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BACK TO VEDAS: Exploring "Womanhood" and her Freedom From the EYES of Swami Vivekananda

Aman A. Cheema

"There is no hope for the rise of that family or nation where there is no estimation of woman, where they live in sadness"

— Swami Vivekananda

On 16 December 2012 in Munirka, a neighbourhood in South Delhi, an incident took place that shook not only India but the whole world. A 23 years old female physiotherapy intern, Nirbhaya (Jyoti Singh) was beaten, gang raped and tortured in a private moving bus on the streets of Delhi, the grostesque and brutal gang rape by six men, especially the savage and cruel act by the juvenile Mohammad Afroz alias Raju, of raping Nibhaya the second time while she lay unconscious, the inhuman act of juvenile extracting the intestines of Nirbhaya with his bare hands and all of them conniving to throw her out of the moving bus devoid of her clothes[1], kept us aghast. But the story of such brutality against women in India doesn't end here. In a sordid reminder to Nirbhaya case, on 9 February 2015, a 28 years old mentally challanged Nepali girl's half eaten body was found in Rohtak after being raped and mutilated[2]. The body was found with blades, stones, condoms and pieces of a stick stuffed in her private parts.[3] Recently again on 28 April 2016, a Dalit law student, in Kerala, who hailed from a poor family, was allegedly subjected to rape and brutal assault using sharp edged weapons before being murdered at her house, has again reminded us of the pitiable status of women in the Indian the society.[4]

These are not one or two cases but there are huge number of crimes being committed on women in India. It is well known that India is not the safest place in the world for women. It is now equally apparent that it is terrible place for girl children. The statisitics are alarming. A report by the Asian Centre for Human Rights says that the incidence of child rape in india has grown by 33.6% in the

1 Aman A. Cheema, " 'The Mask of Sanity' (a Psychopath): Is there a need to include Psychological Defence Plea in Criminal Jurisprudence", 10 Amity Law Review, 63-74 (2014).

2 The Times of India (22 Dec 2015), "Nirbhaya II: 7 rapist-killers get death sentence" available at www.indiatimes.com, visited on 28 May 2016.

3 Dna India (9 Febrary 2015), "All you need to know about the guesome Rohtak rape case", available at www.dnaindia.com, visited on 28 May 2016.

4 DNA India (4 May 2016), "Kerala dalit rape-murder case: Police release sketch of main suspect; MPs in RS express concern", available at www.dnaindia.com, visited on 28 May 2016.

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decade between 2001 and 2011. That is the sign of regress.[5] As per the National Crimes Records Bureau, a total of 3,37,922 cases of crime against women were reported in the country during the year 2014 as compared to 3, 09, 546 in the year 2013, this showing an increase of 9.2% during the year 2014.[6] These are the number of cases which are reported. There are unimaginable and countless number of cases that go unreported due to various socio- economic and political factors.

All these reports and news forces us to analyse our very own roots. Does our culture or religion allow crimes against women? Was the position of woman the same in ancient India as well? Have we in literal sense inherited the today's culture from our forefathers?

Women in the Vedic and Post Vedic Times[7]

The Indian cultural tradition begins with the Vedas. It is generally believed that the vedic period is spread over from 300 B.C. to 600 B.C. Women never observed "purdah". They also received education like boys and went through the "Bramachari" discipline including the "Upanayana" ritual. Women studied the vedic literature like men and many girls in well-to-do families used to be given a fair amount of education down to about 300 B.C. Marriage in the vedic period was considered a social and religious duty and united the couple on an equal footing. Women had a right to remain spinsters throughout their life. Child marriages were unknown. Girls were given to marriage only after puberty that too after completing their education. Women had right to select their life partners. Monogamy was the form of marriage during the vedic days. Re-marriage of widows was allowed. There are a number of references to custom of "Niyoga" where a brother or the nearest relative of a deceased husband could marry the widow with the permission of leaders. The Rigveda no where mentions the practice of "Sati". Vedic women had economic freedom. Some women were engaged in teaching work. Home was the place of production. Spinning and weaving of clothes were done at home. Women also helped their husbands in agricultural pursuits. Though women had a limited right in inheriting the property yet protection was given to them as daughters and wives. Rig-veda recognised the right of a spinster to inherit her father's property though married daughters did not have any share in her father's property. Woman had a control over gifts and properties received by her at the time of her marriage.

5 Arun Poorie, India Today, 6 May 2013, p.1.

6 National Crimes Records Bureau, Crime Against women, available at www.ncrb.nic.in, visited on 28 May 2016.

7 Shauni, "Status of women in ancient India", available at www.yourarticle-library.com, visited on 29 May 2016.

On the religious field, wife enjoyed full rights and regularly participated in religious ceremonies with her husband. Religious cermonies and sacrifices were performed jointly by the husband and wife. Women even participated actively in the religious discourses. There was no bar for women to read or study any of our sacred literature. Women could shine as debaters in public assemblies. They usually occupied a prominent place in social gatherings but they were denied entry into the "Sabhas" because these places besides being used for taking political decisions were also used for gambling, drinking and such other purposes. Women's participation in public meetings and debates, however, became less and less common in the later vedic period.

Epic Period: A Respectable eminence of Women

The women of Epic India enjoyed an honourable position. Both Ramayana and Mahabharata Epics had given a respectable place for women.*Preeti Shukla* states that Valmiki's Ramayana teaches us that Lankan King Ravana and his entire clan was wiped out because he abducted Sita, wife of Lord Rama, the then King of Ayodhya. Ved Vyas's Mahabharata teaches us that all the Kauravas were killed as they humiliated Draupadi, wife of Pandavas in public. According to a custom, a prestigious title Nagarvadhu which means Bride of the City was given to a woman for which she had to compete and win. Amprapali is the most famous example in history. [8] We find vast references of the expression of courage, strong willpower and valour of women like Kaikeye, Sita, Rukmani, Satyabhama, Savitri, Draupadi and others in our great epics.

Dharamshastras and Purans Times: Declining Position of Women[9]

During this period, the status of woman gradually declined and underwent a major change. The girls were deprived of formal education. She was prevented from learning the Vedas and becoming Brahmacharinis. In the social field, Pre-puberty marriages came to be practiced, widow remarriage was prohibited. Custom of 'Sati' became increasingly prevelant, purdah system came into vogue and practice of polygamy came to be tolerated. In the economic field a woman was totally denied a share in her husband's property by maintaining that a wife and a slave cannot own property. At the religious front, she was forbidden to offer sacrifices and prayers, practice penance and undertake pilgrimages.

8 Preeti Shukla, "Out of the Frying Pan into the Fire: Journey of India's Middle Class Women—A Historical Perspectice",2(2), *Lapis Lazuli- An International Literary Journal*, 2012.

9 Shauni, "Status of women in ancient India", available at www.yourarticle-library.com, visited on 29 May 2016.

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Manu, the law giver of Indian society, once said *"Women have to be under father during childhood, under her husband during youth and under her son during old age"*. However he balanced this, with the statement that *"A society in which the woman was not honoured would be condemned to damnation"*.

Prabhati Mukharjee, a renounced sociologist, has identified reasons for the imposition of Brahmanical austerities on the entire society, rigid restrictions imposed by the caste system and the joint family system, lack of educational facilities for women, introduction of the non-Aryan wife into the Aryan house-hold and foreign invasions, for the decline in the status of woman in the then India.

Buddhist Period: A little improvement in the status of Women[10]

The status of women improved a little during the Buddhist period though there was no tremendous change. Some of the rigidities and restrictions imposed by the caste system were relaxed. Buddha preached equality and he tried to improve the cultural, educational and religious status of women. During the benevolent rule of the famous Buddhist kings such as Chandragupta Maurya, Ashoka, Sri Harsha and others, women regained a part of their lost freedom and status due to the relatively broadminded Buddhist philosophy.

Women were not only confined to domestic work but also they could not resort to an educational career if they so desired. In the religious field women came to occupy a distinctly superior place. Women were permitted to become "Sanyasis". Many women took a leading role in Buddhist monastic-life, women had their sangha called the Bhikshuni Sangha, which was guided by the same rules and regulations as those of the monks. The Sangha opened to them avenues of cultural activities and social service and ample opportunities for public life. Their political and economic status however remained unchanged.

Medieval India: Grave Downfall of Women[11]

The Medieval period (Period between 500 A. D to 1500 A.D) proved to be highly disappointing for the Indian women, for their status further deteriorated during this period. Muslim invasion of India changed the direction of Indian history. The influx of foreign invaders and the Brahmanical iron laws were main causes for such degradation.Women were denied education. Neither could she have knowledge of the Scriptures nor could she study letters. Widow remarriage and levirate's were

10 Ibid.
11 Ibid.

disallowed. The practice of child marriage, Purdah, Sati System became rampant. On the economic front she could not inherit property.

However, during the 14th and 15th centuries, with the introduction of Bhakti Movement, certain religious and social freedoms were secured to women. The purdah system was abolished and women could go out of their families to attend pravachanas, Kirtans, Bhajans, and so on. She was encouraged to read religious books and to educate themselves. Thus, the Bhakti movement gave a new lease of life to women but did not change the economic structure of the society and hence women continued to hold low status in the society. The Sati System, prohibition of widow remarriage, education denial to women, polygamy and horde of other disabilities continued to dominant the Indian scenario.

Birth of Vivekananda: Calmness in Pandemonium

Amidst this bedlam, Vivekananda was born. Talking to his disciple, Vivekananda once expressed his anguish, *"To what straits the strictures of local usages have reduced the women of this country, rendering them lifeless and inert, you could understand if only you visited the Western countries! You alone are responsible for this miserable condition of the women, and it rests with you also to raise them again."*[12]It is said that out of the greatest oppression is born the greatest resistance. At every period of time, there have been sensitive humanists who have tried to raise their voice against the disease of gender-based discrimination.[13] Though the reform movements for women had started in the early nineteenth century, but the ideas and attempts of the early reformers were noble. Vivekananda's ideas about woman had an eternal ring about it[14]. Vivekananda elaborated that one of the fundamental rights of the women is their unconditional indpendence in the matter of using their body and mind the way they want, provided it does not harm anyone else. No man under any circumstance ever ought to arrogate this right to himself. It was Vivekananda whose revelations rose the Indians from their sleep, forcing the Britishers to formulate laws erradicating various evils against women.

Perfect Womanhood is Perfect Independence: Vision of Swami Vivekananda

Swami Vivekananda's observations made some more than hundred years ago

12 Vivekananda, *The Complete Works of Swami Vivekananda*, Advaita Ashram: Kolkata, Vol.VII, p.218.

13 Anjana Gangopadhayay, *The Way to Women's Freedom: According to Vivekananda*, Advaita Ashram: Kolkata, 2016, p. 14.

14 Id., p. 21.

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that in India, there are two great evils-trampling on the women and grinding the poor[15], seem to still hold good today. The above referred reports and news analysis clearly point out that though evils like Sati were eradicated but now these evils have come back with a stronger force in a new garb, new disguise, in the shape of 'female feoticide', 'rape' and large scale 'physical abuse'. The need of the moment is to reinvent Swami Vivekananda on the issue of 'Womanhood and its Freedom'; so that we may get answers to our questions. Therefore, the researchers through this paper have made an attempt to understand Swamiji's idea of womanhood when he said that the idea of perfect womanhood is perfect independence[16] and use his divine discourses as a beacon for us to navigate our vessels towards 'back to Vedas' society for women.

Womanhood calls as Motherhood: The Worshipped

"He indeed is a learned man who looks upon all women as his mother"

...Swami Vivekananda[17]

This was the first verse, Swami Vivekananda learnt on the first day of his schooling. Vivekananda equated God with mother and referred that the ideal woman in India is the mother, the mother first and the mother last. He stated that the word 'woman' calls upto the mind of the Hindu, motherhood. Ideal of womanhood in India is that marvellous, unselfish, all suffering, ever-forgiving mother.[18] It is the mother who is all protective, caring and always giving. Vivekananda quotes the great Saint Ramprasad "Mother, O Mother, be merciful; I am wicked! Many children have been wicked, but there never was a wicked mother."[19] Whenever a child is thrashed by the father in India, it is always the mother who intervenes and puts herself between the father and the child.[20]

The whole force of womanhood is concentrated in motherhood. The mother is the centre of the family and our highest ideal. She is the representative of God to us as per Swamiji because the real love i.e. selflessness and the love generated by sufferings on oneself, can only be undertaken by God and it's the mother who represents that love in the world. Thus, the mother is the incarnation of God on

15 Id., p. 8.

16 Marie Louise Burke, *Swami Vivekananda n the West:New Discoveries*, Advaita Ashrama:Kolkata, 1983, p. 98.

17 Vivekananda, *The Complete Works of Swami Vivekananda*, Advaita Ashram: Kolkata, Vol.IX, p.205.

18 Woman of India:Lectures and Discourses delivered at the Shakespeare Club House, Pasadena, California on 18th January 1900, available at www.ramakrishnavivekananda.info, visited on 20 May 2016.

19 Ibid.

20 Ibid.

earth.[21]

Vivekananda sharing his life experience stated *"As children, everyday, when we are boys, we have to go early in the morning with a little cup of water and place it before the mother, and mother dips her toe into it and we drink it. I have been told that either too much worship of the mother makes the mother selfish or too much love of the children for the mother makes them selfish. But I do not believe that. The love which my mother gave to me has made me what I am, and I owe a debt to her that I can never repay."* [22]

Mother is the one to be worshipped as it is the motherhood that comes with tremendous responsibilites. She is the one to eat the last. Vivekananda narrates how many times he had seen his mother taking her meals at two 'o'clock whereas they all had taken at ten because she had other chores to attend to. Swamiji exemplified that image of 'true mother' by stating that when some one knocks at the door and says 'Guest', and there is no food left except what was for the mother, she would give that to him willingly and then wait for her own. That was the life of a mother and she liked it.[23]

A mother actually calls for worship like a God. Referring to his own mother, Vivekananda stated that his mother was a saint to bring him into the world. She kept her body pure, her mind pure, her food pure, her clothes pure, her imagination pure, for years, because he would be born.[24] His mother would fast and pray and do hundreds of things which Vivekananda found himself unable to do for five minutes. She did that for two years. Swamiji believes that whatever religious culture he has, he owes to his mother and all the good impulses have been consciuosly given to him by his mother.[25]

Vivekananda asks *"Is woman a name to be coupled with the physical body only?"* Then he answers *"Ay! The Hindu mind fears all those ideals which say that the flesh must cling unto the flesh. No. No! woman! Thou shalt not be coupled with anything connected with the flesh. The name has been called holy once and forever,*

21 Vijay Sharma and Chetan Agarwal, *Swami Vivekananda and Women*, Commonwealth Publishers: New Delhi, 2014, pp.130-131.

22 Woman of India:Lectures and Discourses delivered at the Shakespeare Club House, Pasadena, California on 18th January 1900, available at www.ramakrishnavivekananda.info, visited on 20 May 2016.

23 Vijay Sharma and Chetan Agarwal, *Swami Vivekananda and Women,* Commonwealth Publishers: New Delhi, 2014, p. 12.

24 Woman of India:Lectures and Discourses delivered at the Shakespeare Club House, Pasadena, California on 18th January 1900, available at www.ramakrishnavivekananda.info, visited on 20 May 2016.

25 Vijay Sharma and Chetan Agarwal, *Swami Vivekananda and Women*, Commonwealth Publishers: New Delhi, 2014, p. 12.

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for what name is there which no lust can ever approach, no carnality ever come near, than the one word Mother?"[26]

Vivekananda explains that we should not think that we are men and women, but only that we are human beings, born to cherish and to help one another. To bring about the real development of women, Swamiji states *"To all men every woman save his own wife should be as his mother. When I look about me and see what you call gallantry, my soul is filled with disgust. Not until you learn to ignore the question of sex and to meet on the ground of common humanity will your women really develop."*[27]

Woman as a Wife: Behind the Shadow of the Mother

"There are different relations held by our Indian woman.....the mother is the greatest in position, the wife is next and the daughter comes after them." ..Swami Vivekananda.[28]

As referred earlier, according to Vivekananda, the ideal of womanhood in India is motherhood. Hence the 'wife' walks behind the shadow of the mother. She must imitate the life of the mother; that is her duty. As the mother's own daughter got married and went off, just the same way the son's wife comes as a daughter of the mother. Swamiji says that the wife has to fall in line under the government of queen of queen's, of his mother. *"As I worship my mother, hence my wife should worship her",* he adds. The wife has to wait till her womanhood is fulfilled. And that womanhood is complete when she herself becomes a mother. Then the wife, on becoming mother, will exercise the same rights. [29]

Vivekananda sees the most complicated mesh-work in the social life of Indian men and women and in their relationship. He goes on to state *"In our Indian culture, we do not speak to our wives before our elders; it is only when we are alone or when inferiors are present. The idea behind this is, we are a monastic race. Marriage is thought of as something impure, something lower. It is only for the weak. The very spiritual man or woman would not marry at all".*[30]As per the Swami, the religious woman thanks the God saying that he has given her a better chance to worship

26 Vijay Sharma and Chetan Agarwal, *Swami Vivekananda and Women,* Commonwealth Publishers: New Delhi, 2014, p. 132.

27 Swami Vivekananda, *Our Women*, Advaita Ashrama:Kolkata, 2015, pp. 25-26.

28 Woman of India:Lectures and Discourses delivered at the Shakespeare Club House, Pasadena, California on 18th January 1900, available at www.ramakrishnavivekananda.info, visited on 20 May 2016.

29 Swami Vivekananda, *Our Women*, Advaita Ashrama:Kolkata, 2015, pp. 28-29.

30 Woman of India:Lectures and Discourses delivered at the Shakespeare Club House, Pasadena, California on 18th January 1900, available at www.ramakrishnavivekananda.info, visited on 20 May 2016.

the God by remaining a spinister. The swami explains further that as all of them cannot put their mind on God, so he recommends that they should be married.

On the relationship of husband and wife, Vivekananda made a vivid observation stating that it is alone in the Sanskrit language that we find four words meaning husband and wife together. It is only in our marriage that they [both] promise, 'What has been my heart now may be thine'. It is there that we see that the husband is made to look at the Pole-star, touching the hand of his wife and saying, 'As the Pole-star is fixed in the heavens, so may I be fixed in my affection to thee'. And the wife does the same.[31]

Upholding the custom of respect in Indian culture, Swamiji retierated that we do not eat before our superiors as a mark of respect. On the question poised to him as to why the [Hindu] husband doesn't sit with his wife to eat? Swami replied that the idea that the husband thinks she is too low a being is wrong explanation. He stated that if a lady is eating, she may eat before her brothers. But if the husband comes in, she stops immediately and the poor husband walks out quickly. The man when is hungry comes in, takes his meal and goes out. He stated that customs are peculiar to the country. And as he himself was unmarried therefore, he is not perfect in all his knowledge about the wife.[32] The researchers think that this custom started as men at that time worked hard, ploughing the fields in the scorching heat, and as soon as he entered the home hungry, the wife set aside her munch to serve the hungry husband, who was to return back to his fields early.

Vivekananda could visualise that the status given to wives by Indian husbands could not match the western culture and wished that Indians should develop womanhood as a 'wife' too. That's why, he stated*"The Hindu have developed the side of womanhood as the mother. But will this side be enough? Let the Hindu woman who is the mother become the worthy wife also, but do not try to destroy the mother. Now the Hindu man needs to develop the other side of the women- the wife of man."*[33]

Woman as a Daughter: A Great Difficulty

Vivekananda says the the great difficulty in the Indian household is the daughter. The daughter and cast combined ruin the poor Hindu, because, she must marry in the same caste, and even inside the caste exactly the same order;

31 Vijay Sharma and Chetan Agarwal, *Swami Vivekananda and Women*, Commonwealth Publishers: New Delhi, 2014, p. 14.

32 Vijay Sharma and Chetan Agarwal, *Swami Vivekananda and Women*, Commonwealth Publishers: New Delhi, 2014, p. 13.

33 Id., p. 14.

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and so the poor man sometimes has to make himself a beggar to get his daughter married. The father of the boy demands a very high price for his son, and this poor man sometimes has to sell everything just to get a husband for his daughter. And, curiously enough, the word daughter in Sanskrit is 'duhita'. The real derivation is that, in ancient times, the daughter of the family was accustomed to milk the cows, and so the word 'duhita' comes from 'duh', to milk;and the word 'daughter' really means a milk maid. Later on, they found a new meaning to that word 'duhita', the milkmaid- she who milks away all the milk of the family. That is the second meaning.[34]

Woman as a Child in Marriage

Once a man asked Swamiji, 'What is your opinion about early marriages?' To this Swami replied *"Amongst the educated classes in Bengal, the custom of marrying their boys too early is dying out gradually. The girls are also given in marriage a year or two older than before, but that has been under compulsion-from pecuniary want. Whatever might be the reason for it, the age of marrying girls should be raised still higher. But what will the poor father do? As soon as the girl grows up a little, everyone of the female sex, beginning with the mother down to the relatives and neighbours even, will begin to cry out that he must find a bridegroom for her, and will not leave him in peace until he does so! And, about your religious hypocrites, the less said the better. In these days no one hears them, but still they will take up the role of leaders themselves. The rulers passed the Age of Consent Bill prohibiting a man, under the threat of penalty, to live with a girl of twelve years, and at once all these so-called leaders of your religion raised a tremedous hue and cry against it, sounding the alarm, 'Alas, our religion is lost!' as if religion consisted in making a girl a mother at the age of twelve or thirteen! So the rulers also naturally think, 'Goodness gracious! What a religion is theirs! And these people lead political agitations and demand political rights!'"*[35]

Vivekananda was totally against early marriage. He argued that *e*arly marriage leads to premature child-bearing, which accounts for most of our women dying early; their progeny also, being of low vitality, go to swell the ranks of our country's beggars. He futher questioned that, if the physique of the parents be not strong and healthy, how can strong and healthy children be born at all? He advocated that when a girl child is married a little later and bred in culture, she will give birth

34 Id., p. 30.

35 Vijay Sharma and Chetan Agarwal, *Swami Vivekananda and Women*, Commonwealth Publishers: New Delhi, 2014, p. 126-127.

to children who will be able to achieve real good of the country. He also lamented that this custom of early marriage is the root cause of so many widows in every home. If the number of early marriages declines, he revealed, then the widows is bound to follow suit.[36]

Woman as a Widow: Her Re-Marriage

"I am asked again and again, what I think of the widow problem..... Let me answer once for all – am I a widow that you ask me that nonsense?.....Who are you to solve woman's problems? Are you the Lord God that you should rule over every widow and every woman? Hands off! They will solve their own problems"-- Swami Vivekananda[37]

The above statement is an evidence to the fact that Swamiji abhorred the least suggestion of dictation of the male to the female. He went on to state that the older books or even newer books do not prohibit the Hindu widows from being married. It is a mistake to think so. They give them their choice, and that is given to both men and woman. The idea in our religion is that marriage is for the weak, and Vivekananda himself does not see any reason to give up that ideal . He further reasons that what is the use of marrying for the one's who find themselves complete even without marriage. And one chance of marriage is given to all those, who wish to marry. When that chance is over, both men and women are looked down upon, if they marry again: but its not that they are prohibited. It is nowhere said that a widow is not to marry. The widow and widower who do not marry are considered more spiritual. Men, of course, break through this law and go and marry; whereas women being of a higher spiritual nature, keep to the law. The basic nature of woman is to keep the law. This non-marriage of widows gradually grew into a custom. Which gradually became rigid and impossible to break through it.[38]

Futher explaining the introduction of this custom of prohibition of widow-remarriage, Vivekananda elaborates that rishis and wicked men could in no case introduce this custom; but it came due to social necessity of the time. He further expounds that two points should be specially observed: (a) Widow-marriage takes place among the lower classes, and (b) Among the higher classes the number of women is greater than that of men. Now, if it be the rule to marry every girl, then it is difficult enough to get one husband apiece. Now, the question arises that how to

36 Swami Vivekananda, *Our Women*, Advaita Ashrama:Kolkata, 2015, pp. 56-57.

37 Vivekananda, *The Complete Works of Swami Vivekananda*, Advaita Ashram: Kolkata, Vol.III, p.246.

38 Vijay Sharma and Chetan Agarwal, *Swami Vivekananda and Women*, Commonwealth Publishers: New Delhi, 2014, p. 8.

remarry the widow and get her two or three husbands? Therefore, the society has put one party under disadvantage, i.e., it does not let her have a second husband, who has had one; if it did, one maid would have to go without a husband. On the other hand widow-marriage in communities having a greater number of men than women, is not prohibited because in their case the objection stated above does not exist.[39]

As part of the intiative to eradicate this custom, Vivekananda goes on to explian that everywhere under the sun you find the same blending of the good and the bad. A Society in every country shapes itself out of its own inititatives. Our part of the duty lies in imparting true education to all men and women in society. As an outcome of that education, they will of themselves be able to know what is good for them and what is bad, and will spontaneously eschew the latter. It will not be then necessary to pull down or set up anything in society by coercion.[40]

Women as Sita: Indian Ideal of a Perfected Woman

"Sita is Unique; all the Indian ideals of a perfected woman have grown out of that one life of Sita; and here she stands these thousands of years, commanding the worship of every man, woman, and child, through the length and breath of the land of Aryavarta"

—Swami Vivekananda[41]

Swamiji states that there is no other Pauranika story that has so permeated the whole nation, so entered into its very life, and has so tingled in every drop of blood of the race, as this ideal of Sita. Sita is the name in India for everything that is good, pure, and holy; everyting that in woman we call womanly. If a priest has to bless a child, he says, 'Be Sita!'. They are all children of Sita, and are struggling to be Sita, the patient, the all-suffering, the ever-faithful, the ever-pure wife. Though all the suffering she had experienced, there is not one harsh word against Rama. She took it as her own duty, and performed her own part in it. Think of the terrible injustice of her being exiled to the forest! But Sita knows no bitterness. That is again, the Indian ideal. Vivekananda quotes the ancient Buddha: *'When a man hurts you and you turn back to hurt him, that would not cure the first injury; it would only create in the world one more wickedness*.' Sita was a true Indian by nature; she

39 Swami Vivekananda, *Our Women*, Advaita Ashrama:Kolkata, 2015, pp. 58-59.

40 Vivekananda, *The Complete Works of Swami Vivekananda*, Advaita Ashram: Kolkata, Vol.VI, pp.492-493.

41 As quoted in Vijay Sharma and Chetan Agarwal, *Swami Vivekananda and Women*, Commonwealth Publishers: New Delhi, 2014, p. 132.

never returned injury.[42]

Vivekananda goes on to quote a passage from the life of Sita. The picture opens when she was in the forest with her husband, wither they were banished. There was a female sage whom they both went to see. Sita's fasts and devotions had emaciated her body. Sita approached this sage and bowed down before her. The sage placed her hand on the head of Sita and said 'It is a great blessing to possess a beautiful body; you have that. It is a greter blessing to have a noble husband; you have that. It is a greatest blessing to be perfectly obedient to such a husband; you are that. You must be happy'. Sita replied, 'Mother, I am glad that God has given me a beautiful body and I have a devoted husband. But as to the third blessing, I do not know whether I obey him or he obeys me. One thing alone I remember, that when he took me by the hand before the sacrificial fire – whether it was a reflection of the fire or whether God himself made it appear to me – I found that I was his and he was mine. And since then, I have found that I am the complement of his life, and he of mine.'[43]

Hence, Vivekananda explicates that the women of India must grow and develop in the footprints of Sita and that is the only way to her freedom. Any attempt to modernise our women. If it tries to take our women away from that ideal of Sita, is immediately a failure.

Woman as an emblem of heroism

"Woman will solve their own problems. They have all the time been trained in helplessness, servile dependence on others, and so they are good only to weep their eyes out at the slightest approach of a mishap or danger. Along with other things, they should acquire the spirit of valour and heroism. In the present day, it has become necessary for them also to learn self-defence. See how grand was the queen of Jhansi."

—Swami Vivekananda[44]

Vivekananda in his discourse, visions the future woman as a combination of saintliness and heroism. He states that this mild Hindu race has produced fighting women from time to time. Referring to Rani Laxmi Bai of Jhansi, he highlights her generalship by stating that during the Mutiny of 1857, she fought against the English

42 Vivekananda, *The Complete Works of Swami Vivekananda*, Advaita Ashram: Kolkata, Vol.IV, pp. 75-76.

43 Vijay Sharma and Chetan Agarwal, *Swami Vivekananda and Women*, Commonwealth Publishers: New Delhi, 2014, p. 134.

44 As quoted in Anjana Gangopadhayay, *The Way to Women's Freedom: According to Vivekananda*, Advaita Ashram: Kolkata, 2016, p. 35.

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soldiers and held her ground for two years – leading modern armies, managing batteries and always charging at the head of her army. He also elaborated upon the story of Chand Bibi, or Chand Sultana (1546-1599),who was the queen of Golconda, where the diamond mines were. For months she defended herself. At last, a breach was made in the walls. When the imperial army tried to rush in there. She was in full armour, and she forced the troops to go back.[45]

Swamiji while testifying the ability of women, stated that women in statesmanship, managing territories, governing countries, even making war, have proved themselves equal to men, if not superior. Whenever they have had the opportunity, they have proved that they have as much ability as men, with this advantage, that they seldom degenerate. They keep to the moral standard, which is innate in their nature. And thus as governors and rulers of their state, they prove, at least in India, far superior to men. He saw Indian women, at that time too, managing vast estates with great ability and further sharing his life experiences articulates *"There were two ladies where I was born who were the proprieters of large estates and patronesses of learning and art and who managed these estates with their own brains and looked to every detail of the business."*[46]

The belief that women have to depend on men to be great is a myth. Vivekananda had experienced the glory of the Divine in its Feminine aspect during his tutedge under Sri Ramakrishna. Resultantly, for him women were the condensed forms of that All-powerful Feminine (Shakti). Is his view the only thing needed was to awaken this awareness in the womenfolk, and the rest would be easy.[47]

Woman as the begetter of 'good beings'

"He is an Aryan, who is born through prayers"

— Manu[48]

Vivekanada narrates that his father and mother fasted and prayed for years and years, so that he would be born. And what ever he is, it is totally because of the prayers and penance of his father and mother. He further quoted Manu,the law-giver,as saying that every child not born through prayer is illegitimate. The child must be prayed for. He further drops a question that what can be expected of

45 Vijay Sharma and Chetan Agarwal, *Swami Vivekananda and Women*, Commonwealth Publishers: New Delhi, 2014, pp. 134-135

46 Id., p. 135

47 Anjana Gangopadhayay, *The Way to Women's Freedom: According to Vivekananda*, Advaita Ashram: Kolkata, 2016, p. 35.

48 Swami Vivekananda, *Our Women*, Advaita Ashrama:Kolkata, 2015, p.29.

such a progeny that came with curses, that slip into the world just in a moment of inadvertence, because that could not be prevented?[49]

Vivekananda goes on to explain that our books teach that it is the pre-natal influence that gives the impetus to the child for good or evil. He pronounces "*Go to a hundred thousand colleges, read a million books, associate with all the learned men of the world – better off you are when born with the right stamp. You are born for good or evil. The child is a born god or a born demon: that is what the books say. Education and all these things come afterwards – are a mere bagetelle*"[50]. Swamiji vehmently held that you are what you are born. All the drugs in the stores will not keep you well throughout your life, if you are born unhealthy. He further raises the question as to how many people of good healthy life were born to sickly, blood-poisoned parents? How many? None.[51]

We find the mention of Abhimanyu, the courageous son of the Arjuna and Subhadra (Sri Krishna's sister) and his encounter with Chakra-vyuha, in the great epic 'Mahabharta'[52]. This story highlights how the healthy mental growth of a child begins even before it is born, while still in its mother's womb. Recent scientific findings have shown that babies can indeed hear from inside their mother.

The ideology of motherhood has been slowly degerating. Motherhood, which stands at the core of woman's identity, which literally defies and defines her, has suffered casualty at the hands of the new value system. The open encouragement and gross misuse of artificially manipulated ways of becoming mother through

49 Ibid.

50 Id., pp.30-31.

51 Id., p.31.

52 This story begins just before Abhmanyu was born. Sri Krishna used to take Subhadra on excursion, when Abhimanyu was in his mother's womb. To humour her, Krishna used to relate many of his adventures to her. On one such exercusion Krishna was narrating his experience with the technique of Chakra-vyuha and how step by step the various circles could be penetrated. Nonetheless, it seems that Subhadra did not find this topic interesting and she soon fell asleep. While Subhadra dozed off, Abhimanyu continued to carefully follow Sri Krishna's narrative of the Chakra-vyuha. But, after talking for some time and not receiving the response from Subhadra, Sri Krishna realised that she was savouring a sweet nap and he gave up his narration, while he was on the Seventh step of the Chakra-vyuha. Abhimanyu could never obtain the technique of breaking all the circles and was left with incomplete knowledge. He grew up to be a brave, handsome young man. Many years later, during the Mahabharata war at Kurukshetra, the Kauravas set up a Chakra-vyuha and challenged the Pandavas to come forward and break it. However, only Arjuna (who was fighting elsewhere) knew the technique of doing so. At that stage, to save the honour of the Pandavas, Abhimanyu came forward and offered his services for the task of breaking the chakra-vyuha. Despite his incomplete knowledge of the technique he entered the grid and overcame one circle after another until he come to the seventh one, the breaking of which he had no knowledge. Brave and ambitious as he was, he fought valiantly in the unequal struggle but in vain. As a consequence, he died and could not break the seventh circle: National Hindu Students' Forum, Mahabharata: Abhimanyu and the Chakra-Vyuha, available at www.nhsf.org.uk/2005/12/mahabharata-abhimanyu-and-the-chakra-vyuha/, visited on 20 May 2016.

the intervention of medical science has robbed motherhood of its sanctity. A section of well to do women today prefers to have children in borrowed wombs (surrogacy). They want babies, but without undergoing the trivails of pregnancy themselves, and aim to retain their attractiveness at all costs! Whether it is IVF, surrogacy or abortion, each of these, originally meant for treating medical cases, is today widely used in ways that raises ethical questions and has turned the sacred ideology of motherhood upside down. This has direct bearing on the philosophy of parenting too. The supreme role and responsibility of an ideal way of mothering and parenting has suffered a major setback.[53] Hence the need of the hour is, that society and women in particular should understand the implications of pre-natal influence on the child in the mother's womb.

Woman as an Educator and an Educated: A Grave Necessity

"Daughters should be supported and educated with as much care and attention as the son.."

— Manu[54]

Once a disciple asked Swami 'woman are abondage and a snare to men. By their maya they cover the knowledge and dispassion of men. It is for this I suppose that scriptural writers hint that knowledge and devotion are difficult of attainment to them.' On this Swamiji replied *"In what scriptures do you find statements that women are not competent for knowledge and devotion? In the period of degradation, when the priests made the other castes incompetent to study the Vedas, they deprived the women also of all their rights. Otherwise you will find that in the Vedic or Upanishadic age Maitreyi, Gargi and other ladies of revered memory have taken the places of Rishis through their skill in discussing about Brahman. In an assemly of a thousand Brahmans who were all erudite in the Vedas, Gargi boldly challenged Yajnavalkya in a discussion about Brahman. When such ideal women were entitled to spiritual knowledge then, why shall not women have the same privilege now?"*[55]He further went on to state that if even one amongst the women became a knower of Brahman, then by the radiance of her personality thousands of women would be inspired and awakened to truth, and great well-being of the country and society will ensue.[56]

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53 Anjana Gangopadhayay, *The Way to Women's Freedom: According to Vivekananda*, Advaita Ashram: Kolkata, 2016, pp.17-18.

54 Vijay Sharma and Chetan Agarwal, *Swami Vivekananda and Women*, Commonwealth Publishers: New Delhi, 2014, pp. 139-140.

55 Swami Vivekananda, *Our Women*, Advaita Ashrama:Kolkata, 2015, pp.39-40.

56 Vijay Sharma and Chetan Agarwal, *Swami Vivekananda and Women*, Commonwealth Publishers: New

Education, may be described as a development of faculty, not an accumulation of words, or as a training of individuals to work rightly and efficiently. Swamiji expressed that as sons should be married after observing Brahmacharya upto the thirtieth year, so daughters also must observe Brahmacharya and be educated by their parents. Swamiji in his anguish retierated, "*But what are we actually doing? Can you better the condition of our women? Then there will be hope for your well being. Otherwise you will remain as backward as you are now*."[57]

Further he had said, "*Without Shakti [feminine power] there is no regeration for the world*". The magic wand that could bring about this regeneration was, according to him, education. "*Only let woman and people achieve education! All further questions of their fate, they would themselves be competent to settle*," he said. But his view of education itself were quite revolutionary.[58] He stated that the hindu women are very spiritual and very religious and if we preserve these beautiful characteristics and at the same time develop the intellects of our women, hindu woman of the future will be ideal woman of the world. Ideal characters must be always presented before the view of the girls to imbue them with a devotion to lofty principles of selflessness. The noble examples of Sita, Savitri, Damayanti, Lilavati, Mira should be brought to their minds and they should be inspired to mould their own lives in the light of these.[59]

The products of that ideal kind of education would appear to be an antithesis to the kind of educated women that come out from the present-day institutions. The modern women have their intellect stuffed with information. But for Vivekananda this mattered very little. He always placed purity and chastity above mere intellectual attainments. While in New York he once said, *"I should very much like our women to have your intellectuality, but not if it must be at the cost of purity... Intellectuality is not the highest good. Morality and spirituality are the things for which we strive."*[60]

Swamiji advocated the revival of the old arts. He asked the people to teach the girls fruit-modelling with hardened milk, artisitic cooking and sewing, painting,

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Delhi, 2014, pp. 136.

57 Vijay Sharma and Chetan Agarwal, *Swami Vivekananda and Women*, Commonwealth Publishers: New Delhi, 2014, pp. 139-140.

58 Anjana Gangopadhayay, *The Way to Women's Freedom: According to Vivekananda*, Advaita Ashram: Kolkata, 2016, p.35.

59 Vijay Sharma and Chetan Agarwal, *Swami Vivekananda and Women*, Commonwealth Publishers: New Delhi, 2014, pp. 140-141.

60 Anjana Gangopadhayay, *The Way to Women's Freedom: According to Vivekananda*, Advaita Ashram: Kolkata, 2016, p.35.

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photograpphy, the cutting of designs in paper and gold and silver filigree and embroidery, History and the Puranas, religious arts, empirical science, hygiene and other essential things. He ensured that it should be seen that every girl knows something by which she can earn a living in case of need. Along with other things, women should acquire the spirit of valour and heroism. Make them learn self defence as that is the need of the day and not to forget humanity, he elucidated. [61]

Hence, after the thorough analysis of these divine revelations of Swamiji especially on 'womanhood', it can be stated with conviction that if these revelations are accepted and applied, they will go a long way in realisation of 'womanhood' and her freedom. His teachings, if adopted, will bring a sea change in the women themselves, the way they look upon themselves, the self-image they carry with them, which is the basis of their conduct in the society. It decides the way men look upon them and approach them. As long as women don't change their self image, to expect a change in men's approach towards them is absurd. And with the former attained, the latter too will stand accomplished. And as more and more women, so also men, take to the expositions of Vivekananda , they will become the pillars of the future glorious society where women will be free in the true sense of the term.

61 Vijay Sharma and Chetan Agarwal, *Swami Vivekananda and Women*, Commonwealth Publishers: New Delhi, 2014, p.141.

'An oasis in chaos'

Reinventing swami Vivekananda from his homilies on education: A Philosophical Survey of Right to Education in India

Ashish Virk[1*]

The Universal Cry for God

'Education has yet to be in the world and civilization- civilization has begun nowhere yet.'

— Swami Vivekananda

It was another day of modern life and modern war. In a small church a handful of devout men and women were gathered to worship God. From the airplane high above, a great bomb was released. Like a diabolical contraption concocted in some unearthly, infernal region afar, it whined its fiendish way earthward, bent on its violent business of destruction. It was not an atom bomb, with its surpassing explosive power and its alarming after-effects, which might show up in generations yet unborn. It was not an unheralded rocket bomb descending faster than the speed of sound. It was not a gas bomb which on explosion would release poisonous gases to make deep burns in the flesh, choke its victims to death, and linger for days to lure tardy, unsuspecting souls to suffering. Nor was it a biological bomb packed with germs of disease and terrifying plagues. It was only a plain, ordinary, old-fashioned block-buster. People knew just about how much damage it would do. When it scored a direct hit on the little Church and went off with a thunderous explosion, the house of worship was obliterated. The Crowd gathered as near to the scene as officers would permit. Among them was a young man who seemed deeply disturbed but said nothing until he turned to leave. Then half to him and half aloud he whispered, "Where is God?" This man was not an atheist, nor an infidel. He was not an agnostic and he did not consider himself justly to be classed as slightly skeptical. And when there stirred within his soul a strange mixture of fear and disappointment and rebellion at what he has seen, he gave but a spontaneous expression to that question which has come to the minds of unnumbered millions, who, through sincere, are troubled to know, "Where is

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God?" why does he not do something about the horrors attending life on this earth? Why does he not manifest himself and "destroy them which destroy the earth?" Why does he not destroy all evil?[2]

We all see ourselves in this man, when we are in the same chaos and then we urge for the same oasis. In many ways man is dying by the machines of his own creation and invention. Thousands of human beings perish due to the wrecks of trains, cars, airplanes etc. The scientific age has brought with it both luxurious and tribulations. The mankind is paying a heavy price of it. The world today is a troubled place; everywhere human beings are surrounded by multiple problems and seek for the solutions. These all situations is longing to know what is the real meaning of life, and will God ever solve these problems of mankind. The results of development have all together challenged the very system of present civilization, economic growth, scientific advancement and on the whole our education system. The present education system has made good political, economic, scientific, legal scientists but not human beings; however, in the years we have witnessed that this has resulted in adding more chaos and unrest amongst the society as well as minds of human beings. It is hence, the time to reinvent Swami Vivekananda on these issues; as we may get answers to our questions. The paper is hence an attempt to craft a spiritual journey and make some introspection in reference to the views of Swamiji on life, God and more specifically education and how it can be a mode of enlightenment for all of us, as God spoke through him ultimately finding a solace and oasis in this chaos.

God Speaks Through Him

'Education is the manifestation of the perfection already in man.'

— Swami Vivekananda

Following his appearance at the 1893 World's Parliament of Religions held in Chicago in connection with the Columbian Exposition, Swami Vivekananda (1863-1902) was at once acclaimed the foremost champion of the harmony of religions. Almost overnight this unknown young monk of India shot into prominence as a great world teacher. It was then held my majority that God speaks through Him. Amongst his various discourses on Spirituality, Religion, God etc, Education could be considered as one of the famous pull for the ones who belong to separate walks of interest than spirituality. The perfection of this saint was that the people who

2 Arthur E. Lickey, God Speaks to Modern Man, Oriental Watchman Publishing House, Poona, 1969, pp. 1-2.

call themselves atheist or scientific would get attracted to his addresses. A layman who cannot understand the philosophies of spirituality would definitely find his sermons on education as relevant and understandable to his intellect. This part of research work is thus an endeavor to reinvent Swamiji on the area of education, so as to make certain introspections as to why the present education system is making violent machines of human beings rather than noble souls of peace. His addresses on education can be further divided into various sub-heads which are briefly discussed below.

The Philosophy on Education: 'We say Newton discovered gravitation. Was it sitting anywhere in a corner waiting for it? It was in his mind, the time came and he found it out. The falling of an apple gave the suggestion to Newton, and he studied his mind. He rearranged all the previous links of thought in his mind and discovered a new link among them, which we call the law of gravitation. It was neither in the apple nor in anything in the centre of the earth." The greatness of this man lies in the form in which he elaborates the complex philosophies of nature. By quoting the example of Newton and his invention of law of gravitation he simplifies the thought that all knowledge is inherent in man, no one comes from outside; it's all inside. He states that what we say a man 'knows' is actually what he 'discovers' or 'unveils.' Swamiji was of the view that every kind of knowledge, whether spiritual or scientific is within the human mind. The entire course of education is uncovering the human mind, so that the advancement of knowledge is made. While analyzing the role of teacher Swamiji states the one who is into the profession of imparting education to child is an external teacher only, the internal or the real teacher is the mind of the person. The external teacher, according to him offers only suggestion which incites the internal teacher to work and to understand things. Hence, according to him education is not the amount of information that is put into the brain; rather it should target life-building, man-making, character-making, assimilation of one's own ideas and thoughts. He makes a very intelligent question by stating;

'The education that does not help the common mass of people to equip themselves for the struggle for life, which does not bring out strengths of character, a spirit of philanthropy and the courage of a lion- is it worth the name?"[3]

He desires for an educational system, which trains the expression of will, it should be brought under control and become fruitful for the entire mankind. This

3 T.S. Avinashhilingam, Education: Compiled from the Speeches and Writings of Swami Vivekananda, The President: The Ramakrishna Math Press, Madras, 1943, pp.7-8.

is what he calls real education.

Means of Education: Swamiji promoted love and character building as the best means of education. He states that the real purpose of education is to push the growth and enhance the expansion of the human personality and character building, as it is only when these objectives are fulfilled the real purpose of education, that is total human development, is achieved.

'Character, Efficiency, and Humanism should be the aim of all education. I strongly plead that development of character through the service of his fellowmen, the utilization of his talents for ensuring the happiness and welfare of the millions of his less fortunate fellow-citizens should be the aim of the education.'[4]

The child should be taught through love, it makes fellow feelings and love for human beings. Education must help the individual to recognize his cultural heritage and to use it in his struggle of life. Education is a lifelong process towards, towards the fullest development of human personality, self-discovery, self-perfection, self-awareness and self- manifestation.[5]

The Only Method of Education: Sri Ramakrishna- the Guru of Swami Vivekananda was like the iron cask, he then was able to transform himself into a glass cask, it was through this transformation he was able to see his inner light. Swamiji states that this transformation was possible only through one method, that is, concentration. The very essence of education is concentration of mind. Every person on this planet, from the lowest man to the highest Yogi, who wishes to get enlightened, wants to attain real knowledge, can do so through concentration. He explains his philosophy by quoting an example of an astronomer, who concentrates the power of his mind and brings them into one focus; he then throws them on the objects through his telescope; and stars and systems roll forward and give up their secrets to him. Hence, more the power of concentration the greater is the knowledge that one acquires. He states that the main difference between men and the animals is the difference in their ability to concentrate. Inability to concentrate makes major portion of thought force waste by an ordinary human beings. Hence, one should try to train one's mind by enhancing concentration. He justifies his philosophy by giving real time examples, where he states that the Greeks applied their concentration to the external world and the result was perfection in art, literature etc. The Hindus were able to concentrate on the internal world upon

4 Pardeep Kumar Johri, Educational Thought, Anmol Publication Pvt. Ltd., New Delhi, 2005, pp.238-39.

5 P. Nithiya, Swami Vivekananda's Views on Philosophy of Education, Asian Journal of Multidimensional Research, Vol.-I, Issue-6, November 2012, pp.43-44.

the unseen realms in the self and developed the science of Yoga.[6] He also supports the life of Bramacharya, and it is only through its strict obedience that the idea of Shraddha will get awakened. He wants the Indian society to solve its own problems by reawakening Shraddha.

Medium of Education: Like other reformists of his times, Gandhiji, Tagore, he also emphasized the imparting of education through the mother tongue of a child; however, he supports common language for the entire country and its unity. He was a supporter of Sanskrit Language and described it as a store house of ancient heritage, to develop our society it is necessary that men and women should know this language, besides the knowledge of the mother tongue.[7]

Types of Education: Swami Vivekananda's views on types of education basically revolve around two kinds, which every educational system should impart to students. These are physical and religious or moral education. *Physical Education*- Swamiji believed that without the knowledge of physical education, the self-realization or character-building is not possible. The attainment of complete education is only possible when one makes his body strong through physical activities. He also wants physical education in every curriculum. Very rightly remarked;

'You will be nearer to Heaven through football then through the study of Gita. You will understand Gita better by your biceps, your muscles a little stronger. You will understand the Upanishads better and the glary of the Atam, when your body stands firm on your feet and you feel yourself as man.'[8]

Religious and Moral Education- Swamiji always held that the ethics and religion are one and same thing. He believed the God is always on the side of goodness. He stated in many of his discoveries that the moral and religious education develop a kind self-confidence among the young men and women. He considered Gita, Upanishads, and the Vedas as the most important curriculum for religious education. Religion thus to him is the inner most core of education. He introduces the concept of New Religion as well. He states that the old religion states that he was an atheist who did not believe in God, the new religion says that he is an atheist who does not believe in himself. He believes that it is this great faith which

6 Swami Vivekananda, The Complete Works of Swami Vivekananda: Mayavati Memorial Editions, Advaita Ashrama, Vol. VI, p.124.

7 P. Nithiya, Swami Vivekananda's Views on Philosophy of Education, Asian Journal of Multidimensional Research, Vol.-I, Issue-6, November 2012, p. 46.

8 S.S. Chandra, Rajendra Kumar Sharma, Philosophy of Education, Atlantic Publishers< New Delhi, 2004, p.212.

will make the world a better place. The ideal of faith in ourselves is of the greatest help to us. If faith in us had been more extensively taught and practiced, he was sure that very large portion of the evils and miseries would vanish.[9]

Women Education: Swami Vivekananda was a great promoter of women's rights especially her educational rights. He believed that unless Indian women do not secure an equal and respectable place in the society, the country can never march forward. He wanted that through education India women should become strong, fearless and conscious of their chastity and dignity. He justifies his philosophy of equality through the Venanta, and stated that Vedas declares that one and the same Self is present in all beings. He mentions in one of his discourse that writing down Smritis etc., and biding them by hard rules, the men had turned the women into mere manufacturing machines. He was a keen observer and could distinguish the difference in perception about the status of women in the West and in India. He once quoted,

'The ideal women in India is the mother, the mother first, and the mother last. The word woman calls up to the mind of the Hindu motherhood; and God is called mother.'[10]

He quotes the Vedic and the Upanishads age where Maitreyi and Gargi and other ladies of revered memory have taken the place of Rishis. It was in the period of degradation, when the priests made the other castes incompetent to study the Vedas; they deprived the women also of all their rights. Women have many grave problems, but every problem can be solved by the magical word: Education. He quotes Manu, 'daughters should be supported and educated with as much care and attention as the sons.' Through education the Indian women will establish their own capabilities and world be able to solve their own problems and issues of life. Swamiji also held that our motherland requires for her well-being some of her children to become pure soul Brahmacharins and Brahmacharinis.[11] They should take up the task to teaching and imparting education. In villages and towns, they must open centers and strive for the spread of female education. He recommends the introduction of subjects like sewing, nursing, domestic science etc., for females, so as to help them in better house-keeping as well along with other things females

9 Swami Vivekananda, The Complete Works of Swami Vivekananda: Mayavati Memorial Editions, Advaita Ashrama, Vol. II, p.301.

10 S.P.Pani, S.K.Pattnaik, Vivekananda, Aurobindo, and Gandhi on Education, Anmol Publications, New Delhi, 2006, p.80.

11 T.S. Avinashhilingam, Education: Compiled from the Speeches and Writings of Swami Vivekananda, The President: The Ramakrishna Math Press, Madras, 1943, pp.62-67.

should also acquire the spirit of valour and heroism. He believes that in present era it has become necessary for them to learn the art of self-defense. He was of the view that if the women are raised, their children will perform noble works and would glorify the name of the country. Educated women in India will awaken in society the principles of devotion, power, and knowledge and would ultimately enhance the Indian culture.

Relationship between the Teacher and the Taught: Education in Vivekananda's sense enables one to comprehend one's self within as the self everywhere. He believes that the entire universe is realized through education. He states that in India imparity of knowledge has always been through men renunciation. It has always been considered as the noblest profession. It was because of this that he wanted the charge of imparting knowledge should again fall upon on the shoulders of Tyagis. The old system of education was very different from the modern system. The students had not to pay anything for education. It was thought that imparting education is so scared that no man ought to sell it. Knowledge should be given freely and without any price. Swamiji held that there are certain conditions which should be present with taught. These are:

- The taught should have real thirst for knowledge. He should give all his desires for gain.
- Purity in thought, speech, and act is very necessary for a taught to receive education.
- There should be a continuous struggle, a constant fight, an unremitting grappling with our lower nature, till the higher want is actually felt and victory is achieved by the taught.
- The disciple must be able to control the internal and external senses. By hard practice he has to arrive at the stage where he can assert his mind against the commands of nature.
- The disciple must have great power of endurance. Life seems comfortable, and you find the mind behave well, when everything is going on well. But if something goes wrong, mind loses its balance. Swamiji promoted a strong personality of disciple when he quotes,

'Bear all evil and misery without hurt, without one thought of unhappiness, resistance, remedy, or retaliation.'

- The next condition the disciple must fulfill is to conceive an extreme desire to be free. He believed that renunciation of the senses and desires is the only way

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out of this misery. If one wants to be spiritual, one must renounce. The sole concern should be to know the highest truth.

On the same note Swami Vivekananda also gave certain qualities of the teacher. As stated above he gave a very high position to a teacher in the society, so he stated in his various lectures that a teacher should have the following qualities:

- The teacher must know the spirit of scriptures. The teacher who deal too much with words of religious books (Bible, Vedas, Korans) and allows the mind to be carried away by the force of the word loses the spirit of these books.
- The second condition necessary for the teacher is that he should be free from all sins. The teacher must be perfectly pure and then only comes the value of his words. Something real and appreciable as an influence comes from the teacher and goes to the taught; therefore, the teacher must be pure in his thoughts and actions.
- The third condition in this regard, is the motive. The teacher must not teach with any ulterior selfish motive, for money, name or fame. His work must be simply love for mankind at large.
- The next important condition for a good teacher is that the teacher must throw his whole force into the tendency of the taught. The true teacher is the one who can come down to the level of the student, and transfer his soul to the students, and should see and understand through his mind. It is only such kind of teachers who can really teach.

Swami Vivekananda, a great thinker, philosopher and a reformist of India, embraces education on a high pedestal. Education for him signifies man-making, as the very mission of his life. The preceding part of the paper expounded and analyzed his views on education; an attempt has been made to highlight the basic theme of his philosophy on the subject. The proceeding part of the paper will deal with relevance of his philosophy on the present educational system of India.

Indian Educational System: Glancing through the Eyes of Vivekananda

'Education is a process by which character is formed, strength of mind is increased, and intellect is sharpened.' Swami Vivekananda

India, situated in the heart of South East Asia, is blessed with beautiful geographical layout. As a nation it is proud of its wonderful and rich traditions. It is one country in the world, which can without opposition boost about the fact that

it 'houses almost all possible cultures and communities that one can think about.' Apart from geographical advantages, India has witnessed the growth of various new religions, new communities, like Buddhism. All this have not only enriched the society of India but also brought new ideas and beliefs amongst its fellow-beings. It is in this country that spiritual values and family traditions are upheld to the maximum. It is because of the multi-cultural and multi-religious place on earth, the country has always been a preacher of peace even when it faced a lot of adversities. The country, which originated with the Indus Valley Civilization has seen many empires built and many battles won and lost. It has been the colony of the British for a century and more. But the adverse years resulted as a blessing for India. These turmoil have enriched its history, culture and lifestyle of its people. The land is also called the land of saints and sadhus. Spirituality, devotion is not limited to any particular time, place, and culture in India. It is a country where innumerable saints and divine personalities incarnated from time to time. Fortunately, there is no piece of land in India which has not been satisfied and blessed by the saints. Swami Vivekananda and his sermons on different areas of life, is one such blessing to India. The exposition and analysis of Swami Vivekananda's scheme of education brings to light its constructive, practical, and comprehensive character. He realizes that it is only through education that the uplift of masses is possible. In his own emotional words he stated,

'Travelling through many cities of Europe and observing in them the comforts and education of even the poor people, there was brought to my mind the state of our own poor people and I used to shed tears. What made the difference? "Education" was the answer I got.'[12]

The present work hence, concludes with certain areas, which should be considered by the Indian policy and law makers in present Indian educational system on the lines of the philosophy of Swami Vivekananda.

Firstly, Swami Vivekananda points out that the defect in the present day education is that it has no definite goals to pursue. He states that a sculptor has a clear idea about what he wants to shape from the material before him; a painter knows what he wants to paint from the available resources; but a teacher, Swamiji says had no idea about the goal of his teaching. Absence of vision amongst the teachers is defeating the very aim of education.

12 Sudipa Dutta Roy, Education in the Vision of Swami Vivekananda. For more information visit; <http//:www.esamskriti.com/essay-chapters/Education-in-the-Vision-of-Swami Vivekananda::Education>, (22nd May 2016).

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Secondly, imparting education has always been considered as sacred in India. The teachers were fully devoted to teaching in our country. However, with the passage of time teaching has been now a profession and imparting education a business. The changing dimensions of educational sector do not go with the philosophy of Swamiji.

Thirdly, according to Swamiji the minds of the students have to be controlled and trained through meditation, concentration, and practice of ethical values. Unfortunately, this aspect is missing in our present educational system; as a result the taught is not fully devoted towards studies and majority of Indian youth is uncertain of their future.

Fourthly, various studies in the country have shown that obesity is on rise amongst the children. Physical education is part of curriculum however; it is not imparted very diligently in the educational institutions. Swami Vivekananda was the opinion that the attainment of complete education is only possible when one makes his body strong and fit through physical activities.

Fifthly, is a misinterpretation of Swamiji's philosophy of education to think that he has overemphasized for the role of spirituality development to the utter neglect of the material side. He in his plan for the regeneration of India repeatedly presses the need for the eradication of poverty, unemployment, and ignorance. He believed that technical education and all else which may develop industries, so that men, instead of seeking for service, may earn enough to provide for themselves, and save something against the rainy day. He was for the development of the balanced nation through the blend of scientific inventions of the West and Spirituality of India. Hence, for him the education system should be such that it equips the youth to contribute to the material progress of the country as well as maintain the supreme worth of India's spiritual heritage.[13]

While provisions of food, shelter, and clothing are necessary in every civilization, the most sustainable way to help a community to improve the humane attitude amongst its residents is through education. It is a process that involves the transfer of knowledge, skills and habits through teaching and training, which in return makes a personality self-confident, benevolent and full of strength. It brings wisdom and the qualities of selflessness; a truly educated soul become above materialistic objects and attains the Higher Self.

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13 Sudipa Dutta Roy, Education in the Vision of Swami Vivekananda. For more information visit; <http//:www.esamskriti.com/essay-chapters/Education-in-the-Vision-of- Swami Vivekananda::Education>, (22nd May 2016).

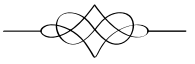
'The Great Emperor, Alexandra the Great, the great monarch standing on the banks of Indus, talking to one of our sannyasins in the forest: the old man he was talking to perhaps naked, stark naked, sitting upon a block of stone, and the Emperor astonished at his wisdom tempting him with gold and honour, to come over Greece.

And the man smiles at his gold and temptations, and refuses.

The Emperor standing in his authority says, 'I'll kill you if you do not come?'

The man bursts into a laugh, and says 'you never told such a falsehood in your life as you told just now. Who can kill me?; for I am spirit unborn and decaying.'

That is the strength education imparts'.[14]



14 Swami Vivekananda, The Complete Works of Swami Vivekananda: Mayavati Memorial Editions, Advaita Ashrama, Vol. II, p.301.

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Farmers' Rights, Seeds and Intellectual Property: An Indian Perspective

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Abstract

A farmer is not merely a cultivator but also a conservator of all agricultural gene pool. It is a fundamental right, not a concession. They assert their right to seed through the Community Intellectual Rights (CIRs) but with the tight norms of UPOV; TRIPs and TRIMs under the WTO the framers' right over seed is facing tough challenges against the breeder's right backed by the corporate bodies. Farmers' Rights are currently acknowledged as a global concern, yet consensus on how to implement Farmers' Rights remains elusive. The greatest current threat to farmers' rights is the progressive privatisation of national seed systems, the spread of hybrid vegetable varieties and the introduction of GM crops. These measures threaten to eventually lead to the violent and total imposition on peasant agriculture of the existing legal framework. Regarding the GM crops, there is an urgent need to device a strong coordinating mechanism in the country.

India has emerged as a frontrunner voicing the concerns of the developing countries, and must take the initiative as a leader in negotiations over the TRIPS provisions to work towards a more unbiased trading system. This can be only be done by bringing to the fore the inequitable bargaining powers within the decision making forums and by taking a consistent and collective stand to address these concerns. It is the moral as well as legal obligation of the international as well as national laws and of every human being, to see that farmers are considered as the most respected professionals, and that they enjoy all sovereignty in their profession, and all comforts in life. If we are to improve the lot of the majority of the poorest people in the world then we must build up and promote the rural sector, putting people, rather than production, at the centre of agricultural policies.

Introduction

Farmers' Rights are currently acknowledged as a global concern, yet consensus on how to implement Farmers' Rights remains elusive. There is a certain level of acknowledgement worldwide that farmers are an important part of the economic, social and political fabric of society and require support.

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The farmers' right on seeds is a traditional right enjoyed by farmers all along the history of agriculture. This right includes the right to save the seed from one's crop and use the saved seed for sowing, exchanging, sharing or selling to other farmers. It is fundamental to the conservation role performed by the farmers.

More or less 70% of the world's poorest people live in rural areas and are dependent on agriculture for their income, food supply and livelihoods. A farmer possesses the inherent rights over tilling, rearing and production. Production includes the production of crops and plants as well. Among the means of production of plant seed is the most common means of reproduction. Traditionally, the farmers had been involved in producing or collecting seeds after the harvesting is over for the next phase of cultivation. A farmer is not merely a cultivator but also a conservator of all agricultural gene pool. The pivotal importance of the farmer having the right to sell seed has to be seen in the context of seed production in India, where the farming community is the largest seed producer, providing about 87% of the country's annual requirement. Denying the farmer the right to sell seed would displace the farming community as the country's major seed provider. As the time advanced, with the growing concern of the people regarding the security against crop failure, diseases and pest attacks, the people started to find out the ways as to how the agricultural production can be enhanced and the food security can be achieved. So the concept of GM crops came in. Again, with the tight norms of UPOV; TRIPs and TRIMs under the WTO the framers' right over seed is facing tough challenge against the breeder's right backed by the corporate bodies. The concept of corporate activities in seed sector is the west in origin. After the Plant Patent Act, 1930 in the USA the seed industry started flourishing. This line of approach has been adopted by other countries as the time elapsed. However, for farmers the right to seed is a positive right and not a negative one. It is a fundamental right, not a concession.[2]

Farmer's Right to Seed

The concept of farmer's right had its origin in the Food and Agriculture Organization (FAO) International Undertaking on Plant Genetic Resources, 1989 in Rome. The Resolution defined farmer's rights as *"rights arising from the past, present and future contributions of farmers in conserving, improving and making available plant genetic resources, particularly those in centres of genetic diversity. These rights are vested in the international community as trustees for present and future*

2 Vandana Shiva, Agricultural Biodiversity, Intellectual Property Rights and Farmer's rights; Economic and Political Weekly, June 22, 1996, p 1622

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generations." [3] For farmers the right to seed is a positive right and not a negative one. Presently, four types of seeds are available- Foundation seed, Breeder seed, Certified seed, and Truth Level seed. At time, after independence, India's policy on plant varieties and seeds were the common heritage of mankind. Agriculture, especially the seed farmer relationship in India has been passed changed with the following phases- the Classical age (starting from the time immemorial); the age of HYV seeds (The Green Revolution beginning in 1967); Age of GM seeds (starting from late 90's) and Organic cultivation (very recently started).[4] Before 1967, India was not self- sufficient in food but the green revolution has changed the scenario. The HYV seeds recognising the interest of the breeders welcomed the corporate bodies into seed sector in the form of the breeders and in other forms. However, the farmers have the following important rights-

a) Farmer's right to produce own seed: - Mostly, the seed required for Indian farming is created by farmers themselves. When it comes to seeds, Indian agriculture has seen and continues to witness a variety of roles that farmers perform. Innovation by farmers began from the time of settled agriculture. Though the process of innovation by the farmers may not conform to the strict terms of the distinctness, stability and uniformity requirement, they also have definite criteria to identify improved varieties they develop. But these innovations are rarely recognised, primarily because of the nature of the farmer's process of innovation. Farmers do not breed in ideal laboratory conditions, but on actual knowledge of the environmental conditions through natural selection and continuous evolving process. While some farmers and farming communities have been breeders of seed varieties. Indian farmers have evolved many varieties those are resistant to salt, flood, draught etc.[5] Again, it is the farmer who has safeguarded the tremendous biodiversity that breeders use as raw material. There have been various efforts at the international level for recognizing the contribution of the farmers. The UNCED provides for the establishment of a global trust fund for genetic resources primarily intended to support programmes relating to capacity building for germ-plasma conservation by rural community.[6] India is the first country

3 Twenty- fifth Session of the FAO Conference- Rome, 1989, Resolution 5/89.

4 Organic farming is an ecological production management system that promotes and enhances biodiversity, biological cycles and soil biological activity. It is based on minimal use of off- farm inputs and on management practices that restore maintain and enhance ecological harmony. [The National Organic Standards Board of the US (1996)]

5 Elizabeth Varkey: Law on Plant Varieties Protection; The Eastern Book Company, Lucknow; First edition, 2007; at p. 146

6 Chapter 14, Agenda 21

which has included farmer's right in its protection of plant varieties. Most of the farmers are seed producers. They mostly save seeds from their own crop to be re-used. Many farmers also engage in seed exchange and thereby meet their varied needs. Farmers are also consumers as they buy seeds from companies and traders. The farmer's rights to sale, reuse and develop seeds and plant materials is going to be hampered[7].

b) **Farmer's right to preserve own seed: - A** farmer is not merely a cultivator but also a conservator of all agricultural gene pool. It is a fundamental right, not a concession[8]**.** They assert their right to seed through the Community Intellectual Rights (CIRs). Since the time immemorial, the farmers were involved in the development of new and productive varieties with better qualities of crops. Indian agriculture is mainly run by seed saved from farmers' own fields, very often by women in farming communities who use their traditional knowledge and skills in selecting and saving seed. In *Mosanto Co. v. Swann*[9] the defendant admitting the fact that he saved and replanted seeds generated from crops produced by seed containing patented technology contented that the right of farmers to save seeds of plants registered under the Plant Variety Protection Act permits defendants to save seeds subject to plaintiff's utility patent. At this, the Court concluded that the defendant's use of plaintiff's patented biotechnology was without authority and the use of a patented product without authority constitutes patent infringement. However, the full Court of Federal Court of Australia in *Cultivaust (P) Limited v. Grain Pool (P) Limited*[10] observed that a person engaged in farming activities (a farmer), who legitimately obtains propagating material from plants grown from the propagating material so purchased and may condition that further propagating material for the farmer's use for reproductive purposes and may reproduce that further propagating material. The farmer may do those some acts in relation to third generation of propagating material harvested from the second generation of propagating material. The farmer will not infringe plant breeder's right by doing so.

c) Farmer's right to exchange the seed: -. Seed exchange between farmers at the local level is based on honesty and the basic rules of being a good

7 Dr. (Mrs.) Harpal Kaur Khera; Patents and sui generis system for the protection of plant varieties: A threat to food security and health care; CILQ 2000, vol. 13, p 190

8 Vandana Shiva, Agricultural Biodiversity, Intellectual Property Rights and Farmer's rights; Economic and Political Weekly, June 22,1996, p 1622

9 308 F. Supp. 2d 937, 941 (ED Mo. 2003)

10 [2005] FCAFC 223, Full Court of Federal Court of Australia

neighbour. Everyone knows the farmer providing the seed and how good his or her seeds are. But, as we increase the area of seed exchange, risk increases. The quality of seed is not visible to the naked eye and the market is soon invaded by fraudsters who sell old seed. Industrial seed producers who want to control markets have used the excuse that the anonymous consumer needs protection and that fraudsters need to be kept at bay. It is in the name of these objectives that the state, together with the corporate seed producers, put in place seed laws to ensure that the corporate can get, and maintain, an absolute monopoly on seed production.

Position Prior to GM Crops

In the beginning, there was widespread objection in the United States to the granting of patents to plants due to the reasons like- non- compliance with the requirements of patentability e.g. plants were thought not amenable to the written description requirement of the patent law, product of nature concept etc[11]. However, in *Asgrow Seed Co. v. Winterboer*[12], the petitioner was the holder of PVPA certificates protecting two novel varieties of soybean seed, which it calls A1937 and A2234. The respondents are the Iowa farmers who in addition to growing crops for sale as food and livestock feed, derived a sizable portion of their income from 'brown bag' sales[13] of their crops to other farmers to use as seed. At this, Asgrow brought suit seeking damages and a permanent injunction against sale of seed harvested from crops grown from protected varieties. The complaint alleged infringement- for selling or offering to sell Asgrow's protected soybean varieties; for sexually multiplying Asgrow's novel varieties as a step in marketing those varieties for growing purposes; for dispensing the novel varieties to others in a form that could be propagated without providing notice that seeds were of a protected variety. At this, the defendant contended that their sales fell within the statutory exemption from infringement liability found in 7 USC Section 2543, entitled 'Right to save seed crop exemption'. At this, the US Supreme Court held that a farmer who meets the requirements set forth in the proviso to Section 2543[14] may sell for reproductive purposes only such seed as he has saved for

11 Diamond v. Ananda Chakraborty, 447 US 303 (1980)

12 513 US 179 (1995).

13 **Brown Bag sale: -** A brown bag sale occurs when a farmer purchases seed from a seed company, plants the seed in his own fields, harvests the crop, cleans it, and then sells the reproduced seed to other farmers (usually in nondescript brown bags) for them to plant as crop seed on their own farms.

14 7 USC S.2543 reads, "Except to the extent that such action may constitute an infringement under subsections (3) and (4) of S. 2541 of this title, it shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner

the purpose of replanting his own acreage. If a farmer saves seeds to replant his acreage, but for some reason changes his plans, he may instead sell those seeds for replanting under the terms set forth in the proviso, or of course sell them for non- reproductive purposes under the crop exemption. The United States Court of Appeals for the Federal Circuit again interpreted the farmer's exemption in *Delta and Pine Land Company v. The Sinkers Corporation*[15]. In this case, the plaintiff was the owner of numerous Certificates of Plant Variety Protection issued by the Plant Variety Protection Office of the United States Department of Agriculture, including PVP Certificates for many varieties in cotton. Here, the plaintiff claimed that the defendant infringed their rights by- (i) transferring possession of protected seed without Delta's authority; (ii) failing to mark bags of protected seed with a notice that they contained protected seed; and (iii) funnelling large quantities of protected seed through its facilities with knowing indifference to the lack of authority from Delta and the absence of an exemption, thereby actively inducing infringing acts by others. At this, the District Court found no infringement and dismissed all the three claims. The United States Court of Appeal also affirmed the District Court's dismissal.

Position after GM Crops

The concept of genetic engineering and its application in the seed sector is further aggravating the picture. Presently, in a tight IPR regime, a number of MNCs into the seed sector through injecting a few economically important traits like high yielding or resistance to a particular disease etc. are improving the crops. Through the agreement[16], they encroach into the farmers' rights of breeding, selecting, saving, using, exchanging/ bartering, distributing and selling of seeds. In recent times, the Multinational seed company Mosanto has been filing series

of the variety for seeding purposes and use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section:
Provided, that without regard to the provisions of S. 2541(3) of this title it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State Laws governing the sale of seed as may be applicable. A bona-fide sale for other than reproductive purposes, made in channels usual for such other purposes, of seed produced on a farm either from seed obtained by authority of the owner for seedling purposes or from seed produced by descent on such farm from seed obtained by authority of the owner for seedling purposes shall not constitute an infringement....."

15 50 USPQ 2d, 1749 (Fed. Cir.1999)

16 "to use the seed containing Mosanto gene technologies for planting a commercial crop only in single season; to not supply any of this seed to any other person or entity for planting and to not save any crop produced from this seed for replanting, or supply saved seed to anyone for replanting and to not use this seed or provide it to anyone for crop breeding, research, generation of herbicide registration data or seed production".

of cases (73 civil lawsuits) against farmers challenging that its rights have been infringed by the farmers and send a stern message in last past five years. Now, let's have a look over the most important among them. In *Mosanto Co. v. McFarling,*[17] McFarling executed a technology agreement in connection with the licence of 1000 bags of Roundup Ready soybean seed in 1998. McFarling conceded that he saved 1500 bushels of seed from his 1998 crop, enough to plant approximately 1500 acres, and that he replanted them in 1999. He subsequently, saved 3075 bags of soybeans from his 1999 crop, replanting them in 2000. In this case, on plaintiff's complaint, the district court granted a preliminary injunction against McFarling prohibiting him from replanting the seeds he saved from crops grown from Mosanto's patented soybean seed. On appeal, Mcfarling contended that Mosanto has committed patent misuse because it has impressively tied an unpatented product to a patented product. By prohibiting seed saving, Mosanto has extended its patent on gene technology to include an unpatented product, the germplasm or God- made soybean seed, which is not within the terms of the patent. However, it didn't argue that he cannot purchase soybean germplasm without the genetic trait that brings the soybean within the ambit of Mosanto's patent. It was also brought before the court that no license was granted to the seed companies to purchase, make or use the patented gene sequence prior to it's insertion into the seed. At this, the Federal Circuit Court found that McFarling's argument centered on the need to replant the entire seed, including the genetic modifications at a technology fee in conjunction with replanting of the second- generation soybeans. It was again observed by the court that McFarling has effectively argued that he should be granted a compulsory licence to use the patent rights in conjunction with the second- generation Roundup Ready soybeans in his possession after harvest and declined to concur with the tying argument of McFarling. On 3rd March, 2003, the US Supreme Court denied the petition for writ of certiorari. Again in *Mosanto Co. v. Swann*[18], the defendant admitting the fact that he saved and replanted seeds generated from crops produced by seed containing patented technology contented that (i) the 1998 Technology Agreement violates the doctrine of patent exhaustion or first scale; (ii) the right of farmers to save seeds of plants registered under the Plant Variety Protection Act permits defendants to save seeds subject to plaintiff's utility patents; (iii) the doctrine of patent misuse precludes plaintiff from ascertaining it's patent infringement claims. At this, after considering all the issues the Court stated that both the soybean and the cotton samples from the defendants' crops for the

17 302 F. 3d 1291 (Fed. Cir. 2002).

18 308 F. Supp. 2d 937, 941 (ED Mo. 2003)

year 2000, which were the infringing products, contained the chimeric gene and the enhanced promoter element covered by Mosanto's infringed patents. The Court also concluded that the defendant's use of plaintiff's patented biotechnology was without authority and the use of a patented product without authority constitutes patent infringement. Again, in *Mosanto Canada, Inc. v. Schmeiser* [19], the Canadian Supreme Court held that the appellants saved, planted, harvested and sold the crop from plants containing the gene and plant cell patented by Mosanto. At this, the court upheld the validity of Mosanto's patent and on using the protected invention, the appellants infringed Mosanto's patent. Again, in another case between *Mosanto and Kim Ralph of Covington*[20] the Federal court at St. Louis U.S. through the District Judge Mr. Richard Webber ordered Ralph to serve the prison for eight months and to repay Monsanto $165,649 for about 41 tons of genetically engineered cotton and soybean seed he was found to have saved (lying about a truckload of cotton seed he hid for a friend) in violation of the agreement. The prison term for conspiracy to commit fraud is believed to be the first criminal prosecution linked to Monsanto's crackdown on farmers for violating agreements on use of the genetically modified seeds. At these, the Organic Consumers organization in the US started a campaign against biotech multinational Monsanto on 28th July, 2006. Sign the "Millions Against Monsanto" petition, demanding that the Monsanto Corporation stops intimidating small family farmers, stops force-feeding untested and unlabeled genetically engineered foods on consumers and stops using billions of dollars of US taxpayers'' money to subsidize genetically engineered crops- cotton, soybeans, corn, and canola.[21]

International Perspective:

In this sector, the international conventions which led a paradigm shift are as follows-

- **The UPOV Conventions: -** The UPOV agreement signed in the year 1961 gave strength and vigour to the global seeds men initially under the leadership of Germany, Hungary, Italy Netherlands, Austria, UK etc. who had already introduced the system of private monopolization of plants and seeds business through legislation not only from their own countries but also from the other countries as well. The UPOV gave strength and vigour to the global seeds men

19 2004 SCC 34, Decision dated 20th January, 2004

20 http://www.organicconsumers.org/ge/prison051403.cfm visited on 5th May, 2009.

21 http://www.organicconsumers.org/monlink.html. visited on 25th March, 2007

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or breeders to exploit the genetic resources not only from their countries but also from all available sources in the world. This convention *inter alia* mandates the member countries to provide the protection of seeds for commercial marketing.[22] This led to the shifting of seed companies from the production of seeds of fruit plants and ornamentals to that of agricultural seeds. With this , the MNCs started their journey towards getting control over the genetic resources through collecting genes worldwide and creating the gene banks with the direct help of several world bodies like CIAR (International Agricultural Research Centre), IRRI (International Rice Research Institute), ICARDA (International Centre for Agricultural Research on Dry Areas), CIAT (International Centre for Tropical Agriculture), CIP (International Potato Centre) etc. and after channelizing the same through the research process resulting a new variety and getting it in patented form, sell back the same at exorbitant price. In this process, many a time it so happens that the gene supplying country is not paid and even they are not excused from pricing and even they many a time don't pay a single pie as royalty for the same to the persons involved in the process**.** Again, the UPOV Convention had constantly revised to tighten the IPR protection over biodiversity.

- **The Biodiversity Convention: -** The Convention on Biodiversity (CBD) in 1992 has somehow advanced the IPR regime in biodiversity protection. This Convention under Art.8 (j) imposes an obligation on the contracting parties to respect, preserve and maintain the knowledge, innovations, and practices of indigenous and local communities embodying traditional lifestyles for the purpose of conservation and the sustainable use of biodiversity. It again mandates prior permission of the holders of the traditional knowledge system for the wider application and also entails showing of benefits. This provision may be read as the recognition of the patent like IPR protection over the existing knowledge systems and warrant for their protection.
- **The TRIPS Agreement: -** According to the Government of India one of the reasons to legislate the PPVFR Act and to allow PBR on plant varieties is the TRIPS agreement which India signed under WTO. Considering the consequences of this to Indian agriculture and the farming community, one may like to ask why India did join the WTO and undertook such agreements. With the emergence of the WTO in 90's, a new era in the field of international trade has begun. The TRIPs agreement as suggested under the WTO is aimed at to internationalise the patent which conceptually made its emergence in the Paris Convention.

22 Art. 14 of the 1961 Convention

Article 27 of the TRIPs agreement requires that the Patents be made available for both processes and products in all fields of technology. This includes biotechnology as well. Under Art. 27(3) (b), the WTO member countries had been made empowered to exclude from patentability "Plants and Animals other than micro-organisms and essentially biological processes for the production of plants or animals other than non-biological processes" so long as members provide for the protection of life forms, "either by patents or by any effective *sui generis* system or by any combination thereof." Again, three universally recognised criteria of patentability namely, novelty, non-obviousness, and industrial application of utility has been incorporated into TRIPs under Art.27.1 which is made applicable to all inventions including biotechnological inventions. Moreover, the term for the protection of patentability has been increased to twenty years.

- The term 'effective' applies in terms of enforcement and protection. This formulation argues that a *sui generis* system needs to allow effective action against any act of infringement, as required by the relevant articles of the TRIPS Agreement. This criterion can only be met if protection is extended to include all the stakeholders involved in plant breeding in various countries, i.e. formal plant breeders - the focus of UPOV - and traditional farmers who continue to play a significant role in the development of agriculture across countries." Most developing countries have steered clear of granting patents[23] for plant varieties and have instead opted for a system that provides plant breeders rights[24] and farmer's rights while, the WIPO and the developed nation's bloc are trying hard to push through the proposal that UPOV 1991 is the 'effective sui generis' system under TRIPs.
- **Position in USA: -** The emergence of seed industry in the United States gives a pointer to the need for protection. The early settlers in the US used to bring the seeds from Europe under the mistaken notion that they will sustain them. Since the seeds were not suited to the environment, the crops failed. Afterwards, the production of seeds was largely in the domain of the wealthy landowners who used to import seeds which were not available to the common farmers. However, since 1819 the seeds became widely available. Later on,

23 US had granted patents under the Plant Patents Act, 1930 and the Plant Variety Protection Act, 1970 and thereafter in 1985 in the *Ex parte Hibberd* case the Board of Patent appeals and Interferences allowed a corn plant with an abnormally high level of amino acid to get a utility patent protection.

24 Plant breeders rights were originally envisaged as an alternative to patent protection because of the obvious resistance to patenting plants or 'life' however this distinction is now eliminated by UPOV 1991 which allows both patent and PBR protection on plant varieties.

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the seed programme was succeeded by the United States Department of Agriculture (USDA) whose primary purposes were the procurement, propagation and the distribution of new and valuable plant varieties. However, there was not much improvement in the seed industry during the period as there was no much legal protection. Private seed breeding was not rampant for lack of necessary incentives. Presently, the US has three systems under which new varieties are protected which are-

1. The Plant Patent Act, 1930 (as amended in 1954) protects asexually reproduced varieties[25].
2. Utility Patents granted under the Patent Statute of 1952.
3. The Plant Variety Protection Act of 1970 (as amended) protects sexually reproduced varieties.

- **Position in Europe: -** In Europe, the commercial seed supply system is highly organised and controlled. European law on seed marketing has evolved over the years to ensure that only uniform seeds for industrial farming can be sold on the market, condemning farmers' seeds and traditional varieties to the black market if not complete illegality. Together with strong intellectual property rules and the production of hybrids, European seed laws lock farmers out of the seed system. In Europe, three sources of law govern the protection of plant varieties. They are the European Patent Convention[26], Plant Variety Protection Certificates and the Biotechnology Directive[27]. The relevant important features of these are as under-
- The product of nature doctrine is recognised under the European Patent Convention which provides that discoveries shall not be regarded as inventions for the purpose of patentability[28] and more over in Article 53(b) of the EPC plant varieties[29] were excluded even if the Strasbourg Patent Convention allows the

25 Asexually reproduced plants are reproduced from a single parent, through processes such as grafting, budding, cutting, rooting and layering. Asexual reproduction may occur naturally, or as part of human plant breeding. A sexually reproduced plant is genetically identical to its parent plant.

26 The European Patent Convention is the result of the political initiative for a centralised system for the grant of patent. European states agreed in 1963 to a convention on the Unification of Certain Points of Substantive Law on Patents for Inventions. This convention laid the path of European Patent Convention which was signed at Munich on 5th October, 1973 with the object of strengthening co-operation between the States of Europe in respect of the protection of inventions. The EPC establishes a single patent granting authority, the European Patent Office (EPO). The EPC doesn't displace individual national patent regimes, but exists alongside with them as an alternative route to obtain intellectual property protection.

27 Directive 98/44. Netherlands voted against this Biotech Directive as they opposed the genetic manipulation of animals and plants

28 EPC Art. 52(2)

29 Defined in the Rule 23(b)(4) of the Guidelines of the European Patent Office.

same under Article 2(b). However, under the EPO Guidelines if a substance is found in nature can be shown to produce a technical effect, it may be patentable.[30] Again, if the invention concerns plants and animals and if the technical feasibility of the invention is not confined to a particular plant or animal variety, the invention is patentable.[31]

- The European patents is not be granted in respect of possesses for modifying the genetic identity of animals which are likely to cause them suffering without any substantial medical benefit to man or animal, and also animals resulting from such processes.[32]
- The Biotech Directive defines a biological material as "any material containing genetic information and capable of reproducing itself or being reproduced in a biological system."[33] Again the directive provides that plant and animal varieties are not themselves subject to patent protection. But invented plants and animals are patentable provided that the application of the invention is not confined to a particular plant or animal variety and no such variety is claimed.[34] Again, essentially biological processes for the production of plants and animals are not patentable. However, this provision is not affect the patentability of inventions which concern a microbiological or other technical process or a product obtained by means of such process.[35]
- The Biotech Directive provides that no one is entitled to a patent to a process for the production of plants and animals consisting entirely of natural phenomena such as cross fertilisation or selection. It also provides that patent protection extends to biological material produced through propagation or multiplication of patented material or using patented process of production.[36]
- The Biotech Directive recognises the rights of farmers to keep the seeds and plants grown using certain listed plants, even if patented, and use those seeds on farmer's land.[37]
- Rule 23(c)[38] acknowledges the patentability of transgenic plants.
- Certain countries grant protection to old, but advantageous varieties that do

30 Part C, Chapter 4, Para 2.3 as revised in July, 1992.
31 EPO Guidelines, Part C, Chapter 4, Para 2a.2
32 Rule 23d(d) EPC
33 Directive 98/44, Article 2(1)(a)
34 Directive 98/44, Article 4(1) and 4(2)
35 Directive 98/44, Article 4(1)(b)
36 Ibid. Article 8
37 Ibid. Article 11(1)
38 Regulations to European Patent Office

not meet the conditions of novelty. The EC Regulation on Community Plant Variety Rights[39] has defined variety in general which includes both, protectable and non- protectable varieties.[40] Even a single plant cell, if capable of producing entire plant, grouping of such plant is considered as a variety. Under the regulation, the varieties of all botanical genera and species including hybrids between genera or species are protectable.[41]

- As a result of GM crops, Europe adopted a directive on patenting plants and animals[42]. Protection has been provided with a patent on genetic information (a gene plus a function) which includes all biological derivatives from its reproduction and multiplication. However, a variety already covered by a PBR cannot be patented, though a variety which includes a patented gene can be protected with a PBR.
- The Regulation authorises a farmer to use for propagating purposes in the field on their own holding the product of the harvest which they have obtained by planting on their holding, propagating material of a variety other than a hybrid or synthetic variety.[43] Again, certain acts done in respect of a variety protected by the community plant variety right shall not be considered as an infringing act.

Seed and Farmer Relationship: Legal Framework in India

The seed and farmer relationship in India is unique one. Here, the farmers enjoy some more privileges on point of producing and using seeds. In 1963, the National Seed Corporation was set up by the Government of India. Here, in India, the seeds are given protection under the *sui generis* system while in many countries like the USA, UK etc. the patent protection is available on seed. In India, the private capital, including that of foreign seed companies, began to flow in even as mushrooming of several small Indian seed companies happened since the late 1980s. As the seed production and supply chain lengthened in terms of distance as well as number of players in the chain, the need for regulating the seed trade

39 Community Plant variety rights within the EC are administered by the Community Plant Variety Office (CPVO) in Angers, France

40 Council Regulation (EC) No. 2100/94 on Community Plant Variety Rights, Article 5(2). According to the Article 5(2), a variety, i.e. a plant grouping within a single botanical tax on of the lowest rank, is essentially characterised by two conditions, viz. firstly, by at least one distinguishable expression of a genotype characteristic (distinctness) and secondly, by its suitability for being propagated unchanged, as a result of which the variety can be considered as a unit (stability)

41 Council Regulation (EC) No. 2100/94 on Community Plant Variety Rights, Article 5(1)

42 98/44/EC - the legal protection of biotechnological inventions

43 Council Regulation (EC) No. 2100/94 on Community Plant Variety Rights, Article 14

became more urgent and important. In this context, the existing Seed Act 1966 as well as the Seeds Control Order 1983 was found to be inadequate in regulating seed trade and ensuring provision of high quality seed. However, the seed industry itself has grown rapidly and changed its profile substantially after the articulation of the New Policy on Seed Development in 1988 and the National Seeds Policy.

To understand the full implications of what lies ahead for Indian farmers in terms of their seed resources, it is necessary to study the policies regarding seed. Any new policy and legislation should first and foremost try and uphold the rights of farmers over Seed in terms of its ownership as well as its use and management. Such policies and legislation should also uphold the central and special role that women have always had when it comes to seeds. The seed sector, in India has been governed by the following policies.

1. Legislations which have been enacted in recent times only work within an IPR framework to the advantage of seed companies, including the PVPFR Act.[44] Farmers' rights are more and more defined only in terms of residual rights, after rights to seed corporations are ensured. However, seeds in Indian agriculture are governed by nearly thirty legislations – the Seeds Act 1966; the Essential Commodities Act, 1955; the Biological Diversity Act, 2002; Plant Varieties Protection and Farmers' Rights Act, 2001; Patents Amendment Act, 2005; Environment Protection Act, 1986; Consumer Protection Act, 1986; Geographical Indication of Goods Act, 1999; The Plants, Fruits and Seeds (Regulation of Import into India) Order, 1989 and so on. However, the most important legislations are on the way of brief discussion-

2. **Plant Varieties and Farmers Rights Act, 2001:-** The Protection of Plant Varieties and Farmers' Rights Act, 2001 was enacted, *inter alia*, to recognise the role of farmers as cultivators and conservers of the country's agro biodiversity by rewarding through benefit sharing. The Act recognises the following rights of farmers-

   - **Benefit sharing over the breeder's registered breed: -** The concept of

44 In AP, just in the span of three months last year (2004), spurious seeds worth nearly seven crores of rupees were seized during raids all over the state. Further, the existing Seeds Act deals only with notified varieties and there are many varieties which are not notified but which get traded. Certification is also voluntary and not mandatory. There are no adequate deterrents in the Law for offenders – the punitive clauses are very weak compared to the tremendous potential that exists to make quick money at the expense of farmers. There are also no compensatory mechanisms provided for farmers in case of failure of seed. Again, given these shortcomings, Maharashtra and Andhra Pradesh wanted to enact their own legislations to regulate the seed industry at the state level. However, the Central Government did not give a clearance for this, citing that a new seeds legislation was on the anvil at the central level. This is the genesis of the current national bill.

benefit sharing is discussed under Section 26 of the Act on a variety of seed registered under Section 24 of the Act. The Act mandates that the breeders shall disclose the location of the genetic material and also the contribution of any farming community which has bred, evolved or developed the variety[45] that the genetic material was lawfully acquired.[46] Again, Section 27 requires the breeder to deposit such quantity of seeds or propagating material including parental line of seeds of registered variety in the National Gene Bank.

- **Recognition of a breed as developed by farmer: -** Section 39 of the Act provides that- (i) a farmer who has bred or developed a new variety shall be entitled for registration and other protection in like manner as a breeder of a variety; (ii) the farmer's variety[47] shall be entitled for registration if the application contains declarations as specified in Section 18(1)(h); (iii) a farmer who is engaged in the conservation of genetic resources of land races and wild relatives of economic plants and their improvement through selection and preservation shall be entitled for recognition and reward from the Gene Fund subject to the condition that material so selected and preserved has been used as donors of genes in registrable varieties; (iv) a farmer is deemed to be entitled to save, use, sow, re-sow, exchange, share or sell his farm produce including seed of a protected variety. However, the farmer is not entitled to sell branded seed of a protected variety. Under Section 43 of the Act, where an essentially derived variety is derived from a farmer's variety, the authorisation to produce, sell, market or otherwise deal with variety is not to be given by the breeder of such farmers variety, except with the consent of the farmers or group of farmers or community of farmers who have made contribution in the preservation or development of such variety.
- **Provision for guarantee of new seed developed by a breeder: -** The Plant Breeder has a duty to disclose the expected performance of the seed under given conditions to the farmer and if such propagating material failed to perform the farmers have a right to compensation which must be determined by the Authority under the Act.[48]

45 Sec 18(e) and Sec 40(1)

46 Sec 18(h)

47 Section 2(l) of the Plant Varieties and farmer's Rights Act, 2001

48 Sec 39(2). In this regard a Fund should be made wherein each breeder who acquires a PBR under the Act,

- **Exemption from the payment of certain fees: -** Section 44 of the Act exempts a farmer or group of farmers or village community from paying any fee in any proceeding before the Authority or Registrar, or the Tribunal or the High Court under the Act or the rules made there under.

3. **The Patent Act, 1970: -** The Indian Patent Act 1970 is often been considered as model legislation for developing countries. Originally, the Patent Act used to grant only process patent in the areas of chemicals, pharmaceuticals and food. Inventions pertaining to atomic energy, agriculture, medicine, horticulture and the processes, which led to products of certain use, were excluded. One of the requirements of this agreement is to make necessary mechanism to facilitate the applicant to file the application for pharmaceutical and agro products where a member country doesn't grant patent protection for such products. This mechanism has been provided U/Art 70.9 of the said Agreement. Pursuant to this provision, the Govt. of India under the Patents (2nd Amendment) Bill 1999 it passed as a Patents (Amendment) Act 2002. It dealt with the products relating to the medicines and drugs, which included exclusive marketing rights of these products subject to certain restrictions. If we closely observe the provisions of the Amendment Act 2002, it reflects the TRIPS agreement but did not follow the objectives as enshrine in the CBD declaration. It simply meant that if some plants or some organisms are taken away by the citizen of other country and make research in it and after that he makes an invention of new drug or medicine, he can exclusively market it throughout the world. But it denied the contribution of the material supplying country or the indigenous people who might have been the resource person of the item. Again, the amendment Act 2002 redefines the term invention. However, under the new amendment Act the followings inter alia have been declared as not patentable, viz.

   a) Discovery of any living thing or non-living substance occurring in nature.

   b) Plants and animals other than micro-organisms in whole or any part there of including seeds varieties and species and essentially biological process for production or propagation of plants and animals.

   The patent Act, 1970 was amended for third time by passing an ordinance in the year "2004". The Bill was passed in the Parliament on 26th December 2004 which extends Patent Protection to products in all fields of technology; including drugs, food, chemicals, which were earlier excluded.

   Again as per the TRIPs obligation[49] the Parliament in the view of amendment

49 Art. 27 (3) (6)

to the Patent Act in 2002 to include micro-organism for granting patent protection. Section 3(I) of the Act reads- "Plant and animals in whole or any part thereof other than micro organizations including reads, varieties, species and essentially biological processes for production or propagation of plants and animals can be patented". Again the definition of chemical substance U/Sec. 5 or the Act also changed. For the purpose of this section 'chemical process' includes biochemical, biotechnological and microbiological process.

4. **The Geographical Indication of Goods (Registration and Protection) Act, 1999: -** After Basmati controversy, the government of India passed the Geographical Indication of Goods (Registration and Protection) Act, 1999 is with an aim to stop 'Bio-piracy'. The Act provides for the registration and protection of resources originated/ developed in India. Sec. 2(1) (e) of the Act defines the term "Geographical Indication".[50] Section 11 of the Act provides that an application for the registration of geographical indication may be made to the Registrar of Geographical indications by any association of persons or producers or any organization or authority representing the interests of the concerned goods. On acceptance of this application the registrar shall advertise the same and on objection within three months hearing the parties, shall issue the registration.[51] Once a geographical indication is registered any producer of the concerned goods may apply to the registrar for registering him as an authorized user of such geographical indication. Once the registration has been granted, it will last for a period of ten years but may be renewed from time to time for an indefinite period.[52] And on infringement of the rights conferred by the Act, the civil and criminal remedies will follow.

5. **The Biodiversity Act, 2002: -** The recent examples of granting of the patent right to Neem, Turmeric and Basmati by the US Patent office while all these resources were traditionally belonging to India led the Indian Parliament to pass the Biological Diversity Act 2002. The Act defines *inter alia* the term bio diversity[53] and speaks of the conservation of biological resources as defined u/sec 2(c) of the Act their by products creators and holders of knowledge and

50 The Geographical Indications in relation to goods, as an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating or manufactured in the territory of country or a region or locality in that territory where a given quality reputation or other characteristic of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods, one of the activities of either the production or of processing or preparation of the goods cantered takes place in such territory region or locality as the case may be.

51 id Sec. 13-14

52 id Sec. 18 (1)

53 The Bio-diversity Act. 2002, Sec 2(b)

information relating to the use of such biological resources, innovations and practices associated with such use and application. The law relating to benefit sharing in cases of utilization of genetic resources has been clarified under the Act. The Act establishes three bodies' viz. the National bio diversity Authority;[54] the State Biodiversity Board;[55] the Biodiversity Management committee.[56] As per the Act, the National Biodiversity Authority and the Sate Biodiversity Authority shall consult the Biodiversity Management Committees while taking any decision relating to the use of biological resources and knowledge associated with such resources occurring within the territorial jurisdiction of the Biodiversity Management committee. Under the Act, an Indian national with only prior information to the National Biodiversity Authority can start any work relating to biodiversity while for a foreign national prior approval of the NBA is necessary to start work.[57] Again, it has been mandatory that the result of the research shouldn't be transferred without the consent of the NBA. But u/sec 5 of the Act non-applicability of Sec 3 and 4 of the Act for some collaborative works involving there to has been laid down. Again the NBA has been given the Authority to impose conditions including the sharing of financial benefits arising out the commercial exploitation of such rights.[58] The Act gives a detailed account of the manner in which the benefit sharing arrangements shall be effected. Under the Act, there is provision for the granting of joint ownership of intellectual property rights to the National Biodiversity Authority, or where benefit claimers are identified, to such benefit claimers; transfer of technology, setting up of venture capital fund for aiding the cause of benefit claimers; payment of monetary compensation and non- monetary benefits to the benefit claimers as the NBA may deem fit etc. Section 7 of the Act speaks that a person who is a citizen of India or body corporate association or organization registered in India shall obtain any biological resources for commercial utilization except after giving prior intimation to the state Biodiversity Board concerned.[59] As per Sec. 21 of the Act[60] there is a provision relating to the determination of equitable benefit sharing with the objective to grant a joint ownership of the IPRs to the National

54 id Sec. 21
55 id Sec. 22
56 id Sec. 41
57 id Sec. 3
58 Sec. 6(2) infra
59 The people who are working on the indigenous medicines have been exempted from this provision for the purpose of the development of indigenous medicines.
60 Sec. 21 infra

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Biological Authority where benefit claimers are not identified. The central Government under the Act has been empowered to develop national strategies and programmes for the conservation and promotion and sustainable use of biological reserves incentives for research, training and public education to increase awareness with respect to biodiversity. Again, the Act prescribes punishment for the contravention of any provision of the Act.

IMPACTS ON FARMERS' RIGHTS TO SEED

The farmers and the farming communities have been enjoying the rights over years, regarding the development, preservation, and conservation of seeds or various traditional varieties. The present IPR Regime with the backing of the developed nations with stricter norms is willing to gain control over this. Although India is now busy with documenting traditional knowledge, to make claim over the American companies regarding the uses of the plant species they have got from us, it has already lost control over it's valuable plant, animal and microbial genetic resources. At this, they are advocating for the stricter *'Plant Breeder's Rights*'. The balance between Plant Breeders rights and farmers rights is perhaps the most controversial issue as far as the protection of plant varieties are concerned and especially in the context of the developing countries. The Indian *sui generis* legislation i.e. the Plant Varieties Protection and Farmers' Rights Act, 2001 provides for the farmer to save, use, sow, re-sow, exchange, share, and sell his farm produce including the seed of a variety protected under this Act, exactly the same manner as he used to do before, however, he cannot sell the branded seed of a variety.[61]

CONCLUDING OBSERVATIONS

India has emerged as a frontrunner voicing the concerns of the developing countries, and must take the initiative as a leader in negotiations over the TRIPS provisions to work towards a more unbiased trading system. This can be only be done by bringing to the fore the inequitable bargaining powers within the decision making forums and by taking a consistent and collective stand to address these concerns. Protecting biodiversity and genetic resources in the developing world is amongst the priority issue. The greatest current threat to farmers' rights is the progressive privatisation of national seed systems, the spread of hybrid vegetable varieties and the introduction of GM crops. These measures threaten to eventually lead to the violent and total imposition on peasant agriculture of the existing legal framework. Regarding the GM crops, there is an urgent need to device a strong coordinating mechanism in the country.

61 Sec 39(iv)

Domestically, our approach needs to be inclusive of different stakeholders in the equation and incentive must be given to them - stimulating foreign investment to boost the potential for biotechnological innovation and assuring small farmers of their ability to be able to sustain their livelihood and protect their knowledge and resources - through legislation. As was mentioned above, almost all IPRs are individualistic, temporary and alienable. But, that does not mean that an *ejusdem generis* is capable of being reduced from those rights because the contents of these rights are not uniform in nature. Even regarding the intellectual output, or the amount of creativity, these rights differ. However, in the case of patent, things are different, this right is given when the subject matter is new, involve an inventive step, and capable of industrial application.

Developing coordination between various legislations and various bodies is another serious difficulty in India. There are a number of institutions that are focusing on promoting India's agriculture and development of farmers. While each organization focuses on one particular aspect, the overall picture is not clearly evaluated by any one body. The lack of one clear and comprehensive policy aimed at benefiting farmers is a serious shortcoming. Evolving co-ordination between the PPVFR and the Biodiversity Act is an enormous task in itself, let alone ensuring linkages between these Acts and agricultural policies.

A global mechanism is urgently required to promote some level of consensus on defining and implementing Farmers' Rights. Attention must now turn to the brass tacks of how to achieve Farmers' Rights. The political and strategic gains of defining Farmers' Rights as IPR type rights must be accompanied by measures to ensure economic benefits by focusing on Farmers' Rights as development rights. Farmers' Rights must also incorporate mechanisms to promote access and sharing of resources rather than only ownership rights. It is high time that the people are made aware of the greatness of agriculture and the farmers, and the enormous contribution they make to the world. To be indifferent to their needs and sufferings, and to put them at stake in the wake of new plant breeding technologies like gene technology is an unpardonable omission and commission from the part of the human conscience. It is the moral as well as legal obligation of the international as well as national laws and of every human being, to see that farmers are considered as the most respected professionals, and that they enjoy all sovereignty in their profession, and all comforts in life. If we are to improve the lot of the majority of the poorest people in the world then we must build up and promote the rural sector, putting people, rather than production, at the centre of agricultural policies.

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Judicial Response to Female Foeticide

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Abstract

It is unfortunate that for one reason or the other, the practice of female foeticides still prevails. The Indian Judiciary has from time to time come up with ingenious ways to provide protection to the fairer sex and this essentially includes the group of unborn girls too. There are cases in which Landmark decisions were given by the Supreme Court of India and different High courts, which contained various directions for implementation of the Act and passed various orders in Writ Petitions Challenging the Constitutional Validity of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 Act. (PNDT Act) Concerned and alarmed with the instant decrease in the sex ratio despite the 1994 Act being in force, February 2000 public interest litigation was filed in the Supreme Court under Article 32 of the Constitution against the Central Government and all the States and Union Territories. Hence the Supreme Court issued appropriate interim directions to the Central Government, Central Supervisory Board (CSB), State Governments/ Union Territories' Administrations, and other Appropriate Authorities on the basis of various provisions for the proper implementation of the 1994 Act and monitoring of the prohibited activities. Since 2001, the judiciary has been closely monitoring the implementation of its various orders passed regarding the ban on the use of ultrasound scanners for conducting such tests. Subsequently, it had sought status reports from all states and Union Territories. The Supreme Court also directed 9 companies to supply the information of the machines sold to various clinics in the last 5 years. Addresses received from the manufacturers were also sent to concerned states and to launch prosecution against those bodies using ultrasound machines that had failed to get themselves registered under the Act. On November 8, 2016 in Voluntary Health Association of Punjab v. Union of India case, A bench of Justice Dipak Misra and Justice Shiva Kirti Singh in its judgment not only raised serious concerns on the indifference in the proper implementation of the provisions of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (PCPNDT Act) but also emphasized that concrete steps have to be taken to increase the same so that invited social disasters do not befall on the society. The most important direction given in the decision is to take steps to educate the people about the necessity of implementing the provisions of the Act by conducting

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workshops as well as awareness camps at the state and district levels. It is normally the function of the Government to implement laws enacted by the legislature. But when the government fails to do so, resort is taken to Judiciary. The primary credit for implementation of the Pre-Natal Diagnostic Techniques (Prevention of Misuse) Act goes to the Judiciary. The story of judicial response doesn't end here. Several new Judgments are being pronounced every day, spelling out the need for the effective implementation of the Act, exploring its various facets and explaining by way of interpretation the grey areas in the statutory provisions.

Introduction

"Female foeticide has its roots in the social thinking which is fundamentally based on certain erroneous notions, egocentric traditions, perverted perception of societal norms and obsession with ideas which are totally individualistic sans the collective good. All involved in female foeticide deliberately forget to realise that when the foetus of a girl child is destroyed, a woman of the future is crucified."

"Decrease in the sex ratio is the sign of a colossal calamity and it cannot be allowed to happen. Concrete steps have to be taken to increase the same so that invited social disasters do not befall on the society. The present generation is expected to be responsible to the posterity and not to take such steps to sterilize the birth rate in violation of law. The societal perception has to be metamorphosed having respect to legal postulates."

Supreme Court, Voluntary Health Association of Punjab v. Union of India [2]

"It is unfortunate that for one reason or the other, the practice of female infanticide still prevails despite the fact the gentle touch of a daughter and her voice has soothing effect on the parents. The traditional system of female infanticide whereby female baby was done away with after birth by poisoning or letting her choke on husk continues in a different form by taking advantage of advanced medical techniques. Unfortunately, developed medical science is being misused to get rid of a girl child before birth. Knowing full well that it is immoral and unethical as well as it may amount to an offence; foetus of a girl child is aborted by qualified and unqualified doctors or compounders."

2 Voluntary Health Association of Punjab V. Union of India and Others, Writ Petition (CIVIL) NO. 575 of 2014

Supreme Court, Cehat v. Union of India [3]

The Indian Judiciary has from time to time come up with ingenious ways to provide protection to the fairer sex and this essentially includes the group of unborn girls too. There are cases in which Landmark decisions were given by the Supreme Court of India and different High courts, which contained various directions for implementation of the Act and passed various orders in Writ Petitions Challenging the Constitutional Validity of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 Act. (PNDT Act)

Concerned and alarmed with the instant decrease in the sex ratio despite the 1994 Act being in force, February 2000 public interest litigation was filed in the Supreme Court under Article 32 of the Constitution against the Central Government and all the States and Union Territories. On May 4th, 2001, the Supreme Court held that "Prima facie' it appears that despite the PNDT Act being enacted by the Parliament five years back[4]; neither the State Government nor the Central Government has taken appropriate action for its implementation." Hence the Supreme Court issued appropriate interim directions to the Central Government, Central Supervisory Board, State Governments/Union Territories' Administrations, and other Appropriate Authorities on the basis of various provisions for the proper implementation of the 1994 Act and monitoring of the prohibited activities.

Recently, Apex Court in the case of Voluntary Health Association of Punjab v. Union of India, safeguarded woman's right to equality by emphasizing that the predicament with regard to female foeticide by misuse of modern science and

3 [2001]5 SCC 577; [2003] 8 SCC 398

4 Realizing the rise of pre-natal diagnostic centers in urban areas of the country using pre-natal diagnostic techniques for determination of sex of the foetus and that the said centers had become very popular and had tremendous growth, as the female child is not welcomed with open arms in many Indian families and the consequence that such centers became centers for female foeticide which affected the dignity and status of women, the Parliament brought in the legislation to regulate the use of such techniques and to provide punishment for such inhuman act. The objects and reasons of the Act stated unequivocally that it was meant to prohibit the misuse of pre-natal diagnostic techniques for determination of sex of the foetus, leading to female foeticide; to prohibit advertisement of pre-natal diagnostic techniques for detection or determination of sex; to permit and regulate the 3 use of pre-natal diagnostic techniques for the purpose of detection of specific genetic abnormalities or disorders; to permit the use of such techniques only under certain conditions by the registered institutions; and to punish for violation of the provisions of the proposed legislation. The Preamble of the Act provides for the prohibition of sex selection before or after conception, and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide and for matters connected therewith or incidental thereto. Be it noted when the Act came into force, it was named as the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 and after the amendments in 2001 and 2003, in the present incarnation, it is called The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994.(PCPNDT Act)

technology has aggravated and enormously affected the sex-ratio in India and it cannot be allowed to happen.[5]

Needless to say, Judiciary, in last decade, has not only played a pivotal role in safeguarding constitutional identity of female, it has also ensured proper implementation of the provisions of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 by issuing comprehensive directives.

Intervention of Judiciary- An Overview

Supreme Court came into picture in February 2000 when public interest litigation was filed in the Court under Article 32 of the Constitution against the Central Government and all the States and Union Territories, urging the apex court to intervene as the sex ratio was continuously falling despite the 1994 PNDT Act was in force. This public interest litigation was filed by the Lawyers Collective, Cehat, and Mausam.[6]

The petitioners, among other things, sought the help of the Supreme Court to review the PNDT Act and reinterpret it so as to declare that the new medical technologies such as PGD also contravene the provisions of the PNDT Act. It also sought court to direct the respective State Governments and the central Government to implement the provisions of the PNDT Act by appointing appropriate authorities (state and district level) and advisory committees. Realizing the gravity and sensitivity of matter, court issued notices to the concerned parties, that is, the Central and State Government on May 9th 2000.

Various affidavits in reply/written submissions filed by the State to the court revealed the complete absence of any kind of implementation of the 1994 Act. It was under these circumstances that the Supreme Court issued various guidelines in Centre for Enquiry into Health and Allied Themes (Cehat) and others v. Union of India and others to Appropriate Governments during 4th may 2001 to 10th September 2003 for the implementation of the Act. Finally on May 4th, 2001, the Supreme Court held that "Prima facie' it appears that despite the PNDT Act being enacted by the Parliament five years back, neither the State Government nor the Central Government has taken appropriate action for its implementation. The court, while issuing a comprehensive framework, directed central government that the intervening period between two meetings of the Advisory Committees

5 Voluntary Health Association of Punjab V. Union of India and Others, Writ Petition (CIVIL) NO. 575 of 2014

6 CEHAT and Others v. Union of India, Writ Petition (civil) 301 of 2000

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constituted under Sec. 17(5) of the Act to advise the appropriate authority shall not exceed 60 days. Among other important directives, it directed Central Supervisory Boards (CSB) to review and monitor the implementation of the Act.

Visualizing the significance of a data base of information, the Court emphasized the survey of Clinics and empowered the district level authorities to conduct the survey and to initiate criminal action, search and seizure of documents, records, objects etc. of unregistered bodies under Section 30 of the Act. On 7th November, 2001, the Central Government came forward by assuring the Supreme Court, with concrete steps in the direction of the implementation of the Act and suggested to set up National inspection and monitoring Committee for the implementation of the Act.

The perusal of these directions in the form of six Orders reflects that the Supreme Court has in this matter legislated on how the Act should be implemented. It also exhibits the deep concern and the anguish felt by the Apex Court towards the social evil of sex selection. The Supreme Court was equally concerned about the apathy on the part of Government in the implementation of the law which aims at preventing such a social evil.

Despite detailed directions issued by the Supreme Court in 2001, in the landmark decision of Cehat v. Union of India, several states did not take any steps for effective implementation of the Act. Hence, a PIL was filed once again in various High Courts to that effect. In the State of Orissa for example, hundreds of skeletons, skulls and body parts of infants were recovered, which shocked the nation.

After coming across a series of news items in the print and electronic media about this incident, one Mr. Hemanta Rath, a social activist filed this PIL under Article 226 of the Constitution of India in the High Court of Orissa seeking directions for the effective implementation of the PCPNDT Act in the state.[7]

The contention raised in this petition was that there was total inaction both on the part of the Central and State Government in implementing the provisions of the Act. Neither the appointment of Appropriate Authorities as contemplated u/s 17(1) of the Act had been done nor had the State Advisory Committee as per Section 17(5) of the Act been constituted.

The State of Orissa in its reply stated that it had already taken immediate steps by lodging criminal cases against the guilty and the investigation of the cases had been handed over to the State Crime Branch, as a result of which the doctors and some of the staff members of nursing homes and ultrasound clinics were arrested.

7 Hemanta Rath vs. Union of India and Others, Writ Petition (Civil) No. 9596 of 2007

It was also informed that the government had formed a State Task Force Committee to monitor the working of ultrasound clinics and nursing homes.

After referring to the object of the Act and Constitutional principles, the High Court stressed both the Statutory and Constitutional obligation of the state, to implement the provisions of the Act. The High Court also took note of the delayed response of the state in the formation of the State Advisory Committee which was constituted only in 2007. This also was not in accordance with the provisions of the Act.

In Vinod Soni and Anr vs. Union of India,[8] the Petitioners challenged the Constitutional validity of the Act basically on two grounds: first, that it violates Article 14 and second that it violates Article 21 of the Constitution of India. At the time of argument, challenge via Article 14 was, however, not pressed into submission.

A very interesting argument was advanced in this case by the Petitioners by submitting that the right to life guaranteed under Article 21 of the Constitution has been gradually expanded to cover several facets of human life and personal liberties, which an individual has as a matter of his fundamental rights. The High Court however exposed the fallacy of this argument by observing that, "right to personal liberty cannot be expanded by any stretch of imagination to liberty to choose the sex of the child and prohibit to coming into existence of a female or male foetus which shall be for nature to decide.

Another case in Gaurav Goyal vs. State of Haryana,[9] it was another case which shows inaction totally on the part of the State government in the implementation of provisions of Act. A PIL was initiated (under article 226 of Indian Constitution) by one social worker in Haryana, when he found female foetus in large no. When the enquiry was initiated on the direction of court, it was found that 250 elimination of female foetus and several medical officers were found guilty. High Court, also directed to fastened the proceedings, but what was found shocking by court was that no proper publication in official Gazette for the appointment of civil Surgeon of the districts as the appropriate authority under Act and it was very shameful on the part of the State that even after the period of over 12 years non-publication of notification never came into the notice of concerned authorities.

In the High Court of Punjab and Haryana, Chandigarh, it was the case when

8 Vinod Soni and Anr vs. Union of India, Criminal Writ Petition No. 945 of 2005 and Criminal Application No. 3647 of 2005

9 Gaurav Goyal vs. State of Haryana, Civil Writ Petition No. 15152 of 2007

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court, took suo-moto cognizance of a newspaper report about sex determination kits were entering the State, which they knew that would affect the sex ratio of state, and alarmed that it is possibility that misuse of medical technology can be happened, thereby issued notice to both the Government i.e. State and Central, as they were available easily in grey market.

In Dr. Devender Bohra vs. State of Haryana and Other Respondents,[10] the Petition filed by Dr. Devendra Bohra, the Order of suspension of registration of a sonography machine installed in the hospital run by the Petitioner and sealing of the equipment was challenged. The Appropriate Authority had taken the said action on the ground that, as the Petitioner was a medical practitioner with a BAMS degree; he was not qualified as per Section 2(g) of the Act to use the said machine.

The contention of the Petitioner was that under the Indian Medicine Central Council Act, 1970, he was a medical practitioner and hence entitled to the use of an ultrasound machine. After considering various provisions and the Object of the Act, the High Court rejected the said contention holding that "a Practitioner under Indian Medicine Central Council Act, 1970, may have a requirement of sonography machine for determination of foetal abnormalities for appropriate treatment, but if he doesn't possess the particular qualification required under the PCPNDT Act to operate the sonography machine, his challenge to the suspension order is futile without a challenge to the provisions of the PCPNDT Act or the Rules themselves." It was further held that the Notification issued by the State allowing the use of the ultrasound machine by a medical practitioner with a BAMS degree cannot expand the legislative intent or the Rules which have been framed under the Act. It was further held that if the PCPNDT Act requires possession of a certain degree and qualification and if the Petitioner does not possess the same, it ends the matter and the question of allowing the Petitioner to continue the registration. It was held that it was a simple, open and shut case of a Petitioner who was not a 'medical practitioner' and who is not, therefore, registered under the Indian Medical Council Act, 1956.

In, Radiological and Imaging Association vs. Union of India and Others[11], Under Article 226 of Indian Constitution challenging the actions of the collector of Kolhapur District; in which he directed Radiologists and Sonologists to transmit form-F online within 24 hours of conducting sonography, it was challenged because according to PNDT Act, it was required to be summied within 5 days of next month.

10 Dr. Devender Bohra vs. State of Haryana and Others, Civil Writ Petition No. 14759 of 2009

11 Radiological and Imaging Association vs. Union of India (UOI), Writ Petition No. 797 of 2011

However it was issued on the reason of poor or we can say worst sex ratio of 838 female per 1000 males and there was rampant misuse of sonography for sex selection in Districts.

High court, however, noticed that four distinct advantages in the online submission of Form 'F' when such large numbers of sonographies are performed every month. Firstly, that entire information in Form 'F' had to be filled up for its online submission; otherwise the form was not accepted by the computer. Hence it would reduce the danger of under-reporting. Secondly, the work of submitting information in Form 'F' has to be complete on a day-to-day basis, which results in the third advantage to the district administration to enable meaningful scrutiny and analysis so as to zero in on cases where sex selection was resorted to after sex determination. Fourthly, it would enable the Appropriate Authority to take immediate action in case of breach of provisions of the Act and Rules. The High Court, therefore, found that the circular to submit Form 'F' online within 24 hours was in keeping with the letter and spirit of Section 17(4) of the Act.

The challenge to the constitutionality of the Pre-conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 on the ground of violation of Article 21 of the Constitution was rejected by the Supreme Court in Vinod Soni vs. Union of India.

Since 2001, the judiciary has been closely monitoring the implementation of its various orders passed regarding the ban on the use of ultrasound scanners for conducting such tests. Subsequently, it had sought status reports from all states and Union Territories. The Supreme Court also directed 9 companies to supply the information of the machines sold to various clinics in the last 5 years. Addresses received from the manufacturers were also sent to concerned states and to launch prosecution against those bodies using ultrasound machines that had filed to get themselves registered under the Act. The court directed that the ultrasound machines/scanners be sealed and seized if they were being used without registration. The Supreme Court also asked three associations' viz., The Indian Medical Association [IMA], Indian Radiologist Association [IRA], and the Federation of Obstetricians and Gynecologists Societies of India [FOGSI] to furnish details of members using these machines.

Recent landmark Judgments- Providing more teeth to laws

Observing that there has been no effective supervision or follow-up action to achieve the object and purpose of the Act, and considering the far reaching impact

of the problem, the Supreme Court, again, came up with detailed directions for proper implementation of the Act on November 8, 2016 in Voluntary Health Association of Punjab versus Union of India case.[12] A bench of Justice Dipak Misra and Justice Shiva Kirti Singh in its judgment not only raised serious concerns on the indifference in the proper implementation of the provisions of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 but also emphasized that concrete steps have to be taken to increase the same so that invited social disasters do not befall on the society.

The Court took note of the fact that in 2001 directions were issued *inter alia* to create awareness about the Act, setting up of an inspection and monitoring committee. It noted that the 2011 Census of India shows a sharp decline in the female sex ratio in many states. In 2013, the Court observed that there had been no adequate or effective supervision or follow-up action so as to achieve the object and purpose of the Act. In 2013, the Court passed several directions for implementation of the objectives of the Act including for the Central Supervisory Board and the State and District Advisory Committees to oversee the implementation of the Act and to take steps to seize records, seal machines, and institute proceedings in case of violation of the Act.

The Court issued the following directions for proper implementation of the Act:

(1) All the States and the Union Territories in India to maintain a centralized database of civil registration records from all registration units so that information can be made available from the website regarding the number of boys and girls being born.

(2) The information that shall be displayed on the website shall contain the birth information for each District, Municipality, Corporation or Gram Panchayat so that a visual comparison of boys and girls born can be immediately seen.

(3) The statutory authorities if not constituted as envisaged under the Act shall be constituted forthwith, and the competent authorities shall take steps for the reconstitution of the statutory bodies so that they can become immediately functional after the expiry of the term. That apart, they shall meet regularly so that the provisions of the Act can be implemented in reality and the effectiveness of the legislation is felt and realized in the society.

12 Voluntary Health Association of Punjab V. Union of India and Others, Writ Petition (CIVIL) NO. 575 of 2014

(4) The provisions regarding the prohibition of advertisement relating to pre-natal determination of sex and punishment shall be strictly adhered to. The Appropriate Authorities shall be imparted periodical training to carry out the functions as required under various provisions of the Act.

(5) If there has been a violation of any of the provisions of the Act or the Rules, proper action has to be taken by the authorities under the Act so that the legally inapposite acts are immediately curbed.

(6) The Courts which deal with the complaints under the Act shall be fast tracked and the concerned High Courts shall issue appropriate directions in that regard.

(7) The judicial officers who are to deal with these cases under the Act shall be periodically imparted training in the Judicial Academies or Training Institutes, as the case may be, so that they can be sensitive and develop the requisite sensitivity as projected in the objects and reasons of the Act and its various provisions and in view of the need of the society.

(8) The Director of Prosecution or, if the said post is not there, the Legal Remembrance or the Law Secretary shall take stock of things about the lodging of prosecution so that the purpose of the Act is sub served.

(i) The Courts that deal with the complaints under the Act shall deal with the matters in promptitude and submit the quarterly report to the High Court through the concerned Sessions and District Judge.

(9) The learned Chief Justices of each of the High Courts in the country are requested to constitute a Committee of three Judges that can periodically oversee the progress of the cases.

(10) The awareness campaigns with regard to the provisions of the Act as well as the social awareness shall be undertaken.

(11) The State Legal Services Authorities of the States shall give emphasis on this campaign during the spread of legal aid and involve the Para-legal volunteers.

(12) The Union of India and the States shall see to it that appropriate directions are issued to the authorities of All India Radio and Doordarshan functioning in various States to give wide publicity pertaining to the saving of the girl child and the grave dangers the society shall face because of female foeticide.

(13) All the appropriate authorities including the States and districts notified under the Act shall submit a quarterly progress report to the Government of India

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through the State Government and maintain Form H for keeping the information of all registrations readily available as per sub-rule 6 of Rule 18A of the Rules.

(14) The States and Union Territories shall implement the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) (Six Months Training) Rules, 2014 forthwith considering that the training provided therein is imperative for realizing the objects and purpose of this Act.

(15) As the Union of India and some States framed incentive schemes for the girl child, the States that have not framed such schemes may introduce such schemes.

The most important direction given in the decision is to take steps to educate the people about the necessity of implementing the provisions of the Act by conducting workshops as well as awareness camps at the state and district levels. It was felt by the Apex Court that the reason for non-implementation of the provisions of the Act was the failure on the part of the authorities to change mindsets that discriminated against women and girls. According to the Court, in addition to awareness of the legal provisions, what is also necessary is awareness in other spheres, like focus on the prowess of women and the need for women's empowerment, for that a change in mindset is required so that practices like dowry are abhorred. In the words of the Court, women play a seminal role in the society and it is a requisite need of the present day that people are made aware that it is obligatory to treat women with respect and dignity. Hence the Court directed that a cosmetic awareness campaign would never sub-serve the purpose. The people involved in the camps must take it up as a service, a crusade. They have to equip themselves with Constitutional concepts, culture, philosophy, religion, scriptural commands and injunctions, and the mandate of the law as engrafted under the Act. They should have boldness and courage to change the mindset of the people. They should clearly spell out that the elimination of female foetuses is the worse type of dehumanization of the human race. Only then, as per the Apex Court, the object of conducting workshops and awareness camps can be achieved to realize the ultimate aim of having gender equality as mandated by the Constitution

Recently in 2016, the Supreme Court appointed National Inspection and monitoring committee and the committee has suggested that license of accused doctors should be suspended and recommended loan for sonograhy machines should be given after varifying clinic's legality under PCPNDT Act. Thirdly, hospital shall not outsource radiological service to an unregistered third party. There should be informing implementation registration of births all on the country only

than complete transparency in registration can be attained.

In Nov, 2016, While acting on a petition filed by Sabu Mathew George, who is a member of the National Inspection and Monitoring Committee set up by the SC in 2003 to inspect and report the implementation of the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, The Supreme court directed search engines Google, Yahoo and Microsoft to delete all pre-natal sex determination advertisements. Further, Apex court banned advertisements of kits for foetal sex determination, addresses of foreign clinics that provide assistance in the illegal act, or any related information. It also asked centre to appoint a nodal agency to monitor the websites which would inform these search engines about any such advertisements on the websites.

Similarly, In Satya Trilok Kesari @ Satyanarayan s/o Trilokchand Lohia vs. State of Maharashtra and Anr case[13], Applicant had published an article in the daily local newspaper Hindustan of Amravati on how to conceive a male child through naturopathy. The submission made was that, it was a research paper of the Applicant and that in no way offends the provisions of Section 22 of the PCPNDT Act. As against it, the submission of the Additional Public Prosecutor was that the title of the so called research paper indicates that the applicant had published the article or issued an advertisement in the garb of an article, to invite people to teach them how to conceive a male child. After going through the whole text of the Article the High Court held that it prima facie amounted to violation of sub-section (1) and (2) of the Section 22 of the Act. Hence the Application for quashing the prosecution was dismissed by the High Court.

It is worth remembering that Section 22(2) of the PCPNDP Act[14] prescribes that no person or organization, including genetic counseling centers, genetic laboratories or genetic clinics shall issue, publish, distribute, communicate or cause to be issued, published, distributed or communicated any advertisement in any manner regarding pre-natal determination or pre-conception selection of sex by any means whatsoever, scientific or otherwise. Sub-section (3) of Section 22 provides punishment with imprisonment for a term, which may extend up to three years or a fine which may extend to Rs. 10,000 to any person who contravenes the said provision. Explanation to this Section lays down that 'advertisement' includes any notice, circular, label, wrapper or other document including advertisement through the internet or any other media in electronic or print form and also

13 Satya Trilok Kesari @ Satyanarayan s/o Trilokchand Lohia vs. State of Maharashtra and Anr, Criminal Application (Apl) No. 178 of 2011

14 http://india.unfpa.org/sites/asiapacific/files/pub-pdf/CaseLawBook_06-08-2014final.pdf

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includes any visible representation made by means of any hoarding, wall painting, signal, light, sound, smoke or gas. Thus, the intention of the Legislature is very clear about prohibiting any sort of advertisement either direct or disguised propagating the use of pre-conception or pre-natal diagnostic techniques for sex selection.

Judicial Intervention- A discussion

It is normally the function of the Government to implement laws enacted by the legislature. But when the government fails to do so, resort is taken to Judiciary. The primary credit for implementation of the Pre-Natal Diagnostic Techniques (Prevention of Misuse) Act goes to the Judiciary. The PNDT Act was enacted by Parliament in 1994. However, it came into operation two years later, on January 1996 and even after a lapse of five years, neither the Central nor the State Governments took any action to ensure its implementation. Hence, the Judiciary had to take upon itself the task of giving effect to the said Act. There are a series of decisions in the petitions filed either suo motu or those moved by NGOs, in which the Supreme Court and the High Courts have issued various directions and pronounced Orders to the Central and the State Governments for creating public awareness and for the effective implementation of this Act.

However, as observed by the Apex Court, there was total inaction on the part of the Government in implementing the provisions of the Act. It was only after several directions were issued by the Supreme Court and the various High Courts, that the government took upon itself the task of creating general awareness, sensitization and also prosecuting doctors and clinics which were found violating the provisions of the Act. Even then, the Act was not being implemented with the zeal and vigor which was expected for this important piece of social welfare legislation. This was reflected in the fact that there were very few prosecutions and hence not many case laws were available. The majority of rulings dealt with challenges raised about the Constitutional validity of the Act and to the directions issued by the Higher Courts for the effective implementation of the Act. There are very few cases, which are registered, prosecuted and finally decided after full-fledged trials.

Hence a vast body of decisional law of the District and the Trial Courts, where the bulk of the cases are ordinarily filed, fought and decided, are not available under this Act. Moreover most of the cases booked under the Act are still pending for trial and are also concerned with ultrasonography centers which do not have licenses and are not registered. Very few of them deal with the problem of sex

selection. Very few provisions of the Act have come for judicial interpretation as the unfolding of the Act is yet to take place in the manner that was expected. There are several other social causes for the same. The Act aims and attempts to address technology and medical issues but not social issues. Sex selection is the result of an unholy alliance between assumed traditional values and modern technology. The Act regulates the use of technology. However, concerns remain as the mindset of the people who adopt and practice sex selection cannot be addressed by the law. The girl child still remains unwanted in several households. These harsh realities of life cannot be ignored and are required to be addressed by the implementation of the Act. Hence, it becomes the duty of society to eliminate this social evil through the effective implementation of the provisions of the Act with the sensitivity it deserves.

Conclusion

Story of judicial response doesn't end here. Several new Judgments are being pronounced every day, spelling out the need for the effective implementation of the Act, exploring its various facets and explaining by way of interpretation the grey areas in the statutory provisions. The preference for a son and discrimination against the girl child is almost universal in India and manifests itself in many ways, including sex selection, that is, the pre-birth elimination of female foetuses. This practice has led to a decline in the Child Sex Ratio in most parts of India. The Child Sex Ratio, which is the number of girls per 1000 boys in the 0-6 year's age group, has declined from 976 in 1961 to 914 in 2011. The burden on the legal community including the bench and the bar in such a situation becomes onerous. The mindset of society cannot be changed by law and it lags behind in legislation; it has to be the job of the Judiciary to fill this gap by adopting a realistic and sensitive approach for the proper implementation of the legislation. The need of the hour is to mould and evolve the law so as to meet its objective through effective implementation.

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Balancing the Freedom of Speech and Regulating the Social Media in India: A Critical Analysis

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Abstract:

The countrywide protest and outrage for the December 16 Gang Rape incident, through Social networking sites, depicts the active contribution of Social Media in participation of the people throughout the country, on social issues, which forced the Central Government to amend the laws in record time. The use of social media is on forefront even in ongoing JNU sedition and Rohit Vemula episode. In small countries, like Iceland, the Government decisions, whether to join or withdraw the European Union, are taken on Facebook discussions. Also, in larger Democracies like India, the social and political issues are discussed by Political leaders and people in general, through Social Media. Thus these Sites provide a platform in consonance with Savigny's popular *Volksgeist*. At the same time, it also signifies the need to regulate the unrestricted publication of contents, which may incite or provoke country wide agitations leading to law and order problems, recently witnessed in Muzaffarnagar, wherein a small fake video led to massive riots. When the Constitution was written, the IT advancements were not foreseen. The Constitution, under Article 19, gave enough space to meet the requirements of future development of the society. Discussions regarding freedom *viz-a viz* restrictions are not yet settled because, the apex court recently sought response from the Centre on the amendment and misuse of Section 66A of IT Act, in the case of Palghar arrests for comments and likes against Bal Thackeray's death. The Delhi High Court in the latest decision of *Vijay Singhal v. Govt. of NCT of Delhi* **[**200 (2013) DLT 8**],** observed, that, *Social media was not far behind in spreading the message of Delhi Gang Rape like wild fire. Views ranged from opinions on what should have been done, to what ought to have been done.* The reasonable restriction placed to the Right to Speech and Expression should be even followed in the Social Media through amendment in the present laws.

A. Introduction

The use of social media is on rise in all organizations and especially those which are financial institutions and at least two-third of their asset managers

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are actively engaged with social media for promotion of their product and services.[2] Sometimes we might get fed up from the fact that every time we connect to internet and in advertisement the business or organizations ask us to follow them on twitter or like them on facebook.[3] *In Vijay Singhal v. NCT Delhi*[4] it was said that "there is increasing awareness of the citizenry to know, how the three principal organs of the State are functioning. These being: the Executive, the Legislature and the Judiciary, represented by Courts. For the citizenry to know the health of the State organs, which operate in their own well defined orbits, i.e., jurisdictional space, it requires a surrogate, which is, the media. It is, therefore, for good reason, that this medium of access, available to the public at large, is called the Fourth Estate." The court also held that the social media was not far behind in spreading the news of December 16 gang rape in Delhi like a wild fire.[5]

The use of social media is increasing day by day. In United States of America people spend just a fraction of online time on news as compared to use of social media.[6] In India more than 62 million people now use social media and around 97 percent of them use facebook also and this social media revolution is set to get bigger says the study report of the Internet and Mobile Association of India.[7] In this scenario we have to make a balance between the rights and restrictions available with us because when the Consitution was written, the IT advancements were not foreseen. The Constitution, under Article 19, gave enough space to meet the requirements of future development of the society. Discussions regarding freedom *viz-a viz* restrictions are not yet settled and, the apex court recently sought response from the Centre on the amendment and the misuse of Section 66A of IT Act, in the case of Palghar arrests for comments and likes against Bal Thackeray's death. In a significant development, in this regard, in the annual conference of DGPs and IGPs on November 21, 2013, the regulation and use of social media was one of the main issues to be discussed in the light of social media's link with freedom of speech and expression and as a preferred

2 Philip J. Favro, "*Keeping Current: Social Media Retaining and Supervising Social Media Communications under New FINRA Regulatory Notice, 11-39*". Business Law Today, 2011 Bus. L. Today 1 (2011).

3 Ahlbrand, Ashley, "*The Social Sides of Law Libraries: How are Libraries Using and Moving Social Media*" 17 AALL Spectrum, 12 (2012-13).

4 200 (2013) DLT 8 at para 18.

5 Id at para 3.

6 Steve Myres, "*Americans spend just a fraction of online time on news compared to social media*" Polynter, Sept. 12, 2011, available at http://www.poynter.org/latest-news/mediawire/145736/americans-spend-just-a-fraction-of-online-time-with-news-compared-to-social-media/ (last accessed on January 18, 2016).

7 Kannan Ramya, "*Study Says Social media revolution set to get bigger"*, The Hindu, March 19, 2013, available at http://www.thehindu.com/sci-tech/technology/internet/study-says-social-media-revolution-set-to-get-bigger/article4516369.ece (last accessed on January 18, 2016).

choice of means of communication for millions of people.[8] The authorities do not want the social media to be invidiously used and want to counter any such attempt to use it. In the latest development of freedom of speech and expression the Apex Court has struck down the draconian provision, section 66 A of Information Technology Act, 2006, which will be dealt subsequently in this paper.

B. What is Social Media?

Merriam Webster dictionary defines social media as forms of electronic communication (as Web sites for social networking and micro blogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos).[9] The examples may include facebook, twitter, google plus, etc.. Susan Hudson and Karla Roberts discuss about two kinds of social media. One being controlled by employer which is generally a page on social media where employers advertise its products and other is "personal social media".[10] The earlier one is employer controlled and later one is free of the control of employer.[11]

As per Election Commission of India, "Social media refers to the means of interactions among people in which they create, share, and/or exchange information and ideas in virtual communities and networks. It differentiates from traditional/industrial media in many aspects such as quality, reach, frequency, usability, immediacy, and permanence."[12] The Election Commission of India categorizes the social media in five branches. They are: (i) Collaborative projects (for example, Wikipedia) (ii) Blogs and micro blogs (for example, Twitter) (iii) Content communities (for example, YouTube) (iv) Social networking sites (for example, Facebook) and (v) Virtual game-worlds (e.g., Apps).[13]

The Department of Electronics and Information Technology defines social media[14] as: "any web or mobile based platform that enables an individual or agency to communicate interactively and enables exchange of user generated

8 "*Sushilkumar Shinde to Inaugurate Annual DGPs/IGPs Conference Today*", Zee News, Nov. 21, 2013, available at http://zeenews.india.com/news/nation/sushilkumar-shinde-to-inaugurate-annual-dgps/igps-conference-today_891459.html (last accessed on Nov. 23, 2013).

9 http://www.merriam-webster.com/dictionary/social%20media

10 Hudson Susan and Roberts Karla, "*Drafting and Implementing an Effective Social Media Policy*", 18 Tex. Wesleyan L. Rev. 767, 2011-12.

11 Id.

12 See, Instructions of the Commission with respect to use of Social Media in Election Campaigning, available at http://eci.nic.in/eci_main1/current/SocialMedia_CI25102013.pdf (last accessed on February 23, 2016).

13 Id

14 "*Framework and Guidelines for Use of Social Media by Government Organizations*", Department of Electronics and Information Technology, Ministry of Communications and Information Technology, Government of India. Available at http://www.negp.gov.in/pdfs/Social%20Media%20Framework%20and%20Guidelines.pdf (last accessed on January 21, 2016).

content." It also provides the six types of social media as classified by Kaplan and Haenlein in 2010, which include (i) collaborative projects, (ii) blogs and microblogs, (iii) content communities, (iv) social networking sites, (v) virtual game worlds, and (vi) virtual social worlds.[15] Thus in general we can say that social media is a kind of media or platform by which people can communicate and express their views to each other in different forms, which can be shared, commented or liked by others and which are very easy to access with deep interest among users.

C. Constitutional Guarantee of Freedom of Speech and Expression

Freedom of speech and expression had got the status of fundamental rights long ago in United States of America[16] which influenced the making of Indian Constitution and it resulted in creating Art. 19 in the Constitution which provides "Protection of certain rights regarding freedom of speech, etc. and under clause (1) (a) All citizens shall have the right to "freedom of speech and expression".[17] This prefixing of "freedom" is not available with other kinds of rights under Art. 19 however it also has the rider of reasonable restriction under Art. 19 (2). But what is the actual meaning of this freedom? The High Courts and the Supreme Court of India had to interpret this right on several occasion in different set of facts. In *Radha Mohan Lal v. Rajsthan High Court*[18], the Supreme Court held that the liberty of free expression cannot be equated or confused with a license to make unfounded and irresponsible allegations against the judiciary. According to Prof. M. P. Jain, the right to expression under Art. 19 (1) (a) includes one's views and opinions at any issue through any medium including words of mouth, writing, printing, picture, film, movie etc.[19] but for the valid freedom of expression it has also to satisfy the requirements of reasonable restrictions applied by Art. 19 (2).[20] Also in *S. Rangarajan v. P. Jagjivan Ram andOrs.*[21] the Apex Court held that our rights are different from the First Amendment in US Constitution and here the freedom of expression means the right to express one's opinion by words of mouth, writing, printing, picture or in any other manner. It would, thus include the

15 Id

16 Thomas Jefferson, "The first Inaugural Address, cited in ,Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis and Holmes, J.J., concurring): If there be any among us who would wish to dissolve this union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.

17 Dharam Dutt v. Union of India, AIR 2004 SC 1295.

18 AIR 2003 SC 1467 at para 10.

19 Jain M.P., "*Indian Constitutional Law*", 6th edn. p.1079, LexisNexis Butterworths Wadhwa, Nagpur, 2012.

20 Id.

21 S. Rangarajan v. P. Jagjivan Ram andOrs.,(1989) 2 SCC 574 at para 8.

freedom of communication and the right to propagate or publish opinion. The communication of ideas could be made through any medium, newspaper, magazine or movie. But this right is subject to reasonable restrictions on grounds set out under Article 19(2) of the Constitution.

In *L.I.C. v. Professor Manubhai D. Shah*[22], it was observed: " Speech is God's gift to mankind. Through speech a human being conveys his thoughts, sentiments and feelings to others. Freedom of speech and expression is thus a natural right which a human being acquires on birth. It is, therefore, a basic human right. Everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinions without interference and to seek and receive and impart information and ideas through any media and regardless of frontiers.

The Supreme Court has justified reasonable restrictions put forth under clause 2 of Article 19 on utilitarian grounds and held in *A.K. Gopalan v. Union of India*[23] that "Man, as a rational being, desires to do many things, but in civil society his desires have to be controlled, regulated and reconciled with the exercise of similar desires by other individuals... Liberty has, therefore, to be limited in order to be effectively possessed". The Apex Court also said that the valuable and cherished right of freedom of expression and speech may at times have to be subjected to reasonable subordination of social interests, needs and necessities to preserve the very chore of democratic life therefore preservation of public order and rule of law.[24] Thus in all these judgments we find that scope of ways of speech and expression are widened and freedom of speech and expression championed for but with a rider provided under clause 2 of Article 19. So, even today for any speech and expression the balance has to be maintained.

D. Misuse of Freedom of Speech and Expression

I. Aggravated Stalking/Cyber Stalking

A twelve year old girl jumped from a building in Florida and lost her life after getting constantly bullied for over a year on facebook and Kik messenger[25] therefore through online messages or texts.[26] The deceased was constantly told by a group of fifteen girls of twelve to fourteen years

22 L.I.C. v. Professor Manubhai D. Shah, (1992) 3 SCC 637.

23 A. K. Gopalan v. State of Madras AIR 1950 SC 27 at p. 69.

24 AIR 2004 SC 2081 at para 7.

25 It is an online application which uses internet to send the messages generated in your mobile or tablets.

26 Quigley Rachel, "Yes I Bullied Her, She Killed Herself and I don't give a f***. Girls 12 and 14 Whose Cyber-Stalking Drove Fellow Pupil 12 to Suicide: are arrested", MAIL ONLINE, Oct. 15, 2013, available at http://www.dailymail.co.uk/news/article-2460996/Rebecca-Ann-Sedwick-suicide-2-girls-aged-12-14-arrested-stalking.html (last accessed on February 22, 2016).

that she is ugly and she should die using bleach.[27] Last year, she informed her mother of this bullying but this year she did not.[28] The police had charged both the girls with "aggravated-stalking". Stalking as well as aggravated stalking is a crime under the 2013 Florida Statute.[29] Again in St. Petersburg the police arrested a fifteen year old girl for sending more than hundred threatening messages to three girls aged fifteen within a week time.[30]

The experts who have studied teen aggressions through social media find that bullying and harassment has increased in the digital age which is a very serious problem because taunts and comments remain online for indefinite period.[31] Now to stop such kind of incidents the mother of the deceased in Florida has started a facebook campaign to create awareness in the name of her daughter. The status says "Stop Bullying; No One Deserves to Feel Worthless, Rebecca Sidwick- Against Bullying".[32]

Stalking is a crime under Indian Penal Code, 1860 as well.[33] It does not use

27 Id

28 Id.

29 The 2013 Florida Statute provides: 784.048-- **Stalking; definitions; penalties:**
1(d)"Cyberstalk" means to engage in a course of conduct to communicate, or to cause to be communicated, words, images, or language by or through the use of electronic mail or electronic communication, directed at a specific person, causing substantial emotional distress to that person and serving no legitimate purpose.
3. A person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person and makes a credible threat to that person commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.(5) A person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks a child under 16 years of age commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

30 Bernard Peter, "*St. Pete Police Arrest 15-Year-Old Girl in Cyberbully Case*" Nov. 8, 2013, available at http://www.wfla.com/story/23908621/st-pete-police-arrest-15-year-old-girl-in-cyberbully-case (last accessed on February 22, 2016).

31 Stanglin Doug and Welch C. William., "*Two Girls Arrested On Bullying Charges After Suicide*", USA Today, Oct. 16, 2013, available at, http://www.usatoday.com/story/news/nation/2013/10/15/florida-bullying-arrest-lakeland-suicide/2986079/ (last accessed on February 16, 2016).

32 official webpage for Rebecca, available at https://www.facebook.com/pages/Rebecca-Sedwick-Against-Bullying/616129218419223 (last accessed on February 22, 2016).

33 Under Sec. 354D Stalking is defined as:
(1) Any man who--
follows a person and contacts, or attempts to contact such person to foster personal interaction repeatedly, despite a clear indication of disinterest by such woman; or
monitors the use by a woman of the internet, email or any other form of electronic communication, commits the offence of stalking:
Provided that the course of conduct will not amount to stalking if the man who pursued it proves that--
it was pursued for the purpose of preventing or detecting crime and the man accused of stalking

the special term of cyber stalking or aggravated stalking but includes the monitoring of the use by a woman of the internet, email or any other form of electronic communication. Thus, indirectly it covers the cyber stalking.

II. Tampered or Fake Videos and Rioting

The September 2013 riot in Muzaffarnagar is alleged to be linked to a video circulated through WhattsApp which has more than three hundred million users in India.[34] The preliminary investigation showed video clips in mobiles of many persons having Whats App application. Thus it is a very dangerous trend because any Microsoft user can agree that it is every body's cup of tea to crop the pictures and make videos of their choice with tampered photos. But still, many mobile users do not know that videos can be tampered or fake videos can be circulated especially which has the potential to hurt the religious sentiments. This message through videos spread like wild fire and different people interpret it differently. Also internet makes available all such kind of pictures and videos necessary for creating those feelings. These need a serious check and harsh punishments for culprits.

E. Misuse of Section 66A of Information Technology Act, 2000

I. Palghar Arrest

In November 2012, two girls were arrested in Palghar in Thane district for posting on facebook over the shutdown of the city because of funeral of Mr. Bal Thakre which was to take place in Shivaji stadium. The woman had posted, *"Respect is earned, not given and definitely not forced. Today Mumbai shuts down due to fear and not due to respect"* and this was liked by one of her friends.[35] This autocratic action of the police and government

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had been entrusted with the responsibility of prevention and detection of crime by the state; or
it was pursued under any law or to comply with any condition or requirement imposed by any person under any law; or
that in the particular circumstances such conduct was reasonable and justified.

(2) Whoever commits the offence of stalking shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and be punished on a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

34 "*Video Circulated On WhattsApp Reportedly to Blame For Muzaffarnagar Riots, Says Officials*" Sept. 12, 2013, available at http://www.newsco.me/content/go/story?news=251941 (last accessed on February 22, 2016).

35 Rajput Rashmi and Das Mala, "*Two Women Arrested For Facebook Post on Mumbai Shutdown Granted Bail*", available at http://www.ndtv.com/article/cities/two-women-arrested-for-facebook-post-on-mumbai-shutdown-granted-bail-294239 (last accessed on Nov. 23, 2013).

was heavily criticized from all the sections of society and the police had to withdraw the charges and finally the local court of Palghar scrapped all the charges against the duo.[36] In a similar act, when a boy was arrested for posting against Raj Thakre of MNS then police was cautious after Palghar incident.[37] The police accepted the fact that the boy's account was hacked or a fake account was created in his name so he was released and new investigation was initiated.[38] The Press Council of India Chairperson Justice Markandey Katju said that "*to my mind it is absurd to say that protesting against a bandh hurts religious sentiments. Under Article 19(1)(a) of our Constitution, freedom of speech is a guaranteed fundamental right. We are living in a democracy, not a fascist dictatorship. In fact this arrest itself appears to be a criminal act, since under Sections 341 and 342 it is a crime to wrongfully arrest or wrongfully confine someone who has committed no crime*". This was enough to strengthen the debate between freedom of speech and expression and what should be reasonable restriction on it because social media such as facebook and twitter are very much different from other kind of print and electronic media. On facebook you write your status and there are comments of your friends, they like your post and can even share on his/her own wall. This spread like wild fire and remain online for indefinite period until it is removed by the one who created the post. This has become one of the fastest medium to circulate any information that is why now a days even political parties and politicians chose this method to reach public. The Supreme Court which is examining the constitutional validity of Section 66 A of the Information Technology Act, 2000 has categorically said that there cannot be blanket ban on the arrest of persons making objectionable comments on social sites.[39] However, it directed the State governments to ensure compliance with the guidelines issued by the Centre on January 9 before making any arrest.[40]

36 See, "Facebook Row: Court Scraps Charges Against Palghar Girls", Jan. 31, 2013, The Hindu, available at http://www.thehindu.com/news/national/other-states/facebook-row-court-scraps-charges-against-palghar-girls/article4365469.ece (last accessed on February 29, 2016).

37 Mukherjee Ashish, 'Palghar Boy Detained For Facebook Post Against Raj Thakre, Released", NDTV, Nov. 29, 2012, available at http://www.ndtv.com/article/india/palghar-boy-detained-for-facebook-post-against-raj-thackeray-released-298698 (last accessed on February 28, 2016).

38 Id

39 Venketasan J., "*No Blanket Ban on Arrest For Facebook Posts, says SC*", The Hindu, May 16, 2013, available at http://www.thehindu.com/news/national/no-blanket-ban-on-arrests-for-facebook-posts-says-sc/article4720384.ece?ref=relatedNews (last accessed on on February 12, 2016).

40 Id. The guideline says that state approval from an officer of DCP level at rural areas and IG level in metros will have to be sought before registering complaints under the controversial section.

II. What Does the Section 66 (A) of IT Act say?

Section 66 A[41]: Punishment for sending offensive messages through communication service, etc.: Any person who sends, by means of a computer resource or a communication device,- (a) any information that is grossly offensive or has menacing character; or (b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred, or ill will, persistently makes by making use of such computer resource or a communication device, (c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages shall be punishable with imprisonment for a term, which may extend to three years and with fine.

Explanation: For the purposes of this section, terms "Electronic mail" and "Electronic Mail Message" means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message.

This provision has become a very contentious one because the courts always ask for clarification from the governments on one or the other issues. That is why, the government has made a rule that before arrest of a person for making facebook comment etc. the police has to take the permission from the officer not below the rank of the DCP in rural areas and IG in urban areas.[42] But still, many petitions including a PIL are filed challenging the constitutionality of this provision. The arguments of challengers are that it gives subjectivity and discretion to authorities to misuse it at the instance of politicians and secondly, the parent provision on which the government claims it to base, the Section 127 of the U.K. Communications Act, 2003, has itself been "read down" by the House of Lords on the ground that the Parliament could never have thought to criminalize statements that one person may reasonably find to be polite and acceptable and another may decide to be 'grossly offensive.[43]

41 Introduced vide ITAA 2008, available at http://police.pondicherry.gov.in/Information%20Technology%20Act%202000%20-%202008%20(amendment).pdf (last accessed on February 12, 2016).

42 Supra note 39

43 Viswanathan Aparna, "*An Unreasonable Restriction*", The Hindu, Feb. 20, 2013, available at http://www.

III. Shreya Singhal v. Union of India[44]

The Supreme Court led by Justice J. Chelameswar and Rohinton F. Nariman struck down the controversial Section 66 A of the Information Technology Act, 2000 saying that liberty of thought and expression is the cardinal principle of our Constitution based on discussion, advocacy and incitement. Article 19 (2) comes in to action when the discussion and advocacy brings incitement.[45] Further, it said that "…the information disseminated over the Internet need not be information which 'incites' anybody at all. Written words may be sent that may be purely in the realm of 'discussion' or 'advocacy' of a 'particular point of view'. Further, the mere causing of annoyance, inconvenience, danger, etc., or being grossly offensive or having a menacing character is not offences under the Indian Penal Code at all,". Thus the judgment put an end to the misuse of section 66 A of the Information Technology Act, 2000 permanently.

F. Guideline for the use of Social Media

I. Election Commission

The use of social media by political parties and politicians has become a craze. It got the momentum after Tumasam, et al's 2010 article "**Predicting Elections with Twitter: What 140 Characters Reveal about Political Sentiment**" which attributed a decisive role to Twitter in predicting election results.[46] Since then, the idea to use social media in elections by parties got strengthened in US Presidential elections of 2012[47] and it is now used in India to the great extent. Keeping this in mind the ECI came out with detailed guidelines along with defining what the social media is. The ECI mandates for the candidate to provide information regarding (I) telephone no.(s), email ID (if any), social media accounts (if any), (ii) Pre-certification of political advertisements by the ECI which is to be aired/used on electronic media including social media. (iii) expenditure on campaigning through internet including social media websites. It says

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thehindu.com/opinion/lead/an-unreasonable-restriction/article4432360.ece (last accessed on on February 22, 2016).

44 Writ Petition (Criminal) No. 167 of 2012, decided on March 24, 2015

45 Id at para 13

46 Datta Saurav, "*Regulating Social Media Election Campaigns - Is It the Election Commission's Overreach*"? DNA, Oct. 27, 2013, http://www.dnaindia.com/analysis/standpoint-regulating-social-media-election-campaigns-is-it-the-election-commission-s-overreach-1909435 (last accessed on on February 20, 2016).

47 Id

that that expenditure on election campaign through any advertisement in social media is a part of all expenditure in connection with the elections and as per Supreme Court guidelines in *Common Cause v. Union of India*[48] and also as per Section 77, sub section (1), of Representation of the People Act, the expenditure has to divulged to the ECI. And (iv) the model code of conduct is applicable to internet including social media. This is a step to stop the misuse of social media during elections which need to be free and fair.

II. Security Exchange Board Of India (SEBI)

The SEBI guidelines for regulating 'crowd funding through social media' are still in pipeline and have not seen the day and it has become very much uncertain now as to when it will be a reality as now the SEBI has put this idea of regulating it in cold store citing the reason that no jurisdiction has done it yet.[49] "Crowd funding" and "social media investment scheme" has become the norm of the day in which the companies lure the common people by sending text messages or through social media advertisements.[50] They promise to double the invested money in two to six years and cheat them and in this way the genuine companies along with the common man are sufferers. The SEBI is investigating some of the matters itself and it feels the need to put a regulatory framework in place to regulate crowd funding from general public and regulate use of investment scheme through social media.[51] The influence of social media on capital market is rising with a high speed because of everyone using them for getting current information and trends. Recently, the global grouping of regulators of capital market that is International Organization of Securities Commissions (IOSCO) of which SEBI is also a member decided to focus on regulating the use of social media in capital market because of excessive use of it in capital market.[52] It can be noted

48 (1996) 2 SCC 752

49 Upadhya Jayshree P., "SEBI Puts Crowd Funding Regulations on The Back Burner", Business Standard, 20 May 2015, available at http://www.business-standard.com/article/markets/sebi-puts-crowd-funding-regulations-on-the-back-burner-115052001138_1.html (last accessed on March 1, 2016).

50 See, "*Crowd Funding And Social Media Investment Scheme Under SEBI lens*", The Economic Times, Oct. 28, 2013 available at http://articles.economictimes.indiatimes.com/2013-10-28/news/43432689_1_alternative-investment-funds-collective-investment-schemes-sebi (last accessed on on February 20, 2016).

51 Id.

52 "*SEBI Working on Guidelines for Social Media Use in Capital Market*", India TV, Oct. 13, 2012, available at http://www.indiatvnews.com/business/india/sebi-working-on-guidelines-for-social-media-use-in-capital-marke-8136.html (last accessed on February 24, 2016).

with great emphasis that in USA a fake tweet saying that US President Barack Obama was injured in an explosion at the White House led to the selling of US stocks amounting USD 130 billion of market capitalization.[53] This is not a small matter; its impact is very deep. This can happen in any capital market including India if such kind of messages are twitted or put on any social media in certain situations. So, the crux here is that the freedom of free speech and expression is being misused against the general public through social media by cheating both the public and the concerned regulatory authorities, hence a regulatory framework is very much required to be put in place.

G. Social Media as the Tool to get Public Opinion and Make Political Decisions

Iceland's population is 321000 only[54] and most of them use facebook. The mood of the population are checked on facebook as after its people wanted to withdraw its application of joining the European Union, it is seriously thinking on withdrew its application.[55] H. E. Mr Ögmundur Jónasson who is the Minister of the Interior in Republic of Iceland accepted the fact that because of very small population of the country and high literacy rate and high internet use, most of the peoples opinion are easily gathered from the facebook.[56] Similarly in other countries social media is used as a tool to campaign and connect to the voters. In India this practice is very much spread. The general election of 2014 for Lok Sabha saw the maximum use of social media for all the political parties. And for this reason the Election Commission of India has come out with a guideline so that social media cannot be misused.[57] The impact and need of social media is such that some of the government departments such as Planning Commission of India, Prime Minister's Office, Ministry of External Affairs, Police Departments and some of Municipalities use facebook to connect and exchange ideas with the people and the government has come out with a framework in which it has to be

53 Id.

54 http://www.statice.is/Statistics/Population (last accessed on February 24, 2016).

55 Many of these opinion polls are conducted via social media as well. Available at http://eunews.blogspot.in/2013/02/most-icelanders-continue-to-reject-eu.html (last accessed on February 22, 2016).

56 He came to deliver a lecture on *"Iceland's place in a Changing World: The Role of Equity, Justice and the Rule of Law"*. The poster is available at http://sau.ac.in/pdf/fls-pubLec.pdf (last accessed on February 22, 2016).

57 See, Instructions of the Commission with respect to use of Social Media in Election Campaigning, available at http://eci.nic.in/eci_main1/current/SocialMedia_CI25102013.pdf (last accessed on March 1, 2016).

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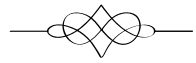
used by the government Organizations in India.[58]

H. Conclusion

The use and abuse of social media is increasing day by day and surely the use is not going to decrease in future for long because of its utility. Social media has not limited itself up to chit-chat and time pass or entertainment but has several uses associated with it. Because of its easy access and wide communication it is very much susceptible to abuses as well. The concerned authorities are in a dilemma in balancing the fundamental right of freedom of speech and expression guaranteed under our Constitution and the restrictions to apply so that use does not become abuse. But what shall be its parameters, limitations or ambit in which it shall limit itself is a big question before all concerned. Few government organizations have come out with guidelines to regulate the use and abuse of social media but they are issue or subject specific such as of ECI, Department of Electronics and Telecommunications, and the contemplation by the SEBI to come out with a similar guideline but none of these guidelines serve the common purpose. Thus the Parliament should come out with a comprehensive and special law or guidelines dealing with social media as a whole because the Information Technology Act, 2000 along with its amendment in 2008 is not capable enough to comprehensively deal with this problem because social media differs from other electronic or print media to a great extent. The provision of "stalking" under sec. 354D of IPC is not as wide as law of the Florida, which talks of aggravated stalking, cyber stalking etc. in detail.[59]



58 "*Framework and Guidelines for Use of Social Media by Government Organizations*", Department of Electronics and Information Technology, Ministry of Communications and Information Technology, Government of India. Available at http://www.negp.gov.in/pdfs/Social%20Media%20Framework%20and%20Guidelines.pdf (last accessed on January 17, 2016).

59 Supra note 28.

International and Non-International Armed Conflicts and Application of International Humanitarian Law

AS *LEX SPECIALIS*

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Abstract

Does the distinction between international and non-international armed conflicts still exist or has it been virtually eliminated? If there are no distinctions and the same set of rules govern both international and non-international armed conflicts, will the international humanitarian law apply as the *lex specialis* to the exclusion of the international human rights law in all armed conflicts, whether international or non-international in character? This article addresses these issues with the help of legal instruments and case laws.

Keywords: Non-international armed conflicts, *lex specialis*, international humanitarian law and international human rights law.

Non-international armed conflicts also referred to as internal armed conflicts represent a vast majority of armed conflicts in today's world.[3] Generally, they take place within the boundaries of a State and comprise of armed conflict between a State and armed groups or among armed groups that do not operate under the State's authority.[4] However, it does not include internal disturbances like riots, civil strife or acts of the like nature.[5] The primary and most important difference

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3 Sandesh Sivakumaran (2011), Re-envisaging the International Law of Internal Armed Conflicts *European Journal of International Law*, *22* (1) 219-219; Yoram Dinstein (2014), *Non-International Armed Conflicts in International Law* (1st edn., Cambridge University Press) 1.

4 Dieter Fleck (ed) (2008), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press) 605.

5 Michael N. Schmitt, Charles H.B. Garraway and Yoram Dinstein, 'The Manual on the Law of Non-International Armed Conflict With Commentary' (*International Institute of Humanitarian Law*, 2006), p. 2,available at http://www.iihl.org/iihl/Documents/The%20Manual%20on%20the%20Law%20of%20

between an international and a non-international armed conflict is due to the actors who take part in them. Traditionally, international armed conflicts are fought between the States, which is not the case in non-international armed conflicts. Development of law regulating non-international armed conflicts grew in a slower pace compared to that of international armed conflict. States were reluctant for any kind of regulation due to a perception that it would constitute a violation of its sovereignty and interference in its domestic affairs.[6]

There was a minimum regulation of non-international armed conflict until 1990s. By the time of conclusion of Article 3, which is common to the four Geneva Conventions, till 1949, international law regulated only those non-international armed conflicts which were reaching the level of belligerency or insurgency, while others, though few in number were regulated on an *ad hoc* basis. A broader category of these conflicts were regulated in the period between 1949 and early 1990s. In this time, the Hague Convention for the Protection of Cultural Property and Additional Protocol II to the Geneva Conventions, 1949 came into being. However in this period, under the customary law, the situation was more uncertain.[7] The next stage of regulation began in the early 1990s and today there is a clear body of international law that governs non-international armed conflict. There are three important bodies of law on the basis on which these laws have developed. Firstly, the law of the non-international armed conflict is modeled on and integrated to the law of international armed conflict. The latter is often seen as a high watermark of legal regulation to which the law of non-international armed conflict should aspire. Secondly, international criminal law has also contributed to the development of the law of non-international armed conflict and thirdly, it has drawn on the international human rights law.[8] The law regulating non-international armed conflict had to rely on these three lines majorly because of the resistance the States posed to the direct regulation of non-international armed conflict through international humanitarian law as mentioned above. Today, it is more widely accepted that international law is binding on States in their internal affairs as well, not only when it comes to human rights issues but also to norms of international humanitarian law applicable in non-international armed conflicts.[9]

NIAC.pdf accessed 19 November 2016; *also see*Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of Non-International Armed Conflicts (Protocol II), Article 1(2).

6 S. Sivakumaran, *supra* note 1, at 222.

7 *Ibid*., at 220.

8 *Ibid.*

9 Dieter Fleck (ed) (2013), *The Handbook of International Humanitarian Law* (3nd edn, Oxford University

I. Treaties and Conventions

When it comes to treaty law, there are different thresholds for its application in non-international armed conflict. Article 3, which is common to the Geneva Conventions simply refers to 'the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'[10], without giving any specific definition. There is no requirement of armed groups fighting against the government of the territory in which operations are conducted as per the definition. Rather, the conflict may be fought between armed groups or between an armed group and the State outside the territory of the State.[11] Since, the threshold of common Article 3 is not specified in greater detail, an interpretation as to text, contents and purpose has to acknowledge that Article 3 was deliberately confined to a few minimum rules, which should receive the widest scope of application. It is due to this limitation States avoided a more specific definition of the scope of application which probably would have been controversial. The concept of 'armed conflict not of an international character' in itself reflects the dynamics of war in its changing character.[12] There is no precise definition of that term even in the International Committee for the Red Cross Manual.[13] The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (hereinafter "ICTY"), the *Tadi...*[14]case referred to non-international armed conflict as a situation of 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.[15] Article 8(2)(f) of the Statute of the International Criminal Court also accepts this test and excludes 'situation of internal disturbances and tensions such as riots, isolated and sporadic acts of violence or other acts of a similar nature' from the purview of non-international armed conflict.[16]

In the years that followed the drafting of the Geneva Conventions, due to the changing nature of armed conflict, in terms of methods, means, participants and the increase in frequency and brutality of non-international armed

Press) 585.

10 The Geneva Conventions of 12 August 1949, Common Article 3.

11 D. Fleck (ed) (2013), *The Handbook of International Humanitarian Law* (3nd edn), *supra* note 7, at 587.

12 *Ibid.*

13 *Ibid.*

14 The Prosecutor v. DuskoTadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94–1-AR72.

15 The Prosecutor v. DuskoTadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94–1-AR72 [70].

16 Rome Statute of International Criminal Court, 1998, Article 8(2) (d) (f).

conflict, there felt a need to develop a new law that was apparent.[17] Hence, the Additional Protocol II was drafted to address non-international armed conflicts and fill the gaps left by the regulatory system of Common Article 3.[18] As in the case with Common Article 3, Addition Protocol II does not apply to situations of internal disturbance and tensions.[19] However, as per Article 1(1) of the Additional Protocol II the rules contained therein apply only to armed conflicts which take place on the territory of a party 'between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations to implement this Protocol'.[20] This provision applies only to Additional Protocol II and is more rigorous than the threshold for the application of Common Article 3.[21] It is said that in practice, it is often hard to identify situations to which the criteria established by Additional Protocol II be applied, especially due to the territorial control which it deals with.[22] Contrary to Common Article 3, Additional Protocol II provides for restriction with respect to its field of application to armed conflict between governmental forces and dissident armed forces or other organized armed groups.[23] The fact that there are different thresholds for the application of Common Article 3 and Additional Protocol II shows that there are atleast two types of non-international armed conflicts, those that are covered by Additional Protocol II (and also by Common Article 3) and those that are only covered by Common Article 3.[24]

The ICTY, on the other hand, has identified a body of customary international humanitarian law, which are equally applicable to international and non-international armed conflicts and they include rules such as the prohibition on attacks against civilians, attack against civilian objects, prohibition on the

17 Emily Crawford (2007), Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-international Armed Conflicts*Leiden Journal of International Law*, *20* (2) 441-448.

18 *Ibid.*

19 Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of Non-International Armed Conflicts (Protocol II), Article 1(2).

20 Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of Non-International Armed Conflicts (Protocol II), Article 1(1).

21 Elizabeth Wilmshurst (ed) (2012), *International Law and the Classification of Conflicts* (1st edn, Oxford University Press) 54.

22 SylvainVite (2009), Typology of armed conflicts in international humanitarian law: legal concepts and actual situations*International Review of the Red Cross*, *91* (873) 69-79.

23 Y. Sandoz et al. (eds), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ICRC/Nijhoff M., Geneva/The Hague, 1987 p. 4461 as cited in *Ibid*.

24 E. Wilmshurst (ed).,*supra* note 19, at 56.

wanton destruction of property, protection of religious objects and cultural property, prohibition on plunder and the prohibition on the use of chemical weapons.[25] It was rightly noted in the *Tadi...* case *"What is inhumane and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife"*.[26]As mentioned above, the law of non-international armed conflict draws heavily from the law of international armed conflict and with respect to legal regulation, the traditional view is that the law of international armed conflict remains the pinnacle towards which the law of non-international armed conflict has to aim.[27]

II. Distinction between International and Non-International Armed Conflicts

Traditionally, the law of international armed conflict was applied only to wars between States.[28] This however changed with the passage of time and the distinction between the law of international and non-international armed conflicts were made by the Geneva Conventions of 1949 and further confirmed by the Additional Protocols I and II to the Geneva Conventions in 1977. The Geneva Conventions of 1949 in its entirety, the Hague Conventions which preceded them and the Additional Protocol I apply to the international armed conflicts. These treaties contain the rules relating to the conduct of hostilities and rules relating to the protection of those who do not take part, or who no longer take part in hostilities.[29] On the other hand, the non-international armed conflict has limited number of treaty rules applicable on them, as explained above, they are restricted to Common Article 3, provisions of the Additional Protocol II and Article 8(2)(c) and (e) of the ICC Statute.

With regard to the actors involved, in international armed conflict, combatants who meet the necessary elements generally get a right to participate in armed hostilities, which is not the case in non-international armed conflict since the members of armed group do not have combatant status.[30] Due to the difference in the actors involved in the two types of armed conflict, it becomes clear why

25 S. Sivakumaran, *supra* note 1, at 228.

26 The Prosecutor v. DuskoTadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94–1-AR72 [119]; *Ibid*., at 230.

27 S. Sivakumaran, *supra* note 1, at 232.

28 R. Bartels (2009), 'Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide between International and Non-International Armed Conflicts' *International Review of the Red Cross, 91* (873) 35-48.

29 E. Wilmshurst (ed).,*supra* note 19, at 34-35.

30 D. Fleck (ed) (2008), *The Handbook of International Humanitarian Law* (2nd edn), *supra* note 2, at 627.

certain legal norms cannot be transposed directly from international armed conflict to non-international armed conflict without some modification.[31] The test for internationalization was laid down in the *Tadi...* case where the Appeals Camber of the ICTY stated, "if an armed conflict takes place between two or more States, it is indisputably international. However, an internal armed conflict within the territory of a State may also become international depending upon the circumstances like those cases where another State intervenes in that conflict through its troops or those cases where some participants in the internal armed conflict act on behalf of that other State."[32] In the wake of this decision, considerable amount of academic debate was seen with scholars arguing that it is difficult to apply objective criteria to determine whether an armed conflict is international or non-international in character. Some scholars agreed that there needs to be a difference in the application of laws while some were of the view that laws could be applied universally.[33]

Notwithstanding the difference in the nature and regulation of international and non-international armed conflicts, some scholars are of the view that the distinction between them is being eroded and this is evident by the fact that today there is greater unity in the laws applicable to these two forms of conflict including the Biological Weapons Convention, 1972, the Chemical Weapons Convention 1993 and the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property 1999.[34] Some scholars are also of the view that in order to avoid confusion with regard to the interpretation of the law, there is a need to adopt a uniform body of rules on international humanitarian law like that of international criminal law and international human rights law. And the fact that the law of non-international armed conflict draws heavily from the law of international armed conflict is a major step in that direction.[35] Additionally, it is also argued that State practice, over the years, have contributed for the blurring of the legal distinction between international and non-international armed conflicts. "The evolution of the law points to the

31 S. Sivakumaran, *supra* note 1, at 221.

32 The Prosecutor v. DuskoTadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94–1-AR72 [84]; James G. Stewart (2003), Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict *International Review of the Red Cross*, *85* (850) 313- 323.

33 E. Crawford, *supra* note 15, at 452.

34 L. Moir, 'Towards the Unification of International Humanitarian Law?' in R. Burchill, N. White andJ. Morris (eds), *International Conflict and Security Law* (2005) 108 *as cited in*E. Wilmshurst (ed)., *supra* note 19, at 35.

35 S. Sivakumaran, *supra* note 1, at 235.

fact that basic humanitarian norms are to be applied regardless of whether individuals to be protected are combatants or non-combatants, or whether the conflict is international or non-international in character. New operating definitions of international and non-international conflicts are to be evolved keeping in mind factors such as the level of violence and the threat to regional and international stability."[36] Some scholars even argue that the distinction between international and non-international armed conflicts is merely a policy error, which needs to be rectified since the distinction does not consider the various changes taking place in armed conflict, consequently leaving many gaps in the application of humanitarian law.[37]

More importantly, it has been argued that customary international law provides for broader rules that govern non-international armed conflicts thereby help in filling the gaps left by the treaty laws. The Appeals Chamber of the ICTY in the *Tadi...* case also noted this.[38] The ICRC takes a similar approach in its comprehensive study of customary international humanitarian law, which was published in 2005 and found that almost all the rules identified in the study applied both to international and non-international armed conflicts.[39]Another important argument, which scholars often look into is the problematic definition in common Article 3 where "armed conflict not of international character" is not precisely defined anywhere. Since, it is a negative definition it does not convey in exact terms what non-international armed conflict really is.[40] Even though Article 3 defines principles of the Conventions, it does not contain specific rules with respect to non-international armed conflict.[41] The Appeals Chamber of the ICTY in the *Tadi...* case also supported the removal of distinction between the two categories of armed conflict. The ICTY noted that due to the changes that have taken place post Second World War with regard to the increase in the number of internal

36 M. Bassiouni and P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996), 479 *as cited in* E. Crawford, *supra* note 15, at 449-450.

37 E. Crawford, *supra* note 15, at 450.

38 The Prosecutor v. DuskoTadic, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, IT-94–1-AR72 [127], "Notwithstanding limitations, it cannot be denied that customary rules have developed to govern internal strife. These rules cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities"; *also see*E. Wilmshurst (ed)., *supra* note 19, at 35.

39 J. M. Henckaerts and L. Doswald-Beck, Customary International Humanitarian Law Study (2004) *as cited in*E. Wilmshurst (ed)., *supra* note 19, at 36.

40 J. G. Stewart, *supra* note 30, at 318.

41 *Ibid.*

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armed conflicts, preserving legal distinction between international and non-international armed conflict is unreasonable as the distinction itself had begun to fade away with time.[42]

However, inspite of the arguments of the scholars who support the elimination of distinction between the international and non-international armed conflict, the distinction still exists. The scholars who support the distinction argue that elimination of distinction would lead to gaps in the overall application of international humanitarian law and the protection of the rights of individuals.[43] Even in the legal sphere, certain distinctions between the two types of conflicts do exist. For example, the status of actors involved, which is explained above; with respect to public property, seizure of military equipment belonging to an adverse party as war booty by combatants may be allowed in an international armed conflict and in occupied territories they can take public property that can be used for military operations and will not be under an obligation to compensate the State to which it belongs. But, such seizures are not regulated by the international law in a non-international armed conflict.[44] In an international armed conflict, prisoners of war must be released without delay after cessation of hostilities. However, in a non-international armed conflict, there is no universal treaty provision on the release of persons deprived of their liberty.[45] In extreme cases, parties to an international armed conflict may resort to reprisals, subject to stringent conditions and where they are not expressly prohibited. However, parties to non-international armed conflict do not have to right to resort to reprisals.[46]

These are some of the cases where the law of international armed conflict cannot be applied. If there is an elimination of distinction between international and non-international armed conflict, then how will one address these issues? Also, in case of there being a conflict which is outside the purview of both

42 The Prosecutor v. DuskoTadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94–1-AR72 [97] "In the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted 'only' within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight."

43 E. Crawford, *supra* note 15, at 452.

44 D. Fleck (ed) (2013), *The Handbook of International Humanitarian Law* (3nd edn), *supra* note 7, at 604.

45 *Ibid.*

46 *Ibid.*

international and non-international armed conflicts how will it be addressed in a scenario where there is no legal distinction between the two? The sole intention of making all the laws come under one canopy might in fact do a lot of injustice with some issues, which deserve attention and better laws so that they can be addressed in a just manner.

III. On *lex specialis*

International human rights law consists of a body of laws, which protect human beings in all situations. Formally, there is no material limitation on the field of their application; they apply in times of peace as well as in times of armed conflict. Bodies such as the United Nations Security Council, the UN General Assembly, the UN High Commission and its Special Rapporteurs and the International Court of Justice (hereinafter "ICJ") have re-affirmed the applicability of the International Human Rights Law during armed conflicts.[47] The ICJ stated that 'the protection offered by human rights conventions does not cease in case of armed conflict, save for the effect of provisions for derogation…'[48] Given that the international humanitarian law is designed specifically to regulate armed conflict, one may question the need for another body of law namely the international human rights law to also apply in a situation when the former is applicable.[49] The above statement by the ICJ shows the importance of the application of the international human rights law during armed conflict, which is primarily regulated by the international humanitarian law. Traditionally, the rules of the international human rights law were developed to address the problems individuals faced during peacetime and at times when they confronted their own State.[50] On the other hand, international humanitarian laws are the laws of war, which regulate the conduct of parties during armed conflicts.[51] Even though human rights law started as an internal affair of States and humanitarian law started as a law between two States with respect to war, with the passage of time and the development of legal jurisprudence the application of human rights law was

47 Orna Ben-Naftali (2011), *International Humanitarian Law and International Human Rights Law* (1st edn, Oxford University Press) 50.

48 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, I.C.J. Advisory Opinion, 2004 I.C.J. 136 at 178 [102-106] Legality of the Threat or Use of Nuclear Weapons, I.C.J., Advisory Opinion, 1996 I.C.J. 266 [25]; *Ibid*., at 50-51.

49 Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds) (2014), *International Human Rights Law* (2nd edn., Oxford University Press) 483.

50 Orna Ben-Naftali, *supra* note 45, at 50.

51 Cordula Droege (2008), Elective affinities? Human Rights and Humanitarian Law*International Review of the Red Cross*, *90* (871) 501-503.

seen in armed conflicts which subsequently raised questions on the interplay of these two branches of international law.[52] If both these branches apply in case of an armed conflict, then how will they interplay and in case of a dispute which will prevail? The ICJ in the *Nuclear Weapons case* said that this issue could be resolved through the maxim *lex specialis derogate legi generali.*[53] This principle seeks to establish a preferential order for two rules or laws that apply to the same scenario but regulate it differently. This principle prefers the more special rule over the general rule, since it is closer to the particular subject matter and takes better account of the uniqueness of the context.[54] The principle does not indicate an inherent quality in one branch of law, rather it determines which rule or law prevails over the other in a particular scenario. Each case must be analyzed individually.[55] The ICJ in the *Nuclear Weapons* case noted the inter-connectedness between the international humanitarian law and the international human rights law and established the *lex specialis* of international humanitarian law.[56] It also proposed a parallel application of the two disciplines, which acknowledges the continued application of human rights during armed conflict but granting some sort of primacy and prevalence to international humanitarian law over the international human rights law.[57]

The interplay between the two disciplines came up before the ICJ for the second time in the *Israeli Wall*[58] case, to which the Court proposed three possible situations: "(a) some rights may be exclusively matters of international humanitarian law; (b) others may be exclusively matters of human rights law; (c) some others may be matters of both. In order to answer this, the Court will

52 *Ibid.*

53 Alexander Orakhelashvili (2008), The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence? *The European Journal of International Law*, *19* (1) 161-169.

54 Marco Sassoli andLaura M. Olson (2008), The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts *International Review of the Red Cross*, *90* (871) 599, 603-604.

55 Anja Lindroos (2005), 'Addressing norm conflicts in a fragmented system: the doctrine of lexspecialis' *Nordic Journal of International Law*, *74* (1) 42 *as cited* in *Ibid*.,at 604.

56 Nancie Prud'homme (2007), *Lexspecialis*: Oversimplifying a more complex and multifaceted relationship? *Israel Law Review*, *40* (2) 355-372; Legality of the Threat or Use of Nuclear Weapons, I.C.J., Advisory Opinion, 1996 I.C.J. 266 [25], the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what constitutes an arbitrary deprivation of life, however, then must be determined by the applicable *lexspecialis*, namely, the law applicable in armed conflict. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicablein armed conflict and not deduced from the terms of the Covenant itself.

57 *Ibid*., at 372.

58 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, I.C.J. Advisory Opinion, 2004 I.C.J. 136.

have to take into consideration both these disciplines of law, namely human rights law and as *lex specialis*, international humanitarian law."[59] There appears to be a lack of legal literature with regard to the precise definition of *lex specialis*[60] but by a careful perusal of the ICJ's opinions in these cases one can conclude two things, first, where both international humanitarian law and international human rights law are applicable, the former tends to prevail as it offers more protection in almost every situation for which it has precise set of rules; second, human rights law remains applicable at all times including in armed conflicts.[61]

Inspite of the ICJ's reliance on the principle of *lex specialis*, considerable debate has sprung up on the issue that this principle does not indicate the dominance of one branch of law over the other. According to many scholars, the Court proposed a theoretical basis for the parallel application of the two branches of law. However, it failed in providing clear guidance or sufficient details on how the maxim *lex specialis* should function thereby falling short of presenting a framework capable of clarifying the interplay between the two disciplines.[62]At best, the maxim is a tool of interpretation and not a rule to solve dispute between two disciplines of law, as it does not indicate towards a hierarchy of norms.[63] Some scholars believe that *lex specialis* is only a technique for resolution of normative conflicts.[64] According to the maxim *lex specialis derogate legi generali*, a special norm will prevail over the general norm. Yet, the rule is silent as to what is specific and what is general; it does not provide any clear guidance to set apart the *lex specialis* from the *lex generalis.*[65] The most common example used to show the relevance of *lex specialis* is the violation of right to life during an armed conflict. While this example is apt, the principle is of less assistance when it comes to many other issues where both international humanitarian law and the international human rights law have to be applied together. For instance, in a non-international armed conflict

59 *Ibid*., at para 106; *also see* N. Prud'homme, *supra* note 54, at 377.

60 C. Droege, *supra* note 49, at 523.

61 Francoise J. Hampson (2008), The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body *International Review of the Red Cross*, *90* (871) 549-559.

62 N. Prud'homme, *supra* note 54, at 378.

63 Martti Koskenniemi, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law' (*Report of the Study Group of the International Law Commission*, 2006), p. 48, available at http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf accessed 19 November 2016.

64 A. Lindroos, *supra* note 53, at 36.

65 N. Prud'homme, *supra* note 54, at 382.

where there is no agreed status of combatant and there is a potential violation of the right to life, international humanitarian law becomes less clear making the application of *lex specialis* even more difficult.[66] Perhaps, due to the difficulty in distinguishing the *lex specialis* and the *lex generalis*, the maxim appears to have limited use when dealing with situations of detention during armed conflicts.[67] Hence, it can be said that in specific circumstances like that of violation of right to life in an armed conflict, the principle of *lex specialis* adequately addresses the interplay between the international humanitarian law and the international human rights law, however, it is of less assistance in dealing with many other complex scenarios that might arise during an armed conflict.[68]

In an attempt to solve the confusion surrounding the application of the rule of *lex specialis*, some scholars suggested that a harmonious interpretation be made between the two disciplines of law as these two branches complement and not contradict each other.[69] Hence, according to the principle of complementarity, both human rights and humanitarian law are based on similar principles and values and can influence and strengthen each other mutually. This principle preserves the idea that international law be understood as a coherent system. International law is seen as a regime in which different sets of rules and laws cohabit in a harmonious manner. This enables the interpretation of human rights in the light of humanitarian law and vice versa.[70] This is reiterated by the decision of the European Court of Human Rights (hereinafter "ECtHR") in *Hassan V. the United Kingdom*.[71] The State's contention that the international humanitarian law should apply to the exclusion of international human rights law was rejected by the Court which went on to hold that the two bodies of law should be applied together and stated that "if the Court accepts the arguments of the government, it would be inconsistent with the case law of the International Court of Justice which has held that international human rights law and international humanitarian law may apply concurrently. It also pointed out that as the ECtHR has observed in many occasions, the Convention cannot be interpreted in a vacuum and

66 Noam Lubell (2005), *Challenges in Applying Human Rights Law to Armed ConflictInternational Review of the Red Cross*, (860) 737,746-750 *as cited in*N. Prud'homme, *supra* note 54, at 382.

67 N. Prud'homme, *supra* note 54, at 382.

68 *Ibid.*

69 A. Orakhelashvili, *supra* note 51, at 169.

70 C. Droege, *supra* note 49, at 529.

71 Hassan v United Kingdom, **[2014] ECHR 29750/09 [**77**].**

should so far as possible be interpreted in harmony with other rules of international law of which it forms part."[72]

Conclusion

The paper has attempted to discuss vital issues with regard to international and non-international armed conflicts and the application of international humanitarian law as the *lex specialis*. With regard to the issue of whether there should be an elimination of distinction between international and non-international armed conflicts it can be said that even though there have been strong and valid arguments in favour of the elimination of the distinction, the distinction still exists. One of the main reasons for the existence of this distinction is the view by States that if non-international armed conflicts are equated with international armed conflicts then it would undermine State sovereignty and in particular national unity and security. States have been very concerned and were reluctant in eliminating the distinction since according to them treating non-international armed conflicts in the same way as international armed conflicts would encourage secessionist movements by giving them status under international law and also restrain the powers of the State in seeking to put down the rebellions.[73] For instance, if the rule of combatant immunity, which prevents prosecutions of combatants merely for taking part in armed conflict, which is applicable in international armed conflicts, is made applicable to non-international armed conflicts then States would not able to criminalize acts, which are traditionally regarded as constituting treason. These concerns of the States have been reflected in treaties as well, like the inclusion of Article 3 in Additional Protocol II according to which nothing in the Protocol restricts the responsibility of the State 'by all legitimate means, to maintain or re-establish law and order.'[74]

Apart from these concerns, the paper has also dealt with certain issues that might arise if there is an elimination of the distinction between international and non-international armed conflicts. There are certain issues under non-international armed conflicts where the law of international armed conflict cannot be applied. Mere intension of bringing both the laws under one umbrella might end up in not adequately addressing certain issues, which deserve attention. Hence, it can be concluded that the distinction between international and non-international armed

72 *Ibid.*

73 F. Bugnion,*'Jus Ad Bellum, Jus in Bello* and Non-International Armed Conflicts' (2003) 6 *Yearbook of International Humanitarian Law* p. 167-168, available at https://www.icrc.org/eng/resources/documents/article/other/francois-bugnion-article-150306.htm accessed on 19th November 2016.

74 E. Wilmshurst (ed)., *supra* note 19, at 37-38.

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conflicts still exists and it should not be eliminated so that all the issues can be addressed in a just and equitable manner.

With regard to the issue of international humanitarian law being the *lex specialis* and being applicable to the exclusion of international human rights law to all armed conflicts, international or non-international, the paper has discussed the opinions of the International Court of Justice which sees international humanitarian law as *lex specialis* in armed conflicts but also notes the importance of application of international human rights law in armed conflicts. It is also made abundantly clear that by mere application of international humanitarian law as the *lex specialis*, the application of international human rights law will not cease. However, as the paper noted, there are some inherent problems with the application of this maxim, like the maxim gives priority to a special rule over the general rule. But it fails to give sufficient guidance as to what is *lex specialis* and *lex generalis*. While it is true that there are certain circumstances where the principle of *lex specialis* adequately addresses the interplay between international humanitarian law and international human rights law by regarding international humanitarian law as the *lex specialis*, it is equally true that many other circumstances cannot be addressed by this principle, as shown in the paper.

Hence, it is hereby suggested that a harmonious interpretation be made between the two disciplines as they complement each other. Once this is done then human rights law can be interpreted in the light of humanitarian law and vice versa. This will enable in solving various issues that might need the interaction between these two branches of international law without there being a priority in application. But the problem remains as to how to have a harmonious interpretation of these two disciplines of law, which approach an issue in different ways. It is hereby suggested that suitable mechanisms be devised including necessary legislations and covenants, which will help in a harmonious interpretation of these two branches of law. Hence it can be concluded that *lex specialis* as a principle, falls short in several respects with regard to addressing the interplay between the international humanitarian law and international human rights law. But by adopting a harmonious interpretation this issue can be addressed so that the individual rights are addressed in an appropriate manner during an armed conflict.

"Issues of 'Dalits' and their Empowerment within the Paradigm of Indian Constitution and Society"

Dr. Mohammad Sharif*[1]

Abstract

Since time immemorial, the history of human society remained to be that of conflict for acquiring power and dominance over others in terms of socio-cultural, political, economic and religious aspects of their life. These often accompanied violations of the people's inclusive human rights in terms of their dignity, decency and status owing to their race, caste, origin and place of birth and alike. These could significantly be found to be evident within the ambit of our Indian society itself. Basically, India's caste system assigns individuals a certain hierarchical status according to conservative and traditional Hindu beliefs pertaining to the same. Accordingly, the 'Dalits' or 'untouchables' have been assigned amongst the lowest rug in the prevalent caste hierarchy of the Indian society. The term itself positively connotes the one for social discrimination and humiliation to the individual personality of a country's population segment. Even though primarily they comprised more than one-sixth of India's population, yet they live in sub-human existence, shunned by much of the society owing to their lowest rank within the social hierarchy. However, the status of the depressed classes or the Scheduled castes and Tribes as they have been accorded statutory status for the administrative and legal convenience for the sake of ensuring the varied safeguards and measures that are provided under the ambit of our Indian constitution. In fact, it could significantly be acknowledged the contributions whereby the erstwhile British system that kept the Indian polity under servitude did took varied initiatives towards according Dalits a humane status by undertaking varied socio-religion reforms against the irrational practices that prevailed against these marginalized target population of the Indian sub-continent. However, pragmatically, even under our Independent India the socio-economic position and status of these communities couldn't be considered as socially stable owing to the prevailing mentality of the upper castes people against them. Dalits are divided into leather workers, street sweepers, cobblers, agricultural workers, and manual "scavengers".

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The latter group considered the lowest of the low and officially estimated at one million, traditionally are responsible for digging village graves, disposing of dead animals, and cleaning human excreta. Approximately, three-quarters of the Dalit workforce are in the agricultural sector of the economy. A majority of the country's forty million people who are bonded laborers are Dalits. These jobs rarely provide enough income for Dalits to feed their families or to send their children to school. As a result, still many Dalits have remained impoverished, uneducated, and illiterate. Menace of social ills and maladies, such as untouchability, child and bonded labour and alike against these marginalized community still exists even in our modern vibrant India of today. The status of women from these marginalized communities couldn't also be ascribed as satisfactory. In fact these segments of our population have suffered worst form of atrocities throughout the ages. In the past, they were frequently subjected to sexual harassments and exploitation at the hands of landlords in rural areas.

The country has to acknowledge and assert the basic rational fact that every person is born free with inclusive human rights and shouldn't be discriminated on the ground of race or religion, caste or creed and the dignity of all shall have to be respected in their overall capacity of fellow human beings. The concept and practice of human rights is the hallmark of any modern society which should not only be respected but also be followed in totality. India, as a champion for the protection of inclusive human rights across the globe, needs itself to put her own house in order pertaining to the same. It is avowedly the need of hour that the state should actively pursue the policy of "intolerance against social injustice and discrimination to Dalit's decency, dignity and exploitation" within the country at large. The present paper emphasized upon the varied issues that these marginalized section of the Indian population still faces amidst the prevailing notion of the noble and idea doctrine of justice, equality, liberty, freedom, fraternity and alike within our country at large. However, with the growth of our progressive nation it may be ascertained that the rational socio-economic policies that are being pursued would certainly lead the country to shrug off its past maladies and acquire an international accolades of a vibrant and developed nation in the years to come.

Keywords: Human rights, dignity, atrocity, Dalit, discrimination, untouchability, humiliation, Prevention of Atrocity Act, exclusion

1. Introduction

It is indeed an un-denying fact that the History of human civilization has been shrouded with varied social issues that ranged from conflict to peace and cooperation; from societal animosity to coexistence or even reactionary agitations against the irrational, conservative or unreasonable custom or traditional practices that ever posed threat not only to the human survivability but also questioned their status, decency and dignity as an indispensible socio-legal and political component of both the society and the nation at large. In this melee quest to acquire socio-economic and political power so as to exert dominance over others by dint of possessing some physiological traits in terms of race, sex, color and texture of body, physical feature and build up, self-proclaimed mental and intellectual potential- either to excel in literary or religious activities or to show velour in battle fields, do loomed large within the precincts of human society itself.

Significantly enough, the sociological and economic concepts of discrimination, class conflicts, deprivation, and scarcity, poverty comes to fore that eventually dents the very concepts of humane solidarity amongst the people thereby affecting inclusive growth and developments both at the national and international level. In fact, discrimination amongst the people is a global phenomenon whereby one may witness the degrading treatments that are being metered out to the people of African continents by the Europeans simply on ground of their race, color or dark body textures. In the past, persistent armed struggles were carried out, in the region, against the socio-economic and political issues relating to exploitation and slavery of the natives at the hands of invaders from outside the continents. Somehow or rather similar situation did also prevailed or even exists today within our Indian continent itself. However its nature and extent could be linked to the specific socio-economic and religious fabrics that influences and guides our target population to resort, initiate or even to agitate against the irrational, unreasonable and conservative customs, traditions or practices that dare to take away the basic human rights, dignity and decency out from their integrated personality.

Today, with the advent of an era of liberalism, globalization, urbanization, rationality and reasonableness pertaining to the respect of human values and rights, the varied issues relating to meting out equal treatment to the erstwhile depressed, deprived and discriminated sections of our diversified population are being deliberated at various public platforms and initiatives to these are

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reflected at the constitutional provisions and the statutory welfare measures being taken by the government towards their empowerment. Basically, to ensure identifications of these economically deprived and socially oppressed sections within our population, the term "Dalit' has been incorporated in the official files for administrative convenience so that adequate welfare measures and policies could eventually be addressed to these target population. In fact, the term has statutorily been given assigned recognition, as Scheduled Caste and Scheduled Tribes respectively under Article 341 and 342 of our Indian Constitution. It has specifically been aimed to respect the dignity and decency of each and every Indian citizen who had stigmatized from the centuries and subsequently remained secluded and depressed from the mainstream population in their capacity as a true human being with inclusive rights associated with the same.

2. Meaning And Significance Of The Term 'Dalit'

Basically, the term "Dalit", meaning "oppressed" in Sanskrit could be considered as a self-chosen political name for those caste that have been regarded as "untouchables' or degraded ones, worthy of being placed under servitude, within the radical vis-à-vis conservative, class-divided Indian socio-economic and political fabric that prevailed throughout the ages. Often, the word "dalit" could also be regarded as a vernacular form of the Sanskrit past participle adjective दलित (dalita). In fact, in Classical Sanskrit, this means 'divided, split, broken, scattered', that has been derived from the meaning of the verbal root दलभेदे: 'to divide'. However, this word was significantly repurposed in nineteenth-century Sanskrit to mean '(a person) not belonging to one of the four Brahminic castes or Varnas' that comprised of Brahmins, Kshatriyas, Vaishyas and Sudras, which were mentioned in the ancient scripture "Manusmriti", so written by the ancient Hindu law giver 'Manu', under his ancient "law of social stratification", that specified the origin and duties of every castes within the society. Though the name Dalit has been in existence since the nineteenth century, the economist and reformer B.R. Ambedkar (1891–1956) popularised the term. It may be ascertained that Dalits were excluded from the four-fold Varna system and formed the unmentioned fifth varna; they were also called Panchama. It was perhaps first used in this sense by Jyotirao Phule, in the context of the oppression faced by the erstwhile "untouchable" castes of the twice-born Hindus. According to Victor Premasagar, the term expresses the Dalits' "weakness, poverty and humiliation

at the hands of the upper castes in the Indian society." The term Dalit has become a political identity, similar to the way African Americans in the United States moved away from the use of the term "Negro", to the use of "Black" or "African-American"[2]Dalits today use the term "Dalit" as they believe the term is more than being broken and is in fact an identity born of struggle and assertion.

Dalits were commonly banned from full participation in Indian social life. They were physically segregated from the surrounding community. For example, they could not enter a temple or a school and were required to stay outside villages. Other castes took elaborate precautions to prevent incidental contact with them. One cannot either ignore or deny the basic fact and practices which prevails within the radical, conventional, traditional or even conservative Hindu caste system whereby it may be ascertained that the 'Dalit status' is associated with all those occupations that have been regarded as ritually impure, such as leatherwork or butchering, or removal of rubbish, animal carcasses and human waste. From the centuries, Dalits do work and earn their livelihood by indulging themselves as leather tanners, manual labor cleaning streets, latrines and sewers. In fact, these activities were considered to be polluting to the individual and this pollution was subsequently considered as contagious through the ages and pragmatically would continue to be so until a universally acceptable egalitarian approach is not only adopted but also practiced without any dissent amongst them pertaining to it. However, given the present socio-economic, cultural and political social ecology that prevails within our country, such state of social progressiveness is realistically a remote possibility that one may acknowledge.

3. Social Reactions and Agitations Against Caste Discrimination Within The Indian Society*:*

It may be envisaged that from the early years, the Indian Society remained not only to be dynamic but also reactionary against any of the illegal activities or open discrimination or atrocities against the 'Dalit' people with humble background that were committed by the upper caste people based on the unreasonable religious tenets for the same. As such there were 'Justice Movements'; Self Respect Movements'; Nair Movements; Satyasodhak and Mahar Movement and the alike that were taken up in South and western India

2 Mendelsohn, Oliver; Vicziany, Marika (30 April 1998). The Untouchables: Subordination, Poverty and the State in Modern India. Cambridge University Press. p.4

with an aim to restore the pride, dignity and respect of the lower caste and the depressed peoples against the socio-religious and cultural dominance of Brahaminism over them. These movements were led by the reformers such as C.N. Mudaliar, T.M. Nair, Ramaswamy Naickar, Jyotiba Phule, B.R. Ambedkar and so on. In fact most of the social maladies like prohibiting dalit to offer prayer in temples or to read ancient Vedic scriptures or even to perform some of the ancient cultural traditions and customs within their homes and alike were statutorily removed within the ambit of our constitutions itself. Moreover, the issues pertaining to socio-religious disabilities with which the depressed castes of our country had suffered worst throughout the ages were taken up by Mahatma Gandhi, the stubborn 'Father of Indian Nation'. In fact, owing to his zeal, most of the safeguards have been incorporated within our constitution for the overall protection of the inclusive rights of the 'Dalits' in this country and eventually they have been accorded statutory position of equality, decency and respect at par with other citizen irrespective of their caste, color or racial backgrounds. Basically the manner through which our country is expected to flourish as a vibrant democracy across the world would eventually get its guidance and inspiration from the initiatives that were taken up by the socio-religious reformers of the country's heroic past.

4. Status and the Atrocities on Dalit: Current Scenario:

Manu speaks of untouchables as 'varn-baya' which means those who remained outside the well prescribed prescient of Varna system. The four classes of Hindus are called 'Savarnas' while those outside it, like the untouchables, are referred as Avarnas. Manu has even stated in his 'Smiriti' that the dwellings of the Chandals shall be outside the village, that they must be made Apapatras... and their wealth shall be dogs and donkeys, their dress shall be the garments of the dead, they shall eat their food in broken dishes and black iron shall be their ornaments, they must wander from place to place and they shall not sleep in villages and towns at nights. It is well known that during the ancient periods, in villages, the untouchables used to live in separate localities, while other castes dwelled in the main village itself. In fact, such blatant abuse of the dignity and decency on the very personality of the downtrodden people, in the socio-economic and cultural practices within the Indian fabric during the ancient period provoked the socio-religious reformers of the "Dalit" movement to adopt a radical approach to ascertain their contentions that "untouchables are not part of Hindu society and they must remain separate and segregated from it". The lead in this direction were taken up by Dr. B.R.

Ambedkar who ridiculed the ancient theology of class-stratification as a blot on the dignity and decency on the very personality of 'Dalits' as a human being with all tenets of human rights available to them at par with other so called individuals of upper castes and 'varnas'. Dr. Ambedkar choose the term "Broken man… as English translation of 'Dalits' in his paper- "The Untouchables" in 1948.

Even though egalitarianism and the varied human rights issues does figure and are deliberated upon at the various national and international forum where volumes are being talked about need and desirability towards ensuring respect, dignity and decency of lives to those people who had suffered owing to socio-economic, legal and political discriminations in varied forms against them, yet pragmatically seen the situation continue to show its presence in one form or the other around our daily happenings. In this respect, it is worth to mention some of the incidents where atrocities over the "Dalits" do serve as an eye-opener over the same.

As reported by the NDTV on 25th September 2016, in Banakantha, Gujarat, a 25 year old pregnant 'Dalit' women and her family were beaten up allegedly by a group of men, belonging from the upper caste 'Thakores' community, after the victims refused to dispose of a cow carcass. In fact the family had left the work long ago and was also abiding the boycott that was called upon by the Dalit groups after the public flogging of four men from their community in the state in 'July 2016 itself. These upper caste men kept them reminding that the 'Dalits' are supposed to do the menial job either by persuasion or by force. It is worth to mention herein that Gujarat had been stirred by protests in the recent months[July '16] after four Dalits men were publically beaten up in Una, in south Gujarat, by the alleged so called "Gau Rakshaks"[cow protectors]. Following the incident, "Dalit community" in the area pledged not to skin dead cows, an occupation thrust upon a section of Dalits. Similar incident are also being reported from some of the rural areas in Uttar Pradesh.

It may also be ascertained that in most of the rural areas, women or men from the 'Dalit' community are being accused of practicing 'black magic' allegedly as a panacea for any of the misfortunes or diseases that affect local population and village alike. As such anything goes wrong against the people or the villages then these 'dalits' are being specifically targeted and in such 'witch hunts' even corporal punishments is meted out to them by the local inhabitants. It could be noticed that in all these practices the persons from upper castes are not even be

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targeted or accused of practicing such practices. In addition to it, '**social boycott**' is yet one of the worst kind of atrocities that are repeatedly being faced by depressed classes, mostly in the rural areas of our agricultural India.

Owing to the prevalent socio-economic status along with the state of depravity amongst the 'Dalits' households in rural areas or countryside, the social evils of 'Discrimination' supplanted with those of untouchables does also exist in access to healthcare and nutrition. As such, medical field workers either do not visit or avoid doing so in the Dalit settlements. Basically with the spate of increasing privatization of health sectors in the urban areas, the inflationary economic situation does take toll of lives during the urgent or dire situations where saving a precious human life even those belonging to a 'Dalit' community matters. Even adequate nourishment is not available to the Dalit children at the government sponsored mid-day meals at schools. Significantly, most of the children from the 'Dalit' community under five years are diagnosed as being suffered from the physiological maladies of underweight and malnourished or anemic. Eventually, the sorry state of high infant mortality rate among children from the 'Dalit' community do exists.

Further, in the field of education among the Dalit community, the situation remains to be grim in comparison to those belonging from the upper caste ones. Lack of proper initiatives and motivation among the 'Dalit' community towards imparting education to their children, particularly the female one; have led to the aggravation vis-à-vis continued presence of the varied social ills in our Indian society. In fact, among the 'Dalit' communities like those of others, there is a feeling of economic insecurity and unemployment even after receiving education. Subsequently, they consider the period of time that has been devoted during the period of their over education as a wastage of their 'earning time' that could have been utilized for productive purposes through manual labor. Apart from it, poor and inadequate infrastructures for the education do aggravate the problem. Basically the dropout rate among the Dalit children, at the primary and the middle level, continues to be grim. Even though the statutory "Right to Education" under Article 21A of the Indian constitution do prevail within the country but its real significance for the Dalit children would be visible only when the government succeeds in lowering down their drop rates through the adequate and rational implementation of its education policy for the same.

Further, in our day today practice it could pragmatically be observed that

amongst the higher or upper caste peoples, the intellectual merit and capabilities of any individual belonging from the 'Dalit' communities is always being looked down and even are underestimated. The intellectual merit of any 'Dalit scholar' is only put to accolade and recognition it is adjudged worthy for the same at both national and international level. It may be ascertained that all the intellectuals and scholars from the Dalit community did get recognition within our country only after they achieved some international feat and recognition by dint of their own merit and intellectual calibers.

It is sad that many educated Indians do not pay attention to educational and professional success of depressed classes; but indulge in caste consciousness. Some of the incidents that blatantly indicate the ignominious treatments being meted out to the dignity of the 'Dalits', even during the present modern era, at hands of the members of upper caste people in the country may also be worth to mention herein. Often Dalit grooms were beaten-up for riding in decorated horses as a part of pre-wedding ritual in a village in Rajasthan, because the upper caste claims such ceremonial tradition to be only of their sole prerogative and "privilege" as part of fanfare in weddings. Also during celebrations in such villages, Dalit invitees are even offered food at those places, within the venue, that are specifically segregated for the same. Usually it may be observed that the 'Non-Dalits', use to avoid participating in those functions that are being organized either by the 'Dalits' or meant for them.

Discrimination against the 'Dalit' children could also be found in the Schools which are located in the remote rural areas of the villages dominated by the upper caste people. Even in most of the government and aided schools of these areas do not have a separate person to clean toilets. Owing to it, the responsibility for the same has been entrusted on the teachers and students to keep the toilets clean. Hence, the complaints of compelling Dalit students to clean the toilets are not uncommon as it is easier to coerce them into doing what other children will refuse to do.

Dalit women face the triple burden of caste, class, and gender in the traditional feudal mindset in the villages dominated by upper castes. Girls from the Dalit agricultural community are often being forced to become prostitutes for some of the dominant-caste patrons, landlords and village priests. Sexual abuse and other forms of violence against women are used by landlords and the police to inflict political "lessons" and crush dissent within the community. It is certainly a disgusting fact that only less than 1% of the perpetrators of crime

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against Dalit women are ever convicted.

Moreover, today, there are still many of the villages in Rajasthan, Haryana or even in the south, so dominated by members from the upper caste community, where caste discrimination of the past still dictates social norms and traditions. The worst sufferers of these are lower caste Dalits families whose members are not allowed even to fetch water from common wells or water bodies. Either they have to dug out wells for themselves or have to wait until dominant caste people come and fetch the water for them. Similarly, even in the urban areas 'Twin-tumbler system' do prevail where in some tea shops, 'Dalits' are served in cheaper glass, plastic or aluminum tumblers contrary to stainless steel tumblers used for dominant caste groups. Often eateries, especially in rural areas have separate bowls, plates and even entrance for the 'Dalits'.

Moreover, the incidents where Dalit children are being frequently discriminated upon in some of the state school do warrant adequate attention. Here they are required to sit in the back of the classroom and even are forbidden from touching mid-day meals. They are also required to sit separately at lunch and eat with specially marked plates for them. Somewhere even the higher caste students are often advised, by their parents, not to mingle with the Dalits. Often the Dalit teachers and professors are also being discriminated against and harassed by authorities, upper castes colleagues as well as upper caste students in different education institutes of India.

Significantly, the atrocities against Dalits are wide spread in modern India. A report from the Human Rights Watch report in the year 2007 did emphasize about the prevalence of these atrocities in India that could be witnessed not only in the country's remote places but in urban India as well.

Today 'Dalits' are often being used as a **'Vote bank'** by the political parties in order to secure either power at the Central Parliament or the State Legislature. Owing to it overall socio-economic interests of these extremely downtrodden communities do suffer. In fact, the inclusive interests of these are being repeatedly sacrificed by those in power to aggrandize themselves both economically or even socially and the poor 'Dalit' masses amongst are left with simple assurances and hope of light for better future and livelihood that are being frequently shown to them during election periods by the selfish political players.

Moreover, because of atrocities on the 'Dalits', there has been the cases of

their proselytization into Islam and Christianity from time to time in the hope of getting more respect and equality of status vis-à-vis dignity in comparison to those that were denied in their erstwhile Hindu religion. However in actual practices, it may be observed that even within the pale of their new religion they continue to suffer owing to their birth as being a "Dalit". The people of noble birth in these religions do acquire dignified position in the capacity of their origin as 'khans', 'Pathans' etc. or even Christianity owing to its place of origin from the European land.[3] Some, like Ambedkar himself adopt Buddhism in the hope and search for solace, peace, decency, dignity and tranquility for their community itself.

5. Statutory Provisions to Address 'Dalit' issues within the Indian Constitution

It has been a well evident fact that our Indian constitution could primarily be envisaged as welfare oriented secular and social document whereby it shows its specific concern towards ensuring statutory protection of the varied rights, interests, dignity, decency and needs of its diversified population. As such, the socio-economic and cultural maladies such as discrimination, conservatism, inequality and alike has been adequately addressed. The Constitution of India, since its adoption in 1950, and largely due to the influence of Dr. B.R. Ambedkar (chairman of the constitutional drafting committee), strives persistently to get departed from the norms and traditions of the conservative caste system of the past in favor of Justice, Equality, Liberty, and Fraternity, that guarantees all citizens their basic human rights regardless of caste, creed, gender, or ethnicity. Dalits or the Scheduled Castes or Scheduled Tribes, as a statutory and legal term under our constitution to denote and signify those marginalized sections of the Indian society who had not only suffered the pain of social humiliation, through discrimination, based on caste, race, origin and alike, but also faced the effects and of being subjected to varied socio-economic maladies of past throughout the ages, have been ensured protection and safeguards along with other weaker sections either specially or by way of insisting on their general rights as citizen. In fact, the latter is aimed to promote their educational and economic interests vis-à-vis to remove all forms of social disabilities so as to ensure their dignity and decency be well protected and preserved in the country at large. Some of these safeguards could be specified hereunder:-

- The abolition of 'untouchability' and the forbidding of its practice in any

3 Jan Nijman, A Study of Space in Mumbai's Slums, , Volume 101, Issue 1, pp. 4–17

form [Art.17]

- The promotion of educational and economic interests along with their protection from social injustices and all forms of exploitation [Art.46]
- Throwing open of all the Hindu religious institutions of a public character to all classes and sections of Hindus [Art.25(2) b]
- Removal of any disability, liability, restrictions or conditions with regards to access to shops, public hotels, restaurants and places of public entertainment or the use of wells, tanks, bathing Ghats, roads and places of all those public resorts that are maintained wholly or partially out of state funds or dedicated to the use of general public [Art. 15(2)]
- The prohibition of discrimination by state, either pertaining to equality of opportunity in matters of public employment or with regards to implementation of any public policies within the country, simply on grounds of religion, race, caste, descent, place of birth or alike [Art. 15/16]. However, states have statutorily been vested with the power to make any special provisions in any of its public policies that are directed specifically to further the interests of scheduled castes and tribes within the country. [Art.15(4),16 and 335]
- Forbidding or any denial of admission to educational institutions that are either being maintained by the state or are receiving grants out of state funds.[Art. 29(2)]
- Special representations in the LokSabha and the state VidhanSabhas to Scheduled Castes and Tribes so as to ensure their political empowerment [Art. 330,332 and334]
- Setting up of Tribes Advisory Councils and separate departments in the state and the appointment of a special officer at the Centre to promote their welfare and adequately safeguard their inclusive interests [Art. 244, 338 and Vth schedule]
- Special provision for the administration and control of Scheduled and Tribal areas [Art. 244 , VthandVth Schedule]
- Prohibition of human trafficking and those of forced labour'
- Equal justice and free legal aid [Art. 39A]

Moreover, in order to monitor the constitutional safeguards provided for the inclusive protection and developments of the rights vis-à-vis interests of the "Dalits' within the country, statutory National Commissions for the Scheduled

Castes and Tribes have also been set up. These statutory bodies do take cognizance against any act of atrocities, either on part of the state or any other individuals, on the members of "Dalit" community.

In the same vein, The 1989 Prevention of Atrocities Act (POA)[4], so enacted by the Indian government, could be considered as an acknowledgement by the latter that caste relations are being defined by violence withi the country at large. Basically The Act denoted specific crimes against Scheduled Castes and Scheduled Tribes as "atrocities" and subsequently created corresponding punishments. Its purpose was to curb and punish violence against Dalits. The list of atrocities included humiliations such as the forced consumption of noxious substances. Other atrocities included forced labour, denial of access to water and other public amenities, and sexual abuse. The Act also permits Special Courts to try POA cases. The Act called on states with high levels of caste violence (said to be "atrocity-prone") to appoint qualified officers to monitor and maintain law and order. However in practice, the Act suffered from a near-complete failure in its implementation. There is indeed paucity of separate courts for these purposes. Often Policemen showed themselves consistently unwilling to register offences under the act. This reluctance stems partially from ignorance and also from peer protection. According to a 1999 study, nearly a quarter of those government officials charged with enforcing the Act were unaware of its existence,

Moreover, the 'Protection of Civil Rights Act, 1955' has been considered as one of the significant constitutional measures and safeguard towards ensuring protection of the inclusive human rights dignity and decency of the 'Dalits' as an indispensible component of our multicultural population. In fact, it is aimed to ensure abolition of untouchability and forbidding of its practice in any form. If practiced, it shall be treated as an offence punishable in accordance with law [Article17][5]. In this respect, The Supreme Court has also held that the fundamental right against untouchability guaranteed in this Article is available even against the private individuals and it is the state's constitutional duty to take necessary steps to ensure that this right don't get violated under any circumstances.[6]Even though various penal provisions have been provided under this legislation against untouchability, yet public consciousness and human rational human conscience is the need of hour for its proper

4 Earlier The Untouchability (Offnces) Act 1955

5 Devatajjah v. Padmanna, AIR1961Mad 35

6 People's Union For Democratic Rights V. Union Of India, A.I.R.1982 SC 1473

implementation within the country at large.

In fact, our constitution, in its basic tenets of Preamble; Fundamental Rights; Directive Principles of State Policies; constitutional machineries to safeguard the inclusive interests of all citizens with the ideal noble doctrine of "Justice, Equality, Liberty, Fraternity, Rule of Law" and alike, do aspires to protect the rights of the depressed and marginalized sections of the population with the might of Judiciary at its back to enforce the same. It may also be ascertained that from its independence in 1947, India did vied to provide jobs and educational opportunities for Dalits. The statutory provisions for these marginalized community within our Indian constitution did served as a panacea to empower 'Dalits' within our erstwhile stubborn and conservative society. Our reformed, democratic, liberal and progressive nation has witnessed Dr. K. R. Narayanan, a Dalit, as the nation's President. Many social organizations have promoted better conditions for Dalits through education, healthcare and employment. With the stern rule of law and strong judiciary at the helm of power, along with adequate constitutional provisions, it would certainly be unfair to ascertain and claim that the status of 'Dalit' within our country could be reverted back to those prevalent during the ancient periods of Indian history. Rather it would continue to be progressive in the years to come.

6. Conclusion

In India, for centuries, certain sections of people were always held as depressed subjects and were even made to bear the brunt and bruise of the exploitative socio-religious practices and caste systems so prescribed within the ancient scriptures, so directed to exert dominance of the higher castes and varnas over the lower ones, whereby the ultimate individual status of the latter was reduced to that of servitudes with extreme limitations upon their daily chores, behavior and activities. In fact, they were not even given the adequate right to live honorably along with the other higher caste people of the villages. Basically it were the 'Dalits' and Adivasis who were considered as the poorest and vulnerable groups of people in India. They were subjected not only to exploitation but were also segregated from the mainstream of the Indian social, cultural and political life. As such great injustices were perpetuated over these vast majorities of Indian population.

However, with the advent of new era of rationalization, social reformation and reason within our Independent India that these section of marginalized people secured their right to live with dignity, decency and empowerment.

Eminent luminaries like Ambedkar and E.V.Ramaswamy respectively in North and South India became prominent crusaders for the rights of downtrodden and depressed people of our country. Their sustained efforts had abetted to kindle a kind of social awareness amongst the people either of higher or the lower caste ones towards ensuring removal of social disparities and maladies to a large extent. Today even though the caste disparities have been removed from the urban areas due to socio-economic and administrative compulsions yet in rural areas these could still be found showing its presence in the form of untouchability or bonded labor within some of the small pockets present thereat. In our present vibrant and digital India, vision for a strong developed India could only be accomplished when the mental and intellectual consciousness of the people attained such a glorious height that the concept of 'Dalit' in itself becomes a matter of past dark era worthy of being forgotten.

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Government Litigations and Pendency of Cases

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Introduction

The judicial administration from the grass-root level to the highest court in the India is suffering from docket explosion of pending cases .On account of such docket explosion various courts of law are over- burdened with the arrears of cases. When delivery of justice becomes slow, expensive and complex to a large extent, the utility as well as value of the court adjudication get undermined giving rise to a feeling of despair and frustration among the litigant public. The litigation system in India is characterized by technical proceedings, dominance of legal profession and overwhelming use of adversarial system of conflict resolution. Apart from these, tendencies of the parties to stall litigation proceedings by using laws to delay litigation had lost its efficacy. The result is that the matters before the courts reach the trial stage as also the appellate stage after so many years. The number of cases pending in different Courts in India has reached at astronomical figures. As on December 2016, there are 62537 cases pending the Supreme Court while number of pending cases in various High Courts are 4005704 cases and in majority of these cases, the Government is a party.

The problem of delay is not a new problem. It is as old as the law courts. Nor is the problem peculiar to our country. Lord Devlin in his speech before the Thirteenth Legal Convention of the Law Council of Australia admitted that even in England cases are taking longer to be decided.[2] In India Committee after Committee[3] has been appointed to tackle this problem. This problem has been examined in some detail in Fourteenth Report of the Law Commission on the Reform of Administration of Justice. In 1923, Rankin Committee was appointed mainly through the efforts of Sir Tej Bahadur Sapru, the then Law Member of the Viceroy's Executive Council to deal with the problems of delay in civil courts. After a thorough and carefully inquiry into the various problems the Committee submitted its report in 1925.[4] The Committee devoted a large part of its Report to this problem.[5] The High Court Arrears Committee of 1949 presided over by Mr. Justice Sudhi Ranjan Das, was appointed to inquire and report on the advisability of curtailing the rights of appeal and revision, the extent and method of such curtailment, and any other

1 Associate Professor, Faculty of Law, University of Lucknow, Lucknow.

2 36*Australian Law Journal*, pages 277,279.

3 14th Report of the Law Commission of India-14thReport, 1958Vol.1, paras 11to13, p.14-15.

4 *Id.*, at para 11,p.14-15.

5 *Civil Justice Committee Report* (1924-25),p.I-446.

measures that might be adopted to reduce arrears of cases in the High Courts.[6] In April 1950, the Uttar Pradesh Committee was set up under the chairmanship of Mr. Justice K.N. Wanchoo for considering the question of reform in the system of administration of justice in the State of Uttar Pradesh with a view to simplify the process of law and making justice cheap and expeditious. The Committee submitted its report in 1951.[7]

Resort to court litigation has become an escape route for accountability for decisions. Once the court intervenes, it is assumed that the concerned department or undertaking should not take any decision and leave it to the court to adjudicate the claim. If the decision is adverse such officer prefers an appeal and by vertical movement the matter generally reaches the apex court. The officer continues to litigate at the cost of public exchequer. The basic reason behind such tendency is that the fight between an individual on the one hand and the Government on the other is an unequal fight. The resources of the individual are limited and the State or Public Sector Undertakings(here in after referred as PSUs) have unlimited resources to be invested in futile litigation so as to exhaust and exasperate the individual who has taken cudgels to bring the matter to the court. A lack of credibility about the actions taken by the Government or PSUs has also contributed to the litigation explosion.[8]When entirely frivolous litigation reaches at the doorstep of the Supreme Court, one feels exasperated by the inaction and policy of do nothingness evidenced by blindly following litigation from court to court.[9]

The State itself has become a biggest litigant, either fighting a citizen or its own department or taking every case into appeal instead of performing the duty of addressing development and welfare of the people, who challenged its actions.[10] The large number of cases against State cannot be a good sign of good governance[11]. This is deficit in governance. Governance is not just army, police, road building *etc.,* but governance also is adjudicating rights of a citizen which is legitimately due to him. Every case filed irrespective of merit is burdening the judiciary, costing the exchequer and increasing the pendency of cases[12]. As per the Government of India

6 *Supra* note.4,para 12,p.15.

7 *Id.*, at para 13 p.16.

8 Law Commission of India-126th Report,1988,para 2.2,p.8.

9 *Id.*, at p.10.

10 *Mr. Suresh Kumar Ranga v. Ministry of Law and Justice*,17 February,2015, File No. CIC/SA/A/2014/000386,p.4.

11 http://indian express.com/article/india/indiaothers/government is the biggest litigant in the country sc judge /Feb 12, 2015.

12 *Supra* note 11 at p.5.

(Allocation of Business) Rules,1961 the Department of Legal Affairs is assigned the duty to conduct cases in Supreme Court, High Courts and other Courts on behalf of the Central Government.[13] Government litigation reportedly constitutes nearly half of all litigations in Indian judiciary. It has contributed to heavy judicial back-log and thus affected the justice delivery in India. However, there is no authoritative governmental source to confirm the actual quantum of its litigations.[14]

The view that a litigation policy must be initiated in order to counter delays in disposal of cases across the country in the courts, was not ignored at all by the judiciary and from the very early times the courts hinted in their various decisions for the formulation of the same. The first step needed in this direction, as felt by the courts was the minimization of court cases involving government agencies.

Need for National Litigation Policy

It was widely felt that absence of a definite litigation policy is one of the major factors for pendency of cases. Our existing general law is not capable of solving huge arrears of cases in absence of any specific guidelines or policies. As far back as in year 1974, the Supreme Court of India emphasized the need of a special procedure for government litigations to highlight an activist policy of just settlement of claims where State is a party. In the case of *Dilbagh Rai Jarry v. Union of India*[15]while delivering the judgement, Hon'ble Mr. Justice Krishna Iyer commented in his obiter dictum that I feel impelled to make a few observations not on the merits but on government disposition to litigation, the present case being symptomatic of a serious deficiency. In this country the State is the largest litigant today and the huge expenditure involved makes a big draft on the public exchequer. In the expanding dimensions of state activity and responsibility, it is unfair to expect finer sense and sensibility in its litigation policy, the absence of which in the present case has led the Railway callously and cantankerously to resist an action by its own employee, a small man, by urging a mere technical plea which has been powered right upto the summit court here and has been negatived in the judgement just pronounced. The instances of this type are legion as is evidence by the fact that then Law Commission of India in its Report[16]on amendments to the Civil Procedure Code has suggested the deletion of Section 80,

13 Government of India (Allocation of Business) Rules,1961,Part –A, point no.3, Department of Legal Affairs, Ministry of Law,p.17.

14 Jauhar, Ameen "Time to move towards a new litigation policy," *The Hindu*, Friday, November 18,2016, p.11

15 AIR 1974,SC 130;(1974)2 SCR 178.

16 Law Commission of India-27th Report, 1964, point no. 50-52, p.21-22.

finding that wholesome provision hardly ever utilized by the Government and has gone further to provide a special procedure for government litigation to highlight the need of an activist policy of just settlement of the claims where the State is a party. It is not right for a welfare state like ours to be Janus-faced and while formulating the humanist project of legal aid to the poor, context the claims of poor employer under it pleading limitation and the like[17].

In another case, *P.P. Abu Backer v. Union of India*[18]the observations of Justice Krishna Iyer in Kerala High Court are also worthy of mention in this regard. In this case the Court stated that State under our Constitution undertakes economic activities in a vast and widening public sector and inevitably gets involved in disputes with private individuals. But it must be remembered that the State is no ordinary party trying to win a case against one of its own citizens by hook or by crook. For the State's interest is to meet honest claims, vindicate a substantial defence and never to score a technical point or overreach a weaker party to avoid a just liability or secure an unfair advantage simply because legal devices provide such an opportunity. The State is a virtuous litigant and looks with unconcern or immoral forensic successes so that if on merits the case is weak, government shows a willingness to settle the disputes regardless of prestige and other lesser motivations which move private parties to fight.[19] The Court further added that the lay out on litigation costs and executive time by the State and its agencies is so staggering these days because of the large amount of litigation in which it is involved that a positive and wholesome policy of cutting back on the volume of law suits by the twin methods of not being tempted into forensic show-downs where a reasonable adjustment is feasible and ever offering to extinguish a pending proceeding on just terms, giving the legal mentors of the government some initiative and authority in this behalf.[20]

The above cases and the views of judges reveal that the taking of concrete steps in the direction towards reduction of cases initiated or filed for or against the government was a prime issue since long back in order to avoid the pendency of cases in the courts across the country as well as to minimize the delay in dispensing of justice caused by the same.

In another major decision of the case of *State of Punjab v. M/s Geeta Irons Brass works Ltd*,[21] the Supreme Court in a case under Section 34 of the Arbitration Act, 1940 and section 80 of Civil Procedure Code,1908 (here in after referred as

17 Law Commission of India-54th Report,1973,point no. 27.6-27.14, p.21-22.

18 AIR 1972 Ker.103.

19 *Id*, para 5,at p.107.

20 *Ibid.*

21 AIR 1978 SC1608.

CPC) remarked that where parties have by contract agreed to refer their disputes to arbitration, the courts should as for as possible proceed to give an opportunity for resolution of disputes by arbitration rather than by judicial adjudication. Krishna Iyer *J*., while delivering the judgment stated that we like to emphasize that Governments must be made accountable by parliamentary social audit for wasteful litigative expenditure inflicted on the community by inaction. A statutory notice of the proposed action under Section 80 CPC is intended to alert the State to negotiate a just settlement or at least have the courtesy to tell the potential outsider why the claim is being resisted. Now, Section 80 has become a ritual because the administration is often unresponsive and hardly lives up to the Parliament's expectation in continuing Section 80 in the Code despite the Central Law Commission's recommendation for its deletion.[22] An opportunity for settling the dispute through arbitration was thrown away by sheer inaction. A litigative policy for the State involves settlement of Governmental disputes with citizens in a sense of conciliation rather than in a fighting mood. Indeed, it should be directive on the part of State to empower its Law Officer to take steps to compose disputes rather than continue them in the Court. We are constrained to make these observations because much of the litigation in which governments are involved adds to the case load accumulation in courts for which there is public criticism. We hope that a more responsive spirit will be brought to bear upon governmental litigation so as to avoid waste of public money and promote expeditions work in courts of cases which deserve to be attended to.[23]

It has been emphasized by the court from time to time that government litigation are on the rise which need to be controlled drastically in order to avoid delay of justice in courts and the first step forward in this regard would be none other than formulation of a legislation policy.

In *Mundrika Prasad Sinha v. State of Bihar,*[24] the Supreme Court of India once again asserted that the State of Bihar, like many other States in the country, has an enormous volume of litigations. Government litigation policy is vital for any State if resources are to be husbanded to reduce rather than increase its involvement in court proceedings. It is lamentable that despite of a national litigation policy for the States having been evolved at an All India Law Minister's Conference way back in 1957 and despite the recommendation of the Central Law Commission to promote settlement of dispute where government is a party, what we find in actual

22 *Supra* note 17, 18.

23 *Ibid*.

24 AIR 1979 SC 1871; (1980)1 SCR 759.

practice is a proliferation of government cases in courts uninformed by any such policy. Indeed, in this country where government litigation constitutes a sizable bulk of the total volume, it is important that the State should be model litigant with accent on settlement.[25]

The clear-cut intention of judiciary was not only directed towards formation of a litigation policy to minimize the litigations on part of government with individuals but also towards eradication of litigations between different departments of he government or between one department of the government and public sector undertakings.

In *Chief Conservator of Forests, Government of Andhra Pradesh v. Collectors and Others*[26] the Supreme Court asserted that under the scheme of the Constitution, Article 131 confers original jurisdiction on the Supreme Court in regard to a dispute between two States of the Union of India or between one or more States and the Union of India. It was not contemplated by the framers of the Constitution or the CPC that two departments of a State or the Union of India will fight litigation in the court of law. It is neither appropriate nor permissible for two departments of a State or the Union of India to fight litigation in a court of law. Indeed such a course cannot but be detrimental to the public interest as it also entails avoidable wastage of public money and time. Various departments of the government are its limbs and therefore they must act in co-ordination and not in confrontation. Filing of a writ petition by one department against the other by invoking the extraordinary jurisdiction of the High Court is not only against the propriety and polity as it smacks of indiscipline but is also contrary to the basic concept of law which requires that for suing or being sued, there must be either a natural or a juristic person. The States/Union of India must evolve a mechanism to set at rest all inter- departmental controversies at the level of the government and such matters should not be carried to a court of law for resolution of the controversy.[27] The decision of Supreme Court was followed in spirit in *Punjab and Sind Bank v. Allahabad Bank*[28] and *Mahanagar Telephone Nigam Ltd v. Chairman Central Board, Direct Taxes and Another*[29] as well as *U.P.S.E.B. and Another v. Sant Kabir Sehkari Katai Mills Ltd*.[30]

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25 *Ibid*, See also *State of Bihar v. Bera Colliery Company (P) Ltd*., AIR 1991 Pat.178; *Suresh Kumar* v *Board of Trustees, Port of Calcutta*(1988) 17 ECC 348.

26 (2003) 3 SCC 472.

27 *Id*., at para 14 and 15; See also *Oil and Natural Gas Commission v. Collector of Central Excise* (1992) 2 Suppl. SCC 432; *Oil and Natural Gas Commission and Another v. Collector of Central Excise*, (1995) 4 Suppl. SCC 541.

28 (2006) ISCC 158.

29 (2004) 6 SCC 431.

30 (2005) 7 SCC 576.

These decisions and directions of the highest court of the country are merely symptomatic of the litigious culture recklessly cultivated by bodies such as Government/PSUs. They are under constitutional obligation to manifest constitutional culture in their dealings and conduct. The officer who either initiates or defends litigation and then prefers appeal after appeal is never personally responsible for the outcome. Not a single case has been brought to the notice of court or public or even Public Accounts Committee of Parliament, where an officer who frivolously pursued litigation was hauled up for his improper behavior inconsistent with the duties of his office[31].

The one enjoys the benefit of litigating at somebody's cost and individual pays from his own pocket. Even low paid lowest grade employees are not spared from the tortuous litigation, disclosing arrogance and superiority complex of the executive of Government/PSUs, almost serving a notice how can a lower grade employee challenge their decision. This comment was made by the court in a case where one Shanker Dass, a cash clerk in the Delhi Milk Scheme under the administrative control of Government of India, was dismissed from services. The poor clerk being deprived of his livelihood was forced to go to the court and he was pursued from court to court for a period of 23 years. The Supreme Court holding that the penalty of dismissal was 'whimsical' ordered reinstatement in service with full back wages from the date of dismissal till reinstatement[32]. There is a similar case of a forest guard from State of Madhya Pradesh disclosing same attitude and receiving same critical comments the court[33].

The agony and litigation both are relevant factors. In the case of *State of Kerala v. M. Padmanabha Nair*[34], an employee of Government was not paid pension and gratuity admissible on retirement to which he was entitled has been unjustifiably withheld. The court having regard to all facts directed the payment with interest.

The case of Deoki Nandan Prasad (I, II and III) draws a more sordid picture of utter indifference and callousness bordering on vendetta. One Deoki Nandan Prasad retired after rendering 39 years of service in Bihar Education Service and was entitled to pension. But the same was not paid, then he filed a petition in the Supreme Court claiming pension and arrears. A dare and shocking contention was taken on behalf of the State of Bihar that pension being a gratuitous payment,

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31 *Supra* note 9 at p.17.

32 *Shanker Dass v. Union of India*, AIR 1985,SC 772.

33 *State of Madhya Pradesh v. Ram Ratan, Jabalpur Law Journal* Vol.30 (1981)105. See also *State of U.P. v. Mohd. Sharif (dead) through Legal Representatives*, AIR 1982 SC937.

34 (1985)1 *L L J* 530.

the action in a court is not competent for enforcing payment of pension. The Constitutional Bench negative the contention and issued a Mandamus directing the State of Bihar to compute the pension and pay the same. Despite the Mandamus of the Supreme Court for a period of 12 years, no action was taken by the State of Bihar and the poor pensioner was pushed from pillar to post[35].

He again knocked at the door of the Court. The Court directed Rs. 25,000 be paid to the pensioner as exemplary cost for the callous, indifferent and whimsical attitude of the authorities.[36]

The same attitude permeated and the poor pensioner had to come to the Supreme Court for the third time. This time a notice of contempt was issued. While disposing of the matter, the Court observed that it would do no credit to the respondent if the history of litigation is recapitulated and it would bring the administration of State of Bihar into disrepute[37].

Commenting on the mentality of litigation by Government,the Supreme Court in the case of *Rajasthan State Road Transport Corporation, Jaipur v. Narayan Shanker and Another*[38] has said that it would have been more humane and just if instead of indulging in wasteful litigation, the Corporation had hastened compassionately to settle the claim so that goodwill and public credibility could be improved. It was improper for the Corporation to have tenaciously resisted the claim.

Likewise, keeping in view the mental pain, agony and humiliation suffered by a petitioner Hon'ble Supreme Court in the case of *Ramrameshwari Devi and Others v. Nirmala Devi and Others*[39] has given emphasis to compensate the litigants who have been forced to enter litigation. This view was judicially recognized by the Supreme Court in the case of *A. Shanmugam v.Ariya Kshetriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam represented by its President and Others.*[40] In this case the Supreme Court considered a catena of earlier judgements for forming opinion with regard to payment of cost[41].

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35 *Deoki Nandan Prasad v. State of Bihar*,(I), AIR 1971,SC1409.

36 *Deoki Nandan Prasad v. State of Bihar*,(II),(1983)4 SCC20.

37 Deoki Nandan Prasad *v.* State of Bihar, (III),(1984) Suppl. SCC 410.

38 AIR 1980,SC 695.

39 (2011) 8 SCC 249.

40 (2012) 6 SCC 430.

41 *Indian Council for Enviro-Legal Action v. Union of India,* (2011) 8 SCC 161; *Ram Krishna Verma v. State of U.P.*,(1992) 2 SCC 620; *Kavita Trehan v. Balsara Hygiene Products Ltd.*,(1994) 5 SCC 380; *Marshall Sons and Co. (I) Ltd. v. Sahi Oretrans (P) Ltd.*, (1999) 2 SCC 325; *Padmawati v. Harijan Sewak Sangh,* (2008) 154 DLT 411; *South Eastern Coalfields Ltd. v. State of M.P.,* (2003) 8 SCC 648 and*Safar Khan v. Board of Revenue*, 1984 (suppl.) SCC 505.

In the case of *South Eastern Coalfields Ltd., v. State of M.P.*[42], the apex Court while dealing with the question of unscrupulous litigants held that litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to interlocutory order favourable to them by making out a prima facie case when the issue are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation.

An analysis of discussed cases reveals that the question of award of cost is meant to compensate a party who has been compelled to enter litigation unnecessarily for no fault on its part. The purpose is not only to compensate a litigant but also to caution the authorities to work in a just and fair manner in accordance to law. In this regard the unfortunate part in India is that considered and thoughtful judgement keeping in view the future of the country or the system is ignored by the executive without correcting itself and adhering to old junk system. Gross injustice done to the petitioner is a case of such mind set. It requires hammering by administration of justice so as to obey and respect law and remains within the four corners of empire of law. These cases coupled with others formed the basis of initiation of a National and State level Litigation Policies in the country.

Legislative Stepes

As far as the Government litigation is concerned, it has neither policy nor plan nor direction nor effective method of management of litigations. The growing accumulation of arrears of cases in Supreme Court as well as in various High Courts and subordinate Courts had created a situation which necessitated a careful examination of the problem of proper functioning of the machinery of the courts. A number of Committees have been appointed from time to time to deal this problem so as to modify the system to the needs of the community. Keeping in view the comments passed by the Courts, the suggestions made from time to time both in Parliament and outside, that a Law Commission should be appointed for suggesting ways and means of improving the system of judicial administration and to lay down broad guidelines on litigation policies and strategies with a view to reduce litigations and load on court system. Considering all these factors 126th

42 (2003) 8 SCC 648.

Law Commission was appointed by the Central Government to recommend on litigation policy to curb the menace of pendency of cases.

The Law Commission of India presented a detailed report and its recommendations on the strategies and litigation policy for the Government and Public Sector undertakings which should be adopted in light of the prevailing congestion of Government cases in the Courts in 1988.[43]

The Law Commission was charged with a duty to recommend basic reforms in the legal justice system were handed over the duty to devise the desirability of formulation of the norms which the Government and public sector undertakings must follow in regard to settlement of its disputes. It was advised that the Government and Public Sector Undertakings must have certain strategies and policies that encourage the avoidance of litigation and settlement of disputes by alternative methods since litigation is a wastage of time and money. Moreover it is required that the Government and PSU conserve its resources and determine its priorities of expenditure by a judicious approach so that unnecessary litigation does not eat away its resources which are meant otherwise for productive beneficial schemes and financial assistance. Further, the design of such policy would also bring down the load on the courts and expenses on the judicial setup.[44]

The court dockets are clubbed by litigation undertaken or contested by the Government, both State and Central and Public Sector Undertakings. More and more administrative actions directly affect the people at large and the lack of credibility about the actions taken by the Government and PSUs have already contributed to excessive litigation. The Court cannot sit on the actions of Government as an auditor and the function of the courts is limited to testing whether the administrative action has been free and fair and is not unreasonable.[45]

It was acknowledged in the report that most of the litigation in which a PSU/Government is a party emanates from an unhealthy attitude on part of the administrator not to act consistent with the principles of natural justice in exercise of the power conferred on him.[46] It was suggested that, if litigation is unavoidable, an alternative method of resolution of dispute has to be found. The Law Commission was certainly referring to medium of arbitration and mediation for the resolution of disputes between Government and the individuals.

43 Law Commission of India-126th Report, 1988.

44 *Id.*,point no. 1.9, p.7.

45 *Id.*,point no. 2.3 p.9. See also *Fertilizer Corporation Kamgar Union (Regd.) v. Union of India*, (1981) 1 SCC 568 at p. 583.

46 *Id.*, point no. 3.5 p.20-21.

The Law Commission in its 126th Report considered various suggestions and remedies by interested groups for setting up a definite legislative policy to eradicate the problem of mounting litigations on part of Government and PSUs. For example, the Election Commission of India canvassed for a proposition that the court dealing with election petitions must, while exercising its power to admit a petition must not look at it merely mechanically at the threshold but should reject petitions against those who are not necessary parties to the petition. Various PSUs suggested that the court should freely exercise the power to compel the parties to resort to arbitration. It was even suggested that the Arbitration Act must be amended to the extent of incorporating a provision where even if the parties to the litigation did not have among themselves an arbitration agreement, the court must be empowered to force the parties in appropriate cases to go for arbitration.[47] Another suggestion considered was that special tribunals must be set up to deal with litigation involving Government and PSU and a litigation Ombudsman be appointed with vast jurisdiction.[48] The suggestion for setting up of a Lok Adalat to deal with disputes between PSU and the Government, local authorities and other authorities and between one PSU and the other PSU.

After making detailed study of the circumstances prevailing in the country, factors contributing to excessive litigation on part of Government and PSU as well as heeding to suggestions given by interested bodies and persons as well as the courts in their decisions, the Law Commission in its 126th Report gave the following recommendations regarding litigation policy for Government and Public Sector Undertakings–

i) Government of India must issue a compulsory directive binding on public sector undertakings that in event of a dispute between any one or more PSU on one hand and the Government on the other, the parties shall refer the dispute to arbitration by a legal device,it must be presumed that in such cases a valid arbitration agreement subsists.[49]

ii) An arbitration panel to be composed of retired Supreme Court and High court Judges from which parties may select arbitrators[50].

iii) Arbitration Act, 1940 to be amended to empower the court to dismiss the suit in which PSU initiate litigation without resort to arbitration.[51]

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47 *Id*., point no. 5.5 and5.6, p. 30-31.

48 *Id*., point no.5.13,p.32. This suggestion probably led to the enactment of Administrative Tribunal Act, 1985.

49 *Id* ., point no. 8.6, p.40.

50 *Id* .,point no. 8.7, p.41.

51 *Id* ., point no. 8.8,p.41.

(iv) Any grievance relating to PSU and its employees must be first taken up by a Grievance cell to be established by every PSU consisting of three representatives each from management and work men side and to be presided over by a retired judge of Supreme Court or High Court or a Chairman of the Industrial Court or Tribunal. The decision of Grievance Cell shall be binding on all.[52]

(v) In case of disputes relating to Government of India, after receipt of notice served to it under Section 80 of CPC, if the Government feels that the demand made is unjust or unfair, it should make it compulsory for the officer concerned to formally write to the person concerned who served the notice, to refer the dispute to one of the arbitrators of the panel of arbitrators. If in case the offer of arbitration is refused by the individual then in a suit filed on behalf of individual, the Government of India must make the same offer of arbitration before the Courts and the Court, empowered by amendment of Arbitration Act must compel the person to go for arbitration.[53]

(vi) In case of disputes between the Government of India and its employees, the same procedure must be followed as in case of PSU *i.e*., dispute to be decided by the Grievance Cell to be set up by the Government.

(vii) In order to courts excessive litigation, a central body in form of Federal Legal Cell must be formed to continuously overview functions of different bodies recommended. The role of Federal Legal Cell would be to co-ordinate ways and means of reducing litigations between Union and States, States and State, Government and PSU, Government and citizens as well as PSU and citizens. The Federal Legal Cell must comprise of retired Judges, retired law officers of both Centre and State and retired senior executives of PSU. The cell would also work as a courier between Executive and Judiciary.[54]

(viii) Lastly, legislative body of the Government must also be involved in these functions. Thus a Parliamentary Committee on Litigation must be formed having power to inquire into the every litigation by or on behalf of the Government to question the correctness of the decision with a view to pointing out that case should be taken in future not to resort to such litigation. The Parliamentary Committee would also study and seek information on expenses incurred by Government and PSU on litigation and the validity or irrelevancy of it.[55]

52 *Id* .,point no. 8.11, p.41.
53 *Id* .,point no. 8.18, p.42-43.
54 *Id* .,point no. 8.21, p.43-44.
55 *Id* .,point no. 8.22, p.44.

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The Australian Practice Statement Law Administration, 2009

This concept of national litigation policy has been explored by other countries as well. For example, the Australian Taxation Office conducts its litigation in accordance with the PSLA 2009/9 Conduct of Tax Office Litigation, which is an elaborate set of guidelines obligating the government to be a model litigant. The Australian Taxation Office formed the basis of outlay of the National Litigation policy 2010 in India. It would not be order to discuss the main principles and guidelines of this policy.

In 2009, the Australian government issued a Practice Statement Law Administration,2009 (here in after referred as PSLA 2009/9) relating to conduct of Tax Office Litigation in order to outline the policies and guidelines to be followed in the conduct of Tax Office Litigation.

The PSLA 2009/9 provides a comprehensive set of guidelines for staff of taxation office involved in litigation. It sets out the Tax Office's approach to litigation, their obligations as a commonwealth litigant and the process that the tax officers must follow to ensure that they meet those obligations as well as those imposed by the courts and tribunals.[56]

The principle lies in the fact that the Tax Office strives to have all disputes brought to finality in a fair, timely and equitable manner consistent with law as also it supports the appropriate use of alternative dispute resolution techniques to limit the need of litigation and cost of litigation. The appreciable aspect of this is that in Australia the Tax Office's approach to litigation is never to win at all costs.[57]

Guiding Principles of PSLA, 2009

In Australia conduct of litigation by Tax Office is guided by the principles provided under section 1(8) of the PSLA, 2009/9. These principles are as follows:

a) the Commissioner in his statutory functions and under the executive arm of the Government has responsibility for administering various laws enacted by Parliament such as those relating to taxation and superannuation, administering those laws properly will involve litigation. The Tax Office will conduct and manage litigation as a model litigant in accordance with its obligations under the law, the Legal Services Directions, relevant court and tribunal rules and directions, and other relevant internal and external policies and guidelines;

56 Statement of PSLA 2009/09, government of Australia site law. ato.gov.in

57 Section 1 (6) and 1 (7) of PSCA 2009/9 .

b) the model litigant obligation does not prevent the Commissioner from acting firmly and properly to protect the interest of the Commonwealth;

c) the Tax office will have regard to its strategic focus, the desire to obtain law clarification in a timely and cost effective manner which provides great certainty for the community;

d) the Tax office holds respect for law as an underlying principle and applies this principle in the conduct of the litigation for the resolution of disputes and in managing the outcome of judicial decisions;

e) the Tax office seeks to promote an environment -

   i) where tax payers have a reasonable understanding of their right and obligations or can readily obtain adequate guidance to provide that understanding;

   ii) where in practice the law can be complied with voluntarily;

   iii) where the law is applied and enforced fairly; and

   iv) where disputes about the law's operation can be resolved expeditiously.

f) the Tax Office has a continuing commitment to a Public Interest Test Case Litigation Program through, which tax payers can be provided with financial support for their litigation costs in appropriate circumstances to achieve law clarification;

g) an objective of the Tax Office litigation function is to assist decision makers in reaching well- reasoned and supportable decisions to avoid unnecessary litigation;

h) the Tax Office will assess risk litigation cases to ensure that cases are appropriately managed. All cases will have equipped with appropriately capable teams marshaled to conduct litigation;

i) the Tax Office aims to resolve disputes in a fair and timely manner, consistent with the law;

j) the Tax office will be consistent, vigorous, firm and efficient in the conduct of litigation;

k) if possible and appropriate, emphasis will be placed on resolving disputes through consultation, negotiation, mediation and formal Alternative Dispute Resolution (here in after referred as ADR) processes available through tribunals and courts to avoid unnecessary litigation and related costs.

l) consistent with the model litigant obligation, the Tax Office aims to handle cases efficiently and effectively in accordance with its responsibility to the community of safeguarding public revenue and also to fulfill its responsibility to other litigants and the justice system.

m) The Tax Office will not adopt an unnecessarily adversarial approach where the tax payer is unrepresented.

n) the Tax Office will foster appropriate relationship with the courts, tribunals and other parts of the legal system to promote efficiency in the conduct of litigation practice and procedure.[58]

Besides this, the Attorney General, as first Law Officer, is responsible for the maintenance of proper standards in Commonwealth litigation and accordingly requires that the Commonwealth act as a model litigant in the conduct of litigation.[59] The requirement for Government litigants to act as model litigants is clearly set out in the Legal Services Directions.[60] The statement also gives priority as well an obligation on part of Government to resort primarily to Alternative Dispute Resolution techniques.[61]

It is undoubtedly a welcome step on part of the Australian Government to set out Statement of Law Administration in regards to Conduct of Tax Office Litigation, in order to reduce litigation as well as connected unnecessary cost involved in it.

The policies and guidelines incorporated therein have also formed a base for National Litigation Policy in India. In 2010, due to pendency of 2.65 Crore of legal cases all over India at various levels of judiciary, a National Litigation Policy (here in after referred as NLP) was formulated by the Ministry of Law and Justice, Government of India to reduce the government litigations. It was prepared to bring down the litigation from government agencies and making them responsible in filing cases. The policy acknowledged that Government and its various agencies are the pre-dominant litigants in the tribunals and the courts in the country. So, it is the responsibility of the government to protect various rights of the people of the country and one of the efficient ways of it is that the government must first of all itself reduce its involvement in various litigations on its part in the country.

The basic philosophy behind the policy is based on the fact that delay in justice or judicial delay is fast spreading and thus has made the justice system unjust. In

58 Section 1 (8), PSLA 2009/9.

59 Section1 (16), PSLA 2009/9.

60 Apperndix B to the Leagl Services Directions, PSLA 2009/9

61 Section 1 (21) to 1 (25), PSLA 2009/9.

order to reduce the burden of cases pending in the country, where government is a major litigant must be efficient and responsible in initiating litigations. An efficient and responsible litigation on part of Government would tackle the problem of long pendency of cases in the courts and would result in reducing the load on the judiciary by minimising the number of cases. As a practical and sensible step a large number of cases initiated by the government can be solved merely by holding talks, taking a step forward and compromising on main issues.

Efficient litigation can be achieved by focusing on the core issues involved in the disputes and by managing and conducting litigation in a co-ordinated, cohesive and time bound manner. Unnecessary litigation must also be avoided. On the other hand, responsible litigation would imply elimination of negative factors that lead to miscarriage and delay of justice. It would also mean avoiding of false pleas, frivolous disputes and attempting to mislead the courts by suppressing necessary facts.

The National Litigation Policy aims to achieve this and on eradicating the philosophy that all matters must be left on the courts to decide. The basic purpose is to reduce government litigation in courts to ensure that the valuable time of the court is utilized for handling other pending cases in order to reduce average pendency time of cases in courts.

On 3rd June 2009, in an address to joint session of Parliament by the then President of India, the need for a roadmap for judicial reform was emphasised taking note of delays in the justice delivery system and arrears of pending cases in courts across the country. Further, on 16th August 2009, the issue of the huge arrears and backlog of cases as the prime source of concern related to the Indian legal system was addressed by the Prime Minister of India in Conference of Chief Ministers and Chief Justices.

Subsequently, a National Consultation for Strengthening the Judiciary Towards Reducing Pendency and Delays was held from 24th to 25th of October 2009 in New Delhi which was presided over by Dr. M. Verappa Moily, Union Minister for Law and Justice[62].In his inaugural address in the Convention Hon'ble Chief Justice of India Mr. K.G. Balakrishnan, acknowledged that in recent years the disposal rates of judicial officers were actually improving with each passing year but the rate of institution of fresh cases is far higher. He declared the present agenda as being

62 The other associated legal lumenaries were Dr. N.R. Madhava Menon, Shri GoolamE.Vahanvati, Altorney General of India, Shri Gopal Subramanium, Solicitor General of India, Shri T.K. Vishwanathan, Law Secretary and Member of Bars from High Courts.

reducing the existing pendency and arrears of court cases. For eradicating the pendency of cases he suggested that some aspects need immediate attention and urgent action such as manpower planning, physical infrastructure and procedural innovations. Besides the Chief Justice, the Union Minister for Law as well as the Attorney General and Solicitor General stressed on reducing the volume of cases and litigation that involves government as a party. After an extensive discussion in the said Convention, on 25th October 2009 a resolution was passed with the commitment of Justices of Supreme Court of India and other members of the judiciary, Members of Bar and representatives of Union Ministry of Law and Justice to dedicate themselves to reduce the pendency of cases from 15 years to 3 years and to work together to implement the various steps required to ensure expeditious, qualitative and inclusive justice. The resolution also acknowledged the initiative taken by Government of India to frame a National Litigation Policy with a view to ensuring conduct of responsible litigation by the Central Government and it was urged that the State Governments also evolve similar policies of litigation.

The resolution emphasized number of key points that illustrate the background and purpose of the NLP. Recognising the value of NLP as a method to curb down the pendency of cases the Government approved the proposal to operationalize the National Mission for Justice Delivery and Legal Reforms to realize and implement the objectives set out and adopted in the said Convention. Although the setting up of National Mission was approved 'in principle' on 3rd December 2009, it was only in September 2011 that the Union Cabinet approved its establishment and committed to spend Rs. 5110 Crore in the next five years for the Mission. The objectives of the Mission aimed at disposal of pending cases in three years from the current average of 15 years by adopting a coordinated approach consisting, inter alia of providing better infrastructure for courts including computerisation, increase in strength of the subordinate judiciary and for taking policy and legislative measures in areas prone to excessive litigation. The time frame for National Mission was set out to be of five years from 2011 to 2016.

Indian National Litigation Policy, 2010

Unfortunately, despite a National Litigation Policy for States having been evolved at an All India Minister's Conference way back to 1957 and recommendation of the Central Law Commission to promote settlement of disputes where Government is a party was not followed in actual practice[63]. The resolutions passed at the National Consultation for Strengthening the Judiciary toward Reducing Pendency

63 *Supra* note.25.

and Delays held on 24th - 25th of October, 2009 were acknowledged by the Central Government and a National Litigation Policy was formed in 2010. The Policy consists of ten heads. Head one is introductory. The other consecutive heads are the vision/ mission, government representation, adjournments, pleadings/counters, filing of appeals, limitation/delayed appeals, alternative dispute resolution-arbitration, specialized litigation and review of pending cases. It can be said that to a great extent this policy is inspired and influenced by the Australian PSLA 2009/9.

The vision and mission of the NLP is based on the recognition that Government as well as its constituent agencies are the main litigant in courts and tribunals across the country and the responsibility of the Government is to protect the right of the citizens and to respect fundamental rights of the people. The Government must not forget this basic principle and as such strive to be an efficient and responsible litigant.[64] The idea is that the Government must cease to be a compulsive litigant and the easier way that 'let the court decide must be discarded' altogether.[65]

The purpose of the policy is to achieve the goal of the National Legal Mission to reduce average pendency time of cases in the courts to 3 years from an existing average of 15 years[66]. The main emphasis and priority of the Government must be welfare legislation, social reform, and assistance to weaker sections and senior citizens.

The National Litigation policy recognizes that to ensure the success of the policy, all the sections like the Ministry of Law and Justice, Heads of various Departments, Law officers, Government Counsels and individual officers connected with litigation must act together and play their respective roles efficiently. As such the Head of the Department of Government agencies must appoint Nodal Officers having expertise in the field of law. The Nodal Officers must also be trained to understand the role they are required to play. [67]

Accountability can be vissioned at various levels including at the level of Officers in Charge of Litigation, those responsible for defending cases, all lawyers and Nodal Officers *etc*. Empowered Committees were required to be set up to monitor the implementation and accountability. The Nodal Officers and Head of the Departments shall send all relevant data to the Empowered Committees, which at the National Level shall be chaired by the Attorney General of India and such other members, not exceeding six in number as may be appointed by the

64 Point I (1), National Litigation Policy, 2010, p.3.

65 Id ., point I (2),p.4.

66 www.pib.gov.in>news site>print release.

67 *Id* ., point I(4)(A)and(B),p. 4-5.

ministry of Law and an Additional Secretary to be the Member Secretary. Besides this, there will be four Regional Empowered Committees to be chaired by an Additional Solicitor General nominated by the Ministry of Law. It shall include all the Assistant Solicitor General of the Region and such other members including a member secretary nominated by Ministry of Law. The Regional Committees shall be required to submit monthly reports to the National Empowered Committee which shall further submit them to the Ministry of Law in a comprehensive manner. The responsibility of the Empowered Committee shall be to receive and deal with suggestions and complaint including those from litigants and Government Departments and take appropriate measures thereto.[68]

Screening Committees shall be formed from the representatives of various Government Departments to ensure that the lawyer included in the panel of Government Advocates should be competent and efficient to represent the Government in various litigations. The panel lawyers must be well equipped with infrastructure such as computer, internet links *etc*. and the conduct of training programmes and seminars as well as workshops shall be encouraged. Conferences on Regional and National level should organized for the government advocates to share problems and matters of mutual interest. The Nodal Officer will be responsible for case management and shall examine whether cases have gone off the track or are being unnecessarily delayed.[69]

It was also contemplated in NLP, 2010 that frequent adjournments of cases by Government advocates is to be avoided at all costs. A reasonable adjournment may be applied for instructions in cases where the Government is a defendant or respondent but it should be ensured that the said instructions shall be made available by the next date of hearing. Where any difficulties arises in communication of relevant instructions in time, in such cases the Nodal Officer or the Head of the Department shall be informed. Here again the Nodal Officer shall be responsible to coordinate the conduct of cases and to monitor that the progress of litigation is not hampered due to adjournments.[70]

As regards pleading and counters, the National Litigation Policy, 2010 provides that suit or other proceedings initiated on behalf of the Government shall be drafted with care and precision. All necessary dates and documents must be included and properly annexed and the pleadings must not be incomplete or full of typing errors. A special format for Civil Appeals, Special Leave Petitions, Counter

68 *Id*., point I (C) and (D).
69 *Id*., point II (A) to (M),p.7-9.
70 *Id*., point III (A) to (E), p. 10-11.

Affidavit *etc*.,will be formulated and circulated as way of guidance in form of a government advocates manual.[71]

As a special direction for conduct of appeals, it provides that appeals shall not be filed against ex-parte interim orders. First attempts must be made to have the said order vacated and appeal must only be filed where the order is not vacated and its continuation shall cause prejudice to the Government. Direct appeal to Supreme Court must only be resorted in exceptional circumstances.[72] It was also provided that orders of tribunals should be challenged only as an exception and not as a matter of routine. In service matters, no appeal shall be filed in cases in which the matter in issue is an individual grievance without any major repercussion or where the matter pertains to a case of pension or retirement benefits without involving any principle or financial implication or without setting any precedent. Similarly guidelines for matters in which appeals and proceedings challenging orders of Administrative Tribunals or of revenue matters were also clearly and specifically laid down. Moreover, circumstances in which appeals may be filed before the Supreme Court were also specified in the policy.[73]

It was acknowledged by the Ministry of Law and Justice that even good cases on part of the Government were being lost because even appeals in strong cases were being filed beyond the lawful period of limitation without any proper explanation for delay or that of condonation of delay. The NLP, 2010 has made it the duly of each Head of the Department as well as Nodal Officer to call for details of such cases and for identifying the cause of delay and persons responsible for it. The counsels should carefully draft application for condonation of delay identifying clearly the areas and causes for such delay.[74]

It was recognized by the Ministry of Law and Justice that in order to bring down the number of cases being filed for or against the Government resulting in over-burdening the workload on the judiciary. The priority ought to be given to settlement of cases intra Government agencies and between Government and individual to settlement the disputes by way of arbitration. It was decided that settling of disputes by way of arbitration must be encouraged at all levels. However, in most cases it so happens that arbitration proceedings take the shape of a court proceeding and is not cost effective, hence arbitration should be conducted efficaciously, effectively and expeditiously. It was laid down that Head of the

71 *Id* .,point IV (A) to (E), p12.
72 Id ., point V (A) and (B), p.13.
73 *Id.*, point V (D) to (I), p.14-15.
74 *Id.*, point VI (A) to (E), p.16-17.

Departments shall analyse the data of pending arbitrations and it should be ensured that arbitrations are not effected by frequent adjournments and unnecessary delays. Review of various arbitration proceedings must be made regularly by the Head of the Departments and it should also be ensured that arbitration agreement must be correctly, cautiously and clearly drafted so that intention of parties to the agreement of arbitration may become clear. Moreover, the arbitrator should be nominated on the basis of knowledge, experience and skill. Routine challenges to arbitration awards should be avoided at all costs.[75]

It was also contemplated that litigation between the PSU or Government agencies must be avoided at all costs. The Attorney General and Solicitor General shall review all pending matters and cases and shall be required to filter the meritorious cases from those which are concerned with frivolous and vexatious matters.[76]

The NLP is aimed at transforming the Government into a responsible and efficient litigant as well as to subsequently reduce average pendency of cases putting a restraint on the Government and PSU for approaching the courts on small and petty issues. This is necessary and urgent because Government litigation constitutes nearly half of the litigation in the Indian Courts and as such effects justice delivery system and backlog. It was a welcome step on part of Ministry of Law and Justice.

It is pertinent to mention here that in answer to a question relating the aim and action plan raised in the Rajya Sabha by Shri Rajeev Chandrashekhar, an independent member of Rajya Sabha representing Karnataka regarding the achievements of goals by National Mission for Justice Delivery and Legal Reforms and action taken by Government. In response to its reports, the Minister of Law and Justice and Communications and Information Technology Shri Kapil Sibal said that the mission has twin objectives of increasing access by reducing delays and arrears in the system and enhancing accountability through structural changes and by setting performance standards and improving capacities. The Mission has adopted a coordinated approach for phased liquidation of arrears and pendency in judicial administration by providing support for better court infrastructure including computerization, encouraging increase in strength of subordinate judiciary, recommending policy and legislative measures in the areas prone to excessive litigation, suggesting re-engineering of court procedure for quick disposal of cases and laying emphasis on human resource development. The result of

75 *Id.*, point VII (A) to (H), p.18-20.

76 *Id.*, point IX (A) to (C), p.23-24.

various steps being undertaken by the Mission would reflect on the improvement in justice delivery in due course of time. However, it may be mentioned here that the increasing trend of pendency of cases in the subordinate courts has been checked and the overall pendency of cases in these courts has declined from 2.77 Crore cases in 2010 to 2.68 Crore in 2012[77].

Assessment of National Litigation Policy, 2010

If we see and assess the position as of now, we find that the very object which the National Litigation Policy was formed with has failed completely. Neither the mind set nor attitude of the responsible authorities has been changed. Till today, there seems to be no reduction in the number of cases filed by or against the Government or PSU. As also the aim to bring down the period of decision of cases from 15 years to 3 years is no-where in sight. The Government and PSU don't seem to adhere the principles and directions/guidelines laid down by the said Policy at all. The failure of National Litigation Policy, 2010 to curb the menace of ever rising Government and PSU litigations is a dent on the objectives proposed in this regard by the Ministry of Law.

Draft National Litigation Policy : A Step Forward

In 2015, a discussion was initiated to review the NLP, 2010 to curb down the menace of pendency of Government litigations. With a view to reversing the image of the Government as the biggest litigant, the Department of Legal Affairs of the Union Ministry of Law and Justice has formulated a Draft National Litigation Policy. It aims to transform Government as an institution which does not believe in entering into unnecessary and avoidable litigation in the Courts by taking appropriate steps at pre-litigation stage itself. The policy also aims to make Government as an efficient and responsible litigant[78].

According to a report, the government is giving final touches to the National Litigation Policy, 2015. All the State Governments have already notified State Legislatives Policies to reduce Government litigation. To bring down the pendency of cases in courts, both the Centre and the States have decided to withdraw the frivolous and ineffective cases. The Law Ministry has drawn a 10-Point Litigation Policy and asked the States to review all pending litigations. States and Central Government have been asked to set up Empowered Panels and suggest withdrawn of frivolous cases particularly those of petty offences and traffic challans. Further

77 www.rajeev.in.

78 Year End Review,2015,Ministry of Law andJustice,www.pib.gov.in.

to discourage future litigation, the Government has decided to compulsorily introduce arbitration and mediation clauses in work contracts of its staff and public sector employees. The Law Ministry has also written to the Chief Justices of High Courts to advise judges to invoke Section 258 of Cr. P.C. which relates to the power to stop proceedings and remove deadwood from judicial system where it is necessary. Some States have already set up Empowered Committees to identify cases which have become ineffective and infructuous with the passage of time.[79] The State Governments have already notified policies to reduce government litigation to the Law Ministry.[80]

In an interview in February 2016, the Law Minister Shri D.V. Sadananda Gouda said that the pendency has been declining in the Supreme Court and High Courts already. He said that in view of pendency reduction drive in last four years the Chief Justices have been requested to establish arrears committees. In 2015 Mega Lok Adalats have been held in which around 44 lakh cases were disposed off. E-courts project has been emphasized and 13273 Courts have already been computerized. The vacancy of judges is another major matter which is also being looked into.[81]

In another report the Union Law Minister Shri D.V. Sadanand Gouda announced that National Litigation Policy, 2015 aimed at reducing the pending cases in various Courts in India would be implemented soon. speaking at the Lawyer's Meet 2015 organised by Bar Council of India in collaboration with Bar Council of Tamil Nadu and Bar Council of Puducherry, Gouda said that the policy is ready with the government. The policy would reduce the trivial litigation in which the Government is also a party. This would make the Government a responsible litigant which could use alternative dispute resolution mechanism to bring an end to various litigations.[82]

However, despite efforts, the National Litigation Policy, 2015 has neither been declared yet and nor there is any sight of its implementation. It is hoped that the Ministry of Law and Justice would act and release the Policy soon covering all the loopholes and short comings of the Litigation Policy of 2010.

Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015

79 For*e.g*., State of Himanchal Pradesh in 2013and State of Goa in 2013.

80 www.timesofindia-indiatimes.com.

81 www.theweek.in/theweek/cover/.

82 www.business-standard.com/July 25, 2015.

In 2003, the Law Commission of India in its 188th report presented the proposal for the constitution of Hi-Tech Fast-Track Commercial Divisions in the High Courts. It was recognized by the Commission that there have been vast changes in the economic policies of India right from the year 1991 which has brought privatization, liberalization and globalization. As such it appears that the investors in India, both domestic and foreign, must be given clear assurance that commercial suits of high pecuniary value shall go before the Commercial Division of the High Court rather than to the District Court or to the Single Bench of the High Court and the facilities in the Commercial Division would be hi-tech with video conferencing and other modern facilities.[83]

It is significant to mention that the Commercial Courts in the UK have been established more than 100 years back in 1895 while in USA there are Commercial Courts in 22 States since 1993. In these countries, including Singapore, the commercial disputes are mostly disposed of within 2 years period.[84] This fact was also acknowledged by the Law Commission of India in its 188th report.[85] The Law Commission also studied and then reported for set-up and facilities as well as working of Commercial Divisions Courts in U.K, USA, Singapore, North Ireland and several other countries.[86] After these detailed studies, the Law Commission recommended setting up of E-Court which would be Commercial Courts, as per the scheme prepared by the National Informatics Centre (NIC). It was proposed that the E-Courts system is meant for all Courts and can be started as a Pilot Project for the proposed Commercial Courts. The basic objectives of the E-Courts concept, as proposed were to -

i) help conducting of court proceedings efficiently;

ii) enable the advocates to argue their cases from remote locations;

iii) record the witness's statement from remote locations.

iv) establish electronics filing facility.

v) make the courts as paperless as possible.

A video conferencing system was proposed to establish for a virtual court at remote locations and for routine interaction between two branches of High Court and the Supreme Court.[87]

83 D.O. No. 6(3)/91/2003-LC (LS), law commission of india.nic.in/reports/188th.

84 Lawgupshup.com/2016/10/commercial courts division appellate division of high court act2016.

85 Law Commission of India- 188thReport,p. 10, 24 and 124.

86 *Id* ., at p. 121.

87 Id ., at p. 131.

As for as the proposal of Fast-Track Commercial Division set up in High Courts is concerned, it was proposed that the Commercial Division will deal with high value of matters and shall be a Court of Original Jurisdiction. It shall also be treated as an Appellate Court but only in regard to appeals pending in the High Court as on the date of commencement of proposed enactment and shall also deal with execution proceedings arising out of said classes of cases. The Courts shall adopt fast track procedures. It was proposed that the Commercial Courts would deal with new commercial cases of a minimum value of 1 crore or above. It will also apply to pending cases of commercial nature which has minimum value of 1 Crore. Moreover, all pending suits in the courts subordinate to High Courts of value above 1 crore shall be transferred to the Commercial Division. The Commercial Courts shall be the executing court of pecuniary value of 1 Crore and above not withstanding anything in the Code of Civil Procedure, 1908. The commercial cases would constitute cases of insolvency matters or winding up proceedings, cases falling under bodies/authorities such as Telecom Regulatory Authority of India Act, 1997, Securities Exchange Board of India Act, 1993 and Debt Recovery Tribunals *etc*.

Further, the Law Commission adopted the definition of 'commercial disputes' with modifications to the definition of 'commercial cause' as stated in Rule 1 of Part D of Chapter III (Part V) of the Delhi High Courts Rules. It provides that commercial dispute means disputes arising out of transactions of trade or commerce and in particular, disputes arising out of ordinary transactions of merchants, bankers and traders such as those relating to enforcement and the interpretation of mercantile documents, export or import of merchandise, affreightment, carriage of goods, franchising, distribution and licensing agreements, mercantile agency and mercantile usage, partnership, technology development, maintenance and consultancy agreements, software, hardware, networks, internet, website and intellectual property such as trademark, copyright, patent, design, domain names and brands, and such other commercial disputes which the High Court may notify.

Explanation I: A dispute which is commercial shall not cease to be a commercial dispute merely because it also involves action for recovery of immovable property or for realization of monies out of immovable property given as security or for taking other action against immovable property.

Explanation II- A dispute, which is not a commercial dispute shall be deemed to be a commercial dispute if the immovable property involved in the dispute is used in trade or put to commercial use.[88]

88 *Id* ., at p. 157.

It was also recommended by the commission that there shall be statutory right of appeal to the Supreme Court of India against decrees passed by the Commercial Division. As regards thetime limit for disposal of cases by Commercial Division it was recommended that suits filed after commencement of Proposed Act must be disposed off within 2 years from date of completion of service on the opposite party.[89]

The proposals,recommendations and report for setting up of Commercial Division of High Courts in India was a positive step to bring the country at par with the set –up and procedure of disposal of cases in several other countries. It is a drastic step considering that in most of commercial cases Government is as a party and such step would also ensure to helpin achieving the objectives of the National Litigation Policy to bring down the number of cases pending in court across India.

This proposal of Law Commission of India was carried forward by the Law Commission in its 253rd Report also.[90] It is significant that the Union Cabinate in the year 2009 approved the proposal of setting up of Commercial Divisions in the High Courts in pursuance of Law Commission of India 188th Report given in 2003 and as a result the Commercial Division of High Courts Bill, 2009 was introduced, which was passed by the Lok Sabha. After some amendments suggested by the Select Committee of Rajya Sabha and the Cabinet, a revised Bill was introduced in Rajya Sabha in 2010. However, the Union Minister of Law and Justice sought more time from Rajya Sabha for incorporating further changes in the Bill which was again referred to the Law Commission which presented its 253rd Report titled "Commercial Divisionand Commercial Appellate Division of High Courts and Commercial Courts Bill,2015". The 253rd Report recommended for the establishment of Commercial Courts and Commercial Divisions and Commercial Appellate Divisions in the High Courts to ensure speedy disposal of high value commercial suits .A new Bill titled "The Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015" was also annexed by the Commission in its 253rd Report. The 253rd Report saw several draw backs in the proposed recommendations in its 188th Report as also drawbacks in the Commercial Courts Bill of 2009 and as such tended in its recommendations to overcome these drawbacks.[91]

Thus, in its 253rd Report the Law Commission broadly recommended *inter alia* that-

89 *Ibid* .,

90 Law Commission of India- 253rdReport, January 2015.

91 Id ., at p. 1.

a) Commercial disputes should be defined broadly to mean disputes arising out of ordinary transactions of merchants, bankers, financers and traders such as those relating to mercantile document, joint venture and partnership agreement and intellectual property rights *etc*.

b) Commercial Divisions are to be set up by the Central Government in High Courts that are already exercising Ordinary Original Civil Jurisdiction, such as Calcutta, to take up commercial disputes with a specified value of rupees one Crore and above.

c) Commercial Courts are to be set up in States and Union Territories where the High Courts do not have Ordinary Original Civil Jurisdiction such as Banglore and in those regions to which the Original Civil Jurisdiction of High Courts (already having Original Civil Jurisdiction) does not extend, such as Pune and Madurai.

d) Pecuniary jurisdiction of the High Courts having Original Jurisdiction to be raised uniformly to Rupees one Crore. When the pecuniary jurisdiction is so raised, Commercial Divisions may be set up in Delhi, Himachal Pradesh and Madras High Courts.

e) No jurisdiction with Commercial Divisions or Commercial Courts to adjudicate matters relating to commercial disputes where the jurisdiction of civil court has been expertly or impliedly barred under law.

f) Constitution of Commercial Division and Commercial Courts to be simultaneous with setting up of Commercial Appellate Division.

g) The Chief Justice shall nominate judges of High Court having expertise and experience in commercial matter for the Commercial Division of High Courts and Commercial Appellate Division for a period of 2 years.

h) All pending suits and applications relating to commercial disputes above Rs. one Crore in the High Courts and Civil Courts to be transferred to Commercial Division or Commercial Court, as the case may be.

Besides this some amendment to the CPC, 1908 were also suggested by the Commission.[92]

Though acting late on the recommendations of the Law Commission of India, nevertheless the Commercial Courts, Commercial Division and Commercial

92 Id ., at p. 52-54.

Appellate Division of High Courts Act, 2015[93] was passed. It received the assent of the President on the 31st December 2015 and published in the Gazette of India on 1st January 2016.

The Act directs for a separate set of Commercial Courts to be set up by State Government at the District Level to try suits and claims pertaining to commercial disputes having pecuniary value of Rs. one Crore and above. In States where the High Courts enjoy original jurisdiction, the setting up of Commercial Divisions is envisaged to settle such disputes. Commercial Appellate Divisions are also to be set up, as per Act, by the High Courts to decide appeals arising from commercial disputes.[94]

The definition of commercial disputes is all inclusive of disputes arising from transaction of merchant, bankers, financers and traders relating to export and import of merchandise or service, admiralty and maritime law, transactions related to aircrafts, mercantile documents *etc*. The disputes also include those arising from agreements of franchising, distribution, licensing, management consultancy shareholders etc.[95]

The Act sets out an outer limit of 120 day for filing defence beyond which the right of defence shall be forfeited.[96]As a step towards expeditious disposal of cases and to curb false claims, provisions have been made for a party to apply for a summary judgement without trial, either for dismissal or for decreeing a suit. Summary judgement can be granted if a party can prove to the court that there is no real prospect of the other party succeeding in its claims or defence after the trial.[97] Other provision mandates the Courts to have case management hearings once pleadings are completed, the Courts would frame issues and set dates for trial, filing of written argument *etc*. The affidavit of all the witnesses is to be filed simultaneously in order to save the time of the court.[98] A time limit of 90 days has been given to the judges to pronounce its judgment,[99] Further, to

93 Act No. 4 of 2016.

94 Section 3, 4 and 5, Commercial Courts,Commercial Division And Commercial Appellate Division Of High Courts Act, 2015.

95 Section 2 (c),Commercial Courts, Commercial Division And Commercial Appellate Division Of High Courts Act, 2015.

96 Section 16Commercial Courts, Commercial Division And Commercial Appellate Division Of High Courts Act, 2015.

97 Order XIII-A, Rule (2),Commercial Courts, Commercial Division And Commercial Appellate Division Of High Courts Act, 2015.

98 Order XV-A, Rule 1 (1), Commercial Courts, Commercial Division And Commercial Appellate Division Of High Courts Act, 2015.

99 Order XX-A, Rule (1),Commercial Courts, Commercial Division And Commercial Appellate Division Of High Courts Act, 2015.

stop the practice of every interim order being challenged in appeal, which prolong the trials unnecessarily, all challenges except those orders for which appeal has been specifically provided for, such orders of injunction, attachments and those passed under Section 37 of the Arbitration and Conciliation Act, 1996 are prohibited.[100]These Courts have started functioning since its establishment. Some of the cases transferred to the Commercial Courts and decided by it are *Mahanagar Telephone Nigam Ltd.* v.*M/s Sr. Telecom Pvt. Limited*[101] *Gulf DTH Fz LLC* v. *Dish TV India Ltd*.[102]

The Act is appreciable piece of legislation and perhaps a step is the right direction but still lot of work is to be done on this front to make the Act a successful legislation. However, unless Commercial Courts are not set up soon in all Districts of the States, the desired infrastructure is not provided,the sufficient numbers of experienced judges are not appointed and the mind set of lawyers and judges are not changed, the object of the Act may not be achieved at all.[103]

Grass-root Level Efforts and Strengthening of Mediation

As a practical solution to the problems of pendency of cases, maximum use of Alternative Dispute Resolution Mechanism like arbitration, conciliation and mediation can be resorted for reduction of case loads and minimization of cases in which Government is a party.

Keeping in view the practicality and the value of ADR mechanism,the Mediation and Conciliation Project Committee (here in after referred as MCPC) of Supreme Court inaugurated a Seminar on Mediation at 'District Level' on the subject "Role of District Judiciary in Strenghtening Mediation at Institutional Level" on November 10, 2012. Inaugurating the Seminar Mr. Pranab Mukherjee, President of India focusing on the pendency of cases said that there is a high degree of public frustration over the complexity of laws, long delays and unproductive use of their resources in litigation. It is important to recognize that despite the robust, independent and impartial judicial system in our country, the unfortunate reality is that legal disputes are both protracted and expensive."[104]

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100 Section 13 and 14,Commercial Courts, Commercial Division And Commercial Appellate Division Of High Courts Act, 2015.,

101 Bombay High Court, Appeal No. 79 of 2016 in Arbitration Petition No. 1543 of 2015, decided on 25th April 2016.

102 Delhi High Court ,CS (05), 3355/2015 decide on 30/8/2016.

103 V.SrivasaRaghavan, Avinash Singh Gautama and Trisha Raychaudhari, " India: Analysis of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act,2015", www.mondaq.com.

104 alternative dispute resolution mechanism imperative,www.the hindu.com.

He insisted that only if the alternative dispute resolution becomes an integral part of the Indian justice delivery system, then we can truly safeguard the welfare of the common man in India. He said that promoting and popularizing alternative methods of dispute settlement is therefore the need of the hour because such mechanism not only facilitate speedier justice but are also a process wherein the parties involved have control over the outcome. This results in quick implementation of decisions taken and eliminates continued litigation in form of appeals. He emphasized that mediation can play a very useful role in amicable resolution of matrimonial and family matters and disputes amongst the government department and agencies.[105]

Thus the District level judiciary has to play an important role in this spirit of law since they would be able to convince the litigants especially the Government agencies that mediation is better than pursuing litigation in courts in order to save valuable time and money. The District Courts must be encouraged themselves to take recourse to mediation rather than litigation.The Chief Justice of India Mr. Justice Altamas Kabir was also of the view that mediation is the only way out of docket explosion.[106]

It is noticeable that the Mediation and Conciliation Project Committee of Supreme Court of India has even prepared and released a detailed Mediation Training Manual of India.[107]Along with formal litigation system in India, mediation has been statutorily recognized as a litigation method vide section 89 incorporated by the Civil Procedure Code (Amendment) Act,1999.[108]

Sec. 89 has been a non-starter with many Courts. It is quite obvious that section 89 has been inserted is to try and see that all cases which are filled in court need not necessarily be decided by the court itself.[109] Keeping in mind the law's delay and the limited number of judges, it has now becomes imperative that resort should be had to alternative dispute resolution mechanism with a view to bring to an end litigation between the parties to an early date. The cases which may be completed in a single sitting or cases relating to the matters where the legal principles are clearly settled, the Court should refer the matter to Lok Adalat. In Case where the questions are complicated or cases which may require several round of negotiations, the court may refer the matter to mediation. If the

105 *Ibid .,*
106 *Id.,*
107 supremecourtofindia.nic.in
108 Preface to the Training Manual of Mediation Training.
109 *Salem Advocate Bar Association v. Union of India,* 2005 (6) SCC 344.

terms of the settlement is ex facie illegal or unforceable, the court should draw the alternation of the parties there to avoid further litigations and disputes about executability. Resort to alternative dispute resolution processes is necessary to give speedy and effective relief to the litigants and to reduce the pendency in and burden upon the courts. By this process, the case will go outside the stream of the court permanently and will not come back to the Court.

The Mediation Training Manual of India in its different chapters elaborates the concept of mediation, its process, stages and role of mediators. Chapter XII of the Manual is devoted to the "Role of Referral Judges" where the actual role of District Judiciary comes into picture.

This chapter emphasizes on the important role of judges who refer the cases for settlement of disputes through any of the Alternative Disputes Redressal system. It also emphasizes that the success of mediation will depend on the proper selection and reference of only suitable cases. The referral judge is required to acquaint himself with the fact of the case and the nature of dispute between the parties and to make an objective assessment of the suitability of cases for reference to mediation.

The Manual elaborates that the appropriate stage for considering reference to ADR processes in civil suits is after the completion of pleadings and before framing of the issues. However, if for any reason the Court did not refer the matter for ADR before framing of issues, it is competent to do so at a later stage too.[110]

The District Judiciary has undoubtedly a crucial role to play in this regard. It has to motivate the parties to the disputes specially the Government to settle disputes through ADR. In informal forum chosen by the parties for the expeditious disposal of their disputes has by the decision of the Court been clothed with 'legalese' of unforeseeably complexity.[111]

Justice D.A. Desai of The Supreme Court in *Ramji Dayawala and Sons (P) Ltd. v. Invest Import*[112] said arbitrate-don't litigate. The Supreme Court again expressed its concern about protracted, time consuming and expansive court trials in *Trustees for the Port of Madras v. Engineering Construction Corporation*.[113] It is presumed that the judiciary explains the concept, process, advantages and interest of litigating parties in order to convince them to adopt ADR system. Moreover, when

110 Mediation Training Manual of India, p.63-66.

111 *Guru Nanak Foundation v. Rattan Singh and Sons, AIR 1981 5C 2075.*

112 AIR 1981 SC 2085

113 AIR 1995 SC 2423

the parties have settled the dispute by mediation, the referral judge must examine whether the agreement between the parties is lawful and enforceable. It may even modify or amend the terms of settlement with the consent of the parties.[114]

The success of mediation depends on the commitment and interest shown by the Courts and the commitment and expertise of mediators. Institutionalisation and constant education of lawyers, litigants and judges by awareness programmes is the solution for improving the ADR Mechanism.[115]

Ground Realities and Report of the Access to Justice Survey 2015-16

An access to justice survey or report is designed to understand the level of functioning of the judicial system and the profile of the litigants. The report is based on the analysis and outcome of a survey conducted on present litigants to access that whether they are able to use the judicial system effectively to their welfare and whether their problems are solved to their satisfaction. The survey includes important questions relating to civil and criminal legal procedures.

Daksh, a Civil Society Organization that undertakes research and activities to promote accountability and better governance in India, conducted an Access to Justice Survey manually between November 2015 and February 2016 in 24 States of India at 305 locations. The various variables on which data was collected were types and cost of travel, expenditure on court cases, expectation of outcome, cost of time lost in attending hearings, ADR used *etc*. A total of around 9329 litigants were interviewed.

The Survey Report reveals some very interesting as well as shocking facts that can be proved to be an eye-opener for one and all. As far as socio-economic profile of surveyed litigants are concerned of the litigants in civil cases, a shocking truth came out that 38.9% of litigants have an annual income of below one Lakh and 53.4% have annual income between one Lakh to Three Lakh.

Majority of litigants about 61% in civil cases felt that the delay in cases is caused by judges not passing the orders quickly. As also 49.35% of civil litigants felt that there is shortage of judges in the Courts which is the main reason for delay of cases in subordinate courts. A considerable size of litigants about 11.8% felt that powerful litigants in civil cases influence the judges. Other significant statistics are equally alarming that civil litigants spend an average amount of Rs. 497/- per day for court hearing and they incur a loss of Rs. 844/- per day due to loss of pay. It is

114 *Supra note 111*, at p. 68.

115 strengthening justice delivery system-some challengers and solutions, kjabir. kar.nic.in.

also shocking that the loss of productivity due to attending court hearings because of wages and business lost comes to 0.48% of the Indian GDP.

In 33% of civil cases ADR methods were used to settle their disputes and out of those litigants who opted for ADR method, 96.3% belong to lower income groups with annual income below Rs. 3 Lakh.[116]

The study made by Daksh clearly shows the urgent need for bringing down drastically the time taken on an average for disposal of cases in India specially those concerning the Government and its agencies. The Report of Survey made by Daksh was released on 23rd April 2016 at a Conference. The Supreme Court judge Madan B. Lokur who chaired the session of the Conference pointed out that there is need to ensure not just access but physical access to the Courts He said that the infrastructure requires improvement. He further added that mediation as means of ADR could be the only way out for reducing the pending cases.[117]

Conclusion

The above study reveals that it is not easy task to resolve pending litigation overnight but the concerted efforts and policy initiated to curb down the pendency if implemented continuously a citizen can find justice within their lifetime. Every cases filed irrespective of merit is burdening the judiciary and increasing the pendency of cases. Undoubtedly the Government is often perceived as the biggest litigant either fighting a citizen or its own constituents or taking every case into appeal, where its actions are challenged. There is no mechanism to scrutinize the cases which need to contested and which not to be. That is the reason that large number of cases are pending against the Government which is not a good sign of good governance. Every effort must be made to prevent litigation at all cost. If litigation cannot be avoided, then alternative dispute resolution methods must be considered. Section 89 of CPC must be resorted extensively.

Reversing the image of the Government as biggest and compulsive litigant, appropriate steps at pre-litigation stage should be preferred to avoid unnecessary litigations. The easy approach 'let the court decide' must be discarded. One of the reasons for the large pendency is the shortage of judges at all levels. So the judiciary has to first tackle the root cause of high pendency rates and mismatch between pending suits and the number of judges hearing it. The members of the judiciary must apply their minds and talents to tackle the problem at initial level.

116 Figures and fact based on survey in 2015-2016 by Daksh, available at their website ww.dakshindia.org.
117 Courtesy www.livemint.com

They should be encouraged to invoke Section 258 of the CrPC to stop proceedings and remove deadwood from judicial system.

The Government cannot be blamed that it has not taken any serious step towards reduction of pendency of cases. The Government has started pendency reduction campaign from 2011. A chronological study of the campaign shows that in 2012 the focus of campaign was to make the judicial system free of cases that were five years old. In 2013 it focused on weeding out ineffective and infructuous cases from the judicial system. In 2014 the emphasis was laid on filling up the vacancies of judicial officer and organization of Mega Lok Adalats. As a result of concerted efforts the increasing trend of pendency of cases has been checked and declined.

As a major component of Government the bureaucracy was not sufficiently motivated to tackle the issue. But a disinterested bureaucracy cannot be an excuse for not acting on such pressing issue. Their decision takings represent that their actions are merely symptomatic of the litigious culture recklessly cultivated. The officer who either initiates or defends litigation and them prefers appeal is never personally responsible for the outcome. Not a single case has been brought to the notice of the court, where an officer who frivolously pursued litigation was hauled up for his improper behavior inconsistent with the duties of his office or obligation to manifest constitutional culture in their conduct. There is no system of social audit of their behavior. So, to curb the menace of pendency of Government litigations the judiciary must take serious cognizance of their irresponsible behavior.

A lack of credibility about actions taken by Government has also contributed to the litigation explosion. So, the Government should adopt pro-active approach at initial stage by fixing greater accountability and transparency. By fixing greater accountability and mandating suitable disciplinary actions against officials violating the norms may put check on their attitude and mindset. A little care, a touch of humanism, a dossier of constitutional philosophy and awareness of futility of puerile litigation would considerably improve the situation which today is facing.

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Theocracy of Environmentalism

Dr. Onkar Nath Tiwari[1]

Abstract

Rising population, unlimited needs, limited natural resources, rising consumerism, heedless economic man are a few realities or aberrations of the globe. Hypocritical individual is prone to generating serious threats to the system social, legal or even otherwise. Futile legislative exercise is matter of common knowledge and the testimony to the fact is worsening climatic zones all over the world. Categorical legislative narcicism happened to be the only solace for the entire globe leaving aside the ensuing effect. Since the dawn of eighties enthusiasm to repel the evil by documented provisions throughout the globe got a punch and still continuing to count our failures or glamourising the same this way or that way. It has become a matter of fashion and proud for the governance model to design norms in the legislative or judicial chambers which will come in the way of developing a comfortable environmental regime but Alas! it proved a nullity. Legal parameters has its own limitations and to think in terms of big success for regulating any intended conduct through such norms is a fiasco. Law is an abstraction and unless conflict situation arises it is meaningless. Till date we have played and still playing a win win game knowing the fact that each one is victor at the cost of depleting natural properties. What is reflected is complete lack of vigor and zeal in order to concretize the norms no matter written or unwritten. It's a fallacy that the present model of social governance has put much emphasis on positive law which are of little value unless strongly reinforced by theological precepts. The priggish disposition of will have to join the hands of in- built juro culture and probably that is the only answer. Law alone can never meet the pinnacle of success in regulating the human disposition unless the force comes from inside. Legal abstraction is a dwarf size baby and the ethical codes though abstraction but runes always counter to any limit. Environmental features or the atmospheric control in order to preserve and conserve the nature's properties must look at values, ethos, culture, traditions and in the different religions having the propensities of strong roots. For instance Hindu mythology has numerous instances in her texts. This paper very modestly tries to examine the comparative role of value system and the legal doctrines in the environmental regulation.

Kew Words : Ethics, Environmental conservation, Theocracy, Governance,

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Prologue

More you debate for environmental conservation more we are witnessing deteriorating scenario globally. Each of us to the best possible level of ones' capacity is contributing either positively to shape the future of degenerating environment or negatively allowing things to cause degrading eco system and more so further toiling hard in shaping the environment in numerous ways, i.e., campaigning, gossiping, standard setting, law making, policy making, politicalising or even generating counter pressure on our natural resource . What is turbulating is the zero effect of such fanfare. This primarily is because of the developmental model we are preferring or yet to choose in future. Inter suggestibility of development in respect of environmental phenomenon are well known to all the human beings of the globe. Engrained notion of legislative mania is the hall mark of present day thinkers. The way we are perceiving the model of development in the garb of civilisation much headway is impossible or more so a herculean task ahead of us. Various features of development commonly argued in the present scenario is an insignia of human rights which are posing a great challenge before us as without being dependant on the natural resource this can hardly be achieved. Endless shore of such developmental model has no parameters and by and large one is bound to face adverse circular reasoning. Very aptly Mrs. Indira Gandhi narrated the crux of the debate while addressing Stockholm Conference in these words, '***the inherent conflict is not between conservation and the development, but between environment and the reckless exploitation of man and the earth in the name of efficiency***.' Environment is our priority or for that matter a necessity as we all have the sense that polluted environment can never allow the life to sustain to see the next sun no matter man or the animal. Although some recipe comes usually on the cards but of no avail.

The stupendous task before the entire humanity is to strike a fine balance between the two diametrically opposed inevitabilities. How to embark upon the situation is big question mark. Balancing is the need of the present as well as future and we all feel that if things go like this the entire humanity will come to a naught. Prioritising may be the one formulae but this too has its own peculiarities and can never go hand in hand for the long time. It causes sequential changes to be accepted without hitch. Priority rotate clockwise or in the reverse manner initiating some short of deep impacts. This research paper modestly focus on the ethical dimension of environmental legislation and its resultant effect on the governance model.

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Facing The Reality

Environmental problems attracted attention since sixties which continued in the same spirit even during seventies and afterwards. Because of known interdependence of environment and development conservation becomes, though herculean, an inevitable task to be cared for. Away from the global arithmetic and the data projected when one confronts with the domestic realities, i.e., the dependence of large population on the limited resources clearly becomes a problem. We do have future plans for rapid growth in all the sectors of human life. Question comes for the consideration that at what cost and the reply is the priceless limited resources which nature has given to the mankind.

Looking at the ensuing danger to the biotic and abiotic components of the nature including human life situation is quite alarming and need no narration. There are two categories of pollutants. First includes inorganic contaminants, i.e., acid, alkalis, carbohydrates, coal, dyes, fall, soaps, waxes, gases, toxic metals, oils resign, rubber, synthetic detergent, radioactive materials. Other includes biological organism such as bacteria, viruses plants and animals. Industrial effluents, municipal sewage, agricultural waste, drainage from the sillage, manure slurry, leaches from mine shafts and quarries etc. causing water pollution to a highest level. As reports say it cause gastroenteritis, disturbance in the neuron system, skin disease, cirrhosis of lever, loss of resistance capacity. Permanent indigestive symptoms are often reported problem caused due to polluted water. It is rather very difficult to pinpoint or enumerate all the problems relating to health caused as a result of consumptions of polluted water. Next comes air pollution, major source are stationary combustion, transportation, industrial process, solid waste disposal, vehicle, chimneys, smoke spraying etc. Pollutants are gaseous and particulate. Former includes carbon dioxide, monoxide, sulpher, hydrogen sulphied, hydrocarbons, nitrogen oxides, ozone and other oxidants. Particulate consists of both solid and liquid particles like dust, fume, mist, spray, smoke. These contaminants contain about-22 metallic elements and the most abundant are silicon, calcium, sodium, aluminum, iron, lead, zinc, copper, magnesium, manganese etc. Such pollutants affect respiratory system, reduce hemoglobin, temporary spasm of the smooth muscle of bronchus, epithelium in the mucosa, cough, short breath, spasm of the larynx, acute irritation to the membranes of eye resulting in tears and redness, allergy, lungs cancer, bromidic, emphysema, asthma and some of the chromic diseases caused due to polluted air. Lead affects children brain.

Noise pollution is part of air pollution caused due to sound and causes stress, strain, nerve pressure, pain and heaviness in the head etc.

Soil and land pollution is caused mainly due to industrial and urban waste, agricultural particles, radioactive materials, biological agents, solid waste, toxic chemicals etc. Pesticides cause indirect health hazards. Bacteria transmitted from man to soil infect man causing bacillary dysentery, cholera , typhoid, paratyphoid fever. Flies which breed or come into contact with contaminated soil become carriers of disease organism. Eggs of some parasitic worms get incubated in the soil and both the eggs and larvae create infection. Soil transmitted helminthes are carislumbricodes (roundworm) whipworm and hookworm. Even the diseases of animals are transmitted to man and soil. Leptos pirocis, Q fever and anthrax come in this group. Fungi and actinomycetes the saprophytes normally grow in soil or vegetation causing serious subcutaneous and systemic mycoses.

Thermal pollution is caused due to the discharge of hot trade effluents from industries, factories and mills and large volume of cooling water from electricity generating station, municipal sewage etc. Such discharge raises the temperature level of the atmosphere which further cause disturbance in chemical reactions. It disturbs reproductive cycles, digestion and respiratory rates. Thermal pollution results effect on aquatic animals (Fish). Due to rise in temperature, physical and chemical properties of water get changes causing harm to living being.

Radioactive pollution results mining of radioactive ores, nuclear experiments drainage from hospitals, industries and research institution. A replaceable type of radioactive pollution also occurs, i.e., some radioactive elements replace other elements. The danger primarily arises through the increased production of nuclear weapons. Radiations consisting of X-ray, Alpha, Beta and Gama rays produce both somatic and genetic effects. The varied effects of radiation depend on its physical and chemical nature, radio active half lives, the energy level of radioactivity its metabolism within the body and their excretion rates. Radioactive materials cause blood abnormalities, leukemia and hemorrhagic diseases, thyroid, bone, skin, pigment, ulceration and lung changes. Radiations cause damage to germ cells. The damage can be of two types-lethal mutations (genetic deaths) and non lethal mutations.

Brief Survey of Pollutants and related health hazards.

Pollutants	Health Hazards
Carbon	Fatal in large dose; aggrieves heart disorder, affects central nervous system impairs oxygen, carrying capacity in blood.

Nitrogen	oxide Irritation in respiratory tract.
Ozone	Eye, nose; throat irritation, risk astha matics, children and these involved in heavy exercise.
Lead	(From petrol vehicles) Extremely toxic, affects nervous system and blood, cause hypertension, impair mental development of children.
Hydrocarbons	Drowsiness, eye irritation, coughing.
Benzene	Carcinogenic
Aldehydes	Irritation of eyes, nose, throat, sneezing congaing, nausea, breathing problem etc.
	Polycyclic Aromatic Carcinogenic hydrocarbons
	These are a few ramifications of environmental pollution and its impact on human health.

Some Facts and Figures :

- 35,000 young children are dying each day from the combined effects of poverty and environment degradation.
- Water use has been growing at more than twice the rate of population increase during the twentieth century. At any given time, approximately one half of the people in the developing world are suffering from a sickness associated with bad water.
- Three quarters of the Earth's surface is covered by water in mighty oceans and seas, great rivers and lakes. But we can only drink less than 1 per cent of this water, mainly that it found in lakes, rivers and underground. The rest is either salty sea water or ice, frozen in glaciers and the polar ice caps.
- Freshwater comes from the water which evaporates from the ocean, at a rate of more than half a million cubic kilometers $(km)^3$ a year. Nearly 90 percent of this evaporated water falls back into the sea as rain. And most of the rainfall that reaches land is evaporated before it is available for human use. The 47,000 cubic Km that returns to the oceans via rivers, ground water and glaciers – known as the global runoff-is the amount that is theoretically available for human use. Capacity of the hydrological cycle to supply water is being outstripped by the volume of human demands, pollution of water resources and poor water management.
- Even a simple action such as turning off the tap while brushing your teeth can save two gallons of water.

- Most deserts are created from large-scale destruction of forests and misuse of land. The Sahara, for example, was one green. Today, we destroy an area of rainforest the size of a football field every second. Unless we are careful, forests will totally disappear in many countries.
- If you recycle one ton of paper, you can save 17trees.
- Climate models predict that the global temperature will rise by about 1-3.5 degree Celsius by 2100. There is evidence that climate change may have already begun. Meanwhile, rapid and unexpected climate transitions can not be ruled out.
- With global warming sea level will also rise. What impact will it have on human life can be known from the fact that about two-thirds of the world's population (3.6 billion people) live within 60 kilometers of the coasts and many nations depend on the sea for survival, whether through fishing, maritime trade or tourism. This proportion will rise to 75 percent (6.4 billion) within three decades nearly a billion more people than the current global population.
- Of the world's 23 mega-cities (those with over 2.5 million inhabitants), 16 are in the coastal belt and are growing at a rate of about one million people per day. Nowadays, the coasts are a powerful magnet for tourism, the world's top growth industry.
- Sea may be home to 10 million species we know nothing about. According to the United Nations Food and Agriculture Organisation (FAO), an estimated 12.5 million fisherman, operating from more than three million vessels, land around 90 million tones of fish per year. The fishing industry provides a livelihood directly or indirectly to about 200 million people.
- An estimated 100,000 man-made chemicals have been introduced into our daily life. Most of them end up in the oceans.
- The majority of pollution (70-75 percent) comes from land-based sources. About 60 percent comes from activities such as pouring used motor engine oil into the drains of towns and cities-only about 25 percent comes from shipping.
- Some 1.2 million barrels of oil are spilled into the Persian Gulf alone, annually.
- It took 8 million years for the dinosaurs to disappear. Today, animals and insects are disappearing at a much quicker rate. Each year we lose between 10,000 and 35,000 species. Most die when forests, their natural home, are destroyed. Illegal trading in rare or disappearing species as an international business turns over more than 1.5 billion dollars a year, second only to smuggling in drugs or arms. it directly affects the populations of more than 37,000 animal

and plant species and represents a severe threat to their survival.

- The international mafias buy a whole range of cheap animal and plant products from the South, which in certain markets, sell for many times the buying prices.
- Approx. annual trade in wildlife (legal and illegal) is :-
- 600,000,000 living ornamental fishes for aquariums.
- 250,000,000 frogs for restaurants.
- 10,000,000 skins of reptiles.
- 15,000,000 skins of feliness and other mammalians
- (Otters, primates, Kangaroos, deer's etc.)

According to recent survey report, it is recorded that 20 % cities of the country are facing acute environmental pollution in some way or the other. Air pollution cause lung cancer and nearly 2.23 lakh people die every year. Sixty six crore population lives in such place in the country where pollution level is extremely high, seventy lakh people die each year in cumulation because of acute air pollution,1000 children die daily due to polluted water consumption. Ganga is the most polluted river in the world.

Extraneous Regulatory Measures; An Abortive Bid

Sensing the rainy days which may follow in the wake of ongoing global efforts to create a developmental regime world took serious measures to obviate the danger. Before eighties environmental issues were the direct concern of scientists and the geographers for the purpose of undertaking research studies to gather the reliable data and the information for scientific planning. Gradually its direct impact were visible and significance of natural properties linked with developmental parameters. Unbriddled horse of development became the common feature of globe and countries started exploiting the resources available within her domestic area arbitrarily. During the decade the dominant feature of states conduct happened to cross any limit for its own end and disparities which perceived in the scientific venture. For the first time in 1972 world leaders reflected their concern and under the banner of United Nations declaration of Principles were adopted in the Stockholm. From a legal perspective the Declaration has very little meaning in regard to its binding character. However, environmental issues attracted attention in a significant manner. It consisted 26 Principles for the regulation of human conduct to maintain the equilibrium. Seven truths and the regulatory Principles were designed and accepted by the global leaders

to join the issue with some amount of sensitivity. These principles, inter alia, provided for the creation of a world body to monitor and assess the activities which may be dangerous for the environment and United Nations Environment Program is the outcome. Other measures are accepting June 5th each year in order to remind the commitments. Anthropological context of the environment was the great achievement of the Declaration. World community has never been sluggish in relation to protecting environment. Efforts and sensitivity reflected way back in mid 20th century where arbitrators in a proceedings took, stock of the situation and awarded heavy compensation to the affected state, U.S., in Trail Smelter Arbitration. Although it was a case of indirect environmental damage. In the post UN period environment was started to be linked with development consequently deteriorating effect of such activities became a matter of serious feeling worldwide. Population growth coupled with technological advancements started to forge the globe in a new domain of anxiety and sensitivity in view of environmental concern. Environment and its governance for the human survival got impetus and the only recourse to the situation was law making process, no matter, soft or hard. International Law by and large developed in the course of state exchange, thus, customary and piecemeal efforts were visible till mid of the 20th century. The seeds of intergovernmental environmental action were sown in 1947 by the UN with Environmental and Social Council resolution convening the 1949 UN Conference on the Conservation and Utilization of Resources.

Parallel to world Charter for Nature World Conservation Strategy 1980 was prepared by IUCN, UNEP, WWF, UNESCO and FAO. The strategy gave currency to the term sustainable development and has led to the preparation of national and sub national strategies in numerous countries of the world including international legal developments. It emphasized three objectives stressing the interdependence of conservation and the development;

- essential ecological processes and life support systems must be maintained;
- genetic diversity must be preserved; and
- any use of species or ecosystems must be sustainable.

Apart from this historical moment certain other norm setting events took place at global level. In the post Stockholm era situation changed as there came institutions like UNEP to monitor and coordinate activities of environmental governance. Thus, in the year 1978 UNEP adopted a draft on principles of conduct in the field of the environment for the guidance of states in the conservation and harmonious utilization of natural resources. It comprised principles to govern

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the use of shared natural resources. Another effort took place in 1981 under the auspices of UNEP in the name of Montevideo Program.

With a very limited scope the Convention provided modest start. The resolution emphasized the importance of the worlds natural resources and its importance to the reconstruction of devastated areas; it also recognized the need for the continuous development and widespread application of the techniques of resourse conservation and utilization. Divided into three parts first part proposed that guidelines, principles or agreements should be developed to address marine pollution from land based sources; protection of the stratospheric ozone layer; transport handling and disposal of toxic and dangerous wastes. The second proposed that action should be taken to address eight priority areas;

- International cooperation in environmental emergencies.
- Coastal zone management;
- Soil conservation;
- Trans boundary air pollution;
- International trade in potentially harmful chemicals;
- Protection of rivers and other inland waters against pollution;
- Legal and administrative measures for the prevention and redress of pollution damage; and
- Environment Impact Assessment.

The third program area proposed work of a general nature to promote the development of environmental Law including research, writing and teaching of theoretical and practical aspects of environmental law and the dissemination of information.

The most significant and revolutionary document at the global level came into being when Brutland Commission known as World Commission of Environment and Development submitted and published its report (WCED) in 1987. The commission an independent body of experts to study the critical situation had three objectives; to reexamine critical environment and development issues and formulate realistic proposals for dealing; to propose new forms of international cooperation and to raise levels of understanding and commitment to action of individual institutions and other state entities. It provided support for expanding the role of sustainable development and also proposed a UN Program on it and identified the central

legal and institutional issues. The Commission focused attention on population, food security, loss of species and genetic resources, energy, industry and human settlements, recognizing that these are connected and can't be treated in isolation. On international cooperation and institutional reform the focus included the role of international economy; managing global commons; relationship between peace, security, development and the environment and institutional and legal change. In addition Commission identified six priority areas for future action at global level.

World Conference on Environment and Development (WCED) commonly known as Earth Summit in the year 1992 at Rio de Zenario, Brazil was the other mega event in the area of environmental governance. World community had to constantly work in furthering the concept of sustainable development a key issue for governance of the countries in future. Rio Convention provided a platform of attaching flesh and blood to the bones of sustainable development emerged in World Conservation Strategy strengthened in Brundtland Commission. Rio Conference created documents having legal flavour on various components of environmental governance. Legal documents emerged during the summit were;

- Declaration of Principles (27 Principles)
- Convention of Bio-diversity
- Convention on climate change
- Agenda 21 (Plan of Action)
- Non-binding nature of Forest Principles.

Declaration of Principles happen to be the most-crucial feature of establishing legal standard to be observed by nation states. Certain Principles like Precautionary Approach, Polluter Pays, Risk Communication, Environment Impact Assessment, Fostering of Public Awareness and Participation in Environmental decision making have taken the shape of law and now no more remains customary. These Principles have taken the shape of International Environmental and as such become the guiding factor of states conduct in relation to environmental governance. Agenda 21 a global plan for action during 21st Century is a comprehensive action plan and touches almost all the components of inter as well as intra state conduct model. It defines the role of each institution formal or informal cooperation among states and the institution and the responsibility of each one in making the environment healthy and smooth. Financial and technological cooperation do find proper place in the commitment. Convention on Bio-diversity, Climate Change and Declaration on Forest Principles delineate the conviction in a sectoral perspective and expect

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states to behave accordingly. Thus, these documents have a deep impact on the issue of environmental governance worldwide. It is not the issue to discuss at this juncture in detail the provisions of each one. Suffice to say here that sufficient legal texts emerge to guide the states conduct on various components of environment. Rio+5 and +10 in Kyoto and Johannesburg were the events to discuss the practicality of the commitment made in 1992. Rio+5 confined to the discussion on climate change in which states were asked to evaluate the framework convention and its aftereffects. Johannesburg Declaration in 2002 in South Africa reasserted states commitment with a new focus on five issues; water, energy health, agriculture and bio-diversity (WEHAB). It was found that sustainable development can never be ensured unless these issues be seriously thought off and implemented in a manner conducive to the growth.

There is no denying the fact that we are bound to have a deteriorating environment no matter what the reason is. Blame game and shoulder shifting approach in respect of responsibility is the very instinct imbibed in the human nature. Man by nature is selfish and comfort oriented hardly bothering for the rationality of his actions. This crude reality is becoming day by day more and more strengthened and we have no rational answer to forward to our future generation as those who are at the helm of affairs are becoming dwarfed size personality. We are fashionable of having mushroom of legislative standards in one form or the other which serves only the paper task. Since 1972 the global community and the domestic authorities of sovereign states are toiling hard as they profess which may be substantiated by the efforts visible but in reality of no avail. The question is, after plethora of policy and legislative documented measures we are facing crisis. Again a rational querry, why. Whether the content of law is inappropriate or its poor application or the sanctions which lack in its proper and effective implementation.

Remedies lies somewhere in ethics and value system and that was perhaps seen in the past human conduct when the religious mandates and dictates happened to be the guiding factor of individual conduct.

Ethics of Environment Conservation-Looking for a Shelter

Ethics, value and morality are different concepts to visualise. In isolation or theoretically these words reflected a typical religious and traditional modes of human conduct sometimes said to be rather spiritual. Secondly, it has its teleology, that is ,the purpose to serve for the sake of common man. In theory ethics is a normative science which teaches us what is good and what is bad in a

particular given perspective. It has no trans boundary and unlimited application in time. It justifies the code of conduct in itself without looking at others. Values are practices ingrained in the routine behaviour with certain abstract virtues. Morality on the other end is disposition and based on the judgment of oneself deriving its force either from the ethical standards or from the abstract values. Law is an abstraction and a collective term which teaches ordering of behaviour of an individual being or a group of persons or even a non human entities. Mother being Jurisprudence describes as to how we should legislate and that's why it is known as skill of legislation. In the ultimate analysis at least theoretically there is no linkage between all these terms.

When you jump on the issue of its utility as to why such abstraction are needed the interlinkage become and more pronounced. However, being his conduct, its interplay, conflict situation and aberrations become a matter of serious look as it might cause and wil definitely cause a crisis situation leading to unpleasant experiences. Apt remarks of Professor Woodhouse needs to be mentioned at this juncture, ***the disease of disjunction between legal education and the profession is not caused by too much theory or too little doctrine and practice but by too little attention to their essential interplay in a complex interconnected world.***

Society or its constituent human being is by nature very selfish, sluggish, knave, barbourous, enemical on the one hand and on the other peace loving and the question is how to strike the balance when the conduct comes at the floor. Order and the peace is the demand of the civilization and we need norms to order any undesired, turmoiling behaviour. Here comes close linkage between these concepts. Thus apart from mere academic discussion such concepts are to be explained in terms of its utility and purpose. Undoubtedly when the question of setting norms or the parameters comes in question all stand at the same footing and do overlap in its regulatory character.

In this process it becomes moot question whether morality is essential for law or law should be moral, morality is internal or external, is it subjective or objective, whether morality is enforced through law or law is to be enforced through morality etc. Different theories have been propunded dealing with this tangle and famous jurisprudential dictum which comes from from Professor H.L.A. Hart who hardly bothers for any outside component in law for its enforcement. However, Professor Fuller and Professor Dworkin both suggest minimum content of morality in law and virtually to this extent there appears diametrically opposite

concepts. It is precisely difficult to delineate the parameters of morality or for that moral standards. What is moral can never be always legal and whatever is legal can never be always moral. For a hungry man stealing of bread can by no means or by any stretch of imagination said to be immoral but its always illegal. So this controversy becomes more and more pronounced in terms of parameters. Furthermore, morality had two dimension ,i.e., public and private, What is good for a person can never be equally good for people in general and the vice versa.

Normative orders spring primarily in two ways, i.e., conduct of state run machinery like legislature, executive, judiciary and the society itself. Regulatory standards in the former group may designed in laws, rules, regulations, statute, policies programs, charters etc. while custom, ethos, tradition, beliefs and practices, value system are the major components of the latter. Furthermore, the sanction in the first permeates from the sovereign power while social cohesion and the solidarity provide required force behind the other social norms which by and large motivates individual of the social unit to follow the path. Another important component of such standards are its intrinsic value. Its quite natural that failures of extrinsic norms in order to control the questioned conduct it is the intrinsic forces which work. So environmental value becomes more and more pronounced in cases of implementing laws which have been made to control environmental hazards. The interplay of social value and the norms of environmental law is significant in numerous ways. It evolves and shapes the principles governing environment besides being instrumental in getting the provisions fully implemented. Law can never play in a vacuum or value free society. Values, according to the Royal Commission on Environmental Pollution mean beliefs either individual or social about what is important in life and ,thus, about the ends or objectives which govern or shape public policies. Though there is no direct connection between law and the ethics but values suggest about what is wrong or right. Thus giving weight to the provisions of environmental law and adherence becomes the priority and the attached sanction comes from the inner value of lending support to the natural properties. There are some more interactive situations between the two. Values play part in operation of environmental regulatory system in many ways,i.e.,triggering formulation of new policies or laws, influencing the interpretation and the enforcement of environmental laws, influences decision making assisting with the legitimacy of environmental laws. However there are close and clear link between what is good for society in general and environment in particular. So any debate must address two issues, i.e., environment is worthy of protection in its own rights and secondly, environmental issues must be considered in the context of possible

impact on future generation. Here one finds intervention of value system in the environmental governance.

Coming to discuss the science of law or the legislation and the role of value or ethics in such process what is commonly said or known that the jurisprudence is a fictitious entity and unless accompanied with other entities it has no meaning in its reality. And that's why law is an abstraction and collective term which comes into play when visualised conduct is to be balanced or regulated. Ethics is a normative science which is two categories,i.e.,private and social. Private ethics teaches us how to dispose himself or oneself to pursue the most conducive which bring happiness and comfort in the future. Jurisprudence on the other hand being the art of legislation teaches us as to how multitude of men may be disposed to pursue that course of action which upon the whole is the most conducive to the happiness of the group as well as the community. In case of ethics the motive to be applied is the self of the being itself while in Jurisprudence it is the motive of the legislator. The very thesis of any law in general and the environmental law in particular can never sustain for long time as what is propagated to be ordered to day may not rightly be needed tomorrow and , thus, the conduct of law becomes redundant and obsolete in changing facets. Normative instincts do not match with the changing situations and this is the tragic part of the legal science and environmental law is not an exception. Norms do apply in a given context so when the context changes legislative parameters become orphan. Thus there are two situations which one visualises in the interplay of law and ethics. Ethics being a matter of accepted inner self propels adoptation of norms easily and comfortably may even in the case like environmental issues and secondly it is perpetual in nature as compared to juridical sciences at least in terms of disposition.

Rights and duties in context of environment are to be scrutinised on the plank of ethics. It is commonly said that the people of the globe has rights of the safe environment and that is the key word of Stockholm Declaration on the Human Environment. Principle 1 speaks that '***man is the creator and the moulder of his own environment'***. Now the obvious question is, where is the man about which the declaration talks about. Whether the same man who is ruthlessly chopping of the trees for his personal comfort in the drawing room or for the big projects, a man carelessly and negligently favouring industrialisation causing irreparable loss to the water and the air, a scarce commodity in the world, a man who is extremely selfish in his life style, a mad and the sinic man, an animal man and less said the better what not. Well we have all the rights but at whose cost. What Jurisprudence says, rights are interests to which law accords protection and each

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right has corresponding duties. We fail to understand that in case of environment no one is the right holder. Rights are innate and utopian concepts and that's why our Hindu texts are resilient on this score. We have only duties and that's is the only meaning of Principle 1 of the Declaration. Both are obligations. Rights are moral claims of individuals whereas duties are moral debts of individuals and both are recognised by the society. Rights are claims recognised by the society acting as ultimate authority to the maintenance of conditions favourable to the best life. Right reside in some individuals; they have rights to certain things which are necessary for the self realisation. Duties are moral obligation on the part of others to respect those rights. Persons having rights are under moral obligation to use such rights for the common good. Both are ultimately based on the same moral laws and relations. Society grants certain rights to its individual member for their own good and good for the society. A man has no right to any thing by himself and it is the society which accords certain rights to him. Thus, rights are nothing else but the moral obligations addressed to himself to use those rights for the common good and in turn to his own good, duties are moral obligation addressed to others ,that is to say to respect those rights. Both are interdependent and correlative terms. Moral obligation are different from the legal obligation and this is the fallacy which environmental law faces. In this branch of law each of us has only legal,vis-vis, moral obligations to pay respect to nature's bounties because we individuals after all our sincere efforts can never have a separate and distinct earth. Because of our selfish ends we can only exploit the limited natural resources for an unlimited period and perhaps this may be said to be our intellectual bankruptsy. Colonial policy had deep and adverse impact on Indian environment. Maximum impact was on the Indian forests, water management and irrigation system, common property resources, and the wildlife. All these studies demonstrate that the interest of the Britishers in the natural resources in India was linked to the purposes they wanted their colony to serve. They generated maximum revenue from the agriculture, cut trees for railways sleepers, oak trees for the golf and hunting grounds etc. for colonial masters. This blame game became the legacy of Independent Indians and as a result of growing population we have wasted the beauty and the gift of the nature for serving our own consumer goals which are very dangerous for the Indian environment. British masters were dishonest as many learned Indian authors advocate and Indians are very much honest in resulting the same phenomenon and perhaps this is the academic dishonesty. We are equally disturbing the whole environment in a much worst manner than what our predecessors did.

Remedy

There is no gainsaying the fact that our splendid efforts have proved a nullity and did not reflect better results in respect of environmental protection as more we are talking more we are facing the deteriorating scenario. There are two models of approach, western and the Indian. In the former it is believed that man is superior amongst all God's creation and everything is for man's use and enjoyment. Virtually they argue that the nature is man's domain. In Indian model God is sacrosanct and superior to all and his creation is only for the use of the mankind in a limited manner, thus ,it believes in God's domain over all the worldly phenomenon. What is reflected in the case of environmental sustainability that we have to accept and exercise the restraint on his own conduct whenever we have the chance to encounter with the nature. No doubt it requires highest inner conscience as to put any restriction which is self imposed is not an easy task. Hindu approach may give the answer to such a situation as it is devoted with highest moral values and the ethical codes. Hindu texts, as one may call, provide strong features which strengthen man's respect for God and her creations to which environment is directly linked with. More so Hindu religion and the belief are ingrained with the principal of sanctity of life. Thus, man has no dominion either over his own life or non human life. Religion does not permit any superiority of man over the nature, thus , no damage is to be inflicted on other species without adequate justification and ,therefore, all life's human and non human are of the same and equal value and all have the same rights to existence. Still more the Hindu culture and the way of prescriptive living provides a system of moral guidelines towards environmental preservation and the conservation. Environmental ethics was practised by the common man as well as even by the Kings and the Rulers because it was treated as one's pious duty towards nature. Religions may be of a great help in transforming society from materialism and consumerism to a consumer society. Law enacted may be strengthened by moral awakening. Religion can exert potential pressure and create an unique moral leadership amongst her followers more specially in respect of strengthening man's harmony with nature. In a secular state like India there appears an important conservation role of religion to play in overcoming the environmental crisis.

Concluding Observation

Making of Law is one thing and its implementation is another. Society develops in built mechanism and the institutions to regulate its functioning albeit in an inchoate way. Sanctions are the instruments which help and perpetuate institutions

to work. Institutions of Law works on the mandates of external sanctions which we used to call punishments. It creates temporal respect towards standards. Unless institution of morality comes for rescue the physical sanctions proves to be a helpless child. So the question of sustaining environmental protection by and large becomes ceremonial. Theological standards project rosy picture and the nature of human behaviour ,restraint, preaching, conduct and mandates depicted in all the religions especially Hindu mythology deserves mention with a positive hope. Hindu Rishis of the Vedic and Upanishdic era perceived the value of maintaining a harmonious relationship between the needs of man and the diversity of the universal phenomenon. Man, in Hindu culture, has been instructed to maintain harmony with nature and to show reverence for the presence of divinity in the nature. Ethical and moral beliefs and values influence ones' behaviour towards others including relationship with all creatures and plants. However, such beliefs have been a matter of attack by the other systems of governance from time to time diluting our respect towards nature. We are witnessing the culture of barbaric consumerism, selfishness and anthropocentricism which is still persisting and largely responsible for environmental distress. What is desirable is the grooming of cultural tradition of environmental conservation and the development of sustainable consumption pattern which might remedy the evil otherwise legal domain may not prove its worth in conserving our prosperous ecosystem.

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Globalization, Retrenchment and Social Justice : An Overview

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Globalization has an enormous impact on Industrial relations. The interpretation of social welfare legislations has also been affected by this trend and we find a lack of sympathy for the workers in the judicial process. Our Apex Court has rightly held, through Justice Ganguli that, the court should make every effort to protect the rights of the weaker sections of the society. He observed that-[2]

I am of the view that any attempt to dilute the constitutional imperatives in order to promote the so-called trends of "globalization", may result in precarious consequence. Reports of suicidal deaths of farmers in thousands from all over the country along with escalation of terrorism throw dangerous signal.

The learned judge emphasized that, the judges of the last court in the largest democracy of the world have a basic duty to articulate the constitutional goals which have found such an eloquent utterance in the preamble to the constitution. This puts onerous duty on the judges and especially the judges of the highest court to ensure that the promises made in the Constitution are fulfilled. If they fail to discharge their duty in making these promises a reality, they fail to uphold and abide by the Constitution which is their oath of office. The promises made in the Constitution to the workers and other marginalized sections of the society have to be and should be equated with conscience of the court.

The court made it may clear that- It needs to be emphasised that if a man is deprived of his livelihood, he is deprived of his fundamental and constitutional rights. For him, the goals of social and economic justice, equality of status and of opportunity enshrined in the Constitution remain illusory. Therefore, the judicial approach has to be compatible with the constitutional philosophy and vision of which the directive principles of state policy constitute an integral part. Justice to workmen should not, and cannot, be denied by entertaining spacious and untenable grounds put forward by the employer, whether public or private. The court emphasised that the ID Act and other similar legislative instruments are social welfare legislations and the same are required to be interpreted keeping in view the goals set out in the Preamble and the provisions contained in the part IV

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2 *Harjinder Singh v. Punjab State Ware Housing Corporation* (2010) 3 SCC 192 at 211.

of the Constitution in general, and articles 38, 39(a) to (e), 43 to 43A in particular, which mandate that the state should secure a social order for the promotion of welfare of the people, ensure equality between men and women and equitable distribution of the material resources of the community should sub-serve the common good and also ensure that the workers get their dues.

The fact of the case - The appellant was employed with the respondent corporation initially on fixed tenure basis which was later on continued beyond the tenure period. In between, he was a given higher position of work munshi from initial position of work charge mali, on a higher pay scale. His services were suddenly dispensed with. He alleged violation of sections 25-F and 25-G of the ID Act. The dispute was referred by the State of Punjab to the labour court which held that there was violation of the mandatory provisions of sections 25-F and 25-G and directed his reinstatement with 50 percent of the back wages. The corporation challenged the award of the labour court before the High Court in a writ petition. The High Court agreed with the labour court that the action taken by the corporation was contrary to section 25-G of the Act but did not approve the award of reinstatemnet on the premise that the initial appointment of the appellant was not in consonance with the statutory regulations of the corporation and articles 14 and 16 of the Constitution. The single judge, accordingly, substituted the appellant should be paid a consolidated amount fixed by it by way of compensation.

The appellant assailed this judgment of the single judge before the Supreme Court. The court was of the opinion that the impugned order of the High Court was liable to be set aside only on the ground that while interfering with the award of the labour court, the single judge did not keep in view the parameters laid down by the Supreme Court for exercise of jurisdiction by the High Court under articles 226 and / or 227 of the Constitution.

The court continued this trend in Ramesh Kumar *v.* State of Haryana[3]. In this case the workman was appointed as mali on casual basis in the public works department of the state. After putting more than two years of service as casual worker, his services were terminated abruptly. After coming to know that persons similarly appointed were either allowed to continue or regularized by the department, the workman sent a notice to the employer expressing his grievances. Ultimately, the matter culminated into a reference before the labour court. It was his case that having put in more than 240 days of service, his service could not be terminated without notice and payment of retrenchment compensation which were conditions

3 (2010) 2 SCC 543.

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precedent for effecting a valid retrenchment under section 25-F of the ID Act. the labour court upheld the plea of the workman that he had put in more than 240 days of service within the 12 calendar months preceding the date of his termination and in view of non-compliance of section 25-F, he was entitled to reinstatement. The labour court directed his reinstatement with continuity of service and 50 per cent back wages from the date of termination. Aggrieved by the said award, the State of Haryana impugned the same before the Punjab and Haryana High Court which set aside the award. The workman impugned the judgement of the High Court before the Supreme Court by way of special leave petition.

The principal point for consideration before the Supreme Court was whether the High Court was justified in setting aside the award of the labour court when the workman had established that he was in continuous service for a period of 240 days in the calendar year preceding termination, particularly, when similarly placed workmen were in fact regularised by the government. The Supreme Court observed that it was not in dispute that the workman was appointed as a mali and posted at the residence of the chief minister in the year 1991. The material placed by him before the labour court clearly showed that he had worked for three years and there was no break during his service tenure. The management witness had categorically stated that the workman was appointed by the department on muster rolls as mali in December, 1991 and he worked upto 31.01.1993. He also had stated in his evidence that there was no break from December, 1991 to January, 1993 during which period the workman was engaged. Admittedly, the workman was not given any notice or pay in lieu of notice or retrenchment compensation at the time of his retrenchment. The court held that the labour court had correctly concluded that his termination was in contravention of provisions of section 25-F of the ID Act. The workman had also averred before the labour court that he was the sole bread earner of his large family and that identical awards were upheld by the High Court and the award in his favour alone was quashed by the High Court.

The court made it clear that it was conscious of the fact that an appointment on public post cannot be made in contravention of the recruitment rules and the constitutional scheme of appointment. However, in view of the material placed before the labour court and before it the court was satisfied that the said principle would not apply in the case at hand since he had not prayed for regularization but only for reinstatement with continuity of service for which he was legally entitled. The court stated, it is well-settled law, that in the case of termination of a causal employee what is required to be seen is whether the workman had completed 240 days in the preceding 12 calendar months or not. If sufficient materials are

shown that the workman had completed 240 days of service with the employer, than his services cannot be terminated without giving him a notice or wages in lieu of notice and compensation in terms of section 25-F of the ID Act.

In fact poverty, illiteracy and ignorance of labour laws are very important hindrances in realizing to goals of social justice by the workers and labour Management jurisprudence. The court has accepted these factors in *Santu Ram Yadav v. Krishi Upaj Mandi Samiti*[4]. In *Anoop Sharma v. Executive Engineer Pvt. Ltd., Haryana*[5], the court observed that it has been repeatedly held that termination of service of an employee by way of retrenchment without complying with the requirement of giving one month's notice or pay in lieu thereof and compensation in terms of section 25-F(a) and (b), respectively, has the effect of rendering the action of the employer a nullity and the employee is entitled to continue in employment as if his service was not terminated. Clause (b) of section 25-F casts a duty upon the employer to pay to the workman at the time of retrenchment, compensation equivalent to 15 days' average pay for every completed year of continuous service or any part thereof in excess of six months. If the workman is asked to collect his dues from cash office, same is not considered sufficient compliance with section 25-F. The workman cannot be retrenched without payment, at the time of retrenchment, compensation computed in terms of section 25-F(b). If the workman is retrenched by an oral order or communication or he is simply asked not to come for work or duty, the management is under duty to lead tangible and substantive evidence to prove compliance with the mandatory provisions of clauses (a) and (b) or section 25-F. The court observed that the consequence of terminating a workman's services / employment / engagement by way of retrenchment without complying with the mandate of section 25-F of the Act are sometimes as nullity and sometimes as non est. Leaving aside the legal semantics, the court, in the of non-compliance of section 25-F was based on correct appreciation of a serious error by setting aside the award of reinstatement ordered by the labour court.

The philosophy of our Apex Court, in the case of Industrial worker has been one of empathy with them and the court has observed time and again that the interest of the worker should be duely protected, because they are not similarly, circumstanced person with the employer as for as their bargaining positions are concerned. Thus in *Bhilwara Dugdh Utpadak Sahakari S. Ltd. v. Vinod Kumar Sharma Dead* (by L.Rs.)[6] the court observed that the appeal before it revealed

4 (2010) 3 SCC 189.
5 (2010) 5 SCC 497
6 AIR 2011 SC 3546.

unfortunate state of affairs prevailing the field of industrial relations in the country. It demonstrated the harsh reality that the employers in order to avoid their liability under various labour statutes very often resort to subterfuge in trying to show that their employees are in fact employees of the contractor. The court, therefore, emphasized the need to ensure that this subterfuge comes to an end. It reemphasized the philosophy underlying labour legislation which is to protect workers against exploitation by the employer by guaranteeing them their basic rights and to level up their position so that they are placed well in their bargaining position. The court was emphatic that conferment of benefits to the labour through various legislation cannot and should not be allowed to be defeated by showing that daily wagers or casual workers are engaged through contractors to defeat their entitlements/ rights under the law. Such practices need to be discouraged and made impermissible. The court made it clear that globalization / liberaliztion in the name of growth cannot be at the human cost of exploitation of workers.

Again in *General Manager (OSD), Bengal Nagpur Cotton Mills, Rajnandgaon v. Bharat Lal*[7] the court observed that it is now a well-settled legal position that if the industrial adjudicator finds that the contract between the principal employer and the contractor is a sham, nominal or merely a camouflage to deny employment benefit to the employee and that there was in fact a direct employment, it can grant relief to the employee by holding that the workman is the direct employee of the principal employer. There are two well recognized and established tests to find out whether the contract labourers are the direct employees of the principal employer which are:

i) Whether it is the principal employer who pays the salary instead of contractor, and

ii) whether the principal employer has the power to control and supervise the work of the employee.

In this case the labour court/ industrial court constituted under the Madhya Pradesh Industrial Relations Act had answered both the question in the affirmative and as a consequence held that the workman in question was not the employee of the contractor but was the employee of the appellant, the principal employer, and had directed the latter to reinstate him in service in a reference made to the labour court which award of the labour court was upheld by the industrial court in appeal preferred by the appellant. "The high court did not interfere with the concurrent findings of the courts below. In the special leave petition preferred

7 (2011) 1 SCC 635.

by the principal employer, the Supreme Court on a careful consideration of the whole matter was of the view that the labour court and the industrial court had committed serious error in arriving at these finding which had been upheld by the high court without examining the contentions of the appellant on merit. The court observed that in regard to the first test referred to above as to who pays the salary, the labour court and the industrial court had placed the onus wrongly on the appellant when it was for the employee to aver and prove that he was paid salary directly by the principal employer and not by the contractor. This onus was not discharged by the workman. Even in regard to the second test the employee did not establish that he was working under the direct control and supervision of the principal employer. The court observed that the industrial court misconstrued the meaning of the terms "control and supervision" and held that as the officers of the appellant were given some instructions to the employee working as a guard at the company premises alongwith other guards engaged through the contractor, he was deemed to be working under the control and supervision of the appellant.

As far as Retrenchment is concerned, the Apex Court has specially directed the appropriate government to apply their mind properly to the dispute raised by the workers when it frames the reference for adjudication they should act as model employer, and the legitimate expectation of workman should be given due wightage. In *Bharat Sanchar Nigam Ltd. vs. Bhurumal.*[8] The respondent's case before the CGIT was that he had been in the employment of the appellant as a line-man on daily wages basis for nearly 15 years. While attending to a complaint of a customer of the appellant he received an electric shock necessitating his admission to a hospital for treatment which was organised by the officers of the appellant company. After he recovered, he was not allowed to resume his duties. He raised an industrial dispute alleging violation of the mandatory provisions of retrenchment law. The conciliation proceedings having failed, the State of Haryana referred the industrial dispute to the CGIT,[9] Chandigarh for adjudication. The appellant denied employee-employer relationship with him and stated that he was a contract labour of the contractor engaged by it.

The CGIT on the basis of the photocopies of the two diaries in which he had entered all the jobs attended by him on the different dates of the clients of the appellant and also taking note of the fact that the appellant had failed to produce the original records summoned by the tribunal and after drawing an adverse inference against the appellant, gave a clear finding that the respondent was

8 (2014) 7 SCC 177.

9 Central Government Industrial Tribunal.

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working directly under the administrative control of the appellant as a line-man. Further, it also held that his services had been terminated in violation of the mandatory provisions of the retrenchment law by the appellant. The CGIT, accordingly answered the reference in favour of the respondent workman and directed the appellant/ management to reinstate him with back wages. This award was upheld both by the single as well as the division bench of the high court. It stated concurrently that the award of the CGIT, both on facts as well as on law, warranted no interference.

The Supreme Court, observed that the finding of the CGIT was not to be interfered with by the high court under article 226 of the Constitution or by it under article 136 unless it was either totally perverse or was based on no evidence. The court very clearly stated that insufficiency of evidence could not be a ground to interdict the findings of the tribunals as it is not its function to re-appreciate the evidence. The court was satisfied that the finding of the CGIT that the respondent had worked for the appellant were genuine. The diaries produced of the last two years of his work clearly showed that he had worked with the appellant as lineman preceding his termination.

Further the court observed that the reasons for denying the relief of reinstatement and ordering payment of compensation in such cases are that when the termination is found to be illegal because of non-payment of retrenchment compensation and notice pay as mandatory required under section 25-F of the ID Act, even after reinstatement, it is always open to the management to terminate the services of that employee by paying him the retrenchment compensation. In the case of daily rated worker even after he is reinstated, he has no right to seek regularization. When he cannot claim regularization and may again face a situation of termination on compliance with the mandatory retrenchment provisions and procedure, no useful purpose is going to be served by ordering his reinstatement and therefore payment of monetary compensation will be the appropriate relief. Giving the relief of reinstatement, that too after a long gap, would not serve any purpose.

The court, however, made it clear that compensation might not be the appropriate relief where termination of a daily-wage worker was found to be illegal on the ground that it was resorted to as an unfair labour practice or in violation of the principle of last come first go, viz., while retrenching such a worker, daily wagers junior to him were retained. There might also be a situation that persons junior to him were regularized under some policy but the services of the workman concerned were terminated. In such circumstances, the terminated worker should not be denied reinstatement unless there were some other weighty

reasons for adopting the course of grant of compensation instead or reinstatement. In such cases, reinstatement should be the rule and only in exceptional cases for the reasons stated, such a relief can be denied. Similarly, where the service of a regular / permanent workman is terminated illegally, or mala fide, or by way of victimization, unfair labour practice, etc. reinstatement with back-wages must ordinarily be the relief granted by the industrial adjudicator.

In *Harinandan Prasad v. Employer I/R Management of FCI*[10] Food Corporation of India. The court has already held that Retrenchment law and the regularization of worker or to distinct issues The court made it clear that no labour court or industrial tribunal can order regularization as a relief in case of violation of mandatory provisions of the retrenchment law or put the worker in a better position than he held immediately prior to the one before his disengatement unless the worker has also raised the issue of unfair labour practice or sought regularization in terms of the regularization scheme on the ground of unreasonable discrimination in violation of article 14 in public employment law. If such a claim has been referred for adjudication and the issue of regularization was one of the subject matters of reference to the labour court or industrial tribunal or if there is a specific relief prayed before the high court or the Supreme Court seeking the relief of regularization, then grant of regularization in appropriate case may be granted.

Thus in recent judgment our Appex Court has clearly held that industrial adjudicator has the power to order regularization of daily, casual, and temporary workers. In all the cases where there has been violation of Art. 14 of the constitution by the employer in public employment of where the employer has resorted to unfair labour practices in termination of the services of workman or where the reference to adjudicator included a claim of regularization by the workers.[11] The courts empathy, towards the working class is crystal clear in the following observation.[12]

Of late, there has been a visible shift in the courts' approach in dealing with the cases involving the interpretation of social welfare legislations. The attractive mantras of globalization and liberalization are fast becoming the raison d'etre of the judicial process and an impression has been created that the constitutional courts are no longer sympathetic towards the plight of industrial and unorganized workers. In large number of cases like the present one, relief has been denied to the employees falling in the category of workmen, who are illegally retrenched from service by creating by-lanes and sidelanes in the jurisprudence developed

10 (2014) 7 SCC 190.

11 Bushan Tiilok Kaul L. ASIL (2014) page 863.

12 Harjinder Singh *v.* Punjab State Ware Housing Corporation (2010) 3 SCC at 209-10.

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by this Court in three decades. The stock plea raised by the public employer in such cases is that the initial employment / engagement of the workman/employee was contrary to some or the other statute or that reinstatement of the workman will put unberable burden on the financial health of the establishment. The courts have readily accepted such plea unmindful of the accountability of the wrongdoer and indirectly punished the tiny beneficiary of the wrong ignoring the fact that he may have continued in the employment for years together and that micro wages earned by him may be the only source of his livelihood.

As far as social justice aspect of labour laws is concerned- the government has laid much emphasis in the recent times on the workers' welfare. Some of those activities are statutorily provided and some of them are taken up by the respective employers in the form of incentive schemes. Then there is mutual welfare which is a cooperative enterprise of the workers themselves to organize international and other facilities for the common. benefit. The proper implementation of welfare programmes goes a long way in motivating a worker in giving a better performance in industry. Besides the welfare programmes covered under the ESIA other legislations also Sufficiently incorporate such facilities to be given to the working class. The Indian Factories Act, 1948, provides for health, safety and welfare facilities, the Workmen's Compensation Act, 1923, makes it obligatory on the part of the employer to pay compensation if personal injury is caused to his workman by accident arising out of and in the course of his employment, the Maternity Benefit Act of 1961 entitles a woman to certain benefits for the period of her absence immediately preceding the date of childbirth and for six weeks after that. Further the Mica Mines Labour Welfare Fund constituted under the Mica Mines Labour Welfare Fund Act, 1946, finances activities to promote the welfare of labour employed in that industry. Some of the major welfare programmes are sanitation, medical facilities, housing, water supply, education, general improvement in the standard of living and recreational facilities. These welfare activities relate to improvement of public health and sanitation, prevention of diseases, provision of medical facilities, drinking water supply, facilities for washing, provision of educational facilities, improvements of standard of living including housing and nutrition, amelioration of social conditions, provision of recreational facilities and provision of transport to and from the place of work.

Thus labour jurisprudence is firmly erected on the solid structure of the social justice which is struggling to be born.

Environmental Legislations- Sustainable Development Judicial Activism

Jaydip Sanyal[1]*

Introduction :

Man is both creature and moulder of his Environment, which gives him Physical sustenance and affords him the opportunity for intellectual ,moral ,social, and spiritual growth. The various activities of human beings though necessary rather unavoidable and unscientific use of natural resources is likely to give adverse results. Man polluted the water , air caused harm to the living beings on earth , land and in the sky. The actions of man caused harm to the physical, social, mental health of his fellow human beings. The natural Resources are drained, ozone layer is depleted and ecological balance is disturbed. Both aspects of man senvironment, the natural and man made are essential to his well being and to the enjoyment of basic Human Rights and the right to life[2].

Man can not afford to cause harm to the earth or to its Bio-diversity as he has to live on earth. He can not afford to dig his own grave. With an understanding between the Developed and developing countries, with advanced scientific, and technical knowledge man can achieve for him self and to the posterity better environment. To defend and improve the human environment for present and future generations has become an imperative goal for man kinda goal to be pursued together with, and in harmony the established and fundamental goals of peace and of world wide economic and social development

It was both with the initiative of Economic and social council of United Nations conducted the conference on human Environment. The way the environment was getting degraded it needed immediate attention from almost all the countries. The historical conference on human Environment was held in 1972 at Stockholm. It was the first global recognition that the Environment was endangered and the governments put in effort to protect the environment .For the first time the developed countries realized that they had completely ignored the impact on the environment during their rapid development. Then UNEP (united Nations Environment Programme) is formed. Almost all the countries of the world have undertaken to monitor the Quality of air, water, and other natural Resources of

1 * Principal, University Law College, VBU, Hazaribag

2 U.N conference on human Environment held in 1972at Stockholm

the World. The U.N. General Assembly laid down as many as 26 principles in the conference held at Stockholmin 1972.

The concept of "Sustainable Development" was used at the time of Cocoyac Declaration on Environment and Declaration in the early 1970s. It was further received impetus with the Stockholm declaration resulting from the U.N. conference on human environment in 1972. It was further strengthened in world conservation strategy in 1980. It was brought in to common use by World commission on environment and development (the Brutland commission)in 1987. The Brutland Report defines Sustainable Development as it is Development that Meets the Needs of the present without compromising the ability of the future Generations to meet their own needs[3]. Later the concept of Sustainable Development is further developed by the United Nations conference on Environment and Development held in june 1992 at Rio Dejanerio which known as Rio-Declaration and also Kyoto-conference on Global Warming in December 1997 and another Declaration at Johannesburg on Sustainable Development.

The important principles of Sustainable Development as culled out from Brundtland Report and other International documents like Rio-Declaration are

1. Inter- Generational Equity,
2. Use and conservation of Natural Resources ,
3. Environmental Protection
4. The Precautionary Principle,
5. The polluter pays principle,
6. Obligation to Assist and co-operate,
7. Eradication of poverty[4]
8. Financial Assistance to Developing countries,

Indian Position:-In India attention has been paid right From the ancient times to the present age in the field of Environmental protection and improvement. The present day legislations in India are the outcome of the growing industrialization and population pressure. There are nearly 500 central and state statutes of which at least 300 statutes concern with the environmental protection either directly or indirectly. Besides this, the common law and constitutional law, civil and criminal

3 Our common future .The World commission on environment and development. 43 (1987)
4 Vellore Citizens Welfare Forum vsUnin of India (1996) S.C. 647

law Remedies relating to environmental protection are also there. In the Economic development of any country Industries plays Vital and pivotal role. It is also known fact that the Industries are the major contributor to the pollution of environment. The core question is Whether for the sake of Environmental protection the industries / technological development can be neglected or withheld. In the Era of Economic liberalization at Global, National, state, and local levels the development activities are to be accelerated. In fact it is a need of hour, that there should be an Environmental balancing approach while pursuing the development projects. It is to be remembered that natural wealth and resources should not be exploited thoughtlessly. It is permanent assets of human beings and are not intended to be exhausted by one generation. The state has to see in protecting the environment as well as in promoting development. The harmonization of the two needs leads to the concept of "SUSTAINABLE DEVELOPMENT". The environment protection and development both have to go hand–in-hand. Economic development at the cost of degradation of environment would not be long lasting.

In india The central pollution Board monitors the industrial pollution prevention and control at the central level ,and at the state level the state pollution control board are the designated agencies.In Pre- independence period the Indian government has passed one important legislation to protect the forest and wild life in the name of Indian forest Act of 1927 . After 1970 comprehensive environmental laws were enacted by the central government in India. Firstly they enacted the Wild life protection Act 1972 aimed at rational and modern wild life management which was amended in 1993 2002, 2006. The water (prevention and control of pollution) Act 1974 which provides for establishment pollution control boards at centre and state level to act as watch dogs for prevention and control of pollution. The Forest(conservation) Act 1980 aimed deforestation , diversion of forest land for non –forestry purpose and to promote social forestry. Later the Air (prevention and control of pollution) Act 1981 aimed at checking air pollution via pollution control boards . The Environmental (protection) Act 1986 is a land mark legislation which provides for single focus in country for protection of Environment and aims at plugging the loopholes in existing legislation.

In 1991, the Public Liability insurance Act was passed to provide for mandatory insurance for the purpose of providing immediate relief to persons affected by accidents while handling any hazardous substances. In 1995, National Environmental Tribunal Act was passed to provide speedy disposal of environmental related cases through these tribunals . In 1997, the National Environmental Appellate authority Act which provided the establishment of

National environmental Appellate authority (NEAA)to hear appeals with respect to restrictions relating to the industries. The Biological Diversity Act was passed in 2002 to protect the Bio- diversity and to facilitate access to genetic materials. There are number of other laws which deals with the various aspects of environment protection , regulation, harmful activities and to provide for remedies in case of their breach. In constitutional law Art 48-A and Art 51-A(g) provides protection and improvement of environment. The other Acts are I.P.C 1860, code of civil procedure 1908 ,Factories Act ,1948 the Mines Act 1952, The industries Development and Regulation Act, 1951 The insecticides Act1968, The Atomic Energy Act 1962, the Motor vehicles Act 1939, 1988, and Noise pollution Regulation and control Rules 2000, the Bio- Medica waste(Hazardous disposal Rules)1998, the Coastal Regulation Zone Notification 1991, etc.

Thus in recent Decades India employed a wide range of Regulating instruments to preserve and to protect its natural resources. These new legislations are impressive in their range covering hither to unregulated fields such as noise, hazardous environment impact assessment etc, the legislations has specified new enforcement agencies and strengthened the old ones.

Judicial Activism and Sustainable Development:

The government and parliament both have taken number of steps to control environmental pollution and to promote the concept of “Sustainable Development” but nothing has been achieved .The judiciary has there fore taken the environmental challenge and contributed a lot through the strategy of judicial activism in the area of controlling environmental pollution . However the fact is that no law or authority can succeed in removing the pollution unless the people co- operate. The role of judiciary in controlling environmental pollution and conservation can be duly acknowledged.

In Vellore citizen Welfare forum vs union of India[5] the supreme court observed the Precautionary Principle and polluter Pays principle which are essential features of "Sustainable Development". In this case the supreme court held that "Sustainable Development" as a balancing concept between ecology and development which has been accepted as a part of customary international.

In M.C. Mehta *v* Kamalnath[6] the S.C declared the Public Trust Doctrine, which means the state as a Trustee is under a legal duty to protect the natural Resources

5 A.I.R (1996) s.c 2715

6 (1977) 1.S.c. 388

and these resources should meant for public use which can not be converted in to private ownership.

The enactments are plenty and the Rules associated with the Acts are umpteen. There was a good initiative from the legislature and the executive but it is the Indian judiciary which has taken a lead in terms of the actual immediate effect in the matter of protection of environment pollution. The Failure of the government agencies to implement the laws made prompted the N.G.O and the public to approach the court as a last resort. Though the credit for the evolution of environmental jurisprudence in India goes to supreme court but it can not be denied by any one that the maximum contribution goes to the famous Supreme court Advocate and the social activist M.C. Mehta who was the Recipient of Magsyasay award in 1997 .

As far as M.C. Mehta is concerned he has succeeded in getting new environmental policies initiated and has brought environmental protection in to Indian constitutional frame work. He has obtained almost more than 40 land mark judgments from supreme court against environmental pollution. The notable cases among them are M.C. Mehta *v.* Union of India[7] (Ganga pollution Tanneries case) M.C Mehta *v.* Union of India[8] (Ganga pollution Municipality case) M.C. Mehta vs union of India[9] (Calcutta Tanneries case) M.C Mehta *v.* union of India[10] (C.M.G Fuel /Motor vehicles case) Apart from these the S.C decided several other cases Centre for social justice *v.* union of India[11] R.A. Goel union of India and other[12] Narmada Bachavo Andolanvs union of India[13] Municipal council Ratlam *v.* Vardichand[14] (Ratlam case) Union of India *v.* Union carbide corporation (Bhopal Gas disaster case)[15] Shriram Food and fertilizer industries and other *v.* union of India[16] M.C. Mehta vs union of India[17] (TaZ Mahal case) Jagannath *v.* Union of India[18] In Vijay Singh puniya *v.* State of Rajasthan[19] the High court decided on the principle of

7 A.I.R 1998s.c 1037
8 A.I.R 1988s.c 1115
9 1997 (2) s.c.411
10 (1991)2 s.c. 137
11 S.P.l.cGjlrvol xl I (3) 2000, 1997
12 A.j.vr 200 Pandh 320
13 (2000) law Report of India S.S. 319
14 A.I.R 1980 s.c. 1622.
15 1986 1. Comp l.j 25 s.c
16 (1986) 1comp L.J 25 (s.c)
17 (1997) 2 s.c 353
18 1997 2 s.c. 87
19 A.I.R 2004 Raj 1

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Polluter pays and directed that each of the polluting industries units shall pay to the state industrial corporation 15% of its turn over by way of damages.

Conclusion:

Judicial Activism in the sphere of environment is the need of the time specially when the legislation lagging behind in bringing lacuna in the existing legal mechanism and administration is still not equipped to meet the challenge. In future too the courts will have play an active role in the formulation and effective determination of environmental policy so that elected persons of government became accountable to land and the public. An over view decisions of Apex court reveals a picture of active judicial interference to enforce the principles of Sustainable Development and to protect environmental Law courts have a Social duty since it is a part of society and in their judgments there should be a proper balance between the protection of environment and development process. The society shall have to prosper but not at the cost of the environment and at the same time the environment shall have to be protected but not at the cost of development of society. There should be both development and proper environment protection and a balance has to be found out and administrative actions ought to be proceeded accordingly.

In this aspect the social workers, N.G.Os and the public spirited lawyers in India are well aware of the facts that invoking the Writ jurisdiction of Supreme court by way of P.I.L is not sufficient to abate the environmental pollution . Prevention is better than cure . This can be achieved by the educating the general public. Their awareness can help in combating the problem on a major scale. The S.C of India directed that all over the country the cinema theatres shall exhibit the slides free of cost on environment. Now it has became a compulsory subject up to 12th standard from academic session 1992 and U.G.C. will also introduce the subject in higher classes in different universities. The credit of evolution of Environmental Justice goes to the Supreme Court and the public spirited lawyers like M.C.Mehta.

Radioactive Waste: Its Management and Legal Response

*Dr. Navin Kumar Verma**[1]

Abstract

Use of radioactive materials may release radioactive waste into atmosphere. These wastes are non-biodegradable and emits ionized radiation that can cause serious health hazards for anyone who comes into contact with the waste, and their effects are passed on to the descendants of victims for many generations to come. These wastes require sophisticated treatment and management to be successfully isolate them from the biosphere. The primary objective of radioactive waste management is the protection of human health, environment and future generation. All radioactive waste producers must ensure that special care is taken to dispose of these materials and also to protect workers, public and environment. The question of safe deposition of all radioactive waste generated worldwide is still problematic. Countries need some specific laws and regulation as well as better coordination among concerned organizations.

This paper discusses the challenges of radioactive waste management and presents methods of dealing with the challenges and effectiveness of law relating to radioactive waste management and environmental protection.

Introduction

All industrial activities results in some waste materials as it's by product. Same is the position of industries using radioactive matters. Highly radioactive materials are created during production of nuclear power and nuclear weapons and other scientific and industrial applications of nuclear energy.[2] Similarly, radioactive materials are also used in steel industry and some medical instruments. There are chances that such use of radio active materials may release radioactive waste into atmosphere. These wastes are not bio-degradable, meaning it does not decompose naturally under atmospheric effects. It emits ionized radiation that causes serious health hazards for anyone who comes into contact with the waste, and the effects are passed on to the descendants of victims for many generations to come. Exposure to radioactivity[3] affects the human body in different ways. It

1 *Asst. Professor, Allahabad University, Allahabad

2 Indian Programme on Radioactive Waste Management" Sadhana Vol. 38, Part 5, October 2013 pp. 849–857 at 849.

3 There are certain elements like radium, uranium, etc. which emit invisible effects known as radiations.

may cause skin diseases and several types of cancer and genetic birth defects.[4] Moreover, it has negative consequences on the environment also. As radioactive wastes remain dangerous to living organisms for extremely long periods there management is a daunting task. Thus radioactive wastes are different from other conventional hazardous wastes. These wastes require sophisticated treatment and management to be successfully isolated from the biosphere. This usually necessitates treatment, followed by a long-term management strategy involving permanent storage, disposal or transformation of the waste into a non-toxic form. The central concern is that all radioactive waste producers must ensure that special care is taken to dispose of these materials and also to protect workers, the public, and the environment.

The primary objective of radioactive waste management is protection of human health, environment and future generation. Therefore, waste produced in process of using such elements must be managed properly. Radioactive wastes if not managed properly may pollute our environment that causes adverse effects on health of living creatures including human beings. Radioactive pollutants[5] may remain lethally radioactive for hundreds of thousands of years and such substances may result in major accidents affecting people for generations.

In May 2010 The recovery of radioactive wastes in Mayapuri, Delhi's biggest scrap market, and the subsequent death and illnesses of the workers has raised serious concerns regarding the safe disposal of radioactive waste in India. In past, nuclear accidents like Chernobyl and Fukushima disasters have cautioned us of nuclear energy use. On the other hand our developmental needs are compelling us to resort for nuclear energy. Our Government has an ambitious goal to increase 5-fold the amount of electricity produced from nuclear power plants to 20,000 M We by 2020. We are, therefore, now forging partnerships to purchase plutonium and uranium from US, Japan and Australia.

Many guiding principles have been shaped by concerned international organizations, and various laws, rules, and regulations are formulated to ensure the safe handling of radioactive waste to protect human and environmental health. But no country has yet developed fool-proof and totally reliable methods for the management and disposal of radioactive waste, especially low-level radioactive waste. The question of safe deposition of all radioactive waste generated worldwide

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The emission of these invisible radiations is called radio activity and such substances are known as radio substances.

4 Bernard L. Cohen, "Radiation Pollution and Cancer: Comparative Risks and Proof" Cato Journal, vol. 2, No. 1 (1982) pp 255-274.

5 Radioactive pollution arises from radioactivity.

is still problematic. Countries need some specific laws and regulation as well as better coordination among concerned organizations.

Sources of Radioactive Waste

There are several sources of radioactive wastes from where it may originate. Most important and dangerous of these sources are nuclear energy cycles and nuclear weapons reprocessing. Other sources of radioactive wastes are medical and industrial wastes and naturally occurring radioactive materials that can be concentrated as a result of the processing or consumption of coal, oil, gas and some minerals.

Uranium oxide concentrate is not very radioactive, however in the process of refining and enriching U-235 from yellow cake (U3O8)a by-product is created. When nuclear fuel is used at the end of the nuclear fuel cycle, mostly spent fuel rods, contains fission products that emit beta and gamma radiation, and actinides that emit alpha particles, such as uranium-234, neptunium-237, plutonium-238 and americium-241, and even sometimes some neutron emitters such as californium. These isotopes are highly radioactive and thus very harmful to living organisms. Many of these are neutron absorbers, called neutron poisons in this context.

In many countries including India,nuclear fuel is reprocessed to remove the fission products, and then the fuel can be re-used. By product thus created, is in highly radioactive concentrated form and its disposal is a challenging task. Their management plan for spending nuclear fuel (SNF) depends on the type of nuclear fuel is used.

Medical radioactive wastes generally contain beta particle and gamma ray emitters. They can be divided into two main classes. In diagnostic nuclear medicine a number of short-lived gamma emitters such as technetium-99m are used. Many of these can be disposed of by leaving it to decay for a short time before disposal as normal waste.

Nuclear Waste Disposal

Radioactive wastes are generally divided into three categories: low, intermediate and high. Radioactive wastes found in Mayapuri, Delhi was of first category which is of low-level radio activity and represents about 90% (in volume) of all radioactive wastes. These isotopes take 10 to 50 years of time span for decay and thereafter they can be disposed of normally. They are used in hospitals, universities, companies, and nuclear energy plants. The second category of

radioactive waste is of intermediate level radioactive waste which contains much higher radioactivity than low-level radio active waste. They are found in resins, chemical sludge and metal reactor fuel cladding, and contaminated materials from reactor decommissioning. Third category is of high level radioactive waste. They are the actual spent reactor fuel, or the residual waste from reprocessing spent fuel.

Governments around the world are considering a range of waste management and disposal options, usually involving deep-geologic placement, although there has been limited progress toward implementing long-term waste management solutions. Most low-level radioactive waste (LLRW) is typically sent to land-based disposal immediately following its packaging for long-term management. This means that for the majority of all of the waste types, a satisfactory disposal means has been developed and is being implemented around the world. Concentrating on intermediate-level radioactive waste (ILRW) and high-level radioactive waste (HLRW), many long-term waste management options have been investigated worldwide which seek to provide publicly acceptable, safe and environmentally sound solutions to the management of radioactive waste. Some countries are at the preliminary stages of their investigations whilst others such as Finland and Sweden have made good progress in their investigations to select publicly acceptable sites for the future disposal of waste.

International and regional organisations such as the International Atomic Energy Agency (IAEA), the Nuclear Energy Agency (NEA), the European Commission (EC) and the International Commission on Radiological Protection (ICRP) formulate standards, guidelines and recommendations under a framework of co-operation to assist countries in establishing and maintaining national standards. National policies are normally crafted in broader framework of these internationally agreed standards, guidelines and recommendations. Fundamentally, international guidelines are formulated to ensure the protection of public life and environment. The philosophy of the safe management of radio active waste is based on the concepts of (i) delay and decay, (ii) dilute and disperse and (iii) concentrate and contain.

Low and Intermediate Level Waste

Low and intermediate level waste management defers according to physical state of the waste. For liquid, solid and gaseous states process is different according to their nature.

Liquid Waste

Low and intermediate level (LIL) liquid wastes are generated in relatively large volumes with low levels of radio-activity. If a particular stream of radio active liquid waste contains short-lived isotopes, it may be stored for adequate time period to ensure that majority of the radionuclides die down, thus, following the 'delay and decay' principles. Similarly, if the level of radioactivity present in the liquid waste is small, it may be pragmatic to dilute it sufficiently to render the specific activity levels well below the stipulated limits set by there gulators and discharge it to a large water body following the 'dilute and discharge' principles. In all other cases, the waste may call for suitable treatment in order to make the waste amenable to discharge.[6]

Solid Waste

Significant quantities of solid LIL wastes of diverse nature are generated in the different nuclear installations. They are essentially of two types: 'primary wastes' comprising components and equipment contaminated with radioactivity (e.g., metallic hardware), spent radiation sources, etc. and 'secondary wastes' resulting from different operational activities. Some solid radio active wastes include protective rubber and plastic wear, miscellaneous metallic components, cellulosic and fibrous materials, spent organic ion-exchange resins, filter cartridges, etc. Solid waste management plants in India are equipped with facilities for segregation, repacking, processing and embedment for radiation sources. Treatment and conditioning of solid wastes are practiced to reduce the waste volume so as to minimize the consumption of space in the disposal facilities and also the mobility of the radioactive materials contained. Low active combustible wastes are incinerated and compactable wastes are reduced in volume by mechanical compaction.

Gaseous Wastes

Radioactive gases and particles carrying absorbed radionuclides are the two pollutants in the gaseous waste. These must be removed before the off-gases are released to the atmosphere through tall stacks. That is why always a comprehensive off-gas treatment and ventilation system,designed to handle normal and anticipated off-normal conditions, is installed in nuclear power plants and other fuel cycle facilities in order to keep the air in the working area and the environment free from radioactive contamination. Various designs of scrubbers are deployed wherein off-gases are intimately contacted with suitable liquid media

6 P K Wattal, "Indian Programme on Radioactive Waste Management" Sadhana Vol. 38, Part 5, October 2013, pp. 849–857 at 851.

so as to retain the activity in the liquid phase. Specific absorbers are also used to remove volatile radionuclides like iodine, ruthenium, etc. The off-gases are finally routed through high efficiency particulate air filters (HEPA) which are designed for an efficiency of >99.9% for sub-micron size particles. Surveillance and monitoring of the off-gases ensure that the discharges are well below permissible limits. Treatment of the secondary solid wastes (filters and absorbers) is accomplished as described above.[7]

High Level Waste

High level radioactive liquid waste (HLW) containing most (~99%) of the radioactivity in the entire fuel cycle is produced during reprocessing of spent fuel. In addition, fuel waste i.e., the hollow clad tubes, is generated as solid HLW after the spent fuel is dissolved for the purpose of reprocessing. Public acceptance of nuclear energy largely depends on safe management of radioactive waste, especially the HLW. Strategy for management of HLW takes into account the need for effective isolation from the biosphere and surveillance for extended periods of time spanning over future generations.

India is one of the few countries to have mastered the technology of vitrification. Owing to the high radiation fields, various operations are carried out remotely in specially designed and state of the art cubicles made of 1.5 metre thick concrete walls known as 'hot cells'. These hot cells are equipped with remote handling gadgets and systems. Indigenous development of the remote handling equipment has been pursuedin active collaboration with the Indian industries, academic and national institutions.

i) Deep Geological Disposal

Among the options considered for disposing of vitrified high level waste, international consensus has emerged that deep geological disposal is the most appropriate means for isolating such wastes permanently from man's environment. The basic requirement for geological form ationto be suitable for the location of the radioactive waste disposal facility is remoteness from environment, absence of circulating ground water and ability to contain radionuclides for geological periods of time. India has wide spectrum of rock types especially those offering good potential as natural barrier for isolation and confinement of vitrified waste products.

7 P K Wattal, "Indian Programme on Radioactive Waste Management" *Sadhana* Vol. 38, Part 5, October 2013, pp. 849–857 at 853.

Granites, constituting about 20% of the total area of the country, could be the most promising candidate for deep geological repository. Even though the need for deep geological repository in India will arise only after a few decades, nonetheless, research and development work is in progress in the field of natural barrier characterization, numerical modelling, conceptual design and natural analogues of waste forms and repository processes. A system of multiple barriers that gives greater assurance of isolation is followed for disposal of radioactive wastes. The overall safety against migration of radionuclides is achieved by a proper selection of waste form, suitable engineered barrier, back fill and the characteristics of the geo-environment of the site.[8]

ii) Recycle and Reuse

The need for resource utilization along with technological advancement has led to emerging scenarios of recycle options, which may also reduce the burden on future generation. Significant reduction in the potential radioactivity of the waste can be achieved through improved recovery and recycling of plutonium. For sustained development of nuclear power, the environmental impact of the long term radio-toxicity of HLW needs to be reduced. In the partitioning and transmutation technology, the long lived minor actinides (Np, Am, Cm) and fission products(129I, 99Tc, etc.) are isolated from the waste and transmuted by subjecting them to neutron bombardment whereby they either become non-radioactive or convert into elements with much shorter half-lives than the original. This transmutation may be achieved in Integral Fast Reactors(IFR) or Accelerator Driven Sub-critical Systems (ADSS), leading to either elimination or reduction of radioactive inventories.

International Position

International and regional organisations such as the International Atomic Energy Agency (IAEA), the Nuclear Energy Agency (NEA), the European Commission (EC) and the International Commission on Radiological Protection (ICRP) formulate standards, guidelines and recommendations under a framework of co-operation to assist countries in establishing and maintaining national standards. National policies are normally crafted in broader framework of these internationally agreed standards, guidelines and recommendations. Fundamentally, international

8 P K Wattal, "Indian Programme on Radioactive Waste Management" *Sadhana* Vol. 38, Part 5, October 2013, pp. 849–857 at 856.

guidelines are formulated to ensure the protection of public life and environment.[9]

IAEA's Role

The IAEA promotes international co-operation in the waste management field since it was established in 1957. Reflecting the very diverse range of interests among its 151 Member States, the IAEA´s waste management programmes encourage activities which benefit Member States regardless of their degree of sophistication in the uses of nuclear energy. It endorses a system approach that includes all operational and safety-related activities, from determining the requirements, resources and technologies to assess the impacts of each element of a waste management system.

The IAEA's regulations or safety standards regarding to radioactive waste management are not legally binding on its members but may be adopted by them, at their own discretion, for use in national regulations in respect of their own activities. It means that the final decisions and legal responsibilities in any licensing procedures rest with the nations. However, the safety standards are binding in IAEA operations in member-States and in relation to operations assisted by the IAEA.

Practice in other Nuclear Power Countries

While radioactive waste management methods vary from country to country, the primary objective remains the same. Regulations principally aim to protect people and the environment from hazards arising from radioactive waste.

(i) United States

In the United States, prior to 1980, no legislation was ratified to manage or disposal of radioactive waste. Wastes, some of which remains dangerously radioactive for many years, were kept in various types of temporary storage. In 1980, Congress enacted the Low-Level Radioactive Waste Policy Act (amended in 1985) to promote the development of regional disposal facilities, also to encourage States to form regional inter-States compacts for the disposal of low-level radioactive waste. Nuclear Regulatory Commission (NRC) and Agreement States are regulatory bodies that regulates low-level waste disposal through a combination of regulatory requirements, licensing, and safety oversight. For

9 Amit Kumar, "Dealing with radioactive waste" accessed at: http://orfonline.org/cms/sites/orfonline/modules/analysis/AnalysisDetail.html?cmaid=19081andmmacmaid=19082 visited on 10 November 2016.

the use of radioactive materials, a company needs to take license from NRC (www.nrc.gov).

The Act contained both positive and negative effects. The positive incentive allowed compacts to restrict access to its regional disposal facility to member states, hence limiting the amount of waste disposed of in any state hosting a regional disposal facility. A negative incentive is for the states that did not provide access to a disposal facility would be required to 'take title' to and possession of the wastes generated within their borders. However, the provision has been lost in 1992; the U.S. Supreme Court struck down the "take title" provision in a lawsuit brought against the federal government by New York State.

(ii) United Kingdom

In UK, the Radioactive Substances Act 1993 provides the framework for controlling the management of radioactive materials and wastes. The Act requires earlier permission to dispose of radioactive waste. It also empowers the concerned environment agency to attach conditions and limitations to any authorization that it issues The law also requires registration for the keeping and use of radioactive material (other than by nuclear sites licensees) and authorization for the accumulation of radioactive waste (other than on nuclear sites). In spite of enactment of this law, UK is still struggling to find a solution to the problem of long term radioactive waste management.

(iii) France

In France, the National Plan for Radioactive Waste Management includes all types of waste (except HLW), regardless of origin, and aims at achieving consistency in its approaches. HLW is attempted within the framework of specific legislation. Following a public debate on the subject of nuclear waste, France adopted a new law on radioactive waste management in 2006. This National Plan, supported by a National Inventory of Radioactive Wastes and Recoverable Materials, is considered as an important tool to improve radioactive waste management.

(iv) Russia

The Russian legal system has no specific law regulating the radioactive waste management. Since 1992, some serious but unsuccessful attempts were made to create a comprehensive legislative Act to regulate radioactive waste

management. In 2008, Rosatom Federal Atomic Energy Agency disseminated the Bill on Radioactive Waste Management. This is one of the first attempts to organize a broad discussion of an important law in the field of nuclear energy use.

(v) China

In China, the Radioactive Pollution Prevention Act is a basic law for the radioactive waste management. In addition to this Act, there are some other subsidiaries laws to deal with the problems of radioactive waste management. These are: Act on Prevention and Control of Radioactivity Contamination, Act on Environment Protection, and Act on Environment Impact Assessment.

China has not yet crafted any specific regulation for radioactive waste management. But, there are some relevant regulations which are as follow: the Ordinance on Supervision of Civilian Nuclear Installation, Ordinance on Safety and Protection for Radioisotope and Radiation Emitting Equipment, and the Environmental Policy for Low Level Waste Disposal. These regulations are enforced principally by State Environment Protect Administration (SEPA) and China Atomic Energy Authority (CAEA).

Nuclear Accident and Third Party Liability

Accident at Chernobyl has shown to the world the geographical scope of damages which it may cause. Therefore, to deal with such accidents affecting people of more than one country and surrounding atmosphere, international community has decided that protection accorded to victims by a third party liability regime be distributed equitably among affected countries. The possible magnitude of damages which may be caused from a nuclear accident is very high therefore insurance coverage of liability required international collaboration between national insurance pools.

To deal with the issue in 1960 through the Paris Convention on Nuclear Third Party Liability,special international regime for nuclear third party liability was established. The drafters of the Paris Convention set out to provide adequate compensation to the public for damage resulting from a nuclear accident and to ensure that the growth of the nuclear industry would not be hindered by bearing an intolerable burden of liability.

The Convention establishes a special legal regime founded on a number of important principles:

- The nuclear installation operator is exclusively liable for damage resulting from accidents at its installation or during the transport of nuclear substances to and from that installation.
- The maximum liability of a nuclear installation operator is SDR 15 million and the minimum liability is SDR 5 million. However, the NEA has recommended that Paris Convention states set the maximum liability amount to not less than SDR 150 million; most have done so.
- The nuclear installation operator must have financial security equivalent to its liability.
- The right to compensation expires if legal action is not brought within ten years of the nuclear accident.
- The Convention must be applied without any discrimination based on nationality, domicile or residence.
- In general, the courts of the state where the nuclear incident occurred deal with compensation claims.

The Paris Convention provides for compensation for injury to or loss of life of any person, and for damage to, or loss of any property caused by a nuclear accident in a nuclear installation or during the transport of nuclear substances to and from installations. It does not cover damage to the nuclear installation itself.

The Paris Convention also applies to nuclear substances in transport from one nuclear operator to another. Liability is, in principle, imposed on the operator sending the nuclear substances since it will normally be responsible for its packing and containment. In the case of transport to or from operators in states which are not party to the Convention, special provisions apply to ensure that an operator to which the Convention regime applies will be liable.

The Paris Convention generally applies when an accident causing damage occurs in the territory of a party and damage from this accident is suffered in the territory of a party, including the territorial sea. In 1968, the NEA Steering Committee recommended that the Convention cover nuclear incidents occurring or nuclear damage suffered on the high seas and in 1971, it recommended that the Convention apply to damage suffered in a Paris Convention state even if the nuclear incident occurs in a state not party to the Convention. Many of the Paris Convention states have adopted these recommendations.[10]

10 "Paris Convention on Nuclear Third Party Liability" accessed at: http://www.oecd-nea.org/law/paris-convention.html visited on 18 November 2014.

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Law in India

In India,the Atomic Energy Regulatory Board (AERB) deals with certification and disposal of radioactive material, but does not monitor if the disposal rules are being followed. Relevant sections of the Atomic Energy Act (33 of 1962) and the rules framed under the Atomic Energy (Safe Disposal of Radioactive Wastes) Rules, 1987, and the Atomic Energy (Radiation Protection) Rules, 2004, prescribe detailed guidelines regarding medical exposure, potential exposure, personal monitoring, and quality control. Moreover, Acts also advocate the appointments of radiation workers and radiological safety officers. For the violations of above mentioned rules penalties are prescribed.[11]

However, the Atomic Energy (Safe Disposal of Radioactive Wastes) Rules, 1987 ("Nuclear Waste Rules") is the only definitive law for the Radioactive Waste Management. It is submitted that it does not even begin to cover the bases, which would be thrown open by the installation of nuclear power plants. A law of this nature ought to provide a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level radioactive waste and such spent nuclear fuel. The Nuclear Waste Rules only provides a sketchy Schedule, containing conditions and procedures for disposal of radioactive wastes by institutions handling small quantities of radioisotopes. It is therefore necessary to re-examine such rules to make radioactive waste management more effective.

The Ministry of Environment and Forests, responsible for checks against contamination of such hazardous elements like lead and mercury, oversees the Hazardous Waste (management, handling and trans-boundary movement) Rules. But there is no mention of 'radioactive waste' in either the Bio Medical Waste Rule 1998 or Hazardous Waste Rules. Although the Bio Medical Waste Rules 1998 list a number of hospital-generated wastes but the rules do not include radioactive waste. The Hazardous Wastes Rules include management, handling and trans-boundary movement of mining waste, heavy metals, metal ash from photographic film, plastic waste, etc.

Although the State Pollution Control Boards are authorized to check for contamination and spills of all kinds of hazardous waste, it has no mandate to investigate radioactive waste or material. This means there is no agency to take complete responsibility for any radioactive material found at a scrap market in India.

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11 "Govt. issues guidelines on disposal of radioactive materials" accessed at: http://www.thehindu.com/news/cities/Delhi/govt-issues-guidelines-on-disposal-of-radioactive materials/article420744.ece visited on 18 November 2014.

As India moves fast on the superhighway to civilian nuclear power plants and with Russia, USA, Japan and other developed countries like Australia agreeing to support us for it and supplying us nuclear fuel, we must also strengthen our regulatory framework for safe and environmentally acceptable methods of disposal of radioactive wastes that would be generated. We must emphasise on safety aspect of nuclear power plants and it would not be premature at this early stage to chalk out a detailed regulatory regime governing disposal of radioactive wastes.

The Civil Liability for Nuclear Damage Act, 2010 which provide for civil liability for nuclear damage and prompt compensation to the victims of a nuclear incident through a no-fault liability regime channelling liability to the operator is a good step forward; however, the Act has several drawbacks. The liability of operator of the nuclear installation is limited to nuclear damage caused by a nuclear incident in that nuclear installation or involving nuclear material coming from, or originating in, that nuclear installation or involving nuclear material sent to that nuclear installation.[12] It does not cover liability for any nuclear damage where such damage is caused by a nuclear incident directly due to a grave natural disaster of an exceptional character or an act of armed conflict, hostility, civil war, insurrection or terrorism.[13]The maximum amount of liability in respect of each nuclear incident is confined to the equivalent of three hundred million Special Drawing Rights[14], although the Central Government may raise it by notification.[15] Section 17 of the Act says that the operator of the nuclear installation, after paying the compensation for nuclear damage have a right of recourse only when such right is expressly provided for in a contract in writing or/and the nuclear incident has resulted as a consequence of an act of supplier or his employee, which includes supply of equipment or material with patent or latent defects or sub-standard services or/and the nuclear incident has resulted from the act of commission or omission of an individual done with the intent to cause nuclear damage. Thus victims will not be able to sue anyone. Section 18 says that the right to claim compensation for nuclear damage shall extinguish, if such claim is not made within a period of ten years, in the case of damage to property and twenty years, in the case of personal injury to any person. The date of occurrence of the incident shall be the date as notified by the Atomic Energy Regulatory Board constituted under the Atomic Energy Act, 1962. Section 35 excludes the jurisdiction of lower courts by stating that: "no civil court (except the Supreme Court and a High Court exercising jurisdiction under articles 226 and 227 of the Constitution) shall have

12 Section 4 (1) of the Civil Liability for Nuclear Damage Act, 2010

13 Section 5 (1) of The Civil Liability for Nuclear Damage Act, 2010.

14 As the Protocol amending the 1963 Vienna Convention on Civil Liability for Nuclear Damages adopted in Vienna, on 8-12 September 1997.

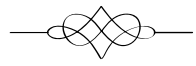
15 Section 6 (1) of The Civil Liability for Nuclear Damage Act, 2010.

jurisdiction to entertain any suit or proceedings in respect of any matter which the Claims Commissioner or the Commission, as the case may be, is empowered to adjudicate under this Act and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act". Thus in case the supplier is US Corporation no law suit can be filed in US courts as may have done under the Price Anderson Act[16] of US. This Act does not properly address liability in case of environmental damages. It was also reported that the Government of India has initiated moves to further dilute the Nuclear Liability Act to seal the nuclear deal with the US government and the US Corporation of Westing house to.[17]

Conclusion

Radioactive pollution creates great problems for the survival of the life. It is harmful for all living beings for a long duration. In the last few decades, number of people being exposed to ionizing radiation has increased tremendously, especially people involved in the mining of uranium ores, patients treated with g-radiations and technical people using X-rays and other radioactive isotopes. However, radioactive wastes generated by nuclear reactors or from nuclear weapons programme are highly dangerous.

In light of the discussion and analysis of the legal provisions, it is suggested that the radio active waste management law in India is still not par with the law of developed countries like United States, United Kingdom and Japan. These laws and regulations must be made more effective and stringent. Penalties provided under the Atomic Energy (Safe Disposal of Radioactive Wastes) Rules, 1987, the Atomic Energy (Radiation Protection) Rules, 2004 and the Civil Liability for Nuclear Damage Act, 2010 must be made more effective and stringent. They have to be in accordance with the absolute liability principal. The radiation incident of Delhi's Mayapuri industrial area may have goaded the authorities into action, but the truth has surfaced again that the dangers posed by radioactive material and wastes have mostly been ignored in India.



16 US Congress passed the Price-Anderson Act in 1957 to ensure that adequate funds would be available to compensate victims of a nuclear accident. It also recognized that the risk of extraordinary liability that companies would incur if a nuclear accident were to happen would render insurance costs prohibitively high, and thwart the development of nuclear energy.

17 Mitul Thakkar, "Dilution of Nuclear Liability Act and Mithi Virdi Power Project face opposition" accessed at: http://articles.economictimes.indiatimes.com/2013-09-23/news/42324057_1_nuclear-power-project-memorandum-nuclear-liability-act visited on 18 November 2014.

The role of Statutory Provisions in advancing Legal Education in India: A Critical Analysis

Dr Anand Kumar Tripathi[1]

Abstract:

Legal education has gone global, thanks to law clinics, the internet, immigration, the evolution of human rights norms, moot courts, Street Law, and cultural, educational, and linguistics exchange programs. Legal education institutions are inherently conservative, like academia in general, where change comes slowly. Efforts to reform professional education come slowly as well, paralleling the conservatism of the legal profession. The Knowledge Commission of India appears to go nearer to the truth when it observes that: 'Legal education should... prepare professionals equipped to meet the new challenges and dimensions of internationalization, where the nature and organization of law and legal practice are undergoing a paradigm shift."

There are mainly three statutory bodies i.e. Bar Council of India, University Grants Commission and Universities which has to shoulder the responsibilities in advancing legal education. Now the time for blaming one institution to other has gone. Legal education is still struggling to achieve the pinnacles in higher legal education. In this situation the role of regulatory bodies becomes important and poses multiple questions. As per existing provisions Bar Council of India is empowered "to promote legal education and to lay down standards of such education in consultation with the universities in India imparting such education and the Bar Councils of the States". In the opinion of the researcher drastic changes are require to be done as Bar Council of India is fail to achieve the lofty ideals of legal education. Hence, a separate regulatory authority is needed to lay down standards and to promote legal education having practical and academic approach. Let us come forward and explore all possible efforts for the bright future of legal education.

This paper aims to understand the roles of various regulatory bodies that how legal education can be placed at the zenith in the academic horizon. Every stakeholder has to have fair play in advancing higher legal education.

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Introduction:

The pattern of legal education which is in vogue in India today was transplanted by the Britishers after the establishment of English Rule in the country. It was in the year 1857, that a step was taken in the direction of imparting formal legal education in the country. Three universities, set up in the cities of Calcutta, Madras and Bombay, formally introduced legal education as a subject for teaching. This was in a way the beginning of the era of legal education in India

Legal Education has traditionally been a neglected area, in India. It is one area where there has not been any fundamental change during the last 150 years. Except for the duration of the courses, Establishing National Law Universities and addition of some fundamental subjects, there has not been innovation in legal education scenario during all these years. Legal Education in India has remained mostly concentrated on developing legal professionals in a national context. Changes in Legal Education scenario cannot be fully understood from various committee reports[2], which do not exactly follow the actual changes in the legal education scenario.

In its Report XIV of 1958, the Law Commission of India stated that the number of growing colleges in India had led to the downfall in the standards of legal education. It added that the majority of students in these institutions were unemployed and not able to secure a job. It further stated that these students had taken up the study of law because they were waiting for a job and had no intention to practice law as a profession. The Commission lamented that the legal education institutions were not teaching law as a science or a branch of learning, but were merely imparting knowledge of certain provisions and principles in law. The Commission characterized the prevailing situation as 'chaotic' and 'dismal' and went on to make a host of recommendations for the improvement of legal education in the country.[3]

In the early age of legal education no regulatory body was in the practice. It was felt to have a proper mechanism in order to supervise and inspect the legal education in our country. In India, Legal education is coming under twin bodies-Bar Council of India and University Grants Commission.

2 Law Commission Report(1958), Ahmadi committee report and Sheetalwad Committee Report for advancing legal education.

3 Law Commission of India, Fourteenth Report on Reform of Judicial Administration (1958).

Advocate Act:

The Report of the Law Commission and concern expressed by academic lawyers and the Bar made Parliament take stock of the situation and as a result the Advocates Act, 1961 came to be enacted by Parliament by virtue of its powers under Entries 77[4] and 78[5] of List I of the Constitution of India. Under the Advocates Act, 1961, one of the functions of the Bar Council of India[6] is to "promote legal education and to lay down standards of such education in consultation with the universities in India imparting such education and the Bar Councils of the States".

After the enactment of the Advocate Act, 1961, Bar Council of India (BCI) became the apex body for the entire legal profession. However, the legal education remained within the purview of University Grants Commission, which was an expert body constituted by the Government of India under the University Grants Commission Act, 1956 with a view to coordinate and determine standards in institutions for higher education or research and scientific and technical institutions.

Bar Council of India

The Bar Council of India and the various State Bar Councils came into existence after passage of the Advocates Act, 1961, which amended and consolidated the laws relating to legal practitioners. Passed by virtue of Parliamentary powers under Entries 77[7] and 78[8] of List I, Schedule VII of the Constitution of India, the Act created an all India Bar. The bar is comprised of only one class of legal practitioners, namely senior advocates and other advocates.

The Bar Council of India enacted its Rules in 1965 to deal with the standards of legal education and recognition of degrees in law for admission as advocates. Rule 21 of the Bar Council of India Rules, 1965 provides that the Bar Council of India may issue directions from time to time for maintenance of standards of legal education and the university/college is required to follow the same.

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4 Constitution of India, Entry 77: Constitution, organization, jurisdiction and powers of the Supreme Court (including contempt of court) and the fees taken therein; persons entitled to practice before the Supreme Court.

5 Id, Entry 78: Constitution, organization (including vacations) of the High Courts, except provisions as to officers and servants of High Courts; persons entitled to practice before the High Courts

6 Section 49(*d*) of Advocate Act 1961, enables Rules to be framed by the Bar Council of India in regard to the standards of legal education to be observed by the universities in India and the inspection of universities for that purpose.

7 Supra Note-3

8 Supra Note-4

Rule 8 of Chapter III of the Bar Council Rules dealing with the Legal Education Committee, enables the Committee to make its recommendations to the Council for laying down the standards of legal education for the universities, to visit and inspect universities and report to the Council, and, to recommend to the Council for recognition of any degree in law of any university under Section 24(1)(c) (iii) of the Act. The Committee is also authorised to recommend the discontinuance of any recognition already granted by the Council.

In Rule 17 of the Bar Council Rules states that no college shall impart legal education unless its affiliation to any university has been approved by the Bar Council of India. Also, Rule 18 deals with inspection by a Committee to be appointed for this purpose. Despite various rules as discussed in preceding lines, not to avail so for in terms of advancement of legal education. Lack of coordination between BCI and University Grants Commission is one of the big hurdles behind failure of legal education.

In this regard it is also pertinent to discuss that Bar Council of India has been empowered to accord recognition to universities wishing to start law courses[9] and lay down standards of legal education, including the subjects to be taught, mode of examination, and the degree to be conferred on successful students.[10] The Council is bestowed with general rule making powers to attain the Act's objectives.[11]But Bar Council of India cannot impose any conditions over the act of UGC regarding policy relating to legal education. "...as law courses in Universities which offer certain law degrees or diplomas (and where such students are notified that those degrees or diplomas will not entitle them to practice are concerned) which do not enable a person to practice, the Bar Council of India cannot impose mandatory conditions. The UGC has the prerogative in such cases. However, in the laying down of standards by the Universities even in regard to such courses, though the prerogative is with the UGC and the Universities, they would benefit much by consulting the Bar Council of India. In other words, in regard to courses in law which do not lead to a professional career, the UGC and the Universities could, at their option, consult the Bar Council of India, though it is not mandatory".[12]

University Grants Commission

The UGC Act provides that, in consultation with the concerned universities, the Commission shall take all such steps it sees fit for the promotion and

9 Undergraduate Law Programme

10 Advocates Act, 1961, s 7(1)(h).

11 Ibid, s 49.

12 The 184th Report of the Law Commission of India on legal education reform.

coordination of university education, and for the maintenance of standards in teaching, examination, and research.[13] The UGC may allocate grants to universities and colleges for maintenance and development. It can also advise the central government, state governments and institutions of higher learning on the measures necessary for the promotion of university education, and make rules and regulations consistent with the Act.[14]

The Commission has the power to confer degrees and develop innovative academic programs on its own. The institutions it oversees are autonomous and not patterned on the conventional university system. While they enjoy the academic status and privileges of a university, these Institutions are able to strengthen activities in their field of specialization, rather than become a multi-faculty university.

Committee on the Reform of Legal Education

In Bar Council of India v Bonnie FOI Law College and Ors,[15] the Supreme Court addressed issues relating to the inspection, recognition, and accreditation of law colleges. The Court noted with concern the diminishing standards of professional legal education and identified the quality and standard of infrastructure, library, and faculty of an institution that imparts instruction in law.

The subsequently formed a three-member Committee on the Reform of Legal Education received suggestions from various legal luminaries. As doubts were expressed regarding the ability of Bar Council of India, the luminaries suggested a new body be constituted to regulate the country's legal education. Their major concern related to the lack of funds, resulting in underpaid faculties. They also made suggestions on changes in the Bar Council's inspection and recognition procedures and introduction of an accreditation or rating system to incentivize and maintain quality legal education. Lastly, they suggested that a bar examination be instituted so that only the best students would have the privilege of appearing in the courts.[16]

National knowledge commission on legal education[17]:

The working committee of the NKC presented certain views in the ambit of

13 University Grants Commission Act, 1956.

14 Id, s 12.

15 SLP 22337 of 2008.

16 Report of the Committee on the Reform of Legal Education (2010) 472-4.

17 Available at http://knowledgecommissionarchive.nic.in/downloads/report2009/eng/2_Overview.pdf visited on 16th April 2017. OMMISSION AND the skilled and talented lawyers differentiated from the mass. e maintained. of the legal aid

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legal education. Summary of the views presented are:

1. The legal education should be based on the concept of justice oriented study and the understanding of the values or in consonance with the principles of Constitution of India.
2. Legal education should be able to deal with the growing demands of the legal profession and should be able to produce such skilled lawyers as the profession demands.
3. There should be highest possible observance of the professional ethics principle by the lawyers. With this they should also be taught the principles of public service and the legal aid they can provide to the society and the benefits of the same.
4. Legal education should be based not only based on the study and understanding of laws prevalent but it should be multi-disciplinary, multi-functional and contextual.
5. The admissions in the law colleges should be based on a common entrance test that should be conducted nationally for the better intake of students and gradually improve the quality in education that a university requires.
6. In the curriculum more weightage should be placed on the human rights laws also so that the students can be sensitized with the situations and problems the world is facing nowadays.
7. International laws and comparative studies should also be given importance. This will help develop the analytical skills of the students when they will be able to compare the current laws of the nation with the laws in practice of the other nations.
8. New developments in technology, medicine, labour and employment policies and overall globalization policies and changes should also be included in the curriculum for the comprehensive study approach.
9. The examinations that are conducted at the end of the semester should be problem oriented and not mere testing the memory of the students.
10. A good number of legal internships should be provided to the students that will help them develop their legal skills and techniques and thus can learn the practical aspects of the legal profession. Also students should be given opportunities of mooting in the college level competitions as well as make them aware of the legal aid programs.

11. Research in the field of law should be encouraged. Better library facilities should be provided also setting up advanced centers which can provide proper learning environment to such research scholars and will help in improving the standards of LL.M, M.Phil and Ph.D.
12. There needs to be a radical change in the rating system. The ease with which the Universities get the ratings according to their needs is because of the high level bureaucratic problems needs to be tackled. The rating criteria should be based on areas like the quality of faculties, course, infrastructure etc. and should be done every year so that the standards of legal education can be maintained.
13. The bar examination should also be restructured to help get the skilled and talented lawyers differentiated from the mass.

Suggestion

Law is not purely a professional skill confined to courts and litigants but it is a social science. Laws reflect social ethos. There has never been a dearth of ideas about the objectives of legal education nor the scheme for redeeming it so as to make it more meaningful and socially relevant. The quality of legal education has a direct impact on the prestige of the legal profession. We must, therefore, identify the areas of default and initiate corrective action to repair the damage. It is rightly observed by an economist of repute, Dr.Manmohan Singh that "We need to focus on utilizing the rich, vast and diverse resources available in the legal domain for imparting legal education in the country[18]."If we are to have the rule of law in our country, if we are to have an economic environment where contracts are easily enforceable, we must ensure that our law teachers, advocates, corporate lawyers, legal advisors, judicial officers and legal facilitators are of very high standard."This is possible only if there is dramatic reforms and improvement in the scope and quality of our legal education systems."[19]

The body governing the standards of legal education i.e. the BCI does not have a proper structure or organization dealing with this issue. The Advocates Act also has number of sections and rules prescribed but then they are not followed properly. No proper supervision is done of the colleges already established and the new ones as well so as to maintain the quality.

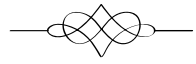
18 http://wapedia.mobi/en/Faculty_of_Law accessed on 25/05/2017

19 http://www.thaindian.com/newsportal/politics/pm-slams-legal-education-in-india_100356716.html accessed on 25/05/2017

There should be separate institution like "centre for Advanced Legal Studies and Research"[20] for advancing research and National Law Academy for law teaching, this is needed to develop and upgrade the skills of existing members or faculties in all the law college and also teachers entering the profession should be skilled before entering the same. Also, a program for continuous upgradation of the skills of the faculties with the advent of new techniques and methods of teaching is also must.

Today, legal education should be oriented to employment and should be overhauled to match the fast pace of a changing world. The position in regard to legal education in this country has, it appears, definitely deteriorated." [21] The UGC Act did bring about some improvement in the matter of regulation of standards of teaching in the universities generally but much was still left to be done.The decline in standards of legal education and with that the decline in the prestige and image of the legal profession became a cause of concern. Dr Radhakrishnan lamented that "our colleges of law do not hold a place of high esteem either at home or abroad, nor has law become an area of profound scholarship and enlightened research...."

It would also be pertinent to quote the verdict of the Supreme Court "that continuing and well organized legal education is absolutely essential reckoning the new trends in the world order and to meet the ever-growing challenges."[22] Despite the fact that position of legal education in the country is deteriorating day by day but the sound of various committees on legal education reform is still not loud enough for somebody to get up from the deep slumber of "Kumbakarna".



20 National Knowledge Commission Report(2002)

21 The Law Commission (14th Report) on "Reform of Judicial Administration", in 1958.

22 State of Maharashtra vs Manubhai Pragaji Vashi (1995) 5 SCC 730

Novel Elucidations of the Right to Life

By Sakshi Pathak[1]
Lavanya Pathak[2]

"Life has no meaning, unless you supply one to it."

— Henry Miller

Abstract

The right to life is a right that incorporates all. With much justice, it has been said that if the Right to Life is interpreted in its true sense, there need not be any more Fundamental rights for it is deep, pervasive and all inclusive. The term Life does not only mean being alive, over time it's scope and horizon has expanded, in collaboration with the changing needs and values of the people. Today, the world is at the dawn of Modernity and this period is defined, not only by varied needs of the people but also by their increasing expectations. This paper aims to highlight some of the contemporary needs of people that strive to be incorporated into the ambit of rights guaranteed by this part and it further analyzes how the judiciary and legislature has recognized the same, applied it and where the scope of application remains lacking. Some of the rights that shall be discussed include the Right to be Forgotten, the Right to a Speedy Trial, the Right to Higher Education, the Right to Die, Right to a Pollution Free Environment and the Right to Rehabilitation. Though these have not been accepted completely, there is surely a ray of hope for the years to come. This paper traces the way from a time where the word "Life" meant so little to the time where it has, in its beauty expanded to fulfill all expectations of the people.

Introduction

Right to life and personal liberty is the most cherished and pivotal fundamental human rights around which other rights of the individual revolve and, therefore, its study assumes great significance. The study of right to life is indeed a study of the, occupies a unique place as a fundamental right. It guarantees right to life and personal liberty to citizens and aliens and is enforceable against the State. The new interpretation of Article 21 in Maneka Gandhi's case has ushered a new era of expansion of the horizons of right to life and personal liberty. The wide dimension given to this right now covers various aspects which the founding fathers of the Constitution might or might not have visualized.

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'Right to life' and 'personal liberty' is the modern name for what have been traditionally known as 'natural right.' It is the primordial rights necessary for the development of human personality. It is the right which every human being everywhere at all times ought to have simply because of the fact that in contrast with other beings, he is rational and moral. It is the fundamental right which enable a man to chalk out his own life in the manner he likes best. Right to life and personal liberty is one of the rights that is expansive enough to incorporate within itself, the new and emerging needs of the people which were not much talked about in the earlier times.

With the privacy of an individual being of great importance in leading a good life, people should have a right over what information is available about them when their name is entered in a search engine and get such information erased that is misleading, redundant, anachronistic, embarrassing, or contain irrelevant data associated with the person, likely by name, so that those past records do not continue to impede present perceptions of that individual: *The right to be forgotten*.. When the government takes measures to stop practices like bonded labour, prostitution and child labour, an important question comes into picture: What source of livelihood is left for such people to sustain themselves and here emerges the question of *the right to rehabilitation* of these people. *Right to speedy trial* has been assuming greater significance due to the delayed procedure of dispensing justice in the country which defies the purpose of providing article 21. If the article provides us the right to live then there should be a liberty to be *able to terminate life*, especially when life is not equivalent to a dignified existence as the article guarantees. With the increasing pressure on the environmental resources, there emerges a *Right to safe and pollution free environment* and with the increasing role of higher education in the upliftment of the people at the lower strata, there is a need for a *Right to higher education* This paper aims at discussing the emerging rights that have been assuming great significance in the country and do qualify as an important requirement in providing us a dignified existence.

Right to be Forgotten

The right to be forgotten is about making sure that the people themselves take decisions regarding what information is available about them online when their name is entered in a search engine. In other words the "right to be forgotten" refers to the right of an individual to erase, limit, or alter past records that can be misleading, redundant, anachronistic, embarrassing, or contain irrelevant data associated with the person, likely by name, so that those past records do not

continue to impede present perceptions of that individual. The article explores the reach of the recent European Court of Justice Case[3]

The intellectual origin of the right to be forgotten has its intellectual origin in French Law, which provides a "right to oblivion" (le droit d l'oubli), wherein a convicted criminal may object to the publication of the facts relating to her conviction after she has already served her sentence. The rationale behind allowing the former convict get the publication of her crime erased is that once the person has served her sentence and is in the process of rehabilitation, she should be free from getting her image tainted because of her past. Following this, in 2010, the European Commission proposing a comprehensive approach to personal data protection that would include a right to be forgotten extending to everybody, not just the rehabilitated criminals. This right was then defined as the "right of individuals to have their data deleted when they are no longer needed for legitimate purposes." Based on the European Commission proposal, a working definition of this right would have the following parts: (I) An individual has the right to have her personal data deleted from a website if doing so does not infringe the right of free expression (which explicitly includes journalism and artistic and literary expressions); (2) website operators must remove such data from their servers without delay, in addition to making best efforts to remove it from any third-party servers with which the data has been shared.

This right can be rightly said to have been developed as a response to technology. Although a new arrow in the quiver of privacy-rights, the right to be forgotten is not precisely the same as the traditional right to privacy, which depends on framing a protected interest against the actions of an infringing party such as a government neither should it be confused with the right to correct information, or the truth-which has been amply protected by centuries of libel and slander jurisprudence. Information that is posted to the Internet is never truly forgotten. While permanently available data offers significant social benefits, it also carries substantial risks to a data subject if personal information is used out of context and towards a completely different end in ways that are greatly harmful to the subject's reputation. The potential for harm is especially high when personal information is disclosed without a subject's consent. When allowed to flow unrestrained, by private commercial norms-data are open to interpretation and use (or misuse) completely divorced from their original context.[4] In *Google*

3 Google Spain SL v. Agencia Espanola de Proteccion de Datos, (2014) EUR-Lex (CJEU) [hereinafter Google Spain].

4 Helen Nissenbaum, *Privacy In Context: Technology, Policy, And The Integrity Of Social Life* (1st edn., 2009).

Spain SL v. Agencia Espahola de Proteccion de Datos,[5] the CJEU held for the first time that EU citizens have a right to be forgotten. On March 5, 2010, Mr. Costeja Gonzdilez filed a complaint with the Spanish Data Protection agency [AEPD] with regards to results related to repossession of his home in 1998. Prior to filing this complaint, Mr Costeja-Gonzdlez himself attempted to have Google remove this information stating that the debt owed on the home had already been paid and the home sold. And when the Google's formal process failed to provide any remedy, he filed a complaint with the Spanish Data Protection Agency.[6] Among other things, he requested that Google Spain or Google be required to remove or conceal search stories so that it no longer appears in the search results and this request was taken into consideration by the Spanish Data Protection Agency. Google Spain and Google, Inc. appealed the decision to the Spanish National High Court and the same was further referred to the Court of Justice of the European Union [CJEU][7] In order to determine whether Mr Consteja-Gonzalez had a right to remove the links, the CJEU evaluated the scope of the: (1)1995 Data Protection Directive (2) The legal status of the search engines referring to the Google Spain Case.

Since the Convention entered into force, EU law has been moving towards "putting individuals in control of their own data and reinforceing legal and practical certainty for economic operators and public authorities. Improvements upon existing technological capabilities and the development of an information society"[8] led to the enactment of the EU's Directive on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data[9] in 1995. Using the Convention as a starting point, the EU moved toward even greater harmonization and consistency between the data protection laws of its member states.[10]

While a right to be forgotten has not been expressly mentioned in Protection Directive, Article 6, Article 12 and 14, all suggest that it is the individuals who have the right over their personal information[11]. The operators must now honour

5 Supra note 1.

6 Supra note 1.

7 Id. at 7.

8 Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation).

9 Hereinafter Data Protection Directive.

10 The Reform of EU Data Protection: Towards More Effective and More Consistent Data Protection (noting that the European Commission was pushed to adopt the Data Protection Directive because of the need for greater harmonization and consistency among national laws than the Convention would facilitate).

11 European Union, Directive 95/46/EC of the European Parliament and of the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995.

requests to remove information from the list of results displayed when an individual's name is entered into the search engine

More countries outside the E.U. are beginning to express an interest in recognizing a right to be forgotten within domestic laws.

In India, there are currently no laws as such, that govern the right to be forgotten. Neither is it a fundamental or legal right given by the constitution, nor is it a talked about in the Information Technology (IT) Act, 2002 nor the IT Rules, 2011.The most important and basically the first and only case that talks about this right is a case of the Karnataka high court. In this case, a father had filed a writ petition in the High Court, asking to remove his daughter's name and personal information from the digital records maintained by the court to the extent that they would not be visible on search engines like Google, Bing, Yahoo, and the like. The petitioner wanted his daughter's name be removed from all digital records maintained by the court. The petitioner had stated that his daughter feared grave repercussions if her name was associated with her earlier case and it would affect her relationship with her husband and also her reputation in the society. Earlier, she had filed a complaint against a man stating that she was not married to him and the marriage certificate should be annulled. However, she later agreed to withdraw her case after both parties arrived at a compromise. The main cause of apprehension was that if anyone carried out a name-wise search on any online search engine, the court's judgment would reflect in the public domain, along with her name. The petitioner worried that this would negatively affect his daughter's marriage which would result in hampering her reputation in the society.

The learned counsel for the defence contended that this is not a right in India and therefor, the precedents not binding on the court. The court still, in a ground-breaking and unique yet sensitive and appropriate way, took the stand that such an action, may have very strong repercussions to the life and liberty of the person and the issue is highly sensitive, specially so in the case of a woman. The court stated, "*Such an action* was *in line with the trend in Western countries where the right to be forgotten exists as a rule in 'sensitive cases involving women in general and highly sensitive cases involving rape or affecting the modesty and reputation of the person concerned*". The Delhi High Court is hearing a case involving a man requesting to have information regarding his mother and wife to be removed from a search engine.[12] The man believes that having his name linked to the search is hindering his employment options. The Delhi High Court is still working on the case, along

12 Laksh Vir Singh Yadav v. Union of India, W.P. (C) No. 1021 of 2016, Delhi High Court.

with the issue of whether or not a right to be forgotten should be a legal standard in India. Currently, there is no such legal standard for the right to be forgotten, but if it is implemented, this would mean that citizens no longer need to file a case in order to request for removal of information from search engines. This case could have significant impacts on the right to be forgotten and search engines in India.

A need that is so basic and necessary for the *'life'* of a person that it cannot be done away with. The right to be forgotten exposes a problem that has prevailed in the society for long but with the broad and in apprehensible endeavors of the information technology; there is an all new and alarming need for the same.

Right to Rehabilitation

A very necessary interpretation of Right to Life is the Right to Rehabilitation. It is imperative for mere survival and consequently the dignity of a person to have a means of livelihood and shelter, basics of sustenance. Hence, an important aspect that has been taken note of in several judicial pronouncements is the fact that under Article 21, the state must provide to those bonded labors, child labors, prostitutes and criminals-whose means of livelihood, however unjustified, is there no more due to the acts of the state-a means of livelihood for better existence ahead.

It has been observed by the Hon'ble courts in several cases, that there must be efforts to rehabilitate the victims of such practices so that they do not continue to suffer and so that these practices are not only wounded but eradicated from the very root.

Bonded Labors

In India, bonded Labor System was abolished by law throughout the country in 1975 under the Bonded Labor System (Abolition) Ordinance which was replaced by the Bonded Labor System (Abolition) Act, 1976. The act made it the responsibility of State governments to identify, release and rehabilitate the bonded labor. In order to assist the State Governments in the task of rehabilitation of identified and released bonded laborers, a Centrally Sponsored Plan Scheme for Rehabilitation of Bonded Labor was in operation since May, 1978. The Government has revamped the Rehabilitation of Bonded Laborers scheme from 17th May, 2016. The revamped scheme is known as the 'Central Sector Scheme for Rehabilitation of Bonded Laborers, 2016'[13]

13 Available at https://www.gktoday.in/blog/rehabilitation-of-bonded-labour-scheme-2016/, last seen on 16/05/2017.

In the case of *Bandhua Mukti Morcha v. Union of India*[14] and *Neeraja Choudhary v. State of M.P.*[15] the court took the view that the failure to rehabilitate the freed bonded labors is a violation of Article 21 and 23 of The Constitution of India and gave directions including setting up of Vigilance Committees etc. for the purpose of identifying and freeing bonded labors and to further raw up schemes or programs for a better and more meaningful rehabilitation of bonded labors and to ensure implementation of the BLS (A) Act 1976. The court held that it is the state and employers have a duty to rehabilitate the released bonded labors and that the grant of financial assistance by the state of Rs. 738 per family for the released bonded labors is inadequate for rehabilitation.[16] Furthermore, the court in the case of *Public Union for Civil Liberties v. State of T.N.*[17] gave various directions that included extinguishing or discharging any existing debt and (or) bonded liability and to ensure an alternate means of livelihood and to provide adequate food, shelter and medical facilities and education to the children of such families as a "package of rehabilitation".

In case of migrant bonded labourers, it is responsibility of the State Governments/Union Territory Administrations, where the bonded labour have been identified, to make arrangements for their repatriation to their native place, if they so desire. The Act affords protection to the freed bonded labourers from eviction from their homestead. District Administration is mandated to restore the bonded labourer to the possession of such homestead or other residential premises as early as practicable. The Act also provides for the economic and social rehabilitation of the freed bonded labourers.[18] The case of *Lakshmi Kant Pandey v. Union of India*[19] further reiterated the same.

Prostitutes

With regards to rehabilitation of prostitutes, who were saved from the webs of trafficking, the court in the case of *Gaurav Jain v. Union of India and Others*[20], giving detailed directions for the rescue and rehabilitation of prostitutes and the children of prostitutes expressed that,

14 1984 3 SCC 181.

15 1984 3 SCC 243.

16 P. Sivaswamy v. State of A.P. (1988 4 SCC 466).

17 (2013) 1 SCC 585.

18 Report by Ministry of Labour and Employment, *"Rehabilitation of Bonded Labour Scheme-2016"* 1 (2016), available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=154895, last seen on 19/05/2017.

19 1984 Indlaw SC 159.

20 AIR 1997 SC 3021.

"Society was responsible for a woman becoming a victim of circumstances therefore, society should make reparation to prevent trafficking in women, rescue them from red light areas and other areas in which the women were driven or trapped in prostitution. Their rehabilitation by socio-economic empowerment and justice, is the constitutional duty of the State. Their economic empowerment and social justice with dignity of person, are the fundamental rights and the Court and the Government should positively endeavor to ensure them."

While shedding light on the fact that rehabilitation is not only dependent on monetary sanctions but other factors such as legitimacy, the court in the case of *Prerana v. Union of India*[21] highlighted that Victims may resist rescue because of their fear and mistrust of police officials who often treat them harshly and are sometimes known to collude with brothel-owners and pimps. Conditions in protective homes for rescued women and children are inadequate. Strict rules and regulations make them feel imprisoned again and there is a severe lack of much needed medical and mental health services and little follow up monitoring takes place. While searching for the best possible solution, the court emphasized that *counselling, cajoling and coercion* of the fallen women to part with the child or child prostitute herself from the manager of the brothel is more effective, efficacious and meaningful method to rescue the child prostitute or the neglected juvenile. The income criteria, therefore, is not a factor not to rescue the child prostitute or the neglected juvenile for rehabilitation.[22] To date, none of these provisions have been enacted either by the state or central governments. This makes the trial process in trafficking cases unnecessarily lengthy, and the end result is low conviction rates. Similar was the ruling in *Prajwal v. Union of India*[23].

Hon'ble Supreme Court vide its order dated 14.2.2011 had asked the State and Central Governments to prepare schemes for rehabilitation of sex workers in all cities in India by giving them technical/vocational training.[24]

Child Labor

In accordance to juvenile, Rule 25 of the JJ (Care and Protection of Children) Rules, 2007 dealing with the functions and powers of the Child Welfare Committee also provides the steps which a committee is required to take so far as custody of

21 (2003) 2 BOMLR 562.

22 Delhi High Court Legal Services Committee v Union of India and others, 2014 Indlaw DEL 3513.

23 (2005) 13 SCC 721.

24 Ministry of Women and Child Development, *"Rehabilitation of Sex Workers"*, 2 (2011), available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=75433, last seen on 02/05/2017.

children is concerned. These include the provision of, inter alia, immediate shelter, ensuring appropriate rehabilitation, restoration of custody as well as making the declaration of a "fit person". The legislature had intended that the juvenile should be extended special care, treatment, development and rehabilitation.[25] The Honorable Court in *Vishal Jeet v. Union of India*[26] observed that *the necessity for appropriate and drastic action to eradicate this evil has become apparent but its successful consummation ultimately rests with the public at large. In this particular case,* Two young girls A and B, aged 14 years and 16 years respectively, trafficked, were rescued by the Delhi Police *and the court felt that* in order to avoid delay in passing appropriate orders for restoration or rehabilitation of the two persons concerned, it was necessary that immediate orders should be passed with regard to conduct of the appropriate inquiry in accordance with the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000.

This legislation has thus aimed at providing a juvenile justice system for juveniles in conflict with law as well as children in need of care and protection by adopting a child friendly approach in adjudication and disposition of matters in the best interest of children and for their rehabilitation, keeping in view the developmental needs of the children.[27]

The court in the case of *Beti Bachao Andolan v. Union of India*[28] observed that compensation may be awarded to all those victims rescued from the circuses with a time bound rehabilitation package and the State Government to create a fund for the same and to lay out a clear set of guidelines prohibiting the employment/ engagement of children up to the age of 18 years in any form in the circuses.

The governmental schemes lack in implementation, as observed in several cases[29] and at the same time, there is a Lack of rehabilitation services for old children not adopted through regular adoption processes. Also, Aftercare and rehabilitation program for children above 18 years are not available in all states, and where they do exist they are run as any other institution under the JJ Act, 2000.[30]

Right to Speedy Trial

"The constitutional guarantee of speedy trial is an important safeguard to prevent undue and oppressive incarceration prior to trial; to minimize concern

25 Krishna Bhagwan v. State Of Bihar, (1989 Indlaw PAT 10)
26 AIR 1990 SC 1412.
27 Sheela Barse and Others v. Union of India and Others (1986 Indlaw SC 184).
28 2011 Indlaw SC 295.
29 Kumari Sangeeta v. State and Anr., (1995 Indlaw DEL 10688).
30 N. R. Nair and Others v. Union of India and Others (2001 Indlaw SC 20094).

accompanying public accusation and to limit the possibilities that long delays will impair the ability of an accused to defend himself".[31] The Supreme Court of the United States has recognized that the right to a speedy trial "is one of the most basic rights preserved by our Constitution".[32] Take into consideration *Bhopal Gas Leak Tragedy*[33] involving lives of more than 15000 people. 20 years had passed for that incident and still people suffered a lot to get the compensation. The condition of those girls who were brutally gang raped during the Godhra riots in front of their helpless family members. Consider the case of *Jessica lal*[34], where Delhi police yet to grab Manu Sharma, key accused, still able to safeguard himself from the clutches of the judicial administration. The victims of *Best Bakery case*[35] who awaited justice to be dispensed in their favor but the climax starts with the key witness in the case turned hostile and the entire fate of the Bakery case is in turmoil. Today, the victims of the all the above-enumerated cases know full well that the price of truth is extremely high.[36]

This is essential to ensure speedy disposal of cases, to 'secure that the operation of the legal system promotes justice'-directive principle 'fundamental in the governance of the country' which, it is the duty of the State to observe in all its action; and to make meaningful the guarantee of fundamental rights in Part III of the Constitution.[37] The European Convention on Human Rights in Article 6(1) promises that *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time."* Delay is a known defence tactic". Since the burden of proving the guilt of the accused lies upon the prosecution, delay ordinarily prejudices the prosecution. Non-availability of witnesses, disappearance of evidence by lapse of time really work against the interest of the prosecution.[38] It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in the circumstances.[39]

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31 AIR 1976 J. *"Making Justice Speedy, Effective and Substantial"*, Hon'ble Sri Justice C. Kondaiah.

32 Klopfer v. North Carolina, 386 U.S. 213, 226 (1967). The Supreme Court held that the right to a speedy trial is a fundamental right and is applicable to the states via the fourteenth amendment due process clause.

33 Union carbide corporation v. Union of India, 1989 SCC (2) 540.

34 Sidharth Vishishth Manu Sharma v. Union of India, 2010 (6) SCC 1.

35 Zahira Habibulla Sheik v. State of Gujarat, 2010 (4) SCC 158.

36 Chhavi Agarwal, *Right To Speedy Trial – Problems And Solutions,* Legal services India, *available* at: http://www.legalserviceindia.com/article/l297-Right-To-Speedy-Trial.html (Last Modified June 2008).

37 Supreme Court Advocates-on-Record Association and another v. Union of India, AIR 1994 SC 268.

38 *Available at:* http://www.lawweb.in/2015/04/landmark-judgment-on-right-to-speedy.html (Last Modified 03/04/2015).

39 Raj Deo Sharma v. The State Of Bihar, (1998) 7 SCC 507.

The court in the case of *Raj Kanwar, Advocate v. Union of India and Anr.*[40] held that speedy trial being a requirement of Article 21 it is the duty of the State to provide speedy justice and to thereby 'secure that the operation of the legal system promotes justice' - a solemn resolve declared also in the preamble of the Constitution. Further, it was ruled in the case of *S.P. Gupta v. Union of India*[41], while emphasizing the importance of speedy trial that;

"Any structure to be internally sound and externally long lasting must be constructed from the foundation. Therefore, this problem of tacking arrears of the cases as well as speedy disposal of cases, which is a requirement of Article 21 is a concern of the CJI as well as the Chief Justices of the High Courts."

The interpretation and goals of the concept in question is vague. On the one hand, the defendant must be protected from the disadvantages of prolonged pendency of charges. Among the disadvantages are stigma and financial loss, limitations on freedom of movement, the psychological strain of an un- certain future, and the possible prejudice to defense through loss of witnesses or faded memories.[42] At the same time, the state must protect its interest in seeking reprisal for violation of the law. Dismissal of charges for failure to prevent trial delay may act to impede dispensing justice.[43] In *Hussainara khatoon v. State of Bihar*[44] which formed the basis of the concept of the Speedy Trial, it was held that where under trial prisoners have been in jail for duration longer than prescribed, if convicted, their detention in jail is totally unjustified and in violation to fundamental rights under article 21.

It is also said that short time limits in the Act will discourage prosecutors from bringing complicated cases. However, the Government has no reason to doubt the courts' ability to reach just solutions through use of the Act's continuance provisions. Another criticism of the Act is that it will result in a decrease in guilty pleas, which are necessary if the courts are not to be overloaded with work. Apart from the questionable desirability of retaining the guilty plea as a part of our system of justice, there is evidence in the experience of the Second Circuit with its speedy trial plan that guilty pleas may even be increased under the Act. Another criticism made of the Speedy Trial Act is that its mandatory dismissal provisions will allow persons posing a danger to the public to be released and will undermine

40 AIR 1993 SC 1407.

41 AIR 1994 SC 268.

42 Yale Law Journal, 1955: 1212-1213; Columbia Law Review, 1957: 846; Province, 1970: 427-428.

43 Misner, R. L., *"Delay, documentation, and the speedy trial act"* 70 *Journal* of Criminal Investigation and Criminology 233, 243 (1979).

44 1979 AIR 1369.

the public's faith in the criminal justice system.

Justice Krishna Iyer while dealing with the bail petition in *Babu Singh v. State of UP*[45], remarked,

"Our justice system even in grave cases, suffers from slow motion syndrome which is lethal to 'fair trial' whatever the ultimate decision. Speedy justice is a component of social justice since the community, as a whole, is concerned in the criminal being condignly and finally punished within a reasonable time and the innocent being absolved from the inordinate ordeal of criminal proceedings."

In the case *Katar Singh v. State of Punjab*[46] it was declared that right to speedy trial is an essential part of fundamental right to life and liberty and consequently in *Abdul Rahman Antulay v. R.S. Nayak*[47], the bench declared certain aspects and guidelines regarding the speedy trial. The court in the case of *Raghubir Singh v. State of Bihar*[48] went on to say that, "It is true that the proviso to Section 167(2) Cr.P.C. postulates personal freedom, but respect and preservation of human dignity as well as the right to a speedy trial should also be placed on the same pedestal." Also, delay allows an implicit assumption for prejudice.[49] It is true that it is the obligation of the State to ensure a speedy trial and State includes judiciary as well, but a realistic and practical approach should be adopted in such matters instead of pedantic one.[50] The court in the case of *Aasu v. State of Rajasthan*[51], observed that "Efforts should be made to dispose of all cases which are five years old by the end of the year". In the case *P. Ram Chandra Rao v. State of Karnataka*[52], the court overruled decision of *Raj Deo Sharma*[53] and the aforementioned judgment common cause and held that no time bound direction for completing a trial can be issued by a High Court. No procedure which does not ensure a reasonable quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21.[54]

In the case *Arun Kumar Ghosh v. State of West Bengal*[55] it was held that mental torture and anxiety suffered by an accused for a long length of time is to be treated

45 1978 AIR 527.
46 1994 SCC (3) 569.
47 1988 AIR 1531.
48 1986 (4) SCC 481.
49 U.S. v. Ewell, 15 L Ed 2d 627.
50 Supra. Note 10.
51 (1959) Supp (1) SCR 528.
52 (2012) 9 SCC 430.
53 Raj Deo Sharma v. State of Bihar, 1992 (1) SCC 225.
54 State Of Bihar v. Ramdaras Ahir, 1985 Cri LJ 584.
55 AIR 1972 SC 1366.

ad punishment inflicted on him.

Article 21 confers a fundamental right on every person not to be deprived of his life or liberty except according to procedure established by law; that such procedure is not some semblance of a procedure but the procedure should be 'reasonable, fair and just'; and therefrom flows, without doubt, the right to speedy trial.[56]

Right to die

While interpreting right to life, there is a conspicuous question which has for long obfuscated not only law makers but people from all walks of society, that whether living does or doesn't include the power to decide how long to live. By virtue of Article 21 of the Constitution of India, all people have a right to dignified existence and hence, when faced with circumstances where this cannot be reiterated, we must not be obliged or compelled to continue living under such circumstances but have the right to die as well.

The concept of dignified existence was much emphasized in many famous judicial pronouncements including the case of *Olga Tellis v. Bombay Muncipal Corporation and others*[57] and *Corlie Mullin v. Administrator and Union Territory of Delhi.*[58] Dignity can be defined a concept that is attached to the identity of a human being as a person, when a human being does not enjoy the right to persons, dignity does not exist at all. In simpler terms, it can be said that dignity can be ensured when every member of the society has a feeling that he or she is a respectable member and no one can humiliate, harass, exploit and insult him or her on the basis of caste, creed, sex and stats etc.[59]

Suicide

Suicide is an unnatural termination of life and contrary to the view of the court in *Chenna Jagdeshwar v. State of A.P.*[60], in *State of Maharashtra v. Maruti Sripati Dubal*[61], it was held that section 309 IPC[62] which punishes attempt to commit

56 Pankaj Kumar v. State Of Maharashtra and Ors, (1980) 1 SCC 81.

57 AIR 1986 SC 180.

58 AIR 1981 SC 746.

59 Dr. N.K.Chakrabrti and Dr. Shachi Chakrabrti, *Gender Justice* 339 (Cambray and Co. Private Ltd, Kolkata, 2nd edn., 2006).

60 (1996) 2 SCC 649.

61 (1986) 88 BOMLR 589.

62 The Indian Penal Code, 1908, s. 309- Attempt to commit suicide- Whoever attempts to commit suicide and does any act towards commission off such offence, shall be punished with simple imprisonment

suicide, is violative of Article 21 of the Constitution. Article 21 takes care of not only protection against arbitrary deprivation of life but also takes care of *positive life* to enable an individual to live with human dignity. It logically follows that right to live will include also right to die or to terminate one's life. In *P. Rathinam v. Union of India*[63] a two-judge bench of the Supreme Court took cognizance of the relationship/contradiction between S. 309 Indian Penal Code and Article 21. But suicide is often seen as a contradiction to right to life and is hence is a contradiction to the decision of *Basheshar Nath v. C.I.T.*[64] as it was held that fundamental rights cannot be waived.[65]

The view of the court that attempted suicides are a medical and social problem and the best dealt with by non-customary measures and that attempt to commit suicide is in reality a cry for help and not for punishment did not last long was disregarded in *Gian Kaur v. State of Punjab*[66], where the court also observed that,

"Right to life is a natural right embodied in Article 21 but suicide is an unnatural termination or extinction of life and therefore incompatible and inconsistent with the concept of right to life."

The Court thus has ruled that section 309 Indian Penal Code is not unconstitutional. Accordingly, section 306 I.P.C., has also been held to be Constitutional.

Euthanasia

The word euthanasia, originated in Greece means a good death[67]. Euthanasia encompasses various dimensions, from active (introducing something to cause death) to passive (withholding treatment or supportive measures); voluntary (consent) to involuntary (consent from guardian) and physician assisted (where physician's prescribe the medicine and patient or the third party administers the medication to cause death)[68]. In other words, Euthanasia is the process of relieving someone of their life, an assisted suicide in other words and includes both voluntary and involuntary euthanasia that can be administered either passively or actively. Passive euthanasia entails the withholding of common treatments, such

for a term which may extend to one year (or with fine, or with both).

63 AIR 1994 SC 1844.

64 AIR 1959 SSC 528.

65 Ibid.

66 AIR 1996 SC 946.

67 Lewy G., *Assisted suicide in US and Europe*, 30 (Oxford University Press, New York, 2011).

68 Dowbiggin I., *A merciful end: The euthanasia movement in modern America* 12 (Oxford University Press New York, 2003).

as antibiotics, necessary for the continuance of life while Active euthanasia entails the use of lethal substances or forces to kill and is the most controversial means.

In *Gian Kaur*[69] the Supreme Court has distinguished between euthanasia and attempt to commit suicide. Euthanasia is termination of life of a person who is terminally ill, or in a persistent vegetative state. In such a case, death due to termination of natural life is certain and imminent. The process of natural death has commenced, it is only reducing the period of suffering during the process of natural death.

The question that follows that "life" with dignity must also take 'to die with dignity' in its fold. This is perhaps gaining ground as was noted in *Bijay Lakshmi v. Managing Committee*[70] of working women's hostel. *Dilip Machua*, from Jamshedpur, Jharkhand for himself and *Jeet Narayan* of Mirzapur in U.P. who pleaded to the President of India to sanction euthanasia for his four sons who were paralyzed from neck down were all denied. There was a similar case where *Dinesh Pratap Singh* knocked the doors of the High Court pleading for euthanasia but the Court refused. This shows that euthanasia is not allowed in India but trying continues.

Euthanasia became a hot topic of discussion after former national chess champion Venkatesh died (2004), without being allowed to be in control of his death or his body afterwards. He wanted to donate his organs but the Andhra Pradesh High Court turned that down, his right to die with dignity he had gone through prolonged muscular dystrophy was not granted.[71]

In a recent development, India has its first guidelines for taking an irrevocably ill patients off treatment and life support. The recommendations are that the patients with irreversible, end-stage diseases should not linger for months on assisted ventilation.[72] In many cases like the one of *K. Venkatesh*[73] not only was he forced to suffer a lot of pain which he would not have suffered if he was allowed to practice euthanasia but also destroys the hope of another person who could have enjoyed a happy life. The Chairman of the Kerala Law Reform Commission and imminent jurist and former Chief Justice of India Hon'ble Justice V.R. Krishna Iyer also shows sympathy for passive euthanasia or withdrawing life-sustaining equipment in his report in 2008 in which he mentioned that passive euthanasia is

69 Id. at 10.

70 AIR 1992 Orissa 242.

71 Editorial, *"Die in peace?"* Hindustan Times, (Delhi, 12/12/2010).

72 Docs Frame, ˜Death with Dignity Norms", Hindustan Times, (Lukhnow, 10/10/10).

73 Anantha Krishna, *Kerala law commission in favour of Euthanasia*, The Times of India, (Kolkata, 08/01/2009).

not an offence and should not be punished.[74] Similarly, the 196th Report of the Law Commission of India also mentions that withholding life-supporting measures should not be considered unlawful but several guidelines should be made in order to practice passive euthanasia. It is also reportedly in favor of decriminalizing suicide along with making euthanasia legal.

In the judgment of Aruna[75], the Supreme Court opened the path for passive euthanasia in India although in this case Aruna was not allowed passive euthanasia. The judges told that in their opinion, the High Court can grant approval for withdrawal of life support to an incompetent patient. They have given the direction when and how passive euthanasia can be performed.

Hence, the current position of euthanasia in India is restricted to involuntary passive euthanasia in a case where the consent is either given by family or in the absence of any of them, such a decision can be taken even by a person or a body of persons acting as a next friend. It can also be taken by the doctors attending the patient. However, the decision should be taken bona fide in the best interest of the patient which will be assessed by the judiciary. Supreme Court has not allowed active euthanasia, to prevent any form of criminal practice against life.[76]

Right to Pollution Free Environment

The Constitution of India, 1950, did not include any specific provision relating to environment protection or nature conservation. Presumably, the acute environmental problems being faced now in the country were not visualized by the framers of the Constitution.

The right to a healthy environment has been incorporated, directly or indirectly, into the judgments of the court. Link between environmental quality and the right to life was first addressed by a constitutional bench of the Supreme Court in the *Charan Lal Sahu Case*[77] while the first indication of recognizing the right to live in a healthy environment as a part of Article 21 was evident from the case of *R. L. and E. Kendra, Dehradun v. State of U. P*[78]

In *Subash Kumar case*[79], the Court observed that 'right to life guaranteed by article 21 includes the right of enjoyment of pollution-free water and air for

74 Ibid.

75 Aruna Ramcharan Shaunbaug v. Union of India, (2011) 4 SCC 454.

76 Jha M.K. et al, *"Euthanasia: Indian scenario"*, 8 Forensic Med Toxicol, 245, 226 (2012).

77 Subhash Kumar v. State of Bihar, 1991 (1) SCC 598.

78 A.I.R 1985 S.C. 652.

79 (1998) 9 SCC 589. Also, In *K. Ramakrishnan* v. *State of Kerala*, AIR 1999 Kerala 385.

full enjoyment of life.' Through this case, the court recognized the right to a wholesome environment as part of the fundamental right to life as guaranteed by article 21. This case also indicated that the municipalities and a large number of other concerned governmental agencies could no longer rest content with unimplemented measures for the abatement and prevention of pollution. They may be compelled to take positive measures to improve the environment. This was reaffirmed in *M.C. Mehta v. Union of India*.[80] The case concerned the deterioration of the world environment and the duty of the state government, under article 21, to ensure a better quality of environment to allow people to live a dignified life. The Supreme Court has held that life, public health and ecology have priority over unemployment and loss of revenue. In another case[81], the Supreme Court dealt with the problem of air pollution caused by motor vehicles. In the Court's view, 'Deprive a person of his right to livelihood and you shall deprive him of his life..... Any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can be challenged .

In *Shanti Star Builders v. Narayan Totame*[82], it was held that right to life is guaranteed in a civilized society would take within its sweep the right to food, the right to clothing and the right to a decent environment . The Court said that notwithstanding the comprehensive provisions contained in the Water (Prevention and Control of Pollution) Act and the Environmental (protection) Act, no effective steps were taken by the Government to stop the grave public nuisance caused by the tanneries at Jajman, Kanpur. In the circumstances, it was held that the Court was entitled to order the closure of tanneries unless they took steps to set up treatment plants.[83] In *L.K. Koolwal v. State*[84], the Rajasthan high court held maintenance of health, preservation of the sanitation and environment falls within the purview of Article 21 of the constitution as it adversely affects the life of the citizen and it amounts to slow poisoning.

The rights like right to education, food and health support the positive right of environment[85]. The Supreme Court considered human awareness on environment is essential for protecting right to environment. In addition to directing the Government to use mass media for environmental education, the Court accepted and applied the principle that "through the medium of education, awareness of the

80 M.C. Mehta v. Union of India (1991) AIR SC 813 (Vehicular Pollution Case).
81 Olga Tellis v. Bombay Municipal Corporation, AIR 1986 SC 180.
82 1990(1) SCC 520.
83 (1987) 4 SCC 463.
84 987 (1) WLN 134.
85 M.C. Mehta v. Union of India, AIR 1992 SC 382.

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environment and its problem related to protection should be taught as a compulsory subject". Thus, from perusal of the trend of all above mentioned cases it is evident that there has been a new development in India and right to live in a healthy and pollution free environment is considered as the fundamental right under Art 21, as without this, right to life and livelihood would become meaningless.[86]

Article 21 is the heart of fundamental rights and has received expanded meaning from time to time and there is no justification as to why right to live in a healthy environment cannot be interpreted to be an inseparable part of it. Article 21 guarantees a fundamental right to life – a life of dignity, to be lived in a proper environment, free of danger of disease and infection. It is an established fact that there exist a close link between life and environment.

Right to Higher Education

Education is what making anyone's able to live in this world with dignity. Education is most important for the man of every class and section of the society. Empirical data is abundant to show that any investment made in education contributes to increased labour productivity, higher individual earnings, higher standard of living, and reduction in poverty and improvement in income distribution. Besides attaining social, demographic and political development. It is assumed that providing elementary education serves the purpose and so providing elementary education is the only prerogative of the state. In this context, providing of higher education needs to be critically examined. It is realized that targets that were to be achieved about half a century ago may remain unfulfilled even by the turn of this century.[87]

It is also realized that higher education could expand only at the cost of mass education programmes. Only those economies that increase the growth of investment in higher education are found to be able to achieve a higher standard of living for its people.[88] Secondly, the number of unemployed is bulging year after year, which means providing just primary education is not sufficient to ensure eradication of class divides between the rich and the poor. Since, due to lack of higher education the lower income group is still not able to procure jobs, the problem of unemployment and poverty still prevails.

Having understood the alarming need for higher education in India, another

86 (2001) 8 SCC 76515.

87 Jandhyala B. G. Tilak, *Financing Higher Education in India: Principles, Practice, and Policy Issues*, 26 Springer 43,47 (1993).

88 J.P. v. State of A.P., (1993)1 SCC 645.

important concern is the new economic policies being adopted by the Government of India consisting of structural adjustment and stabilization policies are feared widely to adversely affect public investment in social sectors like education, and within the education sector the higher education. Accordingly many policy suggestions are being made to experiment with alternative methods of funding higher education under the broad umbrella of 'privatization.'

Speaking of the present context, receiving higher education is sometimes considered as a "privilege", where not the entire population has got the right to be benefited from it.[89] Hence, no one can ever claim of a "right to attend college" and where this privilege can be lost by a variety of reasons.[90]

One of the emerging challenges of privatization of higher education, certainly, is the question of how higher learning being a scarce resource to be judiciously distributed to set the tune of democratic practice in a traditionally hierarchical society like India. [91]

Such institutions have been really a recent phenomenon. They are the result of private enterprise and initiative. In the very recent period, growth of private engineering and medical colleges has been remarkable. These colleges receive little public support. They charge huge donations and capitation fees ranging anywhere from Rs. 50,000 to 20-30 times the same per student, 10-20 times the fees in government colleges. Most recently efforts are made in some states to allow 'auctioning' of 50 percent of the admissions in such professional colleges to the highest bidders, irrespective of their relative rank order in merit/entrance tests. While other colleges are, by definition, non-profit institutions, these institutions not merely cover their costs, but also make huge 'quick profits,' which are not necessarily reinvested in education. There has also been growth of what are known as 'parallel' colleges or teaching shops, which also share several of these features. Some of these colleges are registered under the Shops Act. Thus higher education is subject to vulgar commercialization.

Education is what is allowing anyone to live in this world with dignity but the privatisation of higher education is not good. Everyone is not capable of affording that costly education because privatisation increases the cost of education. Because privatization makes education a business so the people on the top don not think

89 Pratap Bhanu Mehta, *Brookings-NCAER India Policy Forum* 8 Centre for Policy Research Journal 27, 29 (2007).

90 Roy Lucas, *The Right to Higher Education*, 41 Journal of Higher Education 55-64 (1970).

91 Aurobindo Sahoo, *Young Scholars of Indian Education*, 9 National Journal of Policy and Administration 22, 26 (2011).

about the future of the nation and anything, and all they are bothered about is profit.[92] Higher education only becomes a dream for lower income groups which they do not achieve. Education is going out of reach for the economically weaker section of the society. Only those who can afford to pay can proceed further for higher studies. In the long run this will broaden the gap between the educated and the non-educated, thereby increasing the gap between the haves and have not's.

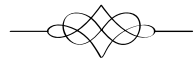
As we know that India is still a developing country and 50% of the population is below poverty, it is the responsibility of government to provide same quality education to rich and poor. The government should ensure that there must be genuine fee structure, talented faculty, equipped labs in private institutions or any institution for that matter.[93]

Conclusion

The very first laws of nature emerged from the integral importance of Life and Self preservance and over time it's scope and horizon expanded, in collaboration with the changing needs and values of the people. Today, the world is at the dawn of Modernity and this period is defined, not only by varied needs of the people but also by highly increasing expectations.

The aforementioned aspects, have emerged from these very expectations and the term "Life" under Right to life and personal Liberty is interpreted to incorporate the same. Perhaps, our Hon'ble lawmakers would have also foreseen the expanding nature of the needs of people and for the same reason left, in their power, a Fundamental Right that an fulfill each need.

It would not be wrong to presume that perhaps, in the coming years, more rights will come into picture but even so, the aforementioned rights are pertinent to the current times and though they haven't completely been established and accepted as laws, our judiciary, making the best use of their knowledge and powers, have, by the way of precedents, contributed greatly towards the goal of establishing these rights and more so, to broaden the horizon of Fundamental Rights that are the backbone of a Democratic Nation.



92 Mayank Mrituynjay, *Right to higher education in India: Issues, concerns and new directions*, 1 University journal of political question 122, 127 (2003).

93 Dr. Sirajuddin Chougle, *Privatization of Higher Education in India*, 8 Indian Journal of Economic Development 89, 93 (2009).

Corporate Criminal Liability: An Analysis

*Dr Arun Kumar Singh**

Introduction

In the era of globalisation at the one hand corporations have become a necessary part of our life on the other these corporations are busy to maximize their profits. In course of these developments it is also found that some of them are indulged in unethical and illegal practices. This situation is not only confined to the developed countries like USA or the European countries but also in developing country like India. To check the growing phenomena of illegality among the corporates the corporate criminal liability has grown rapidly over the last two decades. The difficulty lies not only in the fact that it is too difficult to put the blame on the companies for a criminal wrong committed by them rather the most challenging part is to put the blame on the right shoulders when a wrong has been done.[1] Who made the plan and how it was made? How the plan would be carried are some of the questions before the investigating officers to catch the neck of real culprits. This paper is an attempt to trace the development of corporate criminal liability in India and.It also analyses how liability can be put on right shoulders. In furtherance of the above tasks the relevant statutory provisions have been discussed. The discussion in the paper also uses the views of Foreign as well as Indian Courts regarding corporate criminal liability. At the end of the paper some of the suggestive measures are mentioned which if considered will be useful to provide fruitful result. For the above work the methodology that has been adopted is doctrinal. The attempt is because the Law regarding criminal liability of corporation is not well defined. Generally a corporation is liable for those acts where no *mensrea* is required.

Meaning of Corporate Crimes:

Globalization, industrialization and scientific advances brought socio-economic changes in the society. This change brought development in the society and also increased white-collar crimes in various forms such as tax avoiding, adulteration, negligence etc. As far as the corporate crimes are concerned, crimes by one or more employees of a corporation that are attributed to the

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John T. Byam, The Economic Inefficiency of Corporate Criminal Liability (Vol. 2), 1982, pp. 582

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organization are known as the corporate crimes. The definition of corporate crime covers commissions as well as omission and also includes both intentional and unintentional harms. The mere fact that a machine in a factory is dangerous may be sufficient to prove a crime even if those in charge of the factory did not intend to cause injury to anyone, or even did not know that such machine was dangerous. The Australian criminologist John Braithwaite said that the corporate crime is the conduct of a corporation or employees acting on behalf of a corporation, which is proscribed and punishable by law[2]. If we interpret the above definition it appears that the corporate crimes can be categorised into two sub-categories. The first is the employees or the company commits the wrong and in the second is the company faces the wrong against itself. In many cases the face of the criminal is separate from the company but many a times it appears that the corporate veil has hidden quite a few faces behind it and they are saved behind such veil.

Need to Address Corporate Crime

The corporate crimes not only affect the economy of the country but also the society at large. The highly affected parties by this crimes are the consumers who are the main beneficiaries but are at the maximum risk. Employees of corporates are in twin roles. In one role they are the victim and in another role the main protagonist of crime of the corporations. The State also is among those persons who are not untouched from the affect of such crime because it loses the revenue. Apart from the above, the international community, the NGO working in those areas, the independent contractors, the shareholders, the creditors, the close society where the company operates and the environment surrounding the company, etc. are directly or indirectly affected by corporate crime. Hence, it becomes necessary to understand the nature of crime and criminality in the corporate sector. Whenever any corporate is prosecuted for its crime it tries to justify on the ground that criminals commit crime for their own wish and corporation has no role in such activity. But this arguement of corporates cannot be tenable because the offences are committed for corporate gain or to bring harm to any other corporate. A company being legal person, is competent to commit many crimes like, bribing a public servant or government to attain business, dumping toxics industrial waste into rivers or pollute the underground water resources, indulge in money laundering, monetary frauds, etc. But maximum cases of corporate crimes are either undisclosed or untried because people don't know whom to blame? People

2 John Braithwaite, Regulatory Capitalism: How it Works, Idea For Making It Work Better, Edward Elgar Publishing (2008)

are not even aware that they have been victimized of such crimes until and unless a massive damage has been done to them, their families or their surrounding environment.[3] That is why it becomes necessary to make corporations liable for the crimes committed by them.

Corporate Criminal Liability and the Problems

Generally, corporations are not held liable for the corporate crimes because they are non-human entities. To make a person criminally liable two elements i.e. *mens rea* (guilty mind) and *actus reus* (physical act forbidden by law) must be simultaneously present. A corporation cannot form an intent which is an essential ingredient for a crime. Another question is even if the corporation was held liable, it couldn't be punished because it has no human body. However, courts in this regard have come forward and tried to punish the directors and the administrators for framing such policies due to which such crimes were committed by the corporations.[4] Although, long back the U.S. Supreme Court did not consider the traditional principle of common laws and in 1909 in case of *New York Central and Hudson River Railroad v. U.S*[5] made a corporation liable for its illegal acts. In this case a railroad company employee paid rebates to shippers in violation of federal law. The Court upheld the corporation's criminal conviction, saying that there was no reason that corporations could not be held responsible and charged on the basis of the knowledge and purposes of their agents, acting within the authority conferred upon them. The Supreme Court said that criminal liability could be imputed to the corporation based on the benefit it received as a result of the criminal acts of its agents.

Principles of fixing the criminal liability:

There are two models adopted for corporate criminal liability. One says that only the acts of certain senior officers of a corporation can be taken in determining the corporation's liability whereas in opposition to this the other model says that the corporation is criminally liable for the acts of every individual acting on its behalf.[6] The first model is direct model because it directly makes the corporates

3 Corporate Crimes: Nature and Types and Its Impact on the Society availableat:shodhganga.inflibnet.ac.in/bitstream/10603/107447/12/12_chapter%205.pdf accessed on 21-10-2016

4 http://www.legalserviceindia.com/article/l101-Corporate-Criminal-Liability---An-Analysis.html accessed on 16-10-2016

5 212 US 481

6 Guy Stessens 'Corporate Criminal Liability: A Comparative Perspective' The International and Comparative Law Quarterly, Vol. 43, No. 3 (Jul., 1994), p.506

criminally liable whereas the second model is called derivative because in this model the corporate liability is derived from the acts of other employees.[7] Concept of corporate criminal liability in first model is derived from the theory of *respondent superior(quifacit per aliumfacit per se)* whose roots clearly go back to vicarious liability. The first model is related to France, Germany and England whereas the second is adopted in the USA.

To make the corporate criminally responsible two principles are adopted. The first is the doctrine of "respondant superior" *(qui facit per alium facit per se)*. It has been imported from tort law into the corporate criminal realm. A corporation may be convicted for its agent's unlawful acts when the agent acted within the scope of his or her actual or apparent authority. The second principle of corporate criminal liability is the "collective knowledge doctrine". As knowledge of criminal activity is often the scienter element of a particular crime, the requisite knowledge can be inferred on the basis of collective knowledge of the directors and officers.

In USA better parameters are taken into consideration. As per the new approach court adopts corporate fault and corporate knowledge theories to identify the liable persons for a corporate crime. This aids the prosecution by imputing the knowledge of all employees to the corporation[8]. Hence corporate itself is treated as wrongdoer.

There are certain situations where the employees commit crime without the knowledge of corporation and in violation of corporate policies or scope. In those cases also, the corporation can be held criminally liable.[9] The court observed that when an employee violates express instructions of supervisors or policy manuals, the corporation will be criminally liable. Apart from this, the company can be held liable even if steps of procedural safety were taken up by the company.[10] The US Court in the case of *United States v. Twentieth Century Fox Film Corporation*[11] said that corporation will not get immunity from liability when its employees, acting within the scope of their authority, fail to comply with the law. Similarly, in the case of *United States v. MacDonald and Watson Waste Oil Co.*[12] the corporation was held liable for the conduct of the sales manager, even though he was working in his personal capacity. Despite the corporate policy, he had refused to release

7 ibid
8 Apex Oil Co. v. United States, 530 F.2d 1291
9 Standard Oil Co. v. United States, 307 F.2d 120
10 ibid.
11 539 U.S. 23
12 933 F.2d 35, 42

popular films to movie houses unless they also agreed to book less popular films. On appeal, the corporation argued that it should not have been liable because the manager's conduct was contrary to corporate policy, but the appellate court rejected the argument. In this case the court agreed that the corporation itself could be held accountable even for conduct of its manager which contradicted express corporate instructions. A Corporation which is having a fictitious entity acts through its various agents or employees. So to make a corporation criminally liable for the illegal behaviour of an employee, the illegal conduct must have taken place within the scope of employment.

in case of *U. S. v. John Kelso Co.*,[13] The Federal Court opined that there were certain crimes of which a corporation could not be guilty; as for instance, bigamy, perjury, rape, murder, and other offenses which would easily suggest themselves to the mind. Natural person could only commit crimes like these mentioned. However, Lord Blackburn's view was different. He opined ; "A corporation may be fined and a corporation may pay damages."[14]

In *New York Central R. R. v. U. S.* [15] Day J. said, "It is true that there are some crimes, which in their nature, cannot be committed by corporations. But there is a large class of offenses, of which rebating under the Federal statutes is one, wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them."

Individual's Liability and the Corporation

Besides the above, one pertinent question is, whether an individual within the corporation also liable for his criminal act? Does vicarious liability of the directors of the company make the company liable or it has distinct entity from the company? The Supreme Court of India in case of *Sunil Bharti Mittal v. CBI*[16] has clarified that the criminal jurisprudence does not have the concept of vicarious liability unless the statute specifically provides so. An individual who commits an offence on behalf of the company can be prosecuted alongwith the company when there is sufficient evidence of his active role (*actus reus*) coupled with criminal

13 86 Fed. 304

14 Frederic P. Lee, Corporate Criminal Liability, Columbia Law Review, Vol. 28, No. 1 (Jan., 1928), p.15

15 212 U. S. 481, cited in Frederic P. Lee, Corporate Criminal Liability, Columbia Law Review, Vol. 28, No. 1 (Jan., 1928), p.13

16 (2015) 4 SCC 619.

intention (*mens rea*). And also, a person can be prosecuted when there is some statutory provision which attracts the doctrine of vicarious liability by specifically incorporating such provisions.[17] It was also held by the Court that when a company is the offender, and terere is absence of statutory provisions, the vicarious liability of the directors cannot be automatically imputed. These statutory provisions are especially mentioned in the statutes such as section 70 of the Money Laundering Act, 2002[18] and various other statutes.[19]

The Supreme Court in *R. Kalyani v. Janak C. Mehta and Ors*[20] has ruled that whenever a person of company is going to be made the accused, the company has to be also prosecuted. In any case it would be a fair as well as reasonable to do so, as legal fiction is raised both against the company as well as the person responsible for the acts of the company.

Thus from the above decisions it appears that a corporation can be prosecuted for corporate crime only when there is express provision in the statute regarding the same at par with the individual. A corporation can be absolved from the liability only when it is proved that the act of the individual took place without the knowledge of the corporation. And also, the responsible officer will vicariously liable when the company is criminally liable which is mentioned in statutory provision.

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17 ibid

18 Section 70 of the Money Laundering Act, 2002 provides

(1) Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to the company, for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

(2) Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of any company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Explanation: 1) For the purposes of this section, - (i) "company" means any body corporate and includes a firm or other association of individuals; and

(ii) "director", in relation to a firm, means a partner in the firm. Explanation: 2) For the removal of doubts, it is hereby clarified that a company may be prosecuted, notwithstanding whether the prosecution or conviction of any legal juridical person shall be contingent on the prosecution or conviction of any individual

19 The Negotiable Instrument Act, 1881, S. 14. The Green Environment Tribunal Act, 2010, S. 27. The Environment Protection Act, 1986, S. 116. The Drug and Cosmetics Act, 1940, S. 34. The Income Tax Act, 1961, S. 278 B, Sctions45, 63, 68, 70(5), 203 of the Indian Companies Act

20 (2009) 1 SCC576.

Corporate Criminal Liability and Indian Scenario

The Law Commission of India in its 29th Report pointed out the factors which are responsible for the rise of economic crimes, particularly, the white collar crimes. It observed,

"The advance of technological and scientific development is contributing to the emergence of mass society, with a large rank and file and small controlling elite, encouraging the growth of monopolies, the rise of managerial class and intricate institutional mechanisms. Strict adherence to a high standard of ethical behavior is necessary for the event and honest functioning of the new social, political and economic processes. The inability of all sections of society to appreciate in full this need results in the emergence of growth of white collar crime and economic crimes".[21]

In India it is now well settled that corporate directors, officers, and employees can be held criminally liable for any criminal acts that they personally commit regardless of whether they were acting in furtherance of the corporation's interests or not. A corporate director, officer, or agent has to answer for any personal wrongdoing and they cannot be shielded by the corporate entity. An officer and a director can also be held criminally responsible for criminal acts committed by their agents under the *respondeat superior*. For instance Food Adulteration Act, 1954 provides that where an offence under the Act has been committed by a company, every person who at the time the offence was committed is incharge of the company for the conduct of the business of the company shall be liable to be punished.[22]

The general law dealing with criminal liability in India is the Indian Penal Code, 1860. It applies to all persons having certain territorial connection with India.[23] Thus a company, association, or even an unincorporated body is included within the definition of 'person'.[24] From the definition of person it appears that commission of the offences by companies was recognised since 1860. However, the judiciary has restricted the criminal liability of companies to certain extent, namely, where *mens rea* is not essential as an ingredient, and imprisonment is not mandatory as a punishment. In the case of *State of Maharashtra v. Syndicate*

21 Law Commission of India, 29thReport, (1966) , p.4

22 Section 17 of the Food Adulteration Act, 1954

23 Section 3 and4 of the Indian Penal Code,1860

24 Section 11, Indian Penal Code 1860 provides; It reads *"the word person includes any Company or Association or a body of persons, whether incorporated or not."* .

Transport Corporation Ltd.[25] the Court held that corporation could be prosecuted under section 420, 403 and 406 because the word person includes a company under section 11 of the Indian Penal Code, 1860.[26] Section 2 of the Indian Penal Code use the word 'every person' and makes liable to them and no where it has been mentioned that it will include only natural person and not the juristic person. So, a plain meaning of the section makes liable to the company also. But a company cannot be liable for an offence like rape, bigamy, etc. which can be committed by human beings only. A company cannot also be indicted for the offences punishable with imprisonment or corporal punishment. Barring these exceptions a corporate body should be indicted for criminal acts or omissions of its director, authorized agents or servants whether they are having *mensrea* or not. However, to make the company criminally liable in above situation they (directors, agents or servants) have acted under the authority of the corporate body or in pursuance of the aim or objective of the corporate body. In case of *Municipal Corporation v J.B. Bottling Co*.[27] Delhi High Court held that where the imprisonment was mandatory part of the sentence along with fine the company could not enjoy the immunity from prosecution and the guilty company would be punished with fine only.

Indian courts have used the doctrine of "Absolute Liability" to punish those corporate crimes which have an adverse effect on health and safety of the society. This doctrine enables the courts to punish the perpetrators even without the presence of *mens rea*. This doctrine does not have any excuse. Indian Courts apply this doctrine in cases of mass destructions through pollution, gross negligence of the company resulting in widespread damages like in the Bhopal Gas tragedy case.[28] The Bhopal Gas Tragedy that occurred at midnight of 2nd December, 1984, by the leakage of MIC gas from the appellant's factory was a great industrial disaster and it took an immediate toil of 2600 human lives and left tens of thousands of innocent citizens of Bhopal physically affected in various ways. In this case the court provided no excuse to the corporations for the fatal accident which took lives of many innocent persons.[29] However, the compensation awarded in the case was very meagre and though the corporation was punished but the real punishment

25 AIR1964 Bom 195

26 Section 11 of Indian Penal Code, 1860 (the Code) define person. It reads *"the word person includes any Company or Association or a body of persons, whether incorporated or not."* Further section 2 of the Code provides that *"Every person shall be liable to punishment under this Code."* Thus, section 2 of the Code without any exception to body corporate, provides for punishment of every person which obviously includes a Company.

27 1975 Cr LJ 1148

28 Union Carbide Corporation *v* Union Of India etc.1989 SCC(2) 540

29 http://www.lawctopus.com/academike/bhopal-gas-tragedy-role-supreme-court-india/ accessed on 16-10-2016

could not be given due to the jurisdictional issues appended to the case. This type of punishment is possible in India in cases involving the absolute liability. But the question is what is about the small corporate crime? There is no law in particular dealing with small corporate crimes which are being committed by corporations on a daily basis. In those cases the courts says that *mens rea* of corporation are not proved.

One cannot forget the Uphar Tragedy in Delhi[30] where the court found it very difficult to prosecute the Ansal Brothers for the fatal accident.[31] Although, culprits are punished but it was too late. The Indian Law is very ambiguous in this regard and there is a need of some laws specifically dealing with the aspect of corporate criminal liability.

India is still making officials liable whereas in other developed countries the jurisprudence has developed to an extent that corporations are punished when they are found guilty. They were punished in a very innovative manner where the court not only punished the president of the corporations but also barred the corporation from getting any new fresh contracts.[32] In the case of *US v. Twentieth Century Fox Film Corp.*[33] the corporation was completely denied state contract even though president was no longer employee of corporation. In India though developments are taking place through court rulings to bring the corporation under the ambit of punishment, however, there is a need to amend Indian Laws to make provisions for innovative ways of punishment as in the other parts of the world.

In *The Assistant Commissioner, Assessment- II, Bangalore and Ors. v. Velliappa Textiles Ltd. and Ors,*[34] B.N. Srikrishna J. said that corporate criminal liability cannot be imposed without making corresponding legislative changes. For example, the imposition of fine in lieu of imprisonment is required to be introduced in many sections of the penal statutes. The court was of the view that the company could be prosecuted for an offence involving rupees one lakh or less and be punished as the option is given to the court to impose a sentence of imprisonment or fine. But in the case of an offence involving an amount or value exceeding rupees one lakh, the court is not given a discretion to impose imprisonment or fine and therefore, the company cannot be prosecuted as the custodial sentence cannot be imposed

30 Municipal Corporation Delhi *v* Association of Victims Of Uphaar Tragedy,(2011) 14 SCC 481

31 https://en.wikipedia.org/wiki/Uphaar_Cinema_fire accessed on 16-102016

32 Polyvend, Inc. v. Puckorius, 88 Ill App 3d 778, 411 NE2d 316

33 882 F2d 656 (CA2 1989)

34 AIR 2004 SC 86

on it.

The development can be observed from the ruling of the Apex Court later. In *Standard Chartered Bank and Ors. v. Directorate of Enforcement and other*,[35] the court overruled the above decision on account of providing complete justice to the aggrieved which could not be prejudiced in the garb of corporate personality. In this case, the Bank was prosecuted for violation of certain provisions of the Foreign Exchange Regulation Act of 1973 ("FERA"). Ultimately, the Supreme Court of India held that the corporation could be prosecuted and punished, with fines, regardless of the mandatory punishment of imprisonment required under the respective statute. The court determined on the issue of finding *mens rea*. The Court held that there is no immunity to the companies from prosecution merely because the prosecution is in respect of offences for which the punishment prescribed is mandatory imprisonment. As the company cannot be sentenced to imprisonment, the court cannot impose that punishment. But when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could be enforced against the company. As regards company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. It cannot be said that, there is shield of immunity for any company from any prosecution for serious offences merely because the punishment provided for such offence has mandatory imprisonment. The court by majority held that a corporation could be punished and would be criminally liable for offences for which the mandatory punishment is both imprisonment and fine. In case the company is found guilty, the sentence of imprisonment cannot be imposed on the company but the sentence of fine can be imposed and the court has got the judicial discretion to do so.

Supreme Court of India in case of *P.C Agarwala v. Payment of Wages Inspector, M.P and Others*[36] held that in the context of vicarious liability a person in charge would be deemed to be responsible for the acts of the company. Thus, the Supreme Court has clearly brought some clarity on the principles of attribution and vicarious liability in the context of corporate criminal liability *vis-à-vis* strict liability under a statute.

Again the Supreme Court in *Iridium India Telecom Ltd. v. Motorola Inc.*,[37]reiterated the principles laid down previously in the *Standard Chartered Bank case*. In this case Iridium India Limited filed a criminal complaint against

35 AIR 2005 SC 2622
36 (2005) 8 SCC 104
37 2004 (1) Mh.L.J. 532

Motorola Inc. alleging offences under section 420 read with section 120B of the Indian Penal Code (IPC). It was alleged in the complaint that Motorola Inc. had floated a private placement memorandum (PPM) to obtain funds/investments to finance the '*Iridium project*'. On the basis of the information contained in and representations made through the PPM, several financial institutions had invested in the project. The project became unsuccessful which resulted in massive losses to the investors. Among them the Iridium India Limited was also there which alleged that this took place because of Motorola Inc.'s false representations. In this case the Bombay High Court quashed the proceeding against Motorola by saying that a corporation could not commit the offence of cheating, as it has no *mens rea*. The Court opined that although a company could be a victim of deception but it could not be the perpetrator of deception. Only a natural person could be competent to hold *mens rea* to commit an offence. But in appeal the Supreme Court set aside the high court's finding and asserted that a corporate body could be prosecuted for cheating and conspiracy under the Indian Penal Code. The offences for which companies can be criminally prosecuted are not limited only to the specific provisions made in the Income Tax Act, the Essential Commodities Act, and the Prevention of Food Adulteration Act. Several other statutes also make a company liable for prosecution, conviction and sentence. The court stated that companies could no longer claim immunity from criminal prosecution on the ground that they are incapable of possessing *mensrea* for the commission of an offences.

Hence, from the above discussion it appears that it is the discretion of the court whether the doctrine of absolute liability will be applied or not. It seems that the Court did not go by the literal and strict interpretation rule required to be done for the penal statutes and went on to provide complete justice thereby imposing fine on the corporate. The Court looked into the interpretation rule that all penal statutes were to be strictly construed in the sense that the Court must see that the thing charged as an offence was within the plain meaning of the words used. As regards company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the legislature and the Court has no difficulty in construing the statute in such a way.

Conclusions and Suggestions

Corporations which are considered to be an integral part of the society are also an effective agents of action in our society. But, corporations, as they were past in have not been same today. On the basis of above discussion it can be said

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that the criminal law jurisprudence relating to imposition of criminal liability on corporations is settled on the point that the corporations can commit crimes and hence be made criminally liable. As a responsible citizen it is our duty to prevent these crimes for the betterment of society. However, the statutes in India are not consistant with the rulings of judiciary and the above analysis shows that they do not make corporations criminally liable. It is therefore suggested that amendments should be carried out by the legislature as soon as possible so as to avoid judiciary from defining the law. Also, it is high time that the scope of liability be increased in India. Strict legal action can also be taken against the corporation. There should be indiscriminate application of Corporate Criminal Liability and corporation should be held liable for the agents irrespective of their position in corporate chain. Apart from it there should be alternative forms of punishment apart from fines. The fact is not hidden that corporations have a very huge pocket to pay their fines. The present situation demands that the law should devise other forms of punishment for such crimes.These are, probation, adverse publicity, direct compensation orders etc. These measures may include compulsory winding up of the company also. There should be public destruction of the name and goodwill of the company. Economy and society should work together to curb the menace of corporate crime. Corporation involved in such crimes should not be allowed to get government and state contracts. This will surely have a deterrent effect on the corporation. Besides, the corporations should also be made solely responsible for the rehabilitation of the victims of such crimes. If effluent from an industry of a corporation is polluting waterbodies then the corporation should be made to clean the bodies. This has to be scrutinised and checked also by the government. Strict implementation of the laws is the need of the hour. The heavy fines imposed on corporation should be used to pay compensation to the victims. As prescribed under section 357 of Cr.P.C.

Judicial Accountability: An Approach for Independence of Judiciary

Dr. Sant Lal Nirvana[1]

In a Democracy, the judiciary, as a custodian of constitutional rights and obligations. Judicial independence and accountability are interlinked. Hon'ble Mr. Justice S.H. Kapadia, Chief Justice of India once remarked: "When we talk about the ethics, the judges normally comment upon ethics among politicians, student, professors and others. But I would say that for a judge too, ethics, not only constitutional morality but even ethical morality, should be the base"[2] The well-known legal luminaries including Former Chief Justice of India S. Venkataramaiah and Former Judge of the Supreme Court D.A. Desai and another Former Judge of the Supreme Court Chennappa Reddy have expressed the view that if all the sections of the society are accountable for their actions, there is no reason why the Judges should not be so.[3] Former Chief Justice, Verma recognized the validity of this plea when he remarked on one occasion, "These days we (Judges) are telling everyone what they should do but who is to tell us? We have task of enforcing the rule of law, but does not exempt and even exonerate us from following it".

Significances of Judicial Accountability

It is perhaps pertinent to remember that every developed democratic country has evolved its own procedure of judicial accountability. In India, time has now come to ensure judicial accountability, perhaps through the constitution of a National Judicial Commission and formation of forum of redressal for grievances of common man. Judicial independence and judicial accountability are neither incompatible nor mutually exclusive concepts. Rather the concept of judicial accountability increases the legitimacy of the judiciary amongst the people.

The concept of judicial accountability in India may be considered in two ways. Firstly, accountability of higher judiciary in India for the judgments delivered by them and secondly, the institutional methods of making judges accountable in India. The Indian judicial experience is unique, the judicial accountability in

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2 "Kapadia S.H. *"Cautions Judges Against Judicial Activism"*, New Delhi, May 3, 2010 retrieved at http://beta.thehindu.com/news/national/article420137.ece.

3 Padala Rama Reddi, *"Advocates Practice"* Hyderabad, Padala Rama Reddi Educational Society Vol.2 p. 1469,

the first sense was very much in question in 1950 to 1973[4]. There were clashes between Supreme Court's decision on property and agrarian and economic reform and the government's view that the Supreme Court was unsympathetic and at times hostile to its legislation on such matters. However, from 1973 there have been no such problems as the judiciary changes its direction. It concerns now more for human rights and civil rights of the citizens and community rights. No one speaks about judges accountable for their judgment in economic and property matters today. Today, it is the matter of appointments to the superior judiciary and the absence of any disciplinary control including removal of a judge of superior court, which raises problems of accountability. The appointing authority of the judges of the superior courts with acquiescence of the executive. At the same time, the only constitutional method of disciplining a judge of a superior court viz. by his removal for proved misbehavior by an address given by both the houses of parliament to the president for his assent in unwieldy and in one case, was shown to be politicized.

The judicial system needs to be reclaimed and reinvented by the people of the country, so that it can come to function in accordance with the philosophy of the Constitution. The system will need to be cleared of procedural complexities and cobwebs so that it can be accessed by the common citizens without professional lawyers, who have become a part of the exploitative judicial system. It will need to be strengthened to deliver justice quickly, efficiently and honestly. Whatever, additional financial allocation or additional judges are required for this must be done. For this, the various layers of protection created to shield the judges from accountability would have to be peeled away. To begin with, the clause relating to scandalising the judiciary would have to be deleted from the Contempt of Courts Act[5].

Judicial Accountability and its Functioning in India

In a 'Democratic Republic' power with accountability of the individual enjoying it, is essential to avert disaster for any democratic system. The accountability must be comprehensive to include not only the politicians, but also the bureaucrats, judges and everyone invested with public power. Power and position in a democracy come attendant with responsibility, and every incumbent

4 Kumarmanglam, S. Mohan, *Judicial Appointments, An Analysis of the recent Appointments of the Chief Justice of India*, p. 208 (1999).

5 Campaign Statement Issued By The Peoples Convention On Judicial Accountability And Reforms (Held at ISI, New Delhi on 10th and 11th March 2007)

of a public office must remain constantly accountable to the people, who are the repository of political sovereignty. Lord Woolf, the Chief Justice of England and Wales, remarked; "The independence of the judiciary is therefore not the property of the judiciary, but a commodity to be held by the judiciary in trust for the public." Judicial accountability being a facet or corollary of independence of the judiciary, it is logical, therefore, that there must exist an effective mechanism for enforcing accountability of every holder of a public office. The only difference can be in the nature of the mechanism, depending on the kind of office and the level at which it exists in the hierarchy of public offices.

Accountability of the judiciary at every level, in a democracy cannot be doubted. The need of an effective mechanism for the enforcement of judicial accountability, when needed, is a felt need and must be accepted. Since judicial accountability is a facet of independence of the judiciary, Article 235 of the Constitution of India provides for 'control' of the High Court over the subordinate judiciary clearly indicating that the provision of an effective mechanism to enforce judicial accountability is a part of our constitutional philosophy. The entrustment of the power over the subordinate judiciary to the High Court preserves the independence of judiciary, and respects the directive principle of separation of judiciary from executive (Article 50). It cannot be doubted that the independence of a subordinate judge is as important as that of a judge in a High Court and in the Supreme Court.

Absence of any mechanism for enforcement of judicial accountability at the higher levels, other than by the process of impeachment [Articles 124(4) and 217(1) Proviso (b)] in extreme cases, is because no such need was visualized when the Constitution was framed. At that level, it was expected that settled norms and peer pressure were sufficient checks. However, there is now a felt need for an effective mechanism even for the higher levels of judiciary, though it may be for rare aberrations only. Public opinion is veering in that direction because of several recent instances, some of which have led even to criminal prosecutions and an infructuous impeachment proceeding.

Inadequacy of the existing mechanism was witnessed in the K.Veeraswami case,[6] and the infructuous impeachment proceedings in the case of V.Ramaswami even after the adverse finding of the Judge's Committee under the Judges Inquiry Act, 1968, affirmed that impression. Several subsequent incidents involving judges at the higher levels, which are well known, have led to a clamour for an effective

6 K. Veeraswami v. Union of India (1991) 3 SCC 655

mechanism for use when needed. Absence of an effective means to ensure accountability of all public men portends danger for democracy.

In furtherance of the earlier resolutions of the Chief Justice's Conferences, on May 7, 1997, the Supreme Court of India in its Full Court Meeting unanimously adopted a Charter called the 'Restatement of Values of Judicial Life', generally known as the Code of Conduct for Judges[7]. Simultaneously, two other resolutions were adopted, which require declaration of assets by every High Court and Supreme Court Judge/Chief Justice, and the formulation of an in- house procedure to inquire into any allegation of misbehavior or misconduct against them, which is considered fit for inquiry by the Chief Justice of India and some of his senior colleagues. Conscious of the fact that this mechanism lacked legal sanction for its enforcement, the then Chief Justice of India, J.S. Verma wrote a letter dated December 1, 1997 to the Prime Minister informing him of these resolutions and the need to provide legal support to this effort. That need remains unfulfilled.[8]

However, care must be taken to preserve the independence of judiciary and to ensure separation of judiciary from executive. The adjudicative power must, necessarily, vest in a committee of senior judges, and the consequential action should be taken by the President of India on the advice of the Chief Justice of India in accordance with the judicial finding. This can be a mode in addition to, and as an alternative to impeachment.[9]

The mechanism must also provide stringent punishment against its misuse on false and scurrilous allegations made against honest judges who constitute the overwhelming majority. It will help provide a means to an honest judge to have his name cleared when false and scurrilous allegations are made maliciously or recklessly, for which no effective remedy exists at present. The only means available to sue for defamation is neither practical nor feasible. The mechanism should cater to all needs and cover all aspects of judicial accountability as a facet of independence of judiciary.[10]

A related issue assuming significance in recent years must also be addressed. There is public disquiet, voiced often in private, about some post-retirement engagements of the Supreme Court Judges/Chief Justices. Chamber practice in the

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7 Restatement of values of Judicial Life (As adopted by full Bench of Supreme Court on 7th May, 1997). retrieved at www.google.com

8 CANONS OF JUDICIAL ETHICS by Justice Y.K.Sabarwal, Former Chief Justice of India, article retrieved from< http://www.hcmadras.tn.nic.in>

9 *Ibid*.

10 *Ibid*.

form of written opinions under signature given for use in any court, tribunal or authority; and paid arbitration work done while heading a Commission availing the benefit of the prerequisites and/or salary of a sitting Judge are some of the disturbing trends. Soli Sorabjee, the former Attorney General, expressed grave concern at former Chief Justices of India filing affidavits on behalf of private litigants in the US courts. These are some of the instances impinging on the credibility of the institution on which lies the greatest responsibility for preservation of the Constitution.[11]

Judiciary *v.* Judicial accountability

The method of the appointment of the superior judiciary and the absence of any disciplinary control including the removal of judge of apex court which raises problems of accountability. There is also no method for disciplining a judge of a Supreme Court either for deviant behaviour not amounting to misbehavior. The conclusion is that the Indian higher judiciary is perhaps the most powerful judiciary in the world today and societal perception for it is very, high accountability mechanisms particularly in the disciplining of the judges of superior court and representative character of the courts have not matched with its power and esteem[12]. Judiciary is one of the important pillars of any democracy governed by the rule of law. The legislature, executive and the judiciary are all creatures of our Constitution. The view that the[13] legislature is supreme is no longer recognized even in England where the theory of parliamentary supremacy as propounded by Professor Dicey, was in vogue for a long time. Recent judgments of courts in England have declared that it is the Constitution that is supreme and that each of the three wings has their respective jurisdictions and powers to the extent allocated to them in the Constitution. Our Constitution contains checks and balances, which require all the three wings to work harmoniously. It has created a separation of powers between all the three branches or wings though the separation, it is now well accepted, is not as rigid as it is under the American Constitution. No person, however high, is above the law. No institution is exempt from accountability, including the judiciary. Accountability of the judiciary in respect of its judicial functions and orders is vouchsafed by provisions for appeal, revision and review of orders. What is the mechanism for accountability for serious judicial misconduct, for disciplining errant judges. Our Constitution provides for removal of a judge of

11 Indian Express, March 14,2004, Article by Soli Sorabjee, Former Attorney General, p. 12.

12 T.R. Andhyarujina, Former Solicitor General of India.

13 Sanjay, Sachidanand, Gone at last: The story of v. Ramaswami's Impeachment, pp. 149, 166 (1993).

the Supreme Court or the high court for proved misbehavior or proved incapacity, by what is popularly called the process of impeachment, where under two thirds of the members of each House of Parliament may vote for the removal of the judge. So far, only one impeachment proceeding has been initiated against a Supreme Court judge. It failed because Congress abstained from voting and consequently two third majorities was not available. It is now generally accepted that the present impeachment process is cumbersome, time consuming and tends to get politicized. It needs to be reformed urgently. Further, in the absence of reformulation of the law of the contempt of the court by Supreme Court, the existing law of the scandalizing the court is perceived to operate as deterrent to criticize a judge for his conduct. As Justice Michael Kirby[14] says: 'In a pluralist society, judges are the essential equalizers. They serve no majority or any minority either. Their duty is to the law and to justice. They do not bend the knee to the governments, to particular religions, to the military, to money, to tabloid media or the screaming mob. In upholding law and justice, judges have a vital function in a pluralist society to make sure that diversity is respected and the rights of all protected'. The Indian higher judiciary is perhaps the most powerful judiciary in the world today and the societal perception of it is high, accountability mechanisms particularly in the disciplining of the judges of superior court and the representative character of the courts have not matched with its power and esteem.[15]

Limitations on Judicial Accountability

Judicial independence, correctly understood, is not an end in itself. Although it is sometimes characterized as such in the flowery speeches of public officials. Most thoughtful scholars recognize that judicial independence is an instrumental value – a means to achieve other ends.[16] As an instrumental value, judicial independence has limits, defined by the purposes it serves. Disagreement persists as to what those purposes are, but most would accept some variation on the theme that judicial independence enables judges to follow the facts and law without fear or favor, so as to uphold the rule of law, preserve the separation of governmental powers and promote due process.[17] Given these objectives, one may fairly conclude that judges who are subject to intimidation from outsiders interested in the outcomes

14 An eminent Judge, High Court of Australia.(From 1983 to 1984, he was a judge in the Federal Court of Australia)

15 *Ibid*.

16 Stephen B. Burbank and Barry Friedman, Reconsidering Judicial Independence, In Judicial Independence At The Crossroads, pp. 11-14 (2002),

17 Rule of Law and the Age of Aquarius, Hastings Law Journal(1990) p. 757, 760

of cases the judges decide lack the independence necessary to follow the facts and law. At the same time, one may just as fairly conclude that judges who are so independent that they may disregard the law altogether without fear of reprisal likewise undermine the rule of law values that judicial independence is supposed to further. Although some trumpet judicial accountability as if it were an end in itself, accountability like independence is better characterized as an instrumental value that promotes three discrete ends: the rule of law, public confidence in the courts, and institutional responsibility. First, judicial accountability promotes the rule of law by deterring conduct that might compromise judicial independence, integrity, and impartiality.[18] To say that judicial accountability promotes judicial independence. Accountability does, after all, diminish a judge's literal independence; the judge who is made accountable to an impeachment process, for instance, loses her 'independence' to take bribes with impunity. But properly employed, accountability merely diminishes a judge's freedom to make herself dependant on inappropriate internal or external influences that might interfere with his capacity to follow the rule of law.[19] By deterring bribery, favoritism, bias and so on, accountability promotes the kind of independence needed for judges to adhere to the rule of law. Second, judicial accountability promotes public confidence in judges and the judiciary. Regardless of whether independent judges follow the law, if the public's perception is otherwise, reforms calculated to render judicial decision-making subject to popular or political branch control are sure to follow, to the ultimate detriment of the rule of law itself. Third, judicial accountability promotes institutional responsibility by rendering the judiciary responsive to the needs of the public it serves as a separate branch of government. The public is entitled to courts that administer justice effectively, efficiently, and expeditiously. The judiciary spends taxpayer money just like the other branches of government and, just like the other branches; the judiciary must be subject to regulation aimed at making its operations more streamlined and cost effective[20]. If there is no written Constitution, the constitutional conventions govern. In our country, the Supreme Court of India laid down more than 42 years ago in Keshav Singh's case21 as follows: "…..though our legislatures have plenary powers, they function within the limits prescribed by the material and relevant provisions of the Constitution….." '

Our Constitution contains checks and balances which require all the three

18 *Ibid.*
19 *Ibid.*
20 Gardner Geyh, 56 Case W. Res. L. Rev. 911
21 (1965 (1) SCR p.413

wings to work harmoniously. It has created a separation of powers between all the three branches or wings though the separation, it is now well accepted, is not as rigid as it is under the American Constitution. The Constitution of India, Articles 121 and 211[22] prohibit any discussion in the Parliament or state legislatures on the conduct of a judge of the Supreme Court or High Court in the discharge of their respective duties. The High Courts and Supreme Court are courts of record and have powers to punish for contempt. Under the Constitution of India Art.144,[23] all authorities, civil and judicial in the territory of India will act in aid of the Supreme Court. Judges are also immune under various laws like Judges (Protection) Act, 1985 from civil or criminal action for their acts, speech etc, in the course of or while acting or purporting to act in the discharge of their official or judicial duties or functions. However, judges have to abide by the oath they have taken, namely, that 'they will bear true faith and allegiance to the Constitution of India as by law established'. The fact that the powers of judges are very wide is in itself an indication that the powers may not be allowed to be absolute. Among the constitutional limitations on the judges, the most important one is the provision for removal of judges of the High Court's and Supreme Court by address of the Houses of Parliament to the President on the ground of 'proved misbehavior or incapacity'. This is provided in Constitution of India, Art.124 (2)[24] and (4) in respect of judges of the Supreme Court and in view of Art. 217, that procedure is attracted to the 'removal' of judges of the High Court also. Dr. Param Kumarasamy as Vice-President of the International Commission of Jurists and as former UN Special Rapporteur on independence of the judiciary, in his speech in November 2004 at Chennai on 'judicial accountability' stated that: *"Accountability and transparency are the very essence of democracy.*[25] *No one single public institution or for that matter, even a private institution dealing with the public, is exempt from accountability. Hence, the judicial arm of the government too is accountable."* As *Stephen B.* Burbank says *"a completely independent court in this sense would also be intolerable because they would render impossible the orderly conduct of the social and economic affairs of a society, Courts are institutions run by human beings. Human beings are subject to selfish or venal motives and even moral paragons differ in the quality of their mental faculties and in their capacity."*[26] Thus judicial accountability is an indispensable counterbalance to the judicial independence. An unaccountable judge would be

22 *Ibid.*

23 *Supra* note 6.

24 *Ibid.*

25 Cyrus Das and Chandra K."Judges and Judicial Accountability" p. 99 (2004).

26 *Stephen B. Burbank,Judicial Independence at the Crossroads: An Interdisciplinary Approach, p. 201 (2002).*

free to disregard the ends that independence is supposed to serve.

Need for Judicial Accountability

The judicial system deals with the administration of justice through the agency of courts. Judges are the human stuff which presides over the courts. They are not merely visible symbols of courts; they are actually their representatives in flesh and blood. The manners in which judges discharge their duties determine the image of courts and the creditability of judicial system itself. In India from time immemorial judges have been held in high esteem and honored as super humans but coming across recent incidents in many states i.e. Bihar, Delhi Punjab, Haryana and Uttar Pradesh (like killing of an under trial in the court itself and lynching a suspected thief to death) depicts that frustrated by the failure to get justice, people are slowly losing faith in judiciary and are taking law into their hands. This is highly deplorable. A need definitely is there to make judiciary accountable, as derogation of values in judiciary is far more dangerous than in any other wing of the government as judiciary has to act as the guardian of our constitution. Judicial accountability and answerability of the judges is not a new concept. Several countries in their constitutions have already provided for ensuring accountability of judiciary. This to prevent concentration of power in the hands of a single organ of the state especially in countries where judicial activism interferes with and invades into the domain of other organs. But at the same time Judicial independence is a pre- requisite for every judge whose oath of office requires him to act without fear or favor, affection of ill- will and to uphold the constitution and laws of the country.

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Rape Laws in India

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Introduction

Rape and the issue of violence against women in general have been endemic to Indian society, with high profile cases capturing national and international attention for brief bouts of time before dying down and becoming part of commonplace history. This is an ironic phenomenon, considering the majority of the population religiously worships female goddesses who represent courage, prosperity, and power. Currently, it is estimated that ninety-three women are being raped in India every day. The National Crime Records Bureau (NCRB) in India has reported data about rape cases since 1971. From 1971 to 2011, the number of reported cases increased from 2,487 to 24,206 (National Crime Records Bureau 2013). First Information Reports (FIRs) filed for rape in 2012 showed an increase of 3% from the previous year. In 2012, 24,923 cases were reported, of which only 15% went to trial and only 2% led to conviction. Although such statistics are published, the actual number of rapes is far from being recorded, since the unreported figure is extremely high. The general consensus is that the "current levels of violence reported through national and local law enforcement record represent a minimum of actual violence against women cases". Hence, the issue of violence against women, and more specifically, rape, is far more ubiquitous than it appears. In 2012, a case of rape occurred that made international headlines and stirred an unprecedented uprising in Indian society. At around 8:30 pm on December 16, 2012 a twenty three year old female college student named Jyoti Singh, i.e. Nirbhaya, and her friend were waiting for a public bus in South Delhi after attending a viewing of *Life of Pi*. A bus with tinted windows eventually stopped, whereupon a young boy persuaded the pair to board the bus with the promise of transportation to home. At that fateful moment, Nirbhaya was violently assaulted and raped by six men; these perpetrators were Ram Singh, the main accused bus driver (age 35); his brother, Mukesh Singh (age 29); Vinay Sharma, an assistant gym instructor (age 18); Pawan Gupta, a fruit seller (age 19); Akshay Thakur, unemployed (age 28), and Mohammed Afroz, a juvenile at the time of the crime who was called "Raju" for anonymity (age 17). In an attempt to defend Nirbhaya, her male companion was severely beaten up by the assailants, as well. Three hours later, a Police Control Room (PCR) van picked up Nirbhaya's naked

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body and her injured friend lying under a flyover, and immediately rushed them to a hospital. While Nirbhaya and her friend were in the hospital, three of the accused, including the principal suspect Ram Singh, were arrested on December 17th. On the 18th, a fourth arrest was made. It took three more days to arrest the juvenile and the final perpetrator, on December 21st. Immediately after news of the gang rape spread, protests erupted in Delhi and all over the country. The public in Delhi was so agitated by the tragedy that police resorted to tear gas to control the crowds. In the initial weeks, "Hang the rapists" was the vociferous cry of the Indian media. Nothing less than capital punishment would assuage the collective horror and anger of the populace. However the demand for Capital Punishment to a rape convict is not raised first time, it has been raised many times. Former Home Minister of India L.K. Advani once has given statement in the Parliament in support of death penality for rape convict. In Bacchan Singh *vs.* State of Punjab[2] the SC held death penalty should be given in "rare of the rarest case". However in some countries there is the provision of death penalty in case of rape. In Saudi Arabia, Iran, China in exceptional cases, a rape convict is awarded with the punishment of death. In China, Castration (a surgical action in which a biological male loses the use of testicles) is also used as punishment for rape.

In the political sphere, two Commissions of Inquiry, the Justice Verma Committee and the Usha Mehra Committee, were constituted as a direct consequence of the rape and subsequent outrage about the incident, their purpose being to seek public opinion as to how the then-current anti-rape laws should be amended. The Criminal Law (Amendment) Act 2013 was passed as a result of the Verma Committee Report three months after the rape. This Act encompasses over a dozen amendments in different laws, including the Indian Penal Code, the Code of Criminal Procedure, and the Indian Evidence Act. Now the amendment of 2013 also provides for death penalty u/ss.376A and 376E. Moreover, the government launched the Nirbhaya Fund project designed to ensure the safety of women using public transportation by setting up emergency buttons, GPS technology, and CCTVs in major cities across the country.

Rape is matters of serious concern – not only because of the physical, emotional and psychological trauma which they engender in the victim, but also because it is being tolerated by a society ostensibly wedded to the rule of law. The principle of gender equality is enshrined in the Indian Constitution in its Preamble, Fundamental Rights, Fundamental Duties and Directive Principles**.** The

2 AIR 1980 SC 898

Constitution of India not only grants equality to women, but also empowers the State to adopt measures of positive discrimination in favour of women. Within the framework of a democratic polity, our laws, development policies, Plans and programmes have aimed at women's advancement in different spheres. India has also ratified various international conventions and human rights instruments committing to secure equal rights of women. The Constitution of India not only grants equality to women but also empowers the State to adopt measures of positive discrimination in favour of women for neutralizing the cumulative socio economic, education and political disadvantages faced by them. Fundamental Rights, among others, ensure equality before the law and equal protection of law; prohibits discrimination against any citizen on grounds of religion, race, caste, sex or place of birth, and guarantee equality of opportunity to all citizens in matters relating to employment. Articles 14, 15, 15(3), 16, 39(a), 39(b), 39(c) and 42 of the Constitution are of specific importance in this regard.

Statutory Provisions

Rape is a stigma which exists in the society from a long time. The dictionary meaning of word rape is "the ravishing or violation of a woman." The rape victim i.e. a woman as woman cannot commit rape due to biological reasons. She is traumatized after the event; it is very difficult for a woman to come out of this trauma. Rape in India is a cognizable offence. There are many provisions in various Acts. The word rape is legally defined u/s 375 of Indian Penal Code, 1860. It defines the rape and also prescribes its punishment. Whenever a man penetrates or does sexual intercourse with a woman without her consent or will it amounts to rape. Penetration here means that only a slightest of the touch of penis to vagina amounts to rape, unruptured hymen of woman does not prove that rape was not committed. There are exceptions to it also i.e. when a man does sexual intercourse with his wife who is above 15 years of age. The rape law under Indian Penal Code had gone through a lot of amendments. In 1983, amendment was made and S. 376(2) i.e. Custodial rape, S. 376(A) i.e. marital rape and S. 376(B to D). The Criminal Law Amendment Act 2013, definition of Rape again substituted S.375 and s.376 (A to D) and also inserted S.376E.

(I) Provisions of Rape under Indian Penal Code 1860

> "375. Rape.—A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With or without her consent, when she is under sixteen years of age.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.—Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape

(II) Provision Regarding Rape After the Criminal Law Amendment Act1983

"375. Rape.—A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under sixteen years of age.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.—Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape

376. Punishment for Rape

(1) Whoever, except in the cases provided for by subsection (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever, -

(a) being a police officer commits rape-

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being, a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being, on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation 1- Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

Explanation 2- "Women's or children's institution" means an institution, whether called an orphanage or a home for neglected woman or children or a widows' home or by any other name, which is established and maintained for the reception and care of woman or children.

Explanation 3- "Hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring, medical attention or rehabilitation.

Simply put, the offence of rape is "ravishment of a woman" without her consent or against her will by force, fear or fraud and also includes the "carnal knowledge" of a woman.[3] "Carnal Knowledge" means penetration to any slightest degree. This ingredient of rape has been statutorily incorporated under the Explanation to Section 375.The Ingredients of the rape are following:

1. Consent

In order to bring home the charge of rape against a man, it is necessary to establish that the "sexual intercourse" complained of was either against the will or without her consent. Where the consent is obtained under the circumstances enumerated under clauses firstly to sixthly, the same would also amount to rape. In Dileep Singh *v.* State of Bihar[4] the Supreme Court observed that "though will and consent often interlace and an act done against the will of the person can be said to be an act done without consent, the Indian Penal Code categorizes these two expressions under separate heads in order to as comprehensive as possible." The difference between the two expressions was brought out by the Supreme Court in State of UP *v.* Chottey

3 Bhupendra Sharma v. State of HP (2003)8 SCC 551 [para 10-11]

4 (2005)1SCC 88 (para 14)

Lal[5] in the following words:

" Be that as it may, in our view, clause Sixthly of Section 375 IPC is not attracted since the prosecutrix has been found to be above 16 years (although below18years). In the facts of the case what is crucial to be considered is whether clause Firstly or clause Secondly of Section 375 IPC is attracted. The expressions "against her will" and "without her consent" may overlap sometimes but surely the two expressions in clause Firstly and clause Secondly have different connotation and dimension. The expression "against her will" would ordinarily mean that the intercourse was done by a man with a woman despite her resistance and opposition. On the other hand, the expression "without her consent" would comprehend an act of reason accompanied by deliberation. (Emphasis supplied)"

It must be noted that the Courts have followed the tests laid down under Section 90 of the IPC for establishing "consent". Section 90 reads thus:

"S.90. Consent known to be given under fear or misconception.—A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or Consent of insane person if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or Consent of child unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age."

In this context the decision of Supreme Court in State of H.P v. Mango Ram[6] is noteworthy. The Court observed as follows:

".....The evidence as a whole indicates that there was resistance by the prosecutrix and there was no voluntary participation by her for the sexual act. Submission of the body under the fear of terror cannot be construed as a consented sexual act. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all

5 (2011)2 SCC 550
6 (2011)2 SCC 550

relevant circumstances. From the evidence on record, it cannot be said that the prosecutrix had given consent and thereafter she turned round and acted against the interest of the accused. There is clear credible evidence that she resisted the onslaught and made all possible efforts to prevent the accused from committing rape on her. Therefore, the finding entered by the learned Sessions Judge that there was consent on the part of the prosecutrix is without any basis."

The United Nations Handbook points out that the definitions of rape and sexual assault have evolved over time, from requiring use of force or violence, to requiring a lack of positive consent. The United Nations recommends that the definition of rape should require the existence of 'unequivocal and voluntary agreement' as well as proof by the accused of steps taken to ascertain whether the complainant was consenting. This has the advantage of shifting the burden to the defence to prove that such steps were taken. This approach was endorsed by the CEDAW committee in its views in Vertido *v* The Philippines which made it clear that such a definition would assist in minimizing secondary victimization of the complainant/survivor in proceedings.

2. Penetration

The section further clarifies that mere penetration is sufficient to constitute the offence of rape. In Koppula Venkatrao v. State of AP[7] the Supreme Court held as follows:

"The sine qua non of the offence of rape is penetration, and not ejaculation. Ejaculation without penetration constitutes an attempt to commit rape and not actual rape. Definition of "rape" as contained in Section 375 IPC refers to "sexual intercourse" and the Explanation appended to the section provides that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Intercourse means sexual connection."

Pursuant to the aforesaid observation the offence of 'attempt to commit rape' also need elaboration. Section 376 read with Section 511 of IPC penalizes the offence of 'attempt to rape'

Attempt to commit rape

In Koppula Venkatrao (supra) the Supreme Court, with respect to the applicability of section 511 to the offence of rape, held the following:

7 (2004)3 SCC 602

"The plea relating to applicability of Section 376 read with Section 511 IPC needs careful consideration. In every crime, there is first, intention to commit,secondly, preparation to commit it, and thirdly, attempt to commit it. If the third stage, that is, attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete, but law punishes the person attempting the act. Section 511 is a general provision dealing with attempts to commit offences not made punishable by other specific sections. It makes punishable all attempts to commit offences punishable with imprisonment and not only those punishable with death. An attempt is made punishable, because every attempt, although it falls short of success, must create alarm, which by itself is an injury, and the moral guilt of the offender is the same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment. As the injury is not as great as if the act had been committed, only half the punishment is awarded. A culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; if it fails due to reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. The word "attempt" is not itself defined, and must, therefore, be taken in its ordinary meaning. This is exactly what the provisions of Section 511 require. An attempt to commit a crime is to be distinguished from an intention to commit it; and from preparation made for its commission. Mere intention to commit an offence, not followed by any act, cannot constitute an offence. The will is not to be taken for the deed unless there be some external act which shows that progress has been made in the direction of it, or towards maturing and effecting it. Intention is the direction of conduct towards the object chosen upon considering the motives which suggest the choice. Preparation consists in devising or arranging the means or measures necessary for the commission of the offence. It differs widely from attempt which is the direct movement towards the commission after preparations are made. Preparation to commit an offence is punishable only when the preparation is to commit offences under Section 122 (waging war against the Government of India) and Section 399 (preparation to commit dacoity). The dividing line between a

mere preparation and an attempt is sometimes thin and has to be decided on the facts of each case. There is a greater degree of determination in attempt as compared with preparation. An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt may be described to be an act done in part-execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit a crime, falling short of, its actual commission or consummation/completion. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted. The illustrations given in Section 511 clearly show the legislative intention to make a difference between the cases of a mere preparation and an attempt. In order to find an accused guilty of an attempt with intent to commit a rape, court has to be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part. Indecent assaults are often magnified into attempts at rape. In order to come to a conclusion that the conduct of the accused was indicative of a determination to gratify his passion at all events, and in spite of all resistance, materials must exist. Surrounding circumstances many times throw beacon light on that aspect."

S.376A. Intercourse by a man with his wife during separation.—Whoever has sexual intercourse with his own wife, who is living separately from him under a decree of separation or under any custom or usage without her consent shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

S.376B. Intercourse by public servant with woman in his custody.—Whoever, being a public servant, takes advantage of his official position and induces or seduces, any woman, who is in his custody as such public servant or in the custody of a public servant subordinate to him, to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.

S.376C.Intercourse by superintendent of jail, remand home, etc.—

Whoever, being the superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and induces or seduces any female inmate of such jail, remand home, place or institution to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.

Explanation 1.—"Superintendent" in relation to jail, remand home or other place of custody or a women's or children's institution includes a person holding any other office in such jail, remand home, place or institution by virtue of which he can exercise any authority or control over its inmates. Explanation 2.—The expression "women's or children's institution" shall have the same meaning as in Explanation 2 to sub-section (2) of section 376.

S.376D.Intercourse by any member of the management or staff of a hospital with any woman in that hospital.—Whoever, being on the management of a hospital or being on the staff of a hospital takes advantage of his position and has sexual intercourse with any woman in that hospital, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine. Explanation.—The expression "hospital" shall have the same meaning as in Explanation 3 to sub-section (2) of section 376.

Punishment

The punishment to rapist is provided with an imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both. But it is seen the law relating rape is failed to create deterrent effect on society. There is need of strict laws such as capital punishment. In Bachan Singh vs. State of Punjab[8] the SC held the Capital punishment should be given in rare of rarest case. In Dhananjoy

8 (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : 1980 Cri LJ 636

Chaterjee vs State Of W.B[9] Keeping in view the medical evidence and the state in which the body of the deceased was found, it is obvious that a most heinous type of barbaric rape and murder was committed on a helpless and defenceless school-going girl of 18 years. If the security guards behave in this manner who will guard the guards? The faith of the society by such a barbaric act of the guard, gets totally shaken and its cry for justice becomes loud and clear. The offence was not only inhuman and barbaric but it was a totally ruthless crime of rape followed by cold blooded murder and an affront to the human dignity of the society. The savage nature in Bachan Singh v.State of Punjab[10] of the crime has shocked our judicial conscience. There are no extenuating or mitigating circumstances whatsoever in the case. We agree that a real and abiding concern for the dignity of human life is required to be kept in mind by the courts while considering the confirmation of the sentence of death but a cold blooded preplanned brutal murder, without any provocation, after committing rape on an innocent and defenceless young girl of 18 years, by the security guard certainly makes this case a "rarest of the rare" cases which calls for no punishment other than the capital punishment and we accordingly confirm the sentence of death imposed upon the appellant for the offence under Section302 IPC.

Evidence and proof

It is well settled that the evidence of the victim of rape is on the same footing as the evidence of an injured complainant or witness. Her testimony alone is sufficient for conviction. In prosecutions of rape, the law does not require corroboration. It is only by way of abundant caution that the court may look for some corroboration so as to satisfy its conscience and rule out any false accusation. However, the above principle of presumption while prosecuting rape cases emerged in the aforesaid background. In Tukaram v. State of Maharashtra[11] the Supreme Court had disbelieved the statement of the victim of rape, on the ground that the circumstantial evidence did not lead to the inference of guilt and “in fact derogates in no uncertain measure from the inference drawn by it.”

The facts were these - Mathura was a young girl labourer of 14-16. Her bother and she were brought to their local police station to record their statements in respect of a complaint lodged by her brother. While at the police station, Mathura was raped by Head Constable Tukaram and Constable Ganpat, a fact which she

9 1994 SCR (1) 37, 1994 SCC (2) 220

10 (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : 1980 Cri LJ 636

11 (1979)2 SCC 143

reported to a crowd that had gathered outside the police station. Mathura was then examined by a doctor, who advised her to file a police complaint, which complaint was registered by the police after some hesitation and protests from the crowd. Mathura's medical examination revealed no injuries and evidence of prior intercourse. Presence of semen was detected on her clothes and the pyjama of Ganpat. The Trial Court, however, refused to convict the accused. The High Court reversed the finding and sentenced Tukaram to rigorous imprisonment for one year and Ganpat for five years. The High Court held that both these 'gentlemen' were perfect strangers to Mathura and that it was unlikely that 'she would make any overtures and invite the accused to satisfy her sexual desires' The High Court came to the conclusion that Mathura did not consent to intercourse. The Supreme Court reversed the High Court verdict and held that as there were no injuries shown by the medical report, the story of 'stiff resistance having been put up by the girl is all false' and the alleged intercourse was a peaceful affair. The Court further held that crimes and alarms were a concoction on her part. The Court further held that under Section 375 only the "fear of death or hurt" could vitiate consent for sexual intercourse. Following this verdict a nation-wide protest was launched for inclusion of custodial rape within the legislative provision. The Supreme Court's judgment was criticised by four eminent law teachers – Upendra Baxi, Vasudha Dhagamdar, Raghunath Kelkar, and Lotika Sarkar – who posed the following questions in an open letter to the Supreme Court -

a) Was this not a decision which violated human rights of women under the law and the Constitution?

b) The judgment provided no cogent analysis as to why the factors which weighed with the High Court were insufficient to justify conviction for rape?

c) The fact remains that Mathura was asked to remain in the police station even after her statement was recorded and her friends and relations were asked to leave. Why?

d) Why were the lights put off and the doors shut?

The decision of Tukaram v. State of Maharashtra[12], is a relevant case to show how public opinion and various organisations have espoused the rights of women.

Accordingly the Criminal Law Amendment Act, 1983 was passed which included situation of "aggravated rape" under section 376A to E. Further, the India

12 ibid

Evidence Act, 1872 was also amended by the Criminal Law Amendment Act,1983 and section 114A was incorporated which imposed the burden of proving "consent" upon the accused in the aforesaid cases of aggravated rape. This was an exception of the general rule of presumption of innocence of the accused. However, even before the above amendments came in to force in the case of Bharvada Gohinbhai Hirjibhai v. State of Gujarat[13], the Supreme Court reversed the trend and came to a conclusion that it was open to the Court to rely upon the evidence of a complainant even without seeking corroboration if corroboration by medical evidence is available. We also notice that the said judgment seems to have stereotyped Indian and Western women in a somewhat unorthodox way: In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opiniated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the Western World which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the Western World. It is wholly unnecessary to import the said concept on a turn-key basis and to transplate it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian Society, and its profile. The identities of the two worlds are different. The solution of problems cannot therefore be identical. It is conceivable in the Western Society that a female may level false accusation as regards sexual molestation against a male for several reasons such as:

(1) The female may be a 'gold digger' and may well have an economic motive to extract money by holding out the gun of prosecution or public exposure.

(2) She may be suffering from psychological neurosis and may seek an escape from the neurotic prison by phantasizing or imagining a situation where she is desired, wanted, and chased by males.

(3) She may want to wreak vengeance on the male for real or imaginary wrongs.

13 (1983) 3 SCC 217

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She may have a grudge against a particular male, or males in general, and may have the design to square the account.

(4) She may have been induced to do so in consideration of economic rewards, by a person interested in placing the accused in a compromising or embarrassing position, on account of personal or political vendetta.

(5) She may do so to gain notoriety or publicity or to appease her own ego or to satisfy her feeling of self-importance in the context of her inferiority complex.

(6) She may do so on account of jealousy.

(7) She may do so to win sympathy of others.

(8) She may do so upon being repulsed.

By and large these factors are not relevant to India, and the Indian conditions. Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assualt on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural Society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because:

(1) A girl or a woman in the tradition bound non-permissive Society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred.

(2) She would be conscious of the danger of being ostracised by the Society or being looked down by the Society including by her own family members, relatives, friends and neighbours.

(3) She would have to brave the whole world.

(4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered.

(5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance. With a suitable match from a respectable or an acceptable family.

(6) It would almost inevitably and almost invariably result in mental torture and suffering to herself.

(7) The fear of being taunted by others will always haunt her.

(8) She would feel extremely embarrassed in relating the incident to others being over powered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo.

(9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy.

(10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour.

(11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence.

(12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross examination by Counsel for the culprit, and the risk of being disbelieved, acts as a deterrent".

As a listing of these characteristics, we regret that there is a profiling of an Indian girl which has taken place which is an over generalisation and it would neither be accurate nor scientific to test the testimony of an Indian women with reference to the criteria which are mentioned in paragraph 10 above. But what is important is that the judgment, in a certain sense, discloses how a woman is viewed in India. We feel that it is the duty of the State as well as civil society to deconstruct the paradigm of shame honour in connection with a rape victim. Rape is a form of sexual assault just like any other crime against the human body under the IPC. While we agree that it has its distinguishing characteristics, we do not think that there is any basis for society or the State and much less the police/doctors to treat a rape victim as a victim of any other crime. In other words, we are of the opinion that while the said paragraph quoted illustrates the misplaced juxtaposition of shame and honour with the crime of rape, the juxtaposition is clearly a matter of reality and at the same time we think

(III) The Criminal Law (Amendment Act), 2013

'375. A man is said to commit "rape" if he—

a. penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

b. inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so

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with him or any other person; or

c. manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

d. applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthy.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome Substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.

Explanation I.—For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception I.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.'.

S.376 Punishment for rape.

1. Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not he less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.

2. Whoever,—

   a. being a police officer, commits rape—

      i. within the limits of the police station to which such police officer is appointed; or

      ii. in the premises of any station house; or

      iii. on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

   b. being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

   c. being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

   d. being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

   e. being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

   f. being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

   g. commits rape during communal or sectarian violence; or

   h. commits rape on a woman knowing her to be pregnant; or

   i. commits rape on a woman when she is under sixteen years of age; or

   j. commits rape, on a woman incapable of giving consent; or

k. being in a position of control or dominance over a woman, commits rape on such woman; or

l. commits rape on a woman suffering from mental or physical disability; or

m. while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

n. commits rape repeatedly on the same woman, shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Explanation.—For the purposes of this sub-section,—

a. "armed forces" means the naval, military and air forces and includes any member of the Armed Forces constituted under any Jaw for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government!, or the State Government;

b. "hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation;

c. "police officer" shall have the same meaning as assigned to the expression "police" under the Police Act, 1861;

d. "women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children.

S.376A-Punishment for causing death or resulting in persistent vegetative state of victim.

Whoever, commits an offence punishable under sub-section (l) or sub¬section (2) of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death.

S.376B-Sexual intercourse by husband upon his wife during separation

Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.

Explanation.—In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375.

S.376C- Sexual intercourse by person in authority.

Whoever, being—

a. in a position of authority or in a fiduciary relationship; or

b. a public servant; or

c. superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force, or a women's or children's institution; or

d. on the management of a hospital or being on the staff of a hospital, abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than 6ve years, but which may extend to ten years, and shall also be liable to fine.

Explanation l.—In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375.

Explanation 2. —For the purposes of this section, Explanation I to section 375 shall also be applicable.

Explanation 3.—"Superintendent", in relation to a jail, remand home or other place of custody or a women's or children's institution, includes a person holding any other office in such jail, remand home, place or institution by virtue of which such person can exercise any authority or control over its inmates.

Explanation 4.—The expressions "hospital" and "women's or children's institution" shall respectively have the same meaning as in Explanation to sub-section (2) of section 376.

S.376D-Gang rape.

Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.

S.376E- Punishment for repeat offenders.

Whoever has been previously convicted of an offence punishable under section 376 or section 376A or section 376D and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death.

The Criminal Law (Amendment) Act, 2013 that came into force on the 3rd of February, 2013 amended, substituted as well as inserted new sections in the IPC with regard to various sexual offences. The new Act has expressly recognized certain acts as offences which were dealt under related laws. New offences like, acid attack, sexual harassment, voyeurism, stalking have been incorporated into the Indian Penal Code.

Before the amendment of 2013, sexual intercourse was taken to mean the penetration of the male genital organ into the female genital organ only. The courts interpreted the term sexual intercourse as "*mere slightest or partial penetration of the male organ within the labia majora or the vulva or pudenda is sufficient to constitute 'sexual intercourse'*. The definition of rape has been amended to include not just peno-vaginal intercourse but the insertion of an object or any other body part into a woman's vagina, urethra or anus, and oral sex. This responds to a longstanding demand of women's rights groups. The issue of rape by different means was highlighted in the Delhi gang-rape case, where an iron rod was inserted into the young woman's body.

Conclusion

The laws relating to rape has undergone a lot of change. It has been seen that the law relating to rape has not been able to create deterrent effect. The sentence of punishment, which normally ranges from one to ten years, where on an average most convicts get away with three to four years of rigorous imprisonment with a very small fine. The courts have to comprehend the fact that these conscienceless criminals- who sometimes even beat and torture their victims- who even include small children, are not going to be deterred or ennobled by such a small time of imprisonment. The amendment of 2013 has made punishment more strict. In some cases death penalty may be imposed to rapist when offender commits an offence punishable under sub-section (l) or subsection (2) of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state or when offender has been previously convicted of an offence punishable under section 376 or section 376A or section 376D and is subsequently convicted of an offence punishable under any of the said section.

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Labour as Unorganised Form

Dr .Anil Kumar Chaudhary[1]

The Labour : An Overview

Since the evolution of human civilisation, labour is always and everywhere, the prime factor of production; and the labour income always constitutes a large part of the household as well as national income. Labour itself is among man's basic vital needs. The genesis of human society is inseparably linked to man's labour activity, and the development of material production. *What is Labour?* The very question embodied the significance and the role of labour in the rise of man as the main productive force and an animate vehicle of production relations. *Work* – safe, productive and environmentally sound is the key to economic and social progress any where in the world. Of course, labour is man's purposeful activity through which he adopts natural object, and uses them to satisfy his needs. In any labour process man expends his physical, nervous and mental energy. Labour always results in the emergence of useful products.[2] Labour, its nature, conditions and outcomes are studied by divergent sciences with different attitudes. Natural sciences study labour in its psycho-physiological aspect, while social sciences examine it as a socio-economic phenomenon. Labour has always been a domain of exchange between man and nature. The content of labour may remain the same at different stages in man's history. For instance, the transition from feudalism to capitalism is not necessarily accompanied from the out set by changes in the technical basis of production. The character of labour, however, undergoes revolutionary changes whenever one mode of production superseded by another. Objectively, essential to man's vital activity, labour is his eternal companion. However, the essence of man's attitude to labour varies depending on the social form of latter. In our prevailing economic system, labour, generally, takes on the form of hired labour. Hired labour, generally, takes on the form of labour, which emerges when the means of production become counterposed to man as an alien, as capital. Man can not work before he sells his labour of capital to the capitalist. The interest of owner and labourer are, generally contradictory for all the variety of its forms. Coercion is the common feature characterising labour in antagonistic societies where the coercion of labour is predetermine by its social

1 Mahatma Gandhi Kashi Vidyapith, VARANASI

2 Paul Savehenko, *What is Labour?* Progress Publishers, Moscow, 1987, P.10.

form[3]. With exploitation and economic coercion to work rooted out, the character of labour fundamentally changes. Under socialism, it is the fundamental duty of all members of society to work in worst working condition, order to satisfy their needs. Whereas in capitalism, scientific and technological progress conduces to growing unemployment, meagre income, and the deplorable situation of labourers.

In the realm of development, men acted on nature in the process of labour, transform himself, develop his material and spiritual culture, his physical and mental abilities and as time went by, he attempted to distance himself from the miseries of nature. Engels taken account a brilliant analysis of historical significance of labour in his article "The part played by labour in the transition from ape to man" – 1876. Generally, man's labour resembles the "work" of animals. However, man's labour and animal's "work" are essentially different. While human labour is always purposeful, rational activity; animals are guided by purely instincts. Another characteristic feature of man's labour lies in his using implements of labour, he has made himself to produce various goods. Through his labour man harnesses the forces of nature, making them serve his goals.

There are three important elements in the process of labour are following as[4] :

Purposeful Activity Means of Production Means of Labour

The first element in man's *purposeful activity is the object of labour,* i.e., the materials which are to be transformed or processed. Some of the objects of labour-for instance woods, coal-and oil-fields, ore and diamond deposits etc. – are provided by nature. These are primary objects of labour. The rest have to undergo preliminary treatment before further use. The next element, *means of production* – man uses the means of production to reinforce as it were ,the organs of his own body. The instruments and objects of labour ,essential to manufacturing the things that man needs are the material elements of the labour process in their totality they constitutes the means of production. The last, but most important element is the *implements of labour,* sometimes referred to as *means of labour*- the things man uses to act upon nature and to adopt natural object for his own use. There are material and mental means of labour.

In the process of production, the natural means of production have to be brought into contact with man's physical and mental abilities, occupation of skills, knowledge and production experience which he uses to produce material goods

3 Ibid., pp.6-7

4 Ibid., p.13

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with the help of the means of production. The means of production and man's labour power constitute in their totality the productive forces of society. While latter is more important than former. In the realm of production, distribution, exchange and consumption of material goods, people inevitably, involuntarily and unconsciously enter into socio relations which are referred to as production relations. Man's labour can take place and production can be attained, maintained and sustained only within the framework of these social ties and relations. These relations wholly depend on the form of ownership of the means of production. A form of ownership is a certain mode, in which people appropriate the means of production and, consequently, the fruit of other people's labour. The position of an individual in any system of production relations depends on the *ownership* of means of production. People's relations with respect to the ownership of the means of production thereby predetermine the objective difference in their social positions, their relations to one and other in the process of labour and their place in the social system as a whole. In the prevailing production management, majority of the participants are deprived of the means of production, on an insignificance minority who own the natural wealth, workshops, factories, retail shops, banks and other means of production.

As human society developed, various forms of private ownership with specific characteristics has emerged. Historically, each of these forms of ownership has manifested itself in a specific mode of production, i.e. a way whereby the producers come into contact with the means of production as private ownership of means of production, public ownership of the means of production.

Under capitalism, the producers, i.e. the labour force, are free from personal bondage to the owner of means of production. Although, personally free, but really deprived of the means of production, they are forced to sell their labour power in order to secure the means of subsistence for themselves. Having acquired their labour power as a commodity, the owner of the means of production seeks to make a maximum use of it, an effort to accumulate the profit. Thus on the one side, the producers gains access to the means of labour and by coming into contact with them becomes involve in the process of production. On the other hand, the employer seizes the opportunity of getting richer by appropriating the profit generated by the labour force over and above its own value.

The history of human evaluation reflects that the development of production - i.e. of each concrete mode of production in the totality of productive forces and production relations involved in it- is determine by the nature of

property. Progressive production relations, which correspond to the nature of the productive forces, promote and accelerate the capitalistic development and stimulate material production as a whole, enhance its effectiveness. While outdated production relations, hinder and slow down, the development of production forces. Production relations, i.e. *relations of ownership, production, exchange, distribution and consumption in their aggregate, constitute the basis of the economic structure of a society.* It is on this basis that various social relations, ideas and institutions appear and develop. The basis of each and every society underlies the latter's superstructure, i.e. political, ideological, legal, moral and religious relations prop up by corresponding organisations, institutions and forms of social consciousness. In a society, the mode of production, the economic structure and the corresponding super structure are inseparably linked to one another, constituting an integral organism referred to as a *socio-economic formation.* Each formation encapsulates specific forms, content and character of labour. The division and cooperation of labour ranks first among such forces. In the long run, the division of labour in its aspects serves to increase the labour productivity of man as main productive force. The division of labour promotes the accumulation of labour experience, improvement of skills, dexterity, greater competence and knowledge.

> The Greatest improvement in the productive powers of Labour and the greater part of the skill, dexterity, and judgment with which is any where directed, or applied seem to have been the effects of the division of Labour.
>
> *Source : Adam Smith- The Wealth of Nations ,Bantam Classic ,P9.*

"The division of labour from which so many advantages are derived, is not originally the effect of any human wisdom, which foresees and intents that general opulence to which it gives occasion. It is the necessary though very slow and gradual consequence of a certain propensity in human nature which has in view no such extensive utility: the propensity to truck, barter and exchange one thing for another"[5]. The division of labour as the isolation of various types of labour activity can take place as- within the entire society and with an individual enterprise simultaneously. The intra-societal division of labour envisages the existence of various branches of production. While individual enterprises implies the division of labour between people of various professions and trades as steelmakers, carpenters etc. Division of labour has two aspects to it- the techno-economic, and socio-economic. The former involves the cooperation of machinery,

5 Adam Smit. *The Wealth of Nations*, Bantam Classic, 2003, p.22.

technology, labour, material and financial resources, while latter is conditioned by the form of property in the means of production. As to the socio-economic aspect of the division of labour, it wholly depends on the form of ownership of the means of productions and has a decisive effect on the character of labour.

Cooperation of labour is a form of social labour involving a considerable number of people who interact with one another as they perform identical and inter-connected operations. It has great advantages over individual non-cooperative labour, in that it makes it possible to perform a large volume of work and complete large construction projects within a short span of time. Both the division and cooperation of labour are historical phenomena. As economic ties among the producers grow more and more complicated, there emerges the need for the cooperation of labour on the scale of the entire economy.

The content of labour is conditioned by the means of labour and raw materials used as well as by the worker's operation and the product being manufactured the development of the implements of labour is the main factor causing changes in the content of labour operations. The content of labour depends on the raw materials and stock's used as well as improvements of the means of labour along with the development of man's ability to perform increasingly complicated operations and even more complicated tasks. The content of labour changes from generation to generation as labour becomes more diversified.

Labour may also distinguished between *live* and *objectified* labour. *Live labour is man's purposeful activity* aimed at producing certain material goods and services. While *objectified labour* is man's past labour which has been expended on turning out the means of production as, machinery equipments, buildings, fuels etc. The proportion of objectified labour in the process of production grows with development of productive forces. Labour which is objectified in a commodity (provided that what is produce, is a commodity or a service required by other people) is called *abstract labour*. Abstract labour lies in the basis of the cost of a commodity, that is, it determines the amount of money or other goods offered for the commodity at the market. Any kind of labour is concrete as it yields use value, that is, the properties of the commodity which are required by other people[6]

The Labour - Ancient Indian Perspective :

By the end of the Rigvedic period, the so-called four *Varṇas* or social division came into existence, as the *Puruṣa Sūkta* of the 10th Book clearly shows. Other

6 Paul Savchenko, Op.cit., P.37.

Vedic texts also refer to this process of the formation of the fourfold division of society. The *Taittirīya Samhita* uses the terms : Brahman, *Ksatram and Sūdrāyau;* the *kāthka, Maitrāyaṇī* and *Vājasaneyī Samhitās* and *Satpatha Brāhmana* use the terms:*Brahmana, Rājan, Visya and Sūdra* and the *Brhadāranyaka Upnisad* uses the terms Brahman, Ksatram, *Vis* and *Sūdra*[7].

The Rigvedic (X.90.12) idea, relating to the origin of the four classes, from the different limbs of the Primeval Being, is reproduced with minor alteration in the *Vājasaneyī Samhitā*. The same doctrine of Divine creation of social order is amplified in other samhitās and Brāhmana. The status of the two labouring classes (Vaiśyas *and* Śūdras) during the period was not notable. The Śūdra, we are told, is born of evil and what is evil transgresses purity. The Śūdra is untruth, and the Śudra is sprung out of evil. The Vaiśyas were subjected to the same treatment. Although there were many similarities in the status and the conditions of the labouring classes in Sūtra period were very low, while Śūdras suffered more in the social structure of the Sūtras period. They were protected from the initiation ceremony, studying the Veda and kindling the sacred fire. Nobody could study the veda in the presence of a Śūdra and in the vicinity of a Śūdra. The labouring class of the Buddhist period was composed of all possible elements of the population, differing in point of raise an professional work. The majority of them, of course belong to these families in which manual or menial labour was hereditary. The condition of ordinary labouring classes were not better than that of slaves. The Chandālas, Pukkasas and Nisadas constituted the class of untouchable Labourers. Their condition was worse than that of domestic animals. In the Kautilya period, condition of labouring classes were better than preceding period. Kautilya introduced commendable legislation to improve their status in social and legal matters. In the Gupta period, owing to the social, economic and political development of the country, the outlook of legislators became more liberal and humane and, as a consequence there of, they realised the dignity of labour and raised the status of labourers in their society.

The Labour - Contemporary Paradigm:

After world war second, world economy has ushered in a new era of high growth trajectory which envisages the higher level of production with heavy machinery and innovative technologies. But this development paradigm has not absorbed all the echelons of society. The labour market has become diversified and fragmented. A majority of the labourer groups were not shaded by any legal provisions for the protection of their rights, working conditions, wages,

7 P.C. Jain, Labour In Ancinet India, Sterling Publishers, New Delhi, 1971, pp.1-21

compensation, pensions etc. With the growth of the economies, this segment of labour market has increased formidably. The first report on the National Commission on labour under the chairmanship of P.B. Gazendra Gadkar discussed the issues connected with this group of workers who can not be identified by a definition, but could be described as these; who have not be able to organise in pursuit of a common objective because of constraint such as (a) causal nature of employment, (b) ignorance and illiteracy, (c) small size of establishments with low capital investment per person employed, and (d) Superior strength to the employer operating singly or in combination. The commission has also categories them as : (i) Contract labour including construction workers; (ii) Casual labour; (iii) labour employed in small scale industry; (iv) hand-loom/power-loom workers; (v) bidi and cigar workers; (vi) employees in shops and commercial establishments; (vii) Sweepers and scavengers; (viii) workers in tanneries; (ix) tribal labour, and (x) other unprotected labour[8]. Although there were no specified term were used for this large segment of society, but these characteristics were symbolise as informal or unorganised sector. With the development of economies the role and contribution of this sector has increased.

In early 1970s, researchers, planners, policy makers gave an enthusiastic reception to the concept of informal sector which has since then, lost little of its popularity. In 1972 the term informal sector was first used by the international labour organisation (ILO) to denote a *wide range of small* and unregistered economic activities. Since then this term has been discussed much for want of a universally acceptable and comprehensive definition. In the 15th International conference of labour statistician held in January 19-28. 1993 (ICLS, 1993) at Geneva, the labour statistician discussed variety of issues concerned with the *concept and definition* of informal sector and a resolution concerning statistics of employment in the informal sector has accepted are following:

Concept[9] :

(i) The *informal* sector may be broadly characterised as consisting of units engaged in the production of goods or services with the primary objectives of generating employment and incomes to the persons concerned. These units typically operate at a low level of organisation, with little or no division

8 Report of the National Commission on Labour, Ministery of labour, Employment and Rehabilitation, Govt. of India, 1969, P.145

9 Resolution Concerning Statistics of Empolyment in the Informal Sector. *15th International Conference of Labour Statisticians,* Geneva, 1993, Jan. 19-28.

between labour and capital as factors of production and on a small scale. Labour relations-where they exist-are based mostly on casual employment, kinship or personal and social relations rather than contractual arrangements with formal guarantees.

(ii) Production units of the informal sector have the characteristic features of household enterprises. The fixed and other assets used do not belong to the production units as such but to their owners. The units as such cannot engage in transactions or enter into contracts with other units, nor incur liabilities, on their own behalf. The owners have to raise the necessary finance at their own risk and are personally liable, without limit, for any debts or obligations incurred in the production process. Expenditure for production is often indistinguishable from household expenditure. Similarly, capital goods such as buildings or vehicle may be used indistinguishably for business and household purposes.

(iii) Activities performed by production units of the informal sector are not necessarily performed with the deliberate intention of evading the payment of taxes or social security contributions, or infringing labour or other legislations or administrative provisions. Accordingly, the concept of informal sector activities should be distinguished from the concept of activities of the hidden or underground economy.

Definitions[10] :

(i) For statistical purposes, the informal sector is regarded as a group of production units which, according to the definitions and classifications provided in the United Nations System of National Accounts, from part of the household sector as household enterprises or, equivalently, unincorporated enterprises owned by households.

(ii) Within the household sector the formal sector comprises; (a) informal own-*account enterprises*, and (b) the additional component consisting of "*enterprises of informal employers*."[11]

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10 Ibid.

11 Informal own-account enterprises are household enterprises owned and operated by own-account workers, either alone or in partnership with members of the same or other household, which may employ contributing family workers and employees on an occasional basis, but do not employ employees on a continuous basis envisages the characteristics described in the concept.
Enterprises of informal employers are household enterprises owned and operated by employers, either alone or in partnership with members of the same or other households, which employ one or more employees on a continuous basis including the characteristics described in the concept.

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(iii) The informal sector is defined irrespective of the kind of workplace where the production activities are carried out, the extent of fixed capital assets used, the duration of the operation of the enterprise (perennial, seasonal or casual), and its operation as a main or secondary activity of the owner.

In order to distinguish informal sector from other incorporated enterprises owned by households the 15th ICLS recommended using one or more of the following criteria :

(i) Size of the unit below a specified level of employment, i.e. small size in terms of employment, and

(ii) Non-registration of the enterprise or its employees.

The Unorganised Sector : An Indian Perspective

Indian Labour Market is characterised by a glaring dichotomy. A large number of establishments in the unorganised sector remain out side any regulation while the organised sector has been regulated fairly. It is also noteworthy that Report of the National Commission on Labour, 1969 included a chapter titled as 'Unorganised Labour.' But the term "Unorganised/ Organised" have not defined clearly.

In India generally, the term *informal* (includes the characteristics of unorganised) has neither been used in the official statistics nor in the National Accounts Statistics (NAS). The terms used in the Indian NAS are "Organised" and "Unorganised" sectors. In fact, informal sector and unorganised sector are quite close though not exactly the same. But quite often researchers and planners have used the terms *unorganised and informal* interchangeably. The National Commission for Enterprises in the Unorganised Sector and the report of the second National Commission on Labour have also used both term- informal or the unorganised interchangeably.

The following characteristics of Unorganised Sector indicated by National Commission on Labour-	
a) Low scale of organisation,	c) Small own account (household) or family-owned, enterprises or micro enterprises,
b) Operation of labour relation on a casual basis, or on the basis of kinship or personal relations,	d) Ownership of fixed and other assets by self,

e)	Risking of financial capital by self,	m)	Lack of security of employment and other social security benefits,
f)	Involvement of family labourers,	n)	Use of labour intensive technology,
g)	Production expenditure indistinguish-able from, household expenditures and use of capital goods,	o)	Lack of support from government,
h)	Easy entry and exist,	p)	Worker living in slums and squatter areas,
k)	Unregulated or unprotected nature,	q)	Lack of housing and access to urban services,
l)	Absence of fixed working hours,	r)	High percentage of migrant labour.

(Source : Report of the National Commission on Labour, Ministry of Labour and Employment, Govt. of India, 2002, pp. 600-601.)

Expert Group on Informal Sector Statistics (Delhi Group), 2006 has taken the *organised sector which comprises of enterprises for which the statistics are available regularly from the budget documents or reports, annual survey of industries in case of registered manufacturing. On the other hand the unorganised sector refers to those enterprises whose activities or collection of data is not regulated under any legal provisions and/or which do not maintain any regular accounts. Non-availability of regular information has been the main criteria for treating the sector as unorganised.* This definition helps to demarcate organised from the unorganised. For example, the unit not registered under the factories Act-1948 constitutes unorganised component of manufacturing as these are not regulated under any act. In case of the sectors like trade, transport, hotels and restaurants, storage and warehousing and services, all non public sector operating units constitute the unorganised sector.

In the 55th round NSSO's survey on informal sector non-agricultural enterprises, all unincorporated proprietary and partnership enterprises have been defined as *Informal Sector Enterprises.* This definition differs from the concept of unorganised sector used in NAS.[12] In the *Unorganised sector,* in addition to the unincorporated proprietary or partnership enterprises, enterprises run

12 *Sarvekshana* ,Journal of National Sample Survey Organisation ,Ministry of Statistics dnaProgramme Implementation ,Govt .of India ,New Delhi.

by cooperative societies, trusts, private and public limited companies (Non-ASI) are also covered. *The informal sector can therefore reconsidered as a subset of the unorganised sector.*

'Report on Conditions of Work and Promotion of Livelihoods' in the Unorganised sector which focussed on the conditions of work of the informal or unorganised workers, both in the unorganised and organised sectors also sheds light on the unorganised economy. In the Indian context, the enterprise concept (i.e., to define the unorganised sector) and the employment concept i.e to defined unorganised employment) lack in conceptual clarity and uniformly across the sub-sectors of the economy. For example, the Central Statistical Organisation use the term *organised enterprise* as small, more workers without power for the manufacturing sector. However, the absence of similar statistical data till now prevented this definition being extended to the service sectors. Employment in the *unorganised sector* has hitherto been derived as a residual of the total workers minus workers in the organised sector as Reported by the Directorate General of Employment and Training (DGET). The DGET figures, however, fail to capture the informal/ unorganised employment in the formal/ organised sector- a phenomenon, which is becoming increasingly significant in the Indian economy.

Since the 55th Round Employment Survey of the National Sample Survey Organisation (NSSO), it is possible to apply a uniform and comprehensible definition of both the *sector concept* and the *employment concept* to distinguish the organised/formal from the unorganised/ informal. Using the following two key definitions the NCEUS (National Commission for Enterprises in the Unorganised Sector) has separated the unorganised sector from that of the organised sector as well as unorganised employment from that of the organised employment.

The *organised/unorganised* terms are used interchangeably with *formal/ informal* and as such they are consistent with the international definition as recommended by the ILO.

NCEUS has defined the unorganised sector as, *"The unorganised sector consists of all unincorporated private enterprises owned by individuals or households engaged in the sale and production of goods and services operated on a proprietary or partnership basis and with less than ten total workers."* The above definition excludes only plantation sectors and other types of organised agriculture (e.g. corporate or cooperative farming) and covers a very large part of agricultural activities under taken agricultural holding either individually or in partnership. This definition is generic one in the sense that it has no legal personality of its own

(other than the person who owns it); it is small in employment size and, more often than not, associated with low capital intensity and labour productivity. NCEUS has defined unorganised or informal employment as, *Unorganised workers consist of those working in the unorganised enterprises or households, excluding regular workers with social security benefits, and the workers in the formal sector without any employment/social security benefits provided by the employers*.

The employees with informal jobs do not enjoy *employment security* (no protection against arbitrary dismissal), *work security* (no protection against accidents and illness at the work place), and *social security* (Maternity and health care benefits, pension etc.). In general, we can expect a correspondence between unorganised workers without social security and workers without protection for conditions of work and promotion of livelihood benefits, particularly in the unorganised sector.

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