adults, which is simply wrong morally, legally, constitutionally, ethically and emotionally. The possibility of convicting children as adult criminals are really primitive has pushed us back to the darkness of 19th Century. This Bill will create a selective system whereby the Juvenile Justice Board will have discretionary powers to transfer a child in the age group of 16 to 18 accused of certain crimes that she has mentioned, to an adult criminal justice system for trial and conviction.

On one hand it replaces the word 'juvenile' with 'child in conflict with law', which is supposedly more humane. But this very 'child in conflict with law' is meant to be tried for adult offences, an inhumane idea conceived by this Government. Even here there is a flaw; the terms 'child alleged to be in conflict with law' and the 'child found to be in conflict with law' are not defined clearly and are used interchangeably in this Bill, even though there is an obvious difference between 'alleged to be' and 'found to be'. This is just one more confirmation that it is a bad law, badly written and badly thought through.

International examples show that transferring children to the adult system has failed to prevent repeat offences, failed to reduce the juvenile crime rate and failed to promote public safety. In fact, this Bill will actually increase the risk to public safety because convicting a child in an adult criminal trial will deny the child the fulfillment of his basic rights, will prevent his physical, emotional and intellectual development and eventually we will be churning out more hardened criminals than reformed adults. There is a US study that established that 80 per cent of the juveniles released from adult prisons go on to commit more serious offences. This law will predominantly affect the country's poor and marginalised sections in our society – OBCs, SCs, STs, and minorities a majority of children in conflict with the law come from illiterate families, poor homes or even homeless.

Article 20(1) of the Constitution which clearly states that a person should not be awarded a penalty greater than the one provided for under the law at the time of the commission of the offence. But if you commit an offence when you are 16 and they arrest you when you are 21, you will be tried as an adult under this law and convicted. The fact is that this violates the constitutional prohibition on procedural arbitrariness under Articles 14 and 21 as well as the test of fairness in Article 21. The one month period given to the Juvenile Justice Board for their preliminary inquiry is absurdly short and could lead to a presumption of guilt and

not of innocence, which itself violates the Constitution. All children are nonetheless at risk of being detained for 20 years. He will be a hardened criminal after 20 years and you can be sure of that. He will not reintegrate into the society when he has spent 20 years in an adult jail. They could have easily just changed the three year rule to a six or seven year's maximum instead of doing this to a child."

The government's move had received strong objections from National Commission for Protection of Child Rights as well as various child rights activists. National Commission for Protection of Child Rights had reportedly said that such a move will be against international conventions and as well as the UN Convention, to which India is a party.

The Juvenile Justice (Care And Protection of Children)Act, 2015

The Parliament went ahead and passed the Juvenile Justice Act, 2015. This law repeals the Juvenile Justice (Care and Protection of children) Act, 2000. The new law makes several changes and permits juveniles in the age of 16 years to be tried as adults.

"Child In Conflict With Law" is defined as a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence.[16] A "*Child in need of care and protection*" is defined as one *who is found without any home or settled place of abode and without* any ostensible means of subsistence[17]; or*) who is found working in contravention of labour laws for the time* being in force or is found begging, or living on the street;[18] or *who resides with a person (whether a guardian of the child or not*[19]*) and* such person *has injured, exploited, abused or neglected the child or has*[20] violated any other law for the time being in force meant for the protection of child; or *has threatened to kill, injure, exploit or abuse the child and there*[21]is a reasonable likelihood of the threat being carried out; or *has killed, abused, neglected or exploited some other child*[22] *or* children and there is a reasonable likelihood of the child in question being killed, abused, exploited or neglected by that person; or *who is mentally ill or mentally or physically challenged or suffering*[23]from terminal or incurable disease, having no one to support or look after or having parents or guardians unfit to take care, if found so

16 Section 2(13)
17 Section 2(14) (*i*)
18 Section 2(14) (*ii*)
19 Section 2(14) (*iii*)
20 Section 2(14) (*a*)
21 Section 2(14) (***b***)
22 Section 2(14)(*c*)
23 Section 2(14) (*iv*)

by the Board or the Committee; or *who has a parent or guardian and such parent or guardian is found to*[24]be unfit or incapacitated, by the Committee or the Board, to care for and protect the safety and well-being of the child; or *who does not have parents and no one is willing to take care of,*[25] *or* whose parents have abandoned or surrendered him; or *who is missing or run away child, or whose parents cannot be found*[26]after making reasonable inquiry in such manner as may be prescribed; or *who has been or is being or is likely to be abused, tortured or exploited* for the purpose of sexual abuse or illegal acts;[27] or *who is found vulnerable and is likely to be inducted into drug abuse or* trafficking;[28] or *who is being or is likely to be abused for unconscionable gains;*[29] *or who is victim of or affected by any armed conflict, civil unrest*[30] *or* natural calamity; or *who is at imminent risk of marriage before attaining the age of marriage*[31]and whose parents, family members, guardian and any other persons are likely to be responsible for solemnisation of such marriage. It is generally believed that a child who is defined under the category of 'child in need of care and protection' come in conflict with law.

Crime

Offences committed by a juvenile are split into 3 categories i.e heinous offences, serious offences and petty offences. "Heinous offences" includes the offences for which the minimum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment for seven years or more.[32] "Serious offences" includes the offences for which the punishment under the Indian Penal Code or any other law for the time being in force, is imprisonment between three to seven years.[33] Petty Offences includes the offences for which the maximum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment up to three years.[34]

Claim of Juvenility

The date of commission of an offence will determine whether the juvenile will be dealt under the Juvenile Justice Act or the Criminal procedure Code. Heinous

24 Section 2(14) (*v)*
25 Section 2(14) (*vi)*
26 Section 2(14) (*vii)*
27 Section 2(14) (*viii)*
28 Section 2(14) (*ix)*
29 Section 2(14) (*x)*
30 Section 2(14) (*xi)*
31 Section 2(14) (*xii)*
32 Section 2(33)
33 Section 2(54)
34 Section 2(45)

Offences are those for which minimum punishment under IPC or any other law is imprisonment for seven years or more. If heinous offence is committed by a child below the age of 16 years, then the child is to be tried by the Juvenile Justice Board (JJB) as per the procedures of the Juvenile J System. This implies that a child will not be given detention for more than three years.

If a heinous offence is committed by a child between the age of 16-18 years, then the child is first produced before the Juvenile Justice Board. The Board must make a preliminary assessment. The assessment by the Board is not a trial but to assesses the capacity of the child to commit the offence and whether the child had a 'child mind' or an 'adult mind' in committing the alleged offence. Based on the preliminary assessment, the Board may either dispose of the case by itself or may decided that the child needs to be tried as an adult and thus make an order to transfer the trial of the case to the Children's Court under Clause 19(3). When the matter comes before the Children's Court, the Children's Court may decide that there is no need for trial of the child as an adult, in such cases, the Children's Court has the power of the Juvenile Justice Board and therefore, instead of transferring the case back to the Board, the Children's Court can conduct an inquiry and pass orders accordingly. This implies that a child will not be given detention of more than three years. On the other hand, the Children's Court may decide that there is a need for trial of the child as an adult and thus, will follow the procedures prescribed under Cr. PC.

Juvenile Justice Board

A Juvenile Justice Board is appointed for discharging its functions relating to children in conflict with law. The Board should consists of Child Judicial Magistrate and 2 social workers. In the event of any difference of opinion among the members of the Board in the interim or final disposal, the opinion of the majority shall prevail.

The Board performs various functions the board must first release the juvenile on bail. When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board be released on Bail. When such person having been apprehended is not released on bail he can be kept in Observation Home.

The Board must direct the Presence of Parent before it. Where a child alleged to be in conflict with law is apprehended the parent or guardian of such child, if they can be found the Board must direct them *to* be present at the Board before which the child is produced. The Board must the Child Welfare Officer to prepare

the Social investigation report and submit within two weeks. The Board must make sure that the Social investigation report contains all information regarding the antecedents of the child, its family background. It should also include material circumstances likely to be of assistance to the Board for making the inquiry.

Period of Inquiry

The inquiry must be completed within a period of four months from the date of first production of the child before the Board. The Board has to first make a preliminary assessment about the kind of offence committed. If the juvenile has committed a heinous offence the Board must dispose the proceedings within a period of three months from the date of first production of the child before the Board. If the Board makes an inquiry that the offence committed is petty offence the proceedings will be terminated.

Steps to ensure fair and speedy inquiry

At the time of initiating the inquiry the Board must ensure that the child in conflict with law has not been subjected to any ill-treatment by the police or by any other person, including a lawyer or probation officer and take corrective steps in case of such ill-treatment.[35] The Board must conduct all proceedings in a simple manner. Care must be taken to ensure that the child, against whom the proceedings have been instituted, is given child-friendly atmosphere during the proceedings.[36]Every child produced before the Board must be given an opportunity of being heard and to participate in the inquiry.[37]

Inquiry into the Kind of Offence Committed

If the juvenile has committed a petty offence the Board must dispose the proceedings through summary proceedings as prescribed under the Code of Criminal Procedure, 1973.[38]If the juvenile has committed a serious offence the procedure of trial as used in summons cases under the Code of Criminal Procedure, 1973 must be adopted.[39]

Heinous Offences

If the juvenile commits a heinous offence the Board has to ascertain the age of the child and accordingly conduct inquiry. If the child below sixteen years of age

35 Section 14(5)(*a)*
36 Section 14(5)(*b)*
37 Section 14(5) (*c)*
38 Section 14(5) (*d)*
39 Section 14(5)(***e)***

commits a heinous offence the procedure of trial as used in summons cases under the Code of Criminal Procedure, 1973 must be adopted.[40] This implies that a child will not be given detention for more than three years.

If the child is above sixteen years of age on the date of commission of offence the Board must conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence.[41] If the Board comes to the conclusion that the juvenile had full understanding of the consequences of the act committed the Board must refer the proceedings to be tried by the Children's Court.

Orders Passed by the Board

If the child below sixteen years of age commits a heinous offence the Board may allow the child to go home after advice or admonition by following appropriate inquiry and counselling to such child and to his parents or the guardian.[42] The Board may direct the child to participate in group counselling and similar activities.[43]The Board can order the child to perform community service under the supervision of an organisation or institution, or a specified person, persons or group of persons identified by the Board.[44] The Board can order the child or parents or the guardian of the child to pay fine.[45] The Board may order and direct the child to be released on probation of good conduct and placed under the care of any parent, guardian or fit person. Such parent, guardian or fit person may be required to execute a bond, with or without surety, as the Board may require, for the good behaviour and child's well-being for any period not exceeding three years.[46]

The Board may order the release of the child and on probation of good conduct and placed under the care and supervision of any fit facility for ensuring the good behaviour and child's well-being for any period not exceeding three years.[47]

The Board may direct that the child be sent to a special home, for such period, not exceeding three years, as it thinks fit, for providing reformative services including

40 Section 14(5)(f)(i)
41 Section 14(5)(f)(ii)
42 Section 18(1)(a)
43 Section 18(1) (b)
44 Section 18 (1)(c)
45 Section 18 (1)(d)
46 Section 18 (1)(e)
47 Section 18 (1)(f)

education, skill development, counselling, behaviour modification therapy, and psychiatric support during the period of stay in the special home.[48] The Board may order the child to attend school[49]; or) attend a vocational training centre[50]; or attend a therapeutic centre;[51] or prohibit the child from visiting, frequenting or appearing at a specified place;[52]or undergo a de-addiction programme[53].

Procedure for Trial of Offences

The Board must conduct a preliminary assessment and if the Board concludes that the juvenile must be tried like an adult the Board must refer the proceedings to the Children's Court. If there is need to try the Juvenile like an adult it may be tried according to the provisions of the Code of Criminal Procedure, 1973 and pass appropriate orders. The trial must be conducted in a fair manner and child friendly atmosphere.

If the Board concludes that there is no need for trial of a child like an adult the Board may conduct inquiry and pass appropriate orders.

Children's Court

If the child is handed over to the Children's Court the Children's Court must ensure that while passing final orders the Court must include an individual care plan for the rehabilitation of child. The Court must include a follow up plan of the probation officer or the District Child Protection Unit or a social worker.

The Children's Court must ensure that the child who is found to be in conflict with law is sent to a place of safety till he attains the age of twenty-one years and thereafter, the person shall be transferred to a jail. The Children's Court must ensure that the Probation Officer or the District Child Protection Unit or a social worker files a periodic follow up report every year. This follow up report is required to evaluate the progress of the child in the place of safety and to ensure that there is no ill-treatment to the child in any form.

Orders of the Children's Court

After the completion of the procedure the Children's court must decide to

48 Section 18 (1)(g)
49 Section 18 (2)(i)
50 Section 18 (2 (ii)
51 Section 18 (2 (iii)
52 Section 18 (2 (iv)
53 Section 18 (2 (iv)

release the child on such conditions as it deems fit which includes appointment of a monitoring authority for the remainder of the prescribed term of stay. The Children's Court can decide that the child shall complete the remainder of its jail term On conviction under the new law, the juvenile can be convicted for up to seven years, unlike the earlier maximum stay of three years in a correctional home. No child in conflict with law shall be sentenced to death or for life imprisonment.

Conclusion

The law must be applauded for including several new offences against children such as sale and procurement of children for any purpose including illegal adoption, corporal punishment in child care institutions, use of a child by militant groups, offences against disabled children, kidnapping and abduction of children. These provisions will ensure that the children are provided with a safe environment for a healthy growth. The law presumes any child shall be presumed to be innocent of any *mala fide* or criminal intent up to the age of eighteen years. This creates an artificial differentiation among those children who commit crime in the age group below 16-18 years and those above 16-18 years.The JJB to assess whether a child above sixteen years of age who has committed a heinous offence has the physical and mental capability to commit the offence, along with circumstances in which he has committed the offence. In other words, it implies an assumption that the child has already committed the alleged offence. This enquiry in an essence would be a sentencing decision that is arrived at even before the guilt is established. It was emphasized that such an action would denote complete violation of the presumption of innocence, a central tenet of the juvenile justice as well as the criminal justice system. Also, such an arbitrary and irrational procedure clearly contravenes the fundamental guarantees made under Articles 14 and 21 of the Constitution. Only time will tell if the new law will be an instrument of change to change the crime scene by juveniles in India. The Government needs to bring in a rehabilitation policy which includes skill development program and employment opportunities for juveniles to make constructive citizens out of criminals.

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Need Of Corporate Social Responsibility to Mitigate the Trauma of Misleading Advertisements

Dr. Pooja Singh[1]*

"If you tell about lies about a product, you will be found out- either by Government, which will prosecute you, or by the consumer, who will punish you by not buying product a second time."

-David Ogilvy

Abstract

Consumer protection, consumer awareness and consumer sensitization programmes are now-a-days in the fashion and used religiously to attract the attention of the masses. These programmes are also including those advertisements where the depicted information usually misleads the consumers. Government is investing corers of money in the consumer sensitization. But in the world of economical gains, the business hubs have forgotten about the social responsibility towards their consumers and customers. Each and every day consumers have been cheated, deceived or rather misleaded by the attractive and sensational advertisements.

In this 30th anniversary of Consumer Protection Act, 1986 there is a need to think over the ethical, social and moral constrains in the promotion of the product or products of the corporate hubs .These corporate houses are not concerned about the emotions and sentiments of the consumers they only want to rear billion of billion by the advertisements and are not bother about the gospel of the consumer's rights. This paper will carve out the real picture of the misleading advertisements and will appeal to the master corporate sectors to revive the success formulas in the cat and rat competition and advertise the products as on the commercial values of the products. It is the epoch making time to join the hands to maintain and sustain corporate social responsibility to make their brands popular among the masses, by providing the consumers the right information in the right manner.

At last this paper explores the legal remedies that are available against these misleading advertisements for hailing their rights in the true spirit. It will further discuss the detailed Governmental policies and programmes to lay down the guidelines for the protection of consumers rights and to shun the

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practice of the fake and mislddeading advertisements in the corporate world. For the total success we all have to join the hands along with the Government and the law to stop the corrupt practice of the misleading advertisement.

Introduction

The importance of advertising is not increasing steadily but with the advent of electronic media, it has proved as the best marketing stunt for the corporate hubs in the modern globalized society. These advertisements are constant pervasive, powerful force for shaping the attitude and behavior of the general to particular consumers in the society.

Advertisement is an instrument or a popular channel for the consumers and customers to get right to information. A vital of advertising has been covered in Constitution of India under Article -19 (1) (a), which facilitates the dissemination information about who is selling what product and what cost. Advertisements have proved a helpful medium for knowledge and these have well informed the consumers about the economic choices. it is not merely process its' vital connotation in right to expression of the advertiser, in fact it is the right of the recipient Of the advertisement. The Supreme Court of India has observed in *Tata Tress v. Mahanager telephone Nigam Ltd,*[2] the Honorable Court is of the conception that Article-19(1) (a) does not guarantees right of freedom of speech and expression but it also protects the right of an individual to listen, read, and expression but it also protects the right of freedom of speech and expression.

Conceptual Analysis of Advertisement

The field of advertising is extremely broad and diverse. Prima facie, an advertisement is simply a public notice to convey information that is essential to inform a consumer and invite patronage or some other response. Advertising play a quintessential role both in promotion of a product and to create a general awareness about the market. They perform a very important purpose of making the buyers/customers aware of what already exists in the market and what the market is looking for to launch. Advertising plays the role of creating awareness and delivering imagery, therefore, it is more important for a new brand to create its place in the market than a brand that has created its place[3].

The term "Advertisements" has been defined in the case by Supreme Court in the case *Municipal Corporation of Greater Bombay v. Bharat Petro Chemical*

2 AIR 1995 SC 2438 17

3 Tripti Malhotra, Critical Analysis of Surrogate Advertisements and its impact in India, Journal of Law Teachers of India,vol-1 issue no-1-2 2010,p no-66

Corporation Limited[4], as it is 'an announcement and inform the public as well as disseminate information through media and other means, to draw the attention of the public/ individual concerned to some information.

Advertising is something different from marketing because it is not as complex and complicated as the marketing; it does not involve the transfer of goods from producer to customer and consumer.

Role of Corporate Social Responsibility to Control the Social and Legal Vices

Analytically advertising can be very simple at local and level, globally it is a very twisted issue, because of insertion of multimedia and other modern devices has made these advertising processes, a great challenge a legal, moral and ethical grounds. It has targeted the mainly to the tender aged children and womanhood in most of the advertisements, which is the devastating feature for the modern civilized society.

CSR is a means of analyzing the inter-dependent relationships that exist between businesses and economic systems, and the communities within which they are based. Alfred Nobel got in touch with his feelings and redefined his values. Perhaps the most important question that is imperative today is -where are we heading to? The seven deadly sins according to Mahatma Gandhi are – wealth without work; pleasure without conscience; knowledge without character; commerce (business) without morality (ethics) science without humanity; religion without sacrifice; and politics without principle.[5]

Corporate social responsibility is a term describing a company's obligation to be accountable to all of its stakeholders in all its operations and activities. Socially responsible companies consider the full scope of their impact on communities and the environment when making decisions, balancing the needs of stakeholders with their need to make a profit.[6]

There are the various nascent trends in the field of advertising, such as the misleading advertisements, surrogate advertisements and competitive advertisements. There is a great question is o curb these practices in the advertisements. So initially it is the responsibility of the responsibility of the

4 (2002) 2 SCR 360.

5 Neha Saxena, Corporate Social Responsibility: The Justified Means to a Noble End, conference paper from the conference proceedings of KIET, Ghaziabad, on 17th September 2011.

6 Supra note-3

corporate sector to lay down their own guidelines to stop these bad trends from the advertising.

Legal Aspect of Misleading Advertisement

Now this is the question of great importance that misleading advertisements will be covered under the unfair trade practices, if yes what are the legal measures that are available to the aggrieved party?

The *MRTP Act* does not contain enough provisions against false or misleading advertisements and other unfair trade practices. The *Sachar Committee* also emphasized on the need of new legislative measures to ensure adequate protection to the consumer, consequently Government of India has inserted Part B in Chapter by the Amendment Bill of 1983 to regulate these unfair practices[7].

A new *section 36 A* defines ,*"unfair trade practice to mean a trade practice which for the purpose of promoting the sale, use or supply of any goods or services, adopts any of the following practices and thereby causes loss or injury to the consumers of such goods or services, whether by eliminating or restricting competition or otherwise namely-*

Misleading advertisements and false representation……."[8]

But this MRTP Act has been repealed by the Government by the Competition Act 2002. Now the misleading advertisements are solely regulated by the Advertising Standards council of India (ASCI) 1985.

Prior to this the regulation of the advertisements can be done by *Indian Penal Code 1860*, where the depiction of any obscene material for the promotion of any product is still punishable, But now the code of self regulation in advertising pertinent extracts adopted by the *Advertising Standards Council of India* under Article 2 (ii) of its Article of Association.

The ASCI is a dedicated to the noble cause to standardize the advertising world by incorporating the Self Regulation in Advertising. It is a commitment to honest advertising and to fair competition in the market-place. It stands for the protection of legitimate interests of consumers and all concerned with advertising-advertisers, media, advertising agencies and others who help in the creation or placement of advertisements.[9]

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7 Har Govind, Consumer Protection Legislation-New Thrust Under MRTP, Company Law Journal, vol 1March,1984,p no-92.

8 Ibid.

9 Shubhra Deepa Moitra, available at http://www.legalserviceindia.com/article/l275-The-Code-For-Self---Regulation-In-Advertising.html visited on 20th October 2011

There are three gospels of the ASCI to provide relief from the misleading advertisements:

1) Fewer false misleading claims
2) Fewer unfair advertisements
3) Increasing respectability.[10]

Every day, we see numerous advertisements on various mass media especially on television, internet, and radio. Most of them are objectionable in one and the other means. As The Amul Macho underwear advertisement was banned after the objection before the ASCI.[11]But recently the idea's add as "India is three G petitioner busy" is again objectionable 'still it has been telecast everyday at numerous times. There is a dire need to check these kinds of advertisements.

Laws on Misleading Advertisements all Around the World

Advertising Law refers to the laws defining the ways in which products can be advertised, such as placement, timing, and content.

Advertising Laws in United States of America

- 'There is Advertising Law Resource Centre, Advertising Media and freedom of Speech Information, which has been inserted by the First Amendment in Constitution of US. Audit Bureau of circulations, which was established in Chicago, is the first circulation auditing organization since 1914 all around the world.
- There is also Federal Trade Commission –Division of Advertising Practices, exclusively mend for the protection of consumers from unfair trade practices.FTC guidelines are also covered the internet advertising and the various issues involved in it.
- Marketing and Advertising Regulations- in all business, Privacy Policies and Internet Advertising Laws are also helpful to the consumers in cases of misleading and other advertisements.
- The Lanham Act, this is recently amended in year 2005 October.

Advertising Laws in Europe

- EU Misleading and Comparative Advertising
- Europa –Market Surveillance

10 Ibid.
11 Ibid.

Advertising Laws in United Kingdom

In England The Advertising Standards Authority is established as annexure independent body to regulate the advertising industry through Committee of Advertising Practice (CAP) for the protection and restoration of the consumers rights.

Advertising Laws in China

There is *Advertisement Law of The People's Republic of China*. This law has its' ethos in regulation of the advertising activities and promotion of the sound development of the advertising business and for the protection of legal rights and interests of the consumers in the country.

Advertising Law in Ireland

In Ireland there is *Advertising Standards Authority for Ireland,* an independent self regulating body to impart protection of the public interest and to pr.75omote the highest standards advertising and marketing in the country.

Advertising Laws in Canada

There is a separate unit to control the misleading advertisements named as *Office of Consumer Affairs (OCA).* It ensures to the consumers competitive prices and product choice in the competitive world. Apart from this Canadian Advertisers-Code of Advertising Standards is the prime self regulating body in Canada. This Code is further governed by *Advertising Standards Canada (ASC)*, which establish the acceptable advertising standards.

Advertising Laws in New Zealand

In New Zealand, there is New Zealand Advertising Standards Authority (ASA) is a self regulating body which lay down the standards for the advertisements and protect the consumers rights**.**

Advertising Laws in South Africa

In this country too, there is *Advertising Standards Authority of South Africa,* which serves the as a self regulatory body to regulate the advertising standards for the betterment of public interest.

Advertising Laws in Australia

There is *Australia Advertising Standards Bureau,* for the administration of advertising standards in common public interests.'[12]

Judicial Notion Towards Misleading Advertisements

There is a ruling on the false and misleading advertisement in 1996 by the Australian Competition and Consumer Commission, that has prosecuted the Cue Group for this activity was subsequently fined $75,000 by the Federal Court on the count of making false and misleading representations about the price of garments offered for sale.[13]

ACCC chairman Graeme Samuel says businesses must be clear in product advertising about how much the consumer will save. He has added, "Advertised discounts must be real and not illusory. It is also important that businesses put systems in place to ensure advertising is accurate before it is preleased,"[14]

In India also the *Hamdard Dawakhana case* is also related to the same aspect. The misleading advertisements by the fraud medical practitioners are also been covered by ASCI in India

Recently in the landmark judgment, *Budhist Mission Dental College, Hospital v, Bhupesh Khurana,*[15] the Apex Court laid down that the educational institution offering courses by making false assurance to prospective students through advertisements and prospectus regarding their affiliation with recognized universities shall have to pay huge compensations to the affected students if it was proved Attorney a large stage and said assurance and promise were falsely made.

Conclusion and Suggestion

Succinctly, this is the right time to think jointly to upheld the consumers rights than the corporate gains. For this very purpose the corporate sector has to be socially o responsible. Though the Government has passed the best legislation and the courts have given the remarkable judgments through the judicial

12 http://www.hg.org/advert.html, visited on 20th October 2011

13 http://www.fairtrading.nsw.gov.au/Consumers/Scams/Types_of_scams/Misleading_advertising.ht, visited on 20th October 2011.

14 http://www.smartcompany.com.au/retail/federal-court-slams-another-case-of-misleading-advertising.html, visited on 20th October 2011.

15 (2009) 1 CPJ 25 SC.

interpretation like unfair trade practice and misleading advertisement, still there is a need to take deliberate steps from the corporate world to realize the consumers their right to know, choice and remedy. For achieving real justice to the consumers from misleading advertisements there are the following suggestions underneath:

Initially the corporate sectors have to impart the true information regarding their promotional product and not to mislead the ignorant consumer.

Government has to take initiative to amend the Consumer Protection Act 1986, and insert the definition "honest practices".

The ASCI has to play a versatile role in the very strict sense, because there are such advertisements, that corrupts the tender aged budding buds of the nation.

Corporate Social Responsibility is the only medium through which the aims and objectives can be visualized by the country, because in *Lucknow Development Authority v. M K Gupta case*[16] , the Apex Court has held that; "Importance of Consumer Protection Act 1986, lies in promoting welfare of society inasmuch as it attempts to remove the helplessness of a consumer as he faces against powerful business." So this is the time to rebut this potion by CSR.

The clauses of MRTP Act related to unfair practice should be reinstate in the present legislative provisions.

These advertisements are the medium that construct annexure opinion regarding a product and a thing, so it is the vital duty of the corporate sector to disseminate the actual information related to the advertised thing. It has been aptly said by *Leo Burnett*:

"Let's gear our advertising to sell goods,
but let's recognize also that advertising
has a great social responsibility."

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16 (1996) 1SCC 243,

Food Security in India: Some Issues

Dr. Harjiv Kaur Sidhu[1]*

Introduction:

The Indian planners, right from the beginning, realized the need to attain self-sufficiency in food grains as one of the important goals of planning. Governments realized that the food surplus countries used their food surplus as a weapon to force food deficit countries to submit to their dictates. India's first Prime Minister Jawahar Lal Nehru realized that it was with great difficulty that India was able to avoid the political strings attached with food aid, but it did hurt national pride. It was felt that it is only when we achieve self-sufficiency in food that we can progress and develop ourselves. Government of India under Prime Minister Indira Gandhi went in for green revolution. This policy ushered in a revolution in food production in India and dispensed with food grain imports altogether. Food policy in India evolved from the era of food scarcities in the country during 1950s and early 1960s. It included agricultural prices, marketing policy, technology generation and dissemination mechanism, agricultural trade and input delivery, besides development of irrigation and availabilities of adequate institutional credit at concessional rates. Because of the existing imperfections in the domestic agricultural markets, agricultural price policy had the twin objectives of providing remunerative prices to the farmers to produce enough food grain and ensure availability of such grains to the consumers at reasonable prices. At that time the major instruments were the minimum support prices, procurement of the grains for maintaining buffer stocks and distribution of the subsidized grains through public distribution system and subsidies on production inputs as fertilizers in addition to the setting up of agricultural universities and massive public investment in major and medium irrigation structures. As a result of all these efforts Indian agriculture witnessed Green revolution and was able to achieve self-sufficiency is food production and got transformed itself from food-deficit to food surplus country. Rising Productivities and production not only enhanced farm incomes as well as employment opportunities in agricultural but also benefitted inputs Industry trade in India. But the challenge is not over yet the availability of grains reduced to 1961, level owing to continuous growth in population and more over there is slowing down in agricultural sector.

With the passage of time, effect of Green Revolution started fading and a

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noticeable decline in public investment in agriculture during 1960 and 2009. In 1970s, food security was understood as the availability at all times of adequate world Food supply of basic food stuffs (UN1975).

India has been able to eradicate famines or has reduced the risks of famine like situation. Through its public distribution system the food sufficiency, quality and nutritive value of food grains have now emerged as a considerable challenge alongwith related issues of poverty and nutrition.

The definitional jurisdiction of food security comprises there inherent and important dimensions.

(**a) Availabilities:** It is a function of production of food grains.

(b) Accessibility: It relies on the state's food policy coupled with purchasing power of the consumers.

(**e) Stabilisation:** It is influenced by the sustainability of a food system minimizes the probability of risks related to food insecurity in normal as well as difficult times by ensuing The food consumption at a required land*.

Concept of Food Security:

Any meaningful social protection policy resides on three pillars

(a) Basic Security: A decent standard of living, food, health, education and shelter for the large mass of the population.

(b) Economic Security: Access to productive income generation work and with core labour standards applied to all forms of work for a large Proportion of the working age population.

(c) Social Security: The core contingencies that affect populations such as old age, death, unemployment illness disability and property loss. These insecurities are caused by random shocks that hit the households from time to time structural factors and random shocks have an impact on economic insecurities.

When in 1981 Amartya Sen publised his work 'Poverty and Famines: An Essay on Entitlement and Deprivation' it brought a new understanding of the problem of hunger or food security. According to it availability of food is, just not sufficient criteria, Sen emphasised access to food what he called entitlement. He describes entitlement as a combination of what one can produce, then exchange

in the market or any other socially provided supplies. Sen emphasised the fact that mere availabilities or supply of food does not create entitlement for food. What an individual or household can access depends on the individuals or household entitlement.

Entitlement draws attention to the condition under which people access food, whether from direct production, market exchange or income from other goods produced or wage labour and social security measures.

1995 World Food Summit declared: Food security at the individual, household, national, regional, and global levels exists when all people at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life. (FAO. 1996)

So food securities is a combination of access to food and its absorption by the body, which depends on a number of non-food factors such as sanitation, access to clean drinking water, access to health facilities etc. The outcome of food security can be taken to be the nutritional status of individual, with the understanding that food intake is the basic, though not the only factors that affects nutritional status.

So we can say that the mid sixties are a clear demarcation between the earlier phase of policies and measures to cope with localized situations of scarcity and the later phase characterized by a distinct long term strategy for evolving policies and structures for the regulations, management and development of the country's food economy. Policies of the later phase did not emerge suddenly, but an economic historian is likely to discover that the traumatic food crisis of that period and emerging fears about the political repercussions of large and persistent dependence on imports bring about a radical change in the perceptions at the highest level of policy making realizing the importance of having a country wide system of food security based on domestic capabilities to increase production. In the situations prevailing in the mid sixties, there is much justification of the need to emphasize the two objectives- food sufficiency and coverage of the entire population in public distribution system. Today the public distribution system is also being questioned for its appropriateness, it is thought that public distribution system is out of tune with the changing economic scenario.

The concept of food security has a number of dimensions beyond production, availability and demand for food. It is actually a question of the ability to assess food for all and at all times to lead healthy life. Present level of food grain production is not sufficient to meet the growing demands. If demand for food grains and

livestock food continue to grow, food grain production may not be sufficient to meet the demand.

Food security involves strengthening the livelihood security of all members within a household by ensuring both physical and economic access to balanced diet including the needed micronutrients , safe drinking water and environmental sanitation, basic health care and primary education*FAO(1983) has enlarged its concept of food security as

(a) The ultimate objective of world food security should be to ensure that all people at all times have both physical and economic access to the basic food they need

(b) Food security should have three specific aims: ensuring production of adequate food supplies, maximissing stability in the flow of supplies and securing access to available supplies on the part of those who need them.

Changing perspectives of food security:

The concept of food security has undergone substantial changes during nearly two decades. World Food Conference of 1974 was organized in the wake of world food crisis of 1972-74. Earlier food security was understood as mere arrangement for providing physical supply of an adequate minimum level of food grains for the population in the developing countries, during normal harvest as well as during poor harvest.

But presently it has been recognized that the ultimate aim of food security is not only the provision for the physical availability of food grains, also to assure that whole population including the poor and vulnerable sections have access to food grains.(Bhalla 1993, Sarma 1992)

To fulfill this requirement satisfactory production levels and stable supply should be matched by a reduction in poverty and an increase in the effective demand to ensure economic and physical access to food for the poor.

Global Food Security:

Capability of agricultural produce to support growing population is the major area of concern today because crop yield has fallen because of many factors as declining investments in research and infrastructure, increasing water scarcity, climate changes, etc. If we look at the nations millennium development goals adopted in 2000, poverty eradication was included as one of the objectives. It was

targeted to reduce the proportion of people suffering from hunger. Malthus's essay on the principle of population of 1798, predicted already the concern about the ability of agricultural production to keep up with global food demands. But some others forecast that technological advances or expansions of cultivated area would boost production. In the whole world, crop yield growth has slowed because of declining investments in agricultural research, irrigation and moreover because of poor infrastructure and water scarcity.

To achieve food security world needs policy and investment reforms on multiple fronts which include human resources, agricultural research, rural infrastructure, water resources and farm and community based agricultural and natural resource management. To accelerate food security, investment in people is very essential. Agriculturists should be provided education which works directly to enhance the ability of farmers to adopt more advanced technologies and crop management techniques and to achieve higher rates of return on land.

Concerns on Food Security in India:

In India one third of population is estimated to be absolutely poor and one half of children malnourished, so in a country like India, food security issues are of utmost importance. Food prices are rising continuously, area under food grain cultivation is shrinking which are issues needing some remedy.

The recent food security summit which was held in New Delhi, laid down a road map for attaining the goal of food security. It was analysed and emphasized in the summit that India possesses the technical competence and expertise to attain this goal if proper governance is ensured and same local level action for sustainable food security as ecological security, gender equity etc., also recommended.

Land resource conservation is also emphasized. It stressed the provisions for treating all waste and degraded land in a scientific manner so that their biological potential is restored. Emphasis was also laid on forest management. Other recommendations include sustainable intensification and diversification of farming systems and climate literacy programmes.

Challenges to Food Security

The rapid rise in the prices of Food grains has put food security of the whole world in danger. According to World Bank, the average 83% increase in the prices of food grains during last three years has put a question mark on the food sec.

Food insecurity posed a threat to the overall development of a nation. Rising food prices are causing problems of hunger and malnutrition in poor countries. The world food summit, 1996 has targeted to reduce hunger by 2015 but now it seems difficult

Low productivities of the crops are also the worrying factor. Many efforts are done by the government to maximize returns to the farmers and to boost the food grain production

Upheavals in staple food prices, financial markets and the global economy raise questions about the state of food insecurity, nature of price variability and the appropriate strategies for international agricultural development. Before this turmoil agriculture had received warning attention from the global development community as real food prices declined on trend. Analysts focused their attention on the fate of poor producers, but sudden upswing in prices in 2007-8 turned their attention towards poor consumers as many countries struggled with food riots, mounting malnutrition and the adoption of grain self-sufficiency policies.

Dramatically rising grain prices are posing a serious threat to food security in India and other developed countries. This rise is because of both demand and supply side factors. The use of grains and other agricultural products as feed stock to produce biofuels in the form of ethanol and bio diesel is the primary factor that has triggered an upward shift in the demand for grains and has caused a major surge in prices. Increase in prices of fossil fuels has necessitated a search for alternative sources of energy and bio-fuels were seen as a viable substitute and a second factor responsible for the ongoing shift in dietary patterns towards livestock and high value agricultural products. Per capita rise in income in developing countries is resulting in rising consumption of meat and livestock products, which require several kilos of grain to produce one kilo of livestock. On the supply side, world production of cereals has remained stagnant whereas world population has been increasing. Increase in price of crude oil is also a factor responsible for rising grain prices.

Public Distribution System in India

In India the functioning of public distribution system has come under criticism, there is rising burden of subsidies, cost of storage is increasing and moreover benefits did not reach the targeted people. So the system of public distribution system is unsustainable, it needs revamping. Public distribution system has been criticized on some grounds as this system is inherently costly. It is actually based

on the surpluses of two superior cereals as rice and wheat, but these cereals are grown in a few green revolution pockets like Punjab, Haryana and Western Uttar Pradesh. These surpluses have to be procured, stored and distributed all over the country. Moreover the system is too centralized and highly bureaucratic, quality of food provided and impact on the conditions of beneficiaries, performance of the system is poor. This system is practically absent in some of the hardcore poverty areas. So the present food security system reflects these basic flaws. Relatively better off sections of farmers receive far more attention in policy making than the deprivations suffered by the poor. Areas which are lagging in development like draught prone areas urgently need investment in infrastructure. So what is urgently required is a thorough restructuring of the system rather than piece meal improvements in it.

Right to Food: while the Indian constitution does not explicitly mention the right to food as a fundamental right, it is implicitly enshrined in Article 21 of the constitution as the fundamental right to life of every Indians citizen. In spite of gaining self-sufficiency in food grain production especially in respect of wheat and rice as well as having a domestic production far exceeding the nation's overall demand- India has been witnessing the shortages.

In recent years, the battle against hunger has been placed at the center of the development discourse in India. In this context the National Food Security Bill 2011 is revolutionary initiative of the government.

National Food Security Bill:

As agreed by the National Advisory Council at its meeting on 14 July,2010, a working group of members of the NAC was constituted on the National Food Security Bill.

After due deliberations and wide ranging consultations the NAC finalized the details of the basic framework of the proposed National Food Security Bill at its meeting held on 23 October, 2010 based on the recommendations, a detailed framework note was prepared and considered in the meeting of the NAC on 21 Jan, 2011 and it was decided to put this framework note in the public domain, inviting comments, before the Draft Bill is taken up for consideration by the NAC.

Essential Entitlements under the bill:

The bill seeks to cover up to 75 percent of rural population and 50 percent of urban households and proposes the right to 7 kg food grain per person at Rs 3

per kg for rice, Rs 2 per kg for wheat and 1pkg for coarse grains to the population below poverty line(BPL). The general category beneficiaries will get at least 3 kg of ration per person per month at half the minimum support price of grains.

National Food Security Act:

NFSA has been passed by the parliament and notified by the government, concerns about the benefits of the NFSA continue to linger, for the skeptics, much of the debate that preceded the enactment of the NFSA revolved around the issue of cost of the NFSA and its impact on the economy.

However even for the activists and civil society, NFSA 2013 falls short of a comprehensive legislation on food security. While the legal commitment of the NFSA is limited almost to access, availability and absorption, it only promises goals for progressive realization. But even on access, Government is allowed to get away with cards payments if it fails to ensure supply. On the absorption , matters relating to safe drinking water sanitation and healthcare all relegated to a list of endeavors with no commitments either financial or physical. Its commitments on access are also vague and non- justifiable with no clearly identified criteria.

NFSA entitlements will cover only 67 percent of households against about 85 percent who currently have a ration card. (Himanshu Bhushan, 2013)

Food Security Related Matters:

PDS Reform:

Public distribution system needs to be revamped. It should be made transparent, so that food transfers can be tracked all the way to the cardholders and Fair Price shops are managed by accountable community institutions.

Food security Act will mandate PDS reforms as decentralized procurement, Community management of Fair Price Shops, doorstep delivery to fair price shops, assumed financial viability of FPS-: transparency safe guards, end-to-end computerization; tamper-proof receipts, regular social audits.

Other Enabling Provisions

This requires central, state and local governments to strive towards

1. Revitalization of agriculture and food production
2. Universal access to safe drinking water and sanitation

3. Universal health care
4. Universal access to crèche facilities
5. Special nutrition support for persons with stigmatized and debilitating ailments
6. Provision of persons for aged , disabled and single women

Institutional set-up of Grievances Redressal

There will be a strong system of grievance redressal for all food related schemes as strict transparency standards for all food related schemes imposing fines for any violation of the Act, duty to fine whenever irregularities are found, Principle of vicarious responsibilities, compensation in the event of any loss of entitlement.

Official Approaches some Lapses

The official approach to food security is based on a large and centralized PDS focusing on two food grains – rice and wheat. While excluding other nutritious and more affordable food grains grown in rainfed conditions, the PDS was based on the assumption that the produces and consumes of food grains are distinct (vast majority of poor consumes are not produces) and that low food prices are essential for food security and thereby the low prices of other sectors. This approach to food security missed out on an elementary issue- that our rural population, a majority of who are small and marginal farmers and the land less agri-workers comprise the greatest share of our poor. The largest chunk of hungry people in India is in the rural areas and it is ironic that they are partaking in the food production processes even as they are poor and hungry. There is a greater need to look deeper at their access, control over resources, the production processes and from economics to understand this poverty and hunger.

References

A pathy, "Food security for consumers and insecurity for the farmer", *Survey of Indian Agriculture*, 2011.

A Sarris and L Taylor, *Central Stocks- Food aid and food security for the poor*, World Development Report, 1976.

A.K. Sen, Poverty and Famines: An Essay on Entitlement and Deprivation, Clarendon Press, Oxford, 1981.

Anderson (1985, Sarris Taylor 1976, Gale 1976, Valdes 1980, Konandreas 1975, George, 1985)

Anderson, *Consumer oriented food subsidies*, John Hopkins Press, 1985.

Anita Modi, "Challenges to provide food for all", *Kurukshetra*,Vol. 60 No. 5,2012.

Anupam Hazra, "Food security in rural India: Poverty in the land of plenty", *Kurukshetra*, vol-60 No. 5,2012.

Ashish Bose, "Free India by 2007: Need for evergreen revolution", *Economic and Political Weekly*, Vol 39, Money Banking and Finance, March 2004.

Draft National Food Security Bill Essential Features, *Kurukshetra*, vol 59, No 5,2011.

Draft National Food Security Bill: Essential Features, *Kurukshetra*, vol 59, No 5, 2011.

FAO (1987) Conference 24th Session: Evaluation of Food Security Assistance Scheme.

FAO (1996); Report of the World Food Summit, Rome, www.fao.org.

FAO 1987

FAO(1983): Report of world food summit , www.fao.org.

Food security endangered, *Economic and Political Weekly*, Vol. 43, January 2008.

G S Bhalla, "Food Security in South and South Asian countries", *Man and Development*, Vol. XV, No. 1, 1993.

Gale Johnson (1976), Increases Stability of grain supplies in developing countries, Optimal Carry Overs and Insurance, World Development Report.

Himanshu Bhushan, "National Food Security Act: work in progress", *Yojna* , Dec 2013.

K.P. Kannan, S Mahindra Dev and Alak Narain Sharma, "Concerns on food security", *Economic and Political Weekly*, November, 2000.

Kavita Kuruganti

KK Tripathy and K.C. Misha, "Food sustainable Security in India: Policy issues and challenges", *Kurukshetra*, Vol .59, No.5, 2011.

Konandreas P, H Barbara and V Ramankura, "Food Security: An insurance approach", *Research Report*, IFPRI, Washington DC, 1975.

Mark W. Rosegrant and A. Sarah , "Global Food Security: Challenges and Policies", *American Association for advancement of science; line, new series*, Vol. 302, Dec. 2003.

Pinaki Das, "Food securities in relation to entitlement of the poor: Evidence from India", *The Journal of World Economic Review*, Vol.a, 2014.

Report of the world Food conference, Rome, UN, 15-16 Nov., New York, 1975)

V. M. Rao, "Beyond Surpluses Food Security in changing context", Jan 1995.

*V.*M. Rao and R. S. Deshpande, "Food Security in Draught prone areas A Study in Karnataka", *Economic and Political Weekly*, Vol.37, August 2002.

W. P. Falcon and R. Naylore, "Rethinking food security for the twenty first century", *American Journal of Agricultural Economics*, 87(5), 2005.

❑

Constitutional Principles and Rules of Interpretation: Recent Trends*

*Vani Bhushan***

I. Introduction

Interpretation literally means explanation or elaboration of a fact or law. When there is some doubts or dispute as to the meaning of a legal provision or legal action, some independent and impartial authority must be entrusted this task. This becomes more important in case of a federal democracy like India. It is why this function is exclusively assigned to judiciary which is trained in law. The task of interpretation has inherent difficulties. It will be apt to start with a very salutary remark of Justice Felix Frankfurter regarding compelling need for statutory interpretation quoted by the Supreme Court of India. [1] He observed: [2]

Anything that is written may present a problem of meaning, and that is the essence of the business of judges in construing legislation. The problem derives from the very nature of words. They are symbols of meaning. [Emphasis Added]

There are various rules of interpretation, for example literal, golden, mischief or purposive. While construing legislation there is a tendency to pick up a particular rule of interpretation in a traditional fashion. *Hooghly Mills* [3] should stand as a caution for every judicial authority for interpreting the statutory law so as to enable it to adopt the most appropriate and rational approach. Ganguly, J. quotes Friedrich Bodmer: [4]

Words are not passive agents meaning the same thing and carrying the same value at all times and in all contexts. They do not come in standard shapes and sizes like coins from the mint, nor do they go forth with a degree to all the world that

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1 *Regional Provident Fund Commissioner v. Hooghly Mills Co.Ltd* 2012 (1) SCALE 422, Date of judgment, January 18, 2012, hereinafter referred as *Hooghly Mills*. The case has been unanimously decided by Asok Kumar Ganguly and T.S. Thakur, JJ. The judgement was delivered by Ganguly, J.

2 *See* Sixth Annual Benjamin N. Cardozo Lecture 47 *Columbia Law Review* 527 (1947). *Id.* at 430, para 31.

3 *Supra* note 1.

4 Friedrich Bodmer, *The Loom of Language,* (1944) as quoted in *Hooghly Mills, id.* at 430, para 32. Also quoted in Constitution Bench judgement in *S.C. Advocates-on-Record Association v. Union of India* 1993 (4) SCC 441 at 553. This treatise is also available on *http://archive.org/details/TheLoomOfLanguage*, visited on Aug 22, 2013. Bodmer, was a Swiss Philologist and a Professor in the Massachusetts Institute of Technology.

they shall mean only so much, no more and no less. Through its own particular personality each word has a penumbra of meaning which no draftsman can entirely cut away. *It refuses to be used as a mathematical symbol.* [Emphasis Added]

There are certain 'well settled' rules of interpretation which are part of *legal policy* ergo based on *public policy*. In the words of Francis Bennion: [5]

A principle of statutory interpretation embodies *the policy of the law*, which is in turn is *based on public policy*. The court presumes, unless the contrary intention appears, that the legislator intended to conform to this legal policy. A principle of statutory interpretation can therefore be described as a *principle of legal policy formulated as a guide to legislative intention*. ... [Emphasis Added]

Though principles of statutory interpretation are part and parcel of legal policy, they have not been elevated to the status of *rules of law*. The Supreme Court in an earlier case aptly propounds it in the following words: [6]

The rules of interpretation are *not rules of law*: they are *mere aids* to construction and constitute *some broad pointers*. The interpretative criteria apposite in a given situation may, by themselves, be mutually irreconcilable. It is the *task of the court* to decide which one, *in the light to all relevant circumstances, ought to prevail*. The rules of interpretation are useful servants but quite often tend to become difficult masters. [Emphasis Added]

This status has been universally recognised. A very recent work is worth quoting: [7]

What *are* the rules of interpretation? *Almost all jurists and scholars resist the notion that they are "law."* Instead, most contend that those tools, often called "canons" of interpretation, are "rules of thumb"-a legal category *that seems to sit in between law and individual judicial philosophy.* [Emphasis Added]

In the light of this perspective, it is important to note that ever since independence India is passing through a phase of 'legislative explosion'. A vast amount of statutes are coming up at the central and the State legislatures. Further, there is a continuous and ever increasing demand for new legislation on the one

5 Francis Bennion, *Statutory Interpretation* Section 263 at 769 (Lexis Nexis, New Delhi, 8th edn. 2008). Also referred in *Aneeta Hada v. M/S Godfather Travels & Tours*, AIR 2012 SC 2795 at 2812 para 40, Date of Judgement- 27 April, 2012, hereinafter referred as *Aneeta Hada*. A full bench of Dalveer Bhandari, Sudhansu Jyoti Mukhopadhaya, Dipak Misra , JJ. unanimously decided this Criminal Appeal where Dipak Misra, J delivered the verdict.

6 *Keshavji Raviji & Co. v. CIT* 1990(2) SCC 231: 1990(1) SCR 243: 1990(1) JT 235 : 1990(1) SCALE 207.

7 Abbe R. Gluck, "The Federal Common Law of statutory interpretation: *Eire* for the age of Statutes" 54 *William & Marry Law Review* 755-56(2013).

hand and on the other hand there exists a great lacuna of expertise in the area of drafting of statutes, putting on a heavy burden on the interpreting authorities. The task is not only an arduous one but also requires a high degree of calibre in adopting the proper approach in the aforesaid perspective.

Rules of interpretation provide strong base for the super structure of judicial reasoning. Reasoned judgements very often need the logical support of certain well settled principles generally applied by judges to arrive at convincing decisions. A survey of some judgements in recent years proved this fact. The presumption of constitutionality of statute is elaborately analysed, discussed and applied in various decisions. Resort to literary and purposive interpretation has also helped the court at appropriate occasions. Internal aids of preamble, titles, object clause, proviso *etc* are also beneficially utilized. External aids for example maxim, books, reports, etc also found useful. Due to inconsistency in the opinion of judges a few judgements[8] are referred for higher bench.[9] The Supreme Court of India in the search of 'legislative intent' had discussed almost all settled "rules of thumb".

In view of the legislative explosion and a responsive judiciary in India, challenges regarding interpretation need no special explanation. A very recent work correctly reiterates that "one point should be uncontroversial: interpretation is relative to the document being interpreted."[10] Divergent interpretation of the court, therefore, is some time natural. The Supreme court, in the case of *State of Gujarat v. Hon'Ble Mr. Justice R.A. Mehta (Retd)*[11] however, started with reiterating the warning which it gave fifty years back in a seven judges bench judgement. It extracted from *The Keshav Mills Co. Ltd., Petlad v. The Commissioner of Income-tax, Bombay North, Ahmedabad,*[12] where this Court held:[13]

When this Court decides questions of law, its decisions are, under Art. 141, binding on all Courts within the territory of India, and so, it must be the constant endeavour and concern of this Court to introduce and *maintain an element of certainty and continuity in the interpretation of law* in the country. Frequent exercise by this Court of its power to review its earlier decisions on the ground that

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9 *M/S Delhi Airtech Services Private Ltd* v *State of U.P.* AIR 2012 SC 573 and *Ritesh Sinha v. The State of Uttar Pradesh* AIR 2013 SC 1132: (2013) 2 SCC 357. Both are yet to reach finality.

10 Richard A Posner, *Reflections on Judging*, 232 (Harward University Press, 2013).

11 (2013) 3 SCC 1, AIR 2013 SC 693, 2013(1) SCALE 7, [2013] 1 S.C.R. 1. Decided on: 2nd January 2013. Division bench judgement is delivered by Justice Balbir Singh Chauhan, J. The other member of the bench was Fakkir Mohamed Ibrahim Kalifulla , *hereinafter* referred as *Gujrat Lokayukta case*. In this case paragraph cited here are from *manupatra.*

12 AIR 1965 SC 1636, it was a seven judges bench opinion.

13 *Ibid.*

the view pressed before it later appears to the Court to be more reasonable, may incidentally tend to make law uncertain and introduce confusion which must be consistently avoided.[14] [Emphasis added]

Though words are relative in nature, it is difficult but desirable that certainty in law is not disturbed and basic principles of interpretation are followed.

II. Basic Principles

To begin with it would be appropriate to discuss certain basic principles hereunder in separate headings.

Presumptions

Whenever there is an occasion for interpretation of statute, certain doctrines serve as condition precedent. Presumptions are one of them and an interpreter is bound to begin with certain presumptions. Presumptions are one of the most effective tools which guide the judicial reasoning at the very initial stage. Rupert Cross in an extremely pithy and apt remark has given the exact manner as to *when* and *how* legal presumptions are to be used:[15]

> When there *is a choice of meanings* there is a presumption that one which produces an absurd, unjust or inconvenient result was not intended; but it should be emphasised that when the rule is used as a justification for *ignoring or reading in words resort may only be made* to it in the most *unusual cases*. (Emphasis added)

Constitutionality of a statute

Though courts are said to be impartial and unbiased, certain principles desire the court to begin with party. In case of constitutionality of a statute the court presumes that state action is legally valid. In *Namit Sharma v. Union of India* [16] the court observed: [17]

> There is *presumption of constitutionality in favour of legislation*. The

14 *Ibid.* Also see, *Gujrat Lokayukta case*, para 6.

15 Sir Rupert Cross, *Statutory Interpretation*, 15 (Butterworths, London, 1976).

16 (2013)1SCC745: 2012(8)SCALE593: JT2012(9)SC166. Decided on- 13 Sept 2012, hereinafter referred as *Namit Sharma*. This case has been decided by a division bench of A.K. Patnaik and Swatanter Kumar, JJ. unanimously. The judgement was delivered by Swatanter Kumar J. *Namit Sharma* case covers various aspects of constitutional validity of enactment, basically on violation of fundamental rights. This judgement has been over ruled by another division bench in 2013. Here this judgement is called as *Namit Sharma first* and next is *Namit Sharma second.*

17 *Id.*, para 46.

> Legislature has the power to carve out a classification which is based upon intelligible differentia and has rational nexus to the object of the Act. The burden to prove that the enacted law offends any of the Articles under Part III of the Constitution is on the one who questions the constitutionality and shows that despite *such presumption in favour of the legislation*, it is unfair, unjust and unreasonable. (Emphasis added)

Inevitably constitutionality of legislation is one of the fundamental legal presumptions. As presumptions are *evidentiary principles* they are elementary and primary instruments and therefore guiding factors in the task of interpreting the statutory provisions.[18]

As submitted above there are various interpretative tools for the determination of legal validity of a provision. They are presumption of constitutionality, rule of severability, reading down *etc*. *State of Maharashtra* v *Indian Hotel & Retaurants Assn*,[19] *Namit Sharma second,* [20] *Lalita Kumari v. Govt. of U.P.*[21] and *Suresh Kumar Koushal v. Naz Foundation*,[22] *Manohar Lal Sharma v. The*

18 S. 4 of the Indian Evidence Act 1872 acknowledges *three principles* of presumptions.
May presume-Whenever it is provided by this Act that the court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.
[S. 86-88,88A, 90,90A, 113A, 114, 118, 148(4)]
Shall presume- Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.
[S. 79-85, 89, 105, 111A, 113B, 114A,]
Presumption of innocence and Presumption of sanctity, Presumption of soundness is shall presume without establishing facts.
Conclusive proof- When one fact is declared by this Act to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.
[S. 41, 112, 113, (s. 82 IPC 1860 is also an illustration of conclusive proof)].

19 AIR2013SC2582 ,2013(9)SCALE47, (2013)8SCC519, Decided on 16 July, 2013, delivered by Hon'ble Justice Surinder Singh Nijjar and concurring separate opinion by CJI Altamas Kabir, *hereinafter* referred as *Bombay Bar Dancer* case.

20 *Union of India* v *Namit Sharma*, MANU/SC/0902/2013 : AIR2014SC122 : 2013(11) SCALE85: Decided on -03 Sept 2013, *hereinafter* referred as *Namit Sharma Second.* It was a Review Petition decided by Justice A.K. Patnaik (who delivered the unanimous verdict) and Arjan Kumar Sikri, JJ. Previous case, *Union of India* v *Namit Sharma* (2013)1SCC745: 2012(8)SCALE593: JT2012(9)SC166 (*hereinafter* referred as *Namit Sharma First*) was decided one year before in 13 Sept 2012 by division bench of Justice A.K. Patnaik and Swatanter Kumar unanimously. Justice Patnaik was present in both *Namit Sharma First* and *Second*. Second was over ruled by first. It seems he agreed with both judgements.

21 AIR 2014 SC 187, 2013(13) SCALE559, (2014)2SCC1, Decided on 12 Nov 2013. In a very brief para the read down argument has been raised and rejected for interpretation of section 154.

22 MANU/SC/1278/2013,AIR2014SC563,2014CriLJ784,2013(15)SCALE55, (2014)1SCC1, 2014 (1) SCJ 1, decided on 11 December, 2013. Justice G.S. Singhvi delivered the verdict and Sudhansu Jyoti Mukhopadhaya, J was member of the bench.

Principal Secretary[23] are some illustrations. *Kaushal* is intellectually very rich in considering all these means of constitutionality. Tracing the importance of principle of constitutionality the court extracted six points of Constitutional Bench judgement in *Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar*[24] in the following words:[25]

27. … (b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(d) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

(e) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

On the question of whether principle of constitutionality is applicable to a law which was present prior to the constitution *Kaushal* discussed Article 13(1) and Article 372 of the constitution of India. The court took support from *Ram Krishna Dalmia,*[26] *Keshavan Madhava Menon v. The State of Bombay,*[27] *Anuj*

23 2013 Indlaw SC 841; (2014) 2 SCC 532; AIR 2014 SC 666; JT 2014 (1) SC 105; 2013(15) SCALE 305, Decided on : December 17, 2013. The case has been unanimously decided by Hon'ble Justice R.M. Lodha and Kurian Joseph. Justice Madan B. Lokur has different reasoning but concurrent opinion, *hereinafter* referred as *Manohar Lal Sharma*. There is brief reference to read down at para 27.

24 AIR 1958 SC 538. As quoted in *Kaushal* para 26.

25 *Id.*, para 27.

26 *Ram Krishna Dalmia,* para 18.

27 1951CriLJ 680.

Garg v. Hotel Association of India,[28] *John Vallamattom v. Union of India* [29] and held:[30]

28. Every legislation enacted by Parliament or State Legislature carries with it a presumption of constitutionality. This is founded on the premise that the legislature, being a representative body of the people and accountable to them is aware of their needs and acts in their best interest within the confines of the Constitution. *There is nothing to suggest that this principle would not apply to pre-Constitutional laws which have been adopted by the Parliament and used with or without amendmen*t. If no amendment is made to a particular law it may represent a decision that the Legislature has taken to leave the law as it is and *this decision is no different from a decision to amend and change the law or enact a new law*. In light of this, *both pre and post Constitutional laws* are manifestations of the will of the people of India through the Parliament and are *presumed to be constitutional*.[31] [Emphasis Added]

Self restraint, therefore, must be exercised and the analysis must be guided by the presumption of constitutionality.[32] The court finally concluded that:[33]

(ii) There is a presumption of constitutionality in favour of all laws, including pre-Constitutional laws as the Parliament, in its capacity as the representative of the people, is deemed to act for the benefit of the people in light of their needs and the constraints of the Constitution.

Doctrine of severability and the practice of reading down is another important instrument of interpretation. Kaushal can be used as one of the best modern authority on this point.34 According to Kaushal35 the principle of constitutionality has two off shoots, doctrine of severability and practice of reading down.

i. Doctrine of severability in the USA[36]

In the USA, the doctrine of severability and its allied doctrines like reading

28 (2008) 3 SCC 1.
29 AIR 2003 SC 2902.
30 *Kaushal*, para 28.
31 *Ibid.*
32 *Kaushal* , para 32.
33 *Id.*, para 31.
34 Criticism of *Kaushal* is on final finding and not on this aspect.
35 *Kaushal,* para 29.
36 The author sincerely acknowledge , *Nikhil Ranjan*, LL.M. (one YEAR-2014-15), indian law institute, new delhi for this part of discussion.

into, and reading down have been developed through a line of cases. One of the earliest is that of the *Connolly v. Union Sewer Pipe Co.* (1902), where Justice John Marshall Harlan of the US Supreme Court defined the doctrine of severability in following words:

If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative. Recently, Justice Sandra Day O'Connor of the US SC in *Ayotte v. Planned Parenthood of Northern New England* (2006) defined the doctrine of severability is one of the most lucid ways:

The judiciary shall struck down only so much of the portion of an Act as is necessary and no more;

However, in saving a provision, the judiciary shall not do the Act of a legislature by rewriting the Act; and

In deciding upon the validity of the Act, the intent of the legislature shall be taken into account.

In this case, the Act required compulsory notice to parents before one could undergo abortion. The Court saw notice requirement as unconstitutional and struck it down.

Doctrine of severability in India

According to Article 13 of the Constitution of India any provision of a pre or post constitutional law, which is in conflict with Part III of the Constitution, shall be held invalid, null and void. However, it does provide that only so much part of the law that is in contravention of Part III shall be invalid, if it can be separated (or severed) from the rest of the part. This is known as doctrine of severability, which is further based on the idea that judiciary must respect the legislative wisdom, principle of "separation of powers" and must not jump to declare the complete provision or law as unconstitutional. The Supreme court of India in *Kaushal* referred a passage from *R.M.D. Chamarbaugwalla v. The Union of India* (UOI)[37] where a Constitution Bench observed as follows: [38]

37 AIR 1957 SC 628. In this case competitions of a gambling character was in question, whether definition of 'prize competition' is wide enough to include also competitions involving skill to a substantial degree.

38 *Id.,* para 25.

The doctrine of severability rests, as will presently be shown, on a presumed intention of the legislature that if a part of a statute turns out to be void, that should not affect the validity of the rest of it, and that that intention is to be ascertained from the terms of the statute. It is the true nature of the subject-matter of the legislation that is the determining factor, and while a classification made in the statute might go far to support a conclusion in favour of severability, the absence of it does not necessarily preclude it.[39]

A statute could be unconstitutional because of two reasons, one, the subject-matter being outside the competence of the legislature; two, provisions of statute contravening constitutional prohibitions like part III. This is not material for what reason invalidity exists. When a statute is in part void, it will be enforced as regards the rest, if that is severable from what is invalid.[40]

i. Basis of severability

R.M.D. Chamarbaugwalla summarised seven points from American Courts which was quoted with approval by Supreme court in *Kauhal* as follows:[41]

1. In determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor. The test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid. [42]

2. If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable.[43]

3. Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole.[44]

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39 *Kaushal*, para 29.
40 AIR 1957 SC 628, para 25.
41 *Kaushal* , para 29.
42 *Corpus Juris Secundum*, Vol. 82, at 156; Sutherland on *Statutory Construction*, Vol. 2, at 176-177.
43 *Cooley's Constitutional Limitations*, Vol. 1 at 360-361; Crawford on *Statutory Construction*, at 217-218.
44 Crawford at 218-219.

4. Likewise, when the valid and invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety.
5. The separability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same section or different sections;[45]; it is not the form, but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provisions therein.
6. If after the invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void, as otherwise it will amount to judicial legislation.[46]
7. In determining the legislative intent on the question of separability, it will be legitimate to take into account the history of the legislation, its object, the title and the preamble to it.[47]

With the help of various authorities as discussed above the court made following observation for the use of severability as interpretative means:[48]

iii) The doctrine of severability seeks to ensure that only that portion of the law which is unconstitutional is so declared and the remainder is saved. This doctrine should be applied keeping in mind the scheme and purpose of the law and the intention of the Legislature and should be avoided where the two portions are inextricably mixed with one another.

In *Bombay Bar Dancer* case the argument to apply this doctrine has been rejected which lead to declare section 33A and 33B of the Bombay Police Act, 1951 as unconstitutional. The court held as follows:[49]

122. We are also unable to accept the submission of Mr. Subramanium that the provisions contained in *Section 33A can be declared constitutional by applying the doctrine of severability*. Even if Section 33B is declared unconstitutional, it would still retain the provision contained in Section 33A which prohibits any

45 *Cooley Vol. 1*, at 361-362.
46 Sutherland on *Statutory Construction*, Vol. 2, at 194.
47 *Id.*, Vol. 2, at 177-178.
48 *Kaushal*, para 31.
49 *Bombay Bar Dancer case*, para 122.

kind of dance by any person in the establishments covered under Section 33A. [Emphasis added]

In *Kaushal* the severability rule was rejected and section 377 Indian Penal Code was held constitutional while in *Bombay Bar Dancer* case it was rejected to declare provisions unconstitutional.

In this context it is pertinent to note that Supreme Court being guardian of the constitution has to act in two different ways. It has to be active, take interest in protection of individual liberty. For example, it should declare any executive action unconstitutional at the earliest if it violates fundamental right. But in some cases it has to be reluctant and slow. For example if any provision of an enactment is in question. *Kaushal* puts it this way: [50]

30. Another significant canon of determination of constitutionality is that the Courts would be reluctant to declare a law invalid or *ultra vires* on account of unconstitutionality. The Courts would *accept an interpretation, which would be in favour of constitutionality rather than the one which would render the law unconstitutional.* Declaring the law unconstitutional is one of the last resorts taken by the Courts. [Emphasis added]

ii. Reading into and Reading down

Reading into and reading down is one of the tool used in the interpretative process to save a provision from being turned down as violative of fundamental rights *etc*. reading into means certain words are not written in the provision but the court interprets as if it is present. For example, collegium system has been read into by the Supreme court in article 124. Reading down is opposite of reading into. This tool has also been widely discussed in *Kaushal.* A passing reference has also been made in *Namit Sharma Second, Bombay Bar Dancer* case and *Manohar Lal Sharma.*

In first three cases the court rejected the application of this tool while in last *Manohar Lal Sharma,* it seems the court has accepted the argument of 'read down.' The court in *Kaushal* has thoroughly discussed the rule of reading down and its limitation in following words:[51]

The Courts would preferably put into service the principle of 'reading down' or 'reading into' the provision to make it effective, workable and ensure the attainment of the object of the Act. These are the principles which

50 *Kaushal*, para 30.
51 *Ibid.*

clearly emerge from the consistent view taken by this Court in its various pronouncements including the recent judgment in *Namit Sharma v. Union of India* (2013)1 SCC 745.

Kaushal takes support from *Namit Sharma First* which has been overruled by *Namit Sharma Second* in a review petition. This overruling does not dilute the logic of reading down because *Kaushal* relied upon Constitution Bench judgement of *D.S. Nakara v. Union of India (UOI)*[52] where it observed :[53]

66. If from the impugned memoranda the event of being in service and retiring subsequent to specified date is severed, all pensioners would be governed by the liberalised pension scheme. ...It does therefore appear that the reading down of impugned memoranda by severing the objectionable portion would not render the liberalised pension scheme vague, unenforceable or unworkable.

The technique of reading down was applied in *Namit Sharma first* which was decided last year. It invited severe criticism from all quarters. Sections12(5) and 15(5) of the RTI Act 2005 does not prescribe any basic qualification for commissioners under RTI. *Namit Sharma first* conceived it as missing words and held that such persons must have a basic degree in the respective field as otherwise Sections 12(5) and 15(5) of the Act are bound to offend the doctrine of equality. Therefore the court incorporated the doctrine of "reading into" to avoid turning down the provisions for the violation of article 14.[54]

Responding to the above argument *Namit Sharma second* says that parliament never missed anything because they were clear in mind that the information commission is going to be an administrative body. It observed:[55]

This "reading into" the provisions of Sections 12(5) and15(5) of the Act, words which Parliament has not intended is contrary to the principles of statutory interpretation recognised by this Court.[56]

52 (1983) 1 SCC 305. A Constitution Bench of this Court elucidated upon the practice of reading down statutes as an application of the doctrine of severability while answering in affirmative the question whether differential treatment to pensioners related to the date of retirement *qua* the revised formula for computation of pension attracts Article 14 of the Constitution.

53 *Id.* at para 66.

54 *Namit Sharma first* para 106.2.

55 *Namit Sharma Second*, para 26.

56 The court referred three Judge bench judgement of *Union of India v. Deoki Nandan Aggarwal* 1992 Supp. (1) SCC 323 where it was held that the court could not correct or make up for any deficiencies or omissions in the language of the statute. Courts cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate.

Another pertinent question is whether the interpretative seizure of severability 'augment the class' or 'severance always cuts down the scope, never enlarges it'. *Kaushal* also discusses this question with the help of *D.S. Nakara*, where the Constitution Bench observed: [57]

68. We are not sure whether there is any principle which inhibits the Court from striking down an unconstitutional part of a legislative action which may have the tendency to enlarge the width and coverage of the measure. Whenever classification is held to be impermissible and the measure can be retained by removing the unconstitutional portion of classification, by striking down words of limitation, the resultant effect may be of enlarging the class. In such a situation, the Court can strike down the words of limitation in an enactment. That is what is called reading down the measure. We know of no principle that 'severance' limits the scope of legislation and can never enlarge it.

Kaushal also deliberates the burden of proof, the matter of judicial notice, belief in wisdom of state regarding rationale of discrimination. For these the court extracted from *Commissioner of Sales Tax, Madhya Pradesh, Indore v. Radhakrishan*[58] in the following words:

...the burden is upon him who attacks it to show that there has been a clear transgression of constitutional principles. *For sustaining the presumption of constitutionality the Court may take into consideration* matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived *it must always be presumed that the Legislature understands and correctly appreciates the need of its own people* and that discrimination, if any, is based on adequate grounds. It is well settled that *courts will be justified in giving a liberal interpretation* to the section in order to avoid constitutional invalidity. These principles have given rise to rule of reading down the section if it becomes necessary to uphold the validity of the sections.

In the case of *Lalita Kumari* it was argued that "in the light of Article 21, provisions of *Section 154 of the Code must be read down* to mean that before registering an FIR, the police officer must be satisfied that there is a prima facie case for investigation. The constitution bench, however, declined to oblige this argument.[59] In the case of *Manohar Lal Sharma*[60] the learned senior counsel

57 *D.S. Nakara*, para 68.

58 (1979) 2 SCC 249.

59 *Lalita Kumari*,para 19.

60 2013 Indlaw SC 841; (2014) 2 SCC 532.

for CBI has argued that Section 6A [of Delhi Special Police Establishment Act, 1946] must be read down to mean that prior approval is not necessary in cases where investigation is monitored by the Constitutional court.[61] Though the court did not directly address this argument of 'read down' but the three judges bench held that the prior approval of investigation required in section 6A is for the cases monitored by State. As the case is monitored by constitutional courts like Supreme court, this requirement is not necessary. In other words the court allowed this argument of 'read down.'[62]

iii. Limits of reading down

Kaushal extracted a passage from *Minerva Mills Ltd. v. Union of India (UOI)*[63] where the Court identified the limitations upon the practice of reading down:[64]

The device of reading down is not to be resorted to in order to save the susceptibilities of the law makers, nor indeed to imagine a law of one's liking to have been passed. One must at least take the Parliament at its word when, especially, it undertakes a constitutional amendment.

The idea of reading down cannot be advanced if the provision empowers nothing but arbitrariness. *Kaushal* illustrated it from *Delhi Transport Corporation v. D.T.C. Mazdoor Congress*[65] where in his concurring opinion, Ray, J. observed:[66]

This, however, does not under any circumstances mean that *where the plain and literal meaning that follows from a bare reading of the provisions of the Act, Rule or Regulation that it confers arbitrary, uncancalised, unbridled, unrestricted power* to terminate the services of a permanent employee without recording any reasons for the same and without adhering to the principles of natural justice and equality before the law as envisaged in Article 14 of the Constitution, *cannot be read down to save the said provision from constitutional invalidity* by bringing or adding words in the said legislation such as saying

61 *Manohar Lal Sharma,* at para 27.

62 *Id* at para 65 and para 105.

63 (1980) 3 SCC 625.

64 *Id.* at para . 69. In *Minerva Mills* the UoI argued that 'Article 31C should be read down so as to save it from the challenge of unconstitutionality.' It suggested that 'it would be legitimate to read into that Article the intendment that only such laws would be immunised from the challenge under *Articles 14* and *19* as do not damage or destroy the basic structure of the Constitution.' The court refused to apply the rule of reading down.

65 1991 Supp (1) SCC 600.

66 In *Delhi Transport Corporation v. D.T.C. Mazdoor Congress* 1991 Supp (1) SCC 600 Justice Ray also took note of Seervai *Constitutional Law of India* and Coin Howard, *Australian Federal Constitutional Law*.

that it implies that reasons for the order of termination have to be recorded. In interpreting the provisions of an Act, it is not permissible where the plain language of the provision gives a clear and unambiguous meaning can be interpreted by reading down and presuming certain expressions in order to save it from constitutional invalidity.

The court in *Kaushal* finally concluded that:[67]

iv) The court can resort to reading down a law in order to save it from being rendered unconstitutional. But while doing so, it cannot change the essence of the law and create a new law which in its opinion is more desirable.

In the *Bombay Bar Dancer* case the court reiterated that rule of reading down can be applied "provided it does not clearly and flagrantly violate its constitutional limits". It, however, declined to do so in following words:

It is not possible to read down the expression any kind or type of dance by any person to mean dances which are obscene and derogatory to the dignity of women. Such reading down cannot be permitted so long as any kind of dance is permitted in establishments covered under Section 33B[of Bombay Police Act 1952].

Bombay Bar Dancer case,[68] as submitted earlier the presumption of constitutionality[69] and reading down[70] has been argued by the State counsel. On the controversial question of burden of proof the State argued as follows:[71]

67. On the basis of the above, it was submitted that the burden of proof is upon the Respondents herein to prove that the enactment/amendment is unconstitutional. *Once the respondents prima facie convince the Court that the enactment is unconstitutional then the burden shifts upon the State to satisfy that the restrictions imposed on the fundamental rights satisfy the test of or (sic) reasonableness.* The High Court, according to the appellants, failed to apply the aforesaid tests. [Emphasis added]

iv. Exceptions of presumption of constitutionality

The general rule is that "…the burden is upon him who attacks it to show that there has been a clear transgression of constitutional principles." The

67 *Kaushal*, para 31.
68 AIR2013SC2582, 2013(9)SCALE47, (2013)8SCC519.
69 *Bombay Bar Dancer* case, *Id.* at para 65-69.
70 *Id.* at para 70.
71 *Id.* at para 67.

exceptions to presumption of constitutionality is a grey area because of lack of any legislative direction and divergent opinion of Supreme Court of India. *Kaushal* judgement has been severely criticized for not accepting the argument of exception. However *Bombay Bar Dancer* case throws some light on it in following words:[72]

The Preamble of the Constitution of India as also Articles 14 to 21, as rightly observed in the Constitutional Bench Judgment of this Court in *I.R. Coelho*[73] form the heart and soul of the Constitution. Taking away of these rights of equality by any legislation *would require clear proof of the justification for such abridgment. Once the respondents had given prima facie proof of the arbitrary classification of the establishments under Sections 33A and 33B,*[of Bombay Police Act, 1951] *it was duty of the State to justify the reasonableness of the classification*. [Emphasis added]

For this conclusion the division bench further relied on *M/s. Laxmi Khandsari,*[74] where this Court observed as follow:[75]

14. We, therefore, fully agree with the contention advanced by the petitioners that where there *is a clear violation of Article 19(1)(g), the State has to justify by acceptable evidence, inevitable consequences or sufficient materials that the restriction, whether partial or complete, is in public interest and contains the quality of reasonableness.* This proposition has not been disputed by the counsel for the respondents, who have, however, submitted that from the circumstances and materials produced by them the onus of proving that the restrictions are in public interest and are reasonable has been amply discharged by them. [Emphasis added]

The court in *Bombay Bar Dancer*[76] case finally concluded that doctrine of presumption of constitutionality has been rebutted by *prima facie* proving that fundamental rights are violated and the State "herein have failed to satisfy the aforesaid test laid down by this court."[77] Establishing the rule of strict scrutiny which negates presumption of constitutionality the court observed :[78]

72 *Id.* at para 100.
73 *I.R. Coelho (Dead) by LRs. v. State of T.N.* (2007) 2 SCC 1.
74 *M/s. Laxmi Khandsari v. State of U.P.* (1981) 2 SCC 600.
75 *Id.* at para 14.
76 2013(9)SCALE47, (2013)8SCC519.
77 *Bombay Bar Dancer* case, para 101.
78 *Id.* at para 110.

110. The State has failed to establish that the restriction is reasonable or that it is in the interest of general public. The High Court rightly scrutinized the impugned legislation in the light of observations of this Court made in *Narendra Kumar*,[79] wherein it was held that *greater the restriction, the more the need for scrutiny*. The High Court noticed that in the guise of regulation, the legislation has imposed a total ban on dancing in the establishments covered under Section 33A [of Bombay Police Act, 1951]. The High Court has also concluded that the legislation has failed to satisfy the doctrine of direct and inevitable effect.[80]

v. Foot note four and Presumption of constitutionality

The exception to presumption of constitutionality owes its origin to Foot note four of *United States* vs. *Caroline Products* (1938).[81] In this case the court upheld the legislation on the basis of presumption of constitutionality but acknowledged certain conditions where this presumption of constitutionality may be diluted. The 'Footnote Four,' contained three paragraphs dealing with exceptions to this presumption. Fali S. Nariman examines this in following words: [82]

Chief Justice Harlan Fiske Stone's footnote (in US vs. *Caroline Products*) suggested that there might be situations in which this presumption of constitutionality should be less stringently applied, as for instance, where laws affected ' discrete and insular minorities' – i.e., powerless groups hated or feared by the majority in society. This was because prejudice against religious national or racial minorities would distort the functioning of the political process. A more intensive judicial scrutiny was called for when laws were actually targeted at such minorities. Much legislation existed in the US at that time, particularly at the state level, that reflected white-majority prejudice against African-Americans, Asians [e.g., laws preventing aliens of Asian ancestry from owning land or pursuing certain occupations] and unpopular religious groups, such as Jehovah's Witnesses. Members of these groups, precisely because they were the victims of intense prejudice, were incapable of using the political process to protect themselves. The third paragraph of

79 *Narendra Kumar v. Union of India*, (1960) 2 SCR 375.

80 The court admitted the argument of Dr Rajiv Dhavan at para 79 and referred *Maneka Gandhi's* case (1978) 1 SCC 248.

81 304 US 144 (1938)

82 Fali S. Nariman, *The State of the Nation, In the context of India's, Constitution*, 49-50, Hay House India, First Reprint 2013.

the footnote[83] reflected an awareness that an even-handed but proforma application of the presumption of constitutionality would leave these groups at the mercy of an intolerant majority. The footnote provided a theoretical basis for future judicial activism in defence of powerless minorities.

Fali S. Nariman puts it as under:[84]

The footnote recommended the appropriateness of applying different degrees of judicial scrutiny to different types of legislation. In those cases the court had rigidly scrutinized legislation affecting property rights to determine whether it served a legitimate public purpose and was reasonable in its terms.

As mentioned in the Oxford Companion to the Supreme Court of the United States: 'recognition of the need for special judicial protection for such groups is the footnote's (foot note four of *Caroline Product* Judgement) greatest strength and the principal reason for its continued vitality.'[85]

III. Concluding Remarks

The trends of recent judgements are significant in respect of the fact that it reflects the importance of various interpretative tools like presumption of constitutionality, rule of severability, *etc*. *State of Maharashtra* v *Indian Hotel & Retaurants Assn*[86] *@ Bombay Bar dancer* case, *Namit Sharma second,*[87] *Lalita Kumari v. Govt. of U.P.*[88], *Suresh Kumar Kaushal v. Naz Foundation,*[89] *Manohar Lal Sharma v. The Principal Secretary*[90] are cases where presumption of constitutionality, rule of severability and reading down as an interpretative tool has been comprehensively debated. Presumption of constitutionality is a rebuttable presumption. It conceives three situations. One, if the petitioner is not able to convince *prima facie* that a provision violates fundamental rights *etc*., the court had observed that the law

83 'Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religions, or national or racial minorities … whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities and which may call for a correspondingly more searching judicial inquiry.

84 Fali S. Nariman, *The State of the Nation, In the context of India's, Constitution,* 49-50, Hay House India, First Reprint 2013.

85 Kermit L. Hall (ed.): *Oxford Companion to the Supreme Court of the United States*, Oxford University Press, New York, 1992, pp. 306-07.aa

86 AIR2013SC2582 , (2013)8SCC519.

87 *Union of India* v *Namit Sharma,* MANU/SC/0902/2013 : AIR2014SC122.

88 AIR 2014 SC 187, (2014)2SCC1.

89 MANU/SC/1278/2013,AIR2014SC563, (2014)1SCC1.

90 2013 Indlaw SC 841; (2014) 2 SCC 532; AIR 2014 SC 666.

is valid. Second, if the petitioner is able to convince and *prima facie* rebuts the presumption, then the State comes in picture so far as burden of proof is concerned. If the State is able to convince the court that the provision is within the bounds of established principle and law, the provision is held to be valid. Third, if after *prima facie* proof of violation of fundamental rights etc, the State is not able to justify the grounds of restrictions the provision is not valid. *Kaushal* comes in first category while *Bombay Bar dancer* falls in third category. *Kaushal* did not accept that the *prima facie* violation of fundamental rights have been established. It, therefore, held that section 377 of Indian Penal Code is not violative of article 14, 15 or 21. On the other hand in *Bombay Bar dancer* case the aggrieved persons could *prima facie* convince that Sections 33A and 33B,[of Bombay Police Act, 1951] lead to *arbitrary classification*. Burden of proof then shifted to State and it was duty of the State to justify the reasonableness of the classification, which the State could not do. The court, therefore, held both of these sections unconstitutional.

Another device of interpretation as submitted above, is reading down which is used to save the provision from being turned down as violative of fundamental rights *etc*. *Kaushal* with the help of previous authorities has widely discussed it. A passing reference has also been made in *Namit Sharma Second, Bombay Bar Dancer* case. In the three cases the court rejected the application of this tool while in *Manohar Lal Sharma,* it seems the court has accepted the argument of 'reading down.'

Various legal authorities like Law Commission of India, Supreme court itself recommend modifications in laws. If they are not incorporated by parliament, does this also indicate intention of legislature? *Kaushal* is affirmative on this negative approach of gathering intention. *Kaushal* notices the absence of any amendment in section 377 and non implementation of the report of Law Commission of India as supportive evidence to read the mind of legislature. This proposition of *Kaushal* is 'risky if not reckless' because sometime the Legislature in India is infamous for conscious disregard of constitutional provisions. It is not that they do not want to legislate. Their priority list is volatile where important legislative business some time get low priority. A curative petition in the name of *Dr. Shekhar Seshadri v. Suresh Kumar Koushal* has been filed on April 02, 2014 and is still pending. This case will definitely discuss the levels of judicial scrutiny as propounded in footnote four of judgement of *Caroline Products* (1938).[91]

Though constitution provides protection to minorities, they are vulnerable

91 304 US 144 (1938).

and may be ignored in political process dependent on majority community. The concept of strict scrutiny of judicial review is an added security of their protection. In other words if a statute or executive action provides certain benefits to minorities, presumption of constitutionality will be applicable and scrutiny by judiciary will not be strict. Petitioner has to prove *prima facie* that the public purpose is not served, restriction is unreasonable etc. On the contrary if a statute or executive action imposes restrictions on minorities the court might apply strict scrutiny and will ignore presumption of constitutionality. In such a case State and not the petitioner has to *prima facie* prove the public purpose and reasonability of restrictions. Mathematically speaking presumption of constitutionality is inversely proportional to level (liberal or stringent) of judicial scrutiny. In case of India the doctrine of foot note four has limited application. It cannot be applied to all religious minorities (especially Muslims) because they constitute a big chunk of population. More over they cannot be ignored as they have shown their potential in politics. Indeed the parties have been charged for pursuing a policy of appeasement. In case of other religious minorities, sexual minorities, linguistic minorities the doctrine of strict scrutiny flowing from foot note four may be applicable. However this gives greater discretion to a judge and brings subjectivity. It is probably one reason this level of strict scrutiny judicial review has been avoided by judiciary.

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Development of Wild Animal Protection Laws: National and International Perspective

*Dr. Partha Pratim Mitra**

Abstract

International conventions on wild animals use the words conservation and preservation interchangeably but a critical distinction exists; where preservation focuses on 'nature' and conservation is based on 'society'. The Conservation movement emerged in USA from the 1890s to the 1930s advocated for natural right for the greater good and preservationists believe in maintenance of natural environment where development more or less banned. Though in India the terms 'Conservation', 'Preservation', 'Protection' are used all most in same purpose but it is said that Indian law has been largely motivated by the preservationist approach. In opinion of several conservationists, India has strong wild animal protection laws which are against the rights of tribal people and forest dwellers. This paper is focuses to different social, political and economical issues and also comparatively assesses relationship between anthropocentric conservation and eco-centric preservation measures for protection of wildlife and socio-economic standard for betterment of people in India.

Introduction

The main purpose of conservation of wild animals is to manage the human use of the biosphere in such an way that present generation will get maximum benefit but at the same time future generation will also able to fulfill their need. This need is very much well recognised by legislature as well as is interpreted very well by judiciary also. The answer to the question why preservation of wildlife is important for human society is that preservation of wildlife is important for maintaining the ecological balance in the environment and sustaining the ecological chain. It must be understood that there is interlinking in nature.[1] The concept of conservation of wildlife was developed by biologist or naturalist but the idea got its importance through the support of legal awareness at national and international level. Indian wildlife possesses a rich and diverse fauna and is unique in having immense natural beauty in its different ecosystems. Over the centuries this rich wildlife has played an

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1 Sanchar Chand vs. State of Rajasthan, (2010) 10 SCC 604

important role in our economy; as a source of food for the masses, as material for trade, as in musk, and for use in war.[2] The need of wildlife was observed by Indian judiciary as an asset and heritage of the nation and that should be protected for future generation carefully. Wildlife populations and habitats have been degraded to a great extent under the pressure of human activities and as per Delhi High Court, we can no more afford to kill wild animals for the sake of pleasure of a few persons, thus disrupting life forms and linkages vital for the preservation of bio-diversity.[3] India is a country having huge diverse flora and fauna with Protected Area network in India comprises 670 Protected Areas (102 National Parks, 517 Wildlife Sanctuaries, 47 Conservation Reserves and 4 Community Reserves)[4] covering nearly 4.46% of country's geographical areas including 39 tiger reserves and 27 elephant reserves. The 'species conservation' policy is western concept which is generally adopted by rich countries as huge financial aids are needed whereas projects for protection for total ecosystems are followed by 'developing' or 'underdeveloped' countries.[5] The Endangered Species Act, 1973 and Marine Mammals Protection Act, 1972 in USA are examples of the 'species approach' where as the Wild Life (Protection) Act, 1972 of India is an 'ecosystem approach' for conservation of wildlife in the nature. India does not have the Endangered Species Act, 1973 and the Marine Mammals Protections Act, 1972 like USA or the Conservation of Seals Act, 1970, the Protection of Badgers Act, 1992 or the Salmon and Freshwater Fisheries Act, 1975 like UK for the legal protection of any particular species and only for single species like Salmon, nearly four statues[6] are present in UK. Though many administrative schemes and policies like, Man and Biosphere Program (1970), Project Tiger (1973), Elephant Project (1991) or Project Cheetah (2010) adopted by the Central government or various State governments time to time helped to solve ecological problems of a particular species in India but failed to adopt strict legislative measures for endangered and critical species.

International Conventions for Wild Animal

The enactment of national legislation to protect wildlife and environment generally can be traced back to antiquity, with forestry conservation laws adopted in Babylon in 1900 BC and a law for the establishment of nature reserves promulgated

2 Madhav Gadgil, Ecological Journeys, 1st Published, permanent black, Delhi, 2001, p. 46.

3 M/s Ivory Traders and Manufacturers Association v/s Union of India , AIR 1997 Delhi 273 FB (Para 17)

4 Report to the People on Environment and Forest, 2014 – 2015, Ministry of Environment, Forest and Climate Change, Government of India

5 Sanjay Upadhyay & Videh Upadhyay, Handbook on Environmental Law, Volume-1, 1st Published, LexisNexis Butterworth, 2002, p. 219.

6 Salmon and Freshwater Fisheries (Protection) (Scotland) Act, 1951, Salmon and Freshwater Fisheries Act, 1975, Salmon Act, 1986 and Salmon Conservation (Scotland) Act, 2001

in Egypt in 1370 BC.[7] In England, in 11th century, William the Conqueror imposed the death penalty for killing of royal deer, although this was clearly to protect his own hunting rights rather than the rights of the deer.[8] In India, the concept of wildlife laws is new one comparatively other European and American countries. Though sources of wildlife conservation laws in India are mainly Common laws, Statutory laws and Judicial precedents but legislature and judiciary mainly followed the principles of International Laws. The numerous multilateral treaties were made relating to conservation of wild animals and their habitats. In the modern time, first global regulation directly relating to wildlife was the Convention for Regulating of Whaling, Geneva in 1931 where 26 nations signed together[9] and most important international convention was the Preservation of Fauna and Flora in their Natural State, London in 1933 which created worldwide awareness. But in 1843, most probably the first wildlife treaty was made when France and Great Britain both agreed for limitation of catching fishes in North Sea. Later in 1882, North Seas Fisheries Convention was organized when other than France and Great Britain, Germany, Belgium and Denmark all joined on agreement. In 1911 USA, UK and Russia made the Convention for Preservation and Protection of Fur Seals as 'fur trade' was one of the driving forces behind European expansion into North America for searching of seals and otters after the wipe out of fur-bearing animals in western Russia.[10] In 1916 again USA and Britain made 'Migratory Birds Treaty' for enforcing laws by respective legislature to control hunting of migratory birds like doves and waterfowls and subsequently American congress introduced Migratory Birds Act in 1918 for ecological purpose.[11] After the devastation of World War II, international conferences relating to Whaling Regulation in 1948, Protection of Birds in 1950, Plant Protection Agreement for South East and Pacific Region in 1956, Antarctic Fauna and Flora in 1964 and African Convention for Conservation of Nature and Natural Resources in 1968 were some very important legal regulations in international level for wild animals in nature. In modern environmental jurisprudence, United Nations Conference on the Human Environment, 1972 in Stockholm was a milestone to develop environmental laws in national and international level both. Afterwards the Convention for Conservation of Atlantic

7 Lyster's International Wildlife Law, Michael Bowman, Peter Davies, Catherine Redgwell, 2nd Edition (2010), Cambridge University Press, p. 3

8 Urban Environments and Wildlife Law: A Manual for Sustainable Development, Paul A. Rees, Blackwell Science, p. 82

9 P. Van Heijnsbergen, International Legal Protection of Wild fauna and flora, IOS Press, Amsterdam, Netherlands, 1997 pp. 14-15. [http://books.gogle.co.in]

10 John Bellamy Foster, The Vulnerable Planet, 2nd Indian reprint, Cornerstone Publication, Kharagpur, 1999, p. 42.

11 Amal Roy & Mohit Bhattacharya, Political Theory, Ideas and Institutions, 13th revised edition, World Press, Kolkata, 2003, p. 326.

Seals in 1972, Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) in 1973, Convention on Conservation of Migratory Species in 1979, Conservation of Polar Bear in 1973, Conservation of Atlantic Marine Living Resources in 1980 inspired different nations to legislate rules and regulation for conservation and protection of wild animals at the municipal level. If Stockholm Declaration was the Magna-Carta for international environmental laws then more specifically CITES was a grand norm for international wild animal law. In United Kingdom the development of conservation laws started from Victorian age through enacting the Sea Birds Protection Acts of 1869, 1872 and 1880 mainly to prohibit the killing of sea birds and to restrict the international trade on feathers for hats and clothes[12] and in 1916 made Migratory Birds Treaty with USA to control hunting of migratory birds like doves and waterfowls. In England, national parks were designated under the National Parks and Access to the Countryside Act, 1949 and finally the Department of Environment became a part of ministerial portfolio in 1970. In United States of America, the creation of 'Yellowstone National Park' in 1872 was the impact of early conservation movement in USA and Yellowstone developed a model for conservation movement rest of the world. The National Park Service (NPS) was by American Congress through the National Park Service Organic Act, 1916 to preserve unique resources and existing parks facilities and also to develop the natural resources. The modern environmental legislative process in USA was developed through various civil rights movements during the period of 1960s and 1970s. American President then established an advisory panel on pesticide and finally American Congress enacted the Marine Mammal Protection Act, 1972 and the Endangered Species Act, 1973 for the conservation of wildlife in the ecology. One agreement was made between USA and USSR on May 23, 1972 for a cooperative program to study and protect wildlife and their habitats focusing on migratory birds, fish and marine mammals and parks which link the two countries.[13] After the colonial regime, maximum African and Asian countries tried to preserve their wildlife and large mammals became the focus of newly independent nations in many parts of the world. So the survival of the European Bison in Poland of the 1920s or protection of giant antelope to postcolonial Angola became important to the rulers of the newly developed countries.[14] Later many under developed countries also started to preserve the fauna & flora from industrial development or agricultural conversion in Europe and Africa and many Asian countries like Pakistan, Bangladesh, Nepal, Bhutan, Sri Lanka also made laws

12 Stuart Bell and Donald Mcgillivray, Environmental Law, 7th Edition, Oxford University Press Inc., New York, 2008, p. 683.

13 Wildlife without Borders, US Fish & Wildlife Service, summary report, 2001-2002

14 Ghazala Shahabuddin & Mahesh Rangarajan (ed), Making Conservation Work, 1st edition, permanent black, Uttaranchal, 2007, p. 6.

for conservation of wildlife and Forest. In 2000, a *Cartagena Protocol on Biosafety* (CPB) was adopted under the aegis of the Convention on Biological Diversity (CBD) to ensure safe transfer, handling and use of living modified organisms resulting from modern biotechnology. India is a Party to the CBD as well as CPB. Thereafter, a *Nagoya Protocol on Access and Benefit Sharing* (ABS) has been adopted in 2010 after six years of intense negotiations under the aegis of CBD. Ratification of the Nagoya Protocol by 51 Parties to the CBD is also a major step towards achieving the first of the global *Aichi Biodiversity Targets* (Target 16 that by 2015, the Nagoya Protocol is in force and operational), and that too more than a year before its target date, which is quite remarkable. The Nagoya Protocol would be implemented at the national level through the Biological Diversity Act, 2002.[15]

Classification of International Wildlife Laws

After critically analyzing, all the international conventions to control the depletion of biological resources may be classified mainly into two types. One Category of conventions which deal with general ecological matters like, Convention relative to the Preservation of Fauna and Flora in their Natural Habitat, 1933 or Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 1973 or the Convention on Biological Diversity, 1992 etc where main object is conservation of all biological components broadly and Second Category of conventions which deal with protection and conservation of a particular type of species in the ecology like, International Convention for the Protection of Birds, 1950 or International Convention for the regulating of Whaling, 1946 etc. Again all the international laws relating to wildlife may be categorized in two types where One is related to protection of habitats of wild animals in general like Convention relative to the Preservation of Fauna and Flora in their Natural State, London, 1933 or Ramsar Convention on Conservation of Waterfowl Habitat, Iran in 1971 or Convention on the Conservation of European Wildlife Natural Habitat, Bern (Switzerland) in 1979 etc. Ramsar Convention was most important an intergovernmental treaty for habitat protection regarding the conservation of wetlands for waterfowls which entered into force in 1975 and presently has 152 parties as of August 2006. Second type of international conventions or treaties are mainly based on protection of wild species directly like Convention on Conservation of Migratory Species of Wild Animals, 1980 or Atlantic Seals, 1972 or Polar Bears, 1973 or Plants, 1951 and others which are primarily based on concept preservation of species on their own habitats but huge financial support is necessary for such type of species conservation projects at national level. India

15 Annual Report 2014-15, Ministry of Environment, Forests and Climate Change, Government of India

is signatory to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), International Union for Conservation of Nature and Natural Resources (IUCN), International Whaling Commission, Convention of Migratory Species, and the World Heritage Convention.[16] Indian judiciary has followed the trend of international conventions and natural resources had been given a status of a fundamental right and also brought under Article 21 of the Constitution of India. The Directive Principle of State Policy also stresses the need to protect and improve the natural environment including the forests, lakes, rivers and wild life and to have compassion for living creatures.

Development The Concept of Conservation

The conservation as traditionally defined includes activities such as preservation (as in protected areas), sustainable harvesting (as in fisheries), and control or regulation of organisms harmful to human interests (as in the case of man-eating tigers or crop-raiding elephants).[17] The term 'Conservation' was first time proposed by Gifford Pinchot and to his famous and popular definition, conservation means the greatest good to the greatest number for the longest time.[18] Conservation is derived from two Latin words i.e. '*Con*' means together and '*Servare*' means to keep or guard that means 'to keep together'. The main seed about conservation of wildlife and nature was first developed in USA to enhance sense of the public towards their self respect including the necessity of nature. American philosophers Henry Thoreau and George Catlin developed the wilderness of environment which was later propagated by conservationists like John Muir and Samuel Bowels.[19] The existence of all without disturbing each other is the main aim of conservation which means the management for the benefit of all life including humankind of the biosphere so that it may yield sustainable benefits to present generation while maintaining its potential to meet needs and aspirations of future generations. As per *Lincon* et al, Conservation is the planned management of natural resources to retain the natural balance, diversity and evolutionary change in the environment.[20] The real aim according to *Odum* is two fold, namely, (a) to insure the preservation of a quality environment that considers

16 Report to the people on environment and forest, 2009-2010, Ministry of Environment &Forest, GOI

17 Mahesh Rangarajan (ed.), Environmental Issues in India, A Reader, 11th impression, Pearson, 2012, p. 367.

18 S.Shanthakumar, Introduction to Environmental Law; 2nd Edition, Wadhwa & Co, Nagpur, 2008, p. 33.

19 Ananya Mukherjee, "Conflict and Coexistence in a National Park", Economic & Political Weekly, VOL XLIV NO 23, June 6, 2009, p. 52.

20 J.R.B.Alfred, Environmental Awareness and Wildlife Conservation; 1st Published, Zoological Survey of India, Kolkata, 2006, p. 23.

esthetic and recreational as well as product needs and (b) to insure a continuous yield of useful plants, animals, and materials by establishing a balanced cycle of harvest and renewal.[21] During the period of 1978-1979, the United Nations Environment Program (UNEP) took the initiatives to chalk out a plan for World Conservation Strategy in regard to form an international norm for the conservation of natural resources. This plan finally got the approval by the General Assembly of UNO and the program was launched in 1980 with endorsement form governments and scientists in 34 countries.[22] Three main objectives of resources conservation were; (a) Maintenance of the essential ecological process and life support system, (b) Preservation of the genetic diversities, (c) Sustainable utilization of the genes, species and the ecosystems. However the World Conservation strategy was mainly based on scientific principles of resources management.[23] In America, utilitarian conservationists advocated the construction of dams for electricity and regulated use of natural resources for public purposes rather than strict preservation of natural resources. The philosophy that prevailed in the environmental movement was 'shallow ecology' which was to be distinguished from a truer 'deep ecology'. Shallow ecology was narrowly 'anthropocentric' and thought nature existed only to serve man and deep ecology was 'biocentric' and had the interests of nature itself at heart. While 'reformist' shallow ecologists worked within the scientific and industrial structures of corporations and the state and 'revolutionary' deep ecologists were uncompromisingly opposed to the system and all its workings.[24] Law accepted all most same concept about Conservation according to scientific definitions as established in different international conventions and treaties. Conservation means as per Black's Law Dictionary, the supervision, management, and maintenance of natural resources; the protection, improvement, and use of natural resources in a way that ensures the highest social as well as economic benefits.[25] The term 'conservation' was used by IUCN in its preamble when it was changed from 'International Union for Protection of Nature' (IUPN) to 'International Union for Conservation of Nature and Natural Resources' (IUCN) in 1956. Its preamble tells conservation of nature and natural resources involve the preservation and management of the living world, the natural environment of humanity and the earth's renewable natural resources on which rests the

21 Mitra, Guha, Choudhury, Studies in Botany, Volume Two, 7th Revised Edition, Moulik Library, Kolkata, 2000, p. 643.

22 J.G.Starke, Introduction to international law, 1st Indian Reprint, Aditya Books, New Delhi, 1994, p. 414.

23 J.R.B.Alfred, Environmental Awareness and Wildlife Conservation; 1st Published, Zoological Survey of India, Kolkata, 2006, p. 11.

24 Ramchandra Guha, How much should a person consume, Hachette India, 2010, p. 32.

25 BLACK'S LAW DICTIONARY; Eighth Edition; 2004; p. 324

foundation of civilization. So here conservation concept is based on the process of preservation and management both. All human beings have a fundamental right to a healthy environment, commensurate with their well being, coupled with a corresponding duty of ensuring that resources are conserved and preserved in such a way that present as well as the future generations are aware of them equally.[26] The conservation has produced many positive results in different parts of the world. Governments of several nations have passed laws and set national parks, sanctuaries and other reserved areas with an effort to save the dwindling wildlife. Such efforts have saved several species from becoming extinct and destruction of wildlife habitats. As Conservation imposes some regulations over access to natural resources so in this process conflicts between natural resources and human resources are very much common matter. In *Tirupati Intellectual Forum* case, the Supreme Court of India referred the view of Prof. Weiss, that "Conservation, however, always takes a back seat in times of economic stress." [27] Conservation has become a political process and there are several instances of reflection of political powers at the local, regional or national level. In spite of that sustainable uses of natural resources is one of the chief features of conservation and try to resolve the conflict and to balance between ecology and development.

Conservation and Preservation

Though the words 'preservation' and 'conservation' are used interchangeably in various legal documents but ideologically there are some differences where Preservation focuses on 'nature' and Conservation on 'society'. The main struggle within the conservation movement started from the 1890s to the 1930s in USA and "Preservationists" have been accused of being "enemies of the people" while "conservationists" are also being accused of "enemies of nature." The environmental movement later divided where conservationist, like Gifford Pinchot and Theodore Roosevelt who advocated for natural right for the greater good and other group was preservationist led by John Muir who believed in maintenance of natural environment where development was banned and in 1897 Gifford Pinchot supported sheep grazing in reserve forests. In 1913 American Congress permitted the dam finally on Yosemite's 'Hetch Hetchy Valley' for a reservoir after a long protest from John Muir and other park supporters. The debate is still continuing in America where 'US Forest Service' is focusing on sustainable use of forest but 'National Park Service' gives priority on recreation only. The preservation and

26 Intellectuals Forum, Tirupati v/s State of A.P., AIR 2006 SC 1350 (Para 75)

27 AIR 2006 SC 1350 (Para 75)

conservation debate is also continuing in international level. The green lobbies in Australia, United Kingdom, United States and other developed countries believe that every species can be saved only if there is total protection. Developing countries think that must pay its way to survive and also believe that they have the right to benefit from the species through sustainable use of natural resources.[28] Poor and under developed countries complain that the rich and developed countries always force their version of sustainable development on them. There is a conflict on conservation and preservation in African countries also. In protection of elephants, Kenya is a powerful supporter of preservation policy as they have struggled enough for protection of elephants from poachers and the funds collected from the tourism mainly are used for development of forests and its officials. Recently in 2016, Kenya set on fire over a hundred ton of its ivory stockpile and reduced 105 tons of elephant ivory and 1.35 tons of rhino horn to smoldering ash. On the other side, Zimbabwe is the sustainable user of elephant's population and they make profits by selling elephant meat to locals and selling hunting licenses. Zimbabwe has successfully used the conservation method and they are the strong supporter of conservation along with South Africa, Botswana, Namibia and Malawi.[29] According to many conservationists, culling is necessary to control the size of elephant population. Again culling of elephants from the 'Murchinson Falls National Park' in Uganda resulted increase of woody forests.[30] According to a recent meeting of CITES in 2007, there would not be any ivory trade in Africa for the next 9 years. Botswana, Namibia, Zimbabwe and South Africa, however, demanded regular ivory trade because of increasing elephant populations and also for benefit of farmers for whom elephants cause trouble. But Kenya and Mali argued for a complete ban of 20 years, backed by 11 Central and Eastern African countries and animal welfare groups. Before a ban in 1989 on international trade in ivory, Many Southern African countries were previously allowed to export ivory, especially to Japan.[31] In a meeting of CITES in 1997 Zimbabwe, Namibia and Botswana requested to transfer their elephant from Appendix I to Appendix II and panel of experts also claimed that elephants were not endangered on those countries. Finally, to control wildlife trade and sustainable development, CITES lifted the ban on ivory trade in 1997 and trade was partially allowed for eradication

28 M.C.Valson, "Biodiversity Conservation: challenges and legal solutions", Cochin University Law Review, 23 (1999) p. 139.

29 Leslie A. Burton, "Saving of African Elephant", Indian Journal of Environmental Law, Vol-1,Issue-2, December, 2000, CEERA, National Law School of Indian University, p. 61.

30 Vasant Saberwal, Mahesh Rangaragan & Ashish Kothari,People, Parks & Wildlife Towards coexistence, 1st Published, Orient Longman, New Delhi, 2001, p. 59.

31 Ivory boast, Down to Earth, July 15, 2007, p. 17.

of poverty. So, on the basis of their elephant population the African countries also divided on the concept of conservation and preservation though in November 2014, 25 African nations signed the *Contou Declaration*, in Benin, a joint statement calling for a global ivory ban. African and South American countries have adopted community-based conservation process and few Asian counties including India have also adopted this community-based natural development of environmental resources. One successful conservation story is Markhor conservation at the Chitral Gol National Park in Pakistan. NWFP Wildlife Department allocated licenses for foreign hunters in different hunting areas like Chitral Gol, Tooshi Shasha, Gehrait, and Kaigah and a cooperative agreement was made between the provincial and federal government with the local village conservation committee relating to allocation of the funds.[32] In Chitral's Gol National Park, foreign trophy hunters pay an unbelievable $50,000 plus also to shoot one Markhor, a species of rare wild goat protected by CITES. This is also example of conservation rather than preservation. The hunting began a few years ago with local people and foreign tourists, culling wild boar, and the sport then spread. The idea was to raise the fund for protection of the surviving few hundred Markhor and benefit villagers in the area but there is nothing to stop the hunters and their guides killing more than their single Markhor.[33] In spite of this neighbouring communities reduced poaching and hunting of Markhor, improved grazing on prime Markhor winter ranges through range management of domestic livestock and decreased conflicts with Markhor.[34] Markhor populations have increased through this community based trophy hunting program in the areas where this program was implemented. In India cattle grazing are prohibited in the national parks but present law[35] gives some relaxation for grazing of live-stock within the Sanctuaries where as inside the National Parks grazing is not allowed at all.[36] When the Bharatpur Bird Sanctuary was redesignated as the Keoladeo National Park in 1982 then grazing of buffaloes on marshland was become illegal by new regulation.[37] Widespread cattle grazing in the Keoladeo National Park would alter ecosystem function in ways fundamentally different from that acceptable to a preservationist perspective.[38]

32 http://www.cfc.umt.edu/nwfp/Markhor.html

33 John Elliot, Passage through Gilgit, OUTLOOK, December 4, 2006, p. 34.

34 http://www.cfc.umt.edu/nwfp/Markhor.html

35 Section 33(d) of the Wildlife (Protection) Act, 1972

36 Shyam Divan and Armin Rosencranz, Environmental Law and Policy in India, 8th Impression, Oxford University Press, New Delhi, 2007, p. 330.

37 Battles Over Nature, Vasant Seberwal & Mahesh Rangarajan (ed.), 2nd impression, permanent black, Delhi, 2009, p. 15.

38 ibid, p. 92

The history of cattle grazing in the Keoladeo National Park is longer than of its development as a waterfowl hunting reserve. In India as a whole, pastoralists have grazed cattle more than 5000 years but overgrazing did not become common until recent agricultural expansion.[39]According to noted historian Romila Thapar occupations were differed as per ecological zones of India. Fishing and the making salt was important to the coastal area, the cultivation of rice in the wetlands, the breeding of livestock and practice of shifting cultivation in the pastoral tracts, which were subject to cattle lifting from those who lived in the dry zone, and hunting and gathering was associated with those who lived in backwoods.[40] In the matter of international conventions the concept of preservation and conservation both have some inconsistency regarding its application. Preservation means protection of natural resources from any human or other interference whereas conservation means sustainable use of natural resources for benefit of both nature as well as the human consumption. As per Bonn Convention, 1950, conservation includes restoration or to restore satisfactory population levels. The concept of 'conservation' in the preamble of IUCN includes the management of natural resources with social and economic considerations and the wise use of resources allows them to remain profitable for human beings but documents of IUCN till describe preservation of biotic community or man's natural environment including renewable natural resources. The term preservation and management both are used by IUCN. Conservation as per 'Convention on Fishing and Conservation of Living Resources of the High Seas' also includes optimum sustainable yield in 1958. In 'Atlantic Tuna Convention' the concept 'maximum sustainable catch' was used in 1966. Again the 'African Convention' of 1968 and 'Ramsar Convention' of 1971 both emphasized on the concept of 'utilisation' of natural resources whereas in 1973, 'Convention on Antarctic Seals' used the concept 'rational use' of natural resources including wildlife also.[41] Later the most popular and modern concept of 'sustainable development' came into existence in 1980 at 'World Conservation Strategy' by IUCN which was developed in Report of Brundtland Commission in 1987. Nairobi Convention developed the concept 'management' in 1985 relating to natural resources. In the international environmental law the principle of preservation is generally used by rich and developed countries whereas the concept of conservation is mainly used by underdeveloped and poor countries.

39 ibid, p.89

40 Mahesh Rangarajan (ed), Environmental Issues in India, A Reader, 11th impression, Pearson, 2012, p. 34.

41 P.Van Heijnsbergen, International Legal Protection of Wild fauna and flora, 1st published, IOS Press, Amsterdam, Netherlands, 1997, p. 46 [http://books.gogle.co.in]

The Article 2 of the 'African Convention on the Conservation of the Nature and Natural Resources, 1968,' provides that the contracting states should undertake to adopt measures to ensure conservation, utilization and development of soil, water, flora and fauna. But the provision of the 'Berne Convention on the Conservation of European Wildlife and Natural Habitats, 1979,' creates an obligation to preserve and transmit to future generations the natural heritage of wild plant and animal species. Again the 'Convention on Biological Diversity, 1992,' adopts the measures which should be taken to ensure conservation and sustainable use of biological resources, developing of natural strategies, plans or programs, integrating as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross sectoral plans, programs and policies.[42] So in every international and regional convention protection is the main purpose but it may be in conservation mode or preservation principle.

Indian Position

Though concept of conservation and preservation has very rich historical importance but in India, term 'Conservation' or 'Preservation' or 'Protection' are used in several legislations all most in same sense and in the case of Wildlife (Protection) Act, 1972, the word 'protection' was adopted for more stringent purpose. India has strong wildlife protection laws among the Asian countries and it is also said that conservation practice in India has largely been driven by the preservationist approach.[43] Protection generally means to keep protected form others or maintaining a cover or shield from danger or any attack. Previously all the animals were treated as a part of property and always the term either 'preservation' or 'protection' came before the law makers. In the case of wild animals, it was always treated as the natural resources of states and cattle or other domestic animals were treated as property of individuals. Even Section 428 and 429 are Mischief to cattle under Indian Penal Code, 1860 which is coming under 'offence to property'. So from Penal Code or Cattle Trespass Act, 1871 it is very much clear that cattle and animals were treated as property. In the Elephants Preservation Act, 1897, the Bengal Rhinoceros Preservation Act, 1932, the Indian Fisheries Act, 1879 or the Indian Forest Act, 1927 and many other laws wildlife and forest were treated as natural resources of states. Even after independence, some statues were made by state governments where the term 'preservation' was used

42 S.Shanthakumar, Introduction to Environmental Law; 2nd Edition 2008, Wadhwa & Co, Nagpur, p. 382.

43 Aparajita Dutta, "Threaten Forests, Forgotten People" in Ghazala Shahabuddin & Mahesh Rangarajan (ed) Making Conservation Work, 1st Published, permanent black, Uttaranchal, 2007, p. 165.

time to time by the framers.[44] The concept of legislative control of ecology was not developed in colonial India so much though the term 'ecology' was first time used by Henry David Thoreau in 1858 and meaning of ecology was scientifically analyzed in 1868 by famous German biologist Ernest Haeckel.[45] At the time of making the new Constitution, a meeting was organized with the Premiers of the Indian provinces in July 1949 by the Drafting Committee. There was a strong argument regarding division of legislative powers pertaining to 'Forest' and 'Fisheries' in the State List.[46] At the time of debate relating to drafting of the Constitution, Pandit Pant opposed to insert "Forest" in the Concurrent List as decentralization should be imposed practically, and favoured the concept of cooperative federalism.[47] Wild animals, forests and fisheries were treated as natural resources and the Constitution of India introduced 'Forest' (Entry 19) and 'Protection of Wild Animals and Birds' (Entry 20) and 'Fisheries' (Entry 21) also in the State List of the Seventh Schedule due to the heavy demand from members of the Princely States. But public awareness for environment and ecology mainly came during the 1970's through international conventions in various parts of world. Prior to the Wildlife (Protection) Act, 1972, there were numerous Wildlife laws in various states such as The West Bengal Wildlife Preservation Act 1959, The Gujarat Wild Animals and Wild Birds Protection Act 1963, The Assam Rhinocerous Act 1963, The Punjab Wildlife Preservation Act 1959, The Tamil Nadu Wild Elephant Preservation Act 1873, The Goa Daman and Diu Wild Animals and Wild Birds Protection Act 1965 and others where purpose was mainly to preserve the natural resources for the nation. The Wildlife (Protection) Act, 1972 perhaps is the first law where term 'ecological security' was used by parliament and the Forest (Conservation) Act, 1980 the concept of conservation came into existence. Again, 'hunting' is prohibited under present law but sometime permission is needed by proper authority for hunting of particular type of animals. Recently Madhya Pradesh state government wanted to sell permits to hunt down "excess" wild animals as those had been destroying annual crop exceeding Rs. 100 crore every year and State government finalized a license scheme for hunting animals which damage crops such as cheetals, Black Bucks and wild boars on the lines of trophy hunting in some African countries.[48] Further Section 65 of statute has again given

44 The West Bengal Wildlife Preservation Act, 1959 and the Assam Rhinoceros Preservation Act, 1954

45 S. Shantakumar, Introduction to Environmental Law; 2nd Edition 2008, Wadhwa & Co, Nagpur, p. 3.

46 Shyam Divan & Armin Rozencraz, Environmental Law and Policy in India, 2nd edition 2007, Oxford University Press, New Delhi, p 43.

47 Granville Austin, The Indian Constitution: Cornerstone of a Nation, Oxford University Press, New Delhi, 15th impression 2010, p 200.

48 MP seeks to legalize trophy hunting, The Times Of India, November 7, 2007

some relaxation over the hunting for schedule tribes of Andaman & Nicobar though hunting is totally restricted in India. But some experts think that Sport hunting cannot be introduced in India as it is being done in Texas and Argentina where limited numbers of the animals are shot every year under hunting license.[49] In the case of declaration and alteration of boundary of any sanctuary or National Park, the State government shall follow the recommendation of National Board of Wildlife[50] which was established after 2003 Amendment[51] for betterment of society, tribal and wildlife where an equal representation exists from maximum organization of wildlife as well as society. So all of these are example of sustainable use of wildlife and the term 'protection' means here conservation. There is a constant conflict with preservation of biodiversity and exertion of natural resources and mineral resources. There are ecological conservation one side and other side economical development of the nation. In this case judiciary adopted the international concept of sustainable development which brings economic growth, without destroying the resource base. The Wildlife Protection Act, 1972, and the Forest (Conservation) Act, 1980 all these previous laws are based on the misconception that any human interference in a forest or ecosystem would lead to its destruction. In the 1970s a series of country-wide protests and tribals prompted a thoroughgoing critique of forest policy in modern India.[52] The Indian Forest Department, founded during British rule and in effect India's single largest landlord, viewed all needs of ecosystem people as a burden, as 'biotic' not 'anthropic' pressure, as if the people behind these demands were less than human. Indeed, forest working plans classified 'man' as one of the 'enemies' of the forest.[53] When the European model of strict state control was exported to the colonies, disaffected peasants and tribals responded with arson and violence. Movements over forest were recurring phenomenon in regions ruled by the British, the Dutch and the France.[54] This preservationist mode developed public anger over forests and government officials. But finally the National Forest Policy, 1988 challenged this traditional view about policy statement on national conservation strategies.[55] So the conservation process of government directly came into public domain

49 Vasant Seberwal & Mahesh Rangarajan (ed.), Battles Over Nature, 2nd impression, permanent black, Delhi, 2009, p. 130.

50 Section 26A(3) and Section 35(5) of Wildlife (Protection) Act, 1972

51 Section 5A

52 David Arnold & Ramchandra Guha (ed), Nature, Culture, Imperialism – Essays on the Environmental History of South Asia, 7th Impression2011, Oxford University Press, New Delhi, p. 17.

53 Madhav Gadgil & Ramachandra Guha, Ecology and Equity, Penguin Books, New Delhi, 1995, p. 23.

54 Ramchandra Guhha, How much should a person consume, Hachette India, 2010, p. 118.

55 *V.*Venkatesan, On the Fringes, Frontline, February 29, 2008; p. 15.

relating to save the natural elements of our ecology. The concept of 'conservation' or 'preservation' both came as matter of national debate in the report of Tiger Task Force which was constituted by then Prime Minster to control the dwindling population of tiger and forest areas in India. The environmentalists in India were divided on the point of human existence in the protected areas. As per Valmik Thapar, a wildlife expert and also member of Task Force, the report of Task Force was 'the final nail in the coffin' for the tiger as it refers about co-existence of human with animals. Tigers and people have never coexisted in India but such coexistence is a myth. It needs to be considered on a case-to-case basis[56] but the head of Task Force, Sunita Narayan were in favor of people based participatory conservation. The report which suggested coexistence of Tribal and tigers needed exclusive area for breeding and survival. Again this report was also criticized as it referred about relocation of forest dwellers and villagers. But relocation was very difficult task as nearly 80 villages were relocated in last 30 years. So if co-existence was not allowed then as per Sunita Narayan another 1500 villages are to be relocated from the 28 tiger reserves in India and a huge amount of fund was needed for such program.[57] It could cost over Rs. 600 crore to shift villagers currently living in core areas as report estimates 273 villages exist in the core areas of Indian tiger reserves today and above Rs 1,600 crore more to resettle them all. At present, the allocation for the relocation scheme within project to be limited to Rs 10-15 crore for the five years of the Tenth Plan.[58] On the basis of conservation and preservation, the members of Task Force were divided as pro-tribal and pro-tiger groups. According to P.K.Sen, former director of Project Tiger, this report also suggested that where co-existence was not possible, the villagers would be relocated in a time bound manner which meant putting the cart before the bullock.[59] The two schools of environmentalists were advocating their own theory for tiger conservation without a unified answer to the question. But some strict conservation measures were introduced post-1972 which was not similar to conservation like initiation of Project Tiger and total restriction of forest areas. The Project Tiger was initiated with the view to save the top organism of the food chain for the protection of entire ecosystems. Only in case of Kuno Wildlife Sanctuary, 5000 people were displaced between 1998 and 2003 from 24 villages.[60] In Indian society a large number of communities are centered on wild faunal species for livelihood and

56 In Periyar, poachers protect tigers, The Times Of India; November 11, 2007

57 Sunita Narain, Tigers and tribals, Down to Earth, (November15, 2007) p. 7.

58 Environmentalist vs. Environmentalist, THE TELEGRAPH Calcutta; 14 Aug, 2005

59 P.K.Sen, Tiger vs Tribals, YOJANA, September 2008, p. 18.

60 Ghazala Shahabuddin, Conservation at the Crossroads: Science, Society and the Future of India's Wildlife, 1st published 2010, permanent black, Ranikhet, p. 68.

they are also directly dependent on natural resources for fuel wood and fodder and according to the Anthropological Survey of India, there are as many as 196 communities in the country that trap birds and animals for their livelihood.[61] As per a study in the late 1980s by the Indian Institute of Public Administration (IIPA), 69 per cent of surveyed Protected Areas had humans living inside and 64 per cent had rights, leases or concessions to extract fuel and fodder, to graze, or the carry out other activities.[62] Traditionally national parks and wildlife reserves in Africa have had more restrictions on extractive use than forest reserves. As virtually all national parks and sanctuaries in India are administered by forest officers and were mainly reserved forests with some measure of resource extraction privileges, there is an understandable difference in use philosophy and practice compared with African wildlife reserves.[63] As per provision of the Wildlife (Protection) Act, 1972, there is total elimination of any kind of human interference within protected areas. Though the Supreme Court has established all rights of inhabitants of protected areas but human settlements within national parks or reserved forests or sanctuary must be stopped and existing users will be relocated outside of protected areas. So in the opinion of several tribal rights activists and conservationists, all these legislative and judicial approach of Indian government are very much preservation in nature rather than conservation. In India presently rule of conservation is followed that is the sustainable use of natural resources without depleting their population and habitats.

Conclusion

India is recognized as a mega-diverse country owing to its rich biodiversity across its varied bio-geographic zones and the history of conservation of wild animals in India has both success and failures. India's success in holding on to species such, as the rhino, elephant and tiger is quite spectacular when compared to the record of other Asian countries with the possible exception of Nepal, which have undergone similar social transactions.[64] Expert thinks India has far more stringent wildlife protection standard and a complex set of forest law in

61 Bahar Dutt, Rachel Kaleta and Vikram Hoshing, The Hunter and The Hunted; Conservation with Marginalized Communities, in Ghazala Shahabuddin & Mahesh Rangarajan (ed)Making Conservation Work, 1st Published 2007, permanent black, Uttaranchal, p.242.

62 Vasant Saberwal, Mahesh Rangaragan, Ashish Kothari, People, Parks & Wildlife Towards coexistence; 1st Published Reprint 2004, Orient Longman, New Delhi, p. 72.

63 Ibid, p. 340.

64 Mahesh Rangarajan (ed.), Environmental Issues in India, A Reader, 11th impression 2012, Pearson, p. 366.

comparison with many countries in South America, Africa and Asia.[65] But other expert believes traditionally national parks and wildlife reserves in Africa have had more restrictions on extractive use than forest reserves. As virtually all national parks and sanctuaries in India are administered by forest officers and were mainly reserved forests with some measure of resource extraction privileges, there is an understandable difference in use philosophy and practice compared with African wildlife reserves.[66] Some experts do not support coexistence because the Maasai herders in Africa coexist with lame carnivores in landscapes over several thousand sq km, such coexistence is a feasible option inside wildlife reserves of a few hundred sq km area. We cannot ignore the fact that Maasai reduce livestock losses to predators to tolerable levels by hunting to depress densities of lions and hyenas. While the poor quality land on which Maasai graze their cattle has few other uses in their context, the forests of India can have many profitable uses than pressuring either wildlife or rural grazers.[67] But the human presence within some of the most spectacular ecosystems on earth has proved the coexistence of man and wildlife can possible in the protected areas and the Serengeti National Park, Tanzania, is the good example of the coexistence of humans and biodiversity.[68] Brundtland Commission realised the necessity of public participation in decision making as said, "Our projects will be better if they are based on people's own analysis of the problem they face and their solution." Principle 10 of Rio Declaration, environmental issues are best handled with the participation of all concerned citizens, at the relevant level. In the public participation, the marginalized people of India have taken active role for conservation of forests and wildlife as they are closely related with nature. A very good example of public participation was found in Simlipal forest of Orissa where villagers have come forward to save the forest's eco-system and in the process safeguard their own future.[69] This People's participation should be incorporated in democratic process. Again relocation is very difficult and heavy expensive for the country like India. Recently under Project Cheetah, 2010 the 10-year cheetah relocation plan in India will cost nearly 300 crores of rupees as 80 human settlements in Shahgarh (Rajasthan) and 23 in Nauradehi (Madhya Pradesh) may be relocated with the consent and cooperation

65 Ghazala Shahabuddin, Conservation at the Crossroads: Science, Society and the Future of India's Wildlife, 1st published 2010, permanent black, Ranikhet, p. xvi.

66 Vasant Seberwal & Mahesh Rangarajan (ed.), Battles Over Nature, 2nd impression 2009, permanent black, Delhi, p. 340.

67 Mahesh Rangarajan (ed.), Environmental Issues in India, A Reader, 11th impression 2012, Pearson, p. 372.

68 Vasant Saberwal, Mahesh Rangaragan, Ashish Kothari, People, Parks & Wildlife Towards coexistence; 1st Published Reprint 2004, Orient Longman, New Delhi, p. 45.

69 Mayurbhanj villagers flock to save tigers fest, The Times Of India; March 18,2008

of the inhabitants.[70] On the contrary a large number of communities in Indian society are centered on wild faunal species for livelihood. Community based wildlife management system has become successful one due to autonomy of local villagers and tribal. In Zimbabwe, 'The Parks and Wildlife Act' of 1975 was a breakthrough for conservation as ownership of wildlife passed from the State to owner of the land. Many African countries have adopted same principle later by using traditional tribal areas and privately owned land for utilisation of wildlife conservation. In 1993, Nepal amended 'the National Parks and Wildlife Conservation Act' of 1973 to provide involvement of local people in species conservation and to access ecosystem resources in protected zones. Recently in National Parks like Corbet and Ranthambore, forest dwellers took major initiatives for protection of wildlife within protected areas. Village communities in Nagaland had put a ban on hunting and imposed fines for felling trees and poaching.[71] So, conservation program may not be possible only by filing environmental petitions but to find out more job facilities and alternative livelihood for marginalized communities who use wild animals just for their survival. India not only needs environmentalists but urgently required environmental activists.

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70 Return of the cheetah, this time from SA, The Times of India, Kolkata, Friday, October 8, 2010

71 In Periyar, poachers protect tigers, The Times Of India; November 11, 2007

The New Gateway for Child Labour

*Dr. Ranjan Kumar**

The Child Labour (Prohibition and Regulation) Amend Act, 2016 is a new gateway for the employment of children. This Amendment has entered in the statute book through the door and right of children to free and compulsory education Act of 2000 has vanished through window. This Amendment Act has allowed the children upto age of 14 to be employed in "Family enterprises". It is true that children are permitted to work in Family enterprises only out side school hours and during vacations. It aims at empowering the children economically while studying. This will have a negative effect on both the educative process and earning modes. It will give the opportunity to faceless owner to run the family enterprises in which the whole family is employed. It may very will defeat the very purpose of the law. The going of school of such employed children will be a force.

This Amend Act has created a new category of Adolescents upto group of 14 to 18 years who can be employed in non hazardous occupations. Thus, this Act validates the employment of adolescents in non-hazardous occupation and nullifies the effect of the earlier statutes and Judgements of the Apex Court to the effect that children upto that age should not be employed.

The 1986 Act had identified 83 occupations as hazardous and had prohibited the employment of children in such occupations. However, this Act has dropped many occupations like cotton farmers, Brick kilns, battery recycling units from the list of hazardous occupation. Thus making the employment of children in such occupation as valid.

Ruchika Gupta has rightly written that-[1] the Child Labour (Prohibition and Regulation) Amendment Act, 2016, passed last month in Parliament, seems progressive. It prohibits "the engagement of children in all occupations and of adolescents in hazardous occupations and processes" wherein adolescents refers to those under 18 years; children to those under 14. The Act also imposes a fine on anyone who employs or permits adolescents to work.

The devastating health consequences of the new Act may be the worst blow on India's poor yet. There are 33 million child labourers in India, according to UNICEF. As per the 2011 census, 80 percent of them are Dalits, 20 percent are from the Backward Classes. This law ill restrict these children to traditional caste-based occupations for generations.

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1 The Hindu, 10th August, 2016, p. 11.

If the amendments intended to preserve Indian art and craft by enabling parents with traditional skills to pass them on to their children, this should be done through reform and investment in education. Slashed budgets should be provided through the Sarva Shiksha Abhiyan boarding schools to homeless children. Artisans should be hired as teachers to pass on traditional knowledge and skills to the next generation.

In its editorial the Hindu observed that-[2] Regulation is going to be a big challenge, as it will be difficult to determine whether a particular family is running an enterprise, or whether some faceless owner has employed a single family to circumvent the law. The fallout will be a higher dropout rate. They may go to school for some years, concurrently work with their families, and graduate to being full-time adolescent workers, without completing elementary education. The NDA government, like its predecessor that proposed the amendments, seems to be satisfied with mere compliance with International Labour Organisation Conventions 138 and 182. The former mandates compulsory schooling till the age of 15, but permits countries with inadequate education facilities to reduce it to 14, while Convention 182 prohibits employment of children "in the worst forms of labour". Bare compliance with international norms is not enough. Children from the poor and marginalised sections, especially Dalits, are still in danger of being deprived of both the joys of childhood and their constitutional right to education. It is yet another stark reminder that the country is far from achieving the complete elimination of child labour.

The Declaration of the Rights of Child, 1959, declared that 'whereas, the child, by reason of his physical and mental immaturity, needs special safe guard and care, including appropriate legal protection, before as well as after birth." In Re Westones Settlements[3] Lord Denning has told us that "Children are like trees : They grow stronger with firm roots." The former Chief Justice of India Justice Subba Rao wrote that "Social Justice must begin with Children. Unless tender plant is properly tended and nourished, it has little chance to growing into a strong and useful tree. So, first priority in the scale of social justice shall be given to the welfare of children.[4]

The Child is the father of man in the sense that childhood is the formative year during which the personality of the man is builtup. It has been correctly said

2 The Hindu, August 2, 2016, p. 10.

3 (1996) 1 Ch. 233 at 245-46.

4 Social Justice and Law (1974) p. 110.

that, "The physical and mental health of the nation is determined largely by the manner in which it is shaped in the early stages." [5]

Shri Vijay Kumar has aptly said that "it is not an exaggeration to say that the children are the blooming flowers of the garden of society and so, it is our duty to protect these flowers from damaging effects of excessive exposure to heat, cold and rain."[6]

However, we are living in the myth of the high ideals that children are a supremely important asset. In reality they remain in the realm of social evil of child labour. The orphaned, abandoned, exploited, sexually abused and hunger stricken children are the soldiers of the labour force all over the world.

In fact poverty is the root cause of the child working force. The employment of boys and girls when they are too young to work for hire, or when they are employed at jobs unsuitable or unsafe to children of their age or under condition injurious to their welfare are the incidence of child labour.

Our constitution makers were familiar with the deplorable conditions of the poverty stricken children, therefore they provided guide lines to treat them, so that the ideals of equality, dignity, liberty and freedom are realized by them and their abuse is stopped and their rights are not violated. Thus our constitution provided the following articles which prohibit child labour and obligates the state to take measures that will discourage and punish the practice to abuse the tender age of child.

These are as follows-

1. no child below the age of 14 years will be employed to work in any factory or mine or engaged in any other hazardous employment,[7]
2. that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength,[8]
3. that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and

5 S.D. Gupta "Child Labour – A National Problem", Yojna 1979, Vol. XXII, p. 25.
6 Child Labour Need for Special Awareness. Yojna, Vol. XXIII/20, p. 13.
7 Article 24
8 Article 39(e)

youth are protected against exploitation and against moral and material abandonment,[9]

4. the state must, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want,[10]
5. the state must endeavour to provide, within a period of 10 years from the commencement of the Constitution of India, for free and compulsory education for all children until they complete the age of 14 years,[11]
6. the state must 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 must endeavour to bring about prohibition of the consumption except for medicinal purpose of intoxicating drinks and of drugs which are injurious to health.[12]

Explaining the main cause of child and bonded labour, our Summit Court has said that- Poverty and destitution are almost perennial features of Indian rural life for large numbers of unfortunate, ill-starred humans in this country and it would be nothing short of cruelty and heartlessness to identify and release bonded labourers merely to throw them at the mercy of the existing social and economic system which denies to them even the basic necessities of life such as food, shelter and clothing … It is the plainest requirement of articles 21 and 23 of the Constitution that bonded labourers must be identified and released and on release, they must be suitably rehabilitated."[13]

Child labour is the biggest manifestation of the abuse of the tender age of any child. Generally speaking, a child is a person under the age of majority. The term is commonly defined in different ways by particular statutes. Children are sometimes classified as legitimate, illegitimate, legitimated children and adopted children.

In our country, the following statutes define the child in different ways. Thus, the Children Act, 1960, fixes the age of child as 16 yrs. in case of a boy and 18 yrs. in case of a girl.

9 Article 39(f)
10 Article 41.
11 Article 45.
12 Article 47.
13 Bandhuwa Mukti Morcha v. Union of India, AIR 1984 SC 802, at 1100.

Section 2(a) of the Immoral Traffic Prevention Act, 1956, says that a child is person who has not attend the age of 16 yrs. Section 27 of the Code of Criminal Procedure, 1973, says that the juvenile means a person who is under the age of 16 yrs. The Factories Act, 1948, tells that a child is person who has not completed 15 yrs.

Section 2(11) of the Child Labour (Prohibition and Regulation) Act, 1986 tells us that a child is person who has not completed the age of 14 yrs.

Article 1 of the Convention on the rights of the child, 1989 says that, for the purpose of the present convention, a child means any human being below the age of eighteen yrs. unless, under the law applicable to the child, majority is attained earlier.

Section 82 of the Indian Penal Code says that "Nothing is an offence, which is done by a child under 7 yrs. of age" and section 83 of the said code says that "Nothing is an offence which is done by a child of 7 yrs. and under 12."

The Indian Majority Act, 1874, says that a child is a person who has not attained the age of majority, i.e. 18 years. The Vaccination Act, 1880, defines the age of child as a person who has not attained the age of 14 yrs. in case of boys and 18 yrs. in case of girls.

Reformatory School Act, 1887, fixes the age of child 15 yrs. According to Child Marriage Restrained Act, 1939, a child is a male below 21 yrs. and a female below 18 yrs. of age.

In Words and Phrases the following meanings of child[14] has been given –

1. Anderson's Law Dict. says that of the word "child" the primary definition is an infant, this in a popular sense; that the next allowable use in meaning is "one of tender years, a young person, a youth"; that the next allowable use of the word is as meaning "a legitimate descendant in the first degree", and the next is "a legitimate descendant in any degree; but in this case 'children' is the word used; offspring, issue, or descendants generally" the author commenting thus : "While the word 'children' will include grandchildren, the presumption of law is against such construction."[15]
2. The primary definition of the word 'child' is the immediate progeny of human parents.[16]

14 Vol. 7, p. 4-5.

15 Keeney v. McVoy, 103 S.W. 916, 954, 206 Mo. 42.

16 In re Bryant's Will, 110 N.Y.S. 2d 485, 487.

3. In its primary and commonly understood meaning, "child" or "Children" refers to parentage and embraces only the first generation of offspring.[17]
4. It is a general rule of the common law that the words 'child', 'children' do not, in their natural and proper signification, include a grandchild or grandchildren or descendants in a more remote degree.[18]
5. A person is deemed to continue to be a 'child' until he reaches the age of 16.[19]
6. Children prima facie includes children by a first and second marriage.[20]
7. Generally, terms 'child' and 'children' are generic, and include all of class to which they relate.[21]
8. The term 'child' in its ordinary legal sense implies the idea of a marriage relation and not one begot and born out of lawful wedlock.[22]
9. Primary legal meaning of words 'child or children' is immediate offspring, descendants of first degree, son or daughter of named ancestor.[23]
10. "Child" or "children" in common usage, means descendant or descendants of first degree, and "grandchild" or "grandchildren" designates those of second degree.[24]
11. The rule that the words "child" or "children" will be taken to refer to "issue" or descendants of the first degree, and to exclude descendants of a more remote degree, is not inflexible, as the term will be given a wider signification and include issue, however remote when reason demands it.[25]
12. The ordinary, popular, and legal sense of the word "children" embraces only the first generation of offspring, and for it to be extended further there must either be something in the context showing that a larger

17 *New York Life Ins. Co. v. Beebe, D.C. Md*., 57 F. Supp. 754, 757.
18 *Rogers v. Texas Emp. Ins. Ass'n Tex Civ*. App. 224 S.W. 2d 723, 725.
19 In Re Palumbo, 14 N.Y.S. 2d 329, 330, 172 Misc. 55.
20 *Widgeon v. Widgeon*, 133 S.E. 353, 355, 147 Va 1068.
21 *Bowman v. Morgan*, 33 S.W. 2d 703, 708, 236 Ky. 653.
22 *Glerak v. Lehigh & Wilkes-Barre Coal Co*., 101 Pa. Super 397, 399.
23 *Spencer v. Title Guarantee Loan & Trust Co*., 132 So. 730, 731, 222, Al. 485.
24 *Spencer v. Title Guarantee Loan & Trust Co*., 132 So. 32, 34, 222, Al. 221.
25 *Pfender v. Depew*, 121 N.Y.S. 285, 286, 136 App. Div. 636.

> signification was intended or the person using it must know that there neither is, nor can afterwards be, any person to whom the term can be applied.[26]

It is noteworthy that in 2012 the Protection of Children from sexual Offences Act was passed. This Act aims to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of special courts for trial of such offences. This is for the first time, a special law is passed to address the issue of sexual offences against children and the offences are clearly defined.

The Act under its ambit defines child as a person below the age-group of 18 and is gender neutral and have a clear definition for all types of sexual abuses like sexual harassment, penetrative or non-penetrative sexual abuse, and pornography. The Act provides for stringent punishment, which have been graded as per the gravity of the offence which ranges from simple to rigorous imprisonment of varying periods. The Act provides for the establishment of special courts for trial of offences under the Act, keeping the best interest of the child as of paramount importance at every stage of the judicial process. It also incorporates child friendly procedures of reporting, recording of evidence, investigation and trial of offences.

The National Policy for the welfare of children states that-

"The nation's children are a supremely important assets. Their nurture and solicitude are our responsibility, Children's Programme should find a prominent place in our national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endowed with the skills and motivations needed by society. Equal opportunities for development to all children during the period of growth should be our aim for this would serve our large purpose of reducing inequality and ensuring social justice.

In sets the goals to be achieved for the attainment of full and complete development of the child. They are as follows-

1. The State shall take steps to provide free and compulsory education for all children up to the age of 14. Efforts will be made to reduce the prevailing wastage and stagnation in schools particularly in the case of girls and

26 *Crawley v. Kendrick*, 50 S.E. 41, 44, 122 Ga. 183, 2 Ann Cas. 643.

children of the weaker sections of society.

2. Children who are not able to take full advantage of formal education should be provided other forms of education suited to their requirement.
3. Children shall be protected against neglect, cruelty and exploitation.
4. No child under 14 years shall be permitted to be engaged in any hazardous occupation or be made to undertake heavy work.
5. Existing laws should be amended so that in all legal disputes, whether between parents or institutions, the interests of children are given paramount consideration.
6. In organising services for children efforts would be directed to strengthen family ties so that full potentialities of growth of children are realised within the normal family, neighbourhood and community environment.

Thus, this amendment act has empower the faceless owners to do indirectly, what they can not do directly.

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लोके धर्मिष्ठं प्रजा उपसर्पन्ति।
धर्मेण पापमपनुदति।
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