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From the Desk of Professor-In-Charge

It gives me immense pleasure to put the IInd Volume of *JCLC* in the hands of esteemed readers. As per the feedback to the Ist Volume, provided by Professor (Dr.) Dinesh Singh, Hon'ble Vice Chancellor, University of Delhi, we have re-constituted the Editorial Advisory Board with external experts including foreign experts as well. I am grateful to our esteemed Vice-Chancellor for providing the invaluable feedback which will surely enhance the quality of *JCLC*.

While re-constituting the EAB, care has been taken to have representation from the Bench and Bar apart from the Desk. We are extremely grateful that *JCLC* is privileged to have the patronage of Hon'ble Mr. Justice Arjan Kumar Sikri, Judge Supreme Court of India, whose academic fascination is well known among legal fraternity, and has earned his Lordship the title of Academic Judge. Professor (Dr.) Ranbir Singh, Hon'ble Vice Chancellor, NLU, Delhi and my *guru*, mentor and elder brother, has been a great source of inspiration for us, for maintaining the quality of research, which he says, is absolutely necessary for the growth of a law school. Mr. Mohan Parasaran, Senior Advocate, Supreme Court of India and former Solicitor General of India and Mr. Sidharth Luthra, Senior Advocate, Supreme Court of India always emphasize for maintaining the standards for which CLC has been known. In this regard *JCLC* is fortunate to have their association for setting and maintaining the research standards for CLC. I am grateful to all the members of EAB who have graciously consented to be on the Advisory Board to provide their expertise, as guardians, for the proper growth and development of *JCLC* , which is in its infancy.

Another feedback came from Hon'ble Mr. Justice Kailash Gambhir, Judge, High Court of Delhi. While releasing the first Volume of *JCLC*, he asked us to include a column in the journal which can update the readers on various judgments from the Courts. While incorporating Justice Gambhir's suggestion, we have gone one step more to include the latest statutes and amendments passed by the Legislature along with latest case law. Accordingly, this Volume contains a column entitled "Judicial and Legislative Trends" in which we have provided glimpses of important judgments, of last year, from the Supreme Court of India and some important legislative developments. I am grateful to Hon'ble Mr. Justice Gambhir, for providing to *JCLC* one of the useful research directions.

Professor (Dr.) Upendra Baxi, Emeritus Professor of Law, University of Warwick and Delhi and former Vice-Chancellor, University of Delhi, delivered, at CLC, the First Lotika Sarkar Memorial Lecture in February, 2014. This prestigious lecture was attended by eminent personalities like Justice, A.K. Sikri, Judge Supreme Court of India, Justice Murlidhar, Judge, High Court of Delhi, Dr. Indu Agnihorti, Director, Centre for Women's Development Studies, Professor (Dr.) Ashwani Kr. Bansal, Head and Dean, Faculty of Law, University of Delhi, Professor Permanand Songh, former Head and Dean, Faculty of Law, University of Delhi, Mr. Robert Ladu, Chairperson, National Land Commission and Member, Constitution Review Commission, Republic of South Sudan and many more such personalities. The memorial lecture has been reproduced in this Volume. The fans of Professor Lotika Sarkar can re-live and re-visit the many sided personality of Professor Sarkar and new readers will learn how to unlearn the law while going through this memorial lecture.

The Campus Law Centre organized an International Conference on "Mitigation of Climate Change: Law, Policy and Governance" in April, 2014. The International Conference was a great success and was a milestone in the history of CLC, primarily, because of the huge global participation in the Conference. The Conference witnessed the worldwide participation from Singapore, Italy, China, Indonesia, Mauritius, Nigeria, U.K, South Korea, Maldives, Bangladesh, Iran and Nepal. The duly registered participants for the Conference from Pakistan and Uganda could not make it due to the visa problem. This volume contains some of the prestigious Addresses from the Conference viz. the Inaugural Address by Hon'ble Mr. Justice Swatanter Kumar, Valedictory Address by Hon'ble Mr. Justice A.K. Sikri and Presidential Address by Mr. Mohan Parasaran, then Solicitor General of India. The proceedings of the Conference have also been separately published and can also be accessed at www.clc.du.ac.in

The response to our Call for Papers for this Volume was not good. We did not receive large number of papers. Whatever papers we received, unfortunately, most of the papers were far from satisfactory. It was found that for many writers, especially young ones, research, perhaps, means - just Google. This all time available online tutor may provide us the starting point as a lead. But, for writing a complete good research paper, especially for off- line Journal, we have to leave the mouse and take the books and journals in our hands. Though, we did not disapprove web based research, we do reject only web research. So we have to be ruthless in the selection of submitted papers. Only seven papers out of 30 submitted papers could be finally selected for further editing by us. When

we did not get desired good number of papers in response to the call, I requested my senior colleagues to help us out by writing for *JCLC*. I am extremely grateful to Professor Permanand Singh, former Head and Dean Faculty of Law, University of Delhi , Professor Afzal Wani, Dean, University School of Law and Legal Studies, GGS Indraprastha University, Delhi and formerly Member, 19th Law Commission of India, and Professor Aalok Ranjan Chaurasia, former Professor, Institute of Economic Growth, New Delhi for their generous contribution to *JCLC*.

Professor Permanand Singh's paper highlights that, by using "human dignity" as a central idea implicit in right to life, the Indian Supreme Court has emerged a world leader in ignoring the distinction between civil and political rights and social and economic rights and developing the notion that civil and political rights and especially right to life cannot be realized without realizing social and economic rights, and concludes that social rights recognized by the Supreme Court as human rights, however, will have little meaning in absence of sufficient public spending to realize these rights by coherent public policies and these policies should be properly implemented and there should be transparency in governance While analyzing the sovereignty of human rights, Professor Afzal Wani observes that the Supreme Court has so far discharged a multi-faceted role in relation to the fundamental rights. On the one hand, it is termed as the protector and guardian of these rights and on the other hand, it is perceived as inaccessible to many people. He argues that the expectation of a common man is to see in the judge an image of god and not a lord in himself. Further, the callous approach of the executive has put the judiciary under a heavy burden of litigation involving government cases. He courageously points out that the corrupt persons in bureaucracy and politics commit deliberate abuses of power to eat the cake from both sides. They, for example in case of an appointment favor their own dear ones. When the aggrieved persons move the court of law against their action, they use it as another opportunity to engage a friend or relative lawyer, having put him on panel, in the matter for defending their action at the cost of the public money. Professor Wani looks to the judiciary to devise a way to stop this mischief. Other papers analyze childs rights, rights of disabled persons , copyright protection and the tribal law. This Volume also provides abstracts of the papers to the readers, placed in the beginning of the paper.

I am thankful to Professor (Dr.) P.S. Lathwal for graciously agreeing to be the Editor for *JCLC* and writing the Editorial. The members of the Editorial Team deserve a huge appreciation for the arduous editing done for this Volume.

I found them very disciplined, never missing the editorial meetings, never showing any sign of exhaustion in the hours- long (some day- long) meetings, taking care of coma, full stop, brackets, *Id. Ibid. supra, infra,* spellings, incomplete citations, reformulation of sentences etc. of the selected papers for *JCLC*. In spite of our sincere efforts, there might still be some lapses left behind. We shall be grateful to our esteemed readers, if they apprise us the mistakes, if any. I take pride in congratulating the members of Editorial Team for meticulously going through all stages of publication of this Volume, so that it comes out within the time- line prescribed in the Call for Papers. Further, I am thankful to Keshav Enterprises, the university printers for publishing this Volume in time with reasonable good quality.

Usha Tandon

2nd August, 2014

EDITORIAL

I am delighted to present the second volume of the Campus Law Centre Journal, 2014 to the readers. The maxim "BoniJudicisestampliarejurisdictionem" (Law must keep pace with Society to retain its relevance) remains a driving factor in our minds. We appreciate critical writings and evaluation of societal issues and the articles have been selected keeping this perspective in mind. In this volume we are carrying the first Lotika Sarkar Memorial Lecture, 'Unlearning the Law with Lotika Sarkar' delivered by Prof. Upendra Bakshi on 22nd February 2104, as a lead article. In this article Prof. Bakshi has emphasized that a law teacher can contribute more, to understand the meaning of law, its deployment for freedom, gender equality etc for the transformation of society, along with class room teachings. The courageous initiative taken by Prof Lotika Sarkar in the Open Letter Struggle to combat violence against women was one of the highlights of the lecture.

Various International, National conferences, Seminars, Workshops, Talks and Lectures are a regular feature of the Campus Law Centre, that seek to provide a platform to students, faculty and others, for deliberating upon current legal issues of grave significance. In this series the International Conference on Mitigation of Climate changes: Law Policy and Governance was organized on 24th -27th April 2014 in the centre. In the inaugural address Justice Swatanter Kumar emphasized the need to devise policies and their proper implementation, clear and unambiguous laws and good governance to slow down the rate of climate change as much as possible, keeping sustainable development, inter-generational equity and doctrine of balancing at the center.

Justice A K Sikri while delivering Valedictory Address in the conference stressed up on the need of Judicial Activism to ensure that unheard voices are not buried by more influential and vocal voices.

Mr. Mohan Parasaran, the then SGI, in his Presidential Address explained that climate change is not an overnight phenomenonand countering it would be a constant continuous process.

Professor Parmanand in his article has highlighted that in-spite of sufficient funds, the welfare schemes never reach the intended beneficiaries because of bad governance and rampant corruption.

Professor Afzal Wani in his paper provides an academic assessment of the status of the achievements of the nation so far in the direction of maintaining sovereignty mainly underlining the role played by the court.

Professor Aalok Ranjan Chaurasia in his article speaks about Regulation of India's Health System.

Dr. Shabnam traces the history of law in UK and USA with an effort to compare it with that of India in her article- Presumption of Legitimacy under the Law of Evidence.

Ms Neha in her article has made an effort to analyze the functioning aspects of the Judiciary and its role in discharging the heavy responsibility of safeguarding the rights of persons with disabilities.

Ms Harleen, through her paper, suggests the urgent need for a legal document recognized globally to resolve the Issue of Nationality of Surrogate Child.

Ms Anju Sinha's article attempts to analyze the concept and credibility of Child Witness on the basis of law and judicial pronouncements.

Dr. Vandana Mahalwar speaks of legal protection of fictional works against infringement and propagates their ability to serve the expressive function in her article.

In his article Mr. Moatoshi AO speaks of issues related to rights of tribal individual and fundamental rights of Naga women denied under Naga customary laws.

Mr. Shourie, through his paper, is trying to evaluate the PC PNDT (Prohibition of Sex selection) Act, 1994 as to why it failed to attain its objectives and what could be done in order to cope with the present day situations.

I thank the editorial team, and the contributors for their valuable support and cooperation in bringing the volume of this journal out well in time and expect the same for the future publication. The suggestions and advice for improving the quality of the journal are welcome.

Prof (Dr.) Prem Singh Lathwal

Editor

MEMORIAL LECTURE

22 February, 2014

UNLEARNING THE LAW WITH LOTIKA SARKAR

Upendra Baxi[*]

Prefatory Remarks

It is good to meet on the first anniversary of Professor Lotika Sarkar's death. Hers was a life lived well. And she would have wanted her friends on this occasion to greet her with a smile, not tears. Still, the ache remains. I feel somewhat like Adlai Stevenson (on losing his Democrat nomination twice over) who said- it hurts to laugh but I am too old to cry. The impulse to shed tears stands accentuated by the sad demise of Professor Vasudha Dhagamwar on 10th instant; Vasudha was a good friend and dear colleague, though occasionally she did not share my overt enthusiasm for Lotika Sarkar. I am now incidentally the sole survivor of Mathura Open Letter to Chief Justice of India. I was also heard to say to their Lordships in the petition against the *Shah Bano Case* that I was the co-survivor with Lotika Sarkarthe other petitioners Tara Ali Baig and Madhu Mehta, both adroit human rights activists of the yesteryear, having passed away—; now I am the sole survivor and there is no danger of judicial re-visitation of that case. Indeed, this new habit of being the sole survivor is a bit irritating. Since I have mentioned our *Shah Bano* petition, it might be worthwhile to say in an aside, with poet Thomas Gray that "Full many a gem of purest ray serene The dark unfathomed caves of ocean bear: Full many a flower is born to blush unseen And waste its sweetness on the desert air" In other words, our Supreme Court is the only apex court in the world which wields the power to kill casespower *not* to bring these for proper hearing. Think paradigmatically of course of the *Kesvananda Bharti* petitions: which actual petition out of the six was decided upon in that case or even thereafter?

Lotika Sarkar, or Lot as I fondly called her, was also a gem of the purest ray serene and a flower that she was she refused to blush unseen and converted the desert air of the Law School into streams of fresh air. Lot enlivened the Law School, in big ways and small. Generations of now senior lawyers and Judges still regard the School as Lotika Sarkar law school. They name it so because as her students they first learnt the two, and true, meanings of academic freedom: the freedom to teach and the freedom to learn. She emphasized the latter with

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[*] Emeritus Professor of Law, University of Warwick and Delhi

students and the former with the Deans and Heads. Lot always encouraged the students to learn the law as they wished; for her, the syllabus never cast in stone but a mere opportunity to co-learn, as those fortunate enough to attend her seminars called Manusaha know well.And as Professor Amita Dhanda recalls it in an obituary note, she never imposed her socialist ideology or any ideology on students; her fondness for Marxist school, on particular for William Bonger (who early last century BC offered a materialist interpretation of crime and punishment) was evident to all but she never proselytized, let alone impose, it in the classroom or the Faculty. That is a mark of a true teacher and Lot was a teacher above everything else. Lot was a fighter against the establishment; the establishment was also a symptom of the system and systems were meant to be combated. This made her very popular with students and most of the school. Almost everyone went to her door, with real or fake complaints and she made the former a battle cry against the establishment. She was the popularly appointed Ombudsperson of the Faculty and she just loved the role. I speak of course as one of the victims of hers: as a young Law Dean (1975-1978),I know the opposition I encountered from her, although for the first and last time she had accepted the In-Charge-ship of the Campus Law Centre then, only to oppose the Dean in that capacity.

There are many stories to tell about Lots relationship with me. Of course, both of us knew about stories that our friends and colleagues put across; these never bothered us as we knew these to be untrue, and occasionally malicious. This is scarcely the occasion to narrate these but a couple may be mentioned. She and Chanchal Sarkar liked my monograph length book review of Granville Austin[1] (and later introduced me to him); and she gave me a nice present on publication of my introduction to Jeremy Bentham[2] The many presents she gave me (and I am sure to some other colleagues) were the handiwork of Spastic children; she devoted much time to the Spastic Society of India. Her bond with spastic children was so great that she was a Di to them; and she pursued me as the Vice Chancellor of Delhi University when an elite college refused to give a spastic young person the services of an amanuensis on the specious ground that

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[1] Granville Austin, *The Indian Constitution: Cornerstone of a Nation,* (1966); Delhi,Oxford University Press(1996) Upendra Baxi, The Little Done: The Vast Undone: Reflections on Reading Granville Austin's The Indian Constitution, *Journal of the Indian Law Institute* 9: 323-430(1967).

[2] Jeremy Bentham, *Theory of Legislation,* edited with a foreword by Upendra Baxi, Bombay, NM Tripathi (1975).

he may plagiarize. Late in her faculty life, she travelled by bus; she was one of the few Professors to do so; I occasionally met the Triva Mudirka from IIT at Hotel Vikrant shop. It is amazing that we were able to coordinate the timings even in the absence of a cell phone.

On Unlearning

I wish to speak today of unlearning the law with Lotika Sarkar, a title which might puzzle you in the first instance. If learning is a difficult enough notion, its Siamese twin-unlearning is even a more difficult one. Siamese twin it is because to learn something you have also to unlearn something else. If learning is also unlearning, how does one unlearn without learning? What, in this context would relearning mean? If learning /unlearning/relearning are difficult categories, the law is less not so. In advanced liberal thoughtthat is where human rights are considered mediatory devices standing between the state and the individual, and the state in relation to other states, or the community of statesthe question is about responsible freedom. As Mohandas Gandhi used to say the question of just freedom but that of just freedom is the most of important one. In some senses, the A to Z (from Agamben to Zizek) thinkers are concerned with the same question.

There are many difficulties with the notion of rights and human rights. Extending the feminist political philosopher Wendy Brown, human rights as all rights are at once

> . . . rights as boundary, and as access; rights as markers of power, and as masking lack; rights as claims, and protection; rights as organization of social space, and as a defense against incursion; rights as articulation, and mystification; rights as disciplinary and anti disciplinary; rights as marks of ones humanity, and as reduction of ones humanity; rights as expression of desire, and as foreclosure of desire[3]

Lot was no philosopher of law but as a practical thinker she too was concerned with responsible freedom. For her unlearning the law meant at least meant, in my words, maximizing state free as distinct from state filled spaces. But she, too, suffered from the paradoxical character of rights.

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[3] Wendy Brown, *Stares of Injury: Power and Freedom in Late Modernity*, 96 at n.2 (1995). See also, Wendy Brown, Suffering the Paradoxes of Rights and Wendy Brown and Janet Hailey, *Left Legalism* (2002) 420-34.

Educational theorists have wrestled with these difficult questions and in a sense circular ones. There is no thing as learning in the abstract; one learns something always in context and this particularly true about skills and competencies. Lotika changed the context of learning by emphasizing the freedom of learners to learn. And among the skills and competences she included learning what the law diminished and excluded and why so. In this sense, let me say that the Cambridge and Harvard don in Lot learnt the law but she truly unlearnt it in Delhi. By this I mean that she learnt what the common law and the uncommon law was like in the United Kingdom and the USA, she pushed the bounds of postcolonial legality in teaching law in Delhi. She unlearnt the law in many ways. One way was to engender the law: this was the very title that Amita Dhanda and Archana Prasher gave to a festschrift dedicated to her[4]. As the grapevine grows, the then learned Chief Justice of India who released the book referred to the title by saying that the book was all about endangering the law. In this he was inadvertently right: the universal patriarchy embodied in all law can be countered, if at all by engendering the law and that necessarily endangers the law as we know it. In this respect, Lot was clearly, but constitutionally, seditious.

We also unlearn the law when we focus on law reform. And we unlearn law reform when we chose to distance ourselves from the reform of lawyers law but engage with social law itself. Reform in lawyers law is technical law reform; it aggravates or eliminates the difficulties experienced by lawyers and judges in the administration of justice. Of course, that which is technical is also social in a broad sense; yet, the technical does not directly aim to enact a behavioural or dispositional change on the part of social actors. For Lotika change was of the essence of all law. She chafed at the thought that all law, including the postcolonial, was colonial because it was primarily patriarchal. The law colonizes womens bodies and consciousness; in it, the mastersignifier is all male. She searched for the Male in the State (an expression of feminist political theorist Wendy Brown) and fought to displace it with all her fury and might.

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[4] See, Amita Dhanda and Archana Prasher, Engendering Law: Essays in Honour of Lotika Sarkar, Lucknow, Eastern Book Company (1999).

Towards Equality

An imprint of the early struggle is readily available in the report of the National Commission of Women—Towards Equality[5]. That report was submitted on December 31, 1974, on the eve of the first international womens day, to Professor Nurul Hasan, an eminent Historian and the then Minister of Education; at that time; we were not so modern- we did not name our education as Human Resource Development. The Report contains a wealth of information and recommendations; and veritably, it is a constituent assembly of women experts at work. Lotika was ably assisted, in study committees, by lamented Professors B. Sivarammaya and Raghunath Kelkar and I contributed a paper on reservations, which became the dissent note on the subject of Professor Lotika Sarkar and Vina Mazumdar[6].

It is easy enough to say where Lots special contribution lay. The Committee as a whole derived its understanding of the spirit and the letter of the Constitution from Lot and I am sure that the emphasis on equality as a core value of the constitution by the Commission was inspired by her. She was not a feminist theorist but concerned with finding solutions to immediate pressing problems through the law. She was attracted to socialist feminism but equally engaged with the constitution of India, which she regarded as socialist. Did she have a well worked out theory of the state? The answer to this question is a resounding no, if by theory of state we mean a systematic analysis and account of sate formation. An implicit theory of state, however, cannot be ruled out in Lots corpus. She believed in a constitutional state that is a state governed by the rule of law; she also knew that the political state that thrives on competition for power was somewhat indifferent to the constitutional state[7]. Her strategies comprised law and education: times without number, Towards Equality seeks to constrain the political state by new laws respecting womens equality and seeks as well public citizen constitutional education favouring gender parity and equity[8].

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[5] See, Towards Equality: Report of the Committee on the Status of Women in India Ministry of Education and Social Welfare, Government of India (1974: in two parts); see also the Report as Edited and Introduced by Kumud Sharma, C.P. Sujaya, Delhi, Pearson (2012).

[6] See, Vina Mazumdar and Indu Agnihotri, Democracy Freedom and Development: The Struggle for Womens Emancipation in India in Bijaylakshmi Nanda (ed.)Understanding Social Inequality: Concerns of Human Rights, Gender and Environment,Macmillan, New Delhi (2010).

[7] I develop this distinction in Upendra Baxi, Caste Census and Political Justice, EPW: XLV, 37, 25-29 September 11(2010).

[8] Towards Equality Chapters 3-5.

In this respect, Lot was a liberal legal feminist par excellence. She believed in law reform as a means of changing social attitudes and behaviour and she read the Indian constitution as a charter for social reform. Hers was a liberal and women friendly reading of the Constitution. She of course realized that while womens problems were structural, law reform was piecemeal and slowly erratic; that is one reason why the Commission and she stressed education of the elite as well as the laity. And although much in sympathy with the Left critique of the Indian Constitution as being pro- bourgeois and pro- landlord[9], Lot viewed it as a site of normative and institutional antinomies rather than material contradictions[10]. Like almost all *Bhadralok* Bengalis, she believed in Parliamentary Communism. I may mention her later good work in Bankura, West Bengal, where alongside with Veena Mazumdar and the CWDS teams, she deployed law as a means and end towards womens participation in public affairs.

Open Letter

This is a long and complex narrative, and what follows are bold strokes. All of us came to age in this struggle against violence on women and this was a third moment of thinking and feeling like a woman- or in other words practicing constitutional sedition against the law. The best way, perhaps, in turn is to speak of different moments of the Open Letter struggle.

The first moment was reading the case in 1979(I have the bad habit of reading judgments of the courts.)this was the Supreme Court of India speaking to the effect that rape by two police personnel of a sixteen year tribal woman, who had gone to the police station to register a case for her missing brother, was not rape at all since there were no marks of resistance on her body. This despite the fact that the Bombay High Court on appeal had held otherwise and the two police constables, held guilty of the offence, were suspended from office.

The second moment was prolonged and weighed the question what should be done about this obvious yet extreme instance of judicial patriarchy? I suffered all alone with this question. A newspaper article would not simply do, even if the folklore of contempt of the court which then prevailed were to be overcome. Nor would a law review article do, because it would take a few months more and even then it would attract a specialist and a limited specialist audience. All

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[9] S. K. Chaube, Constituent Assembly of India: Springboard of Revolution. (1973); Sobhanlal Datta Gupta, Justice and Political Order in India (1979).

[10] Upendra Baxi, Marx, Law, and Justice: Indian Perspectives, Bombay, NM Tripathi Ltd (1993).

available forms of communication were themselves patriarchal. It was a flash of agonized inspiration when I thought of an Open Letter to the Chief Justice of India. Such a letter was never written before, or even since. But in act of courage and sorrow I drafted it.

The third moment was to have the Open Letter being signed by some colleagues. I was still new to Indian law teaching and I had, at that point of time, never taught Indian evidence and criminal law and procedure. Such was our legal education then at Bombay that apart from the Indian penal code, the rest was not considered necessary. Having learnt my jurisprudence with Roscoe Pound, I still believed that taught law is tough law. Lotika Sarkar and Vasudha Dhagamwar were clearly the first ones to approach with a request that they co-sign the letter. Both agreed enthusiastically and it was at Lots persuasion that Raghunath Kelkar had agreed to the text. All of them were initially concerned about an Open Letter and it required little persuasion on my part to suggest that it was the only way to go, even when it meant that it risked the contempt of the court proceedings. Later, and happily, Lot and Vasudha acknowledged the Open Letter to be their own work; this ownership was important to what was after all a joint and cooperative venture. The draft Open Letter ended by saying that the Court realized in future the error of its ways and overturned the principle of this ruling; there was some discussion amidst us as to whether we should ask for some specific remedy; it was however an article of faith with me that criminal law decisions by courts, extending to guilt and punishment, should not yield to public sentiment or opinion. Fortunately, all of us ultimately agreed, little knowing that we would have to later to bear the brunt of womens organizations that wanted to file, and actually did so, the review petitions which were subsequently dismissed. Lotika Sarkar had to particularly engage in quiet diplomacy with friends that proved in the end unsuccessful.

The fourth moment was particularly difficult. That pertained publicity. The text of the Open Letter was about four long pages in stencil (at that time Xerox was simply unheard of in faculties.) and Mishraji (of the case material fame) constantly converted pubic into public hair. The news editors were simply not interested; they had their own reasons; one was the fear of contempt at the Open Letter and the other was that since the rape occurred many years ago, in 1972, the Open Letter was surely not news. To my surprise, the co-signatories to the Open Letter were not inclined to pursue the editors; I fought a lone battle arguing with some editors that they should differentiate between the folklore and the fact of contempt, a distinction that I pursued later in my Antulay book[11].

[11] See,Upendra Baxi, Liberty and Corruption: The Antulay Case and Beyond, Lucknow, Eastern Book Company (1980).

I further argued that democratic ordering dies sure death when injustice ceases to be news. These arguments were of no avail. Fortunately, two unrelated events helped. Professor Manubhai Shah (the Indian Ralph Nader and funder of the Consumer Education Research and Education Society, Ahmadabad) reunited me with Smt. Charubahen Yoddha, of the Gandhian Jyoti Sangh. As a result, I ended up (in my broken Gujarati and Hindi) addressing the women workers on Mathura Open Letter. The small reportage that ensued attracted the attention of national womens movement as well as the press. While she liked the attention, I am not sure that Lot liked very much my addressing the Jyoti Sangh.

The second event related to a request to contribute to inaugural issue of Progress—the Journal of United Lawyers Association, a leftist lawyers association. All I could think of was the text of Open Letter which the editors decided not to carry, On the inaugural occasion, Chief Justice Chandrachud was heard to say, in the presence of Lot and myself that he would have been happier if a journal so entitled were to carry the text of the Open Letter.

The fifth moment was troublesome: not merely was there a barrage of steady criticism from senior faculty colleagues but also from the academic legal fraternity at large. Vasudha replied to Salman Khurshid in the pages of student publication at Oxford; the Supreme Court Cases[12] which in its halcyon days carried the full text of the Open Letter also carried a rebuttal from a law academic, then teaching in Nigeria; but perhaps the greatest challenge came from Krishen Mahajan who in a Sunday Edition of Hindustan Times (of which he was a legal correspondent) criticised us for not reaching out to Mathura, upon whom the impact on her was most lethal. She was, it was alleged, in sex traffic network having been spurned by her husband on hearing about the case. Lot was most upset because Krishen never raised the matter with her; she expected her former student such a discourtesy, even when she respected his freedom of speech. At any rate, Dada Chitale of the AIR at Nagpur was kind enough to respond to my urgent call and send a law reporter to Chanderpur to verify the story: we learnt that contrary to newspaper report; Mathura was accepted by husband and was relatively leading a peaceful life.

The seventh moment was equally crucial. We decided to make law reform proposals and eventually prepared a memorandum for Parliament. Vasudha

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[12] See, Upendra Baxi et. al. Open Letter to the Chief Justice of India: (1979) 4 SCC (J) 17.

disagreed with some of our early recommendations and disassociated with the group for reasons explained in an article in the Mainstream; and Raghunath proved obstinate and even dogmatic on many points; his knowledge of criminal law and procedure was unrivalled and eventually proved of great assistance in our submissions to the Joint Select Committee of Parliament. Lot and I lobbied members of Parliament: we divided MPs whom we approached on linguistic lines; she largely met Bangla speaking MPs and I met Guajarati and Hindi speaking ones. I will not here go into the details of lobbyingan expression we had some knowledge of from American lawsince I have elaborated this elsewhere[13]. Lot bore the expenses of printing the memorandum as she knew by that time that I was living on a shoestring budget; I mention this only to show that civic activism was deeply sacrificial in character.

Thus was borne the modern Indian law on rape that totally revised the old law. We were successful inter alia in introducing harsher punishments for gang rape and rape, reversing the onus of proof, the medicinal examination of the accused, and the conception of power rape, that is rape by virtue of dominant social, economic, or political position. We failed on outlawing marital rape, as even the most progressive women leaders, inside the Parliament and outside, did not support us; that was task performed by the Verma Commission in 2013; even so, the legislature did not accept the recommendation.

Towards Conclusion

I have already taxed your indulgence and patience; so, the story of *Agra Protective Home Case* must unfold another day. Although the case is listed in my name, it was always a joint venture. It was the first social action litigation started by law professors .There was never a hearing that Lot missed, although she rarely wanted to argue the petition herself.

We made several innovations to states of affairs. Although the judicial announcement of public standing was later made in the *Judges Case*, the actual proceedings in Agra Home Case already acknowledge the system of petitioner in person who can file letter petitions writs and argue for peoples rights when no right of hers were violated.

That case was also a precedent for socio-legal commissions of citizens who will do the fact-finding for the highest court in the land. Lotika, Chanchal, Bani del Roy, and I went to Agra where we were joined by Dr. Sodhi (whose letter

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[13] See,Upendra Baxi, Women in the Labyrinth of Law in Inhuman Wrongs and Human Rights (1993).

to the Editor *Indian Express* we clipped to our letter to the Supreme Court). We examined the Home and were shocked to find that about 100 women lived in a room not much larger than courtroom No 2 of the Supreme Court. They lived in utterly insanitary conditions; they were rarely medically examined; most of them suffered from STD; and as later learnt also were AIDS patients. The Court also innovated a procedure where under the District and Sessions Jude, Agra, was to visit the Home and file a report every month; Lot carefully studied these reports and it was on her suggestions that further litigative strategies were planned. The case went on and though Lot disapproved of it, I was heard as saying that we will stay litigating as long as the State of Uttar Pradesh took to learn the alphabet of the rule of law. It was particularly difficult to argue in person when I assumed the office of Vice Chancellor, Delhi University and upon my sojourn at Warwick, the case was handled by Mr. (now Justice) Murlidhar, first before the Court and then before the National Commission of Human Rights, where it still dwells under the scrupulous care of Mr. Venktaramani, a senior counsel.

This has been a short story of my unlearning and relearning the law with Lotika Sarkar. In a sense I was her student, though born into the Faculty of Law only as a Professor. Her close association with me was a matter of privilege and an honour. I continue to miss her; and I hope you would have glimpsed her many-sided personality through these few remarks. The Campus Law Centre would do a signal service to Lotika and the Faculty if it were to maintain the tempo of the memorial lectures. Memorial lectures in India often lose their memory; let this not happen to Lot.

ADDRESSES

INTERNATIONAL CONFERENCE ON "MITIGATION OF CLIMATE CHANGE: LAW, POLICY AND GOVERNANCE". 25TH -27TH APRIL, 2014

INAUGURAL ADDRESS

Hon'ble Mr. Justice Swatanter Kumar

Chairperson, National Green Tribunal, Principal Bench, New Delhi

Law, Policy and Governance are simplistic terms. Often held to be the modus through which a civilized state and its citizenry is obliged to adhere to a code of conduct which would empower them to enjoy their rights, fundamental and otherwise, to the best of their abilities while, making sure that such enjoyment does not barge into or infringe the rights of others. Law, for instance, traditionally came as development to avoid what the famous Social Contract Theorist "John Locke" termed as the State of Nature; a state in which each individual enjoyed his right with little regard to others, leading to total anarchy. Hence, Law and Policy are aspects to curb the apprehended damage to state, its citizenry and the society at large. Governance, on the other hand, relates more to the execution of such law and policy. Law, and policy without proper governance, would hardly solve the object, or the mischief that is trying to be curbed.

However, all of us present here, are aware, that Law is dynamic in nature, changing as per the societies needs, changing as per the policies that the Government or the state deem fit to be implemented to help the society better. This is because the society, the environment and the needs of the people are ever changing. Change, ladies and gentlemen, is inevitable. So they say. And it is an accepted fact that everything in this world is dynamic in nature. The climate, being one of them, is no exception. With the advent of Industrialisation, of development, a tug of war between economies of the world, the environment started taking a back seat. Today, climate change is a reality and it must be dealt with head on. In an ideal world, in a world that is healthy, whose inhabitants are in the pink of health, in a world where flowers blossom and rivers run their course to meet the oceans, we would not need such Conferences. But our race, while treating life as a trade-off between environment and development, lost sight of the principles of balancing and sustainable development. We cut trees, built dams, polluted the rivers that we drink from and the air that we breathe, but somewhere along the line, we forgot what was so aptly described by the great American revolutionist, Martin Luther King, that "For in the true nature of things, if we rightly consider, every green tree is far more glorious than if it were made of gold and silver." Consequently, today we are at the brink of

ominous harm to our race. The present generation is a trustee of the environment, having inherited it from our forefathers and to be passed on to the next generation i.e. inter-generational equity. It is only through Conferences like these and the knowledge we imbibe there from, that we can prepare ourselves for taking suitable actions against challenges such as managing the environment as well as mitigating and adapting to the many impacts of climate change. Therefore, I must, at the very threshold, congratulate the Campus Law Centre, Delhi University, a leading institution in the field of Law for its efforts in organizing this International Conference to address the burning topic of present times, Mitigation of Climate Change: Law, Policy and Governance. The same is deeply appreciated.

How cunningly nature hides every wrinkle of her inconceivable antiquity under roses and violets and morning dew. Ralph Waldo Emerson, the famous American poet, so eloquently put, what we are here to discuss. Despite the fact, the our race has had little or no regard for nature, while Industrialisation and development took place at rampant speeds, nature remained beautiful, its true state only visible over comparison of the past. However, now, a time has come that climate change, that global warming has had visible affects on the nature. Our Polar Caps are depleting, our glaciers are melting, due to the pollutants and smoke produced by the industries, black carbon is depositing on mountains, causing further melting of the same.

Recently, we, at the National Green Tribunal, encountered a situation relating to the one of the most significant gifts of nature to mankind in the wide Himalayan range, the Rohtang Pass, which is at a height of 13,500 feet above the sea level. This tourist spot, often termed as the Crown Jewel of Himachal Pradesh, attracts a large number of tourists. Heavy tourism, besides being a boon to the economy of Himachal Pradesh, is also the cause for adverse impacts on ecology and environment of the State. Diverse and devastating impacts were visible on the melting glacier and were attributable to unregulated and heavy tourism, overcrowding, misuse of natural resources, construction of buildings and infrastructure, littering of waste and other activities associated with tourism. Studies suggested that 40% of the glacial retreat could be attributed to Black Carbon impact and hence Black Carbon emission reduction can lead to near term impact on warming and thus reduce glacier melting. As per the latest reports available, as a country, India emits 534 kilotons of Black Carbon annually with major contributions from domestic usage, burning of crop residues, sugar industry, dung cake burning, vehicles, brick kilns, steel industry and power plants. Dust and Black Carbon from forest fire also accelerate melting of snow and glaciers in the Himalayas. This is because black colour absorbs all colours of light. The light absorbed by the black material interacts with atoms and

molecules and converts the light energy into heat energy. This heat energy accelerates melting of glaciers. So much so, that the Parbati Glacier in the Kullu Valley of Himachal Pradesh has been receding at the rate of 52 metres per year based on a study from 1990 to 2001

The Tribunal, in a landmark judgment in *Durga Dutt v. The State of Himachal Pradesh and Ors.*, addressing this issue, laid down guidelines for tourism, setting up a green tax fund, curbing the vehicular pollution and Black Carbon emission, shifting to bio-degradable waste etc, in order to better preserve the nature, environment and atmosphere of the pristine glacier. However, the problem is a lot larger than a single issue.

As per the Second National Communication submitted by India to the UNFCCC, it is projected that the annual mean surface air temperature rise by the end of the century ranges from 3.5 c to 4.3 c whereas the sea level along the Indian coast has been rising at the rate of about 1.3 mm/year on an average. These climate change projections are likely to impact human health, agriculture, water resources, natural ecosystems, and biodiversity. These are serious statistics and what should concern us further is, that this is just the tip of the ice berg. The impact of climate change and global warming is even more evident in other parts of the world. According to NASA, Global sea level rose about 17 centimeters (6.7 inches) in the last century. The rate in the last decade, however, is nearly double that of the last century. All three major global surface temperature reconstructions show that Earth has warmed since 1880. Most of this warming has occurred since the 1970s, with the 20 warmest years having occurred since 1981. Even though the 2000s witnessed a solar output decline resulting in an unusually deep solar minimum in 2007-2009, surface temperatures continue to increase. The Greenland and Antarctic ice sheets have decreased in mass. Data from NASA's Gravity Recovery and Climate Experiment show Greenland lost 150 to 250 cubic kilometers (36 to 60 cubic miles) of ice per year between 2002 and 2006, while Antarctica lost about 152 cubic kilometers (36 cubic miles) of ice between 2002 and 2005. The Arctic has been heating up, and studies show that is happening at two to three times the global average. This rising temperature in the Arctic has served to reduce the regions floating ice layer by more than 20%. And as you would expect, when the reflective ice and snow layer is stripped away, it leaves a dark blue sea.

Now, what does the effect of the dark blue sea being exposed have on the Arctic area? Well, the ice and snow layer reflects the majority of the suns rays harmlessly back into space. But the dark blue of the exposed sea absorbs the rays, aiding the heating process. These are just some of the instances which show as to how Global Warming and Climate Change is menacing not just the

quality of life around the globe, but by virtue of its magnitude, the very existence of life on planet earth.

The need of the hour is to device policies, and as stated previously, implements them through clear, unambiguous laws and good governance to slow down the rate of climate change as much as possible, keeping concepts of sustainable development, intergenerational equity and doctrine of balancing at the very centre. I sincerely feel that the next age of legal and economic developments should and will be, with the interests of environment at heart. As Francis Bacon, the famous English author and jurist once said Nature, to be commanded, must be obeyed.

I hope that this remains the mantra of the times to come, while congratulating Campus Law Centre for organizing a Conference on an issue of such grave significance.

VALEDICTORY ADDRESS

Honb'le Mr. Justice Arjan Kumar Sikri

Judge, Supreme Court of India

For last three days, you have been discussing on various aspects of climate change and environment and you had the best person who inaugurated the Conference, viz. the Chairman of National Green Tribunal (NGT), Mr. Swatantar Kumar. I remember few years ago when he was a Judge of the Supreme Court and I was judge in the High Court he had organized an International Conference on environment, and I was closely associated with that, since I was made a member of the organizing committee. His experience there and now naturally for last more than a year while working as the chairman of the NGT, he is coming in contact with these conflicted issues day in and day out. I am not going to repeat all what you have already discussed. Professor Kaul has already done his job brilliantly well and given you the International perspective and the approach that has been adopted. Therefore, my focus will be limited to one aspect, which I, as a Judge, have experienced. It has been said by the earlier speakers that Supreme Court has done a commendable job and there are many path breaking judgments in environmental law. That is one side of the comment. You ask the environmentalists today. You go to those seminars where they speak. You ask Sunita Narain or Medha Patekar. They will say Supreme Court has not done its job too well. So these are two conflicting and extreme views.

In the mid 1980s, PIL culture started, thanks to Justice Bhagwati. It led to the growth of human rights jurisprudence including environmental issues. And today we are in a situation where there is so much expectation from judiciary by the common man of this PIL and many times a common person believes and feels that Indian Supreme Court and High Courts can do everything and anything. The issues which they want to bring and what they expect from judiciary are such which are not within the domain of the judiciary. After all we have three organs of the State and we always talk of separation of power between judiciary, executive and legislature. Only two days ago I received a copy of letter which was addressed to Chief Justice of India and I quote from there ,it says, -"...in a democratic republic where sovereignty is vested not only with the elected representatives but with the people as a whole, the parliamentarians represent only a fraction of people that is 10- 15 Lakhs because in one constituency when an MP is elected the voters may be 1-1.5 million people. Honorable President of India is generally nominated on the wishes of a ruling part but Supreme Court of India represents over 1.25 billion people with exclusive suo moto power granted by the Constitution of India to protect the rights of fellow citizens and ensure that every law passed is equal and for the people and is executed

within the guidelines of national law." After giving these sermons it says that "the Constitution of India empowers the Supreme Court of India to travel beyond the Constitution, to protect the interests of the nation and to direct and dictate to rectify when the policy are framed."

Even a student of law understands that this is not the Court's domain and Court cannot do it at all. What I am trying to convey is the extent of expectation of the judiciary of this country. Now these are the aspirations of people of this country from judiciary that whenever there rights are to be protected which includes environmental rights, judiciary will come to their rescue. As I said that we have in our Constitution, the principle of separation of powers which we have adopted and judiciary cannot trample over the area which is earmarked for others. So, we have two extreme views about the performance of the judiciary in environmental matters. Executive feels that the judiciary is overactive and unnecessarily interferes in projects of public importance aimed at development. It is not only in India, in other parts of the world, including in United States and England and even in South Africa and Australia there is such a feeling. Only yesterday as I was reading an article in The Hindu, titled "where should judiciary draw the line" and it discusses the ideology of Professor Waldren, who has argued that empowering judges to decide on the policy issue amounts to disrespecting the democratically elected representatives. Extending this principle logically, it would mean that judicial activism results in upsetting the balance of power in the executive, legislature and the judiciary.

Without entering into this debate any further, I emphasize that we have the jurisprudence created on environmental issues -we have precautionary principle, the public trust doctrine, the principle of eco development and most importantly, which is applied in a given situation, is that of sustainable development viz. development on the one hand and maintaining the ecology on the other hand has to go together. So development should not be at the cost of environment and at the same time we have to see that development takes place for the welfare of the people.

In this scenario when the matter comes before the Court, what happens? There is a project- it may be setting up of an industry, it may be construction of a dam, it may be some electric substation, some power plant, or any such development project. We have legal regime before us. The statutory regimes call for clearances from so many agencies including environmental clearances. Most of the time, and that is the experience in India that, when the project is underway and almost at the advanced stage, PIL is filed asserting that if this project comes up or if it is allowed to be established, it is going to be doom for the environment. The dilemma of the court is heightened when papers are

presented in the court, which include a set of scientific facts, economic and other issues deliberated upon, social and natural consequences thought about and discussed about the project. On the other hand the person who has filed the PIL, may be a public spirited person who claims to be an environmentalist or an NGO and the position taken by such environmentalists, from their own studies is that the project in question is environmental hazard. A common complaint of the environment camp is that these ongoing projects are predicated on irrational and unrealistic premise. By virtue of their broad view of the problems and sometimes skeptical view, the environmentalists often sound negative. Now these are the two extreme positions taken in a matter. This adds to the dilemma of the Court. The court while examining the particular decision of the administration, whether it is justified or not, in exercise of judicial review can only go into decision making process and not the merits, that are to be left to the policy makers or the administrative bodies. That is the law as the courts are not the policy decision makers. We have to only see whether the decision is constitutionally valid or not. So that is the argument of the State. On the other side, many times what environmentalists are saying also appeals to the Court.

Having said that, we have to keep in mind that environmental issues are human rights issues and let there be some criticism while dealing with these issues that there is a judicial overreach or activism but when it comes to enforcing the human rights or environmental issues, if at all, court has duty to protect the environment and at the same time ensure that development is not affected. It is this delicate balance which needs to be achieved.

It is easy to explain the aforesaid principle in theory. However, when it comes to implementation thereof in a given case, the task of judiciary is far from easy. As Zygmunt J.B.Plater put (Zygmunt J.B. Plater, et al., Environmental Law and Policy: Nature, law and Society, (1992) West Publishing Co. p 2) put it:

"Trade-off between short-term material welfare and long-term ecology integrity do occur, although environmentalist often argues against false trade-off decisions where rational alternatives are available. "You have to choose: either economic development, or environmental quality, you can't have both." That cliché is the classic false tradeoff."

Each case of environmental issue involves a highly individualized set of scientific facts, economic and political issues, and social and natural consequences. There is, however, a special environmental perspective that provides a common ground for all environmental cases. The positions taken by environmentalists are typically based upon a broadened accounting of the considerations involved in decision making. Almost every environmental case

starts in response to someone's decision to do something: new products or technologies; construction projects; the start, continuation or cessation of various programs that affect the physical world. The people who make these decisions are usually not environmentalists. Indeed, the environmental position often surfaces relatively late in the game long after the planning stage and well into the implementation stage, when citizens finally see bulldozers rolling. A common complaint of the environmental camp is that these ongoing decisions are predicated on irrational and unrealistic narrow grounds. The proposed actions, it is argued, unwisely ignore facts, costs, and impacts on social and natural values that have real importance to the wellbeing of the community. By virtue of their broad view of problems and sometimes skeptical view of benefits, environmentalist often end up sounding negative (Zygmunt J.B. Plater, et al., Environmental Law and Policy: Nature, law and Society, (1992) West Publishing Co. p3). The environmental perspective does not reflexively condemn economic activity; it insists only that decisions to pursue environmentally detrimental activities be made in a way that gives an adequate accounting of the full range of impacts. As President Barber Conable of the World Bank summarized it, "Good ecology is good economics" (Conable, Address to the World Resources Institute, May 05, 1987).

It is, thus, dilemma and to extreme divergent views which are to be balanced and that is the challenge before the Courts while dealing with environmental issues. Reverting back to the Article of Mr. Anirudh Krishnan, the Advocates for restrictive interference by giving the examples of South African Supreme Court decisions, his submission is that it is possible for courts to mentor actions of the other limbs of democracy without actually stepping into their shoes. As per this restrictive interference, the judiciary should not create policies to enforce rights but must require the Government to draw its own policy and submit along with a time table execution. Interestingly, while saying so his Article ends with the following write up:

"The mere risk of judicial over activism cannot be an argument against judicial activism. Judicial activism, keeping in view the ideals of democracy, is, in fact, necessary to ensure that unheard voices are not buried by more influential and vocal voices. Indeed, on most occasions, timely interventions of the judiciary in India-the home of judicial activism has helped democracy flourish in our country despite repeated failures of the other organs."

PRESIDENTIAL ADDRESS

Mr. Mohan Parasaran

Then, Solicitor General of India

- Climate change has been one of the most sought after issues in the recent past. With the ever growing population and the desire of human beings to fulfill their objective needs, has led to severe degradation of the environment and thus the Climate.
- Rapid Industrialization and development of third world Countries, endless cars and other means of fuel consuming transportation fulfilling the human desire for commuting faster and faster have resulted in the emission of Green House gasses thereby resulting in what is known as Global Warming.
- It is said that as a result of Global warming, the Glaciers would melt and result in the rising of sea levels across the Globe. An extreme form of the impacts of Climate change has been portrayed in the Hollywood Movie "2012" which all of you would be familiar with I am sure. A detailed documentary as to the impact of Green House gasses and Global Warming titled "Inconvenient Truth" also depicts the extreme Climatic Change that the world is heading towards.
- With the advent of the rising temperatures and extreme and abnormal weather patterns, life for both humans and other animal and plant life has taken an adverse impact.

Global Warming and the International Scenario:

- The growing concerns globally resulted in the framing of United Nations United Nations Framework Convention on Climate Change (UNFCCC). The UNFCCC is an international treaty that sets binding obligations on industrialized countries to reduce emissions of greenhouse gases. The UNFCCC is an environmental treaty with the goal of preventing dangerous anthropogenic (i.e., human-induced) interference of the climate system. The Protocol recognizes that developed countries are principally responsible for the current high levels of Green House Gasses emissions in the atmosphere as a result of more than 150 years of industrial activity, and places a heavier burden on developed nations under the principle of 'common but differentiated responsibilities.
- The Kyoto Protocol, developed under the UNFCCC - the United Nations Framework Convention on Climate Change, was an agreement negotiated by many countries in December 1997 and came into force in 2005. The

reason for the lengthy timespan between the terms of agreement being settled upon and the protocol being engaged was due to terms of Kyoto requiring at least 55 parties to ratify the agreement and for the total of those particles emissions to be at least 55% of global production of greenhouse gases.

- Participating countries that have ratified the Kyoto Protocol have committed to cut emissions of not only carbon dioxide, but of also other greenhouse gases, being Methane(CH4),Nitrous oxide (N2O), Hydrofluorocarbons (HFCs), Perfluorocarbons (PFCs), Sulphur hexafluoride (SF6).
- If participant countries continue with emissions above the targets, then they are required to engage in emissions trading; i.e. buying "credits" from other participant countries who are able to exceed their reduction targets in order to offset.

Global Warming and the Indian Scenario

- The goals of Kyoto were to see participants collectively reducing emissions of greenhouse gases by 5.2% below the emission levels of 1990 by 2012.
- In December, 2009, the United Nations Climate Change Conference, commonly known as the Copenhagen Summit, was held in Copenhagen, Denmark. The conference included the 15th Conference of the Parties (COP 15) to the United Nations Framework Convention on Climate Change (UNFCCC) and the 5th Meeting of the Parties (MOP 5) to the Kyoto Protocol. According to the Bali Road Map, a framework for climate change mitigation beyond 2012 was to be agreed. The Copenhagen Accord was drafted by the United States, China, India, Brazil and South Africa on 18 December, and judged a "meaningful agreement" by the United States Government. The document recognized that climate change is one of the greatest challenges of the present day and that actions should be taken to keep any temperature increases to below 2 °C. Interestingly however, the document is not legally binding and does not contain any legally binding commitments for reducing CO2 emissions.

Given This Global Scenario, Let Me Now Focus On India.

- India's investment in climate change appears to be ramping up domestically as well.
- The Ministry of Environment and Forests has released a report listing 20 initiatives that the country is undertaking to address climate change at home. These steps come as part of India's larger National Action Plan on Climate Change.

- The report mentions reforestation as a priority on India's environmental agenda. A major drive is under way nationwide to add 0.8 million hectares of forest per year, coupled with efforts to improve forest management, conservation, and regeneration and to boost local capacity and job creation for some of India's poorest communities.
- These initiatives will help offset 11% of India's annual emissions, according to the Ministry report.
- The report also touts the government's recent approval of two of the eight "missions" that comprise the National Action Plan on Climate Change: the Solar Mission and the Mission for Enhanced Energy Efficiency.
- The Solar Mission sets a target to install 20 giga watts (GW) of solar capacity by 2020 and 200 GW by 2050. It is the most ambitious solar plan that any country has put forward so far.
- The Mission for Enhanced Energy Efficiency contains initiatives designed to improve the efficiency of energy use across sectors. The Government has said the program will include a series of mandated efficiency standards for vehicles, buildings, and appliances; a market-based mechanism to trade energy-efficiency certificates; and other mechanisms to finance efficiency efforts, such as tax exemptions and insurance funds.
- The Ministry has also floated a proposal to create a National Environmental Protection Authority that would monitor and evaluate the implementation of environmental efforts in India. The proposal comes as part of a new drive from the Ministry to improve its "accountability and transparency," as outlined in a recent video that asks viewers to provide feedback on Ministry activities.
- Despite its increasingly proactive engagement on climate issues, India has not waivered from its position that equity concerns must underlie the international climate negotiations. The government insists that, despite a common goal of global climate stabilization, each country has a different responsibility to address the problem.
- "The major responsibility for bringing about climate change is that of the developed countries, and they should carry out credible action in order to control emissions," said Prime Minister Manmohan Singh at a press conference following the recent G20 Summit in Pittsburgh, Pennsylvania.
- Topping India's agenda have been appeals for more ambitious emissions cuts from industrialized countries as well as larger commitments to provide financial and technical support to the developing world.

- "Nearly 200 million Indians live on less than $1 a day and nearly 500 million do not have access to modern sources of energy," said External Affairs Minister S.M. Krishna at a U.N. round table event in New York in September.
- At the meeting, Mr. Krishna called on industrialized countries to cut their carbon emissions "at least 40 percent by 2020" from 1990 levels and asked them to consider changes in lifestyle patterns to achieve this shift.
- "We cannot get away from the fundamental fact that unsustainable lifestyles and patterns of production and consumption in the developed world have caused climate change. This cannot continue," he said.
- Mr. Krishna emphasized the importance of focusing on climate change adaptation as well as mitigation. "Developing countries must be supported financially, technologically, and with capacity-building resources so that they can cope with the immense challenges of adaptation," he said in a statement to the U.N. General Assembly.

Courts Role in Mitigation Of Climate Change:

- In *MC Mehta v. Union of India,* 2001 (2) SCR 698 popularly referred as the CNG case the Supreme Court has ordered for converting the entire public transport system to CNG. The same has resulted in a greener Delhi;
- Following the example set by the honble Apex Court, the Courts in Bombay and Ahmadabad have also ordered for converting public transport system into CNG which emits lesser GHG as compared to conventional fuels;
- To give effect to the Courts orders, the Government has also had to change and amend its policy to supply adequate gas thereby changing the priorities for supply of Natural Gas;

Conclusion

- Several legislations and authorities have been framed for the purposes of ensuring that the there is minimal Climate Change. Road transport and emission levels of vehicles are being regulated to achieve the highest global standards. Subsidies being provided for alternative fuel consumption projects. The Courts have also played a significant and major role in achieving this.
- Climate Change is not an overnight phenomenon and countering it would be a constant process and must be continued in the generations to come.

ARTICLES

REALIZATION OF SOCIAL RIGHTS IN GLOBALIZING INDIA: A CRITIQUE OF LAW, POLICY AND GOVERNANCE

Parmanand Singh*

Abstract

This paper argues that social rights such as right to adequate nutrition, health care, housing, education and work and so on cannot be realized just by judicial enunciation of these rights as aspects of human rights but by a set of public policies, political planning, and participation of civil society to enhance the capabilities of the poor and disadvantaged people. Such policies should try to reconcile economic liberalization with equity so that the poor are not left at the mercy of market forces. In India there is no paucity of funds with the State and there are numerous welfare schemes but due to bad governance and rampant corruption, the benefits of the schemes never reach the intended beneficiaries.

I

Introduction

In India social rights have been enshrined as non-justiciable directive principles imposing an obligation on the State to realize them subject to availability of resources. It is true that the Supreme Court has overcome the question of enforceability of these rights by giving an expansive meaning to right to life guaranteed by Article 21of the Constitution [1]. It is also true that right to life has been held to include right to nutrition, shelter, health care, education and so on Justices of the Supreme Court may indulge in judicial populism and talk of right to life as including right to food, education, health, shelter and so on without exactly determining who has the duty and how such a duty to provide social and economic assistance can be enforced. It must be remembered that one has social rights to material needs only if one can demand

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* Former Professor of Law, Campus Law Centre and Head and Dean, Faculty of Law, University of Delhi

[1] See S.Muralidhar, "Implementation of Court Orders in the area Economic, Social and Cultural Rights: An Overview of the Experience of Indian judiciary" (IELRC Working Paper 2002) at htpp;//www..ielrc.org/content/0202.pdf (visited on july12,2013).

that the State gives one the minimum resources necessary to lead a decent life. It would make no sense to hold that people have a right to nutrition, food, minimum income, work, housing, health care, minimum education and so on and then to impose a duty upon the State which is too vague and imprecise that the declaration of social rights become illusory on the ground of limited economic resources or low levels of economic development.[2]

In *Bandhua Mukti Morcha case* [3] the Supreme Court observed that the right to live with human dignity enshrined in Article 21 "derives its life and breath from the Directive Principles of State Policy, and therefore it must include protection of health, and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief"[4]. The content of social rights has been derived by the Court from non-justiciable directive principles.[5] In *Bandhua case* the Supreme Court clarified that since the directive principle are not enforceable in a Court of law, "it may not be possible to compel the state through judicial process to make provisions by statutory enactment or executive fiat for ensuring these basic essentials which go to make up a life of human dignity but where legislation is already enacted by the state providing these requirements....the State can certainly be obligated to ensure observance of such legislation as for in action on the part of the state in securing implementation of such legislation would amount to denial of the right to live with human dignity".[6]

In *Olga Tellis case*[7] the Supreme Court interpreted Article 21 as embodying all graces of human civilization including right to means of livelihood and right to work and indicated that even though right to means of livelihood and right to work and housing are parts of right to life these social rights cannot be enforced through judicial process in the absence of some existing welfare policies or

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[2] Mahendra P.Singh *Statics and Dynamics of Fundamental Rights and Directive Principles- A Human rights Perspective* in S.P.Sathe and Satyanarain (eds) *Liberty, Equality and Justice: Struggles For a New Social Order,* 45-58(2003).

[3] *Bandhua Mukti Morcha* v *Union of India*, (1984) 3 SCC 161.

[4] *Id. at 183.*

[5] For example Article 39(a) requires the state to direct its policy towards securing adequate means of livelihood for its citizens. Article 47 spells out the duty of the state to raise the level of nutrition and the standards of living of its people. Article 41 spells the duty of the state to secure to the people right to work to education, public assistance in cases of unemployment, old age, sickness and disablement.

[6] *Supra* note *3 at 183-4.*

[7] *Olga Tellis* v. *Bombay Municipal Corporation*, (1985) 3 SCC 545.

laws. In *D.D. Horticulture case* [8] the Supreme Court realized that it is probably false to proclaim that right to means of livelihood, work and other social rights are matters of enforceable rights when Justice P.B.Sawant held:[9]

> "This Country has so far not found it feasible to incorporate the right to livelihood as a fundamental right in the Constitution. This is because the country has so far not attained the capacity to guarantee it and not because it considers it any less fundamental to life. Advisedly, therefore, it has been placed in the chapter on Directive Principles, Article 41 of which enjoins upon the state to make effective provision for securing the same within the limits of its economic capacity and development."

It is thus clear that the judiciary has to rely upon the executive to assign to the people minimum basic amenities, which enable them to remain free from hunger, disease and physical sufferings.Thinking of human needs as human rights however provides resources for public campaign to force the executive to be responsive to human rights.[10]

II

Persistence of Human Deprivation

It is believed that India has witnessed constant economic growth ever since the economic reforms were introduced in 1991 but wealth generation has benefited only top 10 % of Indias upper middle income groups and has not percolated to the vast majority of the populace who are still living in abject penury and poverty. In terms of National sample Survey report 61st round for 2004-2005 poverty ratio at the national level is as high as 27.8%. Thus despite sustained economic growth the number of absolutely poor is staggeringly high. On the employment front the picture is highly disappointing since 1991 Employment generation as been in urban informal sector and not informal

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[8] *D.D. Horticulture Employees' Union* v. *Delhi Administration,* AIR 1992 SC 789.

[9] *Id. at 795.*

[10] In *Chameli Singh* v. *State of UP,* (1996) 2 SCC 541, the Supreme Court observed that right to life guaranteed by any civilized society includes right to food, water, decent environment, education, medical care, and shelter. In *Shanti Star Builders* v. *Narayan,* (1998) 1 SCC 520 the Court said that basic needs of man have traditionally been accepted to be three, food, shelter and clothing. In *Francis Coralie Mullin* v *Administrator, Union Territory of Delhi,* AIR 1981 SC 746 at 753 the Supreme Court held, " We think that the right to life includes right to live with human dignity and all that goes along with it, namely bare necessities of life such as adequate nutrition, clothing, and shelter over head...."

organized sector. The number of unemployment has increased from about 9 million in 1993-94 to 13.1 million in 2004-2005. Increase in unemployment rate has resulted in increase in poverty and destitution.[11]

The National Commission for Enterprises in the Unorganized Sector, in its First report submitted in 2007 has identifies *Aam Aadmi*. On the basis of the statistics available of per capita consumption of our people, six groups, namely extremely poor, poor, marginally poor, vulnerable, middle income and high income in terms of poverty line have been identified. The report states that the " number of people belonging to extremely poor and poor came down from 274 million in 1993-94 to 237 million in 2004-05, despite a substantial growth of population during this period. But the marginal group consuming less that Rs 15 per day increased from 168 million in 1993-94 to 207 million in 2004-05. The vulnerable group, having per capita consumption less than Rs 20 per day, increased from 290 million to as high as 392 million . As a result the total number of people in India belongs to the poor and the vulnerable group having a daily per capita consumption of less than Rs 20 in 2004-05 was 836 million, constituting about 77 per cent of our population. By all means they constitute our *Aam Aadmi.*"[12] The above data show that the gains of growth has not spilled to the growth of the poor and the vulnerable and various development programmes have by-passed the poor.

A UN Report submitted in 2012, on human rights has slammed India for its poor record on human development. The report says that the Governments policy driven by neo-liberal economic paradigm continue to perpetuate "exclusion" and ignoring the poor. India ranks 131 out of 187 countries on UNDPs Human Development Index and 129 out of 147 countries on gender inequality index. The report says that India has worst child mortality sex ratio in the world. While countrys wealth may have increased, there is no willingness to invest a part of it for a better life for the poor. The report also looks at the violation of right to food and housing. The report cites a survey according to which around 42% of children under five are underweight and more that 50% are stunted. There are no entitlements for urban poor, no urban equivalent of National Rural Health Mission or National Rural Employment Guarantee Scheme.[13]India is one

[11] Pullin B. Naik " Building Blocks" *Hindustan Times*, Delhi, May 31, 2007, p 12.

[12] Arjun Sen Gupta "Against the Grain" *Hindustan Times*, New Delhi, August 21, 2007, p 10. Arjun Sen Gupta, was Chairman, National Commission for Enterprises in the Unorganised Sector.

[13] Anahita Mukherji "Growth Pangs: A Recent UN Report on Human Rights Slammed India for its poor record. Why an emerging economy is doing so badly on Human Development Index" *Times of India*, June 3, 2012, p 13. The report is available at http/www.wghr/pdf/status% report%2023.05%versionpd (last visited on August 30, 2013).

of the most privatized health care systems in the world. World Bank data for 2010 shows Indias proportion of public expenditure to total spending on health at 29.2%, is much lower than the global average of 62.8%. Not only India spend less on health care than most of the world even what little is spent comes from private sources.[14]

The persistence of human deprivations amounts to denial of social rights. Malnutrition, illiteracy, hunger, starvation, social exclusion, ill health and lack of public participation constitute a set of unfreedoms resulting in human poverty. Poverty makes a person vulnerable and helpless victim deprived of social, cultural and political freedom. Poverty is not just low income or low consumption but a multiple deprivation causing premature death, chronic undernourishment, illiteracy, illness, and social exclusion. The realization of social rights which are necessary for the survival of a person as a biological entity, therefore is closely linked with the notion of human development which means enlarging choices, expanding human freedoms and assuring human rights.

According to National Commission to Review the Working of The Constitution (NCRWC), "human development involves enhancing capabilities to live long and healthy and productive life, the capability to acquire knowledge, and the capability to lead a decent life. Human development consists of promoting freedomsfreedom from ignorance, freedom from hunger, and freedom to participate in decision-making. It entails assuring to every citizen freedom from discrimination and exploitation, and the freedom to lead a life of dignity and freedom to be free of traditional social restraints and to achieve full potential so as to lead a life of dignity."[15]

India is one of the most under-nourished countries of the world. The proportion of under-nourished children in India is higher than 53%. [16] The low levels of life expectancy, high rates of infant mortality and maternal deaths reflect poor health status of India. More than 90% of the rural population and some 50% of urban population does not have proper sanitation facilities.[17] This is despite the fact that the country has achieved remarkable expansion in food production and has built a good safety stock of food grains. In the country the low birth weight babies is 33%. The percentage of such babies is only 9% in China and in South Korea it is 8%, in Indonesia it is 6% and in Thailand it is

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[14] The *Times of India*, Delhi, August 8, 2012, p 7.

[15] Pace of Socio-Economic Change Under the Constitution: A Consultation Paper by the National Commission to Review the Working of the Constitution iv and 51-52 (2001).

[16] *Ibid.*

[17] *Id. at 34.*

6%.[18] In India 54 % of married women in reproductive age between 15-49 are suffering from anemia- 46% in urban area and 54% in rural area[19]. Close to 74% children below the age of three suffer from anemia-71 % in urban area and 75% in rural area. Easy access to quality health care remains a distant dream for millions of Indians.[20] Large segment of the population of the country remains without access to safe drinking water. The opening of new schools, and new clinics and developing new farming techniques have little significance for those who cannot think beyond finding food for their family.[21] Elementary education is far from being universal despite the Right of Children to Free and Compulsory Education Act 2009 enacted in pursuance of Article 21-A of the Constitution. Nearly half of the Indian women are unable to read and write and the proportion is quarter for men.[22] Roughly speaking about 350 million people in India cannot even read and write[23]. There is serious under provisioning and overall shortage of good quality and affordable social services.[24] Indias record of ending poverty has not been impressive. Today more than 260 million people live below poverty line. These people have neither the resource nor energy to benefit from economic development.[25] Female wage rate in unorganized sector is lower than male rates. Anti-female bias is very strong everywhere resulting in large scales female fanticide and female foeticide[26]. Despite enjoying sustained growth, the levels of human development in India have remained very low.

III

Social Rights Adjudication

The Indian experience shows how a powerful and activist judiciary can develop powerful social rights jurisprudence by a creative and innovative interpretation of the Constitution. Using "human dignity" as a central idea implicit in right to life the Indian Supreme Court has emerged a world leader in ignoring the distinction between civil and political rights and social and

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[18] *Id. at 28.*
[19] *Id. at 29.*
[20] *Ibid.*
[21] *Id. at x.*
[22] *Id. at xi.*
[23] *Id. at 37.*
[24] *Id. at xv.*
[25] *Id. at 34.*
[26] *Id.at 41-42.*

economic rights and developing the notion that civil and political rights and especially right to life cannot be realized without realizing social and economic rights.

(i) *Right to Elementary Education*

In *Unnikrishnan* v. *State of Andhra Pradesh*,[27] the Supreme Court virtually rewrote the constitution by declaring that every child in the country has a fundamental right to free and compulsory education and this right flowed directly from right to life under Article 21. Beyond 14 years the right to education was subject to limits of economic capacity of the State. Here the directive principle in Article 45[28] was read into the right to life contained in Article 21 of the Constitution. The Court clarified that it was relying on Article 41[29] to illustrate the content of right to education flowing from Article 21.The Court in articulating fundamental right to education took support from Article 13 of International Covenant of Economic, Social and Cultural Rights and reminded the state to take all steps to make free and compulsory education for children up to the age of 14 years a reality.

Unnikrishnan case asserted the obligation of the State to provide free and compulsory elementary education for all children in the country. The Court stated that this obligation could be fulfilled through the government schools as well as through the schools receiving financial assistance from non-governmental organizations that are willing to impart free education.[30] Realizing the States limited resources the Court suggested that "while allocating resources the regard should be had to the wise words of the founding fathers in Articles 45 and 46".[31] The Court did not ask the State to establish adequate number of schools so that every child has access to free primary education but left it to the State to fulfill the constitutional commitment.

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[27] (1993) 1 SCC 645. Also see *T.M.A. Pai Foundation* v. *State of Karnataka,* (2002) 8 SCC 481 and *P A Inamdar* v *State of Maharashtra,* (2005)6 SCC 537, where education was recognized as a charitable activity subject to reasonable restrictions under Article 19(6). In these cases the Court ruled that Article19 (1) (g) gives every citizen the right to establish an educational institution and make reasonable profit so as to achieve economic security and stability and imposition of quota or enforcing reservation policy on unaided private educational institutions would impinge upon the autonomy of these institutions.

[28] Article 45 required the State to take steps to provide free and compulsory education for all children up to the age of 14 years.

[29] Article 41directs the State within the limits of its economic capacity and development make effective provision for securing ....right to education.

[30] *Supra* note *27 at 715.*

[31] *Id at 737.* Article 46 states: The State shall promote with special care the educational and economic interests of the weaker Sections of the people, and, in particular, of the Scheduled Castes and Scheduled Tribes and shall protect them from social injustice and all forms of exploitation.

Unnikrishnan case prompted the government to incorporate the right to elementary education as a fundamental right. The insertion of Article 21A[32] in 2002(by 86th Constitutional Amendment) created a fundamental right to education for providing free and compulsory education for all children of the age six to fourteen years. More than seven years after the constitution was amended the historic Right of Children to Free and Compulsory Education Act 2009(hereafter RTE Act 2009) was enacted by Parliament to give effect to Article 21 A. The Act provides that children between ages of six and fourteen shall have the right to free and compulsory education in a neighborhood school[33]. Every child shall have the right to continue to receive education till the completion of elementary education.[34] No child shall pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing elementary education.[35] A childs disability is no bar to receive free and compulsory elementary education.[36] It also lays down minimum norms that each school has to follow in order to get legal recognition. The Act shows special concern to children belonging to weaker Section and disadvantaged group so that they are not discriminated against and prevented from pursuing and completing elementary education on any grounds.[37] Recognized State owned or State controlled schools are required to admit all such children without any discrimination[38].The obligation of recognized State aided schools extends to provide free and compulsory education to "such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum of twenty five percent".[39] Section 12 (1) (c) requires recognized unaided private schools to admit in class I "to the extent of 25% of the strength of that class, children belonging to weaker Section and disadvantaged group in the neighborhood and provide them free and compulsory elementary education till its completion"[40] If the recognized unaided school fails to fulfill the stipulated obligation, it is liable to fine or face the consequence of de-recognition if it has already secured recognition.[41]

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[32] Article 21 A: "The State shall provide free and compulsory education to all children of six to fourteen years in such manner as the State, by law, determine".

[33] RTE Act 2009, Section 3(1).

[34] *Ibid.*

[35] *Ibid.* Section 3(2).

[36] *Ibid.*

[37] *Ibid.* Section 9 (c).

[38] *Ibid.* Section12 (1)(a) read with S 2 (n) (i).

[39] *Ibid.* Section12 (1) (b) read with S 2(n) (ii).

[40] *Ibid.* Section12 (1) (c) read with S 2 (n) (iv).

[41] *Ibid.* Section 18 (3).

Some unaided private schools challenged the constitutional validity of Section 12(1) (c) of RTE Act of 2009 which requires unaided private schools to admit at least 25% of students belonging to weaker Section and disadvantaged group. They opposed the enforcement of these provisions under the threat of fine or de-recognition. Citing leading judgments of the Supreme Court[42] they argued that this provision impinged on their right to run educational institutions without government interference and violated their fundamental rights under Article 19(1)(g) of the Constitution.

In *Society for Unaided Private Schools of Rajasthan* v. *Union of India* decided on April 12, 2012, the Supreme Court[43] upheld the provision in the RTE Act 2009 that makes it mandatory for all schools (Government and Private) except private unaided minority schools to reserve 25% of their seats for children belonging to weaker Sections and disadvantaged group. The Courts majority held that the Act shall apply to (a) Government controlled schools, (b) Aided schools (including minority administered schools), and (c) Unaided non-minority schools.

The Court ruled that Article 21A makes it obligatory on the State to provide free and compulsory education to all children between 6 and 14 years of age. However, the manner in which the obligation shall be discharged is left to the State to determine by law. The State is free to fulfill its obligation through its own schools, aided schools or unaided schools. The 2009 Act is "child centric" and not "institution centric". Further, the Act places a burden on the State as well as parents/guardians to ensure that every child has the right to education. The right to education envisages a reciprocal agreement between the State and the parents and it places an affirmative burden on all stakeholders in our civil society. The private, unaided schools supplement the primary obligation of the State to provide for free and compulsory education to the specified category of students. The cumulative effect of Article 21-A, 21 and 45 is that State can remove all barriers which make right to education unaffordable. In holding that Section 12(1) (c) did not violate the petitioners fundamental rights under Article

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[42] *Supra* note 27.

[43] *Society for Unaided Private Schools Rajasthan* v *Union of India,* (2012) 6 SCC 1.The verdict was given by a three judge bench comprising Chief Justice S H Kapadia and Justice Swatanter Kumar and Justice K S Radhakrishnan. Justice Radhakrishnan gave a dissenting judgment. For a critique of this case see Virendra Kumar, " The Right of Children to Free and Compulsory Education Act, 2009 : A Judicial Critique of its Constitutional Perspective" *55 Journal of the Indian Law Institute, 21-44(2013).*

19 (1) (g) read with Article 19 (6) the Courts majority examined the constitutional validity of Section 12 (1) (c) in the light of the objective of Article 21 A . However in view of Article 30(1) of the Constitution which gave unqualified right to all minorities to establish and administer educational institutions of their choice, the provision contained in Section 12(1) (c) was held to be inapplicable to unaided minority schools.

However in *Pramati Educational and Cultural Trust* v. *Union of India*[44] decided on May 6, 2014 a Constitution Bench of the Supreme Court has held that the Act of 2009 in so far as it is made applicable to minority schools, aided or unaided is ultra vires the Constitution as it offends the rights of the minorities under Article 30(1) of the Constitution. The Court ruled that the majority judgment in Society for Unaided Private Schools of Rajasthan in so far as it held that the Act of 2009 is applicable to aided minority schools is not correct and is overruled. Ultimately the Court held that the Act of 2009 in so far it applies to minority schools aided or unaided, covered under clause (1) of Article 30 of the Constitution is ultra vires the Constitution. In *Pramati case* the Supreme Court was called upon to decide the Constitutional validity of Constitution (Eighty-Sixth Amendment) Act 2002 inserting Article 21A of the Constitution. The Court unanimously held that this Amendment did not alter the basic structure or framework of the Constitution.

Upholding the constitutional validity of Article 21-A the Court ruled that a new power was made available to the State under this Article to make a law determining the manner in which it will provide free and compulsory education to the children of the age of six to fourteen as this goal contemplated in the Directive Principles in Article 45 could not be achieved for fifty years. The Court clarified that this additional power vested by the Constitution(Eighty-Sixth Amendment) Act 2002 in the State is independent and different from the power of the State under clause(6) of Article 19 and has affected the voluntariness of the right under Article 19(1) (g) of the Constitution. By exercising this power the State can by law impose admissions on private unaided schools to children of poorer, weaker and backward Sections of the society to achieve the constitutional goals of equality of opportunity and social justice and such a law

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[44] MANU/SC/04192 014, WP (C) No 416 of 2012 .

would not be destructive of the right of the private unaided educational institutions under Article 19(1) (g) of the Constitution.

The Court also upheld the constitutional validity of Constitution (Ninety-Third Amendment) Act of 2005 inserting Clause (5) of Article 15 as not altering the basic structure or framework of the Constitution. Article 15(5) of the Constitution which enables the State to provide reservations in favor of socially and educationally backward classes and the Scheduled Castes and Scheduled Tribes in educational institutions whether aided or unaided does not abrogate the rights under Articles 14,19(1)(g) and 21 of the Constitution. The Court unanimously rejected the view taken by Justice Bhandari in *Ashoka Kumar Thakur* v *Union of India*[45] that the imposition of reservation on unaided institutions by the Ninety Third Amendment has abrogated Article 19(1) (g), a basic feature of the Constitution.

(ii) Right to Food

In *Kishen Patanayak case* [46] the Supreme Court disposed of a food petition on the empty assurance of Orissa Government that steps would be taken to prevent starvation deaths but nothing was done. After more that two decades a food petition was again filed in 2001 which had spurred a national campaign on the right to food[47]. In *PUCL* v *Union of India*[48] a petition was filed before the Supreme Court in response to the large number of starvation deaths arising from droughts in Rajasthan, Madhya Pradesh, and Orissa, despite the availability of surplus food stocks. The petitioners alleged the complete breakdown of public distribution system and asked for proper implementation of various poverty alleviation schemes of the government. The food petition raised three major questions. First, starvation deaths had become a national phenomenon while there is surplus stock of food grains in government granaries. Does the right to life mean that people who are starving and who are poor to buy food grains should be denied food grains free of cost by the State from the surplus stock of the State particularly when it is lying unused and rotting?, Second, does the right to life under Article 21 of the Constitution of India include the right to food? Third, does the right to food imply that the State has a duty to provide food especially in situations of drought to those who are not in a position to

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[45] (2008) 6 SCC 1.

[46] *Kishen Patanayak* v. *State of Orissa,* AIR 1980 SC 677.

[47] See S.M. Dev , Right To Food in India (Centre For Economic and Social Studies Working Paper No.50 August 2003) at http://www.cess.ac.in.(visited on 15 August, 2013).

[48] (2001) 7 SCALE 484.

purchase food? The Court lamented that plenty of food was available but distribution of the same amongst the very poor and the destitute was scarce and non-existent leading to malnourishment, starvation and other related problems.

On 28th November 2001 the Supreme Court issued various directions to be complied by all the State Governments and Union Territories by January 2002. These directions included completion of the identification BPL (Below Poverty Line) families and issuance of ration cards to them, distribution of 25kg of grain per family per month, supply of grain to the poorest of the poor at Rs. 2 per kg under the *Antodaya Anna Yojana* (AAY), supply of cooked mid-day meal in all schools with a minimum content of 300 calories and 8-12 grams of protein on each day of school for a minimum of 200 days and so on. Between 2001 and the present day the Supreme Court has issued various directions[49] for implementation of its November 2001 orders. It was brought to the notice of the Court that Mid-day meal scheme introduced in 1995 has not been even started in many states. It has been fully implemented only in Tamil Nadu. Ration shops remained closed despite specific orders of the Court and large scale diversions of grains continued unabated. Integrated Child Development Scheme (ICDS) which aims at providing nutrition to children is in disuse. . For example in Bihar 160 lakh children were found to be under-nourished. The funds for poverty alleviation programmes largely remained unutilized. *Annapoorna* Scheme has been discontinued in M.P., Haryana, Arunachal Pradesh, Punjab, Chhattisgarh, Gujarat, Kerala, Uttar Pradesh and Uttaranchal.[50] With a view to ensuring adequate food to the poorest the Court in March 2002 asked all the States and Union Territories to respond to an application seeking the framing of wage employment schemes such as the *Sampoorna Gramin Rozgar Yojana* ensuring the right to work to adults in rural areas. The states were also asked to provide fund utilization certificate before money was released for use. Apparently the Court asserted its power to enforce right to food asking for the strict implementation of the already formulated schemes and making the State accountable to the entitlements of the poor and hungry. According to one commentator,: " These orders of the Supreme Court bear great relevance for

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[49] *PUCL* v *Union of India,* (2003) 9 SCALE 835, 840, (2004) 5 SCALE 484.

[50] These figures are based upon the report of the Commission appointed by the Supreme Court in this case to monitor the implementation of Court orders. The Court orders and the report of the commission has been published in *Right to Food* (eds) Colin Gonsalves, Vinay Naidu, P.Ramesh Kumar, and Aparna Bhat, (2004).

social rights jurisprudence it not only shows once again the indivisibility of rights but also that the Courts do have the authority to order positive action by the State which has financial/budgetary implications. Pleas on financial constraints did not seem to have affected the Court in making this order for enforcement of the right to food of the thousands of people starving in the drought-struck States and the Court took the opportunity to be truly activist."[51] The Court had appointed Commissioners to monitor the implementation of poverty alleviation schemes and to provide redress on behalf of the Court, in respect of complaints arising from these schemes. The reports submitted by the Commissioners to the Court revealed startling facts. It was found that the States of Bihar, Jharkhand, Uttar Pradesh, Andhra Pradesh, Assam, West Bengal, Chattisgarh, and Gujarat had not given reasons for the failure of public distribution system resulting in denial of food entitlements to the needy. The report gives various instances of lack of political will of the States in eliminating hunger and starvation.

During the year 2002-2003, 60 million tons of food grains were lying in the stock of the government, yet in many pockets of the country people were dying of hunger and starvation not because of lack of funds but because of bad governance and institutional disarray. What can the Court do in such a setting except issuing directions for timely compliance of its directions? Locating right to nutrition in right to life the Court observed: [52]

Article 21 of the Constitution of India protects for every citizen a right to live with human dignity. Would the very existence of life of those families which are below poverty line not come under danger for want of appropriate schemes and implementation thereof, to provide requisite aid to such families? Reference can also be made to Article 47which inter alia provides that the state shall regard the raising of level of nutrition and of the standard of living of its people and the improvement of public health as among its primary duties.

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[51] Jayana Kothari, "Social Rights and the Constitution", *(2004) 6 SCC (Journal) 32 -39.*

[52] *PUCL v Union of India,* (2003) 9 SCALE 835 at 836.

According to a study[53] conducted by Utsa Patnayak, between the early 1990s when economic reforms began and at present, taking three years average, the annual absorption of food grains per head has come down from 177 kg to155 kg. This steep and unprecedented fall in the food grain absorption in the last five years has entailed a sharp increase in the number of people in hunger, particularly in rural areas and for very many it has meant starvation. Therefore reports of starvation, farmer suicides and deepening hunger should cause little surprise when we see the recent trends in official data on food grain output and availability.

According to Colin Gonsalves[54] the commitment to globalization, the enslavement to multinational corporations and resistance to welfare of the poor people cannot be changed even by Supreme Court orders. He states that when the food petition was filed in 2001 before the Supreme Court the government responded to the orders of the Court with "stealth, guile, ruthlessness" and "it set about sabotaging the already fragile system of food security in the country."[55] First it dealt with the excess food stocks not by using them for appeasing hunger in the food-for-work schemes but by exporting the grain. In the two years between 2000-2002 the government of India exported 20 million tons of grain to Eastern European countries much of it for cattle feed, at prices below BPL price. Second, the government proposed a slashing of the BPL families from the list on a false justification that the poverty in India had declined from 37% to 27%. If the calculation of poverty made by Utsa Patnayak is to be believed then if one takes BPL cut of line fixed in 1979 at an intake of 2400 calories per person per day then today 80% population of India should be below the poverty line. Even if the cut off was taken at 1800 calories per person per day, 40% population should fall below poverty line. Third, while exporting grain, the government of India imported genetically modified grain, thus capitulating to the grain trans-nationals, giving them not just a toe-hold, but allowing them a stranglehold of the Indian grain market.

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[53] Utsa Patnayak, "The Republic of Hunger ", a public lecture on the occasion 50th birthday of Safdar Hashmi organized by Sahmat, on April 10, 2004 at New Delhi reproduced in *Right to Food supra* note *22 at pp 280-309,* K.B.Mahabal, Enforcing Right to Food in India-Impact of Social Activism, *5(1) ESR Review(March 2004)* at http://www.community law centre.org. za/ser/esr2004/2004 march.india. (visited on October 1, 2013)

[54] *Id. at 311.*

[55] *Id. at 18.*

The National Human Rights Commission has also stated that "the starvation deaths reported from some pockets of the country are invariably the consequence of bad governance resulting from the acts of commission and omission on the part of the public servants."[56] According to the Commission, the prevalence of extreme poverty and hunger is unconscionable in this day and age, for not only does it militate against respect for human rights, but it also undermines the prospects of peace and harmony with in the State. Poverty and hunger constitute an affront to human dignity and worth of human person.[57]

In 2012 a Planning Commissions calculation of Rs 28.65 per capita per day for cities and Rs 22.42 for rural areas triggered a nationwide debate questioning the rationale of such calculation for determining poverty line in view of lack of purchasing power due to inflation. The figures based on 68th round of National Sample Survey Organization (NSSO)for 2011-12 affirms that the benefits from Indias economic growth have been cornered by the upper crust ,while the poorest continue to languish in near destitution. The poorest 10% living in rural India spend on an average Rs 16.8 per day to survive and half of the population in rural India spends less than Rs 35 per day. The monthly per capita expenditure (MPCE) is considered a good proxy to measure social inequality and prevalence of poverty. It covers the money spent in a month in a household on the entire gamut of lifefrom food, education, medicines to consumable durables and entertainment. In urban India the poorest 10% spend Rs 23.4 per day on average while the richest 10% spend Rs 255. This survey concludes that 90% of rural Indians spend less than Rs 68.47 per day per person and 90% of urban Indians spend less than 142.70 to survive in cities. Thus social inequality is rising in India despite impressive economic growth.[58]

(iii) *Right to Health*

In a case where the Supreme Court had to deal with the case of a seriously ill man who was refused entry into seven hospitals the Court found that the government hospitals were duty bound to extend medical assistance for preserving human life. Failure on part of a government hospital to provide

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[56] Case no. 37/3/97, Proceedings of the NHRC dated 17. 3. 2003: Coram J.S.Verma J (Chairman), *Sujata v. Manohar J., and Virendra Dayalat* pp 12-13

[57] *Ibid.*

[58] *The Times of India,* Delhi, August 2, 2012 at p 1 and 9.

timely medical treatment results in violation of right to life.[59] In another case concerning the occupational hazards faced by the workers in the asbestos industry the Court explicitly recognized right to health as an integral facet of a meaningful right to life under Article 21 read with Articles 39(e), 41 and 43.[60] The state, according to the Court, has an obligation to provide emergency medical services and also to create conditions necessary for good health, including provisions for basic curative and preventive health services. In another case the Court prohibited smoking in public places in the entire country on the ground that smoking is injurious to the health of passive smokers and issued directions to the Union of India, State Governments and the Union territories to take effective steps ensure prohibiting smoking in all public places. In a very interesting public interest petition the Supreme Court has issued several directions to the Central and State governments to control noise pollution created by loudspeakers, firecrackers, public address system, or any other noise source. The Court recognized right to freedom from noise as an integral aspect of right to life guaranteed by Article 21 of the Constitution.[61] This is, however another matter that the orders prohibiting smoking in public places or use of loud speakers or use of firecrackers during festivities have very little effect and are rarely enforced. In my view the judicial rhetoric on health care has no effect on the status of health in India.

(iv) *Right to Shelter*

In *Olga Tellis case*[62] the Court recognized the right to means of livelihood and right to work as aspects of right to life but it contradicted itself by saying that this right could be taken away by the state by following reasonable procedure:[63]

The State may not by affirmative action be compellable to provide adequate means of livelihood or work to its citizens. But any person who is deprived of his right to livelihood except according to just and fair procedure established

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[59] *Paschim Banga Khet Majoor Samity v State of West Bengal,* (1996) 4 SCC 37. Also see *Vincent Panikurlangara v. Union of India,* (1987) 2 SCC 165, *Murli S. Deora v Union of India,* (2001)8 SCC 765, M.C.Mehta v. Union of India, (1999) 6 SCC 9, *'X'* v. Hospital *'Z'*, (2003) 1 SCC 500, *Parmanand Katara* v. *Union of India,* (1989) 4 SCC 286.

[60] *Consumer Education and Research Centre* v. *Union of India,* (1995) 3 SCC 42.

[61] *Noise Pollution (V), In RE, with Forum , Prevention of Environmental & Sound Pollution* v. *Union of India,* (2005) 5 SCC 733.

[62] *Supra* note 7.

[63] *Id. at 573.*

by law can challenge the deprivation as offending right to life conferred by Article 21.

Accordingly the Court upheld the action of the municipal corporation demolishing the slum and pavement dwellings on public land holding that no one has a right to make use of a public property for a private purpose without requisite authorization and therefore the slum and pavement dwellers have no right to encroach upon public land by constructing dwellings thereon. The Court viewed the existence of pavement dwellings as a "source of nuisance to the public, at least for the reason that they denied the use of pavements for passing and re-passing".[64] This is why the Court held that "pavement and slum dwellers should be given, though not a condition precedent to their removal, alternative pitches"[65] This observation of the Court that the dislocated people may be allotted alternative sites gave rise to feeling that the Court recognized right to housing as aspect of right to life under Article 21.

That the judicial view in *Olga Tellis case* on right to housing was a tentative one became clear in *Almitra Patel* v. *Union of India*.[66] Here the Court showed a lack of sensitivity towards the poor when it commented adversely upon the governments policy to rehabilitate the slum dwellers. Insinuating criminality on the slum dwellers the Court remarked: "Establishment or creating slums, it seems appears to be good business and is well recognized. The number of slums has multiplied in the last few years by geometrical proportions. Large areas of public land in this way are usurped for private use free of cost.... The promise of free land at the taxpayers cost, in place of jhuggis is a proposal which attracts more land grabbers. Rewarding an encroacher on public land with free land alternative site is like giving reward to a pick pocket".[67]

Thus it appears that on the issue of forced eviction the Supreme Court has leaned in favour of public property rather than protection from homelessness of urban poor. In dealing with forced eviction the Court has thus failed to take

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[64] *Id. at 579.*

[65] *Id at 589.*

[66] (2000) 2 SCC 679.

[67] *Id at 685.* Earlier in *Ahmedabad Municipal Corporation* v. *Nawab Khan,* (1997) 11 SCC 123 the Supreme Court held that though no person had a right to encroach and erect structures or otherwise on footpaths, pavements, or public streets or any other place earmarked for a public purpose, the State had a constitutional obligation to provide adequate facilities and opportunities by distributing its wealth and resources for settlement of life and erection of shelter over their heads to make the right to life meaningful.

into account the economic compulsions that give rise to pavement and slum dwellings and restricted the examination of the issue from purely a statutory point of view rather than from a human rights perspectives Even the policy makers have not realized that the problems of migrant rural labour can be solved more by creating new opportunities of employment in rural sector and than by forcible eviction of slum and pavement dwellings. These people migrate from rural areas to metropolitan cities for small jobs to nurse the city. About half of the population in these metropolitan cities lives in these slums which are unsanitary urban wastelands where poor people huddle in ill-lit shabby structures lacking all graces and amenities. These slums constitute a hindrance to the development projects for modernizing and renovating big cities of India[68]. According to U.N. Commission on Human Rights forced evictions constitute a gross violation of human rights.[69] Forced eviction, according to Committee on Economic, Social and Cultural rights, affects directly on the right to life, the right to security of person, the right to non-interference with privacy, family and home and the right to peaceful enjoyment of possessions.[70] The Committee is of the view that eviction should not result in individuals rendered homeless or vulnerable to the violation of other human rights and the State party must provide adequate alternative housing, resettlement or access to productive land.[71]

(v) *Rights of the Displaced Persons*

There are few judgments where the Supreme Court has overlooked the rights of the poor while allowing the construction of mega construction projects like dams and power projects. For example in *Narmada Bachao Andolan* v. *Union of India*[72] the Court virtually ignored the impact of continued construction of Sardar Sarovar Project dam on hundreds and thousands of tribal people of Narmada valley who had been displaced without adequate rehabilitation and resettlement options when it ruled that the displacement of tribals and other

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[68] The Committee on Economic, Social and Cultural Rights has determined that the right to housing must be read in the widest sense, not just to provide shelter but to strive to secure the right to live somewhere in security, peace and dignity. It has described right to housing as of central importance for the enjoyment of all economic, social and cultural rights .General Comment 7 of the Committee holds that forced evictions are prima facie incompatible with the requirements of the International Covenant on Economic, Social and Cultural Rights, 1966.See, Committee on Economic, Social and Cultural Rights, General Comment 7, Forced Eviction and the Right to Adequate Housing (Sixteenth Session, 1997) U.N.Doc. E/1998, 22 annex, iv at 113(1998) para 1.

[69] U.N. Commission on Human Rights, Resolution 1993/77. para 1 quoted in *supra* note *68 para 2.*

[70] *Id. at para 3-4.*

[71] *Id. at para 16.*

[72] (2000) 10 SCC 664.

persons would not per se result in the violation of their fundamental or other rights. The Courts majority, on the other hand, venerated the virtues of big dam projects for bringing green revolution in the country. The Court also made disparaging remarks against Narmada Bachao Andolan as an anti-development organization.[73] The Courts ideology tended to subordinate environment to development.[74]

The above analysis of cases on development issues makes it clear that the Courts ideology has leaned in favour of economic liberalism and utilitarianism, which looks at pleasure, happiness, and desire fulfillment and seeks to achieve greatest good of greatest number without any regard to those whose social and economic opportunities have been taken away by these mega developmental projects. The inherent importance of the lives of the people displaced or ousted by these development / slum clearance projects hardly merits the attention of an utilitarian so long as these projects are designed to serve the common good. Why should the utilitarian metric of pleasure, happiness, desire fulfillment should be considered relevant for measuring peoples quality of life? If social and economic rights are the entitlements of the people such rights can never be allowed to be traded off to promote general welfare or common good.

IV

Economic Liberalization and Social Rights

The question that is quite often raised in India is whether the new philosophy of trade would promote the realization of social rights. Overwhelming faith in privatization and liberalization involving reduction in state subsidies on social services such as food, education, transport, rural employment and poverty alleviation programmes, would increase the demands of the vulnerable Sections of the society because of inflation and costly living. The States obligation to provide basic amenities and satisfy basic human needs will be transferred to the market forces in the hands of private players signaling the retreat of welfare State. People therefore argue that both market and introduction of global finance should be guided from the standpoint of employment generation and extensive prosperity rather of intensive accumulation by the few.

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[73] In a strong dissenting judgment Justice Bharucha took the stand that Sardar Sarovar Project was proceeding without a comprehensive environmental appraisal and without necessary environmental impact studies.

[74] Also see *Narmada Bachao Andolan* v. *Union of India,* AIR. 2005 SC 2994 for directions for the rehabilitation of the oustees affected by submergence by reason of raising the height of dam. The Court said that in the matter of rehabilitation no distinction should be drawn between permanently and temporarily affected families.

The negative aspect of globalization, it is argued, is that the limited gains of economic growth have been cornered by upper classes and upwardly mobile middle classes while the masses remain impoverished and suffering from human deprivations. Opponents of economic liberalization point out that in India the new philosophy of trade would increase unemployment, lead to a model of modernization that will push the people to the brinks of disaster, erode workers rights and further depress the conditions of migrant, bonded and child labour.

Be that is it may, globalization is now a reality and cannot be wished away. The basic ideology of globalization is that efficient markets will make the welfare schemes more efficient and sustainable. But for good governance market solutions are justified only if they are most efficient means of achieving social justice such as eradication of hunger, malnutrition, premature deaths, illiteracy, homelessness and social exclusion. Market ideology wants freeing up of markets, protecting property rights, removing labour market rigidities and removing all barriers to wealth generation. Even if one is an ardent believer in pro-market reforms, it would be foolish to shut ones eyes to the enormous challenges occasioned by Indias economic successes that will require State intervention for regulating the market for achieving the goals of social justice. An interventionist state is indispensable for realizing social rights. Markets also need Government in order to function properly.

V

Conclusion

The human rights approach of the Supreme Court in interpreting right to life enables the people to formulate their claims in the language of rights. It also enables people to formulate social goals to be realized by positive state action in terms of rational public spending in social welfare. The Courts judgments on the right of school mid-day meals, effective implementation of poverty alleviation schemes, obligation of hospitals to provide medical treatment to the needy, and payment of salaries to the starving employees of public sector undertakings who were denies their salaries for a long time,[75] are some of the positive achievements of an activist Court. The judicially recognized right may also be used as legal resource to mobilize public campaign and public action to force the State to realize social rights or rights to survival.

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[75] *Kapila Hingorani* v. *State of Bihar,* (2003) 6 SCC 1, *Kapila Hingorani* v. *State of Bihar*, (2005) 2 SCC 262. In these cases the Supreme Court directed the States of Bihar and Jharkhand to deposit money with the High Courts of the State for disbursement of salaries to the employees of public sector undertakings.

Let us agree that the satisfaction of social rights depends upon the levels of economic development in a given society. But staying alive is a pre-condition for biological existence of human being and therefore everyone is entitled to a right to subsistence needs as a matter of human rights. Opponents of social rights maintain that since these rights are rights to scarce resources and opportunities requiring positive duties of assistance and support, they conflict with one another and therefore they cannot be entrenched as enforceable human rights in a constitution. On the other hand, civil right or negative rights such as freedom of speech, freedom from torture, freedom from arbitrary coercion and so on impose duties of non-interference and therefore they do not conflict with each other. Hence they can be constitutionalized. In my view, the argument for rejecting social rights is misleading. In India people have a right to physical security as aspects of right to life and personal liberty. As a negative right it imposes a negative duty on the State to refrain from interfering in ones freedom. But this right also imposes a positive duty on the State to protect people by providing for police force, criminal Courts, human rights commission, police training institutes, lawyers and so on. Funds are allocated by the State for meeting the expenses for maintaining law and order. The demand for protection of personal liberty is not simply a demand that one should be left unhindered but a demand that everyone should be adequately protected against the violation of right to life and personal liberty.

Cecile Fabre defends social rights on the ground that these rights promote the autonomy and well-being of individuals and should, therefore, be constitutionalized.[76] According to her individuals have an equal fundamental interest in having a decent life for which autonomy and well-being are two privileged conditions.[77] Autonomy consists of the capacity to frame, revise, and pursue a conception of the good. Well-being is the absence of physical suffering.[78] A person who is hungry and sick will lack capacity to choose between different kinds of life and therefore not be autonomous. Only that person is autonomous who has access to scarce resources and opportunities society offers to everyone.

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[76] Cecile Fabre, *Social Rights under the Constitution* (2000). According to Joseph Raz, 'the ideal of personal autonomy is the vision of people controlling to some degree, their destiny, fashioning it through successive decisions throughout their lives.' J. Raz, *The Morality of Freedom, 369* (1986). John Rawls describes personal autonomy as the ability to frame, to revise, and to pursue a conception of the good and to deliberate in accordance with it. J. Rawls, *Political Liberation* 72 (1993). Amartya Sen defines well-being as freedom from physical suffering, freedom from disease, hunger, malnutrition and so on . A. Sen Well-Being, Agency and Freedom 82, *Journal of Philosophy 169-221(1985).*

[77] *Supra* note *76 at 8.*

[78] *Id. at 12-13.*

Satisfaction of social rights to nutrition, minimum income, housing, education and so on, is minimally necessary for people to be autonomous. Similarly a persons well being can be promoted by keeping him free from physical suffering. Fabre offers a strong moral argument for constitutionalizing social rights and for creating an obligation of the State and society to enhance human capabilities. Even if one agrees that in India social rights have been recognized through judicial interpretation, enunciation of these rights should be matched by adequate public spending on social sector. If people have social rights to nutrition, employment, health care, education and so on the State has an obligation to invest in basic human capabilitiesin primary health care, nutrition, rural employment, essential physical infrastructure such as housing, electricity, roads and so on. It should also be ensured that the money reaches the people it is meant to serve. There is need to have an independent evaluation of the outcome. In India people are poor not because the State lacks funds but they are poor due to lack of accountability and lethargic performance of the bureaucracy with regard to proper implementation of various welfare schemes.

The role of civil society is indispensable in promoting and protecting right to basic human needs. The participation of institutions of civil society will have a significant effect in social mobilization inducing public pressure on the political executive to satisfy human needs. It must be remembered that the right to food, health, education and all other social rights are interdependent. For example providing sufficient food to address the problem of under-nourishment will not help one to recover from ill-health. Provision for health care is also necessary at the same time people should have access to education and information.

Social empowerment can be possible only by creation the social opportunities for the people by political planning and public policies for the expansion of the capabilities of the people. The National Rural Employment Guarantee Act 2005, Right to Information Act 2005, Right of Children to Free and Compulsory Education Act 2009 and National Food Security Act 2013 if effectively implemented will be a helpful step in the direction of tackling extreme poverty and development within the rights framework.[79]

Here it is important to refer to the Capability Approach to development articulated by Amartya Sen [80] in his economic analysis of famines, poverty and developmental problems. According to Sen, development should focus on expansion of peoples capabilities to achieve different valuable functionings.

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[79] The Central government had announced plan to spend Rs.1 lakh crores on urban renewal to be called the Jawahar Lal Nehru National Urban Renewal Mission which would be geared towards the development of urban infrastructure and services covering 60 cities.

[80] A.Sen, *Development As Freedom,* 3-12 (2000).

The crucial question that should be asked is: what are the social and personal conditions that facilitates or hinder the individuals ability to transform resources to different functionings? Paying attention to nutrition, health, literacy, self respect, and political participation and promoting them through coherent policies is a matter of justice. In my view the advantage of thinking of human development as an expression of human capabilities and human freedoms is that it addresses the problems of malnutrition, hunger, premature mortality, illiteracy, and social exclusion. According to Sen, "creation of social opportunities makes a direct contribution to the expansion of capabilities and the quality of life".[81] Development requires " removal of major sources of unfreedoms: poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or over activity of repressive States".[82] Capability as a target of public policies is in essence the characteristic of good governance. The development of a country should not be judged by its gross national product or rise in personal income or rapid industrialization or technological advancement but by development of the well being of the people. Social rights to food, education, health, shelter, and so on recognized by the Supreme Court as human rights will have little meaning in absence of sufficient public spending to realize these rights by coherent public policies and these policies should be properly implemented and there should be transparency in governance

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[81] *Id. at 144.*
[82] *Id. at 5.*

SOVEREIGNTY OF HUMAN RIGHTS AND THE INDIAN JUDICIAL BEHAVIOUR: A WIN WIN SITUATION WITH EXECUTIVE AND POLITICS

Prof. M. Afzal Wani[*]

Abstract

The human anxiety due to a perpetual gap between the recognition and enjoyment of rights is a question of great significance to any rights-conscious individual, group or nation. This is the real indicator of both human miseries and happiness, which are the consequence of a legal regime and its functioning. In the Republic of India, the Constitution did in 1950 put in place a rights-regime to attain the goal of happiness, which was conceived by its people during the struggle for freedom. Now after 64 years of the enforcement of the Constitution it is apt to check the status of institutional deliverance on achievement of the goals then conceived in terms of rights reflected in the Constitution as fundamental rights and the directive principles of state policy. Since India is the biggest democracy of the world with most diverse habitat and habitants, the observance of human rights in public decision making and political processes becomes a subject of serious interest. In general the best feature of governance in the country is its pluralistic ethos and richness in tolerance, which balances the excesses of ordinary politics and administrative hammering. However, the role of the Indian judiciary in this regard, being most imperative, needs an appraisal for its appreciation as well as pointing out the gaps to be filled. This paper is an academic assessment of the status of achievements of the nation so far in the direction of maintaining sovereignty of human rights mainly underlining the role played by the Courts.

I

Introduction

Indias Constitution is now in its 64th year of enforcement. It seeks to secure to all its citizens: JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation... It devotes its full-fledged

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Part-III to fundamental rights guaranteeing most important human rights to attain the goals of justice, liberty, equality and fraternity as set out in its Preamble. The Constitution, historically, marked a win but not the end of the long battle for real independence. Virtually the battle would be complete only on the true realization of the goals set out in the Constitution, especially in Part-IV, given though for the guidance of the State and not enforceable through Court.[1] The content of Universal Declaration on Human Rights (1948), International Covenants on Political Rights (1966), International Covenants on Economic, Social and Cultural Rights (1966), The Declaration on Right to Development (1986), etc. is quite apparent from these two parts of the Constitution. The constitutional processes and the institutional mechanism prescribed in its various other provisions aim at the same end of assuring people their due as envisaged.[2] The judicial interpretation of the guaranteed rights and the directive principles makes this clear as is obvious from pro rights attitude of Courts and widening of the horizon of certain rights like right to life and liberty. Presently the right to dignity and the right to development hold the key to enjoy any other right making the State to pay maximum attention towards citizens right to education, health and so on.

Seen in the context of right to development, the National Human Rights Commission has stated that it has a conviction that all human rights whether civil or political, economical, social, and cultural must be viewed, as the 1993 Vienna Declaration of Programme of action did as "universal, indivisible, inter

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[1] Granville Austin has observed that two revolutions, the national and the social, had been running parallel in India since the end of the First World War. With independence, the national revolution could be complete, but the social revolution must go on. Freedom was not an end in itself but only a means to an end, that end being the raising of the people to higher level and hence the general advancement of humanity. [Granville Austin, *The Indian Constitution-Corner Stone of a Nation*]. Pandit Jawahar Lal Nehru told in the Constituent Assembly that the first task of that Assembly was to free India through a new Constitution, to feed the starving people, clothe the naked masses, and to give every Indian the fullest opportunity to develop himself according to his capacity.

[2] The National Human Rights Commission (NHRC) in its Annual Reports of 1996-97, referring to the famous "Tryst with density" speech of Jawahar Lal Nehru put a question to itself in the context of its statutory responsibility of promoting and protecting human rights, the first Prime Minister, thus speaking on 14-15 August, 1947 said: "Long years ago we made a tryst with destiny, and now the time comes when we shall redeem our pledge, wholly or in full measure, but very substantially".

dependent and inter related". The human rights are classified as: civil and political rights; economic, social and cultural rights; and collective rights of self-determination and right to development. The first category of these rights is contained in Part III of the Constitution of India under the heading of "Fundamental Rights" which are enforceable through Courts. The category of rights are contained in Part IV of the Constitution under the heading of 'Directive Principles of State Policy' which are not enforceable by any Court, but the principles there in laid down are nevertheless fundamental in the governance of the country and it is the duty of the state to apply these principles in making law. The third category of these human rights are contained in various provisions of the Constitution spread over in different chapters related to individual and national development including part IX and IX-A of the Constitution. The Constitution 73rd and 74th Amendment Acts contained in Part IX and IX-A of the Constitution were enacted to create institutions of local self government meant for decentralized planning and addressing local issues.

II

Judiciary and the Sovereignty of Rights

Initially, Indias Judiciary followed a policy of maximum judicial restraint and did not interfere with the legislative enactments and executive action unless that was in clear transgression of the literal constitutional expressions. Toeing the Parliamentary Supremacy principle, the Courts denied a visible role in policy-making or choice of values. The judges were hesitant to question the wisdom of the legislature as was apparent from the statute. Either the shadow of the British tradition of supremacy of the legislature or Nehrus dominant parliamentary mandate the judicial complacence was obvious from the initial judicial behaviour. During Nehrus Prime Ministership, the Constitution underwent 16th Amendment and the 17th Amendment was to remove various property legislations from the purview of judicial review that resulted into a debate on the Parliaments power to amend the Constitution.

In 1951, the Supreme Court answered in affirmative the question whether Parliament could under Article 368 take away or abridges fundamental rights.[3] That was a unanimous five- judge bench decision. In 1965, after Nehrus death,

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[3] *Sankari Prasad* v. *Union of India,* AIR 1951 SC 458.

a minority view had emerged against that view.[4] Later, in 1967, a majority of six to five judges in the *Golak Nath* v. *State of Punjab*[5] held that Parliament could not amend the Constitution so as to take away or abridge the Fundamental Rights, which challenged the basic assumption of judicial process and democracy. In *Kesavananda Bharati* v. *State of Kerala*,[6] eleven out of thirteen judges did not agree with the *Golak Nath* judgment. While conceding extension of the Constituent power of Parliament under Article 368, to every Article of the Constitution, the majority of seven against six judges held that such power did not extend to destroying or tampering with the basic feature or basic structure of the Constitution. What is basic structure would be expressed by the Court from time to time. This virtually meant that Courts would have the last say in respect of the Constitution. Can an unelected Court do so is seen in the context that a written Constitution must have judicial review and where a Constitution contains a bill of rights, such review is bound to acquire larger dimension.

The Supreme Court of India though slowly started acquiring more powers through constitutional interpretations and judicial creation of rights. The Court interprets a provision of the Constitution liberally and in the light of the spirit underlying it. That keeps the Constitution abreast of the times through dynamic interpretation.[7] In the least, the principles of liberty, equality and fraternity cannot be ever compromised in any form. The human rights of Indians were widely violated by the British rulers. Therefore, the framers of the Constitution, most of whom had suffered long incarceration under that period, had a very positive attitude towards human rights and incorporated them in the Constitution as Fundamental Rights in Part III (Articles 12 to 35).

These provisions confer justiciable rights on the people, which are enforceable through the Courts. These also constitute restrictions and limitations on governmental action to prevent persecution and arbitrariness. The government cannot take any action, administrative or legislative, by which a fundamental right may be infringed. If ever a basic right is thought desirable to be curtailed

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[4] *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845.

[5] AIR 1967 SC 1643.

[6] AIR 1973 SC 1461.

[7] In *A.K.Gopalan* v. *State of Madras*, AIR 1950 SC 27 the Court interpreted Article 21 very literally and held procedure established by law meant any procedure laid down in a statute competent to deprive a person of his life or personal liberty. In 1978, in *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597 the Court held that the word procedure in Article 21 meant right, just and fair procedure.

that would be done only by the elaborate and more formal procedure and would be subject to strict judicial scrutiny.

The Supreme Court has so far discharged a multi-faceted role in relation to the fundamental rights. It is the protector and guardian of these rights, expanded these rights and integrated directive principles with fundamental rights. This comprehensiveness in approach approach is in consonance with Dr B.R. Ambedkars closing address to the Constituent Assembly in which he emphasized that the principles of liberty, equality and fraternity were not to be treated as separate entities but as a trinity. They formed the union or trinity in the sense that to divorce one from another was to defeat the very purpose of democracy. Liberty could not be divorced from equality. Equality could not be divorced from liberty. Nor could equality and liberty be divorced from fraternity. Without equality, liberty would not produce supremacy of law. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality would not become a natural course of things. Accordingly, the Constitution puts due emphasis on equality, fraternity and liberty.

After 16th Lok Sabha Elections, the Nation has many challenges before it in terms of rights and freedoms. These rights and freedoms are now globally considered as the essence of the process of development and need prime consideration. It expects a like role from the judiciary to balance the under action as well as over action or deviations of the legislature and the executive, which may be motivated by politics.

III

Contemporary Demands from Judiciary

The judiciary has to project the whole gamet of rights under the Constitution as an inclusive measure and action plan for attaining the objectives set in that. For that, the need is for a more alert judiciary for maintaining globally acceptable human rights standards. The Court has not merely to act as an arbitrator or adjudicator; it has to evolve jurisprudence capable enough to support a human rights regime addressing the issues of equality, security and dignity of every citizen of the country. The constitutional framework for that is very rich and viable. An over view of the rights and principles expressly mentioned in the Constitution will further explain the position.

(i)Equality for Dignity and Development

Article 14 of the Constitution provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India and Article 15 prohibits discrimination by State against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. No citizen can on such grounds be subjected to any disability, liability, restriction or condition to use any facility which is available to any other person. The State may, however, make any special provision for women and children or for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

By 93rd Amendment of the Constitution, in 2005, the State was empowered to make any special provision by law for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30.[8]

About equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State, Article 16 approves of certain reservations which need a continuous monitoring and periodical revision. This may not be retained or removed without a rational basis.

These provisions are to enable participation of all Indian people, both privileged and underprivileged, in the development of the country as well as in the use of opportunities for individual development.

To strengthen equality, Article 17 of the Constitution abolishes untouchability and forbids its practice in any form. The enforcement of any disability arising out of untouchability has been declared as an offence punishable in accordance with law. In the following Article 18 it is provided that no title of a military or academic distinction should be conferred by the State and no citizen of India shall accept any title from any foreign State. It is further provided that any citizen of India holding any office of profit or trust under the State cannot, without the consent of the president, accept any title, present, emolument or office of any kind from or under any foriegn state.

(ii) Basic freedoms

With equality a prelude to development is right to basic freedoms which any person should possess to develop and prosper. Article 19 of the Constitution,

[8] Constitution of India 1950, Article30 (1).

guarantees to all Indian citizens: right (*a*) to freedom of speech and expression; (*b*) to assemble peaceably and without arms; (*c*) to form associations or unions; (*d*) to move freely throughout the territory of India; (*e*) to reside and settle in any part of the territory of India; (*g*) to practice any profession, or to carry on any occupation, trade or business. The right can be reasonably restricted by the State on grounds of Nations sovereignty, integrity, security, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence.

(iii) Fair Sense of Security

To infuse a fair sense of security in the mind of an individual, Article 20 assures that no person can be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. It prevents double jeopardy saying that no person shall be prosecuted and punished for the same offence more than once. Self incrimination is also prohibited as Article 20 also says that no person accused of any offence shall be compelled to be a witness against himself.

(iv) Right to Life and Personal Liberty

Most important Article of the Constitution is Article 21. It reads that "No person shall be deprived of his life or personal liberty except according to procedure established by law". The judiciary has given a very wide connotation to the expression life and personal liberty to include all the rights together constituting the right to development. In this regard some words from the decision of the Supreme Court of India in *Francis C. Mullin* v. *Administrator, Union Territory of Delhi*[9], are noted by way of an example as follows:

" Whether the right to life is limited only to protection of limb or faculty or does it go further and embrace something more. We think that the right to life includes right to live with human dignity and all that along with it, namely,the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings. Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must in any view of the matter, include right to basic necessities of life and also the right to constitute the bare minimum expression of the human self."

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9. AIR 1981 SC 746.

The Supreme Court of India has held several unremunerated rights to fall within the ambit of Article 21 as follows:

(a) The right to go abroad. [10]

(b) The right to privacy. [11]

(c) The right against solitary confinement. [12]

(d) The right against bar fetters. [13]

(e) The right to legal aid. [14]

(f) The right to speedy trial.[15]

(g) The right against handcuffing.[16]

(h) The right against delayed execution.[17]

(i) The right against custodial violence.[18]

(j) The right against public hanging. [19]

(k) The Right to Doctor's assistance. [20]

(l) The Right to Shelter. [21]

(m)The Right to Know. [22]

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[10] *Satwant Singh Sawhney* v. *Ramarathnam, APO, New Delhi,* AIR 1967 SC 1836.
[11] *Govind* v. *State of MP,* (1975) 2 SCC 148, relied on *Griswold* v. *Connecticut,* 381 US 479.
[12] *Sunil Batra* v. *Delhi Administration,* (1978) 4 SCC 494.
[13] *Charles Sobraj v. Supdt. Central Jail,* [(1978) 4 SCC 104.
[14] *M H Hoscot* v. *State of Maharashtra,* (1978) 4 SCC 544.
[15] *Hussainara Khatun* v. *Home Secretary, State of Bihar,* (1979) 3 SCR 532.
[16] *Prem Shanker Shukla* v. *Delhi Administration,* (1980) 3 SCC 526.
[17] *T V Vatheesswaran* v. *State of Tamil Nadu,* AIR 1983 SC 361.
[18] *Shela Barse* v.*State of Maharashtra,* (1983) 2 SCC 96.
[19] *A G of India* v. *Lachman Devi,* 1996 SC 467.
[20] *Parmanand Katra* v. *Union of India,* (1989) 4 SCC 268.
[21] *Shantistar builders* v. *N K Tomate,* (1990) 1 SCC 520.
[22] *R P Ltd.* v. *Proprietors of Indian Express, Bombay Pvt. Ltd.,* AIR 1989 SC 190.

It may be noted that the Supreme Court, in *Bandhua Mukti Morcha* v. *Union of India,*[23] opined that to live with human dignity and free from exploitation is a fundamental right of everyone in this country as assured under Article 21 as interpreted by this Court in *Francis Mullin case*.[24] This right to live with human dignity in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42. At the least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State has the right to take any action which will deprive a person of the enjoyment of these basic essentials.

Thus, in these and many more judgments, the Supreme Court of India has held right to education as a fundamental right. Here, it is apt to mention that instruction in art and its promotion is a very significant component of education. Absence of State endeavor in this regard tantamount to violation of fundamental right to education and disrespect to the directive principles of state policy. Earl Warrep, CJ, speaking for the Supreme Court of United States in *Brown* v. *Board of Education*,[25] has tried to bring that wide dimension of the right to education to focus in the following words:

"Today, education is perhaps the most important function of State and local governments ... It is required in the performance of our most basic responsibilities.... It is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training and in helping him to adjust normally to his environment". In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

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[23] AIR 1984 (1) SC 802.
[24] *Supra* note 6.
[25] 347 US 483 (1954).

Since societies have grown more complex, now every kind of facility for education must be made available by the State. State itself must lake all positive measures necessary for providing education to its citizens. The Supreme Court of United States in *Wisconsin* v. *Yoder*,[26] case recognized this obligation of the State saying that providing public schools ranks is at the very apex of the function of a State.

This observation of the Court gave due legitimacy to the right to education as a basic necessity of life and as one of the activities constituting "the bare minimum expression of human self. In 1984, the Supreme Court of India in *Bandhu Mukti Morcha* v. *Union of India,*[27] held that the right to education is implicit in and flows from 'the right to life. Later, in *Bapuji Education Association* v. *State*,[28] Justice Rama Jois held that right to education is an essential attribute of personal liberty. He observed that the right of an individual to have and/or to import education is one of the most valuable and sacred rights. The judge further observed that "Among various types of personal liberties which can be regarded as included in the expression "personal liberty" and in Article 21, education is certainly the foremost".

The question whether a 'right to education' is guaranteed to the people of India under the Constitution was dealt with by the Supreme Court at length in *Mohini Jain* v. *State of Karnataka.*[29] The main question in this case related to the admission of Miss Mohini Jain who was selected for MBBS course but was asked to pay a tuition fee of Rs. 60,000 per annum and a capitation fee of four and a half lakhs. The matter after reaching the Court became extraordinarily significant. The Court through Kuldip Singh J. referred, regarding this issue, to the preamble of the Constitution which promises to secure to all citizens of India "justice-social economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity"; and assures dignity of the individual. The Court also referred to the Articles 21, 38, 39(a), 39(f), 41 and 45 of the Constitution.[30].

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[26] 406 US 205 (1971).

[27] *Supra* note 20.

[28] AIR 1986 Karnat 119.

[29] AIR 1992 SC 1858.

[30] Article 21:
Protection of life and personal liberty. No person shall be deprived of his life or personal liberty except according to procedure established by law.
Article 21A [inserted later by 2002 Amendment]:

After a reference to the relevant constitutional provisions, the Court observed that "right to education" had then not as such been guaranteed as fundamental right under Part III of the Constitution but a reading of the above quoted provisions cumulatively manifested it beyond doubt that the framers of the Constitution made it obligatory for the State to provide education to its citizens. The Court forcefully put forward the view that the preamble of the Constitution promises to secure to all citizens justice- social, economic and political combining social and economic rights along with political and enforceable/ legal rights. In order to establish social justice and to make the masses free in the positive sense the State was to strive to achieve the goals set out in the preamble of the Constitution. As regards social justice it has been specifically enjoined as an object of the State under Article 38 of the Constitution. The Court raises the question that can the objective which has been so prominently pronounced in the preamble and Article 38 of the Constitution be achieved without providing education to the large majority of citizens who are illiterate. A dispassionate consideration of the question leads to the conclusion that the

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Right to education. The state shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may by law determine. Article 38:
State to secure a social order for the promotion of welfare of the people - (I) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all the institution of the national life.

(2) The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.
Article 39:
Certain principles of policy to be followed by the State. - The State shall, in particular, direct its policy towards securing -
(a) that the citizen, men and women equally, have the right to an adequate means of livelihood;....
(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.
Article 41:
Right to work, to education and to public assistance in certain cases - State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.
Article 45:
Provision for free and compulsory education of children . - The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.
[replaced by 2002 Amendment as under-
Provision for early childhood care and education to children below the age of six years - The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.

objectives flowing from the preamble of the Constitution cannot be achieved and shall remain on paper unless the people in this country are educated. The Court observed that the three pronged justice- social, economic and political, promised by the preamble is only an illusion to the teaming-millions who are illiterate. It is only the education which equips a citizen to participate in achieving the objectives enshrined in the preamble.

Bringing to focus another significant aspect of the issue the Court remarked that the preamble also assures the dignity of the individual and the Constitution seeks to achieve this object by guaranteeing fundamental rights to each individual which he can get enforced, if necessary through Court of law. The directive principles in part IV of the Constitution are also with the same objective. The Court made it clear that the dignity of man is inviolable. It is the duty of the State to respect and protect the same. It is primarily education which brings forth the dignity of a man. The framers of the Constitution were aware that more than seventy percent of the people, to whom they were giving the Constitution of India, were illiterate. They were also hopeful that within a period of ten years illiteracy would be wiped out from the Country. It was with this hope that Article 41 and 45 were brought in Part-IV of the Constitution. An individual cannot be assured of human dignity unless his personality is developed and the only way to that is to educate him. That is why the Universal Declaration of Human Rights, 1948 emphasizes "Education shall be directed to the full development of the human personality...."

Another vital question that was considered by the Apex Court related to recognition of an individual's right "to education" in Article 41 of the Constitution which provides that "the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to education". The Court observed that although a citizen cannot enforce the directive principles contained in Chapter IV of the Constitution but these were not intended to be mere pious declarations.

The Court has invoked in support of its argument the following words of Dr. Ambedkar:

"In enacting this part of the Constitution, the Assembly is giving certain directions to the future legislature and the future executive to show in what manner they are to exercise the legislative and the executive power they will have. Surely it is not the intention to introduce in this part these principles as mere pious declarations. It is the intention of the Assembly that in future both the legislature and the executive should not merely pay lip service to these principles but that they should be made the basis of all legislative and executive

action that they may be taking hereafter in the matter of the governance of the Country".[31] The Court accordingly concluded in this respect as follows:

"The directive principles which are fundamental in the governance of the country cannot be isolated from the fundamental rights guaranteed under Part Ill. These principles have to be read into the fundamental rights. Both are supplementary to each other. The State is under a constitutional mandate to create conditions in which the fundamental rights guaranteed to the individuals under part III could be enjoyed by all. Without making right to education under Article 41 of the Constitution a reality the fundamental rights under Chapter III shall remain beyond the reach of large majority which is illiterate".

The Court also beneficially referred to its earlier observation regarding right to live with human dignity and the Directive Principles of the State Policy in *Bandhu Mukhti Morcha* v. *Union of India*[32] that the right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Article 41and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women, and the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humble conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State neither the Central Government nor any State Government - has the right to take any action which will deprive a person of the enjoyment of these basic essentials.

After a due consideration of all the above given observations the Court held that the right to education flows directly from the right to life. It said:

"'Right to life' is the compendious expression for all those rights which the Courts must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct which the individual is free to pursue. The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied

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[31] Constituent Assembly Debates (CAD), Vol. VII, p. 476.

[32] *Supra* note 20.

by the right to education. The State Government is under an obligation to make endeavor to provide educational facilities at all levels to its citizens". The Court continued to observe: "The fundamental rights guaranteed under Part III of the Constitution of India including the right to freedom of speech and expression and other rights under Article 19 cannot be appreciated and fully enjoyed unless a citizen is educated and is conscious of his individualistic dignity".

The Court then declared that the "right to education", therefore, is a concomitant to the fundamental rights enshrined under Part III of the Constitution. Defining the responsibility of the State regarding the matter, the Court held that the State is under a constitutional mandate to provide educational institutions at all levels for the benefit of the citizens. The educational institutions must function to the best advantage of the citizens.

The basic question, whether the Constitution of India guarantees a fundamental right to education to its citizens came again for consideration before the Supreme Court in *Unni Krishnan* v. *State of A.P.*[33], where writ petitions were filed by private educational institutions engaged in imparting medical and engineering education calling in question the *Mohini Jain* judgment. The views expressed by the concerned judges in this case are of great academic and practical significance. The matter was heard by L.M. Sharma, C.J. and S. Ratnavel Pandian, S.Mohan, B.P. Jeevan Reddy and S.P. Bharucha, JJ. The judges delivered three separate judgments each with a novel import. In one of the judgments, Sharma C.J. (for himself and Bharucha, J.) (partly dissenting) said that there is no fundamental right to education for a professional degree that flows from Article 21. As regards the question whether the right to primary education mentioned in Article 45 of the Constitution is a fundamental right or not, Sharma C.J in view of financial and other implications left it to be decided in some subsequent case by a larger bench. The other three judges viz. S. Mohan, Jeevan Reddy and S. Ratnavel Pandian upheld the right to education as a fundamental right. S. Mohan, J. in his separate (concurring) judgment laid much emphasis on the importance of education and held that the State is obliged to provide education to all upto14 years of age, within the prescribed time-limit. He specially mentioned what poet Valluvar (with his famous Tirukkural) said about education that "Learning is excellence of wealth that none destroys; to man nought else affords reality of joy".

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[33] (1993) 1 SCC 645.

The judge, tracing the nexus between the life, living and education, said that the fundamental purpose of 'education is the same at all times and in all places. It is to transfigure the human personality into a pattern of perfection through a synthetic process of the development of the body, the enrichment of the mind, the sublimation of the emotions and the illumination of the spirit. Education is a preparation for a living and for life, here and hereafter. Besides, in a democratic form of Government which depends for its sustenance upon the enlightenment of the populace, education is a social and political necessity. In India, the leaders harped upon universal primary education as a desideratum for national progress but the percentage of illiteracy here is still appalling. In this era of knowledge-explosion when the frontiers of knowledge are enlarging with incredible swiftness it is the foremost need of the State to eradicate illiteracy which persists in a depressing measure.

Again in a very poetic style Mohan, J. Explains the need for eradicating illiteracy as follows:

"Victories are gained, peace is preserved, progress is achieved, civilization is built up and history is made not on the battlefield where ghastly murders are committed in the name of patriotism, not in the council chambers where insipid speeches are spun out in the name of debate, not even in factories where are manufactured novel instruments to strangle life, but in educational institutions which are the seed-beds of culture, where children in whose hands quiver the destinies of the future are trained. From their ranks will come out when they grow up statesmen and soldiers, patriots and philosophers, who will determine the progress of the land".

On the basis of all these views Mohan, J. declared right to "education as a fundamental right" of all citizens. Technically he takes it as covered by both the right to personal liberty as 'well as by the right to life.

In 1962, a Constitution Bench comprising of six learned Judges, in *Kharak Singh* v. *State of UP*, considered the content of the expression "personal liberty" in Article 21 and Rajagopala Ayangar, J. Speaking for the majority, observed:

"We shall now proceed with the examination of the width, scope and content of the expression ' personal liberty' in Article 21. .... We feel unable to hold that the term was intended to bear only this narrow interpretation but on the other hand consider that ' personal liberty ' is used in the Article as a compendious term to because great concepts like liberty and life were purposefully left to gather meaning from experience. They relate to the whole domain of social and economic fact changing with time. Political, social and economic changes entail the recognition of new rights and the law grows to meet the ever increasing

demands of society. There is no person in whom right to life and liberty does not inhere and the same does not need to be provided in the Constitution in positive terms".

Similarly, there is no person in whom right to education is not inhere and the same being a part of right to life did not need to be expressly provided in the part III of the Constitution. Though, in the Constitution the right to education was not stated expressly as a fundamental right, the Supreme Court has not followed the rule that unless a right was expressly stated as a fundamental right, it could not be treated so. Freedom of Press is not expressly' mentioned, yet it has been read into and inferred from the freedom of speech and expression. Particularly, from Article 21 have sprung up a whole lot of human rights as mentioned above —right to legal aid and speedy trial, the right to means of livelihood, right to dignity and privacy, right to health, right to pollution-free environment and so on. In *Express Newspapers* v. *Union of India,*[34] it was held that the freedom of speech comprehends the freedom of press and the freedom of speech and press are fundamental personal rights of the citizens.

The view, that the right to education flows from Article 21 is also supported by what Gagendragadkar, J. Observed in the *University of Delhi* v. *Ram Nath,*[35] saying that : "The education seeks to build up the personality of the pupil by assisting his physical, intellectual, moral and emotional development".

Article 45, containing a Directive Principles of State Policy dealing with the policy of education read as follows:

"Provision of free and compulsory education of children. - The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years".

The decisions of the Supreme Court mentioned above have explained the position of the right to education under the Constitution well with reference to its being in Part-IV.

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[34] AIR 1958 SC 578.
[35] AIR 1963 SC1873.

In 2002, notwithstanding above verdicts, the Parliament of India by the Constitution (Eighty Sixth Amendment) Act, 2002 inserted Article 21A in Part-III of the Constitution to expressly make right to education a fundamental right as follows:

Article 21A. Right to education.The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

Article 45 has been substituted by a new provision as follows:

Provision for early childhood care and education to children below the age of six years.The State shall endeavor to provide early childhood care and education for all children until they complete the age of six years.

Further, one more clause, namely (k) was inserted in Article 51A of the Constitution dealing with Citizens Fundamental Duties as under:

Article 51A. Fundamental duties.It shall be the duty of every citizen of India

(k) Who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.

This position makes right to education expressly a fundamental right of all children from six to fourteen years. The right of the children of less than six years is covered by Article 45 in Directive Principles of State Policy. It would be apt to observe that the judiciary must, in view of the importance of the pre-school education and its earlier verdicts about interface between Part-III and Part-IV of the Constitution, declare right of children below six years of age is also a fundamental right and declare studies related to art and craft an essential component of education in view of its future importance for them.

Now, the literacy rate has risen from 16.6 percent in 1951 to 74.04 percent according to the 2011census. The number of educational Institutions has more than doubled, while the number of teachers and students has multiplied many times. But, despite that yet all Indians have not real access to schools and more than half, as per certain estimates are drop outs. A large percentage of the dropouts are girls, Scheduled Caste and Tribe members and minorities. Poverty is the main cause for keeping children away from the school.

In the international human rights perspective, under Article 26 of the Universal Declaration of Human Right:

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

3. Parents have a prior right to choose the kind of education that shall be given to their children.

Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides:

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this Article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this Article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Both these provisions make education a human right, but indicate that initially studies in art and latter instruction in art should be a part of curriculum. In their absence the purpose of education would remain incomplete.

As noted above, in 2002, a new Article, namely Article 21A was inserted in the Constitution of India which made free and compulsory education a fundamental right to all children in the age group of six to fourteen years. Pursuant to this Amendment, the Parliament enacted the Right of Children to Free and Compulsory Education Act, 2009 to provide to every child full time elementary education of satisfactory and equitable quality in a formal school which satisfies the essential requirements and standards as may be necessary.

The right to compulsory education casts an obligation on the appropriate government to provide and ensure admission, attendance and completion of elementary education. It is anchored in the belief that the values of equality, social justice and democracy and the creation of a just and humane society can be achieved only through inclusive elementary education to all. The obligation under the Act is not merely on schools run or supported by the appropriate government but also those not dependent on government funds.

The Right of Children to Free and Compulsory Education Act, 2009 in its Section 3 provides that every child of the age of six to fourteen years shall have a right to free and compulsory education in a neighbourhood school till completion of elementary education. For this purpose no child shall be liable to pay any fee or charges or expenses which may prevent him from pursuing and completing the elementary education.

If a child above six years of age has not been admitted in any school or though admitted, could not complete his elementary education, for such children Section 4 of the Act provides that they should be admitted in a class appropriate to his age. Such children should also be given special training as may be necessary and made able to complete their elementary education even if it extends beyond fourteen years of age.

To meet situations of change of place, Section 5 of the Act enables a child to seek transfer from one school to another, either within or outside a state, and claim immediate issuance of transfer certificate. The incharge of the school making delay in issuance of such a certificate is liable for disciplinary action.

Duties have been cast by Section 6 on Central and State governments and local authorities to establish schools in areas where they do not already exist, within a period of three years from the commencement of this Act. Section 7 provides for financial and other responsibilities of the Central and State governments and for developing by the Central government of a national curriculum and the standards for training of teachers.

Main duties of the appropriate government and local authority under the Act, as enumerated in Section 9 to 11, include providing of all infrastructural facilities, teaching staff and learning equipments, and other related facilities. In providing facilities there should not be any discrimination regarding disadvantaged students. Parents and guardians are also required to admit or cause to be admitted his child or ward for elementary education, in a neighbourhood school. Pre-school education arrangements may also be made by the appropriate government for children between the age of three and six years.

Section 13 of the Act prohibits claiming of capitation fee by any school and any kind of screening procedure for admission. The former is punishable with ten times the amount of capitation fee claim and the later with a fine of Rs.25, 000/-for first contravention and Rs.50, 000/- for each subsequent contravention. By virtue of Sections 15 to 17 no child can be denied admission for lack of age proof or expiry of the admission period or extended admission period, and no child can be held back in any class or expelled from school till the completion of elementary education or subjected to physical punishment and mental harassment.

The Act contains many more provisions about maintenance of standards of education, duties of teachers, pupil-teacher ratio, curriculum and evaluation procedure, monitoring of right to education by National and State Commissions

for protection of child rights, redress of grievances and constitution of national and state advisory councils for advising governments on implementation of the provisions of the Act in an effective manner.

Under Section 19, observance of prescribed norms and standards for schools has been made obligatory and a school shall not be established or recognized, unless it fulfills the norms and standards specified in the Schedule. Where a school established before the commencement of this Act does not fulfill the norms and standards specified in the schedule, it shall take steps to fulfill such norms and standards at its own expenses, within a period of three years from the date of such commencement failing which its recognition can be withdrawn. It is further provided that with effect from date of withdrawal of recognition, no school shall continue to function. Any person who continues to run a school after the recognition is withdrawn, shall be liable to fine which may extend to one lakh rupees and in case of continuing contraventions, to a fine of ten thousand rupees for each day during which such contravention continues.

Section 21 makes the school management committees participatory to include elected representatives of the local authority, parents or guardians of children admitted in such school and teachers. At least three-fourth of members of such Committee should be parents or guardians and that proportionate representation be given to the parents or guardians of children belonging to disadvantages group and weaker section; fifty percent of members of such Committees to be women.

The School Management Committees have to perform the functions of: (a) monitor the work of the school; (b) prepare and recommend school development plan; (c) monitor the utilization of the grants received from the appropriate government or local authority or any other source; and (d) perform such other functions as may be prescribed.

Under Section 24, the teachers have been made duty bound to: (a) maintain regularly and punctuality in attending school; (b) conduct and complete the curriculum in accordance with the prescribed norms; (c) complete entire curriculum within the specified time; (d) assess the learning ability of each child and accordingly supplement additional instructions, if any, as required; (e) hold regular meetings with parents and guardians and apprise them about the regularity in attendance, ability to learn, progress made in learning and any other relevant information about the child; and (f) perform such other duties as may be prescribed.

Any teacher committing default in performance of these duties is liable to disciplinary action under the service rules applicable. Provided that before taking

such disciplinary action, reasonable opportunity of being heard is to be afforded to such teacher.

All the above mentioned provisions of the Right to Free and Compulsory Education Act, 2009 if implemented with sincerity, can ensure a literate next generation which can afford to live with dignity without falling prey to exploitation of any kind, especially child labour.

(v) Right Against Detention and Hampering Development

To make an environment of development sustain the Constitution also contains provisions about life free from fear of detention. Detention of a person affects development especially when it is maneuvered and motivated as it affects both body and mind of a person along with the whole family. It creates fear in the mind of every common man and results into the denial of dignity. Next in the Constitution is, therefore, the provision to prevent deprivation of life and liberty of a person through detention by State authorities. Article 22 is very comprehensively dealing with matters connected thereto providing: "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate." This provision would, however, not apply to an enemy alien; or to any person who is arrested or detained under any law providing for preventive detention. The preventive detention of a person cannot be for a longer period than three months unless an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as judges of a High Court has reported before the expiry of such period that there is sufficient cause for such further detention.

When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds, if not against public interest, on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

Parliament may by law prescribe in certain circumstances for detention of more than three months without obtaining the opinion of an Advisory Board.

(vi) Right Against Exploitation

The Constitution of India enshrines a very important right in Articles 23 and 24 called Right against Exploitation in the form of traffic in human beings, *begar*, child labour and other similar forms of forced labor. Article 23 lays down that traffic in human beings and *begar* and other similar forms of forced labor are prohibited and any contravention of this provision shall be an offence punishable in accordance with law. However, the State can impose compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

Article 24 states that no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

(vii) Freedom of Conscience

For the promotion of spirituality and inner conscience of the people the Constitution of India gives to all persons Right to Freedom of Religion making them, by Article 25, equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion, of course subject to public order, morality and health and to other fundamental rights guaranteed under this Constitution. The State can regulate by law any economic, financial, political or any other secular activity which may be associated with religious practice. Article 26 recognizes the right of every religious denomination or any section thereof to establish and maintain institutions for religious and charitable purposes; to manage its own affairs in matters of religion; to own and acquire movable and immovable property; and to administer such property in accordance with law subject to public order, morality and health. Pursuant to its secular character, Articles 27 and 28 of the Constitution restrict the State from compelling any person to pay any taxes, appropriated for the promotion or maintenance of any particular religion or religious denomination and prohibit religious instruction in any educational institution wholly maintained out of State funds. If there is any educational institution administered by the State but has been established under any endowment or trust which requires that religious instruction be imparted in such institution no such restriction would apply to that educational institution. Further, any person attending an educational institution recognized by the State or receiving aid out of State funds cannot be required to take part in any religious instruction that may be imparted or to attend any religious worship that may be conducted in such institution or in any premises attached thereto without his or, if such person is a minor, his guardian s consent.

(viii) Right to Culture and Establishment of Institutions

Even cultural and educational rights are recognized as fundamental rights in India, which are very important for enjoying right to development. Article 29 enables any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own to conserve the same. To seek to attain a pluralistic purpose through law clause (2) of Article 29 prevents denial of admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Article 30 (1) guarantees to all minorities, whether based on religion or language, a right to establish and administer educational institutions of their choice. And Article 30 (2) provides that the "State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language".

(ix) Directive Principles of State Policy

Under the Directive Principles of State Policy, various principles have been laid down, which though not enforceable by any Court, "are nevertheless fundamental in the governance of the country and it [is]...the duty of the State to apply these principles in making laws". Article 38 requires the State to "strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life". In particular, the State should "strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations". It has been made incumbent by Article 39 on the State to act to the end(*a*) that the citizens, men and women equally, have the right to an adequate means of livelihood; (*b*) that the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good; (*c*) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; (*d*) that there is equal pay for equal work for both men and women; (*e*) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength; (*f*) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

It is a vanity to think of justice without an efficient judicial system which delivers justice rather than engages litigants to the benefit of the stronger party. To ensure access to justice for all by the State Article 39A has been inserted in the Constitution which provides that the operation of the legal system promotes justice, on a basis of equal opportunity, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

For democratic participation of all people in development, Article 40 directs taking of steps to organize village *panchayats* with necessary authority to function as units of self-government. After the working of the Constitution of India for more than 43 years, the people of this country realized that all Human Rights and fundamental freedoms could not be fully achieved unless Institutions are created at grassroots levels to achieve the objectives contained in Part IV of the Constitution of India. 73rd and 74th Amendments were made to achieve this object. The Supreme Court rightly noticed as to the status of these constitutional instrumentalities in its judgment in the case of *Ahmedabad Municipal Corporation* v. *Nawab Khan Gulab Khan.*[36] In another judgment of Supreme Court in *Air India Statutory Corporation* v. *United labour Union,*[37] it was held that Directive Principles in our Constitution are fore-runners of the UN Convention on right to live as an inalienable Human Right and every person and all people are entitled to, contribute to and enjoy social, cultural and political development in which all human rights and fundamental freedoms would be fully realized. For the realization of this right to development the Institutions of local self government have been brought to the level of constitutional functionary by 73rd and 74th Amendment Act of the Constitution.

Since 1950 the first task of the people of India should have been the exercise of human rights development as contained in various provisions of the Constitution at all levels allowing an opportunity to people for full participation determining policies at local levels and influencing the decision making showing their actual participation in the process of development for shaping the model of the development of a particular region.

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[36] AIR 1997 SC 152.
[37] AIR 1997 SC 645.

The Eleventh and the Twelfth schedule read with Article 243-G and Article 243-W show that the backwardness of the various regions of this country in economical, social and cultural fields is sought to be removed by empowering people to participate in the preparation of plans for economical development and social justice and by the implementation of directive principles as contained in Part IV of the Constitution which cannot be realized alone on the pattern of imposition of schemes by Governments but by maximum use of the right to development by participation in the process of development. India as a developing country has in order to develop into a developed country, have to urge its entire people to participate in its development and also in their own individual development. Any other form of modulating or processing development is destructive of this urge and is devoid of the fruits of development. Thus, the constitutional sentiment is that the right to development is an inalienable human right by virtue of which every human person and all people are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development.

With the same understanding should some more provisions of the Constitution be read and followed. Article 41 calls for making, within the limits of its economic capacity and development, effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want. Article 42, in the same vein, directs that the "State shall make provision for securing just and humane conditions of work and for maternity relief" and Article 43 states that the State shall endeavor to secure, by suitable legislation or economic organization or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavor to promote cottage industries on an individual or co-operative basis in rural areas. Article 43A provides that the State, shall take steps by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organizations engaged in any industry. Some other such directives are related to State responsibility for endeavoring:

(a) to provide early childhood care and education for all children until they complete the age of six years.[38]

(b) to promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and

[38] Article 45.

the Scheduled Tribes, and shall to protect them from social injustice and all forms of exploitation.[39]

(c) to regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavor to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.[40]

(d) to organize agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.[41]

(e) to protect and improve the environment and to safeguard the forests and wild life of the country.[42]

(f) to protect every monument or place or object of artistic or historic interest, declared by or under law made by Parliament to be of national importance, from spoliation, disfigurement, destruction, removal, disposal or export, as the case may be.[43]

(x) Fundamental Duties

Article 51A of the Constitution enumerates eleven duties of citizens which have the effect of developing both the individual as well as the nation. These duties, *inter alia,* require the citizens to abide by the Constitution and respect its ideals and institutions; to cherish and follow the noble ideals which inspired our national struggle for freedom; to uphold and protect the sovereignty, unity and integrity of India; to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women; to value and preserve the rich heritage of our composite culture; to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures; to develop the scientific temper, humanism and the spirit of inquiry and reform; to safeguard public property and to abjure violence; and to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavor and achievement.

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[39] Article 46.
[40] Article 47.
[41] Article 48.
[42] Article 48A.
[43] Article 49.

Institutional mechanism has to be developed to promote duty culture in the country. The corrupt practices of honouring the non-performers should no more be followed. The common man should get a feel and motivation to work for development and expect appreciation from the nation. A tendency has developed that people close to power centers are encouraged to take some initiatives to get rewarded, but those real initiators and performers are de-motivated and discouraged by authorities who could be real agents of change with sincerity. This practice should change to reap an early harvest of the constitutional provisions envisaging fundamental duties.

IV

Conclusion

The people of India are in a state of unrest. The constitutional guarantees and the schemes about implementation of the agenda for democracy and development have failed to appeal to the popular sentiment. The reason is the colonial style of successive Governments, non-participation of people in decision making and absence of respect for talent of the people because of corruption. There is also an absence of even a proper and sufficient institutional mechanism for ensuring rights to the people who have lived in disarray for centuries now.

The successive Governments have been totally oblivious of their Constitutional obligation to create and operate institutions which could make possible peoples participation in individual, local, national and international development. Governments have bitterly failed in initiating and promoting the process of strengthening people through the institution of local self government though some claims of women empowerment through reservation in *panchayats* is frequently being made.

If State fails in its duty to appoint the Constitutional functionaries and/or permit or enable them to work with true democratic spirit then it cannot be said to be carrying on in accordance with the provisions of the Constitution. It is the duty of the Union of India under Article 355 of the Constitution to ensure that the Governments of States is carried on in accordance with the provision of the Constitution. So far only political considerations are dominating the scene. The working of any government should now be evaluated on the basis of achievements made as per the requirements of right to development. The situation now demands maximum alertness from judiciary and its optimum independence and accountability.

REGULATING INDIA'S HEALTH SYSTEM

*Aalok Ranjan Chaurasia**

Abstract

This paper speaks of regulation of India's Health System and is divided into various parts. The part I of the paper highlights the complexity of the health system in India. The part II of the paper presents a brief overview of the current state of health regulation in the country while section three outlines the basis principles of health regulation. Part four presents an analytical perspective of different health regulation models while part five discusses essential components of the proposed Health Regulatory Authority. The concluding part of the paper summarises arguments presented in the paper and suggests the way forward.

I

Introduction

Health of the people has been an abiding concern to social and economic development in India right since independence. Addressing health needs of the people, has always been one of the priority development agenda in the development discourse of the country. Despite this policy focus, population health and its impact on the quality of life remains a major development challenge in India. In the recent past, India has recorded an impressive economic growth but gains on the economic front could not be translated into accelerated improvements in the health status of the people. At the current pace, India is likely to miss health related Millennium Development Goals[1] (Government of India, 2014). There has been improvement in the health status of the people but yet, the pace of improvement has been substantially slower than what has been planned or expected in the context of development needs of the country.[2] India ranks 149 among 201 countries in terms of expectation of life at birth, the most commonly used measure of population health.[3] Expectation of life at birth in India is estimated to be lower than that in Bangladesh and substantially lower than that in China.

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1 Government of India (2014) Millennium Development Goals India Country Report 2014. pp 7-8. New Delhi, Ministry of Statistics and Programme Implementation.

2 Chaurasia AR (2010) Mortality transition in India 1970-2005. Asian Population Studies 6 (1): 47-68 pages.

3 United Nations (2013) World Population Prospects: The 2012 Revision, Volume I: Comprehensive Tables. pp 273. New York, Department of Economic and Social Affairs, Population Division.

Among the many reasons attributed to slower than expected health transition in India, an important one is poor performance of the health system in meeting peoples health needs. Although, health care is not the only determinant of peoples health, yet health care services in the form of lifesaving and life-enhancing interventions play a key role in preventing majority of the premature deaths. Indias XII Five-year Development Plan (2007-12) had aimed at universal health coverage to accelerate health transition[4] but concerns remains about access to and quality of health care. Other things being equal, improving health care services delivery is necessary to achieve universal health coverage as articulated in the XII Five-year Development Plan andrepeated in the XIII Five-year Development Plan.[5]A recent analysis has however suggested that there is substantial scope of improvement in the performance of the health care delivery system in the country.[6]

One of the approaches advocated for improving health system performance for meeting the health needs of the people is regulating the health system. Regulation, in the context of health care services delivery, is defined as the range of factors exterior to the practice or administration of health care that influences the behaviour in delivering or using health care services.[7] It is the responsibility of the government to effectively regulate the health system to achieve national health objectives including improving health outcomes, ensuring equity, promoting social cohesion, and increasing economic efficiency.

There are reasons for regulating the health system. There is general agreement that some form of oversight is needed when concerns as essential as survival and health are at stake. Even those who oppose regulating the health system do admit value in some form of external supervision of the delivery of health care services as the health system benefits from regulatory inputs from varying perspectives. Opposition to any form of regulation in the health system, for most part, swirl not around whether oversight should exist but instead around the way it should be structured.[8]

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[4] Government of India (2007) Eleventh Five Year Plan 2007-2012-2017: Social Sectors, Vol II. pp 69-115. New Delhi, Planning Commission.

[5] Government of India (2013) Twelfth Five Year Plan 2012-2017: Social Sectors, Vol III. 292 pages. New Delhi, Planning Commission.

[6] Chaurasia AR (2013) India: Health System Performance Assessment. pp 95-120. Bhopal, MLC Foundation and Shyam Institute.

[7] Brennan TA, Berwick DM (1995) New Rules: Regulation, Markets and Quality of American Health Care. pp 40-54. Sanfrancisco, Jossey-Bass.

[8] Field RJ (2007) Regulation in America: Complexity, Confrontation and Compromise. pp 9-15. New York, Oxford University Press.

The importance of regulation is also reflected in the approach advocated by the World Bank to improve health of the people.[9] This approach emphasises, among others, accreditation of health care delivery institutions and health services providers. Similarly, an integral component of the framework for improving health system performance proposed and adopted by the World Health Organisation is the stewardship function.[10]

Regulating the health system is however a complex preposition because of the complexity of the health system in India which includes both formal health care delivery system and a large informal health care system which has been in existence since times immemorial. In its simplest terms, heath system in India can be characterised across three dimensions: 1) diversity; 2) organisation; and 3) ownership. In the context of health system regulation, an understanding of the three dimensions is necessary.

The complexity of Indias health system in terms of different systems of medicine is revealing. All major medical systems have strong presence in India along with numerous other approaches to meet the health needs of the people. These include the ancient Indian system of Siddha and Ayurveda, western allopathic and homeopathic systems of medicine and Unani and Tibba medical system. Siddha and Ayurveda are the oldest medical systems known to the mankind. They are believed to be evolved around ten thousand years ago and constitute the backbone of health care in India even today. The Unani and Tibba systems of medicine was introduced by the Muslims during the 13th Century AD whereas Allopathy was brought in the country by the Portugese during the 16th Century AD and Homeopathy gained a foothold during the period 1819-39. In addition, many other approaches of meeting health needs of the people have been practised in different parts of the country since times immemorial. For example, the tribal people - the aboriginals - have their own system of health care[11].

The second complexity of Indias health system is related to the organisation of health care services. The scientific foundations of home-based care may be found in Indian systems of Ayurveda and Siddha. There is no way to assess the size and structure of this unorganised, informal health system but the formal health system is definitely a small proportion of the informal health system in the country. Majority of the Indian masses, especially the poor and the marginalised ones living in the rural and remote areas, depend upon this informal system to meet their health needs.

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9 World Bank (1993) World Development Report 1993: Investing in Health. pp 156-171. New York, Oxford University Press and World Bank.

10 WHO (2000) World Health Report 2000. pp 45. Geneva, World Health Organization.

11 Chaurasia (2013), *Ibid.*

The formal health system includes both public and private health care institutions. Public health institutions are almost entirely funded by the government out of its budgetary resources. This system has a very strong presence in the rural areas in the form of a nested primary health care delivery institutions comprising of sub-health centres, primary health centres and community health centres. The private health system, on the other hand, ranges from single doctor clinics and dispensaries and small nursing homes to large super speciality hospitals and is largely un-organised. Services available through private health system are not free and the cost of services is often beyond the reach of an average Indian.

Given the complexity of the health system in India, this paper advocates the constitution of Health Regulatory Authority for regulating the health system in an effort to achieve the goal of universal health coverage as articulated in the XIII Five-year Development Plan of the country. Constitution of such an Authority is necessary as existing mechanisms to regulate health care services in the country have been found to be grossly inadequate and ineffective in improving health system performance to meet the health needs of the people. The proposed Authority will focus on some of the critical elements to reinvigorating health system - equitable access to health care services and cost containment, provider performance, accreditation of institutions and providers of health services, etc. The proposed regulatory authority will also be able to provide broad directions for the evolution of the health systems in the context of the demand for health services.

II

Current Status of Health System Regulation in India

The current mechanism of regulating health system in India can best be characterized as fragmented and incomplete. This mechanism may be classified into two categories - mechanism that works within the health system and hence is a part of the health system and mechanism that is independent of the health system.

The regulatory mechanism within the health system comprises of a number of statutory regulatory bodies and numerous acts enacted either by the central Government or by state Governments time to time to regulate the health system within their jurisdiction[12].

[12] The list of different Acts and Regulations directed towards regulating the health system in either one or the other context is very long. These Acts and Regulations can be grouped in nine categories: 1) health facilities and services; 2) disease control and medical care; 3) human health care resources; 4) Pharmaceuticals and medical devices; Radiation protection; 5) Elderly and disabled rehabilitation and mental health; 6) Social security and health insurance and 7) health

The country, however lacks acomprehensive law that covers all aspects of health care.[13] All the statutory regulatory bodies, broadly cover the following aspects of the health system: 1) education of health services providers; 2) recognition of institutions eligible for providing education and training; (iii) recognising Degrees and Diplomas which entitle a person to deliver health care services; (iv) registration of eligible health care services providers; (v) rights of registered health care providers; (vi) professional misconduct and methods of dealing with it; and (vii) constitution and functioning of the regulatory body as supervisory bodies. These statutory bodies do not cover other aspects of the health system and therefore their role in regulating the delivery of health care services is at best limited. Moreover, all these statutory bodies have representation of a particular class of health care services providers and none of them has any representation of the people - the users of health care services. The primary role

information and statistics. Some of these Acts and Regulations include: Indian Red Cross Society Act, 1920; All India Institute of Medical Sciences Act, 1956; Post Graduate Institute of Medical Education and Research, Chandigarh, Act, 1966; Bureau of Indian Standards Act and Rules, 1986, 1987; National Institute of Pharmaceutical Education and Research Act, 1998; Clinical Establishment Acts, 2010; Epidemic Diseases Act, 1897; Indian Aircraft Act and Rules, 1934, 1954; Indian Port Health Rules, 1955; Medical Termination of Pregnancy Act, 1971, 1975; Transplantation of Human Organs Act and Rules, 1994, 1995, 2002; Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act and Rules, 1994, 1996, 2002, 2003; Indian Medical Council Act and Rules, 1956, 1957, 1965, 1993, 2001, 2002; Medical Council of India 1994, 1998, 2000, 2001; Establishment of New Medical Colleges, Higher Course Regulations, 1993. Eligibility Requirement for Taking Admission in Undergraduate Medical Course in Foreign Medical Institution Regulations, 2002; Indian Medicine Central Council Act and Regulations, 1970, 1989, 2005; Homeopathy Central Council Act, 1973, 2002; Homeopathy Education Courses, Standards, 1983; Homeopathy Practitioners (Professional Conduct, Etiquettes and Code of Ethics) Regulations, 1982; Dentist Act, 1948, 1993; Dental Council of India Regulations, 1955, 1956, 1984, 2006; Dental Council (Election) Regulations, 1952; BDS, MDS Course Regulations, 1983; Establishment of Dental Colleges, 1993; Pharmacy Act, 1948; Pharmacy Council of India - Regulations; Indian Nursing Council Act, 1947; Indian Nursing Council Regulations; Rehabilitation Council of India Act and Regulations, 1992, 1997, 1998; Drugs and Cosmetics Act, 1940, 2005, 2006; Drugs Control Act, 1950; Drug and Magic Remedies (Objectionable Advertisement) Act, 1954; Department of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homeopathy (Ayush) Orders, 2005; Atomic Energy Act and Rules, 1962, 1984; Radiation Protection Rules, 1971; Radiation Surveillance Procedures for Medical Application of Radiation, 1980, 1989; Atomic Energy (Working of the Mines, Minerals and Handling of Prescribed Substance) Rules, 1984, 1987; Safety Code for Medical Diagnostic X-Ray Equipment and Installations; Laws in relation to Elderly, Disabled, Rehabilitation and Mental Health; Mental Health Act, 1987; Central and State Mental Health Rules, 1990; Minimum Wages Act, 1948; Employees State Insurance Act and Rules, 1948, 1950; Life Insurance Corporation Act, 1956; Maternity Benefit Act, 1961, 1963; Insurance Regulatory and Development Authority Act, 1999, 2000, 2001, 2002; Births, Deaths and Marriages Registration Act, 1886; Registration of Births and Deaths Act, 1969; Collection of Statistics Act and Rules, 1953, 1959; Census Act, 1948, 1993.

[13] Jugal Kishore (2012) Legislation and health promotion in India. Review of Global Medicine and Health Care Research 3(2): 75-87.

of these statutory bodies is limited to producing health care services providers having certain level of competence and skills[14].

In addition to statutory regulatory bodies, there are a number of Acts enacted by national and state Governments time to time for the smooth functioning of the health system. A review of these Acts again reveal the fact that most of them cover only a few aspects of the delivery of health care service and lack comprehensiveness necessary to effectively regulate the health system. It is also not clear to what extent these acts have contributed towards achieving the goal of universal health coverage.[15] These Acts are implemented by the bureaucracy - the executive arm of the Government. The bureaucratic approach of implementing these Acts have created a lot of opposition in the health fraternity. One major limitation of these Acts and associated regulations is that, in most of the cases, they are meant for the private or the non-government health system and not for the public health care delivery system or the health care delivery system owned by the Government.

An important limitation of the existing mechanism of regulating the delivery of health care services is that it primarily focusses on the supply side of health services delivery. The demand side of health care has totally been overlooked in the regulation of the health system. Ideally, delivery of health care services should respond to the demand for these services. This means that the regulatory system must be able to assess the demand for health care services and should have the capacity to analyse whether the health system is able to meet the demand for health care services or not. Such an analysis should also be the basis for regulating the deliver of health care services. Since the demand for health care services is very dynamic in nature, it is obvious that any mechanism to regulate health system must be dynamic in its scope and functioning so that regulation of health care services delivery is evidence-based not normative or hypothetical. Right now, there is no system of matching the delivery of health care services with the demand for these services so that despite numerous acts and regulations formulated and enacted by the Government, regulation of the delivery of health care services in the country remains largely ineffective.

Outside the health system, there is no mechanism to regulate the delivery of health care services. Some of the issues related to the delivery of health care services are addressed under the consumer protection act. This act treats the user of health care services as a consumer and the health practitioner or the

[14] Jesani A (1996) Laws and health care providers. A study of legislation and legal aspects of health care delivery. pp 133-134 pages. Mumbai, Centre for Enquiry into Health and Allied Themes.

[15] Jesani (1996), *Ibid.*

health system as the provider of services. This very simplistic approach of defining the relationship between a user of health care services and a provider of health care services has however been found to be of little significant value in improving the performance of the health system in meeting the health needs of the people. Rather, this approach has resulted in a trust deficit between the user and the provider of health services[16].

Given the current loosely articulated, fractured system of health regulation, there is a need of designing and developing a comprehensive mechanism of regulating health system as a whole and not just a medical doctor or a nurse or an Ayurveda practitioner. A statutory Regulatory Health Authority is needed in this context.

III

Principles of Health System Regulation

The following are the guiding principles for ensuring the efficiency and effectiveness of any mechanism designed to regulate the health system:

1. The need to regulate behaviour of health care providers and the underlying objectives of regulating health systems must be very clear, unambiguous, well documented and widely disseminated.

2. Regulation must be used to

   (a) Protect patients from harm.

   (b) Ensure that quality and other care and safety standards are met

   (c) Inform the public about their care

   (d) Prevent fraud or abuse

   (e) Contains cost of health care

   (f) Ensure functioning of the market for competing providers

3. Regulation should facilitate channels of communication between regulators and health services providers. Regulation must ensure accountability of health care delivery institutions and health care providers to the people.

4. Regulation must be cost effective so that it can be effectively enforced with least investment. In order to be cost effective, any health regulation mechanism should

   (a) Be based on sound scientific, technical, economic and other relevant information.

[16] David PH, Muraleedharan VM (2008) Regulating Indias health services. To what end? What future? Social Science and Medicine 66(10) pp 2133-2144.

(b) Reflect an understandiMng of the operations of regulated entities and the consequences of proposed action

(c) Minimize the cost of compliance assessment for both regulated and regulators

(d) Embody the greatest degree of simplicity and understandability as far as possible

(e) Be scalable to the size and complexity of each provider regulated

(f) Integrate and/or coordinate its requirements with those of other regulations

2. Regulation must create an environment for innovations and encourage the pursuit of excellence through best practices.

3. Regulation must be applied and implemented in a manner so as to avoid

(a) Disrupting patient care activities

(b) Unnecessary costs

(c) Overwhelming administrative functions and information systems.

IV

Regulatory Models

In order to translate the aforesaid principles into specific operational framework, a number of regulatory models have been evolved and implemented in different countries of the world. A review of health regulation models in ten countries - Egypt, Germany, Greece, India, Italy, Nigeria, Pakistan, Poland, South Africa and Spain - suggests that the health regulatory system in different countries vary widely and there is no universally agreed framework for designing and institutionalising a health system regulation framework or mechanism[17]. In the context of the regulation of the health care delivery services, different health regulatory models and systems prevailing in different countries can be grouped into the following broad categories:

(i) *Public Health Utility Regulation*. This type of regulatory framework generally provides a "franchise" or monopoly to the regulated entity to serve a specified area and is usually accompanied by detailed regulatory control[18].

[17] Hand de Vries et al (2009) International Comparison of Ten Medical Regulatory Systems. Santa Monica CA, RAND Corporation. pp 5-14.

[18] Priest AJG (1970) Possible adaptation of public utility concept in the health care field. Law and Contemporary Problems 35(4):839-848.

(ii) *Command and Control Regulation*. In this model, detailed, perspective requirements are imposed on regulated entities to determine how regulatory objectives are met[19].

(iii) *Delegated Regulation*. In this model, a voluntary, private standard setting programme is selected by the government to serve as a substitute for direct government involvement in the regulation of health care[20].

(iv) *Inspection*. This is the most common form of regulatory mechanism that has traditionally been used in the public administration system including the public health system. In this model, regulators inspect the regulated entities at regular intervals. This system generally rely thereafter on complaint investigations[21].

(v) *Performance-based Regulation*. In this model of regulation, incentives are used to induce the desired behaviour by the regulated entity in achieving desired outcomes. The level of oversight, in this model is determined by the performance of the health system in terms of outcome achieved compared to those desired[22].

(vi) *Reporting and Disclosure*. In this model, regulators relay upon voluntary or mandatory public disclosure of information to regulate the behaviour of regulated entities such as facts about available health services and health care technology so as to help the customers to make informed choices. No regulatory intervention is taken in this model unless complaints and routine reporting and disclosure trigger a caution flag[23].

(vii) *Market Incentives*. In this model, competition and operation of the market forms the base for regulators to induce the regulated entity to achieve desired goals. How to achieve the desired goals is left to the discretion of the regulated

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[19] College of Nurses of Ontario (2014) Legislation and Regulation. RHPA: Scope of Practice, Controlled Acts, Models. Toronto, Canada, College of Nurses. pp 6-7.

[20] College of Nurses of Ontario (2013) Working with Unregulated Care Providers. Toronto, Canada, College of Nurses. pp 6-7.

[21] Health Care Improvement Scotland (2014) Unannounced Inspection Report. Independent Health Care. Glasgow, The Priory Hospital.

[22] Coglianese C, Nash J, Olmstead T (2002) Performance-based regulation: Prospects and limitations in health safety and environment problems. Cambridge, Massachusetts, John F Kenndey School of Government. Centre for Business and Government. Regulatory Policy Programme. pp 35.

[23] Virginia Department of Health (2011) Regulation for disease reporting and control. Richmond, VA, Virginia Department of Health.

entity. The regulated entities, are free and flexible to adapt to changing marketing conditions[24].

Different regulatory models have their own advantages and disadvantages in the context of the regulation of health care delivery services. A comprehensive review of these models, highlighting their basic features and analysing their perceived advantages and disadvantages, is summarized in the following table. The table amply depicts the complexities involved in designing and instituting a health care delivery regulatory mechanism.

Model/ Features	Public Utility	Command and Control	Delegated Regulation	Inspection	Performance Based	Reporting and Disclosure	Market/ Incentive
Overview	Provides a "franchise" or monopoly to the regulated entity to serve a specific area. Usually carries with is detailed regulatory control.	Imposition of detailed, prescriptive requirements to determine how regulatory objectives are met.	Voluntary standard-setting programme selected by the government to serve as a substitute for government regulation. Gives regulated entity a "seal of approval" that it meets a specific set of standards and Conditions.	Regulators inspect the regulated entity at regular intervals. Regulation is enforced primarily through complaint investigation.	Incentives are used to induced changes in the operations of regulated entity. Level of oversight is determined by outcomes achieved compared to those desired.	Regulation is based on public disclosure of information and caveat emptor. Assumes everything is okay unless complaints and/or routine disclosure triggers a cautions flag.	Based on the system of rewards and penalties, leaving to entity discretion how to achieve goals. Allows entity flexibility to adapt to changing conditions.

[24] Saltman RB, Busse R, Mossialdos E (2002) *Regulating Entrepreneurial Behaviour in European Health Care System.* Philadelphia, Open University Press. pp 10-23.

Model/ Features	Public Utility	Command and Control	Delegated Regulation	Inspection	Performance Based	Reporting and Disclosure	Market/ Incentive
Regulatory mechanism typically used	Setting of operating standards. Compliance inspections. Rating. Audits. Public hearings.	Setting operating standards. Compliance inspections. Price controls Audits. Certification.	Setting operating standards. Compliance inspections. "Seal of approval".	Setting criteria for approval. Inspection. Public. Grivances redressal. Application approval.	Setting desired outcomes. Performance measurement. Determining level of oversight.	Information to be reported. Adequacy and accuracy of disclosure. Monitor signs for prohibited Behaviour.	Establish incentives and penalties. Establish objectives.
Basic Source of Regulatory Authority.	Ability to grant franchise and protect from competitors.	Ability to control.	Ability to grant the "Seal of Approval".	Ability to control the entrance.	Ability to control programme participation or market entrance. Incentives to improve quality.	Ability to stay in market by identifying and/or removing bad actors.	Ability to affect success in market.

Model/ Features	Public Utility	Command and Control	Delegated Regulation	Inspection	Performance Based	Reporting and Disclosure	Market/ Incentive
Enforcement and sanctions.	Monitoring Investigation Sanctions Price control Withdrawal of franchise.	Refusal to allow participation Corrective actions Financial penalties.	Refusal to accredit Corrective actions Public disclosure of accreditation results.	Refusal to grant application Financial penalties.	Differentiation on the basis of performance: Reduced oversight and/ or increased payments for higher performance and vice versa.	Public disclosure Criminal prosecution Fines Removal from market.	Financial disincentives Loss of market share Financial penalties Criminal prosecution.

Model/ Features	Public Utility	Command and Control	Delegated Regulation	Inspection	Performance Based	Reporting and Disclosure	Market/ Incentive
Advantages	Eliminates competition and associated costs. Assure availability of public good. May guarantee	Procedural protections allow inputs from regulated entities slowing down the pace of adverse changes. Enhances public confidence and trust. Uniform rules may promote level playing field.	Greater involvement of regulated entities Frequent inspections are reduced Enhances public confidence and trust.	Provides for external quality control. Once approval is obtained and standards are continuously met, regulated entities have significant Flexibility.	Promotes performance Gets away from rigid one-size fits all type of regulations. Needs based standards may be set May be applied at community Level.	Readily adaptable to quality improvement. Less intrusive and adversarial form of regulation than the first four Medels.	Incentives driven regulation Limited regulatory efforts/ resources needed to achieve desired outcomes.
Disadvant-ages	Often accompanied by Command and Control regulation Service provision concentrated in few hands.	Slow to reflect changes. High cost of regulation Prescriptive approach produces complexity.	Increased cost of regulation Not easily adapted to other areas of regulation.	Based on narrow set of measures Enforcement may be coercive and adversarial.	Requires unambiguous and verifiable standards.	Requires detailed and adequate information Information may be misleading.	May not apply well to health care because patient may not have sufficient information when needed To make choice.

V

Essentials of Health Regulatory Authority

This section outlines the broad structure of the proposed Health Regulatory Authority which can effectively regulate delivery of health services to the people and contribute towards universal health coverage. Key elements of the proposed Health Regulatory Authority are summarised below:

(a) The Health Regulatory Authority must be constituted through an Act passed by the Legislature. It must have necessary legal powers to act as regulator for the health care delivery system - public and private.

(b) The authority should not be a part of the bureaucracy - the executive arms of the Government. It should be an independent entity like the Telecommunications Regulatory Authority or the Electricity Regulatory Authority.

Independent functioning of the Health Regulatory Authority is essential in developing and sustaining its credibility among the people and the health care providers.

(c) The authority must cover both the public and private health care delivery system. In the current environment when functional autonomy is being delegated to public health institutions, regulating public health system is as important as regulating private health system.

(d) The authority must have necessary technical expertise and capacity to effectively regulate the delivery of health care services giving due consideration to the local and cultural context of health care.

(e) The role, functions and powers of the Authority must be clearly defined. Essentially, the Health Regulatory Authority should strive for health sector integration through

(f) Developing and implementing a uniform system of contracting out health care services.

(g) Laying down minimum standards of health care services delivery under different settings.

(h) Developing and enforcing a uniform set of regulations to ensure availability, access and quality of health care through public and private health systems.

(i) Create mechanisms for protecting the rights and interests of patients.

(j) Shift the basic orientation of health care from a technology driven perspective to a human centred, behaviour change perspective.

(k) In order to achieve its objectives and goals, the Health Regulatory Authority should focus on the following areas:

(l) Appropriate regulation for ensuring adequate human resources with necessary skills in public and private health care delivery institutions by laying down norms and standards for staffing and requirements for knowledge and skills up-gradation.

(m) Developing standards for rational drug choice in different health care delivery settings. The focus of developing the standards should be on keeping the list of drugs small, especially in primary level health care institutions.

(n) Exercise control on the introduction of new medical and health technologies so as to keep the cost of health care delivery under control. The introduction of new medical and health technologies should not be left at the discretion of health care providers. Rather, it should be based on the needs which are determined by prevailing health situation.

(o) Developing mechanisms for the accreditation of health care institutions and health care providers so that people have information about the strength and capacity of different health care institutions and health care providers and use this information in making choices.

(p) Develop procedures and methods for self-regulation by health care institutions and health care providers and linking self-regulation processes with the accreditation of health care institutions and health care providers.

In order to make the proposed Regulatory Health Authority really effective, there is a need of formulating a law that covers the entire health system and constitutes the basis for action for the Regulatory Health Authority. As already discussed, such a law does not exist in India at present. It may be pointed out here that way back in 1946, the First Health Survey and Development Committee constituted in India had explicitly recommended formulation and enaction of such a law as a critical intervention to improve the performance of the health system to meet the health needs of the people.[25] The Mudaliar Committee constituted immediately after the independence to suggest a framework for the development of the health system in the country also reiterated the need of formulating a comprehensive law to cover all dimensions of the health system as the basis for health sector development.[26] The Committee even took extra efforts to prepare a draft public health law for the country. However, there has been little progress towards evolving a unified approach of health system development which encompasses all dimensions of health care in terms of diversity, organisation and ownership.

VI

Conclusions

With the increased involvement of private sector in the delivery of health care, meeting the health needs of the people is now no longer the propriety of the Government as has been the case in the past. It is however, the responsibility of the Government to ensure that the people get health care services of an accepted quality and at an affordable cost to meet their health care needs. It is also important that people get value for the money they pay to receive health care either through public or through private health care institutions. Constitution of an independent Health Regulatory Authority through an Act of Legislature and formulation and enaction of a comprehensive public health lay may be a step in this direction.

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[25] Government of India (1946) Report of the First Health Survey and Development Committee. New Delhi, Controller of Publications.

[26] Government of India (1962) Report of the Health Survey and Planning Committee. New Delhi, Ministry of Health.

Regulation, it may be stressed here, is not without any risk. It is well known that regulation can itself invite corruption in the delivery of health care. At the same time, excessive regulation may hamper the growth and development of health care delivery system. Perhaps the best example of this perspective is the public health care delivery system itself which continues to be very heavily regulated not from the point of view of the quality and cost of health care but from the point of view of bureaucracy. Unnecessary or poorly targeted or implemented regulations frustrate health care providers and the patients they serve. The same regulations can even interfere with appropriate care when it is needed most; informing the police before any medical assistance in case of an accident is the best example. At the same time, it is also true that the longer the health system - public or private - remain unregulated, the higher will be the cost of bringing the system back to control.

PRESUMPTION OF LEGITIMACY UNDER THE LAW OF EVIDENCE

*Dr. Shabnam**

Absract

The case of Nandlal Wasudeo Badwaik V Lata Nandlal Badwaik & Anr[1] has sparked a controversy for upholding the determination of paternity by DNA testing by the Supreme Court in a routine manner for proving non-access by the husband on his failure to prove the same. The determination of paternity and a child born within wedlock stands as conclusive proof until legally non-access or a birth not within 280 days after marriage is proved. The typical scenario in such cases is that of putative abandoning of the biological father because of an illicit affair, presumption of legitimacy of the child and presumptive paternity of the man to whom the women is married. The law of Evidence under contested paternity and also the legal provisions of Section 112 of The Indian Evidence Act, 1872 considers it as conclusive proof of paternity when born within a wedlock and does not allow evidence at any point of time to disprove the same, the exception clause being non-access or 280 days of birth after marriage. Presumptive paternity holds good even if the couple are residing separately and access between the couple is present While DNA testing is allowed to prove illegitimacy in England and the U.S., Indian Courts have provided that it cannot be allowed as a matter of routine. This paper seeks to trace the history of law relating to presumptive legitimacy with analysis in England and the U.S. along with the law as it exists in India under the law of Evidence. The current judgment tries to bring a discourse by the Court in the manner in which orders have been passed for DNA testing by the superior Court. The rights and status of the child can have serious repercussions of putative abandoning, proof of legitimacy or illegitimacy and the dilemma of the Courts in ordering or not allowing DNA testing which is set for determination in each case.

I

Introduction

The truth in determining the paternity of a child in matters of legitimacy are based on the presumption that a child born within wedlock is presumed to be the legitimate child. This presumption stemmed from the prospect of inheritance rights of the children born in marriages as 'the illegitimate child' went without certain basic rights and specially those relating to property. Stigmatization is the other side of the same coin in case rebuttal of paternity as a social issue gets

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[1] Criminal Appeal No.24 Of 2014(@Special Leave Petition (Crl.) No.8852 Of 2008).

associated with the birth of a child. Paternity issues arise when the separation of a couple leads to issues of denial or acceptance of rights and liabilities. The denial to accept the issue for maintenance, property and legitimacy issue so asnot to place a stigma for the mother and child, could be by producing evidence which the Courts and the legislation permits. The rights and liabilities and the best interests of a child are to be taken into account before the Court can determine and give out a legal decision in such cases.[2] The rebuttal of the presumption is based on whether the father could not have had access to his wife and the child is born. The law does not ask only for logical reasons with exceptions for the 'impotency' or 'access', but requires a legal reference in order to determine the legitimacy of a child in relation to contested rights to be determined[3]. The birth of a child is the blissful state of matrimony for a couple where implied relations of love and care are created by adding a member to the family. The paradise is lost when a suspicion that the child is not the biological offspring of the man is created. The agony and the mental stress over marital issues and mixed distorted feelings are questioned leaving the jarred situation for the Courts to decide.[4] The most distressful question being, "Who is the father of the child?" The stressful atmosphere creates a concern for the innocent child for severity imposed of stigmatized illegitimacy, or to not getting social and economic benefits of growing carefree under the loving protection of being in a family as the breakdown of marriage also takes place.[5]

The presumption of legitimacy itself can be traced back to 1777 where, in an ejectment case involving the issue of the claimant's paternity, Lord Mansfield of the Court of the King's Bench denied the claims of the spouses not to be admitted to prove illegitimacy.[6] Laws in the U.S. have taken a different course, where paternity is questioned based on the DNA testing and then determining on the basis of best interest of the child. Marriages may bear children reared by extended family, as joint family system is peculiar to the Indian system. Where DNA testing reveals the true father, the Putative father, as he is referred to, may seek visitation or custodial rights of the child in cases of contested paternity.[7]The related contested rights and liabilities may be within the marriage, i.e., between

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[2] See David J. Shuster," The Best Interests of the Child Must be Considered Before Rebutting the Presumption of Legitimacy", University of Baltimore, *23 U.. Balt. L. Rev. 661, 1994.*

[3] *Ibid.*

[4] *Ibid.*

[5] *Ibid.*

[6] *Ibid, Staley* v. *Staley,* 25 Md. App. 99, 102, 335 A.2d 114, 117 (1975) (quoting Goodright v. Moss, 2 Cowp. 591, 592-94, 98 Eng. Rep. 1257, 1258 (1777)).

[7] *See McDaniels v. Carlson,* 738 P.2d 254 (1987).

husband and wife or between the legal father and the putative father. The exceptions of non-accessibility and impotency of a man still hold good but now the new issue only in specific cases is to get a blood test or DNA testing done when ordered by the Court to establish the true nature of legitimacy.[8] For the rebuttal of presumption of legitimacy, the constitutional mandate provides for a due procedure to be followed and after the due procedure, the legislation should have exceptional circumstances where it is allowed to be rebutted.

II

Presumption Generally and Presumption of Legitimacy

Presumption under law of evidence is governed by the rule of law which takes into consideration that when the main set of facts, once proved, make an inference that the consecutive set may also be considered to be proved. Rebuttal of presumption takes place when the existing evidence is rebutted by the party overcoming the presumption. It is based on a strong rationale that the original facts in the course of events would lead to a natural flow where the derived facts are the natural consequence of the original ones.[9] In such cases, where original facts are proved, the law requires not to bring in further evidence to establish the presumed facts. In conclusive proof, a favorable decision may not be given by a Court, if it was based on false factual basis. The presumption of legitimacy under the law of evidence was considered to be a rebuttable in case the child is born in a valid marriage and impotency or non-access of the husband to the wife cannot be proved.[10] The law does not allow rebuttal when either cannot be proved and the child is born in a legal marriage for a tenuous concern as dissimilarity of paterfamilias.[11] The law today has extended in certain countries to include blood tests or DNA testing in case proved may pave the way to determine contested paternity, but is to be taken with caution so as not to work to the detriment of preservation of rights of a child and has to be taken from the factual basis of each case.

III

Law Relating to Presumption of Legitimacy in Other Countries

(i) *English Law*

In Roman as well as the English law, the conclusive presumption of legitimacy is antiquated theory, in which the law allowed rebuttal only when husband's access due to non availability for being on the sea, or physical disability or

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[8] *Ibid.*

[9] Chief Justice M. Monir, *Law of Evidence* (Short Addition), New Impression, 2004.

[10] *Ibid.*

[11] Indian Evidence Act, 1872.

impossibility for physical intimation or wife's cohabitation with another man at the time of conception, could be proved beyond reasonable doubt. Infidelity within marriage had no basis for allowing the child to be proved as illegitimate by the husband. It was meant to provide protection to an innocent child from social stigmatization as a severity for disability of rights as well as protection of a strengthened family care. The common law regarded an illegitimate child as *filius populi and quasi nullius filius* (son of the people, and as if the son of no one).[12] As the legal child of no one, the illegitimate child was no one's legal heir.[13] As a child of the people, the illegitimate child was a ward of the public, and legal custody of the child rested with the public authorities.[14] The presumption of legitimacy in a legal marriage is based on, *"Pater est quem nuptiae demonstrant"* [the nuptials speak for themselves].[15]The presumption of legitimacy during marriage could only be rebutted if there was proof of the husband's impotence, sterility, or non-access to the wife.[16] The 18th-century presumption by Lord Mansfield holds that declaration of spouses were inadmissible to bastardize a child born of the marriage.[17]

Since genetic proof of paternity was not known during that time, rebuttal proved to be difficult between the legal father and the biological father. As a result the legal father was saddled with the burden of upbringing in the absence of proof of paternity. This judicial determination was conclusive and could not be rebutted or subject to examination. Therefore, rebuttal of presumption of paternity under English Law[18] may be evidenced on balance of probabilities,[19] lack of relevant sexual intercourse between the spouses,[20] evidence of the husband's impotence,[21] an admission of paternity by a third-party,[22] and forensic evidence such as blood DNA testing or refusal to submit to such tests.[23]

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[12] See Edward R. Armstrong, "Putative Fathers and the Presumption of Legitimacy—Adams and the Forbidden Fruit: Clashes between the Presumption of Legitimacy and the Rights of Putative Fathers in Arkansas", *25 U. Ark. Little Rock L. Rev. 369, pg.372-373, 2003.*

[13] *Ibid.*

[14] *Ibid.*

[15] William Blackstone, 1 Commentaries, 446-54.

[16] H. Nicolas, Adulterine Bastardy1, pages 9-10, (1836).

[17] 98 Eng. Rep. 1257 (K.B.) (1777).

[18] Murphy P. Glover R., *Evidence,* page 713,(12th Edition).

[19] *Ibid,* Lord Lloyd dissenting, in Re H(Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563.

[20] *Ibid,* (*Banbury Peerage case* (1811) 1 Sim & St 153).

[21] *Ibid, Legge* v *Edmonds* (1855) 25 LJ Ch 125.

[22] *Ibid,* King's Lynn Justices, ex-parte M [1988]2 FLR 79.

[23] *Ibid, F v Child Support Agency* [1999] 2FLR 244.

(ii) *American Law*

Since 1997, Nineteen States have enacted an assortment of statutes that attempt to provide legal solutions to the paternal renunciation dilemma. Like the case law that preceded the statutes, these legislative models are inconsistent. For example, Louisiana permits paternity to be challenged within one year from when the father learns or should have learned of the child's birth; Delaware, Illinois, and Washington permit two years; Alaska and Minnesota permit three years; Texas permits four years; Colorado, New Jersey, Ohio, and Wyoming permit up to five years; and Alabama, Arkansas, Georgia, Iowa, Maryland, Missouri, Montana, and Virginia do not place any time limits on paternity challenges. Alaska and Virginia do not specify who can or cannot challenge paternity; Arkansas permits only adjudicated fathers to challenge paternity; Maryland permits only fathers of non-marital children to challenge paternity; Illinois, Iowa, and Minnesota permit the child, mother, and adjudicated father to challenge paternity; Colorado, Delaware, and Wyoming permit the child, mother, adjudicated father, and welfare department to challenge paternity; Missouri, New Jersey, Ohio, and Texas permit the child, mother, adjudicated father, welfare department, and the alleged biological father to challenge paternity; Alabama, Montana and Washington permit any "interested party" to challenge paternity. Georgia and Illinois require the adjudicated father to produce DNA proof of non-paternity as a prerequisite to filing the action. Most other states, however, permit the Court to order DNA testing after the paternal renunciation action has been filed. Delaware, Iowa, Texas, and Wyoming rely primarily on the best interest of the child standard to determine whether to admit DNA evidence of non-paternity. Conversely, Colorado, Georgia, Maryland, and Washington permit DNA to be admitted to prove non-paternity but also require Courts to determine whether renunciation is in the child's best interests. Most States, however, do not take into account the best interest standard when determining renunciation.[24]

(iii) *European Convention and Human Rights Act*

The European Convention on Human Rights has to a great extent placed an impact on the law of evidence. This Convention for protection of Human Rights and Fundamental Freedoms, signed in 1950 came into effect in 1953 by the members of the Council of Europe. The Human Rights Act 1998 deals with specific provisions of human rights which came into effect on 2 October 2000. In accordance with accepted principles of statutory application, decisions which predate the coming into effect of the Act cannot be important on the ground that they do not comport with Convention rights. Courts are obliged to take into

[24] *Supra* note1.

account (but not necessarily follow) the jurisprudence of the European Court of human rights whenever it is relevant in domestic proceedings in countries affected by the European Court. Such provisions of the Constitution have affected the law. Article 8, which guarantees the right to respect for private and family life, is relevant to the forcible exclusion of evidence by means of trespass, the interception of Communications, or other violations of privacy.[25] The Human Rights Act, 1998,[26] advocates respect for private and family life with no interference by a public authority with an exception to a statute law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

IV

Indian Law on Legitimacy

(i) *Indian Constitutional Law*

The Constitution of India provides for certain fundamental rights for its citizens where Article 14 gives equality before the law and equal protection of the laws. It provides for equality amongst equals and where there is reasonable classification, it has to have a rational with a reasonable nexus which is sought to be achieved. Article 21 provides for, that no person will be deprived of his life and personal liberty except for the due procedure established by the law."Fair trial is the main object of criminal procedure and such fairness should not be hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society."[27] Therefore, any hindrance in a fair trial could be violative of Article 14 of the Constitution. Article 12 of the Universal Declaration of Human Rights provides for the right to a fair trial what is enshrined in Article 21 of our Constitution. Therefore, fair trial is the heart of criminal jurisprudence and in a way, an important facet of a democratic polity and is governed by rule of law. Denial of fair trial is crucifixion of human

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[25] *Ibid.*

[26] Articles 8 & 14.

[27] See, *Smt. Triveniben* v. *State of Gujarat,* AIR 1989 SC 1335; *Zahira Habibullah Sheikh (5)* v. *State of Gujarat,* AIR 2006 SC 1367; *Capt. Amarinder Singh* v. *Parkash Singh Badal & Ors.,* (2009) 6 SCC 260; *Mohd. Hussain @ Julfikar Ali* v. *State (Govt. of NCT of Delhi),* AIR 2012 SC 750; and *Natasha Singh* v. *CBI,* (2013) 5 SCC 741.

rights.[28] Article 21 of the Constitution does not permit prosecution on a legal fiction.[29] It is said that the procedure contemplated by Article 21 must be right and just and fair, and not arbitrary, fanciful or oppressive. Otherwise, it would not be procedure at all and the requirements of Article 21 would not be satisfied.[30] The Courts have denied the violation of right to life or infringed privacy for DNA testing by a person[31] when due procedure of law is followed but should be exercised cautiously by weighing pros and cons and satisfying the test of eminent need. It has enumerated further that where there is a refusal for submission of test by a person, a case of adverse inference under Section 114 maybe deduced by the Court.[32]

(ii) Indian Law of Evidence

The Indian Evidence Act, 1872 as drafted by Sir James Fitz James Stephen is not an exhaustive code but a consolidated Act. The Act is not based on justice, equity and good conscious, therefore the Courts cannot dispense with any part of the procedure in allowing evidence to be admitted. The Evidence Act is both a part of the procedural as well as the substantive law and all questions relating to evidence must be decided according to the law of the land. This is referred to as Lex fori or the land where the dispute arises. This means that the issues which are to be decided in a case have to be decided where the forum exists or the place of seating of the Court in whose jurisdiction the case falls and where the law applies. Evidence may be brought from outside the territorial extent but will be applied in accordance to what the law exists in India. The principles of exclusion of evidence adopted by the Act must be applied strictly and cannot be relaxed at the discretion of the Court.[33] A thorough understanding of the rules of admissibility and significance towards a particular aspect is the foundation of all related persons in this field, like academician, lawyers or judges etc. The objective requiring an impartial judge, unprejudiced prosecutor and the accused's lawyer is conviction of the guilty and justice and protection for the innocent.

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[28] See Rajesh *Talwar & Anr v. CBI & Anr.*, 2013 AIOL 690, 2013 Legal Eagle(SC) 702.

[29] See *Menaka Gandhi* v. *Union of India;* AIR 1978 SC 597; *Sunil Batra* v. *Delhi Administration,* AIR 1978 SC 1675; In *re, Special Courts Bill* 1978, AIR 1979 SC 478; *Bachan Singh* v. *State of Punjab,* AIR 1980 SC 898; *Sriniwas Mall* v. *Emperor,* AIR 1947 PC 135.

[30] See *Usmanbhai Dawoodbhai Memon* v *State of Gujrat,* AIR 1988 SC 922 : 1988 CrLJ(SC) 938 : 1988 (1) JT 539 : 1988 (1) Scale 494 : 1988 (2) SCC 271 : 1988 (1) SCC(Cri) 318 : 1988 (3) SCR 225.

[31] See *Sharda* v. *Dharmpal* AIR 2003 SC 3450; *Bhabani Prasad Jena* v. *Convenor Secretary, Orissa State Commission for Women* AIR 2010 SC 2851.

[32] *Ibid.*

[33] See *Sris Chandra Nandy* v *Rakhalananda* (1940) 43 Bom. LR 794, 68 IA 34,(1941) 1 Cal 468; *Emperor* v *Prabhoo* (1941) All 843, FB.

(a) *Presumptions under the Indian Evidence Act, 1872*

A Court, where it 'may presume'[34] of fact, has a discretion to presume it as proved, or to call for confirmatory evidence of it, as the circumstances require. In such a case presumption is not a hard and fast presumption, incapable of rebuttal, a *presumptio juris et de jure*.[35] In cases in which a Court 'shall presume'[36] of fact, the presumption is not conclusive but rebuttable.[37] In other words, presumption of facts are always rebuttable as facts may be rebutted in any case where evidence may be produced by either party to rebut the same and is provided under the provisions as 'may presume'. It is the presumption of law which in certain cases are rebuttable where the provision provides for that the Court 'shall presume' of fact to be proved unless it is disproved. In such cases, the Court shall first take the facts to be proved until the law requires special proof to rebut the same. The irrebuttable presumptions of law are 'conclusive proof'[38] where the provision in the law may speak on certain facts or the law be taken as conclusive proof and does not allow evidence at any point during proceeding to be given to disprove it. An artificial probate value is given by law to certain facts as in Sections 41, 112 and 113.[39] No evidence is allowed to combat its effect as such cases occur when policy of government or the interest of society require that such things shall have a finality and should not be further open to dispute.[40]

(b) *Presumption of Legitimacy*

Certain provisions of the Indian Evidence Act, 1872[41] are similar to provisions of law in other countries as England and the US for it to provides for legitimacy of a child when born during the continuation of a valid marriage is presumed to be the legitimate child of the couple and the Court does not allow evidence to be produced to rebut proof regarding the legitimacy. The common law in its various previous decisions had provided for legitimacy only to be proved when the husband was impotent or was away on high seas and could not have had access to the wife. Under Indian law, presumption of legitimacy arises from birth from the wedlock and not the conception.[42]

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[34] Indian Evidence Act, 1872, Section 4.

[35] Ratanlal & Dhirajlal, *The Law of Evidence*, 21-22, 2009.

[36] *Supra* note 34.

[37] *Supra* note 35.

[38] *Supra* note 34.

[39] Chief Justice M. Monir, *Law of Evidence* (Short Addition), 64-66, 2004.

[40] *Ibid.*

[41] Indian Evidence Act, 1872, Section 112.

[42] *Shyam Lal @ Kuldeep v. Sanjeev Kumar & Others*, 2009 AIOL 488 : AIR 2009 SC 3115 : 2009 AIR(SCW) 5006 : 2009 (8) JT 108 : 2009 (5) Scale 507 : 2009 (12) SCC 454 : 2009 (5) SCR 1049 : 2009 (4) Supreme 711.

The provisions of the Evidence law namely, that a child born within a wedlock or continuing marriage is conclusive proof of the legitimacy of the child and the paternity is clear and living proof for the man to whom the women is a wife. The conclusive proof is established in case the continuity in marital relationship exists and the husband and wife are not living separately or in case of separation the child is born during 280 days of existence of marriage, where the husband had access to the wife during the aforesaid period. The denial for legitimacy exists in case it can be shown that the parties to the marriage had no access to each other at any time when the child could have been begotten. Indian Law prescribes as a statutory mandate for conclusive proof of legitimacy to be taken of the fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."[43]

1. *Valid Legal Marriage*

In India, the law of marriage is essentially a personal law. In other words, the governing law of marriage in India is not the Indian law or the State law but the law of the religious community to which the parties belong without any bearing as to domicile or nationality.....[44] However, there is the possibility of the conflict arising indirectly in respect of inter-communal laws. In such a case when one of the spouses to marriage converts to another religion, the conflict arises between the application of pre-conversion law and post-conversion law.[45] There is the Special Marriage Act, 1954 under which 'civil' marriage' can be performed between any two persons. There is still another statute the Foreign Marriage Act, 1969 which allows the marriage in a foreign country, between parties, one of whom at least is a citizen of India.[46] The law does not deal with those marriages which are either void ab initio or absolutely void but to those where a valid marriage existed and the marital relationship existed between the couple. It could also mean where the couple may not have stayed together but have cohabited for the purpose of having a child during marriage.

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[43] *Ibid.*

[44] See Usha Tandon,"Validity of Marriage under International Private Law", page 38 *JCLC* VOL 1 (2013).

[45] *Ibid.*

[46] *Ibid.*

2. *Presumption of Paternity*

The paternal presumption is drawn where the child is born out of wedlock and the man is presumed to be the legal father of the child. According to the provisions of the law in a continuous marriage the law would presume in favor of legitimacy of a child when born out of wedlock and does not allow evidence to be produced to rebut the presumption. Only in cases of special proof of non-access or non-cohabitation by the husband and where the evidence beyond reasonable doubt is produced, can lead to an unfavorable decision towards paternity. The husband also cannot resort to DNA testing in evidence to prove that he is not the father of the child.[47]

3. *Born Within 280 Days*

A child born within 280 days of marriage, even if the husband and wife have separated, is presumed to be the legitimate child within a marriage. The paternal presumption of legitimacy is raised again in case the condition of 280 days is fulfilled and the Court again does not allow evidence to be produced to rebut the presumption. This time period is to be calculated according to the facts and circumstances of each case where it can be shown that when the marriage was continuing, there was cohabitation between husband and wife which is presumed and even if they were living separately had access to each other for the child to be born. If the husband was living separately and the separation does not fulfill the requirement of 280 days, then only the presumption of paternal legitimacy can be rebutted and the Court may allow evidence to be produced to rebut the same. The period of gestation also may be taken into account while considering the 280 days for the birth of the child.[48]

4. *Conclusive Proof of Paternity*

The presumption under this Section is of conclusive proof and the presumption which cannot be removed except for the non-access or the fulfillment of 280 days requirement of the law. The law has made special provisions for this provision to be a part of conclusive presumption under the law as a protection for the child from being stigmatized in a society. It works for the protection of the child to whom protection is awarded, of not only legitimacy but also a stigma of being called illegitimate names, as well as maintenance for upbringing with the money and name security. It also works towards the inheritance of property of a child in the name of the family in cases of joint family properties or other properties held by the parents.

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[47] See *Maya Ram* v *Kamla Devi,* AIR 2008 HP 43(44); *Smt. Geeta Mishra* v *Krishna Mohan Mishra, AIR 2009 (NOC)* 1266 (MP).

[48] *Ibid.*

V

Indian Cases

In *Kamti Devi v. Poshi Ram*[49], the Court held that where scientifically accurate DNA testing has revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. The non biological father may have to bear the brunt of the situation but the law leans in favor of the innocent child from being illegitimate if his mother and her spouse were living together during the time of conception. The Court in *Banarsi Dass v. Teeku Dutta*[50] further contemplates that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112. The Court in *Kamti Devis*[51] case stated that the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access. In *Bhabani Prasad Jena v. Orissa State Commission for Women*[52], there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the Court to reach the truth, the Court stated that it must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA test is eminently needed.

The law contemplates degree of proof by means of considering evidence which proves access and 'non-access'. Evidence of non-accessibility when the child could have been begotten, is an outlet to overcome rigorous of presumption of conclusive proof.[53] Standard of proof in Criminal Prosecution is proof beyond reasonable doubt and, in Civil Cases; test of preponderance of probabilities is applied. The law anticipates that mere tilting of preponderance of probability could lead to bastardize a child which cannot be allowed, which imposes a greater burden on the husband of higher degree of proof, than what usually found sufficient in civil matters.[54]

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[49] (2001) 5 SCC 311.
[50] (2005) 4 SCC 449.
[51] *Supra* note 41.
[52] (2010) 8 SCC 633.
[53] *Ibid.*
[54] *Ibid.*

The Burden of Proof is on person who wishes the Court to believe in the person's right or liabilities depending on the facts of each case. Usually in Indian case, it lies on the legal father to show that access to his wife did not exist during conception for him to renounce his commitment for the rearing of the child or maintenance or any other liability for which there is a denial. Where the husband can procure evidence for non-access or the child born not within 280 days or a preconception of the child before marriage, the Court has discretion to allow evidence to disprove the legitimacy of the child. The denial in these circumstances by the legal and not the biological father is made acceptable as the legal father cannot be expected to bear the burden of a child who does not belong to him in an otherwise broken matrimony. The Court while considering various questions has stated that Section 112 of the Evidence Act incorporates a presumption which is part of the substantive law of this country.[55] The Family Courts, in view of the provisions of Section 14 are bound by Section 112 of the Evidence Act, if not considered, the very purpose of the provision would be frustrated without the necessary presumption.[56] The putative father seeking rights has the burden to prove his biological paternity. In exceptional cases, children gaining adulthood may have a burden to seek legitimacy or paternity rights based on DNA testing.

Since the law bends in favor of legitimacy and does not allow evidence to disprove it in any of the circumstances with only a few exceptions provided for rebutting the presumption, the dilemma is between the legal father and a biological father where in certain conditions may lead to acceptance or denial of rights and liabilities. The legal father does not want to be burdened with the fact that the child may not be his and the biological father may not be ready to accept his liabilities which in turn may work towards the detriment of the child. The law looks at it from the point of view of protection the child versus the liability of the legal father for maintenance of the child under Section 125, Criminal Procedure Court. It also signifies the existence or non-existence of opportunities for sexual intercourse; it does not mean actual "cohabitation".[57]

This decision has been accepted in various judgments delivered by various Courts involving similar issues in those cases. However, if non-access before marriage can be proved as a fraud, it would also amount to a case covered under exceptions of Section 112.[58] The fraudulent aspect under Section 17 of the

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[55] *Rajesh Francis* v *Preethi Rosalin* 2012 (2) KLT 613.
[56] *Ibid.*
[57] *Goutam Kundu* v. *State of W.B.*, (1993) 3 SCC 418.
[58] *Supra* note 41.

Indian Contract Act, need to be mechanically and blindly be imported into matrimonial law. The wife who has got impregnated by premarital sex with another, whether to her confirmed knowledge or not, and marries without confirmation of pregnancy is guilty of fraud in matrimonial law.[59] DNA testing may be allowed for vitiating fraud on the husband.

The legality of DNA testing [60] is that the Courts in India cannot order blood test as a matter of course; or for a roving inquiry or fishing. There must be a strong prima facie case and in that the husband must establish non-access in order to dispel the presumption. The consequences of ordering the blood test should not just have the effect of branding a child as a bastard and the mother as an unchaste woman. No one can be compelled to give sample of blood for analysis except for in exceptional cases under the due procedure anticipated under the law. The accuracy and understanding of the DNA test involves: "All living beings are composed of cells which are the smallest and basic unit of life. An average human body has trillion of cells of different sizes. DNA (Deoxyribonucleic Acid), which is found in the chromosomes of the cells of living beings, is the blueprint of an individual. Human cells contain 46 chromosomes and those 46 chromosomes contain a total of six billion base pair in 46 duplex threads of DNA. DNA consists of four nitrogenous bases adenine, thymine, cytosine, guanine and phosphoric acid arranged in a regular structure. possible now, access/non-access as on such date/period has to When two unrelated people possessing the same DNA pattern have been compared, the chances of complete similarity are 1 in 30 billion to 300 billion. Given that the Earths population is about 5 billion, this test shall have accurate result."[61] As authentic and scientific evidence of the precise date/period when the child was begotten (i.e., the gestational age of the foetus) is forensically be specifically ascertained by Courts before choosing to draw the conclusive presumption under S. 112 of the Evidence Act.[62]

In the case of *Nandlal Wasudeo Badwaik*[63], the disputed paternity over a girl-child born in a wedlock where the husband's lack of proof for non-access was overlooked by ordering DNA testing twice where reports proved the non-biological paternity. The non access was proved by DNA testing. The liabilities of being a legitimate father were dispensed with based on the reports. The reasoning by the Court for a discourse in the usual non allowance of DNA

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[59] *Ibid.*

[60] *Supra* note 49.

[61] *Nandlal Wasudeo Badwaikv. Lata Nandlal Badwaik & Anr,* (Criminal Appeal No.24 Of2014, (@Special Leave Petition (Crl.) No.8852 Of 2008).

[62] *Supra* note 41.

[63] *Supra* note 61.

testing was given by suggesting that "Interest of justice is best served by ascertaining the truth and the Court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. In our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former. We must understand the distinction between a legal fiction and the presumption of a fact. Legal fiction assumes existence of a fact which may not really exist. However presumption of a fact depends on satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to be presumed. Section 112 of the Evidence Act does not create a legal fiction but provides for presumption."

Cases usually represent the father who is resisting parentage at the cost of bastardizing the child. In *Rohit Shekhar v. Narayan Dutt Tiwari & Anr.*[64], the child, who, on attaining adulthood, sought for a declaration to determine his parentage. The protective jurisdiction is disclaimed for want of legitimacy ordained by the law. The peculiarity in the case being that legitimacy of the child should not be jeopardized. The perception of the issue holds a differential peculiarity by the Court that, "with a comparable fact-situation where the offspring of parents, born during the subsistence of their marriage, sought a paternity declaration that another man (and not his mother's husband) was his father, is discernible." The clear establishment by the voluntary DNA testing of the legal father of proof of illegitimacy for demand of a valid biological paternity by DNA testing was sought by the son for redressal where applicability of Section 112 prima facie stood rebutted.

The best interests of the child is the standard considered for determination are premised on the love and care and the security to grow in a healthy atmosphere which appropriately meets the needs of the child in a given set of circumstances. It is the parentage which can ensure such a security and the Courts considers the importance of the role of each person residing in the family unit. The biological and psychological bonds are indispensible for the best interest of a child. The psychological bonds may extend to members of either the joint family or the extended help by parents under their care and upbringing which helps in the behavioral development. The evidentiary challenges for legitimacy and paternity ordained by the law perceives the best monetary, emotional attachments and social security in granting relief to the disputing fathers in the differential cases before the Courts.

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[64] 2012 (189) DLT 105.

VI

Conclusion

Family is a source of well being of individuals in the society and a marriage is a traditional manner of holding familial ties together. Constitutional protection is accorded to family relations where any interference by an external agency is frowned upon as an infringement of privacy. Paternity questions threatening family ties have to be treated with great care and caution by the Courts for determination of contested rights. Juxtaposed to this is the protection of the rights of the child not only from the public glare for stigmatization but also divesting monetary benefits coupled with a secure and healthy lifestyle for existence in the society. Determination of legitimacy or paternity comes at a cost which wisdom dictates should be by exercising all measures for protection of interest of the child. The statutory law forbids intrusion unless compelling reasons are shown and in those cases the most restrictive and least invasive means should be chosen to advance that purpose. The procedural protection is accorded only for fundamental liberty interest of undisputed familial ties and not when cases come under exceptional circumstantial clauses. Blood testing recourse should be the last endeavor envisaged for the innocent child who may be divested of the legitimate rights for his/her birth where challenged to be denied rights for a secure life.

ROLE OF INDIAN JUDICIARY IN THE PROTECTION OF RIGHTS OF DISABLED PERSON

*Neha Aneja**

Abstract

Over 21 million people in India are suffering from one or the other kind of disability. This is equivalent to 2.1% of the population. Among the total disabled in the country, 12.6 million are males and 9.3 million are females. However the Preamble of the Indian Constitution guarantees social justice and equality of status and opportunity to all the people of India still Persons with disabilities suffer enormous discrimination regarding access to education, employment and housing and in other spheres of life also. In order to provide equal opportunities to disabled persons for participating as productive citizen of country The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (Act 1 of 1996) was enacted. The Act simply requires the appropriate government to endeavor, ensure, and promote equality for people with disabilities. Judiciary in every country has an obligation and constitutional role to protect human rights of citizens and because of tremendous statutory recognition of rights of disabled persons the role of Indian Judiciary in enforcement of their rights has expanded remarkable in recent time. The judiciary must therefore adopt a creative and purposive approach in interpretation of fundamental rights of the disabled persons with a view to advancing human rights jurisprudence. The promotion and protection of rights of persons with disabilities depends upon the strong and independent judiciary. In the present paper the main study here would be to analyze the functional aspect of the judiciary and to examine how far the judiciary in India has achieved success in discharging the heavy responsibility of safeguarding the rights of persons with disabilities.

I

Introduction

Disability is an unfortunate part of human life which can affect not only the natural way of living but also despair component strength and power. Persons with disability are most disadvantaged Section of society as they suffer enormous discrimination regarding access to education, employment etc. They are unable to enjoy many of their rights due to prejudice against them and absence of legal provisions responding to their special demands. Around 10 per cent of the world's population, or 650 million people, live with a disability. According to the UN

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Development Programme (UNDP), Eighty per cent of persons with disabilities live in developing countries.[1] Census 2001 has revealed that over 21 million people in India are suffering from one or the other kind of disability. This is equivalent to 2.1% of the population. Among the total disabled in the country, 12.6 million are males and 9.3 million are females.[2] The stated objective of current disability law regime worldwide is to achieve equality between the disabled and the non-disabled. This involves the question of securing equality not only between the disabled and non-disabled, but also various categories of disabled people themselves.[3]

II

Rights of Disabled and International Perspectives

Prior to the drafting of the Disability Convention 2006, there was no International Treaty dealing specifically with the human rights issues of persons with disabilities. The equality clauses of three central human rights instruments of UN: The Universal Declaration of Human Rights (1948)[4], the International Covenant for Civil and Political Rights (1966)[5] and the International Covenant for Economic, Social and Cultural Rights (1966)[6], do not mention disability as a protected category .If disability is addressed as a human rights issue in these documents it is only in connection with social security and preventive health policy. In addition to these three universal treaties, the United Nations General Assembly has enacted four hard law treaties protecting people based on specific identity characteristics unrelated to disability - the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);[7] the Convention on the Elimination of All Forms of against Discrimination Women (CEDAW);[8]

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1 http://www.un.org/disabilities/default.asp?id=18 (visited on March 9,2014).

2 http://censusindia.gov.in/Census_And_You/disabled_population.aspx (visited on March 9, 2014).

3 Addlakha Renu, Mandal Saptarshi, "Disability Law in India: Paradigm Shift or Evolving Discourse?", *Economic and Political Weekly, 44(41&42),p63,2009.*

4 Universal Declaration of Human Rights,GA Res 217,UN DocA/810 at 71 (10 December 1948).

5 International Covenant on Civil and Political Rights, GA Res 2200A (XXI),21 UN GAOR Supp (no 16) at 52 , UN Doc A/6316(1966) ,999 UNTS 171 , (23 March 1976).

6 International Covenant on Economic , Social and Cultural Rights, GA Res 2200A UN GAOR, 21st Session , Supp No 16 at 49 UN Doc A/6316(16 December 1966).

7 International Convention on the Elimination of All Forms of Racial Discrimination, GA Res2106(XX),Annex,20 UN GAOR Supp (No 14) at 47, UN Doc A/6014 (1966),660 UNTS 195(4 January 1969).

8 Convention on the Elimination of All Forms of Discrimination Against Women GA Res34/ 180 34 UN GAOR Supp at 193, UN Doc A/34/46,(3 September 1981).

the Convention on the Rights of Child (CRC);[9] the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICPMW).[10] Among these treaties, only CRC contains a specific disability related Article; it requires that state parties recognize the rights of children with disabilities to enjoy "full and decent" lives and participate in their communities.[11]

It was only in December, 2006, the UN adopted Convention on the Rights of Persons with Disabilities[12] elaborating in detail the rights of persons with disabilities and setting out a Code of implementation. The International treaty is seen as marking a paradigm shift from charity based approach, which views persons with disability as "objects" of charity, medical treatment, and protection, to a rights-based approach of seeing them as "subject" capable of claiming their rights and making benefit of the new approach is that, the disability proclaimed to be a mainstream issue, and their status will be reflected in national assessment of development and poverty reduction strategies and corresponding international frameworks. The purpose of the convention is to promote, protect and ensure the full and equal enjoyment of all human rights by the persons with disabilities depending upon their needs and situations. It covers a number of key areas such as accessibility, personal mobility, rehabilitation and participation in political life etc. India ratified the UN convention on the rights of persons with disabilities (UNCRPD) in September, 2007. The CRPD came into force in May, 2008. In fulfillment of their obligations under the UN CRPD, state parties are required to bring their laws and policies in harmony with the convention. The CRPD also required that this process of amending the law should be undertaken in consultation with disabled people and their organizations.

III

Disability Rights under the Indian Legal System

The social responsibility of the State with the commitment and respect to protect and enforce the basic human rights of individuals lead to the incorporation of a charter of justifiable fundamental rights under Part III of the Constitution

[9] Convention on Rights of Child GA Res 444/25, Annex, 44 UN GAOR Supp(No 49) at 167 UN Doc A/44/49 (2 December 1990).

[10] The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, GA Res45/158, Annex,45 UN GAOR Supp(No49A) at 262, UN Doc A/45/49(1990),(1 July 2003).

[11] Convention on Rights of Child GA Res 444/25, Annex, 44 UN GAOR Supp(No 49) at 167 UN DocA/44/49((2 December 1990), Article 23.

[12] International Convention of Rights of Persons with Disabilities and its Option Protocol,UN GAOR, 61st Sess, Item. 67(b) ,UN Doc A/61/611 (6 December 2006).

of India. The principles of equality before law and equal protection of law guaranteed under the Constitution envisages a unique brand of equality of opportunity aimed at the creation of an egalitarian order in the society.[13] The provision of freedom from oppression, suppression and exploitation coupled with the right to life and personal liberty work together for achieving the goal of equal distribution of economic and social resources envisioned by the Constitution of India.[14] The Directive Principles of State Policy along with the charter of Fundamental Duties of the citizens underline the importance of preserving the individual liberty of people guaranteed by the constitution.[15]

The Constitution of India mandates the State to accord justice to all members of the society in all the facets of human activity[16]. The Preamble inter alia guarantees social justice and equality of status and opportunity to all the people of India. Articles 14 and 16 guarantees equality of opportunity to all the citizens of India. Article 38 requires the State to promote the welfare of people by securing a social order in which justice, social, economic and political, informs all institutions of the national life and to make efforts to eliminate inequalities in status, facilities and opportunities amongst individuals. The Constitution not only guarantees right to life and personal liberty but also directs the State through Article 41 to make effective provisions for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement.[17] Constitution of India, seventh schedule, list II, Entry 9 contains subheading "Relief of Disabled and Unemployable". The schemes of policies and procedures designed by the legislations along with the statutory authorities and bodies constituted have produced commendable result in the welfare and wellbeing of persons with disabilities. In 1992 the Parliament passed a law to regulate the training policies and programmes in the field of rehabilitation of persons with disabilities.

The Economic and Social Commission for Asian and Pacific Region convened a meeting at Beijing in December 1992 to launch the Asian and Pacific Decade of Disabled Person 1993-2002. In that meeting, the Proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region was adopted. India is a signatory to the said Proclamation. To give effect to the said Proclamation, The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (Act 1 of 1996) was enacted.

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[13] The Constitution of India1950, Articles 14,15and 16.

[14] Id.at Articles 19 and 21.

[15] Id.at Article 51-A.

[16] *Consumer Education and Research Centre* v. *Union of India* (1995) 3 SCC 42.

[17] Kumar B.S. Jag Javeen, "Rights and Equal Opportunities for People with Disabilities", *Andhra Law Times, 147(12),* p.33, 2007(june).

The PWD Act is the principal and comprehensive legislation concerning disabled persons. The Act has fourteen chapters dealing with various issues. It defines and classifies "disability" into seven categories, namely, blindness, low vision, leprosy-cured, hearing impairment, loco motor disability, mental retardation and mental illness.[18] For a person to avail of the rights and protection, he must have been certified by a "medical authority" as having at least 40% disability.[19] Provisions have been made in this Act for the prevention of disabilities[20], rehabilitation[21] and social security[22] of the disabled persons. It also contains provisions for providing aids and appliances to persons with disabilities by the appropriate Government[23]. Provision relating to education is contained in chapter V of the Act. The Act mentioned certain specific provisions to be made available for people with disability such as removal of architectural barriers in schools[24], structuring of curriculum for children with disabilities[25] or. The Act defines the responsibilities of Central and State Government with regard to the services for disabled persons. Chapter VI of PWD Act, 1995 imposes duty on the Government to identification and reservation of the post for persons with disabilities, and establishment of special employment exchange, employers were required to maintain records and the vacancies which are not filled up to carried forward. Further it has also provision for relaxation of age-limit in respect of government employment.[26] Section 33 of the Act confers special and preferential right on "Person with Disabilities" in government employment and inter alia provide 3 percent reservation of vacancies for person with disabilities, where 1% each is to be reserved for persons suffering from (1) blindness or low-vision, (2) hearing impairment and (3) loco motor disability or cerebral palsy. In so far as persons acquiring disability are concerned they are taken care of by enacting a provision like Section 47 of PWD Act. Section 47(1) mandates that no establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service. Further under Section 47(2) it has been laid down that no promotion shall be denied to a person merely on the ground of his disability. The Act also recommends to create a barrier free environment by removing all type of discrimination against persons with disabilities where they can share the development benefits which a normal persons enjoys[27]

[18] The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, Section 2(i).
[19] *Ibid.* Section 2(t).
[20] *Ibid.* Section 25.
[21] *Ibid.* Section 56.
[22] *Ibid.* Section 66.
[23] *Ibid.* Section 42.
[24] *Ibid.* Section 30(b).
[25] *Ibid.* Section 30(g).
[26] *Ibid.* Section 38(b).
[27] *Ibid.* Sections 44- 47.

India has ratified the UN convention on the rights of persons with disabilities (2006) in September; 2007. It came into force on 3rd May 2008 and makes it obligatory on the part of the government to synchronize laws or legal provisions with the terms of convention. Further in order to incorporate the significant provisions enshrined in the UNCRPD, 2006 in our national legal frame work Indian parliament has introduced a bill in 2014 in Rajya Sabha named as "The Rights of Persons with Disabilities Bill, 2014"

IV

Indian Judiciary and Rights of Persons with Disabilities

In every country judiciary has an obligation and constitutional role to protect human rights of citizens and because of tremendous statutory recognition of rights of disabled persons the role of Indian Judiciary in enforcement of their rights has expanded remarkable in recent time.

The stated objective of current disability law regime worldwide is to achieve equality between the disabled and the non-disabled. Notion of formal and substantive equality are deployed to this end. These two approaches differ in how they negotiate with the notion of "difference". The formal approach to equality is concerned with "equal treatment", i.e. likes must be treated alike and unlike must be treated differently. In other worlds, the task of the Courts when faced with whether the individuals/ groups in question are similarly situated question of equal/unequal treatment of two individuals or groups, is to find out or not. Any finding of "intelligible" difference precludes any further inquiry of equality.[28]

In the formal approach, "difference" justifies "differential treatment" even if it is unequal in effect. For instance, segregated educational facilities for disabled children would be immune from an equality challenge under the formal approach, since there is "objective" difference between disabled and non-disabled children. Substantive equality, on the other hand, focuses on actual impact of the law.[29]

Further, since ensuring substantive equality for disabled requires recognizing and accommodating the "difference", facilities such as ramps, accessible transport, disabled friendly lavatories in public buildings, and other infrastructural modifications become central to enforcement of equality. Faced with resources constraints, the Courts often restrict the availability of state assistance to only a few categories of disabled people. The focus of the judge

[28] *Supra* note 3.
[29] *Ibid.*

then is not on the existence of impairment but on the level of vulnerability and the actual need for support necessitated by the impairment. This involves the question of securing equality not only between the disabled and non-disabled, but also various categories of disabled people themselves. This once again indicates that the pursuit of equality is contingent upon how "difference" is construed by the law and judicial discourse.[30]

Indian judiciary has played a significant role in transforming and broadening concept of the human rights of the persons with disabilities. The Courts by adopting pragmatic and holistic approach have given useful shape to these rights. In fact, by its activist role it has made executive function in various spheres by awaking them from slumber.[31]

As process has been further sharpened with the advent of Public interest litigation. Actions in public interest have been filed when the ground level situations of a particular individual or groups is an infringement of Fundamental Rights guaranteed under the Constitution. These cases have been filed before the High Court or Supreme Court under Article 226 and 32 respectively for issuance of appropriate writ, order of Direction for remedying the derivation and upholding the rights of Persons with Disabilities. Some of new dimensions in regard of conflicting rights of persons with disabilities which have emerged from the judicial trends are as following:-

(i) Adjudicating Disability: Extended Meaning and Scope

In the case of *G Muthu* v. *Tamil Nandu State Transport Corporation*,[32] a bus driver was discharged from service, after a periodic health check-up revealed that he was colour-blind. He argued before the Madras High Court that his discharge was in violation of Section 47 of the PWD Act, which mandates accommodating the disabled employee in an alternative position with the same pay scale and service benefit as before. But colour blindness is not a condition categorized as disability under the Act, although low vision and blindness are in order to be eligible for claim protection under the Act, Muthu argued the definition clause of the Act begins with the phrase "Unless the context otherwise requires" which indicates the definition of disability under Section 2(i) is not an exhaustive one but an inclusive one, which could be expanded to include impairments not currently enumerated in the Act. Hence the protection of the Act could be extended to people with colour blindness as well .in this case Court interpreted the definition clause liberally and included the petitioner within

[30] *Ibid.*

[31] http://www.scribd.com/doc/62692613/ (visited on March 9, 2014)

[32] (2006) 4 MLJ1669.

the ambit of the Act. In this case it was established that the definition was not exhaustive, it paved the way for inclusion of other health conditions within the category of disability. What remained unexamined however was the basis on which conditions were included.

The Muthu judgment has been authoritatively relied upon by subsequent judgment delivered by the same High Court and by the Delhi High Court.[33] In *K Ganesan* v. *Metropolitan Transport Corporation*,[34] the petitioner had suffered heart attack. After recovery they approached High Court claiming protection under PWD Act. Relying on Muthu , it was held that the scope of the non-discrimination provision of the Act was broad enough to give protection to petitioners even though their heart ailment and resultant incapacity was not specifically enumerated as "disability" under Section 2(i) of PWD Act.

In addition to these judgments, various other high Courts have passed orders where they have directed the Government to include categories of impairments not currently included in the definition. The High Courts of Delhi[35] and Bombay[36] have ruled that persons with dyslexia (learning disability) are entitled to the protection under PWD Act, and the Andhra Pradesh High Court has directed the Government to include persons with short stature within category of "Orthopedically handicapped".[37]

Not all the petitioners claiming disabled status succeed in their cases in their case, though. In the *Harpal Singh* v. *Union of India*[38], the petitioner was a cancer patient who contended that in the absence of any financial and rehabilitation facilities given to poor cancer patients, the Court should direct the former to extend the facilities currently provided to the disabled as per the PWD Act, to those afflicted with cancer. The Delhi High Court refused to accept the argument on three grounds: one, the familiar argument that PWD Act dealt with "Permanent Disabilities" and not diseases, and cancer was a disease; two, that the petitioner had made a sweeping assertion that he was not able to carry out strenuous activities and had not specified the nature of disability by him on account of cancer; and three, the decision as to which conditions constituted disability was the mandate of the legislature and hence it was beyond the power of the Courts to comment on it.

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[33] *Union of India* v. *Suresh Kumar,* WP (Civil)No. 9443.

[34] (2008) 5 MLJ787.

[35] *Disabled Rights Groups* v. *Delhi University and Others,* WP(Civil) 10055/2004.

[36] *Vincy D Silva* v. *St Marys School and Others,* WP: 1744/2005.

[37] *Bogga Mallesh* v. *Commissioner, Disabled Welfare Department, Government of Andhra Pradesh,* WP: 22440/2004.

[38] 150(2008) DLT209.

Further, there are medical parameters defining each category of impairment. Such medicalised definition of disability is that a singular focus on impairment for the purpose of legal redressal, distracts attention from the social and structural barriers that prevent participation of disabled in society, the judgments discussed in this paper show how medical interpretations are deployed to buttress claims and counter-claims in disability adjudication. They also highlight the impact of such pervasive medical approach on the legal rights of disabled persons.

(ii) Right to Employment and Promotion

The International Covenant on Economic Social and Cultural Rights guarantees the right of everyone to enjoyment of just and favourable condition of work, which ensures adequate remuneration also.[39] Under this covenant everyone has the right to adequate standard of living for himself and his family, including the adequate food, clothing and housing. But in various cases this right is not at all being respected so far as the disabled persons are concerned. Therefore the PWD Act, 1995 confers special and preferential right on Persons with Disabilities. Under Section 33 of the Act confers special and preferential right on " Person with Disabilities" in government employment and inter alia provide 3 percent reservation of vacancies for person with disabilities. As per Section 33 if the vacancy cannot be filled up due to non-availability of suitable candidates with disability such vacancy shall be carried forward to succeeding recruitment year. But reality has shown that these provisions are not affected because of the general misconception among on disabled that persons with disabilities are not capable of doing any job properly. Therefore the role of Court in trying to change the mindset of people, and particularly, how far the employment right concerned is worth appreciating.

In *Jai Shankar Prasad* v. *State of Bihar*[40] On the question of appointments of the respondent Dr Shiva as a member of Public Service Commission, who was physically infirm (totally blind), at the time of appointment and as per Article 317(3) of the constitution such an appointment was illegal. The Supreme Court categorically held that blindness of the respondent does not disqualified him to be appointed as a member of commission "infirmity" means such inability which affects a person s capacity to perform his duty effectively but Dr Shivas qualification and Padmashree award for excellent work in teaching showed that he was an apt person to hold this post. In view of all this, the Court held that appointment of respondent was perfectly valid.

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[39] *Supra* note 6, Article 17.

[40] (1993) 2 SCC 597.

Again in *Nand Kumar Naryan Rao Ghodmore* v. *State of Maharashtra*[41] the Apex Court ordered for consideration of appellant who was colour blind to the Maharashtra Public Service Commission. The Apex Court thus observed out of total 35 posts in the Agriculture Department only 5 post require perfect vision without colour- blindness. For other 30 posts colour blindness was not impediments for the appointment of candidate.

The High Court of Delhi in the *Pushkar Singh* v. *University of Delhi*[42] issued direction to the Delhi University to implement its 1994 decision to reserve 3 percent of teaching posts for blind and orthopedically handicapped candidates.

In *Union of India & Anr.* v. *National Federation of the Blind & Ors*,[43] the question raised for determination was whether the reservation provided for the disabled persons under Section 33 of the PWD Act is dependent upon the identifications of posts as stipulated by Section 32 of the Act. It was held by the Court that reservation under Section 33 of the Act is not dependent on identification as urged on the behalf of Union of India, though a duty has been cast upon the appropriate government to make appointments in the number of post reserved for these categories mentioned in the Section 33 of the Act in respect of persons suffering from the disabilities spelt out there in. The scope of identification comes into picture only at the time of appointment of person in the post identified for disabled persons and it is not necessarily relevant at the time of computing 3% reservation under Section 33 of the Act.

Further, promotion shall not be denied to any person on the ground of his disability only as observed by the Apex Court in the cases of *Union of India* v. *Devendra Kumar Panth*[44] if the disability does not affect his capacity to discharge the higher functions of a promotional post.

(iii) Rights of Persons Acquiring Disabilities during Employment

In *Anand Bihari* v. *Rajasthan State Road Transport Corporation,*[45] workmen challenged the order of termination of service, since the corporation came to decision that workmens eye-sight was not of standard required to drive the buses. The Apex Court stretched its protective arms to workmen and held the corporation should give each of the retired benefits and in addition offer them any available alternative job which they are eligible to perform .it was further stated that in case no such alternative job was available, each workmen should be paid an additional compensatory amount along with retirements benefits. If

[41] (1995)6SCC720.
[42] 90 (2001) DLT 36.
[43] (2013) 10 SCC 722.
[44] AIR 2010 SC 1253.
[45] (1991)1SCC731.

the alternative job was become available at a later date, the corporation may offer it to the workmen provided they refund the proportionate compensatory amount the choice to accept one of the two reliefs options, if the corporation offered an alternative job would be of workmens. Thus, for the two reasons this judgment was significant, firstly, in the mood of apex Court, the concept of alternative appointments and reasonable accommodation was evident; secondly, it reflects true spirit of constitutional rights and guarantees the advancement of existing legal provisions as it preceded the disabilities Act by five years.

Further, the scope of Section 47 in general was considered by Apex Court in *Kunal Singh* v. *Union of India*[46] Section 47, of the PWDAct, 1995 deals with an employee, who is already in service and acquires a disability during his service. In this case, the Supreme Court adopted a very humane approach and remarked with anguish that "it must be remembered that a person does not acquire or suffer disability by choice. An employee who acquired disability during his service is sought to be protected under Section 47 of the Act specifically. Such an employee acquiring disability if not protected would not only suffer himself, but possibly all those who depend on him would also suffer.

Virender Kumar Gupta v. *Delhi Transport Corporation*,[47] is a paradigmatic case since a majority of the cases that have come up for adjudication before the Courts have similar fact situations, raise similar questions and the litigants make similar claims and counter-claims. Gupta had been working with the DTC as a bus conductor. As a result of an accident, he sustained injuries and was admitted to the All India Institute of Medical Sciences (AIIMS), in Delhi. On being discharged from hospital, he was given a medical certificate stating that he had recovered from his injuries, but was fit to undertake only a desk job. He rejoined work and sought to be assigned an appropriate desk job at the bus depot where he had been working. He was to be appeared before the medical board of the DTC and undergo another medical check-up. Subsequently he was retired prematurely based on the assessment of the board which found him medically unfit. The DTC argued before Court, that the Medical Officer of the DTC, and hence the order of premature retirement based on the report of Medical Officer was valid. The petitioner, on the other hand, contended that he had been certified as medically fit by a premier medical institute of the country, and it was the DTC which was disregarding its statutory duty under Section 47 of PWD Act. The Court decided the case in favour of the petitioner by applying the above mentioned provision of law, which mandates the employer to provide alternative

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[46] (2003) 4 SCC524.
[47] 2002(61) DRJ 355.

tasks to an employee who acquires disability during the employment and maintain the same pay scale and service benefits that he was receiving before the occurrence of the disability.

In *Dalco Engineering Private Ltd.* v. *Shree Satish Prabhakar Pandey*[48], on the question whether a private limited company is covered under the term "establishment" as defined under Section 2(k) of the PWD Act, 1995 for the benefit of Section 47. It was categorically held by the Court that PWDA, 1995 does not cover employment in the private sector.

(iv) Disability and Capability

The judiciary is one of the fertile sites where the disability- capability debate unfolds in interesting ways as seen in the following judgments. In *Government of NCT of Delhi* v. *Bharat Lal Meena*,[49] the respondent Bharat Lal meena had been appointed to the post of physical education teacher (PET) against the position reserved for disabled. After issuing appointment and posting orders to meena, the government detected that there had been a mistake in appointing a "physical handicapped" person to post of PET and issued show cause notice to latter, demanding why his service should not be terminated. Meena challenged the government order and the show-cause notice before the Administrative Tribunal, which ruled in his favour and quashed the government order. The government approached the Delhi High Court against the tribunals decision. On the question of the capability of the respondents to carry out the duties of a PET, the judges accepted their arguments and held that after acquiring the requisite degree, a person could not be told that he was not suitable for the job which he had been trained and certified. Once such persons had completed the course, it is to be presumed that they are physically fit and competent to perform their duties.

The right to equality of opportunity may be violated on the grounds of presumption of incompetence, a pre- judgment arising out of social prejudice rather than an objective assessment of the situation as illustrated in *Amita* v. *Union of India*,[50] Amita responded to an advertisement inviting applications for the post of the probationary officer (PO) in the Indian Overseas Bank, wherein she mentioned that since she was visually impaired ,she would require a scribe at the time of written exam. However, her application was rejected on the ground that blind candidates are not recruited for the post of PO. Amita challenged this decision of the bank before the Supreme Court as voilative of the fundamental

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[48] AIR 2010SC 1576.
[49] 100 (2002) DLT157(DB).
[50] (2005) 13 SCC721.

rights to equality and equal opportunity. Drawing on earlier judgments, the judges concluded that the denial of permission to sit and write the examination for selection of probationary officers is the violation of right under Article 14 and 16 of the Constitution.

This case had wider ramifications as it led to the long overdue revision of the list of job considered suitable for persons with different type of disabilities at various level of government service. In this regard, one of the posts identified as suitable for visually impaired persons was the post of Probationary Officer.

(v) Right to Barrier Free Environment

Disability legislation, including the Convention on the Rights of Persons with Disabilities, 2006[51], is premised on the fundamental idea that society creates the barriers and oppressive structures which impede the capacities of person with disabilities. Capability theorists are of opinion that there cannot be a different set of capacities or a different threshold of capabilities for persons with disabilities. This raises the critical issue of creating a level playing field with whereby all citizens to have equality of fair opportunities to enable them to realize their full potential and experience well-being.[52]

In *Javed Ali* v. *Union of India*,[53] the Supreme Court taking into consideration the true spirit and objective for which the PWDAct,1995 was enacted to create barrier free environment, to make special provisions for the integration of persons with disabilities into the social mainstream apart from the protection of rights, provision of medical care, education, training employment and rehabilitation which are some of the prime objectives of the Act. The Supreme Court bearing in mind the discomfort and harassment suffering by a person of loco motor disability would face while travelling by train particularly too far off places, issued direction to Indian Airlines to grant concessions in airfares to persons suffering from loco motor disability to the extent of 80%.

In *Deaf Employees Welfare Association* v. *Union of India*,[54] while discussing the important issue of eligibility of Deaf and Dumb Central and state government employees for transport allowance, a 2-judge bench of Honble K.S.Radhakrishnan and A.K.Sikri jj held that disability ,as envisaged under Section 2(a) of PWD Act, with respect to the hearing impaired person, is no less than the disability of a blind person. A further discrimination amongst them

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[51] *Supra* note 12.
[52] *Supra* note 45.
[53] AIR 1999 SC512.
[54] (2014) 3 SCC 173.

is clearly violation of Article 14 of the Constitution of India. The nature of disability may differ from person to person included in Section 2(i) of the Act, but all such persons have been categorized as a group of "Persons with Disabilities" and from a class by themselves under Section 2(i) read with Section 2(t) of the Act and the travel undertaken by the deaf and hearing impaired employees is equally arduous and burdensome as compared to persons having other disabilities referred to Section 2(i).

(vi) Right to Education

In the era of 21st century, the right to education has been considered to be one of the most valuable rights. In such situation it is very important to give adequate attention upon education. Section 26 of this Act enjoins upon authorities to ensure appropriate environment till child attains the age of 18 years. It is also to endeavor to promote the integration of student with disability in the normal school. Alongside this statutory emphasis, there is a social fact that normal school blatantly denies admission to persons with disabilities on the reasoning that lack of infrastructure and personnel to teach such student with disabilities, Acceptance of the above reasoning is thus a negation of statutory mandate and it is here that Courts have a crucial role to play. The Court possess the power to authoritatively direct school and government to fulfill the mandate of the Act and insure that inclusive education is provided both in form and substance[55].

In *Naveen Kumar* v. *University of Delhi*,[56] Kumar , a physically challenged person , using a wheelchair, was denied admission to the Bachelor of Engineering (BE) Computer Science Course, on account of his impairment . The petitioner had secured a rank of 5,016 out of 25,000 in the entrance test and hence was eligible for admission. In the Court, the respondent, the University of Delhi argued that Kumar was so "badly handicapped" that he would not be able to pursue the course in the light of his impairment. Instead it directed the medical officer (MO) of the university to examine him and find out whether his impairment would prevent him from pursuing the course. The MO was specifically directed to take the petitioner to the workshops and laboratory and observe, "That while working on machines, he would neither be endangering his own life and limbs nor in ordinary course his presence to pursue studies undertake the requirements of the course successfully, and that as a result, it would amount to unnecessarily blocking a seat, which could have otherwise benefited another "deserving" candidate. While the Court stressed the statutory obligation of Delhi University to pursue affirmative action and granted that the petitioner was entitled to be considered for the seats reserved for the disabled,

[55] *Supra* note 50.

[56] Writ Petition (civil) 4657/2000.

it refrained from commenting directly on the question of Kumars ability to would cause damage to the instruments and other apparatus in the laboratory and workshop". The judge disposed of the case, by directing the university to decide the question of admission on the basis of medical examination with in stipulated period of time.

This case illustrates one of the central criticisms against medicalisation of disability. The judge proceeded on the assumption that the "problem" rested in the impairments of the petitioner and then set to depute a medical authority to assess whether Kumar would be able to meet the demands of the course and whether his impairment would prevent him from accessing the laboratory, workshop etc. An alternative judicial course in this case would have been to direct the university to implement the provisions of PWDAct, 1995, which provides for changes in the curriculum and adaptations in the built environment to facilitate the exercise of rights by disabled. [57]

VI

Conclusion

The developments in judicial approach documented above make it clear that disability is indeed an evolving concept. Therefore judiciary should adopt a creative and purposive approach in interpretation of fundamental rights of the disabled persons with a view to advancing human rights jurisprudence.

While on the one hand a human rights discourse drives the law, its application in concrete cases brings to the surface tensions, emanating from the intersection of different conceptual categories that may not always be in the best interest of the individual petitioner or of the disabled in general. For instance, the overwhelming reliance on a medical definition of disability flies in the face of challenging the social dimensions of impairment itself. Medical knowledge is after all also situated knowledge not divorced from culture and society in which it is created[58].

While the text of the Act focuses on the "Causes" of the disabling condition for the purpose of legal protection, these judgments have gradually shifted the attention to the "effects" of the same. The focus on the disabling impact has resulted in the inclusion of a range of impairment groups and disabling conditions within the legal category of disability, thus rectifying the problem of narrow reach of PWD Act. But this is only one aspect of judicial approach. Although the judges draw upon diverse legal resources and deployed existing approaches

[57] *Supra* note 3 at 65.
[58] *Supra* note 3 at 68.

innovatively to support their decisions, but this is problematic for it does exactly what disability activists and scholars worldwide have resisted all along, that is, associating "disability" with health conditions commonly regarded as "illness". The disabled require separate legal protection as their marginal status in society is occasioned by a distinct set of oppressive social relations centering on normative notions of body, beauty, self-sufficiency, Productivity and so on. Including illnesses within the category of disability would require explicating the theoretical basis of such moves, which one does not find in these judgments. As far as the practical aspect of such judicial strategies is concerned, health conditions such as asthma, heart ailments, HIV, and so on, need not be treated as "disability" to provide legal relief to claimants. There is already a robust body of case laws that address unfair discrimination based on health status, which along with Article 21 of the Constitution provide sufficient legal protection to such claimants.[59]

While it seems logical and commonsensical that core issues of employment, education and access should dominate disability legislation in the early stages, there is no denying that a number of provisions of the extant legislation, such as social security and reservation in the private sector, also needs to be amended to make space for other core of life concerns such as health, sexuality and reproductive health, family life, old age in the context of disability. There is an enormous need for legal literacy on the issue of disability. It is ironic that even most literate persons with disabilities do not know about the various provision of PWD Act. But mere awareness generation is not enough. There is an urgent need to create mechanisms that assist clients to undertake the long and complicated process of litigation. Otherwise, the law will remain a paper tiger.[60]

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[59] Mandal Saptaeshi, "Adjudicating Disability :Some Emerging Questions", *Economic and Political Weekly, 45 (49),* p 24, 2010.

[60] *Supra* note 58.

THE ISSUE OF NATIONALITY OF SURROGATE CHILD: AN ANALYSIS

Harleen Kaur *

Abstract

The right to acquire nationality vests with every human who takes birth. This right, however, remains alien to children born through a surrogacy arrangement as their status with respect to parentage remains uncertain and which leads to an uncertain status of their nationality as well. A number of cases have arisen in the past and are still on the rise due to the commissioning parents being unable to establish 'their legal parenthood and their childs national identity, primarily due to restrictiveness of the Country of the commissioning parties with respect to the legality of surrogacy. This Article attempts to analyze the issue of nationality of the surrogate child which often becomes the bone of contention due to lack of International consensus on legality of surrogacy. With this objective, the author first provides an overview of the concept of surrogacy and its regulation and thereafter, the author examines the rights of a surrogate child in light of the Article 7 of Convention on the Rights of the Child, 1989 which provides that children have "the right to acquire nationality" and then some of the reported cases. Though individual disputes have met with some stop gap solutions like issuing emergency entry documents or by compelling administrative authorities to recognize birth certificates related to surrogacy arrangements that may run counter to their domestic public policies, however, the insufficiency and scantiness of such approaches is evident. Further, this Article envisages some of the provisions of Assisted Reproductive Technologies (Regulation) Bill, 2010 which aims to prevent the troubles faced by stateless surrogate children. The author concludes by suggesting an urgent need for a multilateral, legally binding instrument that would establish a global, coherent and ethical practice of international surrogacy since in the absence of international regulation issues of conflict of laws will continue to occur.

I

Introduction

Every child has rights, no matter who they are or where they live. Nearly every Government in the world has promised to protect, respect and fulfill these rights, yet they are still violated worldwide. In a welfare State like ours, it becomes the duty of respective governments to afford protection to the interests

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and rights of children. In fact, the protection and promotion of the interests and rights of children in India has been the paramount consideration in constitutionallaw[1] as well as under various social welfare legislations[2]. However, in case of a surrogacy arrangement, the main question which arises is how the interest and rights of surrogate children are to be best protected?

Surrogate children are often born with an uncertain status as to parentage and nationality. Matters are made worse by the fact that commissioning parents usually come from countries which ban surrogacy, whether commercial or otherwise. A number of cases have arisen as a result of commissioning parents being unable to establish their legal parenthood and their child's national identity primarily owing to restrictiveness of the Country of the commissioning parties with respect to the legality of surrogacy. The major challenge for authorities and Courts faced with international surrogacy cases is ensuring the welfare of children born via surrogacy while respecting their countries policies and laws on surrogacy.

II

Surrogacy: The Concept

Surrogacy as defined under the Draft Assisted Reproductive Technology (Regulation) Bill (ART) 2010, is an arrangement in which one woman (the surrogate mother) agrees to pregnancy through assisted reproductive technology in which neither of the gametes belong to her or her husband and the intention is to carry it to its term and hand over the child to the person or persons for whom she is acting as a surrogate.[3] In simple terms, Surrogacy may be defined as a method of reproduction whereby a woman agrees to become pregnant and deliver for the contracted party. This so happens because of infertility problems in couples due to which they are not able to conceive a child of their own and other reproductive technologies like artificial insemination and IVF fails. Such couples or single men or single women take the help of a surrogate mother who can carry the baby for them. Options in surrogacy are twofold: Traditional and Gestational. A traditional surrogate is a woman who donates her own egg and

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1 See Articles 14, 15, 23, 24, 47 and so many other Articles of Indian Constitution which seek to protect and promote interests and rights of children in India.

2 See, for e.g. Indian Wards Act 1890, Immoral Trafficking Prevention Act 1956. The Hindu Adoption and Maintenance Act 1956, Hindu Minority and Guardianship Act 1956, the Juvenile Justice (Care and *Protection*) Act (2000), The Commission for *Protection of Child* Rights *Act* 2005, The *Protection* of Children from Sexual Offences *Act*, 2012 are some of the laws which are worth mentioning in the area of protecting and promotion of the interest of children.

3 Assisted Reproductive Technology (Regulation) Bill 2010, Section 2(1).

then carries the pregnancy. Here the surrogate's egg is fertilized through artificial insemination with the sperm of the father or a sperm donor. A gestational surrogate, also known as a gestational carrier, is not biologically or genetically related to the child she carries. Gestational carriers become pregnant through the process of in vitro fertilization, where an embryo or embryos created from the eggs and sperm of the intended parents (or donor egg and donor sperm selected by the intended parents) are implanted in the uterus for the gestational period of 40 weeks. Intended parents and surrogates must also consider the type of surrogacy arrangement they are comfortable with. Commonly, there are two types of Arrangements: Commercial and Altruistic. An altruistic surrogate receives no financial reward while a commercial surrogate is compensated for her time and effort. However in both the cases, all expenses related to the pregnancy and birth, are paid by the intended parents. Surrogates can be amongst friends or relatives or acquaintances of the commissioning parents.

Surrogacy is one of the most expensive solutions to infertility and is an option that not every couple can afford. In a developed country, it is estimated that the entire cost of surrogacy including payment for a surrogate mother ranges between US$50,000 and $100,000. However, in developing nations such as India, these costs may be as low as ten percent of such costs. According to the 228th Report of the Law Commission of India, "Need for legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy[4]," the usual fee for surrogacy in India is Rs. 25,000/- to Rs. 30,000/-. This has made India a very sought after destination for foreign couples who look for a cost effective treatment for infertility and now a whole branch of medical tourism has flourished on this surrogate practice. The Indian reproductive tourism industry is now worth an estimate USD 500 million, with over 200,000 clinics operated around the country.[5] Anand, a small town in Gujarat has acquired a distinct reputation as a place for outsourcing commercial surrogacy[6].

III

Regulation of Surrogacy

Currently, there is no legislation governing surrogacy in India and neither any treaty nor convention at the international level in this regard has been signed. Countries differ in their positions regarding surrogacy and in the United States position varies amongst various states as well. In India, the legal validity of

[4] http://www.lawcommissionofindia.nic.in (visited on January 10, 2013).

[5] Anil Malhotra and Ranjit Malhotra, "*Surrogacy in India-A Law in the Making*" p30, 2013.

[6] Dr. M.Srinivas, "Assisted Reproductive Technology: *Legal Issues" Andhra Law Times, 166 (15),24-32p, 2010*

surrogacy was upheld in *Baby Manji Yamada case*[7]. In the absence of any law to govern surrogacy, the 2005 Indian Council for Medical Research Guidelines for Accreditation, Supervision and Regulation of Art Clinics in India are being applied. The major drawback of these guidelines is that being non-statutory in nature; they are not enforceable or justifiable in a Court of law. Thus, in the absence of any law governing surrogacy, surrogate parenting agreement shall be governed by general principles governing Indian Contract Act1872. Under Section 10 of the Contract Act, all agreements are contracts, if they are made by free consent of parties competent to contract, are for a lawful consideration, are with a lawful object, and are not expressly declared to be void. Therefore, if any surrogacy agreement satisfies these conditions, it is an enforceable contract. Since consideration is an important aspect for a valid contract, therefore, in a way, even commercial surrogacy gets legitimized. Thereafter, under Section 9 of the Code of Civil Procedure1908, it can be the subject of a civil suit before a civil Court to establish any issues relating to the surrogacy agreement and for a declaration/ injunction for the reliefs prayed for. Although India has never prohibited surrogacy but in recent years, India has increasingly recognized the need to regulate the industry given the number of problematic cases that continue to be reported with respect to cross border surrogacy arrangements where the childs citizenship and parentage status are un-defined. The Law Commission of India vide its 228th Report, dated 5.8.2009 has asserted that legislation to deal with issues of surrogacy be immediately brought into force. Currently The Assisted Reproductive Technologies (Regulation) Bill which was initially released in 2008, then subsequently revised in 2010[8], is the only guiding force. This Draft ART Bill aims to regulate legal and medical aspects of surrogacy by establishing a National Advisory Board and setting out guidelines for clinic accreditations.[9] It also outlines the rights and duties of surrogates and intended parents. In 2011, The Maharashtra ART Act 2011, was also introduced in the State and is still pending though the draft of the Bill has not been publically released[10].

IV

The Convention on the Rights of the Child

The Convention on the Rights of the Child, 1989 has been regarded as hugely influential and "The touchstone for childrens rights throughout the world." The Convention on the Rights of the Child is the most widely ratified human rights

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[7] *Baby Manji Yamada* v. *Union of India and Another (2008) 13 SCC 518.*

[8] Anil Malhotra, "Legalising Surrogacy Boon or Bane?", *Tribune (India) July 14, 2010.*

[9] The Assisted Reproductive Technologies (Regulation) Bill - 2010 [hereinafter Draft ART Bill].

[10] www.freepressjournal.in/news/38465-surrogates-may-get-respite-withbill-in-the-offing-experts.html (visited on January12, 2013).

treaty in history that sets out the civil, political, economic, social and cultural rights of every child, regardless of their race, religion or abilities. The most important consideration under this convention is the Best Interest of the child. Under the Convention on the Rights of the Child, it is contrary to the childs best interests to remain stateless and be separated from his or her family. The child shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. The State is required to ensure the implementation of these rights in accordance with its National Law.[11] The Convention on the Rights of the Child also imposes obligations on States to ensure family reunification in a positive, humane and expeditious manner.[12] .

As has been recognized by the United Nations Convention on the Rights of the Child, a child has a right to know and understand its history and identity. This is particularly relevant to children born of surrogacy given many of these children have anonymous donors as one or both genetic parents. This lack of medical and personal history will represent a loss to most children, which may be heightened in cases where the genetic donor shares a different ethnic background to the family in which the child is raised.

Since different countries have taken different legislative approaches with respect to commercial surrogacy arrangements combined with a lack of international regulations, a number of legal problems encroach upon the human rights of the often vulnerable surrogate mothers and the surrogate children. In fact many complicated social and legal questions arise from such arrangements such as:

1. Determination of the status and identity of the child in reference to "right to identity" as a right.
2. What will be regulatory mechanism to protect the child who goes to the foreign parents and is exposed to abuse later on?
3. What will be the emotional impact on the child if he reaches the age of 18 and the information is revealed to him that he is a surrogate child?, Does he have the same social re-integration or rehabilitation as normal biological children in society?

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[11] The Convention on the Rights of the Child 1989, Article 7.

[12] *Ibid,* Article10.

4. What will be the status of the child or redress machinery to the child if the parents get divorced before/after the birth of the child as it happened in the case of Manji? Or if a single parent made a contact for surrogacy and, unfortunately he/she died before/ after birth, what will be the emotional, psychological, educational and financial security of the child?

5. If, after the birth of the surrogate child, the parent gets a biological/normal child, the possibility of getting the same affection or care from the parents will be minimized to the surrogate child?

6. If the surrogate mother or the donor has some genetic disease that leaves a disability or chronic illness in the child which was not detected in the process of surrogacy, what will be the judicial status of the child? Or what shall be the Right of the abnormal or disable child born out of surrogacy and whom the responsibility will be laid?

7. Whether surrogacy will lead to human trafficking or not?

It is felt and experienced that the interests of surrogate children have not been shown any concern. They have been deprived from many rights and entitlements. There is an in-built bias against the surrogate child as the surrogate mother is constrained to underplay her bond with the growing baby from the beginning. Early separation of surrogate child from the surrogate mother cause immunological and psychological health problems to him. It is worthy to mention here that every child has a right to care, health and nutrition[13]. The Constitution of India, 1950 also incorporates the provisions ensuring right to health and nutrition of children. In commercial surrogacy, the surrogate mother has to hand over the child to the commissioning parents. This practice debars the newly born baby from the right to breast feeding which may lead to various medical problems in future in the baby. It may be relevant to mention here, breast milk is considered an ideal food for infants as it provides numerous benefits such as age-appropriate nutrition as well as immunological protection to them. The alternatives to breast milk are expensive and unsafe. But in surrogacy arrangements, the interest and welfare of the child are least considered. Links between commercial surrogacy and trafficking of children are not fanciful but are all too real. It has been widely reported that an Israeli man, previously convicted of sex offences against young children, has legally gained custody of a girl, through a surrogacy arrangement with an Indian surrogate[14]. The issue

[13] Article 47 of the Indian Constitution obligates the State to regard, as among its primary duties, the raising of the level of nutrition and the standard of living of its people and the improvement of public health. For details see, M.P. Jain, *"Indian Constitutional Law,* "1390 (5th ed. 2003).

[14] http://www.thejc.com/news/israel-news/108352/israeli-horror-sex-abuser-adopts-girl-4> (visited on January10,2013).

was brought to the attention of the Israel National Council for the Child (NCC), an NGO for childrens rights following an anonymous tip off[15].

V

Reported Problematic Cases

This part deals with some of the cases which have highlighted the need for enacting an effective legislation for dealing with the rights and interests of surrogate children.

In Baby Manji Case[16] a baby called Manji was born to an Indian surrogate mother and to commissioning parents belonging to Japan. The Japanese couple had used the husbands (Mr. Yamadas) sperm and an Indian donated egg to create the embryo. Shortly before Manjis birth, Mrs. and Mr. Yamada divorced each other and Mrs. Yamada made no claim to the baby. Following the directions of the Chief Registrar of the Anand Municipal Office Gujarat, a birth certificate was applied for and issued with only Mr. Yamadas name on it. Japanese authorities told Mr. Yamada that he would only be able to bring Manji to Japan by adopting Manji pursuant to both Japanese and Indian laws and obtain an Indian passport. While Mr. Yamada attempted to obtain the relevant documents to adopt Manji, an NGO called Satya, filed a petition before the Rajasthan High Court seeking to prevent Manji from being taken out of India. Satya challenged the legality of commercial surrogacy and accused the clinic where Manji was born of illegal trade in infants. It alleged that the absence of surrogacy law in India meant that no one could claim to be the parent of Manji, including Mr. Yamada.

The Rajasthan High Court required Manji to be brought to them within four weeks. In response, Mr. Yamadas mother filed a writ petition on Manjis behalf before the Supreme Court of India. The Supreme Court granted her temporary custody of Manji and in an order disposing of the case dated 29 september 2008, the Supreme Court stated that the Commission organized under the Protection of Children Act 2005 was the appropriate authority to hear the complaints of the type made by Satya and on that basis the Supreme Court disposed of Satyas proceedings in the Rajasthan High Court[17]. With respect to commercial surrogacy, the Court effectively validated the procedure in India:

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[15] Noam Barkan, "Convicted Paedophile Raises Surrogate Daughter" http://www.ynetnews.com/Articles/0,7340,L-4387303,00.html > (visited on January 10, 2013).

[16] *Baby Manji Yamada* v. *Union of India and Another* (2008)13 SCC 518.

[17] *Id.* at 524.

Commercial Surrogacy is legal in several countries including India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions. CommercialSurrogacy is sometimes referred to by the emotionally charged and potentially offensive terms wombs for rent, outsourced pregnancies or baby farms.[18]

After this judgment was pronounced, the Jaipur Passport Office gave special dispensation and issued Manji with a certificate of identity. Thereafter, the Japanese Embassy in New Delhi granted Manji a one-year Japanese visa on humanitarian grounds and Manjis grandmother was able to take her to Japan. However, this still did not resolve the question of her nationality. Japanese officials have suggested that Manji could become a naturalized Japanese citizen but it remains unclear what processes future intended parents from Japan would have to take to ensure that their surrogate child is recognized as a citizen. It did not take long for Indian Courts to be confronted with this issue again.

Another surrogacy case, this time involving German commissioning parents, has also reached the Indian Supreme Court[19]. A German couple, Mrs. and Mr. Balaz, commissioned a surrogate pregnancy in India using Mr. Balazs sperm and a donated egg. As a result, twins Nikolas and Leonard were born in India in 2008 but had to remain there for two years due to their statelessness. The twins were originally registered and issued with Indian birth certificates naming the Balazs as their parents. A legal battle ensued when the German authorities refused to recognize the birth certifications as establishing the parentage or German nationality of the stwins due to surrogacy being illegal in Germany. The Balazs turned to judicial procedures to seek Indian passports for the twins. A lower Court refused to recognize the children as Indian because they lacked an Indian parent. The authority that had issued the birth certificates then recalled them and replaced Mrs. Balaz with the Indian gestational surrogate as the childrens mother, while Mr. Balaz remained identified as the father. Passport authorities then allowed the application for two Indian passports.

However, the Indian Ministry of External Affairs ordered the Balazs to surrender their passports while the matter went before the High Court of Gujarat. The Court recognized the nationality of the children as Indian because they were born on Indian soil to an Indian mother, meaning gestational mothers were now recognized as legal mothers, despite birth certification practices undertaken in most surrogacy clinics to the contrary. Despite of Gujarat High Court order directing the passport authorities to release the twins passports, the

[18] *Id.* at 523.

[19] *Jan Balaz* v *Anand Municipality, No 3020, Special Civil Application(Gujarat* High Court 11 november, 2009).

regional passport office still refused to reissue the twins passports without consultation with the Union Home Ministry. Balaz approached the Gujarat High Court again, claiming that the passport office was in contempt of Court by not following the Gujarat High Courts order[20]. On the heels of notice issued by Gujarat High Court demanding an explanation of why contempt of Court proceedings should not be initiated against the passport office for not issuing passports, the Central Government challenged the Gujarat High Courts ruling at the supreme Court of India[21].

The India Apex Court finally considered the matter in December 2009 and upon coming face to face with the substantive issues, the SLP (C) was converted into a Civil Appeal for decision on legal issues. It urged Indian authorities to consider non-judicial avenues and suggested adoption as a possible solution. The Apex Court asked the Central Adoption Resource Agency [CARA] to consider one time exemption for balaz and lohole so that they could adopt the twins. CARA agreed but stated that this exemption would not serve as a precedent for future cases. Finally in May 2010, more than after two years of the birth of the twins, they were allowed to be adopted and Germany granted the twins the necessary travel documents to travel to Germany. The Supreme Court thereafter converted into a Civil Appeal to address the substantive issues raised in the case. The case is still pending adjudication[22].

Neither of the above two cases provide the Courts with an instructive framework for resolving future cases. In the absence of regulation or case precedent, it is unclear how future Courts in India would address cases of stateless surrogate children.

In *Goldberg Twins Case*[23] Mr. Goldberg and Mr. Angel, a gay couple from Israel, arranged a surrogacy in India using a donated egg and Mr. Goldbergs sperm. Israel allows surrogacy but does not allow gay couples to be parents under surrogacy arrangements. When Goldberg and Angels surrogacy resulted in the birth of twin boys, they found themselves stranded in India after the Jerusalem Family Court refused to allow a paternity test to initiate the process for gaining Israeli citizenship for the twins. The issue was debated in the Israeli Parliament and, with the support of Prime Minister Benjamin Netanyahu, the case was appealed to the Jerusalem District Court where it was accepted that it

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[20] *Ibid.*

[21] 'HC Seeks Explanation From Passport Officer For Contempt Of Court', *TheTimes of India, November.19, 2009.*

[22] *Union of India & ANR* v *Jan Balaj and Others,* Civil Appeal No8714of2010 Supreme Court of India.

[23] *Supra* note 5 at 32.

would be in the best interests of the children to allow the paternity test to go ahead. The DNA test confirmed that Mr. Goldberg was the boys biological father and so they were able to gain Israeli passports and travel to Israel after spending the first three months of their lives in India.

In *Volden Case* a single Norwegian woman spent over a year attempting to take twins born in India in 2009 to Norway, but encountered tremendous difficulties because the children were not Norwegian citizens and could not be issued Norwegian passports[24], the twins were born to a surrogate mother in India at the direction of the Norwegian single woman, who commissioned the pregnancy with the use of an Indian egg donor and a Scandinavian sperm donor.[25] Under Norwegian law, a woman who gives birth to the child is the childs mother.[26] According to the Norwegian authorities, he only way motherhood can be transferred in such a situation is through adoption.[27] After many months of negotiation, the Norwegian Government granted the twins a residence permit in Norway in April, 2011.[28] It was expected that the twins would obtain Norwegian citizenship after their legal adoption there.

Another reported case of twins born through surrogacy arose in connection with a Canadian couple who commissioned a surrogate pregnancy in India using the husband s sperm and a donated egg[29]. Twins, a boy and a girl, were born in 2006 and the couple applied for proof of Canadian citizenship at the Canadian High Commission in New Delhi. Surrogate children are usually granted Canadian citizenship so long as the child has a genetic link to one Canadian parent.DNA tests confirmed the couples baby girl was the genetic daughter of the commissioning father, however the baby boy was not, either due to medical error or to fraud[30]. There were no policies in place for the Canadian authorities

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[24] Norsk Kvinne I India Med Tvillinggutter FodtAVsurrogatmor. Ministry of Children, Equality and Social Inclusion (9 april2010), at www.regjeringen.no/nb/deb/bld/aktuelt/nyheter/2010/Norsk-Kvinne-i-India-med-twinggutter-fodt-av-surrogatmor.html?id=600042 (visited on January 10, 2013).

[25] S Deb Roy, "Norwegian Stuck in limbo with Twins Not Genetically Her Own" . *The Times of India,* July 21, 2010.

[26] *Ibid.*

[27] *Ibid.*

[28] MVikas and LM Glomes," Volden-Tvillingene Kommne Til Norge VGNett (oslo,15 April, 2011), http://www.vg.no/nyheter/innenriks/surrogati-debatten/lar-volden-tvillingene-komme-til-norge/a/10084386, / (visited on January 10, 2013).

[29] R Aulakh"Baby Quests Traps Couple in India", the Star.com (Toronto, 21 December 2010), at<www. the star.com/news/Article/910085-baby-quest-traps-couple-in-india>, (visited on January 10, 2013).

[30] *Ibid.*

to deal with such a situation so the family had to stay in India until 2011, eventually the Canadian government granted the non-biological child an entry visa, and couple planned to file an application for Canadian citizenship for the non-biological child based on humanitarian and compassionate grounds[31].

VI

The Assisted Reproductive Technologies (Regulation) Bill, 2010

In the light of various cases concerning the parentage and citizenship of children born through surrogacy the Indian Draft ART Bill[32] contains relatively extensive provisions on those matters. It spells out that:

(1) A child born to a married couple through the use of assisted reproductive technology shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both spouses, and shall have identical legal rights as a legitimate child born through sexual intercourse[33].

(2) A child born to an unmarried couple through the use of assisted reproductive technology, with the consent of both the parties, shall be the legitimate child of both parties[34].

(3) In the case of a single woman the child will be the legitimate child of the woman, and in the case of a single man the child will be the legitimate child of the man[35].

(4) In case a married or unmarried couple separates or gets divorced, as the case may be, after both parties consented to the assisted reproductive technology treatment but before the child is born, the child shall be the legitimate child of the couple[36]. The birth certificate of a child born through the use of assisted reproductive technology shall contain the name or names of the commissioning parties as the child parents.[37]

A foreigner or foreign couple not resident in India, or a non-resident Indian individual or couple, seeking surrogacy in India shall appoint a local guardian who will be legally responsible for taking care of the surrogate child during and

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[31] R Aulakh "Couple Fights Surrogacy Policy to Bring Their Boy Back to Canada", the Star.com (Toronto, 20 August 2011),at<www.the star.com/news/Article/910085-baby-quest-traps-couple-in-india>, (visited on March 6,2013).

[32] *Supra* note 9.

[33] *Supra* note 3, Section 3.

[34] *Ibid,* Section 35(1).

[35] *Ibid,* Section 35(2).

[36] *Ibid,* Section 35(4).

[37] *Ibid,* Section 34(10) and Section 35(7).

after pregnancy as per clause 34.2, till the child / children are delivered to the foreigner or foreign couple or the local guardian. Further, the party seeking the surrogacy must ensure and establish to the assisted reproductive technologyclinic through proper documentation, ie, a letter from either the embassy of the Country in India or from the foreign ministry of the Country, clearly and unambiguously stating that (a) the country permits surrogacy, and (b) the child born through surrogacy in India, will be permitted entry in the Country as a biological child of the commissioning Couple/individual) that the party would be able to take the child / children born through surrogacy, including where the embryo was a consequence of donation of an oocyte or sperm, outside of India to the country of the partys origin or residence as the case may be. If the foreign party seeking surrogacy fails to take delivery of the child born to the surrogate mother commissioned by the foreign party, the local guardian shall be legally obliged to take delivery of the child and be free to hand the child over to an adoption agency, if the commissioned party or their legal representative fails to claim the child within one months of the birth of the child During the transition period, the local guardian shall be responsible for the well-being of the child. In case of adoption or the legal guardian having to bring up the child, the child will be given Indian citizenship[38]. The person or persons who have availed of the services of a surrogate mother shall be legally bound to accept the custody of the child / children irrespective of any abnormality they may have and the refusal to do so shall constitute an offence under this Act.[39]

While the Draft ART Bill 2010 languishes in Parliament, the Indian Ministry of Home Affairs on July 9, 2012 issued new visa regulations for those who travel to India for surrogacy arrangements and declared that an appropriate visa category for Intended Parents for traveling to India for surrogacy is Medical Surrogacy visa and such visa would be granted subject to the fulfillment of the following conditions[40]:

(a) The foreign man and the woman are duly married and the marriage should have sustained at least for two years;

(b) A letter from the Embassy of the foreign country in India or the Foreign Ministry of the country should be enclosed with the Medical Surrogacy VISA application stating clearly that (a) the country recognizes surrogacy and (b) the child/children to be born to the commissioning couple through the Indian surrogate mother will be permitted entry into their country as a biological child/children of the couple commissioning surrogacy;

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[38] *Ibid,* Section 34(19).

[39] *Ibid,* Section 34(11).

[40] http://www.indianembassy.ru/index.php/en/133-consular-services/975-guidelines-regarding-foreign-nationals-intending-to-visit-india-for-commissioning-surrogacy (visited on January12, 2013).

(c) The couple will furnish an undertaking that they would take care of the child/children born through surrogacy;

(d) The treatment should be done only at one of the registered ART clinics recognized by ICMR (The list of such clinics will be shared with MEA from time to time); and,

(e) The couple should produce a duly notarized agreement between the applicant couple and the prospective Indian surrogate mother.

2. If any of the above conditions are not fulfilled, the surrogacy visa application shall be rejected.

3. Before the grant of visa, the foreign couple need to be told that before leaving India for their return journey, exit permission from the FRRO/FRO would be required. Before granting exit, the FRRO/ FRO will see whether the foreign couple is carrying a certificate from the ART clinic concerned regarding the fact that the child/ children have been duly taken custody of by the foreigner and that the liabilities towards the Indian surrogate mother have been fully discharged as per the agreement. A copy of the birth certificate(s) of the surrogate child/ children will be retained by the FRRO/ FRO along with photocopies of the passport and visa of the foreign parents.

4. It may be noted that for drawing up and executing the agreement cited at Para 1 (v) above, the foreign couple can be permitted to visit India on a reconnaissance trip on Tourist Visa, but no samples may be given to any clinic during such preliminary visit.

Clearly, as of now, single parent, gay couples and unmarried partners cannot commission surrogacy arrangements in India which till recently was permissible. Since the ART Bill 2010, is not in the harmony with the conditions stipulated by the Government of India in its latest Medical Visa Regulations 2012, either the Bill have to be suitably amended to incorporate the said Medical Visa Regulations or in the alternative, the Visa Regulations will requires changes. However on 5 February, 2013 a limited relaxation in such matters has been permitted on a case to case basis by Ministry of Home Affairs only in respect of cases where the surrogacy had already been commissioned and the children due to born or has been born in the year 2013.

VII

Need for International Regulation

Although India is taking steps to regulate surrogacy, surrogacy is increasingly a global issue. It is insufficient to demand regulation in any single nation. There

is an urgent need for a multilateral, legally binding instrument that would establish a global, coherent and ethical practice of international surrogacy."[41] In April 2010, the Council on General Affairs and the Policy of the Hague Conference on Private International Law "acknowledged the complex issues of private international law and child protection arising from the growth in cross-border surrogacy arrangements" and invited the Permanent Bureau, the secretariat of the Hague Conference responsible for researching issues undertaken by the Conference to generate a report on the matter. Preliminary reports were produced in March 2011 and March 2012, and it is expected that a full report will be produced in 2014[42]. While an international convention on surrogacy would likely reduce instances of conflict of laws, it would not completely eliminate instances of children being born stateless as a result of an illegal surrogacy arrangement as International Convention would only govern the processes of a cross-border surrogacy arrangement between parties to the convention. Eighty-nine nations are parties to The Hague Adoption Convention.[43]. The Stateless surrogate children may still be born in states that are not parties to the proposed international convention on surrogacy. Even assuming that all nations become a party to a surrogacy convention, it remains an open question whether the child could obtain the nationality of the intended parents if the intended parents made surrogacy arrangements in contravention of the convention. However, in the absence of international regulation, issues of conflict of laws will continue to occur.

VIII

Conclusion

In view of the above discussion, it is visible that till the time there is no settled position regarding surrogacy in private international law, the issues concerning a childs legal parentage and his/her citizenship status would continue to crop up and, therefore, such issues need to be settled at the earliest and in accordance with the principles articulated by the Convention on the Rights of Child. As a matter of precaution, therefore, such children should remain with

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[41] Katarina Trimmings & Paul Beaumont, "International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level ", *7 J. PRIVATE INTL L. 627, 633 (2011).*

[42] Hague Conference on Private International Law,"Council on General Affairs and Policy of the Conference (17-20 April 2012):conclusions and recommendations adopted by the Council; para 21,available at <www.hcch.net/upload/wop/gap2012concl_en.2012pdf>, (visited on March 6, 2014).

[43] 170 Convention Countries, U.S. DEPT OF STATE, http://adoption.state.gov/hague_convention /countries .php (visited on January 23, 2014).

the commissioning parents while his or her legal status is being resolved and in a situation where the parents are financially or legally incapable of remaining in the country where the child was born, the receiving country should issue an emergency travel certificate to permit the child an entry into that country in order to ensure that the child does not get forcibly separated from the parents. This was exactly the approach that was ultimately adopted by the Japanese government in the *Baby Manji case* analyzed, where a humanitarian visa was granted to authorize Manji to travel to Japan. Not recognizing the citizenship rights of such surrogate children and their parentage would imply leaving such children in an indeterminate state as well as severing their connections from their parents who will otherwise have love and the want to foster them.

DEPOSITION OF CHILD WITNESS WITH SPECIAL REFERENCE TO VENKATESHWARLU CASE

*Anju Sinha**

Abstract

Witnesses and document are the chief sources of evidence. A witness is a person who gives testimony or evidence before any Court. The ordinary meaning of the word "witness" is a person who is present at some event and is able to give information about it. Children are the most vulnerable of all witnesses. Several factors influence childrens memory capacity, including the childs age, psychological development and intellectual ability, the complexity of the event, their familiarity with the event and the delay between the event and the time at which the event is recalled. There is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the Court, his deposition does not require any corroboration whatsoever. In spite of having clear guidelines on this point the in K. Venkateshwarlu v/s State of Andhra Pradesh, VI(2012)SLT 321, the High Courts judgement holding accused guilty of rape was struck down by the Supreme Court on the ground that child witnesses were at police station for considerable period before they were brought to the Court and narration made by them suggest tutoring by police. This Article attempts to analyze the concept and credibility of child witness on the basis of law and judicial pronouncements.

I

Introduction

In *K. Venkateshwarlu* v. *State of Andhra Pradesh*[1] a two judge Division Bench[2] judgement has thrown open an important question of appreciation of evidence related to child witness as per Indian Law of Evidence. In brief, the facts of the case[3] are that a complaint was filed by prosecution against the accused, who was working as police constable, under Indian Penal Code, 1860[4]

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1 *K.Venkateshwarlu* v. *State of Andhra Pradesh,* VI(2012)SLT 321.

2 *Aftab Alam and Ranjana P. Desai,* JJ.

3 *Supra* note 1, page 322.

4 Section 375/376.

for committing rape on victim. The Trial Court acquitted the accused basically on the ground that victim and her mother did not speak anything about the rape; witnesses turned hostile and child witness were kept by police in the police station prior to giving evidence, therefore, their evidence cannot be relied upon, benefit of doubt was given to accused.[5] An appeal was filed by the State of Andhra Pradesh to the High Court. The High Court came to a conclusion that there was no appreciation of evidence at all by the Trial Court. The High Court re appreciated the evidence and recorded a finding that the prosecution has proved its case beyond reasonable doubt. The High Court set aside the Trial Court s order and convicted the accused[6]

Against the order of the High Court an appeal was filed before the Supreme Court. The Supreme Court was of the opinion that the High Court has to bear in mind that presumption of innocence of an accused is strengthened by his acquittal and unless there are strong and compelling circumstances which rebut that presumption and conclusively establish the guilt of the accused, the order of acquittal cannot be set aside. Crime may be heinous, morally repulsive and extremely shocking but moral considerations cannot be a substitute for legal evidence and the accused cannot be convicted on moral considerations.[7] The Supreme Court analyzed the evidence produced before it and set aside the conviction order of High Court. Before highlighting the merits and demerits of the Supreme Court judgment, it is imperative to discuss the legal position of child witness under Indian Evidence Act 1872[8] because several child witnesses have been relied upon in this case.

II

Child Witness: Concept

A witness is said to be competent when there is nothing in law to prevent him from appearing in Court and giving evidence. Whether a witness is competent, depends on his capacity to understand the question put to him and the capacity to give rational answers thereto. Competency to give evidence means that there is no legal bar against the person concerned to testify in a Court.[9] Under the Evidence Act[10] all persons are competent to testify unless they are incapable of giving evidence or understanding the questions put to

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5 *Supra* note 3.

6 *Ibid,* Andhra Pradesh High Court sentenced the accused to undergo rigorous imprisonment for a period of 7 years and also to pay fine of Rs 1000/-, in default, to suffer imprisonment for a period of one month.

7 *Supra* note 1, p 323.

8 Indian Evidence Act, 1872 (hereinafter referred as Evidence Act).

9 Debrati Dey,"Child", page 10 available at www.academia.edu/4528459 (visited on April 2, 2014).

10 *Supra* note 8, Section 118.

them because of tender years, extreme old age, disease or any other cause of same kind.[11] In deciding that whether a child is competent enough to give evidence, the Court must satisfy itself that the witness understands the questions, and ascertain in the best way it can, whether from the extent of his intellectual capacity and understanding he is able to give a rational account of what he has seen, heard or done on a particular occasion.[12]

If a person of tender age can satisfy the above mentioned requirements, his competency as a witness is established. However, utmost precaution is to be observed due to the presumption that the children could be easily tutored and therefore can be made a puppet in the hands of the elders. In this regard the law does not fix any particular age as to the competency of child witness or the age when they can be presumed to have attained the requisite degree of intelligence or knowledge. To determine the question of competency, the Courts, often undertake the test that whether from the intellectual capacity and understanding the child is able to give a rational and intelligent account of what he has seen or heard or done on a particular occasion.

Children are the most vulnerable of all witnesses. Several factors influence childrens memory capacity, including the childs age, psychological development and intellectual ability, the complexity of the event, their familiarity with the event and the delay between the event and the time at which the event is recalled. The intimidation of potential child witnesses by interviewers remains a problem, and it is possible that false suggestions might be implanted in a childs mind.[13] In this regard the law does not fix any particular age as to the competency of child witness or the age when they can be presumed to have attained the requisite degree of intelligence or knowledge. Although childrens evidence has historically been seen as weak, experimental studies have shown that when children are allowed to recall information "freely," or when information is elicited through the use of general questions, even very young children can give evidence that is as accurate as that given by adults.[14]

While examining the provisions of the Indian Oaths Act, 1873[15] and the Evidence Act,[16] it was held by the Supreme Court[17] that every witness is competent to depose unless the Court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason

[11] Batuk Lal, *The Law of Evidence*, 513, 2012.
[12] *Supra* note 9.
[13] *Id. at 11.*
[14] *Id. at 12.*
[15] *Section 5.*
[16] *Supra* note 8, *Section 118.*
[17] *Rameshwar S/o Kalyan Singh* v. *The State of Rajasthan*, AIR 1952 SC 54.

of tender age, extreme old age, disease whether of body or mind or any other cause of the same kind. Thus a person is always presumed to be competent to give evidence unless the Court considers otherwise.

A child as young as 5/6 years can depose evidence if he understands the questions and answers in a relevant and rational manner. The age is of no consequence, it is the mental faculties and understanding that matter in such cases. Their evidence, however, has to be scrutinized and caution has to be exercised as per each individual case. The Court has to satisfy itself that the evidence of a child is reliable and untainted. Any sign of tutoring will render the evidence questionable if the Court is satisfied, it may convict a person without looking for collaboration of the childs witness. It has been stated many a times that support of a childs evidence should be a rule of prudence and is very desirable.[18]

A child witness is a privileged witness and he may not have to take an oath. A girl of about ten years of age could give evidence of a murder in which she was an eye-witness as she could understand the questions and answer them frankly even though she was not able to understand the nature of oath.[19] The same principle has been applied in India too.[20] A child who is not administered oath due to his young years and is not required to give coherent or straight answers as a privileged witness can give evidence but this evidence should not be relied upon totally and completely.[21] Before the evidence of a child witness is being recorded, the Court must by preliminary examination test his capacity to understand and give rational answers and must form his opinion as to the competency of the witness. It is desirable that the Trial Court, which has a child witness before him, must preserve on the record some questions and answers given by the witness which would help the Court of Appeal to come to the conclusion whether the Trial Courts decision, in regard to the competency of child witness was right or erroneous. [22]

III

Credibility of Child Witness

All witnesses who testify in Court must be competent or able to testify at trial. In general, a witness is presumed to be competent. This presumption applies to child witnesses also. It is well known that the attitude of children to reality

[18] *Chagan Dam* v. *State of Gujrat* 1994 CRLJ 66 SC.

[19] *M Sugal v. The King 1945 48 BLR 138.*

[20] *Queen* v. *Sewa Bhogta 1874 14 BLR 294, Beng and Prakash Singh v. State of MP AIR1993 SC 65.*

[21] *Supra note 17.*

[22] *Supra* note 11, page 514-515.

and truth differs widely from that of adults and that, while some young childrenwill make fairly reliable witnesses, it is absurd to expect true testimony from others though older. The traditional view about child witness is reflected in the United States Supreme Courts 1895 decision[23] where the Court held that the 5-year-old son of a murder victim was properly qualified as a witness:

"That the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness, is clear. While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath."[24]

Children as witnesses generate unique concerns within the legal system because of their vulnerability, immaturity and impressionability. Courts and lawmakers increasingly have recognized these concerns and have attempted to adjust substantive, procedural and evidentiary rules to accommodate the special problem of child witness. So where the accused was convicted for the rape of an eight year old girl on the basis of statement made by the victim to her mother, on appeal the Sessions Court held that the evidence was sufficient enough to form the basis of a moral conviction, but was legally insufficient. When the matter reached to the High Court, it was held that no doubt the law requires corroboration but here this statement itself is legally admissible as corroboration. Later, the High Court granted leave to appeal and therefore the matter reached to Supreme Court, where it made observations with regard to the question of admissibility of the statement. The Assistant Sessions Judge certified that the child did not understand the sanctity of an oath. But there was nothing to show whether the child understood her duty to speak the truth. The Apex Court observed that the omission to administer an oath goes only to the credibility of the witness and not his competency.[25] Evidence Act [26]makes it very clear that there is always competency in fact unless the Court considers otherwise. It is desirable that the judge or magistrate should always record their opinion as to whether the child understands his duty to speak the truth and also to state that why they think that ,otherwise the credibility of the witness would be seriously

[23] *Wheeler* v. *United States*, 15 9 U.S. 523 (1895).

[24] *Ibid.*

[25] *Supra* note 17.

[26] *Supra* note 8, 1872.

affected, so much so, that in some cases it may be necessary to reject the evidence altogether. In the situations where the judge or the magistrate doesnt make any express statement as to this effect then inferences has to be collected from the circumstances of the case. In this case, the Assistant Sessions Judge omitted to administer the oath to the child as she could not understand its nature, but still continued to take her evidence, shows his intention to the fact that he was satisfied that the child understands her duty to speak the truth On the basis of the above observations the Supreme Court had affirmed the decision of the High Court.[27]

The Supreme Court has held[28], that if it appears from the version of teenaged children that it is so truthful that can be rightly believed then the arguments like children were tutored or had given the prosecution version parrot like and so on are not acceptable. Thus the competency of a child to give evidence is not regulated by the age but by the degree of understanding he appears to possess and no fixed rule can be laid down as to the credit that should be assigned to his testimony. The question depends upon a number of circumstances such as the possibility of tutoring the consistency of the evidence, how far it stood the test of cross examination and how far it fits in with the rest of evidence.

In the 1990's a trend emerged where the Courts started recording their opinions that child witnesses had understood their duty of telling the truth to lend credibility to any evidence collected thereof. The Supreme Court has also commended this practice. If the Court is satisfied, it may convict a person without looking for collaboration of the childs witness. It has been stated many a times that support of a childs evidence should be a rule of prudence and is very desirable.[29] Again the Apex Court while dealing with the evidence of a child witness observed that there was always scope to tutor the child, however, it cannot alone be a ground to come to the conclusion that the child witness must have been tutored. The Court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring.[30] Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness.[31]

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[27] *Supra* note 17.

[28] *Dalip Singh* v. *State Of Punjab,* AIR 1979 SC 117.

[29] *Supra* note 9, p 21.

[30] *Mangoo & Anr.*v. *State of Madhya Pradesh*,, AIR 1995 SC 959.

[31] *Ibid.*

The Supreme Court has held[32] that there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the Court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the Court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature. The 'burden of proving incompetence is on the party opposing the witness. The Court considered five factors when determining competency of a child witness. Absence of any of them renders the child incompetent to testify.[33] They are:

1. An understanding of the obligation to speak the truth on the witness stand;
2. The mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it;
3. A memory sufficient to retain an independent recollection of the occurrence;
4. The capacity to express in words his memory of the occurrence; and
5. The capacity to understand the questions about it

The Supreme Court has further examined the law relating to deposition by child witnesses.[34] While examining the law on the aspect, the Court has observed that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the Court and there is no embellishment or improvement therein, the Court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. However, an inference as to whether the child has been tutored or not, can be drawn from the contents of his deposition. The Supreme Court while analyzing a number of earlier judgments on the subject reiterated that where deposition of a child witness inspires confidence, the Court may rely upon his/her evidence

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[32] *State of Uttar Pradesh.* v. *Krishna Master & Ors.*, AIR 2010 SC 3071.
[33] *State* v. *Allen*, 70 Wn.2d 690, 424 P.2d 1021 (1967).
[34] *State of Madhya Pradesh.* v. *Ramesh & Anr.*, 2011 (3) SCALE 619.

even without any corroboration. The Supreme Court held that every witness is competent to depose unless the Court considers that he/she is prevented from understanding the question put to him or from giving rational answers by reason of tender age, extreme old age, disease It was held that evidence of a child must be evaluated more carefully with greater circumspection because a child is susceptible to be swayed by what others tell him. It was laid down that testimony of a child witness can be accepted even without any corroboration provided it inspires confidence.[35]

Thus where the Trial Court put a number of questions to the child witnesses to discern whether they were capable of understanding the questions and the sanctity to speak the truth. The Court was satisfied that they could understand the questions and gave rational answers and therefore, it proceeded to examine them. The testimony of these three child witnesses was held very much reliable and convincing and the Court did not find any reason to disbelieve the same.[36] In another case before scrutinizing the testimony of solitary eye witness to the incident, who was a child aged about ten years,[37] the Court analyzed the legal position concerning the testimony of a child witness and observed that Evidence Act[38] does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease- whether of mind, or any other cause of the same kind[39]. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto.

Now it is well accepted that child is a competent witness but by reason of his tender age he is the most vulnerable of all witnesses. The increased attention given to child witness has required the trial Court to carefully scrutinize whether the children are competent to give testimony. There are no rigid rules that address the competency of child witness to give testimony[40].Competency is determined on a case to case basis and Courts possess extremely broad discretion in making the determination. If substantial doubt exists regarding the ability of the child

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[35] *Ibid.*

[36] *Gianshree*v. State (Govt. Of Nct Of Delhi) CRL. A. 807/2010, decided on 3 April, 2014, available at www.indiankanoon.org/doc/37524502, (visited on March 12, 2014).

[37] *Jodhpal*v. State, CRL.A. 207/2000,decided on 4 March, 2014, available at www.indiakanoon.org/doc/16909747(visited on March 12, 2014).

[38] *Supra* note 8.

[39] *Supra* note10.

[40] *Blume* v. *State,* 729 P2d 664,668, (1990).

to perceive, remember, distinguish truth from falsehood, the Court shall conduct competency examination of the child.[41] A child is presumed to be a competent witness unless the Court finds otherwise and there is no minimum age below which a child is presumed to be incapable of testifying.[42] As with all witnesses the Court must determine that the child possesses significant cognitive capacity to observe the occurrence, to remember the subject matter about which the child is called upon to testify, to understand the examiners question, to frame intelligent response and to be conscious of the obligation to tell the truth.[43] When a child goes into the witness box the practice is for the judge to ask a few preliminary questions of a general nature to see if the child is capable of understanding questions, give rational answers, and has a rough idea of difference between truth and falsehood [44]

The evidence of child witness and the credibility therefore would depend upon the circumstances of each case. The only precaution which the Courts should bear in mind while assessing the child witness is that the witness must be reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored[45] "In the Indian Act there is no such provision and the evidence is made admissible whether corroborated or not. Once there is admissible evidence a Court can act upon it, corroboration, unless required by statute, goes only to the weight and value of the evidence. It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law."[46] Thus in the absence of any inherent defect the plea to reject the testimony of this child witness was denied by the Court[47] and the Bombay High Court while striking down the apprehensions in accepting the witness account of a child, in a case where the testimony of an eight-year-old has nailed his father who strangulated his mother, held that the child testimony is, "cogent and consistent", and "free from contradictions and omissions", and can be "safely relied on for awarding the conviction".[48]

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[41] *Ibid.*

[42] *Waltersv. McCormick,* 122F.3d 1172,1176(9th Cir.1997).

[43] *Commonwealth* v. *Hart,* 501 pa.174,177,460 A.2d 745,747(1983).

[44] Vepa P. Sarthi, *Law of Evidence*, 244, 2002.

[45] Dr. Manjula Batra revised Mr. Monir, *The Law of Evidence,* 410, 2010.

[46] *Mohamed Sugal Esa* v. *The King,* AIR 1946 PC 3.

[47] *Suryanarayana* v. *State Of Karnataka,* Appeal (crl.) 522 of 1999,decided on 3 January, 2000, available at www.indiankanoon.org/doc/868213 (visited on March 24, 2014).

[48] Mayura Janwalkar," Childs Testimony is Enough to Award Conviction: Bombay High Court " available at www.dnaindia.com (visited on April 25, 2014).

The decision on the question whether the child witness has sufficient intelligence primarily rests with the Trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the Trial Court may, however, be disturbed by the Higher Court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.[49]

Venkateshwarlu case[50] should not be treated as a good law on the subject of credibility of child witness. A careful perusal of this case reveals following basic reasons as to why it should not be accepted as a good law on the subject:

Firstly, the decision in this case is very disappointing in as much as it relates to appreciation of child witness. The Apex Court while dealing with the evidence of a child witness observed that there is always scope to tutor the child; however, it cannot alone be a ground to come to the conclusion that the child witness must have been tutored. The Court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring.[51] Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness.[52] But in the case in hand the testimony of child eye witnesses has been rejected on the ground that because they were kept in police station before coming to the Court, they were under pressure of the police and tutored by police[53]. Without examining the evidence and finding out the traces of tutoring/police pressure how the Apex Court can reject the testimony of child eye witnesses? It is unfortunate that the Court even did not try to evaluate the child testimony on its own from this view point.

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[49] *Nivrutti Pandurang Kokate & Orsv. State Of Maharashtra,* AIR 2008 SC 1460.

[50] *Supra* note 1.

[51] *Supra* note 33.

[52] *Supra* note 30.

[53] *Supra* note 1, p324.

Secondly, the decision proceeds on basic assumption of innocence of guilt and settled principles of criminal jurisprudence. The Court was of the opinion that it is safe and prudent to look for corroboration of child testimony but at the same time some relevant facts noticed by the Court, which could have been used for corroboration, were not considered by the Court. The Court itself said that" the demeanour of victim, the tears in her eyes, her walking out of the Court after looking at accused ,pricks the judicial conscience but conviction cannot be based on suspicion, conjectures and surmises."[54] If judicial conscience was picked by conduct of victim then why her conduct[55] was not considered as relevant for the purpose of corroborating the child witnesses?

Thirdly, it was even accepted by the Hon ble Court that accused is a police constable so needle of suspicion does point out to the accused because in a small village where the incident took place witnesses may be scared to depose against him.[56] If such doubt was created in the mind of the judge then, why the case was not considered from this view point moreover when the witnesses were turning hostile?

Fourthly, even if the witnesses turned hostile it was very much within the power of the Court not to discard the evidence of hostile witness because the law on this point is well settled that the evidence of hostile witness can be used to corroborate other reliable evidence if such reliable evidence exist on record[57]. Evidentiary value of hostile witness has been even accepted by the Supreme Court when it said that "it is settled law that evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version"[58], in fact the evidence of a hostile witness can be relied upon by the prosecution as well as by the defence.[59] Thus it is settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof.[60]

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[54] *Id at 324-325.*

[55] *Supra* note 8, Section 8-Conduct of a party is relevant.

[56] *Supra* note 1, p 324-325.

[57] *Mangi Lal* v *U.P. State* 1991,Cr.L J 916.

[58] *Koli Laxman Chana Bhai*v. *State of Gujrat* AIR 2000SC 210.

[59] *Ashok Kumar*v. *State*, CRL. APP. NO.351/1998,decided on March 14, 2014, *available at* www.indiankanoon.org/doc/73056938 (visited on April 10, 2014).

[60] *Rameshbhai Mohanbhai Koli*v. *State of Gujarat,* (2011) 11 SCC 111.

IV

Conclusion

In view of the above, it can be concluded that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the Court and there is no embellishment or improvement therein, the Court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition.[61]

Huge responsibility has been placed on the shoulders of judiciary and for the purpose of doing complete justice the power has been given to it to ask any question, in any form[62]. Unfortunately, *Venkateshwarlu case*[63] is an example of non utilization of this power by the Honble Court. It is not the law that if a witness is a child; his evidence shall be rejected, even if it is found reliable. The law is that the evidence of child witness must be evaluated more carefully and with great circumspection because a child is susceptible to be swayed away by what others tell them and thus a child witness is an easy prey to tutoring [64] Thus in *Venkateshwarlu case*[65], instead of mechanically setting aside the order of the High Court, the Supreme Court should have analyzed the entire evidence on record and if after perusal of entire record it would have appeared that it is not safe to rely upon uncorroborated testimony of children, then there was nothing wrong in rejecting the testimony but without even analyzing their testimony, without determining their competency, without looking for corroboration rather without considering the relevant material on record it was entirely unjustified to set aside the order of the High Court because when one talk about innocence of accused in criminal justice system, one should not forget that even victim has a right to get justice and the duty of the Court is to maintain a balance between the innocence of accused vis a vis rights of victim.

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[61] *State Of M.P v. Ramesh And Anr,* decided on 18 March, 2011, *available* at supreme Court of india.nic.in (visited on April 20,14).

[62] *Supra* note 8, Section 165- The judge may ,in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the party nor their agent shall be entitled to make any objection to any such question or answer ,not, without the leave of the Court to cross examine any witness upon any answer given in reply to any such question.

[63] *Supra* note 1.

[64] *Panchhi* v. *State of Uttar Pradesh,* AIR 1998 SC 2726.

[65] *Supra* note 1.

A QUEST FOR HOME OF FICTIONAL CHARACTERS: A VALIDATION FOR CHANGE IN COPYRIGHT PROTECTION

*Dr. Vandana Mahalwar**

Abstract

I shall speak facts; but some will say I deal in fiction.

- Ovid

The copyright law protects the EXPRESSION of ideas, rather than the IDEAS themselves. The distinction, however, between an idea and its expression is often quite elusive. Fictional characters, being variable and elusive, lack any protection under the copyright law, independently from the work in which they appear. They are protected by copyright law only within the context of the works in which they appear. The expansion of entertainment media has directly enhanced the commercial value of popular and recognizable characters. For instance, a popular fictional character that appears first in a literary work may later become the focus of producer of a cinematographic work. The issue of separate protection of character arises when that character is removed from the original work and is used in some other work without authors permission.

A character has tangible existence only in the specific words created by its author. These words, however, also create an image in the mind of the reader, an image which may be more vivid than life. An independent character, therefore, is difficult to define or grasp clearly, since no two minds will conceive of it imprecisely the same way. Characters such as Sherlock Holmes, Tarzan, Falstaff, Superman, James Bond, Peter Rabbit, the Bobbsey Twins, Nancy Drew and Travis McGee may be better known and more valuable than any particular work in which they appear.

Although fictional characters as expressions of the authors, have become an increasingly pervasive part of our daily lives, they still do not enjoy well defined legal protection against infringement. Their unique ability to serve the expressive functions justifies intellectual property protection to be granted under copyright law.

I

Introduction

Though the fictional characters have assumed a well-pervasive place in readers minds and lives, they still do not enjoy that clear legal protection

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against their infringement. Fictional characters, being variable and elusive, do not get any protection under the copyright law, independently from the work in which they appear. Sherlock Holmes, Tarzan, James Bond, Harry Potter: the mere names of these figures possess substantial market power and popularity among readers. Once a reader comes to be familiar with a character, he wants to spend more time with that character.[1] The reading about a character brings many of the same sensations and emotions as an actual social interaction with her in a readers real life would do.[2] Readers can come to know a character even more intensely than they can know a person, possibly because of narrative techniques that draw the readers to characters inner lives.[3]The fact that when a novel ends, readers are sorry to part with the characters, is evident of their deep attachments with their characters. Also, in that feeling of association, readers begin to compare themselves with their favorite character, imitate him, empathize with him, or imagine him in new stories.[4] Readers, who are authors as well, try to accommodate such characters in their own subsequent literary works.[5] Characters occupy a very unique place and emerge to lead lives in works beyond their original ones, as they can be removed from that work for the purposes of subsequently situating them in other works and this is the reason that characters become the subject of copyright litigation.

The question of separate protection of literary character arises when a character is taken from the original work and leads new and independent life in a new literary piece of work.[6] Characters, which remarkably stay in readers mind, are able to lead independent lives from the original work, even when the original story is forgotten by the readers. They are competent of being relocated from one story to the other and hence, can be easily affected by the copyright law.[7] If Author II reads a work by Author I and finds Author Is character, John, deeply compelling, nothing in the law of copyright would prevent him from naming his own original character John. Borrowing a name is not,

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1 Zahr K. Said, "Fixing Copyright In Characters: Literary Perspectives On A Legal Problem" 35 *Cardozo L. Rev. 769, 770 (2014).*

2 Annie Murphy Paul, "Your Brain on Fiction", *N.Y. Times,* at SR6, Mar. 18, 2012.

3 Rita Felski, *"Introduction",* 42 New Literary Hist., v-vi (2011).

4 Suzanne Keen, *"Readers Temperaments and Fictional Character"* 42 New Literary Hist. 295, 306 (2011).

5 Anupam Chander & Madhavi Sunder, "Everyones a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use" 95 *Calif. L. Rev. 597, 601-12 (2007).*

6 Jasmina Zecevic, "Distinctly Delineated Fictional Characters That Constitute The Story Being Told: Who Are They And Do They Deserve Independent Copyright Protection?" 8 *Vand. J. Ent. & Tech. L. 365 (2006).*

7 Leslie A. Kurtz, "Fictional Characters and Real People" *51 U. Louisville L. Rev. 438,* 441 (2013)

copyright.[8] If Author II were to borrow from Author I not simply the name, but many other details from the text including verbatim descriptions of the character, or many textual details by itself, infringing on an authors that embed the character, Author II would be infringing on the copyright of Author I.[9]

Fictional characters are protected by copyright law within the context of the works in which they appear.[10] On the whole, the literary work in which a character appears is copyrightable and that character is merely an element of such copyrighted work.[11] As the copyright law does not provide apposite protection to the fictional characters, the litigants and Courts often rely on some alternative standards to protect fictional characters.[12] When these alternative standards act to fill up the loopholes of copyright law, they are, at times, misinterpreted and variably applied by Courts. It is definite that there must exist an equilibrium between providing authors enough incentives to create noteworthy characters and leaving an adequate amount of raw material in the public domain upon which authors can work out.[13] Courts have attempted to formulate tests for providing protection to fictional characters.

This paper starts discussing the problems inherent to character protection through copyright. It then looks into the background of copyright law and how it treats the copyrightability of literary characters. Then it proceeds to elaborates the meaning of fictional characters, characterization and personality portrait, and demonstrates that the two tests presently used are not satisfactory tools for ascertaining when copyright law protects literary characters. It also argues that the tests created for determining when fictional characters merit protection are not of much help and the said standards have caused much confusion and ambiguity. After considering the dicta of various Courts and the consequential perplexity faced by it, the paper advocates for a change in the copyright law.

II

Current Copyright Protection for Fictional Character

Copyright law reflects a cautiously crafted bargain wherein the authors are conferred certain exclusive rights, for a certain period of time, to incentivize

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[8] *Andersonv. Stallone,* (C.D. Cal. Apr. 25,1989) WL 206431.

[9] *Ibid.*

[10] *Empire City Amusement Co.*v. *Wilton,* C.C.D. Mass. 1903 134 F. 132.

[11] Leslie A. Kurtz, "The Independent Legal Lives Of Fictional Characters" *Wis.L. Rev. 429*,430 (1986).

[12] Chafee, "Reflections on the Law of Copyright", *45 Colum. L. Rev. 503,* 514 (1945).

[13] Jasmina, *supra* note 6, at 367.

the creation of new works of authorship and adds to the public domain.[14] This bargain is founded upon the idea that the public benefits from the works ofauthors and presupposes that in the absence of public benefit, the grant of copyright protection would be unjustified. The aim of this protection is to provide incentives to authors to create works of art they might not create if they feared misappropriation of those works for profits by others.

The basic rationale of copyright law is to encourage creativity and the dissemination of creative works so that the public may also be benefitted from the labour of authors.[15] Copyright protection provides the authors with a legal mechanism to control the use and infringement of their creative work.[16] It allows the authors to shape the future of their creations, prevent exploitations and reap financial profits.[17] Authors possess the exclusive right to copy, perform, distribute or display their works, and to create what the law terms "derivative works." Derivative works are the subsequent works of authorship that are based on preexisting works or that incorporate characters or component parts from preexisting works.[18]

Copyright protection commences once a work is fixed in any tangible medium of expression. As the character does not have a "tangible existence," copyright law does not recognize nor protect the character outside the particular copyrighted work in which it appears.[19] When character details

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[14] *Rockford* Map Publishers v. Directory Serv. Co., (7th Cir. 1985) 768 F.2d 145, 148 ("The copyright laws are designed to provide creators incentives to produce new works. They permit people to collect the reward for their contributions.").

[15] Melville B. Nimmer and David Nimmer, *Nimmer on Copyright*, § 1.03[A] (1991).

[16] Sec.14(1)(a), Copyright Act, 1957 provides certain exclusive economic rights to the owner of copyright in order to control certain uses of the work, such as :
(i) to reproduce the work in any material form including the storing of it in any medium by electronic means;
(ii) to issue copies of the work to the public not being copies already in circulation;
(iii) to perform the work in public, or communicate it to the public;
(iv) to make any cinematographic film or sound recording in respect of the work;
(vi) to make any translation of the work;
(vii) to make any adaptation of the work;
(viii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in clauses (i) to (vi).

[17] Leslie *supra* note 11, at 437.

[18] *King Features Syndicate* v. *Fleischer,* (2d Cir. 1924) 299 F. 535 (contending that copy right protection extends to all copyrightable component parts of a work in which copyright subsists).

[19] Kenneth E. Spahn, "The Legal Protection of Fictional Characters" *9 U. Miami Ent. & Sports L. Rev. 331* (1992).

in any story are borrowed verbatim as part of the exact preexisting work, Courts do not need to dig up the issue of whether the characters are independently copyrightable.[20] This is because a subsequent work that is "substantially similar" to a preexisting work will be found to be infringing.

On the other hand, when a characters details from one work are used in the creation of an otherwise new work- such as an unauthorized sequel -the allegedly infringing work would fail the substantial similarity test for purposes of proving copying as the old and new works would look too different. It is usually then that Courts deal with the question of whether copyright subsists in the independent character, and has been contravened.[21] The only common element in the both the works is the character. The old character may be said to have assumed a life of her own in a new work.[22] Copying characters can hence act as the sole basis of an infringement claim, despite of whether anything else in an allegedly infringing work is substantially similar to a pre-existing work.[23]

Some scholars have made a clear distinction between these two kinds of infringement: copying and creative reuse.[24] The second kind of infringement alone i.e. reuse of characters by the creation of original derivative works, which is significant in its own right[25] and can generally be distinguished from mere copying quite effortlessly.[26]

Creative reuse plays a much more important role in character jurisprudence as compared to copying. If a second author copies a work completely, he will have copied characters along with the rest of the works defining traits. If a second author aims to make something fresh using the seeds of an earlier work, what he will do is lift the characters out of the earlier work and commence from that starting point.[27] The typical character infringement

[20] Melville B. Nimmer & David Nimmer, *Nimmer On Copyright* § 13.03[2] (2013). ("Where there is literal similarity. ... it is not necessary to determine the level of abstraction atwhich similarity ceases to consist of an expression of ideas, because literal similarity by definition is always a similarity as to the expression of ideas.")

[21] *Olson v. Nat'l Broad. Co.*, (1988) 855 F.2d 1446.

[22] Leslie *supra* note 11, at 432.

[23] Zahr *supra* note 1, at 777.

[24] Christopher Sprigman, "Copyright and the Rule of Reason", *7 J. On Telecomm. & High Tech. L. 317,* 323 (2009) (emphasized upon a distinction should be drawn between the verbatim copying and distribution of preexisting works, and the creation of derivative works based on those preexisting works.)

[25] Leslie *supra* note 11, at 473. ("Permitting authors to make productive use of an already existing character, for new artistic purposes, seems more important than allowing others to make copies of a work."

[26] *Ibid.*

[27] *Id.* at 440.

cases concentrate on creative reuse, rather than copying, as that is the situation in which independent protection may possibly exist.

III

Fictional Characters Defined

What does a fictional character mean? The dictionary provides "character" to mean: "the aggregate of features and traits that form the individual nature of some person or thing.... An account of the qualities or peculiarities of a person or thing".[28]

Kellman states a fictional character to be consisted of "one or more of three elements:

1. It can be an idea-a general concept;
2. It can be the expression or detailed development of an idea;
3. It can be a name."[29]

Brylawski, considering the intrinsic problem in permitting an idea to stand alone for the purpose of copyright, offered that a character "consists of two dissimilar parts: a name and a characterization or personality portrait."[30]

A character has tangible existence only in the specific words created by its author. These words also create an image in the mind of the reader or viewer, an image which may be more vivid than life. This mental image forms the basis for recognizing a character in new situations. It is only in this abstract form that a character can be said to have an independent existence. An independent character, therefore, is difficult to define or grasp clearly, since no two minds will conceive of it in precisely the same way.[31] These characters, removed from their original contexts, can take on lives of their own.[32] When a character is born, he acquires at once such an independence, even of his own author, that he can be imagined by everybody even in many Other Situations wher eht author never dreamed of placing him; so he acquires for himself a meaning which the author never thought of giving him.[33]

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[28] Websters Unabridged Dictionary 345 (2nd ed. 1998). ("character" can be defined as "a person represented in a drama, story, etc.")

[29] Leon Kellman, "The Legal Protection of Fictional Characters" *25 Brook. L. Rev. 3,* 6 (1958).

[30] E. Fulton Brylawski, "Protection of Characters-Sam Spade Revisited" *22 Bull. Copyright. Socity.* 78 (1974).

[31] Leslie *supra* note *11, at 431.*

[32] Leslie *supra* note 11, at 430-432.

[33] Luigi Pirandello, *Six Characters In Search Of An Author, In Naked Masks; Five Plays* 268 (Eric Bentley ed., 1952).

IV

Standards for the Character Copyrightability

The development of copyright protection for fictional characters has been perplexed with ambiguities and variabilities as Courts have struggled to fit fictional characters into the sphere of copyright law.[34] In part, as a response to this ambiguity, the copyright infringement analysis of fictional characters has come out into a two-part test. This test requires Courts to determine whether the character s expression is copyrightable; and, if it is, whether there is an infringement of this expression?[35]

Notwithstanding the difficulty innate in establishing independent legal protection for fictional characters, Courts have evolved two main tests for determining when a character is entitled to independent copyright protection.[36] The first test was named as the "distinctly delineated" test and the second test has been referred to as the "story being told" test.

(i). *The Distinct Delineation Standard*

The first prong of the copyright infringement inquiry, ascertaining whether a fictional character is a proper subject of copyright, has proven to be a considerable challenge for the Courts. One important standard for evaluating this issue, the distinct delineation standard, originated in the 1930 decision *Nichols v. Universal Pictures Corp.*[37] The plaintiff in that case was the author of the play Abies Irish Rose, which is about a Jewish boy marrying an Irish-Catholic girl.[38] The play involves a conflict which the couples union causes within their religious families, but ultimately has a happy ending. The plaintiff alleged that the defendants motion picture The Cohens and the Kelleys infringed upon her play.[39] The defendants movie is about a Jewish girl and an Irish-Catholic man who marry and the trouble that their marriage causes within their families.[40] The movie also ends happily with the families reconciling.[41]

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[34] Gregory S. Schienke , "The Spawn of Learned Hand-A Reexamination of Copyright Protection and Fictional Characters: How Distinctly Delineated Must the Story Be Told?" *9 Marq. Intell. Prop. L. Rev. 63* (2005).

[35] Melville, *supra* note 15, at § 2.12.

[36] Jasmina, *supra* note 6, at 365.

[37] (2d Cir. 1930) 45 F.2d 121.

[38] *Id.*at 120

[39] *Ibid.*

[40] *Ibid.*

[41] *Ibid.*

In analyzing the case, Judge Learned Hand established for the first time that a fictional character could be protected "quite independently of the plot".[42] Nevertheless, Judge Hand was careful to highlight the limited nature of copyright protection available to fictional characters, expressing:

"If Twelfth Night were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress. These would be no more than Shakespeare's ideas in the play, as little capable of monopoly as Einstein's Doctrine of Relativity, or Darwin's theory of the Origin of Species. It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly."[43]

Judge Hand was much concerned with establishing a copyright analysis for fictional characters which protected original expressions yet left the ideas embodied in characters to the public domain. The distinct delineation standard is an effort to strike this balance, resting upon the principle that "the more developed a character is, the more it embodies expression and less a general idea".[44] Judge Hand ultimately observed that the characters of Abies Irish Rose were not sufficiently delineated to merit the copyright protection.[45] As a result, the threshold of "distinct delineation" that would be needed to provide copyright protection to fictional characters in the future remained indeterminate. Courts since Nichols have widened a two-part test from Judge Hands discussion, which has become the standard employed in character infringement cases.[46] The distinctive delineation test set out in Nichols has become the de facto majority approach in copyrights character jurisprudence.[47] Nichols shaped independent copyright protection for characters, but limited the scope of such protection to rule out poorly developed characters.

This test of character delineation, evolved by Judge Hand places responsibility on the shoulders of the author with the duty of developing

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[42] *Id.* at 121.

[43] *Id.* at 122.

[44] Jasmina, *supra* note 6, at 370.

[45] Nichols, *supra* note 37, at 122.

[46] Gregory S. Schienke, "The Spawn of Learned Hand - A Reexamination of Copyright Protection and Fictional Characters: How Distinctly Delineated Must the Story Be Told?" *9 Marq. Intell. Prop. L. Rev. 63,* 68-69 (2005).

[47] Zahr, *supra* note 1, at 784.

the character distinctly within that specific writings.[48] The crux of JudgeHands test is that an inadequately developed character amounts merely to be an idea not securing any copyright protection.[49] Consequently, the price for developing a character so indistinctly is the unprotectability of the copyrightable characterization of the character.[50]

(ii) The Story Being Told Test

The test introduced by Judge Hand in Nichols did not result in any rigid rule regarding how much developed a character must be so as to be considered as copyrightable. In, 1954, the Ninth Circuit Court tried to make clear the mist left by Nichols in *Warner Bros. Pictures v. CBS* (the Sam Spade Case).[51] But, unluckily, the verdict could not clear the mist rather it made the situation more perplexed.

The question of copyrightability of a literary character in a work was entirely before the Court in Warner Bros. Pictures.[52] In this case, Dashiell Hammett, the author published a mystery novel titled as The Maltese Falcon.[53] The protagonist in the novel was a detective, Sam Spade. Dashiell Hammett gave Warner Brothers Pictures, Inc., the exclusive motion picture, radio and television rights *to* The Maltese Falcon.[54] Later, Hammett used The Maltese Falcon characters including Sam Spade in new tales and granted rights to CBS to produce a radio program based on series called as the "Adventures of Sam Spade".[55] This radio series featured Sam Spade and other characters from The Maltese Falcon also.[56] Warner Brothers brought an action against CBS on the basis that the contract with Hammett had granted to Warner Brothers the exclusive rights to employ the characters in The Maltese Falcon. Hammett asserted that the contract with Warner Brothers didnt grant any exclusive rights explicitly in the characters and that it was the tradition for the author to use their characters in the subsequent works.[57]

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[48] James L. Turner, James L. Turner, "Its a Bird, Its a Plane or Is It Public Domain?: Analysis of Copyright Protection Afforded Fictional Characters" *22 S. Tex.L.J. 341,* 346 (1982).

[49] *Olson* v. *NBC,* (9th Cir. 1988) 855 F.2d 1446, 1452-53

[50] E. Fulton Brylawski, " Protection Of Characters-Sam Spade Revisited" *22 Bull. Copyright Soc'y 77,* 86 (1974).

[51] (1955) 348 U.S.971 .

[52] *Id.* at 950.

[53] Leslie *supra* note 7, at 442.

[54] *Ibid.*

[55] *Ibid.*

[56] *Ibid.*

[57] *Id.* at 948-49.

After the examination of the facts, the Court contended that in absence of an explicit grant of rights to the characters in an agreement with Warner Brothers, any rights of characters of the authors original novel were not conveyed with the motion picture rights to The Maltese Falcon.[58] Therefore, since the character rights were not conveyed through the agreement, Warner Brothers did not possess any right to the characters.[59]

The Ninth Circuit decided that Congress intended the copyright legislation to incorporate characters within the sphere of protection.[60] However, the Court expressed that the Sam Spade character is merely a medium for narrating tale and hence was not entitled to protection by copyright. While stating so, the Court maintained that a literary character could be given protection by copyright law if " the character actually constitutes the story being told, but if the character is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright".[61] This test is called as the "story being told" test. The Sam Spade standard would lead to an outcome of excluding almost all characters from the purview of protection by copyright as it seems difficult to imagine the tale entirely free from a plot in which character comprises the whole composition. [62] Thus, even if Hammett assigns all the rights in copyright to Warner Brothers, he still can utilize the character in other stories. Court stated:

"The characters were vehicles for the story told, and the vehicles did not go with the sale of the story."[63]

The Court thus acknowledged the probability that the copyright in the work would protect the right to use the character in other stories. Though, the test it applied was too restrictive as compared to the Nichols standard. For instance, Sherlock Holmes or Tarzan can be regarded as sufficiently delineated for protection under Nichols, but not to constitute the story being told under Warners.[64] In fact, each one of them has appeared in a number of stories being told.[65]

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[58] *Id.*at 949.
[59] *Ibid.*
[60] *Id.* at 950.
[61] *Ibid.*
[62] Melville, *supra* note 15, § 2.12.
[63] Warner, *supra* note 51, at 950.
[64] Leslie *supra* note 7, at 441.
[65] Leslie *supra* note 11, at 454.

In fact, many Courts recognized and applied the Story Being Told Test to different literary cases,[66] a number of cases have accepted the test more in line with The Character Delineation Test of Nichols.[67] These Courts expressed that copyright protection can be given to a literary character only, when it attains a distinctive personality. [68] As per this reasoning, a character attains a distinct personality only when it has been delineated to such a degree that its actions are quite predictable.[69] Thus, when a character comes across a new situation, it can be anticipated to act in a way that is peculiar to that specific character.[70]

V

Shortcomings of the "Distinctly Delineated" and "Story Being Told" Tests

Independent copyright protection for characters hence necessitates that characters fulfill one of two main tests, either the "distinctive delineation test" or the "constitutes the story being told" test.[71] Some Courts applying both the tests produce confusion and unpredictability.

The law in this area is inconsistent, unsettled, and unclear.[72] Apart from these two formal tests Courts use to decide characters independent copyrightability, by considering numerous informal factors.[73]

As these two standards, the haphazard evolution of copyright protection for characters has concluded in uncertain and aesthetically non-neutral standards for protection. Courts regularly include elaborations of degree or actual additional factors as requirements for Copyrightability.[74] The "distinctly delineated" test is complex to apply for three major reasons: the test is ambiguous and asks judges to take on the role of literary critic; judges often

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[66] *Anderson*v. *Stallone,* (C.D. Cal. 1989) 11 U.S.P.Q.2d (BNA) 1161.

[67] *Burroughs* v. *Metro-Goldwyn-Mayer, Inc.,*(2d Cir. 1982) 683 F.2d 610 .

[68] *DC Comics* v. *Reel Fantasy, Inc.,* (2d Cir. 1982) 696 F.2d 24.

[69] Paul Goldstein, COPYRIGHT § 2.72, at 128 (1989).

[70] *Ibid.*

[71] *Warner Bros. Pictures, Inc.* v. *Columbia Broad. Sys., Inc.,* (9th Cir.1954) 216 F.2d 950; *Nichols* v. *Universal Pictures Corp.*, (2d Cir. 1930) 45 F.2d 121.

[72] E. Fulton Brylawski, "Protection of Characters-Sam Spade Revisited" 22 Bull. Copyright Socy U.S.A. 77 (1974) (naming character doctrine as "inconsistent, unclear, and quixotic")

[73] Under the "extrinsic test" for substantial similarity, Courts look at whether subsequent works use the character's name, mannerisms, physical likeness (whether verbally or graphically rendered), signature props or disguises, patterns of speech, and so on: The analysis is based on objective qualities discernible to experts if not always to the average reader/viewer.

[74] *Walt Disney Prods.* v. *Air Pirates,* (N.D. Cal. 1972) 345 F. Supp. 111 .

apply it erroneously, which leads to overprotection; and it does not essentially protect the most developed characters.[75] The "distinctly delineated" test elucidates that more- developed characters merit more protection.[76] Courts have not justified what exactly makes a character "distinctly delineated" enough to get protection. Judges are left to proceed as literary critics and decide ontheir own which fictional characters deserve protection and which lack sufficient development.[77]

The more confusion appeared in *Burroughs v. Metro-Goldwyn-Mayer Inc.*[78] In this case, Mr. Edgar Rice Burroughs, the author of the Tarzan novels, formed Edgar Rice Burroughs, Inc. (ERB) to control the copyrights in his novels. In 1931, Edgar Rice Burroughs, Inc. assigned Metro-Goldwyn-Mayer (MGM) the right to make use of the Tarzan character and other characters featured in certain Tarzan novels to produce a motion picture.[79] But, the MGM was supposed to write its own original screenplay, not based on any of Burroughs already existing novels, but was permitted to use any of the characters created by Burroughs in the past. One more limitation in the agreement was that Burroughs was allowed to review MGMs screenplay to decide whether its content infringed upon any of his own works.[80] MGM was permitted to remake the movie as frequently as it wanted, but each remake was to be founded significantly on the first MGM photoplay. Moreover, all the remakes were to be titled same.[81]

ERB sought an injunction preventing the production of MGMs 1981 remake of the movie, titled as Tarzan, the Ape Man. The District Court for the Southern District of New York did not prevent MGM as under the agreement, MGM was not granted any copyright interests in any of the authors novels. The agreement was restricted to the right to make use of characters only.[82] Hence, the agreement was not dependant on authors right, under the Copyright Act to cease the exclusive or non-exclusive grant of a transfer or license of the renewal copyright or any other right under it.[83] But, it did not indicate that the Tarzan characters could not be copyrighted. The Court evaded a direct encounter on that

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[75] Leslie *supra* note 11, at 459 .
[76] Melville, supra note 15.
[77] Jasmina, *supra* note 6, at 373.
[78] (2nd Cir. 1982) 683 F.2d 610.
[79] *Id.*at 614.
[80] *Id.* at 615.
[81] *Ibid.*
[82] *Burroughs* v. *Metro-Goldwyn-Meyer, Inc.*, (S.D.N.Y. 1980) 491 F. Supp. 1324.
[83] *Id.* at 1324.

issue by expressing that no matter whether the Tarzan characters featured in the authors works are copyrightable or not yet it is clear that agreement was not planned to grant MGM any copyright interest.[84] Hence, as there was no copyright interest was granted, the right to make use of the Tarzan characters was not terminable under the Copyright Act.[85]

Subsequently, both ERB and MGM moved for summary judgment on the matter of whether the agreement between ERB and MGM assigned any rights under copyright.[86] While discussing the copyrightability of the character of Tarzan, the Court pointed out that the copyright law protected the whole composition in whole. It is not assumed that the copyright law protects only the plot excluding all characters.[87]

One step ahead , the Court held that only well-developed characters can be protected by copyright.[88] The Court also took into account the delineation of the Tarzan character in the books and discovered Court declared:

that it was adequately developed to be protected by copyright. Thus, the "Since appropriation of a well-delineated copyrighted character would constitute contravention, it must be concluded that the grant by which one acquires the right to use that character comprises a right arising under copyright."[89]

However, the Court made a point that a copyright was not conveyed by the ERB-MGM agreement, rather, it was with Burroughs only. In fact, the agreement allowed Burroughs to assess any MGM Tarzan movie to decide whether there might be an infringement of his copyrights. Therefore, MGM was free to make its own movie founded on the Tarzan characters, but the copyright was to vest in Burroughs. As a result, Burroughs might have been able to enter into a contract with any other second film company, permitting the second company to produce its own movie based on the Tarzan characters, provided that the second company did not violate any original work created in MGMs movie i.e., the work created by MGM and not by Burroughs.[90] The Court contended that the copyright in the literary work covered the work in its entirety covering the characters.[91] The Court asserted:

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[84] *Ibid.*

[85] *Id.* at 1326.

[86] Burroughs, *supra* note 82, at 388.

[87] *Id.* at 391

[88] *Ibid.*

[89] *Ibid.*

[90] Stephen Clark, "Of Mice, Men, And Supermen: The Copyrightability Of Graphic And Literary Characters" *28 St. Louis U. L.J. 959,* 973 (1984)

[91] Burroughs, *supra* note 82, at 391. .

"It cannot be assumed that such a copyright denotes protection of only the plot, leaving the characters free for public exploitation for, as in the case of plays, the characters and sequence of incident are the substance. However, these are only well-developed characters which are subject to copyright protection."[92]

The Court contended that the character Tarzan was delineated in an adequate and distinctive way to be copyrightable and protected from infringement of the copyright in the work itself.[93] The Court provided following reasons in discovering sufficient delineation:

"Tarzan is an ape man. He is an individual closely in tune with the jungle environment, able to communicate with animals however able to experience human emotions, he is athletic, innocent, youthful, gentle and strong. He is Tarzan. . . The character Tarzan is copyrightable . . . ."[94]

The Courts ruling in Tarzan seems to enter into the sphere of idea rather than expression. The reasoning given by the Court is just a plain compilation of ideas for a stock character. The Court did not explain what a well delineated character is. The Tarzan character holds many qualities other than those expressed by the Court. The character Tarzan is adequately delineated to obtain copyright protection. However, the degree of delineation of the character goes beyond the plain reasons articulated by the Court in *Burroughs v. Metro-Goldwyn-Mayer, Inc.*[95] Courts have justified that the character must be distinctly delineated in such a way so as to be expression rather than idea so as to be protected by copyright.[96] Tarzan holds his delineation through his personality by means of the readers expectation of his acts.

All of the criticisms of the "distinctly delineated" test apply equally to the "story being told" test. The "story being told" test offers a distinction between a character that "constitutes the story being told" and one that is "only the chessman in the game of telling the story".[97] However, according

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[92] *Ibid.*

[93] *Ibid.*

[94] *Ibid.*

[95] Burroughs, *supra* note 82, at 388.

[96] *Sid & Marty Krofft Television Prods.* v. *McDonald's Corp.*, (9th Cir. 1977) 562 F.2d 1168.

[97] *Warner Bros. Pictures Inc.* v. *Columbia Broad. Sys.*, (9thCir. 1954) 216 F.2d 950

to one scholar. "what this distinction is supposed to mean, how any Court could conceivably use it to divide protected from unprotected characters, and what gives a federal judge the aesthetic credentials to draw this line, are matters on which Judge Stephens maintains a sphinx-like silence."[98] The result is that the test is applied inconsistently, alone, or in combination with the "distinctly delineated" test. However, whenever the test is applied, the outcome is unpredictable and confusing.[99]

VI

Conclusion

Intellectual Property protection provided to fictional characters has been puzzled with much ambiguity. The literary characters do not get accommodated easily within any of the legal standards that have been used to protect them. The two prominent tests evolved by Courts to tackle the phenomenon of protecting an independent character have not been particularly of much help. The confusion regarding protection of fictional characters arises by applying the legal doctrines inconsistently and letting them to move too far from their conceptual horizon. Cases dealing with fictional characters have been especially conflicting because of the Courts concentration on whether a particular character is allowed to protection-whether it is sufficiently developed or distinctive, or whether it constitutes the story being told. Both the Sam *Spade* and Nichols approaches must be rejected. The proper starting point is a comparison of the characters in the allegedly infringed and infringing works, not a determination of whether a character is sufficiently developed to deserve protection.

As the uncertainty of fictional characters standing in the copyright has led to a mess legacy of confusing doctrines and the misapplication of alternative principles, statutory recognition of the independent copyrightability of fictional characters is much needed to establish the fictional characters as copyrightable. The need for an exclusive kind for fictional character protection would seem apposite and this calls for an Amendment to the Copyright Act. This separate category would eradicate much of the confusion and variations consequential of the present lack of explicit character protection. It will also provide authors an enhanced understanding of the contours of protection and reduce the chance that they will lose their creations in a maze of overlapping tests.

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[98] Francis Nevins, "Copyright + Character = Catastrophe" 39 *J. Copyright Socy* U.S.A.303, 315 (1992).

[99] David B. Feldman, "Finding a Home for Fictional Characters: A Proposal for Change in Copyright Protection" *78 CAL. L. REV. 687,* 691 (1990).

NAGA CUSTOMARY LAW VIS-À-VIS THE ADVENT OF ADMINISTRATION: HISTORICAL LEGAL FRAME WORK AND IMPACT ON ADJUDICATION

*Mr. Moatoshi Ao**

Abstract

The Nagas practice a rudimentary system of delivering justice based on simplicity and truthfulness. This customary law was handed down the generations solely through the word of mouth differing in usage and practice among the various tribes. The British, since they set foot on the Naga Hills, recognized and gave special status for the autonomous operation of customary laws and procedures in both administration and judiciary. This system continued, having secured statutory recognition, by various enactments during the British Raj and was readily adapted in the Sixth Schedule to the Constitution of India. Though unwritten, it continued in practice and the 16-Point Agreement, signed between the Government of India and the Naga Peoples Convention in July, 1960, resulted in the insertion of Article 371A in the Constitution of India and the formation of the State of Nagaland. The Nagas enjoy a special status in settlement of disputes under the shade of Article 371A, however, in the scuffle of customary law and formal laws speedy and instant settlement of disputes by the formal Courts becomes convoluted rendering in the pronouncement of adversarial judgement difficult. The strict adherence to Naga customary law denies the fundamental rights of Naga women granted by the Constitution, which the Legislative Assembly defended under Article 371A, and property right of tribal individuals are other important issues focused in this paper.

I

Introduction

Nagaland, the 16th State of the Union of India, located on the extreme North-Eastern end of the country sharing international border with Myanmar is a land with natures beauty of vibrant green hills and populated with sixteen[1] major tribes. Each Naga tribe is distinct from the other in customs, traditions, dress and language. The Nagas lived[2] in independent villages having their own independent government, foreign policy and defence.

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[1] Angami, Ao, Chakhesang, Chang, Kachari, Khiamniungam, Konyak, Kuki, Lotha, Phom, Pochury, Sema (Sumi), Rengma, Sangtam, Yimchunger and Zeliang.

[2] Each Village in the Naga region was independent with no external interference having its own Village Council of elders whose decision was final and binding in all matters of policy, defence, war, administration of village and settlement of disputes.

The Village Council headed by a headman was the government and judiciary of the village. The headman was/is elected by the members of the village. Unlike in other tribal societies, he is simply primus inter pares, and often only pro tem sanctioned with nominal powers. The village was[3], and still continues to be, the centre of all social, cultural and political activity. J.P. Mills attest it as "as with all Nagas the real political unit of the tribe is the village".[4] John Butler[5] writing on the Naga democracy during his military expedition to the Naga Hills in Angami country observed that "every man follows the dictates of his own will, a form of the purest democracy which it is very difficult indeed to conceive as existing even for a single day; and yet that it does exist here, is undeniable fact".[6] Every adult male[7] member takes part equally in the policy making, administration and defence of the village. The Nagas practice a rudimentary system of delivering justice based on simplicity and truthfulness. This customary law was handed down the generations solely through the word of mouth differing in usage and practice among the various tribes. Personal matters like divorce, marriage and adoption, inheritance and property disputes among family members are initially settled by the clan elders and an appeal lies in the Village Council- the final adjudicating authority. Fines in the form of money or animals like pig, cow and buffalo are imposed on the guilty party. Similarly, in criminal offences the offender is penalized by imposing fine and in heinous cases his property is confiscated and given to the victim. In cases (both civil and criminal) where the party denies the allegations and refuses to accept the verdict of the Village by administration of oath and leaves the decision to Providence. This procedure settled of oath taking is called "Azungngüshi" and "Rüsedie" in Ao and Angami tribal dialects respectively. Ostracism is the highest form of punishment and is Council, the status of the case is deadlocked rendering difficulty in maintenance

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[3] Even in the present days the Village Council exercise judicial and administrative jurisdiction over its members irrespective of the place the village member resides. For instance, although X lives in Delhi he pays membership to his Village Council. Incase when X residing in Delhi commit an offence or by his actions and deeds defame his village reputation or image he will be punish by his Village Council even though Delhi is out of the Council territorial jurisdiction.

[4] J.P. Mills, *The Ao Nagas* 176 (Directorate of Art and Culture, Govt. of Nagaland, Nagaland, 3rd Edition, 2003).

[5] Capt. John Butler, Bengal Staff Corps and Political Agent of the Naga Hills who died on 7th January 1876 from the effects of a spear wound received in an encounter with the Pangti village warriors in the Lotha country, Naga Hills. (Ref. Verrier Elwin, *The Nagas in the Ninteenth Century* 552-554, 1969.

[6] Verrier Elwin, *The Nagas in the Ninteenth Century* 525-526,1969.

[7] Women were not allowed to involve in the policy and decision making of the Village.

of peace and order resulting in violent clashes between the parties.[8] The council in such circumstances orders the party to take oath.[9] Thus, many disputes are awarded for contempt of Village Council orders, moral offences and defaming the image or reputation of the village. The then Prime Minister of India Pandit Jawaharlal Nehru while announcing the 16-Point Agreement[10] and the formation of the State of Nagaland in Lok Sabha in August, 1960 said, "The Nagas are a hard-working and disciplined people, and there is much in their way of life from which others can learn with profit. We have had for many years Nagas in the Indian Army and they have proved to be excellent soldiers. Our policy has always been to give the fullest autonomy and opportunity of self-development to the Naga people, without interfering in any way in their internal affairs or way of life."[11]

This paper attempts to study the legal history of special status and constitutional recognition given to the State of Nagaland in its religious or social practices, customary laws and procedure, administration of civil and criminal justice and ownership and transfer of land and its resources according to Naga customary law. The paper further attempts to study the impact of conflict between customary laws and formal laws in speedy and instant settlement of disputes, rendering pronouncement of adversarial judgement difficult by formal Courts in contemporary times. It also highlights the Fundamental Rights of Naga women granted by the Constitution, however, stands denied by the Legislative Assembly of Nagaland under the purview of Article 371A. Property rights of Naga tribal individual is another important issue focused in this paper.

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[8] In cases like land disputes, the border demarcation is artificial and temporary like a boulder or a trunk of a dead tree. Such border demarcation gets vanished due to various natural causes and ultimately dispute between the parties. In absence of written records, it is difficult to identify the exact border line and hence difficult to give an adversarial judgement. During such circumstances the parties often have violent clashes disturbing the peace and order of the village. The Village Council in such situation will order the parties to take Oath. Similarly, in criminal case like theft, where the accused denies the offence, he is asked to take Oath.

[9] Oath is the final step the adjudicator orders the parties to take in a judicial proceeding where the parties swears that he will die or any misfortune or adversity or sickness would happen to him or to his family and clan members if he has sworn falsely. The procedure for oath is distinct in each type of case and all the villages/tribes do not follow the same procedure for the same type of case. However, in toto the objective is same with slight difference. Thus, among the Ao tribe 30 days reckoning period is given in most cases while in many other Naga tribes the reckoning period is observed till the next harvest.

[10] The 16-Point Agreement was signed between the Government of India and the Naga Peoples Convention in July 1960. The chief outcome of the Agreement was the formation of the State of Nagaland and insertion of Article 371A in the Constitution of India by the Constitution (Thirteenth Amendment) Act, 1962.

[11] S.C. Jamir, *Naga Peoples Convention and 16th Point Agreement* 77-78, 2011.

II

From British Policy of Non-Interference to Developments under Sixth Schedule to the Constitution of India

With the advent and occupation of the Naga Hills by the British, customs and practices which hitherto continued absolutely uninterrupted began to fade away with the application of new administrative policies and the spread of Christianity. The convert Christians themselves with the passage of time began to disregard their own customs and practices. Besides, the British were able to establish their administration in the hills by setting up headquarters at Wokha in 1875,[12] which later shifted to Kohima in 1878[13] and finally a sub-divisional headquarter at Mokokchung in 1890.[14] However, the British followed complete Non-Interference Policy giving maximum latitude to Naga way of administration and adjudication of disputes from the day they set foot in the hills till they left, for good, to their home land. The British when started military expeditions in the Naga Hills beginning in the year 1832,[15] Regulation X of 1822 was in force in the North Eastern frontier. The regulation sanctioned all the powers of administration of civil and criminal justice, collection of revenue, the superintendence of police, and every other branch of the Government in one administrator called the "Civil Commissioner" creating a different system of administration called the "Non-Regulated System".[16] After the Government of India Act, 1853 and the Indian Councils Act, 1861, the Garo Hills Act, 1869 was passed empowering the Lieutenant-Governor of Bengal under Section 9[17] to extend, all or any of the provisions of the Act to the Naga Hills. The failure of several military expeditions and diplomatic policies finally compelled the British to withdraw the non-interference policy and start gradual extension of administrative control in the Naga Hills and in 1866[18] established their administrative headquarters at Samagutting (presently called Chumukidima under Dimapur District, Nagaland). In 1867 the Naga Hills together with some

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[12] *Supra* note 6 at p.178.

[13] *Id.* at p.182.

[14] Tajenyuba Ao, *British Occupation of Naga Country,* 100 (Naga Literature Society, Mokokchung, 1993).

[15] B.C. Allen, *Gazetteer of Naga and Manipur,* 11, 2010.Verrier Elwin, The Nagas in *the Nineteenth Century,* 114, 1969.

[16] B.L. Hansaria, *Sixth Schedule to the Constitution,*1, 2011.

[17] Section 9 of Garo Hills Act, 1869 : Power to extend Act to Jaintia and Naga Hills, and to British Portion of Khasi Hills.- The said Lieutenant-Governor may, from time to time, by notification in the Calcutta Gazette, extend, mutatis mutandis, all orany of the provisions contained in the other Sections of this Act to the Jaintia Hills, the Naga Hills, and to such other portion of the Khasi Hills as for the time being forms part of British India.

[18] Alexander Mackenzie, *The North East Frontier of India,*120-121, 2013.B.C. Allen, *Gazetteer of Naga and Manipur,* 10, 2010.

areas of Karbi Anglong (Assam) was declared as a district.[19] On 6th February, 1874 the province of Assam was created and put under a Chief Commissioner by taking away its management from the Lieutenant Governor of Bengal, the Naga Hills which was under the immediate authority and management by the Governor-General-in-Council was also put under the jurisdiction of the Chief Commissioner by a proclamation issued by the Government of India, Home Department proclamation No.379, dated the 6th February, 1874.[20] The Naga Hills thus was taken out from the jurisdiction of the Lieutenant Governor of Bengal and came under the jurisdiction of the Chief Commissioner and become a part of the Province of Assam. However, the same year in April the Scheduled Districts Act, 1874 was enacted which recognised the fact that the "under-developed tracts" which among others included the Naga Hills needs to be treated differently with regard to the enforcement of procedures of laws applied in other parts of British India.[21] The Naga Hills by that time was under the Chief Commissioner of Assam and the entire Chief Commissioner of Assam had been included as a Scheduled District in the First Schedule of the Act which dealt with the territories to which the Act extended even in the first instance.[22] The Act enabled the local government, with the previous sanction of the Governor-General-in-Council, to declare what normal laws should be applied to a Scheduled District, and until and unless such declaration is made under Sections 5 and 5A of the Act, any law made by the British Parliament could not be enforced in Scheduled Districts or could not be applied to the people living in such district.[23] The Scheduled Districts Act, 1874 was in fact the first steep taken by the British recognising statutorily the indigenous ways of Naga life.

Owing to the backwardness of the frontier tracts of the Province of Assam, a need was felt to provide a separate treatment to those tracts inhabited by hill tribes. The Assam Frontier Tracts Regulation, 1880 was enacted giving exclusive powers to the Chief Commissioner of Assam to remove any part of that area from the coverage or extend of the laws in force unsuitable in such tracts. The Regulation was further amended in 1884 as Regulation 3 of 1884-The Assam Frontier Tracts Regulation, 1884 to declare that Act 10 of 1872 (the Code of Criminal Procedure) shall be deemed never to come into force in the Garo Hills District, the Naga Hills District, and the Khasi and Jaintia Hills District.

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[19] http://online.assam.gov.in/documents/10156/5fa39bda-5c4c-4789-87d8-d3e554f751a1 (Visited on April 4, 2014).

[20] *Supra* note 16 at p.3 & 214-216.

[21] See the Preamble of the Scheduled Districts Act, 1874.

[22] *Supra* note16 at p.3.

[23] P. Chakraborty, *Fifth & Sixth Scheduled to the Constitution of India,* 2, 2011.

The said Regulation thus removed all such laws in force in the Naga Hills unsuitable with the tribal system including the procedural law of Cr.P.C. C.P.C was, however, never applied in the Naga Hills. The administration and judiciary was simplified by appointing Gaon Boras (G.B.)[24] and Dobhasis (D.B.)[25] for the administrative convenience of the British administrators. Disputes were settled with the help of the Gaon Boras and Dobhasis according to their respective tribal customs and practices.

In 1918 the Montagu-Chelmsford Reforms examined the frontier region of Assam and reported that there were certain backward areas to which the Constitutional reforms could not be applied, and that these typically backward tracts should be directly administered by the Governor.[26] It was stated that political reforms could not be applied to these areas whose people are primitive and there was no material on which to found political institutions.[27] To implement the recommendations contained in the Montagu-Chelmsford Report, with certain exception, the Government of India Act, 1919 was enacted which inserted Section 52A in the Government of India Act, 1915. Section 52A of the said Act provided that the Governor-General-in-Council may declare any territory in British India to be a backward tract, and on such declaration being made, further direct that any Act of Indian Legislature shall not apply to the territories in question or shall apply subject to such exceptions or modifications as is thought fit.[28] The Government of India Act, 1915 thus changed the under-developed tracts to backward tracts. Nine territories, which included the Naga Hills, were declared as backward tracts by a notification issued under Section 52A of the said Act by the Governor-General-in-Council. These nine territories declared as backward tracts were later designated as Tribal Areas in the Sixth Schedule to the Constitution of India after Indias independence.

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[24] Gaon Bora, means a village elder. "Gaon" means village and "Bora" means an elder or old man. The words are derived from Assamese and are not indigenous Naga tribal dialect. The British administrators for their administrative convenience appointed Gaon Boras form every village. The Gaon Boras are given both civil and criminal powers.

[25] The term "Dobhasi" originated from Hindi and Assamese language meaning dho Basha. The word Dhomeans two and the word Bashameans language. Therefore, Dobhasis is the name given to an officer who knows two languages i.e., the Naga tribal dialect and the language of the Britishers. Dobhasis were used as interpreters by the British.

[26] *Supra* note 23 at p. 2.

[27] *Supra* note 16 at p. 4.

[28] *Ibid.*

In 1930 the Statutory Commission popularly known as the Simon Commission did a pragmatic study of the backward tracts and suggested the exclusion of the tribal areas from the general constitutional arrangements. The Commission main recommendation was that there should be centralization of administration in view of the fact that no provincial legislature was likely to posses either the will or the means to devote special attention to the particular requirements of these areas under them, because expenditure in the tracts does not benefit the areas from which elected representatives are returned.[29] The Commission reported that "the stage of development reached by the inhabitants of these areas prevents the possibility of applying to the methods of representation adopted elsewhere. They do not ask self-determination but for security of land tenure in the pursuit of their traditional methods of livelihood and the reasonable exercise of their ancestral customs. Their contentment does not depend so much on rapid political advance as on experienced and sympathetic handling, and on protection from economic subjugation by their neighbours."[30] The Commission, on one hand, considered it too huge a task to be left to the Missionaries and individuals, since for a long-term policy, its uninterrupted pursuance, coordination of activities an adequate fund would be required, while, on the other hand, a typically backward area was considered to be non-productive or non-revenue-earning and deficit area for which no provincial legislature was likely to possess either the will or the means to develop the area without any return. At the same time the Commission also felt that it would not be a realistic arrangement if these areas were placed under such a centralized administration that there would be a risk of its separation from the provinces of which the area were an integral part.[31] The Commission also realized that isolation from the mainstream of progress and development and it would be necessary to educate and make self-reliant and draw to the main stream of development through gradual assimilation with the mainstream. It is also worthy to note that the honourable members of the Commission took exception to the word "Backward". Sir John Simon is reported to have called it a nauseating word while Mr. Cadgan described it in the House of Commons as misleading. Instead of "Backward tracts", the commission proposed the establishment of "Excluded areas" Excluded and Partially Excluded areas, which later were incorporated in the

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[29] *Id.* at p. 5.

[30] S.R. Maheshwari, Simon Commission, Report of the Indian Statutory Commission, Volume II, Recommendations,109,1988. Indian Statutory (Simon) Commission Report, 1930, Volume II, Part III, Chapter 2, Paragraph No.128. B.L. Hansaria, *Sixth Scheduled to the Constitution of India,* 228, 2011. Pieter Steyn, *Zapuphizo Voice of the Nagas,*50, 2010.

[31] *Supra* note 23 at p.4.

Government of India Act, 1935. The Commission ultimately recommended that the responsibility of administration of the backward tracts or areas should be entrusted to the Central Government but the Central Government should use non-political offices of the Governors as agents for the administration of these areas, and that depending on the degree of backwardness, it could be prescribed under appropriate rules how far the Governor would act in consultation with his Ministers in discharge of his duties as an agent of the Central Government.[32]

The Simon Commission recommendations on centralized administration of backward tracts were not fully adopted in the Constitutional reforms of 1935, also called the Government of India Act, 1935; however, in pursuance of the recommendations of the said Commission a separate chapter (i.e., Part III, Chapter-V) was dedicated to the backward tracts in the Government of India Act, 1935.[33] The Act inserted the terminology of "Excluded" and "Partially Excluded" areas under Section 91 of the Act and removed the terminology of "Backward tracts".[34] It may also be noted that The Sub-Committee on the North East Frontier (Assam) Tribal and Excluded Areas under the Advisory Committee on Fundamental Rights, Minorities and Tribal and Excluded Areas constituted to assist the Constituent Assembly was constituted in accordance with the same principle as provided in Section 91 of this Act.[35] The powers of administration of the excluded and partially excluded areas were laid down in Section 92 of the Act that no Act of the Federal Legislature or the Provincial Legislature shall apply to an excluded area or partially excluded area, unless the Governor by public notification so directs. The excluded areas were to be administered by the Governor himself in his discretion; and the partially excluded areas were to be his special responsibilities, implying power to override advice of the ministers in his individual judgement, whereas in matters within Governors discretion advice of the ministry was not necessary.[36] The Governor was also empowered to make regulations for the peace and good government subject to the Governor Generals assent. Under clause (3) of Section 92 the Governor was empowered to act in his discretion in any area in a Province declared as an excluded area. On 3rd March, 1936 under the provisions of Section 91(1) of the Government of India Act, 1935, the Government of India (Excluded and Partially Excluded Areas) Order, 1936 was promulgated by His Majesty in Council. Under Part I in the Schedule to the Government of India (Excluded and Partially Excluded Areas) Order, 1936, amongst five others, Naga Hills was declared as an excluded area. This arrangement continued until the Sixth Schedule to the Constitution of India was enacted in 1950.

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[32] Ibid.
[33] Supranote 16 at p.5.
[34] Ibid.
[35] Id.at p. 5-6.
[36] Supra note 16 at p. 5.

As suggested by the Cabinet Mission to the Constituent Assembly, Advisory Committee on Fundamental Rights, Minorities and Tribal and Excluded Areas (hereinafter called the Advisory Committee) was constituted in such a manner to have representation from all the tribal and excluded areas. Thus, the Sub-Committee on the North East Frontier (Assam) Tribal and Excluded Areas (also called the Bordoloi Committee) was formed with the then Premier of Assam, Shri Gopinath Bordoloi, as the chairman and four other members. Amongst the four members one member was from the Naga Hills. Shri Mayangnokcha was the member from the Naga Hills who was later replaced by Shri Aliba Imti after he was assassinated by the Naga insurgent group. However, even Shri Aliba Imti too could not represent himself in the sub-committee due to threat of assassination from the NNC (Naga National Council). The Naga Hills thus remained unrepresented in the process of draft of the Constitution and Sixth Schedule. The Bordoloi Committee was formed on 27th February, 1947 and after extensively toured the Province of Assam, as it was then, submitted its Report on 28th July, 1947 to the Chairman of the Advisory Committee, Sardar Vallabhbhai Patel. However, due to bad weather conditions the Committee could not visit Garo Hills District and Jowai Sub-division of Khasi Hills. The Advisory Committee discussed the matter on 7th December, 1947 and 24th February, 1948 and forwarded the draft with only two Amendments[37] to the Constituent Assembly on 4th March, 1948. The Constituent Assembly considered and debated the draft of the Sixth Schedule on 5th, 6th, and 7th, September, 1949 and after extensive debates the draft was adopted with various Amendments.

In the Constituent Assembly objections were raised by different members for adding the Naga Hills in the Sixth Schedule which is what guaranteed a substantial autonomy to Nagas in regard to their political affairs. During the Constituent Assembly debates on 6th September, 1949 Shri Kuladhar Chalia opposing on the autonomous powers given to district council said, "The Nagas are very primitive and simple people and they have not forgotten their old ways of doing summary justice when they have a grievance against anyone. If you allow them to rule us or, run the administration it will be a negation of justice or administration and it will be something like anarchy.....It is said that they are very democratic people; democratic in the way of taking revenge; democratic in the way they first take the law into their own hands. And it is threatened by some that they are so democratic that they will chop off our heads."[38] Shri

[37] 1. The Assam High Court shall have power of revision in cases where there is failure of justice or where the authority exercised by the District Court is without jurisdiction.
2. The plains portion were to be excluded from Schedule B of the areas which were recommended for inclusion in the Schedule by the Sub-Committee.

[38] Source: http://parliamentofindia.nic.in/, http://164.100.47.132/LssNew/cadebatefiles/C06091949.html (Visited on April 4, 2014).

Brajeshwar Prasad was also opposed to the autonomous powers of District and Regional Councils, "I am opposed to the District Councils and Regional Councils because they will lead to the establishment of another Pakistan in this country.....I will not jeopardise the interest of India at the alter of the tribal. The principle of self-determination has worked havoc in Europe....It led to the viviSection of India, arson, loot, murder and the worst crimes upon women, and children."[39] Adding fuel to the words of Shri Brajeshwar Prasad and Shri Kuladhar Chalia, Shri Rohini Kumar Chaudhuri even went to the extent of saying, "There was a Deputy Commissioner who used to flog any Naga who was dressed in Dhoti. The British wanted the Nagas to remain as they were.....Roman script was introduced forcibly by the British officers.....During the last ten years, they have tried to substitute the ordinary Bengali by Roman script."[40] Despite strong opposition, Dr. B.R. Ambedkar, Shri Gopinath Bordoli and Rev. J.J.M. Nicholas Roy who deeply understood the problems of the hill tribes answered the opposition with their revered experiences of tribal life and legal wisdom and ultimately the Sixth Schedule was enacted providing powers of autonomy to the District and Regional Councils. Dr. B.R. Ambedkar answering to all the opposition said, "the position of the tribals in Assam stands on a somewhat different footing from the position of the tribals in other parts of India...the tribal people in areas other than Assam are more or less Hinduised, more or less assimilated with the civilization and culture of the majority of the people in whose midst they live. With regards to the tribal in Assam that is not the case. Their roots are still in their own civilization and their own culture. They have not adopted, mainly or in large part, either the modes or the manners of the Hindus who surround them. Their laws of may be the reason for it, is inheritance, their laws of marriage, customs and so on are quite different from that of the Hindus.....In other words, the position of the tribal of Assam, whatever somewhat analogous to the position of the Red Indians in the United States as against the white emigrant there.[41] Dr. B.R. Ambedkar further explained, "Now what did the United States do with the Red Indians? So far as I am aware, what they did was to create what are called Reservations or Boundaries within which the Red Indians lived. They are a Republic by themselves. No doubt, by the law of United States they are citizens of the United States. Factually they are a separate, independent people. It was felt by the United States that their laws and modes of living, their habits and manners of life were so distinct that it would be dangerous to bring them at one shot, so to say, within the range of the

[39] *Ibid.*
[40] *Ibid.*
[41] *Ibid.*

laws made by the white people for the white persons and for the purpose of the white civilization."[42] Ultimately after debating each paragraph of the draft of Sixth Schedule drafted under the Chairmanship of Dr. B.R. Ambedkar was finally adopted in the Constitution, however, with some Amendments. It may be worthy to note that besides Shri Gopinath Bordoli and Rev. J.J.M. Nicholas Roy, Dr. B.R. Ambedkar views carried the greatest weight in the final adoption of Sixth Schedule to the Constitution of India.

The Sixth Schedule divided the Nagas into two parts the Naga Hills District[43] and the Naga Tribal Area.[44] District Councils were not established in the erstwhile Naga Hills District, and therefore, the provisions of paragraph 19 of the Sixth Schedule (which are analogous to Section 92 of the Government of India Act, 1935) was applied in the Naga Hills District for maintaining the status-quo in respect of tribal land and customs. While, in the erstwhile Naga Tribal Area comprising of Tuensang District, it was left to the discretion of the Governor to apply the provisions of Sixth Schedule to the said area by issuing a publication notification with the previous approval of the President of India vide paragraph 18(1); but no notification was issued. Thus, the said area was administered by the Governor, in his discretion, as an agent of the President under sub-paragraph (2) of paragraph 18. Thus, the entire State of Nagaland was theoretically part of the Sixth Schedule to the Constitution at the commencement of the Constitution; but, in fact no part of the State of Nagaland was ever governed by its provisions. Precisely, both paragraphs (i.e. 18 and 19 of the Sixth Schedule) debarred the application of any laws enforced in other parts of the country and even the provisions of Sixth schedule throughout the Naga Hills giving extensive legislative and executive powers to the Governor.

In 1954 for the readjustment of the administrative units of the areas specified in Part-B of the Table annexed to the Sixth Schedule to the Constitution of India, the North-East Frontier Areas (Administration) Regulation, 1954 was enacted and those areas[45] were collectively called North East Frontier Agency (NEFA).[46] By this Regulation the "Naga Tribal Area" was renamed as "Tuensang

[42] *Ibid.*

[43] Part-A of the table annexed to the Sixth Schedule (as First Enacted) to the Constitution of India.

[44] Part-B of the table annexed to the Sixth Schedule (as First Enacted) to the Constitution of India.

[45] Areas specified in Part-B of the table annexed to the Sixth schedule to the Constitution of India and the North East Frontier Tract, the Abor Hills District, the Misimi Hills District and the Naga Tribal Area.

[46] The First Amendment to the Sixth Schedule was made as early as 26th January, 1954 under the North-East Frontier Areas (Administration) Regulation Act, 1954 which was made under Article 243 read with paragraph 18(2) of the Sixth Schedule to the Constitution of India.

Frontier Division". Again Section 4 of the Regulation made changes to theterminology of executive officers in the Rules for the Administration of Justice and Police in the Naga Hills District, viz. Commissioner as Governor, Political Officer as Deputy Commissioner and Assistant Political Officer as Assistant to the Deputy Commissioner. The Regulation thus changed the terminology used by British to a new Indian system.

The second Amendment to the Sixth Schedule was made for the establishment of an administrative unit by the name Naga Hills-Tuensang Area comprising of the Naga Hills District and Tuensang Frontier Division by enacting the Naga Hills-Tuensang Area Act, 1957. By this Act item No.4 of part-A of the table namely Naga Hills District was omitted and item No.2 of part-B of the table was substituted with the words the Naga Hills-Tuensang Area. By virtue of Section 3 of this Act, (a) in paragraph 20 of the Sixth Schedule, after sub-paragraph (2A) a new sub-paragraph (2B) was inserted to define the area of the Naga Hills-Tuensang Area to be the erst while Naga Hills District and Naga Tribal Area as follows:-

"(2B) The Naga Hills-Tuensang Area shall comprise the areas which at the commencement of this Constitution were known as the Naga Hills District and the Naga Tribal Area."

"Further in sub-paragraph (3), after the words "administrative area" the brackets and words "(other than Naga Hills-Tuensang Area)" shall be inserted." The statement and object of the Act further provides that the Naga Hills-Tuensang Area will be administered by the Governor as the agent of the President but will be distinct from the North East Frontier Administration. The Act also amended

the Delimitation of Parliamentary and Assembly Constituencies Order, 1956, and the Representation of the People Act, 1950.

III

Formation of the State of Nagaland

The Nagas aspiration for sovereignty could not be satisfied despite all the legislative enactments, administrative reformations, negotiations and talks with the Government of India (GoI). The Naga National Council (NNC) under the leadership of A.Z. Phizo declared Naga independence on 14th August, 1947 i.e., one day before Indias Independence and in 1951 launched a Plebiscite to affirm the Naga Independence (in which 99% voted in favour of Naga Independence).[47]

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[47] R. Vashum, *Nagas Right to Self-Determination,* 152, 2005.

However, the Plebiscite was not recognised by both the Government of India and Myanmar[48] and hence the NNC took arms against the GoI. Whilst, the NNC was at war with the GoI, some educated and peace loving Nagas convened a public meeting in which about 1735 representatives of the sixteen (16) tribes of the Naga Hills and Tuensang Frontier Agency met at Kohima from 22nd to 26th August, 1957 to discuss, deliberate and explore all possible means for the early and lasting restoration of peace, unity and harmony in the beleaguered Naga lands.[49] The collective deliberative initiative was ultimately christened as "Nagaland Peoples Convention" (NPC) with Dr. Imkongliba Ao as the first president.[50] In 1959 the NPC successfully convened its 3rd meeting at Mokokchung town from 22nd to 26th October, 1959 and drafted a 16-Point Memorandum to form the basis of negotiation with the GoI for the Naga political settlement. A Negotiation Body was also constituted incorporating seven representatives from the Naga underground i.e. NNC.[51] The Negotiation Body of NPC (hereinafter called the delegation) met the Governor of Assam Gen. S.M. Srinagesh at Shillong with the 16-Point Memorandum despite knowing that the Governor is not empowered and authorised constitutionally to take decisions on such critical and far-reaching matter; the motivation to meet the Governor was merely to adhere to protocol and to follow the proper channel of administration, since the Governor of Assam was also in-charge of the Naga Hills-Tuensang Area and it was deemed necessary to engage the highest functionary of the state and brief him about the demands set out in the 16-Point Memorandum.[52] To the dismay of the administrative arrangements in the form of District Council. However, the delegation bluntly and empathically told the Governor and his Advisor not to treat them as credulous and naive school children and to raise the level of the delegation the Governor and his Advisor Shri Rustamji I.C.S. were loath with the demands set out in the memorandum and tried to pacify by explaining discussion and discourse and graciously requested the Governor to forward the 16-Point Memorandum to the GoI since they were representing the wishes and aspirations of the Naga people and negotiating the political demands of the entire Naga community.[53]

After two months of nerve-racking silence since the inconclusive meeting with the Governor of Assam, the President of NPC was officially communicated about the Prime Minister of India, Pandit Jawaharlal Nehrus consent to meet the Naga Negotiating Body at New Delhi on 23rd July 1960, and the Prime Minister of India announced the terms of the agreement in the Lok Sabha on 1st

[48] *Ibid.*
[49] *Supra* note11 at p.8.
[50] *Ibid.*
[51] *Id.* at p. 54.
[52] *Id.* at p. 65.
[53] *Id.* at p. 65-66.

August, 1960 stating that his Government would shortly introduce a Bill to constitute the sixteenth Sate in India.[54] The then Prime Minister of India Pandit Jawaharlal Nehru while announcing the 16-Point Agreement and the formation of the State of Nagaland in Lok Sabha on 1st August, 1960 concluded his speech by saying "We have always regarded the territory inhibited by the Nagas as a part of independent India as defined in our Constitution. We look upon all these tribal people as citizen of independent India having all the privileges and obligations of such citizenship."[55] During the transitional period (i.e., after the conclusion of the 16-Point Agreement and before the Statehood), the Nagaland (Transitional Provision) Regulation, 1961 was promulgated by the President of India which provided for the formation of an Interim Body consisting of forty five members elected from all the tribes. Section 12(1) and (2) of the Regulation provided for the formation of Village Council for each village, Range Council for each Range and Tribal Council for each tribe, and empowered the interim Body to make by-laws for regulating the constitution of village council, range and tribal councils, the powers exercisable by the said councils in disputes involving breaches of customary laws and usages respectively. Dr. Imkongliba Ao was elected as the first Chairman of the Interim Body while Shri P. Shilu Ao was elected as the first Chief Councillor of the Executive Council.

The State of Nagaland was thus established comprising of the territories Naga Hills-Tuensang Area and Naga Hills District by the State of Nagaland Act, 1962 and Article 371A was inserted in the Constitution of India[56] making special provisions with respect to application of Parliamentary legislation to the State of Nagaland in terms of the 16-Point Agreement concluded between the NPC and GoI. The provisions of Sixth Schedule to the Constitution of India aforesaid ceased to be applicable to the State of Nagaland. Thus, the Constitution (13th Amendment) Act, 1962 and the State of Nagaland Act, 1962 ended the mere application of the provisions of the Sixth Schedule to the Constitution of India and left the management of the State to the people of Nagaland.

IV

Post Statehood: Naga Customary Law Vis-à-vis the Formal Laws

The diverse culture and custom of the Naga tribes attracts a lot of attention for comprehensive study of all customary law, practice and usages of all the existing tribes. However, for brevity sake a study of some major issues prevailing

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[54] *Id.*at p. 72-75.

[55] *Id.*at p. 75.

[56] Inserted by the Constitution (13th Amendment) Act, 1962.

in the State at present would help bring a rational conclusion to satisfy the aim of this paper.

The Naga society is in a transitional stage and as a result numerous social and legal issues emanates. Law is a tool of social engineering and judiciary and legislature are pillars to the Constitution and Government. Laws enacted by the legislature as well as the judiciary can play a vital role in the development and advancement of the society. Article 371A[57] could be used to the advantage of the society as well as to the disadvantage of certain Sections of the Naga society. The words "unless the Legislative Assembly of Nagaland by a resolution decides" have to be noted and studied. For instance, the Legislative Assembly of Nagaland rejected the Women Reservation Bill for reservation of women[58] in local bodies i.e. town and municipal councils and State Legislative Assembly on the ground that Naga customary law do not allow women to participate in decision making and justified it under Article 371A of the Constitution of India; the question here is, does it conform to the Constitution of India or ultra vires the Constitution? The Naga customary laws do not give women the right to inherit ancestral property nor do they allow participation in socio-economic and political decision making. The Constitution of India prohibits gender or sex discrimination and declares both women and men equal. The question is that whether Article 371A overrides Article 14 and 15 of the Constitution of India in so far as Naga women rights are concerned and if so whether it is ultra vires Article 13 of the Constitution of India? The Gauhati High Court in *State of Nagaland v. Rosemary Dzuvichu & others*[59] ruling in affirmative of the defense of the State of Nagaland in regard to reservation of women on the said bodies observed, "Not only the text of Article 371A(1) does not endorse this elucidation, the prefatory sequence of events does not sanction the same lest those stand obliterated and enciphered. In contradistinction, the proposition that an Act of Parliament in respect of the themes set out in Article 371A(1)(a) would apply to the State of Nagaland only if the Legislative Assembly of the State by a resolution so decides not only accords with the tenor, temper and sentiment of the architects of this constitutional provision with the singular outlook of ensuring maximum autonomy to the Naga community and the tribal State comprised of it, but also the language applied in harmony with the spirit and

[57] Article 371A (1) (a) states that no Act of the Parliament of India in respect of (i) religious or social practices of the Nagas; (ii) Naga Customary Laws and Procedure; (iii) administration of civil and criminal justice involving decisions according to Naga customary law and (iv) ownership and transfer of land and its resources shall apply to the State of Nagaland unless the Legislative Assembly of Nagaland by a resolution decides.

[58] Source: NagalandPost, 23rd Sep. 2012, available at: http://www.nagalandpost.com/channelnews/state/StateNews.aspx?news=TkVXUzEwMDAyNDc5NA%3D%3D-ci8%2BO4KMNj c%3D (visited on Visited on April 8, 2014).

[59] GLT 2012(4) 744; MANU/GH/0547/2012.

psyche thereof. The plea that in this unique contextual premise the framers of the Constitution had visualized the inmate obligation of the Legislative Assembly of the State of Nagaland to scrutinize every Act of Parliament bearing on the fields of the legislation envisaged in Article 371A(1)(a) commends for acceptance.... The impugned resolutions of the Nagaland Legislative Assembly to this effect, therefore, in our view, cannot be repudiated to be incompetent and/or constitutionally barred" (Para 29 & 30)[60] The ruling of the Gauhati High Court is challenged and the matter at the time of writing this paper is pending before the Supreme Court of India.

Even though the State is the sovereign dominant owner of the land and its resources, however, in the case of the Nagas there is no such State sovereign dominant ownership according to Naga customary law. In fact, there is only private individual and community ownership. The current legal controversy of the mineral and oil exploration and extraction in Nagaland is another legal issue to be studied. The Nagaland (Ownership and Transfer of Land and its Resources) Act, 1990 which was passed by the Legislative Assembly of Nagaland by virtue of Article 371A of the Constitution of India failed to satisfy the demands of the Naga people leading to public uproar and consequently the State Government was compelled to ask Oil and Natural Gas Corporation Limited (ONGC) and other companies to stop oil extraction and exploration in Nagaland. After almost two decades the Legislative Assembly of Nagaland enacted another statutory legislation the Nagaland Petroleum and Natural Gas Regulation, 2012 on 22nd September, 2012 in exercise of its sovereign Constitutional powers conferred upon it by the special provisions in Article 371-A (1) (a) of the Constitution of India. However, this time again, the said Regulation remained only in paper as the land owners refused to accept the Regulation on the ground of royalty.[61]

As regards the proprietary rights on land, a three judge bench of the Honble Supreme Court in the case of *Threesiamma Jacob & Others Versus Geologist, Department of Mining & Geology & Others,*[62] decided on 08-07-2013 in Civil Appeal Nos. 4540-4548 of 2000, examined and decided the rights of ryotwari pattadars and jenmis in Malabar area of Old Madras Province to be proprietors of the subsoil rights/minerals until they are deprived of the same by legal process. At para No.41,[63] the Honble Apex Court observed that the provisions of Article

[60] *Ibid.*

[61] The State Government of Nagaland failed to comply with the Land Owners and Tribal Hoho(s) demand of 10% royalty of the total value of production by giving only 2% of the total value of production.

[62] MANU/SC/0684/2013; AIR 2013 SC 3251.

[63] *Ibid.*

294 of the Constitution that provides for the succession by the Union of India or the corresponding State, as the case maybe, of the property, which vested in the British Crown immediately before the commencement of the Constitution. It was also observed that Article 297 makes an express declaration of vesting in the Union of India of all minerals and other things of value underlying the ocean. Vide para No.41 of the Judgment,[64] it was observed that on contradistinction between the two Articles, it was held that "the makers of the Constitution were aware of the fact that mineral wealth obtaining in the land mass (territory of India) is not vested in the State in all cases. They were conscious of the fact that under the law, as it existed, proprietary rights in minerals (subsoil) could vest in private parties who happen to own the land." Vide para No.51 of the Judgment,[65] their Lordships of the Honble Apex Court observed that pattadar liable for separate tax in addition to the tax shown in the patta if minerals are found in the properties found in the property covered by the patta, and if the pattadar exploits those minerals, and Collector of Malabar standing orders providing for collection of seigniorage fee in the event of mining operation being carried on, cannot in any way indicate the ownership of the State in the minerals. It was held that power to tax is a necessary incident of sovereign authority (imperium) but not an incident of proprietary rights (dominium). More significant to the case of Nagaland, vide para No.56 of the Judgment,[66] it was also held that "the Oilfields (Regulation and Development) Act, 1948 deals with the oilfields containing crude oil, petroleum etc. which are the most important minerals in the modern world. The Act does not anywhere declare the proprietary right of the State."

In the case of Nagaland, the non obstante clause in Article 371A[67] of the Constitution provides protection against the application of any Acts of Parliament. In view of the overriding effect by the provisions of Article 371A (1), the other provisions of the Constitution are no impediment, and even Article 246 read with List I Union List in the Seventh Schedule have no binding force on the Legislative Assembly of Nagaland so far as the matters enumerated in sub-clause (a) (i) to (iv) are concerned. The meaning of the "Act of Parliament" is not defined under any statute or even in the Constitution itself. In Blacks Law Dictionary, Ninth Edition,[68] the words "act of Parliament" is defined as a

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[64] *Ibid.*

[65] *Ibid.*

[66] *Ibid.*

[67] *Supra* note 57.

[68] Bryan A. Garner (ed.), Black*s Law Dictionary* 39 (Thomson West, USA, Ninth Edition, 2009).

law made by the British sovereign, with the advice and consent of the Lords and the commons; a British statute. In Strouds Judicial Dictionary of Words & Phrases, Seventh Edition,[69] it is defined that "Act of Parliament" is not confined to Private Acts but includes General Acts. In P. Ramanatha Aiyers, the Law Lexicon, 2nd Edition,[70] the words "Act of Parliament" is defined as Statutes or Acts of Parliament are made by the Kings Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in Parliament assembled. It is also defined that the term "Act of Parliament", includes both Private Acts as well as General Acts. Therefore, perusal of the available legal definition, in the context of Article 371A (1) (a), the Petroleum Act, 1934, the Oilfields (Regulation & Development) Act, 1948, the Petroleum Rules, 2002, the Mines and Minerals (Regulation & Development) Act, 1957, and the Inflammable Substance Act, 1952, shall come within the meaning of the Acts of Parliament.

The legislative power on the rights in or over land is exclusively given to the States under Article 246, List II State List in the Seventh Schedule. There is nothing in any Acts of Parliament which may be construed to have encroached on the customary rights of ownership and transfer of land and its resources in the State. The law relating to minerals, petroleum and natural gas enacted by the Parliament and the rules framed thereunder by the Union Government appears to have no encroachment on the proprietary rights of the landowners. These Acts and Rules are regulatory, controlling and supervisory in nature, and have no confrontation to the proprietary rights of the landowners. The excavation for searching for or obtaining mineral oils, refinery, storage, and transportation of petroleum and its products and natural gas require technology, engineering, scientific and experts safety measures for which the regulations and the rules framed thereunder are essential for the public in general. The State Legislature sought to supplant the Central enactments and the rules framed thereunder, by passing the Nagaland Petroleum & Natural Gas Regulations, 2012, and the Nagaland Petroleum & Natural Gas Rules, 2012, framed thereunder by the Government, however, which remained stumbled from execution on intervention by the Union Government. Be that as it may, the words "ownership and transfer of land and its resources" appearing in Sub-Clause (iv), so far, remains unambiguous in its interpretation not only the use of the land, but also includes the transfer of the land and its resources either by free or for commercial purposes. It is rightly to be regarded as unambiguous in the interpretation of the law in so far as no party has questioned before any appropriate forum as to the ambit and scope of the words "ownership and transfer of land and its resources".

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[69] Daniel Greenberg (ed.), *Strouds Judicial Dictionary of Words & Phrases,* 40, 2008.

[70] Y.V. Chandrachud (ed.), *P. Ramanatha Aiyers the Law Lexicon,* 38, 2002.

As stated the land in Nagaland is owned by private tribal individuals or by a clan and he/they have the absolute right to the use and disposal of the land. However, there is no written document of ownership title or records. In the settlement of such land dispute the formal Court find it difficult to decide the case in the absence of codified law and written ownership title documents or records. In *Tekaba Ao* v. *Sakomeren Ao*[71] Honble Justice D.M. Dharmadhikari in his judgment lined:-

"it may be stated that the civil rights to the water source and the land in the Hill District of Nagaland comprising the two villages mentioned above are not governed by any codified law contained in Code of Civil Procedure and the Evidence Act. The parties are governed by customary law applicable to the tribal and the rural population of Hill District of Nagaland." [Para 3 of the judgment][72]

"In view of the peculiar substantive and procedural law as contained in the Rules[73] applicable to Hill Districts of Nagaland, the village disputes, particularly with regard to the source of water and the land in which it is situated, was required to be decided not as an adversarial litigation but as a subject-matter requiring solution in a spirit of accommodation and adjustment of conflicting rights of the members of two contesting clans. The disputes in villages like the one involved in the present case regarding access to the source of water and right and title to the land in which the source exists, needed a resolution so as to best serve the demands of all members of the two village communities who had raised the dispute." [Para 18 of the judgment][74]

The Apex Court thus refrained from giving a definitive ruling and disposed of the appeal by declaring that the village communities in two clans of two villages would have a joint and equal right to the water source in the disputed land. None of the members of the two contesting clans or communities in the two villages shall restrict access to any one of the two village communities to the common water source.

In the present days, the Naga society is transforming to modernity and people have adopted the modern ways of life style. In such process of social transformation the need of administration multiplies resulting in legal disparity contrast to the traditional system. Thus, in the brawl of contemporary formal

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[71] 2004 (5) SCC 672; AIR 2004 SC 3674.
[72] *Ibid.*
[73] Rules for the Administration of Justice and Police in Nagaland, 1937.
[74] *Supra* note 61.

laws and Naga customary law instant and speedy justice by the formal Courts becomes convoluted resulting in the pronouncement of adversarial judgement difficult. Among the landmark cases the Supreme Court of India has decided on the brawl of formal laws in force in the country and the Naga customary law, *State of Nagaland Vs. Ratan Singh*[75] is the first case where the Court set aside all the contentions and upheld the application of the customary law after considering the length of law-making history in the Naga Hills. In this case the Supreme Court observed that "Laws of this kind are made with an eye to simplicity. People in backward tracts cannot be expected to make themselves aware of the technicalities of a complex Code. What is important is that they should be able to present their defence effectively unhampered by the technicalities of complex laws. Throughout the past century the Criminal Procedure Code has been excluded from this area because it would be too difficult for the local people to understand it.....The removal of technicalities, in our opinion, leads to the advancement of the cause of justice in these backward tracts. On the other hand, the imposition of the Code of Criminal Procedure would retard justice, as indeed the Governors-General, the Governor and the other heads of local Government have always thought." Upholding the ruling in the *State of Nagaland* v.*Ratan Singh* the apex Court in the case of Changki Village through *Tinnunokcha Ao & Ors.*v.*Tibungba Ao & Ors.*[76] lined out before proceeding into the details of the case as "Before we proceed to set out the details of the case and the decision rendered by the High Court, it is relevant to mention that the Civil Procedure Code and the Criminal Procedure Code do not govern the proceedings before the Civil and Criminal Courts in Nagaland.....that the Rules of 1937 framed by the Governor of Assam under the powers vested in him by Section 6 of the Scheduled District Act were validly enacted and the rules were successively preserved by Sections 292 and 293 of the Government of India Act, 1935, Section 18 of the Indian Independence Act, 1947 and Article 372 of the Constitution." The simple, speedy and just settlement of dispute whether it is criminal or civil has been the practice of the Naga society since time immemorial. The British acknowledged this system as accurate and decided not to interfere in the Naga customary law and practices and ways of life. Hence, made special statutory provisions for the protection and convenience of the people discussed hereinabove[77] and the same was recognized and adopted in

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[75] AIR 1967 SC 212; 1967 Cri LJ 265.

[76] AIR 1990 SC 73; MANU/SC/0017/1990.

[77] *See* Point II (From British Policy of Non-Interference to Developments under Sixth Schedule to the Constitution of India).

the Constitution of India[78] and the same is upheld and protected by the apex judicial body of the country.[79]

As mentioned Naga society is in a transitional stage ensuing legal intricacy. The ultimate difficulty is in adjudication owing to the convolution and brawl of customary law and the formal laws. On one hand, the customary law in many cases, fails to do justice in contrast to the contemporary formal laws and rights of individual, while on the other hand, the contemporary adjudicate, making formal laws and other legal provisions in force in the country could not pronouncement of adversarial judgment difficult. In such circumstances, the judiciary as well as the parties to the litigation suffers jeopardizing the rights of the parties. Property rights and women rights are the instances of such circumstances. Another example is the inheritance rights of women. Marriages are solemnized in the Church but Christian personal law or any other laws in force in the country is not applied in case of any dispute to the marriage *viz.* divorce, inheritance of property by the wife after the dead of husband, adultery and legitimacy of marriage. Such disputes are settled by the clan members or by the village council wholly based on the custom of the village, which deny such constitutional and statutory rights available to women in other parts of the country. The same is with the inheritance of ancestral property.

V

Conclusion

For thousands of years, customary laws alone have ordered human activities in Naga society. The Naga customary law predates the written laws and Courts. However, all customary law may not satisfy the legal and judicial needs of the contemporary Naga society. As of today, on this subject the apex Court has decided only a few cases and the State Legislative Assembly have not enacted the required statutory laws. Codification of Naga customary law is difficult due to diverse tribes having their respective customary law. The State therefore continued with the erstwhile Rules for the Administration of Justice and Police in Naga Hills District, 1937[80] by amending it to suit the developing needs of the society. However, the said Rules as amended from time to time are not free

[78] Insertion of Article 371A to the Constitution of India by the Constitution (Thirteen Amendment) Act, 1962).

[79] *See* Tekaba Ao v. Sakomeren Ao 2004 (5) SCC 672; AIR 2004 SC 3674; State of Nagaland v Ratan Singh AIR 1967 SC 212; 1967 Cri LJ 265; Changki Village through Tinnunokcha Ao & Ors. v Tibungba Ao & Ors AIR 1990 SC 73; MANU/SC/0017/1990.

[80] Rules for the Administration of Justice and Police in Nagaland, 1937, (as amended by Rules for the Administration of Justice and Police in Nagaland (Amendment) Act, 1974).

from defects and fail to satisfy the ends of justice in many cases. Article 371A of the Constitution of India has recognized and provided special safeguards to the Naga customary law, practices and procedures as the British Government has done during its Raj in the Naga Hills. This special provision was inserted in the Constitution to provide the Nagas to grow and develop in the ways that has been followed for generations and as the people desires. It is no doubt, that all customary law, practices and procedures practiced during that time would not completely fit into and satisfy the present ends. However, that doesnt mean Article 371A would fail to satisfy the present ends. Majority of the Naga population lives in village, so also the disputes is from villages. The technical law and procedures is far beyond the understanding of the village population. Besides, the lengthy and expensive formal litigation is beyond the capability of the village population. In such circumstances, customary law is best suited for its speedy justice with no litigation expenses. The Dobhasi Court[81] (Customary Court) and the Village Court[82] (consisting of the Village Council members, Gaonburas[83] and Village elders) as in practice at present should be encouraged

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[81] The word "Dobashi" is not a Naga word. It is a foreign word coined by the British. However, it is also not an English word too. The word is an Assamese and Hindi origin dho Basha meaning two language. The word Dho means two and the word basha means language. Therefore, Dobhasi (DB) is the name given to an officer who knows two languages i.e., the Naga tribal dialect and the language of the British. Thus, originated the Dobhasi Court in the State of Nagaland. It is also called District customary Court. It is the Court of appeal against the decision of the Subordinate District Customary Court and Village Courts (Rule 55(1) of Rules for the Administration of Justice and Police in Nagaland (Third Amendment) Act, 1984). It also exercise original jurisdiction in criminal cases, however not exceeding the powers of a Magistrate of First Class as defined in the Code of Criminal Procedure, 1973 (Rule 56 of the Rules for the Administration of Justice and Police in Nagaland (Third Amendment) Act, 1984).

[82] *See Rules* 40-41 and 45-49 the Rules for the Administration of Justice and Police in Nagaland (Third Amendment) Act, 1984.

[83] Gaonburas (GBs) in fact, are the first appointees the British appointed Nagas in their service and recorded in their files. The word "Gaonbura" is an Assamese and Hindi origin and not derived from any of the Naga tribal dialects. "Gaon" means village and "bura" means elder. The word Gaonbura thus means Village Elder. Gaonburas are appointed from each village and khels. The British, right from the initial period of relation with the Nagas maintained good relations with the Village Headman and the elders, forthey knew, that the chief and the elders hold esteemed position in the Village. Thus, the headman and the elders were appointed as GB. In every village one Head GB and one Assistant GB from each Khel were appointed. Though GBs were the undisputed leaders of the Village, however, they were appointed to serve the colonial interest as loyal agents of the colonial administration at lower reaches. In short, they were the link between the colonial administrators and the masses. This system continued and is still in practice in the State of Nagaland Each Village has a GB and an Astt. GB. The GBs are empowered with some civil as well as criminal powers under the Rules for the Administration of Justice in Police in Nagaland, 1984.

by providing time to time training in contemporary techniques of settlement of disputes.

Head-hunters, as the Nagas were, the punishment for breach of customary rules are cruel and at instances violate Human Rights, viz., expulsion or ostracism from village, confining for days without food and water in Süki[84] etc. should be discouraged. Punishing by the Village Council for defaming the Village honour[85] is an immemorial practice. It may amount to double jeopardy; however, this is such a practice even in present days which keep the people disciplined irrespective of where he lives and increases fellowship and fraternity with his home Village.

As in the case of women inheritance rights and reservations in policy making bodies is concerned, the State should adopt policy consistent with the fundamental rights enshrined by the Constitution of India and universal rights without undermining Article 371A of the Constitution of India.

One of the biggest problems is in settlement of land disputes. The State should take steps to record the rights over land particularly in the Villages as early as possible. Since time immemorial the Nagas neither require any permit nor pay taxes or royalty to any authority for the resources exploited from his private land for instance, log, bamboo, coal, agricultural and forest production or any other resources grown and found in private lands. It is a Constitutional Right that no person can be deprived of his property save by authority of law[86] and hence in the case of the Nagas (even though the State is the dominion owner of the land and its resources) the land is owned by private individuals or collectively by clan and by virtue of Article 371A rights over land and its resources is absolutely vested in the individual owner or collective ownership by clan and not the State. The State should be more careful in enacting statutory law which infringes such time-honoured rights and practices in future so that instances like the Nagaland (Ownership and Transfer of Land and its Resources) Act, 1990 and the Nagaland Petroleum and Natural Gas Regulation, 2012 may not repeat.

In conclusion it may be stated that Article 371A of the Constitution of India and Section 31 of the State of Nagaland Act, 1962 is crucial in solving this quandary. Traditional customary institutions and its procedures with the wants

[84] The word "Süki" is an Ao Naga tribe dialect. It is a cage made of wood that causes itching on human body. The size of the cage is just small enough that a man can hardly squat or crouch. It is used to correct criminals by caging him in isolation for days without water and food, until he swears that he will not repeat the offence again.

[85] *Supra* note 3.

[86] The Constitution of India, Article 300A.

and ends of contemporary society should be studied pragmatically leaving out the degenerate laws and practices and continue with the enviable laws under the umbrella of Article 371A of the Constitution of India.

CHALLENGES FACED BY THE PCPNDT ACT 1994 DUE TO THE RAPID DEVELOPMENT OF SCIENCE AND TECHNOLOGY AND THE RIGID PATRIARCHAL MINDSET.

Anand Singh Shourie*

Abstract

Legal instruments and litigation as a way to enforce the rights to life and to health is a relatively new strategy that is increasingly common[1]. being largely a patriarchal society India has deprived the female child of its existence to a very great extent. This has been done mainly in order to secure the property related rights of the sons who were considered to be the support of their parents in their old age and also in response to the system of dowry prevalent in India. Earlier, when the present scientific developments were not in existence the elimination of the female child were done in the conventional manners of homicide. But as the scientific progress found its share in the sex- determination technologies it gave birth to the evil practices of sex-determination and female feticide. This ultimately led to the beginning of imbalanced sex ratios all over the country apart from the denial of the constitutional and legal rights of the women. Therefore the legislature after realizing the perverse use of the said technology enacted the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 in order to limit the use of the technology only for medical purposes and punish the ones who go beyond. Although the seriousness of the legislature with respect to the situation is evident by the Act making every offence under it to be cognizable, non-bailable and non-compoundable, it has not deterred the son-aspiring people.

Today after several other developments in science and technology (eugenics in this case) it has become possible to have a child of preferred sex and there is no need of identification of the sex of the foetus after conception. Therefore the present legal framework is not capable of dealing with the challenges and needs suitable modifications to address the situation.

This paper tries to evaluate the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 as to why has it failed to attain its objectives and what could be done in order to cope with the present day situations.

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[1] Jerome Amir Singh, Michelle Govender and Edward J Mills, Do Human Rights Matter to Health ? *Lancet, Vol 370, 11 August 2007.*

I

Introduction

India is one of the few countries where males outnumber females; the sex ratio at birth (SRB)[2] which shows the number of boys born to every 100 girls - is generally consistent in human populations, where about 105 males are born to every 100 females. The male/female population in India has great imbalances; there are also huge local differences from Northern / Western regions such as Punjab or Delhi, where the sex ratio is as high as 125, to Southern / Eastern India e.g. Kerala and Andhra Pradesh, where sex ratios are around 105[3]. Though "prenatal sex discrimination" was legally banned in 1996, the law is nearly impossible to enforce and is not even familiar to all Indian families. Hence, the preference for a male child persists, quite often out of mere practical, financial concerns, because the parents might not be able to afford the marriage dowry for (another) daughter. This leads to some of the most gruesome and desperate acts when it comes to gender discrimination: Selective abortions, Murdering of female babies and Abandonment of female babies.

Prenatal tests to determine the sex of the fetus were criminalized by Indian law in 1994, but the above mentioned imbalances in the sex ratio at birth, clearly point to gender selective abortions. While abortion is officially illegal in India there are some exceptions to this rule such as the failure of contraceptive device used by a couple; if the woman was raped; or if the child would suffer from severe disabilities. In total 11 million abortions take place annually and around 20,000 women die every year due to abortion related complications[4].

The recently released data from the Indian 2011 census has refocused the world's attention on the dark side of India's demographic change (a low and falling ratio of girls to boys).For the last 40 years, each successive census has found the number of young girls shrinking relative to boys. Interestingly, the deterioration in the child sex ratio has occurred in the face of rising living standards and improvements in every other indicator of demographic change and human development (average life expectancy, infant mortality, male and female literacy, fertility rate, and schooling enrollment of children).India is one of a handful of countries that has significantly more males than females. The problem is particularly severe at younger ages; the child sex ratio (i.e., the

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[2] The 'sex ratio at birth' defined as the number of girls born for every 1000 boys born, is a more accurate and refined indicator of the extent of prenatal sex selection. The comparison of observed sex ratio at birth with normal sex ratio at birth gives an idea of girls missing at birth. Available at http://india.unfpa.org/?publications=2440. (visited on February 4. 2014).

[3] Available at http://www.saarthakindia.org/womens_situation_India.html (visited on February 5, 2014).

[4] Available at http://www.saarthakindia.org/womens_situation_India.html (visited on February 5, 2014).

number of girls per 1,000 boys in the 0-6 years age group) has declined steadily (from 964 in 1971 to 962in 1981, 953 in 1991, 927 in 2001, and 914 in 2011)[5].

After abortion was legalized in India in 1971[6], and technologies[7] to diagnose the sex of the fetus became widely available, the practice of sex-selective abortions became wide spread. As the prices for sex-selection diagnostic tests fell during the 1980s and 1990s, the practice became even more rampant. The Indian government responded to this problem by passing the Pre-Conception and Pre-Natal Diagnostics Techniques (PNDT) (Prohibition of Sex Selection) Act in 1994, and the same was further amended into the Pre-Conception and Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) (PCPNDT) Act in 2004 as a powerful legal instrument to foster positive change in this modern sociological trend. But, as shown by several studies, its implementation has been weak. In the more than 15 years of the law being in place, a little over 600 cases have been lodged using the law across India The PNDT Act prohibited the use of diagnostic methods to diagnose the sex of an unborn child. However, there is a general perception within India that the Act has not been effective, as the child sex ratio has continued to fall.

II

Purpose and Definitions

The basic purpose of Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 is three-fold, with a focus on averting further decline in sex ratio:

(i) Regulation of Pre Natal Diagnostic Techniques only for legitimate uses as prescribed under the Act

(ii) Complete ban on misuse of Pre-conception Diagnostic Techniques' (PCDT) and Pre-natal Diagnostic Techniques' (PNDT) for sex selection / determination

(iii) Absolute prohibition of selection of sex of the foetus, both before and after conception, except for detecting sex-linked diseases

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[5] The natural sex ratio in a population typically ranges from 950 to 970 girls per 1,000 boys. In the restof the world, sex ratio is generally reported as male-to-female. The Indian Census has been historically reporting female-to-male ratios.

[6] The Medical Termination of Pregnancy Act, 1971.

[7] Earlier it was quite expensive to use ultrasound technology and it was not easily available. Ultrasound was first used for clinical purposes in 1956 in Glasgow. Obstetrician Ian Donald and engineer Tom Brown developed the first prototype systems based on an instrument used to detect industrial flaws in ships.

The term "Pre-natal Diagnostic Techniques" (PNDT) includes all pre-natal diagnostic procedures' and pre- natal diagnostic tests[8]. "Pre-natal Diagnostic Procedures" means all gynecological, obstetrical or medical procedures, both invasive and non-invasive, for sex selection, both before and after conception. Invasive pre-natal diagnostic procedures are utilized to remove samples from a woman or a man, both before and after conception, of amniotic fluid, chorionic villi, embryo, blood or any other tissue or fluid, for conducting any type of analysis or test like: amniocentesis, chorionic villi biopsy, foetal skin or organ biopsy, cordocentesis, non-invasive pre-natal diagnostic procedures include ultrasonography, foetoscopy.

"Pre-natal diagnostic tests means test or analysis conducted on the samples received by the conduct of pre-natal diagnostic procedures such as amniotic fluid, chorionic villi, blood, conceptus or any tissue removed from a woman or a man, both before and after conception to detect genetic or metabolic disorders or chromosomal abnormalities or congenital anomalies or haemoglobinopathies or sex-linked diseases.

The term Sex selection includes: technique, administration, prescription and provision of anything for the purpose of ensuring or increasing the probability that an embryo will be of a particular sex

III

Offences under the Act

All the following are categorized as amounting to committing offences under the Act. Every offence under the Act is cognizable (do not need warrant of arrest for arrest to be made), non-bailable (bail cannot be granted except on Court's order), and non-compoundable (cannot be privately compromised or settled monetarily or in any other way by or between parties)

Section 5[9] deals with the prohibition of communicating the sex of the foetus. Misuse of PC & PNDT, even by a qualified person, solely for sex-determination

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[8] PCPNDT ACT 1994, Section 2 (I), (j), (k).

[9] Written consent of pregnant woman and prohibition of communicating the sex of foetus.

1. No person referred to in clause (2) of Section 3 of the PCPNDT ACT 1994 shall conduct the pre-natal diagnostic procedures unless (a) he has explained all known side and after effects of such procedures to the pregnant woman concerned; (b) he has obtained in the prescribed form her written consent to undergo such procedures in the language which she understands; and (c) a copy of her written consent obtained under clause (b) is given to the pregnant woman.
2. No person including the person conducting pre-natal diagnostic procedures shall communicate to the pregnant woman concerned or her relatives or any other person the sex of the foetus by words, signs or in any other manner.

and in conditions not falling under the exceptions under the Act Section 6[10] deals with prohibition of determination of sex. Sex selection which would include any technique, procedure, test, administration, prescription or provision of anything, before or after conception, for the purpose of ensuring or increasing the probability of birth of male child. This would include even Ayurvedic pills or any alternative therapy claiming to be effective for this purpose.

Section 18[11] deals with registration of Genetic Counselling Centres, Genetic Laboratories or Genetic Clinics: Genetic Counseling Centre (advising PNDT of both kinds: procedures or tests), Genetic Clinic (conducting PNDT procedures), Genetic Laboratory (conducting PNDT tests), including the vehicle used as Genetic Clinic.

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[10] Determination of sex prohibited.- On and from the commencement of Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, (a) no Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall conduct or cause to be conducted in its Centre, Laboratory or Clinic, pre-natal diagnostic techniques including ultrasonography, for the purpose of determining the sex of a foetus; (b) no person shall conduct or cause to be conducted any pre-natal diagnostic techniques including ultrasonography for the purpose of determining the sex of a foetus; (c) no person shall, by whatever means, cause or allow to be caused selection of sex before or after conception.

[11] Registration of Genetic Counselling Centres, Genetic Laboratories or Genetic Clinics. (1) No person shall open any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, including clinic, laboratory or centre having ultrasound or imaging machine or scanner or any other technology capable of undertaking determination of sex of foetus and sex selection, or render services to any of them, after the commencement of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002 unless such centre, laboratory or clinic is duly registered under the Act. 2. Every application for registration under sub-Section (1), shall be made to the Appropriate Authority in such form and in such manner and shall be accompanied by such fees as may be prescribed. 3. Every Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic engaged, either partly or exclusively, in counselling or conducting pre-natal diagnostic techniques for any of the purposes mentioned in Section 4, immediately before the commencement of this Act, shall apply for registration within sixty days from the date of such commencement. 4. Subject to the provisions of Section 6, every Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic engaged in counselling or conducting pre-natal diagnostic techniques shall cease to conduct any such counselling or technique on the expiry of six months from the date of commencement of this Act unless such Centre, Laboratory or Clinic has applied for registration and is so registered separately or jointly or till such application is disposed of, whichever is earlier. 5. No Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic shall be registered under this Act unless the Appropriate Authority is satisfied that such Centre, Laboratory or Clinic is in a position to provide such facilities, maintain such equipment and standards as may be prescribed.

Section 22[12] of the PCPNDT ACT 1994 deals with prohibition of advertisement relating to pre-natal determination of sex. Issue, publication or circulation of any advertisement of facilities or any means of selecting or determining sex of the foetus before or after conception. The advertisement may be in any form: notice, circular, label, wrapper or any other document, advertisement through internet or any other media in electronic or print form, hoarding, wall-painting, signal, light, sound, smoke or gas. Section 29[13] of the PCPNDT ACT 1994 deals with maintenance of records by Genetic Counselling Centres, Genetic Laboratories or Genetic Clinics. Every Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic and Imaging Centre is required to maintain a register showing, the names and addresses of the men or women given genetic counselling, subjected to pre-natal diagnostic procedures or tests, the names of their spouses or fathers and the date on which they first reported for such counselling, procedure or test.

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[12] Prohibition of advertisement relating to pre-natal determination of sex and punishment for contravention.-

1. No person, organization, Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, including clinic, laboratory or centre having ultrasound machine or imaging machine or scanner or any other technology capable of undertaking determination of sex of foetus or sex selection shall issue, publish, distribute, communicate or cause to be issued, published, distributed or communicated any advertisement, in any form, including internet, regarding facilities of prenatal determination of sex or sex selection before conception available at such centre, laboratory, clinic or at any other place.
2. No person or organization including Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic shall issue, publish, distribute, communicate or cause to be issued, published, distributed or communicated any advertisement in any manner regarding pre-natal determination or preconception selection of sex by any means whatsoever, scientific or otherwise.
3. Any person who contravenes the provisions of sub-Section (1) or sub-Section (2) shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees. *Explanation.* For the purposes of this Section, "advertisement" includes any notice, circular, label, wrapper or any other document including advertisement through internet or any other media in electronic or print form and also includes any visible representation made by means of any hoarding, wall-painting, signal, light, sound, smoke or gas.

[13] Maintenance of records. 1. All records, charts, forms, reports, consent letters and all other documents required to be maintained under this Act and the rules shall be preserved for a period of two years or for such period as may be prescribed: Provided that, if any criminal or other proceedings are instituted against any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, the records and all other documents of such Centre, Laboratory or Clinic shall be preserved till the final disposal of such proceedings. 2. All such records shall, at all reasonable times, be made available for inspection to the Appropriate Authority or to any other person authorized by the Appropriate Authority in this behalf.

Rule 3A deals with sale of ultrasound machines/imaging machines. No organization including a commercial organization or a person, including manufacturer, importer, dealer or supplier of ultrasound machines/ imaging machines or any other equipment, capable of detecting sex of foetus, shall sell, distribute, supply, rent, allow or authorize the use of any such machine or equipment in any manner, whether on payment or otherwise to any Genetic Clinic, Ultrasound Clinic, Imaging Centre or any other body or person unless such Centre, Laboratory, Clinic, body or person is registered under the Act.

IV

Punishments for Offences

The punishments for major offences involving sex selection or sex determination and non-maintenance of records are provided in Section 5[14] and 6[15] of the PCPNDT ACT 1994. Elaborate responsibilities and punishments are fixed under these Sections in order to curb the immoral practice.

V

Legitimate Use

The Act allows use of PNDT only to detect chromosomal abnormalities, genetic metabolic disease, haemoglobinopathies, sex-linked genetic diseases, congenital anomalies, or other abnormalities/diseases in the foetus[16] be specified by the CSB. But the use of PNDT to detect these abnormalities is permitted only in registered places/units (including vehicles) and by qualified persons only: When the pregnant woman: Is above 35 years of age or has undergone two or more spontaneous abortions or foetal losses or Has been exposed to

[14] Written consent of pregnant woman and prohibition of communicating the sex of foetus.
1. No person referred to in clause (2) of Section 3 shall conduct the pre-natal diagnostic procedures unless (a) he has explained all known side and after effects of such procedures to the pregnant woman concerned; (b) he has obtained in the prescribed form her written consent to undergo such procedures in the language which she understands; and (c) a copy of her written consent obtained under clause (b) is given to the pregnant woman.
2. No person including the person conducting pre-natal diagnostic procedures shall communicate to the pregnant woman concerned or her relatives or any other person the sex of the foetus by words, signs or in any other manner. ???? (specify act)

[15] Determination of sex prohibited. - On and from the commencement of this Act, (a) no Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall conduct or cause to be conducted in its Centre, Laboratory or Clinic, pre-natal diagnostic techniques including ultrasonography, for the purpose of determining the sex of a foetus; (b) no person shall conduct or cause to be conducted any pre-natal diagnostic techniques including ultrasonography for the purpose of determining the sex of a foetus; (c) no person shall, by whatever means, cause or allow to be caused selection of sex before or after conception.

[16] *Supra* 9 Section 4 (2).

potentially hazardous teratogenic agents such as drugs, radiation, infection or chemicals or has a family history of mental retardation or physical deformities such as spasticity or any other genetic disease[17]. In addition, all the above are subject to mandatory informed consent in writing by the woman[18]or Under any other condition specified under the Act (such as ultrasound tests can be conducted in conditions added in Form F under the Act, subject to strict record maintenance).

VI

Statutory Authorities under the PCPNDT ACT 1994

(i) At the Policy Level:

A Board is required to be constituted by the Central Government which is known as the Central Supervisory Board. The Act makes provision for inclusion of government officials, specialists as well as representatives of welfare organizations in this Board. Section 7(2) of the Act[19] states that the Central Supervisory Board shall consist of the Minister in charge of the Ministry or Department of Family Welfare, who shall be the Chairman, ex officio; the Secretary to the Government of India in charge of the Department of Family Welfare, who shall be the Vice-Chairman, ex officio; three members to be appointed by the Central Government to represent the Ministries of Central Government in charge of Women and Child Development, Department of Legal Affairs or Legislative Department in the Ministry of Law and Justice, and Indian System of Medicine and Homeopathy, ex officio; The Director General of Health Services of the Central Government, ex officio; Ten members to be appointed by the Central Government, two each from amongst -

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[17] *Ibid.* Section 4 (3).

[18] *Ibid.* Section 5.

[19] Written consent of pregnant woman and prohibition of communicating the sex of foetus. 1. No person referred to in clause (2) of Section 3 of the PCPNDT ACT 1994 shall conduct the pre-natal diagnostic procedures unless (a) he has explained all known side and after effects of such procedures to the pregnant woman concerned; (b) he has obtained in the prescribed form her written consent to undergo such procedures in the language which she understands; and (c) a copy of her written consent obtained under clause (b) is given to the pregnant woman. 2. No person including the person conducting pre-natal diagnostic procedures shall communicate to the pregnant woman concerned or her relatives or any other person the sex of the foetus by words, signs or in any other manner.

i. Eminent medical geneticists

ii. Eminent gynaecologist and obstetrician or expert of stri-roga or prasutitantra

iii. Eminent paediatricians

iv. Eminent social scientists

v. Representatives of women welfare organizations.

Likewise other relevant personalities constitute the board. Section 9[20] of the Act states that the Board shall meet at least once in six months and its functions are specified under Section 16[21] of the Act. Furthermore similar responsibilities are laid down on the State Supervisory Board for effective enforcement of the Act.

(i) At the Level of Implementation

The role of implementation of the Act has been assigned to the Appropriate Authorities (AA) which must function with the aid and advice of an Advisory Committee. The Central Government is required to appoint one or more Appropriate Authorities for each of the Union Territories. Under the Amendments, a multi-member body has been provided as the State Appropriate Authority consisting of: an officer of or above the rank of the Joint Director of Health and Family Welfare-Chairperson; an eminent woman representing women's organization; and an officer of Law Department of the State or the Union Territory concerned.

Under the directions of the Supreme Court, Appropriate Authorities are to be appointed at district and sub-district levels as well. At the District level, the Chief Medical Officers or the Civil Surgeons have been designated as the Appropriate Authorities. Recently the Union Government has recommended making the District Magistrate the Appropriate Authority and many states have followed this us. At the sub-district level, the practice varies from State to State.

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[20] *Ibid.*

[21] Functions of the Board. - The Board shall have the following functions, namely:
(i) to advise the Central Government on policy matters relating to use of pre-natal diagnostic techniques, sex selection techniques and against their misuse; (ii) to review and monitor implementation of the Act and rules made thereunder and recommend to the Central Government changes in the said Act and rules; (iii) to create public awareness against the practice of pre-conception sex selection and prenatal determination of sex of foetus leading to female foeticide; (iv) to lay down code of conduct to be observed by persons working at Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics; (v) to oversee the performance of various bodies constituted under the Act and take appropriate steps to ensure its proper and effective implementation; (vi) any other functions as may be prescribed under the Act.

Functions of the Appropriate Authority are: to grant, suspend or cancel the registration, to follow up complaints by initiating legal action in Court, to examine all Form filled in for each ultrasound, giving full details of the reasons for doing the ultrasound and its result, to receive applications for registration (in duplicate in Form A accompanied by an Affidavit with undertaking of not carrying out sex-determination or sex selection and displaying notice to that effect), to send decoys to medical practitioners under suspicion and raid the premises or inspect the premises and collect the evidence on the spot, to ensure accurate recording of any sex determination carried out. to take appropriate legal action against the use of any sex selection technique by any person at any place, suomotu or brought to its notice and also to initiate independent investigations in such matter apart from several other important relevant functions.

The Act was made with good intention but yet we are seeing that the sex ratio in our country is not up to the mark. Prosecutions have been few and far in between. In a landmark judgment a three bench Court of the Gujarat High Court; consisting of Honorable Mr Justice M.S Shah, Honorable Mr Justice D.H Waghela and Honorable Mr Justice AkilKureshi very clearly made the following pronouncement in criminal reference 3 and 4 of 2008; overruling the observations of a single judge bench in Dr. Manish C. Dave versus state of Gujarat, 2008 (1)GLH,475. Under the provisions of Section 28 of the PC&PNDT Act, a Court can take cognizance of an offence under the Act on a complaint made by an officer authorized on that behalf by the AA. The proviso to sub-Section (3) of Section 4 of the PC&PNDT Act does not require that the complaint alleging inaccuracy or deficiency in maintaining record in the prescribed manner should also contain allegations of contravention of the provisions of Section 5 or 6 of the PC&PNDT Act. In a case based upon allegation of deficiency or inaccuracy in maintenance of record in the prescribed manner as required under sub-Section (3) of Section 4 of the PC&PNDT Act, the burden to prove that there was contravention of the provisions of Section 5 or 6 does not lie upon the prosecution.

Deficiency or inaccuracy in filling form 'F' prescribed under Rule 9 of the rules made under the PC&PNDT Act, being a deficiency of inaccuracy in keeping record in the prescribed manner, is not a procedural lapse but an independent

offence amounting to contravention of the provisions of Section 5 or 6 of the PC&PNDT Act and has to be treated and tried accordingly. It does not, however, mean that each inaccuracy or deficiency in maintaining the requisite record may be as serious a violation of the provisions of Section 5 or 6 of The Act and the Court would be justified, while imposing punishment upon conviction, in taking a lenient view in cases of only technical, formal or insignificant lapses in filling up the forms. For example, not maintaining the record of conducting ultrasonography on a pregnant women at all or filling up incorrect particulars may be taken in all seriousness as if the provisions of Section 5 or 6 were violated, but incomplete details of the full name and address of the pregnant women may be treated leniently if her identity and address were otherwise mentioned in a manner sufficient to identify and trace her.

The question that arises is that in spite of having an Act with such measures why has it not succeeded in a way it should have or as was expected of it. What are the challenges faced by the authorities and what needs to be done.

VII

Challenges

(i) The Medical Profession

The sex selection industry is run by medical professionals who have, so far, shown little inclination in putting their house in order. Doctors have shrugged their shoulders on the matter of getting their associations to do something about the illegal practice. No associations of medical professionals have taken a strong stand curbing the unethical use of diagnostic procedures. They have fought only as lobbies to control their commercial interests. The fact is that providers have benefited from promoting the technology for decades. Doctors have even gone to Court against the law.

Only 5.91% of the doctors felt that the PNDT Act is the only tool for improving the gender ratio. As many as 79.41% of the doctors were of the opinion that the PNDT Act is not the only tool to improve the gender ratio while 14.7% had no opinion. About a quarter (26.55%) of the doctors were of the view that penalties for violating the PNDT Act are very heavy while three-quarters (73.45%) did not feel so[22].

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[22] Available at http://www.ncbi.nlm.nih.gov/pmc/Articles/PMC2781127/ (visited on February 4, 2014).

(ii) Problems in Implementing the law[23]

The lack of resources is an excuse by the PNDT authorities. "What is the point of making doctors keep records if they are not audited?"Cases under the PNDT Act must rely heavily on such documentation. A careful reading of all the centres documents will provide circumstantial evidence if something wrong is being done. Centres doing sex selection are likely to slip up on maintaining the required records. An examination of clinic records found that many clinics reported doing just one or two scans a day which is financially unviable for a scan centre. Obviously, they were not recording most of the sonographies that they conducted. Many forms did not contain all the required information. Some were unsigned; some clinics had blank, signed forms. Some other problems related to implementation are[24] of implementation not in place in terms of continuity, consistency and tracking, inactive role of Government to revive the supervisory system, Evidence for a legal case, that sex determination was done, is difficult to put together, Reluctance to take action on the suspected doctors by the PCPNDT committee members (as most of the committee members are doctors), Easy availability of modern technology at the doorstep (the availability of portable ultrasound machines adds to the problem of monitoring), lack of a written referral by a gynecologist, specifying the reason, why the pregnant woman has to undergo scan, lawyers handling the cases are at times ignorant about the Act and less sensitive to the issues, and the biggest hurdle is that officials in-charge of implementing the Act and monitoring the medical facilities are themselves not convinced about Sex Selective Elimination (SSE) leading to female foeticide being a criminal offence

(iii) Social Issues

The prevailing mindset of the people and preference for male child, leading to social acceptance and sanction to sex selection. Conservative thinking and age old customs like dowry (making girls a liability). Lack of empowerment of women and their right to take decisions regarding maternity issues etc are nothing but the overall impact of Patriarchy. Moreover the Act is also viewed in isolation and not as part of the larger issue of Violence against women

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23. Available at http://www.wunrn.com/news/2008/08_08/08_11_08/081108_india3.htm (visited on February 4, 2014).

24 Available at ftp://ftp.solutionexchange.net.in/public/gen/cr/cr-se-gen-mch-24030901.pdf (visited on February4, 2014).

(iv) Advancement in Science and Technology.

Finally, there is the question of what to do as technology advances to take foetal sex detection beyond regulation. Foetal sex selection using ultrasound has, so far, been doing the damage. But all this is changing quickly. When the PNDT Act was drafted, ultrasound could not be used for sex selection until very late in the pregnancy. That is no longer true, and this is the technique that is most prevalent today. But the most frightening development, reported by Dr. Puneet Bedi at a recent consultation, is a blood test isolating foetal cells from maternal blood, enabling foetal sex detection.

These days there are many methods by which you dont need to do an ultrasound yet still decide the sex of your child. Some of them are:

IVF: With in-vitro fertilization (IVF), an egg from the woman is injected with sperm obtained from the man. In a typical IVF procedure, the sperm is not tested for male or female chromosomes, so the chances of conceiving one or the other are still approximately 50/50.

IUI: With intrauterine insemination (IUI), sperm is injected directly into the uterus. In a typical IUI procedure, the sperm is not separated into X and Y. But with **MicroSort Sperm Sorting**[25] one can choose the sex of the child.The method has a success rate of 91 percent for a girl and 76 percent for a boy. MicroSortsorts sperm using a technique called "flow cytometry." The sorting technology is based on the larger X chromosome. The idea behind MicroSort is if that a woman is inseminated with mostly X sperm she is more likely to conceive a girl, and with Y sperm a boy. MicroSort is used with either IUI or IVF.

(v) Preimplantation Genetic Diagnosis (PGD)[26]**.** This method has a success rate of 100 percent. PGD is always used with IVF. It enables the physician to choose the specific embryos to implant into the mother. Not only is the embryo guaranteed to be the desired sex, its also screened for genetic diseases, and

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[25] Available at http://www.babyzone.com/pregnancy/boy-or-girl/high-tech-ways-to-choose-baby-gender_71655 (visited on February 4, 2014).

[26] Definitions under Section 2(f) Gynecologist, 2(g) Medical Geneticist, 2(h) Pediatrician, 2(m) Registered Medical Practitioner and 2(p) Sonologist or Imaging Specialist be put under one category - as those who are competent to advise prenatal diagnostic procedures and those who are authorized to carry out those procedures. There exists confusion/ contradiction in the definition. Do away with all definitions of prenatal diagnostic techniques, laboratories and clinics and replace them with a comprehensive definition of prenatal services and antenatal services. It is not clear whether taking certificate from specialists other than sonologist or imaging specialist (defined under Section 2P) or registered medical practitioner (defined under Section 2M) will allow someone to conduct sonography.

abnormalities. With PGD, eggs are collected from the mother and fertilized with the fathers sperm. The embryos are incubated for three days and then one cell is removed for testing. This one, tiny cell contains the entire DNA sequence necessary to identify gender as well as disease. Once an appropriate male or female embryo is chosen, or more than one if available and indicated, it is implanted in the uterus of the mother.

Interestingly one can easily go out of the country and get these procedures done if they face a difficulty in India due to the PCPNDT Act, which in any case is not a huge problem even in India if you are wealthy.[27]

VIII

Conclusion

With advent of technology, it becomes important to regulate it. It is rather unfortunate when leaders and authorities put emphasis on the need to change the social mindset and that civil society has a big role to play. Incentives and disincentives for bearing and bringing up the girl child may also be counterproductive, as it tends to reinforce the stereotype of the girl child being a liability rather than an asset.

In terms of proper implementation of the Act, first, Appropriate Authorities need to be more accountable in their action and performance. Second, there is a need to ensure greater vigilance over the clinics and diagnostic centers; and how the technologies therein are used. Third and importantly, the law clearly states that sex selection/determination / female foeticide is a cognizable, non-bailable, and non-compoundable offence and therefore anyone including doctors who are indulging in such unethical and illegal practices is liable for punishment irrespective of the plea of social pressure or demand.

The PC-PNDT Act does not fix the responsibility for implementation of the Act on any authority. One fails to understand that how we have an Act with no one responsible for its implementation - till someone actually lodges a complaint. One can draw parallel to the Dowry Prohibition Act 1964 (amended, 1986). Each Block has Dowry Prohibition Officer but s/he is not responsible for implementation of the Act - so dowry related atrocities and crimes keep on taking place and even after registration of a crime, this Officer is not booked for negligence of duties. Can we make the Chief Medical Officers (CMOs)/ District Magistrates (DMs) responsible for implementation of the Act - if the sex ratio is not improving or it keeps on declining, what was the Appropriate Authority doing? Unless this question is answered, there is no future for PC-PNDT Act.

[27] The census data of 2011 shows that sex ratios are heavily lopsided in well off areas example south Delhi compared to rest of Delhi.

Science and Technology is developing at a rapid pace and law has to keep up to it, today the idea of take home diagnostic kits are so common example for testing pregnancy (which was unimaginable few years back) and as the cost of production goes down the use of genetic markers will increase and if we dont think ahead such kits to test the sex of the unborn child will be available in our local stores and in not nipped in the bud then it will flourish in the black market if not openly available and then will be right in the middle of a nightmare sadly which is going to be true and we just cant wake up and feel happy that it was a dream. Thousands of years of patriarchy cant be washed away in few decades but yes we need to keep trying. The challenge posed by science can only be tackled by science. What can be the ways and means is for the policy makers to decide keeping in mind that seems science fiction today can be the harsh reality tomorrow.

Society must recognize that it is engaging in a self-defeating exercise, eliminating women may mean the end of civilization, and nothing less than the survival of the human race would be at stake. Perhaps, the change has to begin at the top, not at the bottom when it comes to attitude towards women. Time has come when we need to be jolted from our slumber and take effective measures before its too late.

JUDICIAL AND LEGISLATIVE TRENDS

JUDICIAL TRENDS

Akash Anand*

I

Case no. 1 ***Safai Karamchari Andolan And Ors v Union Of India And Ors*** *on 27 March, 2014*[1] *Bench: P Sathasivam, Ranjan Gogoi, N.V. Ramana Due to effective intervention and directions of the Supreme Court, the Government of India brought an Act called "The Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013" for abolition of this evil and for the welfare of manual scavengers. The enactment of the aforesaid Act, in no way, neither dilutes the constitutional mandate of Article 17 nor does it condone the inaction on the part of Union and State Governments under the 1993 Act. What the 2013 Act does in addition is to expressly acknowledge Article 17 and Article 21 rights of the persons engaged in sewage cleaning and cleaning tanks as well persons cleaning human excreta on railway tracks.*

The supreme court after going through the various provision of the Act issued the following directions:-

(i) The persons included in the final list of manual scavengers under Sections 11 and 12 of the 2013 Act, shall be rehabilitated as per the provisions of Part IV of the 2013 Act, in the following manner, namely:-

(a) such initial, one time, cash assistance, as may be prescribed;

(b) their children shall be entitled to scholarship as per the relevant scheme of the Central Government or the State Government or the local authorities, as thecase may be;

(c) they shall be allotted a residential plot and financial assistance for house construction, or a ready built house with financial assistance, subject to eligibility and willingness of the manual scavenger as per the provisions of the relevant scheme;

(d) at least one member of their family, shall be given, subject to eligibility and willingness, training in livelihood skill and shall be paid a monthly stipend during such period;

(e) at least one adult member of their family, shall be given, subject to eligibility and willingness, subsidy and concessional loan for taking up an alternative occupation on sustainable basis, as per the provisions of the relevant scheme;

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[1] http://judis.nic.in/supremecourt/imgs1.aspx?filename=41346

(f) shall be provided such other legal and programmatic assistance, as the Central Government or State Government may notify in this behalf.

(ii) If the practice of manual scavenging has to be brought to a close and also to prevent future generations from the inhuman practice of manual scavenging, rehabilitation of manual scavengers will need to include:-

(a) Sewer deaths entering sewer lines without safety gears should be made a crime even in emergency situations. For each such death, compensation of Rs. 10 lakhs should be given to the family of the deceased.

(b) Railways should take time bound strategy to end manual scavenging on the tracks.

(c) Persons released from manual scavenging should not have to cross hurdles to receive what is their legitimate due under the law.

(d) Provide support for dignified livelihood to safai karamchari women in accordance with their choice of livelihood schemes.

(iii) Identify the families of all persons who have died in sewerage work (manholes, septic tanks) since 1993 and award compensation of Rs.10 lakhs for each such death to the family members depending on them.

(iv) Rehabilitation must be based on the principles of justice and transformation.

II

Case no 2 ***Lily Thomas v Union Of India & Ors*** on 10 July, 2013[2]

Bench: A.K. Patnaik, Sudhansu Jyoti Mukhopadhaya.

If any sitting member of Parliament or a State Legislature is convicted of any of the offences mentioned in sub-sections (1), (2) and (3) of Section 8 of the Representation of people Act 1951 and by virtue of such conviction and/or sentence suffers the disqualifications mentioned in sub-sections (1), (2) and (3) of Section 8 of the Act after the pronouncement of this judgment, his membership of Parliament or the State Legislature, as the case may be, will not be saved by

[2] *Lily Thomas* v. *Union of India,* (2013) 7 SCC 653

subsection (4) of Section 8 of the Act which we have by this judgment declared as ultra vires the Constitution notwithstanding that he files the appeal or revision against the conviction and /or sentence.The supreme court in this case after reading of the two provisions in Articles 102(1)(e) and 191(1)(e) of the Constitution held that it would make it abundantly clear that Parliament is to make one law for a person to be disqualified for being chosen as, and for being, a member of either House of Parliament or Legislative Assembly or Legislative Council of the State. In the language of the Constitution Bench of Supreme Court in *Election Commission, India v. Saka Venkata Rao*, Article 191(1) [which is identically worded as Article 102(1)] lays down "the same set of disqualifications for election as well as for continuing as a member". Parliament thus does not have the power under Articles 102(1)(e) and 191(1)(e) of the Constitution to make different laws for a person to be disqualified for being chosen as a member and for a person to be disqualified for continuing as a member of Parliament or the State Legislature. To put it differently, if because of a disqualification a person cannot be chosen as a member of Parliament or State Legislature, for the same disqualification, he cannot continue as a member of Parliament or the State Legislature. This is so because the language of Articles 102(1)(e) and 191(1)(e) of the Constitution is such that the disqualification for both a person to be chosen as a member of a House of Parliament or the State Legislature or for a person to continue as a member of Parliament or the State Legislature has to be the same.

Thus the Supreme Court held that Article 101(3)(a) provides that if a member of either House of Parliament becomes subject to any of the disqualifications mentioned in clause (1), his seat shall thereupon become vacant and similarly Article 190(3)(a) provides that if a member of a House of the Legislature of a State becomes subject to any of the disqualifications mentioned in clause (1), his seat shall thereupon become vacant. This is the effect of a disqualification under Articles 102(1) and 190(1) incurred by a member of either House of Parliament or a House of the State Legislature. Accordingly, once a person who was a member of either House of Parliament or House of the State Legislature becomes disqualified by or under any law made by Parliament under Articles 102(1)(e) and 191(1)(e) of the Constitution, his seat automatically falls vacant by virtue of Articles 101(3)(a) and 190(3)(a) of the Constitution and Parliament cannot make a provision as in sub-section (4) of Section 8 of the Representation of People Act 1951 to defer the date on which the disqualification of a sitting member will have effect and prevent his seat becoming vacant on account of the disqualification under Article 102(1)(e) or Article 191(1)(e) of the Constitution.

III

Case no.3 ***People's Union For Civil... v Union Of India & Anr*** on 27 September, 2013[3]

Bench: P Sathasivam, Ranjana Prakash Desai, Ranjan Gogoi

Eventually, voters participation explains the strength of the democracy. Lesser voter participation is the rejection of commitment to democracy slowly but definitely whereas larger participation is better for the democracy. But, there is no yardstick to determine what the correct and right voter participation is. If introducing a NOTA button can increase the participation of democracy then, in our cogent view, nothing should stop the same. The voters participation in the election is indeed the participation in the democracy itself. Non-participation causes frustration and disinterest, which is not a healthy sign of a growing democracy like India

The supreme court in this case held that a perusal of Section 79(d) of the Representation of People Act, Rules 41(2) & (3) and Rule 49-O of the Rules make it clear that a right not to vote has been recognized both under the RP Act and the Rules. A positive right not to vote is a part of expression of a voter in a parliamentary democracy and it has to be recognized and given effect to in the same manner as right to vote. A voter may refrain from voting at an election for several reasons including the reason that he does not consider any of the candidates in the field worthy of his vote. One of the ways of such expression may be to abstain from voting, which is not an ideal option for a conscientious and responsible citizen. Thus, the only way by which it can be made effectual is by providing a button in the EVMs to express that right. This is the basic requirement if the lasting values in a healthy democracy have to be sustained, which the Election Commission has not only recognized but has also asserted. The Supreme Court also observed that Democracy is all about choice. This choice can be better expressed by giving the voters an opportunity to verbalize themselves unreservedly and by imposing least restrictions on their ability to make such a choice. By providing NOTA button in the EVMs, it will accelerate the effective political participation in the present state of democratic system and the voters in fact will be empowered. Further the court also considered the view that in bringing out this right to cast negative vote at a time when electioneering is in full swing, it will foster the purity of the electoral process and also fulfill one of its objective, namely, wide participation of people.

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[3] *People's Union for Civil Liberties* v. *Union of India*, (2013) 10 SCC 1

IV

Case no 4T.***S.R.Subramanian & Ors v Union Of India & Ors*** on 31 October, 2013[4] .

Bench: K.S. Radhakrishnan, Pinaki Chandra Ghose

Civil servants have to function in accordance with the Constitution and the laws made by the Parliament. In the present political scenario, the role of civil servants has become very complex and onerous. Often they have to take decisions which will have far reaching consequences in the economic and technological fields. Their decisions must be transparent and must be in public interest. They should be fully accountable to the community they serve.

The Supreme Court in this judgment has recommended major reforms in the functioning of the civil servants. It observed that Parliament can under Article 309 of the Constitution enact a Civil Service Act, setting up a CSB, which can guide and advice the political executive transfer and postings, disciplinary action, etc. CSB consisting of experts in various fields like administration, management, science, technology, could bring in more professionalism, expertise and efficiency in governmental functioning. The court also directed the Centre, State Governments and the Union Territories to constitute such Boards with high ranking serving officers, who are specialists in their respective fields, within a period of three months, if not already constituted, till the Parliament brings in a proper legislation in setting up CSB.

The court also noticed that civil servants are not having stability of tenure, particularly in the State Governments where transfers and postings are made frequently, at the whims and fancies of the executive head for political and other considerations and not in public interest. The court further observed that fixed minimum tenure would not only enable the civil servants to achieve their professional targets, but also help them to function as effective instruments of public policy. Repeated shuffling/transfer of the officers is deleterious to good governance. Thus the court also directed the Union State Governments and Union Territories to issue appropriate directions to secure providing of minimum tenure of service to various civil servants, within a period of three months.

Also the supreme court in this case referred to the recommendations of the Hota Committee, 2004 and Santhanam Committee Report and those reports have highlighted the necessity of recording instructions and directions by public servants and noticed that much of the deterioration of the standards of probity

[4] http://judis.nic.in/supremecourt/imgs1.aspx?filename=40943

and accountability with the civil servants is due to the political influence or persons purporting to represent those who are in authority. The court reiterated that Rule 3(3)(iii) of the All India Service Rules specifically requires that all orders from superior officers shall ordinarily be in writing. Where in exceptional circumstances, action has to be taken on the basis of oral directions, it is mandatory for the officer superior to confirm the same in writing. The civil servant, in turn, who has received such information, is required to seek confirmation of the directions in writing as early as possible and it is the duty of the officer superior to confirm the direction in writing. The court held that there must be some records to demonstrate how the civil servant has acted, if the decision is not his, but if he is acting on the oral directions, instructions, he should record such directions in the file. If the civil servant is acting on oral directions or dictation of anybody, he will be taking a risk, because he cannot later take up the stand, the decision was in fact not his own. Recording of instructions, directions is, therefore, necessary for fixing responsibility and ensure accountability in the functioning of civil servants and to uphold institutional integrity

V

Case no 5 ***Suresh Kumar Koushal & Anr v Naz Foundation & Ors*** on 11 December, 2013[5]

Bench: G.S. Singhvi, Sudhansu Jyoti Mukhopadhaya

In its anxiety to protect the so-called rights of LGBT persons and to declare that Section 377 IPC violates the right to privacy, autonomy and dignity, the High Courts has extensively relied upon the judgments of other jurisdictions. Though these judgments shed considerable light on various aspects of this right and are informative in relation to the plight of sexual minorities, we feel that they cannot be applied blindfolded for deciding the constitutionality of the law enacted by the Indian legislature.

The Supreme court after a detailed study of various leading cases on constitutionality of a law to be declared void or not outlined the various principle which have to be relied upon. They are

(i) The High Court and Supreme Court of India are empowered to declare as void any law, whether enacted prior to the enactment of the Constitution or after. Such power can be exercised to the extent of inconsistency with the Constitution/contravention of Part III.

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[5] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1

(ii) There is a presumption of constitutionality in favour of all laws, including pre-Constitutional laws as the Parliament, in its capacity as the representative of the people, is deemed to act for the benefit of the people in light of their needs and the constraints of the Constitution.

(iii) The doctrine of severability seeks to ensure that only that portion of the law which is unconstitutional is so declared and the remainder is saved. This doctrine should be applied keeping in mind the scheme and purpose of the law and the intention of the Legislature and should be avoided where the two portions are inextricably mixed with one another.

(iv)The court can resort to reading down a law in order to save it from being rendered unconstitutional. But while doing so, it cannot change the essence of the law and create a new law which in its opinion is more desirable.

Applying the afore-stated principles to the case in hand, the supreme court deem it proper to observe that while the High Courts and Supreme Court are empowered to review the constitutionality of Section 377 IPC and strike it down to the extent of its inconsistency with the Constitution, self restraint must be exercised and the analysis must be guided by the presumption of constitutionality. The 172nd Law Commission Report specifically recommended deletion of that section and the issue has repeatedly come up for debate. However, the Legislature has chosen not to amend the law or revisit it. This shows that Parliament, which is undisputedly the representative body of the people of India has not thought it proper to delete the provision.

V

Case no 6***Abhay Singh v State Of Uttar Pradesh & Ors*** on 10 December, 2013[6]

Bench: G.S. Singhvi, C. Nagappan

The best political and executive practices have been distorted to such an extent that they do not even look like distant cousins of their original forms. The best example of this is in the use of symbols of authority including the red lights on the vehicles of public representatives from the lowest to the highest and civil servants of various cadres. The red lights symbolize power and a stark differentiation between those who are allowed to use it and the ones who are not.

The supreme court in this case after observing the rules under which multi-toned horns and red lights can be used laid down various direction of which the major are:

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[6] http://judis.nic.in/supremecourt/imgs1.aspx?filename=41060

1. The term high dignitaries takes within its fold the holders of various posts, positions and offices specified in the Constitution.

2. The motor vehicles carrying high dignitaries specified by the Central Government and their counterparts specified by the State Government may be fitted with red lights but the red lights with or without flasher can be used only while the specified high dignitary is on duty and not otherwise.

3. No motor vehicles except those specified in rules or similar provisions contained in the rules framed by the State Governments or the Administration of Union Territories shall be fitted with multi-toned horns giving a succession of different notes or with any other sound producing device giving an unduly harsh, shrill, loud or alarming noise.

VII

Case no 7 ***Novartis Ag v Union Of India & Ors*** on 1 April, 2013[7]

Bench: Aftab Alam, Ranjana Prakash Desai

On a combined reading of causes (j), (ac) and (ja) of section 2(1) of the Patents Act 1970, in order to qualify as "invention" a product must, therefore, satisfy the following tests: It must be "new" It must be "capable of being made or used in an industry "It must come into being as a result of an invention which has a feature that: entails technical advance over existing knowledge; or has an economic significance and makes the invention not obvious to a person skilled in the art.

In the face of the materials referred by the court in this case held that the court is completely unable to see how *Imatinib Mesylate* can be said to be a new product, having come into being through an "Invention" that has a feature that involves technical advance over the existing knowledge and that would make the invention not obvious to a person skilled in the art. Imatinib Mesylate is all there in the Zimmermann patent. It is a known substance from the Zimmermann patent.

VIII

Case no 8.***National Legal Ser. Auth v Union Of India & Ors*** on 15 April, 2014[8]

Bench: K.S. Radhakrishnan, A.K. Sikri

Gender identity is one of the most-fundamental aspects of life which refers to a persons intrinsic sense of being male, female or transgender or transsexual

[7] *National Legal Services Authority* v. *Union of India, (2014) 5 SCC 438*

[8] *National Legal Services Authority* v. *Union of India, (2014) 5 SCC 438*

person. A persons sex is usually assigned at birth, but a relatively small group of persons may born with bodies which incorporate both or certain aspects of both male15 and female physiology. At times, genital anatomy problems may arise in certain persons, their innate perception of themselves, is not in conformity with the sex assigned to them at birth and may include pre and post-operative transsexual persons and also persons who do not choose to undergo or do not have access to operation and also include persons who cannot undergo successful operation. Countries, all over the world, including India, are grappled with the question of attribution of gender to persons who believe that they belong to the opposite sex.

The supreme court in this case observed that Article 21 protects ones right of self- determination of the gender to which a person belongs. Determination of gender to which a person belongs is to be decided by the person concerned. In other words, gender identity is integral to the dignity of an individual and is at the core of "personal autonomy" and "self-determination". Hijras/Eunuchs, therefore, have to be considered as Third Gender, over and above binary genders under our Constitution and the laws. Articles 14, 15, 16, 19 and 21, do not exclude Hijras/Transgenders from its ambit, but Indian law on the whole recognize the paradigm of binary genders of male and female, based on ones biological sex. Non-recognition of the identity of Hijras/Transgenders in the various legislations denies them equal protection of law and they face wide-spread discrimination. Article 14 has used the expression "person" and the Article 15 has used the expression "citizen" and "sex" so also Article 16. Article 19 has also used the expression "citizen". Article 21 has used the expression "person". All these expressions, which are "gender neutral" evidently, refer to human-beings. Hence, they take within their sweep Hijras/Transgenders and are not as such limited to male or female gender. Gender identity as already indicated forms the core of ones personal self, based on self identification, not on surgical or medical procedure. Gender identity, in our view, is an integral part of sex and no citizen can be discriminated on the ground of gender identity, including those who identify as third gender.

The court therefore held and concluded that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution, and hence the court is inclined to give various directions to safeguard the constitutional rights of the members of the TG community.

IX

Case no 9

Voluntary Health Ass. Of Punjab v Union Of India & Ors on 4 March, 2013[9]

Bench: K.S. Radhakrishnan, Dipak Misra

Indian societys discrimination towards female child still exists due to various reasons which has its roots in the social behaviour and prejudices against the female child and, due to the evils of the dowry system, still prevailing in the society, in spite of its prohibition under the Dowry Prohibition Act. The decline in the female child ratio all over the country leads to an irresistible conclusion that the practice of eliminating female foetus by the use of pre-natal diagnostic techniques is widely prevalent in this country. Complaints are many, where at least few of the medical professionals do perform Sex Selective Abortion having full knowledge that the sole reason for abortion is because it is a female foetus. The provisions of the Medical Termination of Pregnancy Act, 1971 are also being consciously violated and misused.

The supreme court in this case observed that many of the clinics are totally unaware of amendments in the medical termination of pregnancy and are carrying on the same practises. In such circumstances, various directions are given of which major are:

1. The Central Supervisory Board and the State and Union Territories Supervisory Boards, constituted under Sections 7 and 16A of PN&PNDT Act, would meet at least once in six months, so as to supervise and oversee how effective is the implementation of the PN&PNDT Act.

2. The State Advisory Committees and District Advisory Committees should gather information relating to the breach of the provisions of the PN&PNDT Act and the Rules and take steps to seize records, seal machines and institute legal proceedings, if they notice violation of the provisions of the PN&PNDT Act.

3. The authorities should ensure also that all Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics, Infertility Clinics, Scan Centres etc. using pre-conception and pre-natal diagnostic techniques and procedures should maintain all records and all forms, required to be maintained under the Act and the Rules and the duplicate copies of the same be sent to the concerned District Authorities, in accordance with Rule

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[9] *Voluntary Health Assn. of Punjab* v. *Union of India, (2013) 4 SCC 401*

3. Steps should be taken by the State Governments and the Union Territories to educate the people of the necessity of implementing the provisions of the Act by conducting workshops as well as awareness camps at the State and District levels.

4. The authorities concerned should take steps to seize the machines which have been used illegally and contrary to the provisions of the Act and the Rules thereunder and the seized machines can also be confiscated under the provisions of the Code of Criminal Procedure and be sold, in accordance with law.

X

Case no 10 ***Shatrughan Chauhan & Anr v Union Of India & Ors*** on 21 January, 2014[10]

Bench: P Sathasivam, Ranjan Gogoi, Shiva Kirti Singh

This case provides yet another momentous occasion, where this Court is called upon to decide whether it will be in violation of Article 21, amongst other provisions, to execute the levied death sentence on the accused notwithstanding the existence of supervening circumstances.

The supreme court in view of the disparities in implementing the already existing laws relating to mercy petitions framed guidelines for safeguarding the interest of the death row convicts. The major directions are:

1. Solitary Confinement: This Court, in Sunil Batra case held that solitary or single cell confinement prior to rejection of the mercy petition by the President is unconstitutional. Almost all the prison Manuals of the States provide necessary rules governing the confinement of death convicts. The rules should not be interpreted to run counter to the above ruling and violate Article 21 of the Constitution.

2. Legal Aid: There is no provision in any of the Prison Manuals for providing legal aid, for preparing appeals or mercy petitions or for accessing judicial remedies after the mercy petition has been rejected. Various judgments of this Court have held that legal aid is a fundamental right under Article 21. Since this Court has also held that Article 21 rights inhere in a convict till his last breath, even after rejection of the mercy petition by the President, the convict can approach a writ court for commutation of the death sentence on the ground of supervening events, if available, and challenge the rejection of the mercy petition and legal aid should be provided to the convict at all stages. Accordingly, Superintendent of Jails are directed to intimate the rejection of mercy petitions to the nearest Legal Aid Centre apart from intimating the convicts.

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[10] Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1

3. Communication of Rejection of Mercy Petition by the Governor: No prison manual has any provision for informing the prisoner or his family of the rejection of the mercy petition by the Governor. Since the convict has a constitutional right under Article 161 to make a mercy petition to the Governor, he is entitled to be informed in writing of the decision on that mercy petition. The rejection of the mercy petition by the Governor should forthwith be communicated to the convict and his family in writing or through some other mode of communication available..

4. Minimum 14 days notice for execution: Some prison manuals do not provide for any minimum period between the rejection of the mercy petition being communicated to the prisoner and his family and the scheduled date of execution. Some prison manuals have a minimum period of 1 day, others have a minimum period of 14 days.

5. Mental Health Evaluation: We have seen that in some cases, death-row prisoners lost their mental balance on account of prolonged anxiety and suffering experienced on death row. There should, therefore, be regular mental health evaluation of all death row convicts and appropriate medical care should be given to those in need.

6. Final Meeting between Prisoner and his Family: While some prison manuals provide for a final meeting between a condemned prisoner and his family immediately prior to execution, many manuals do not. Such a procedure is intrinsic to humanity and justice, and should be followed by all prison authorities. It is therefore, necessary for prison authorities to facilitate and allow a final meeting between the prisoner and his family and friends prior to his execution.

7. Post Mortem Reports: Although, none of the Jail Manuals provide for compulsory post mortem to be conducted on death convicts after the execution, we think in the light of the repeated arguments by the petitioners herein asserting that there is dearth of experienced hangman in the country, the same must be made obligatory.

XI

Case no. 11 ***Arnesh Kumar v State Of Bihar & Anr*** on 2 July, 2014[11]

Bench: Chandramauli Kr. Prasad, Pinaki Chandra Ghose

Arrest brings humiliation, curtails freedom and cast scars forever. Law makers know it so also the police.

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[11] http://judis.nic.in/supremecourt/imgs1.aspx?filename=41736

There is a battle between the law makers and the police and it seems that police has not learnt its lesson; the lesson implicit and embodied in the Cr.PC. It has not come out of its colonial image despite six decades of independence, it is largely considered as a tool of harassment, oppression and surely not considered a friend of public. The need for caution in exercising the drastic power of arrest has been emphasized time and again by Courts but has not yielded desired result. Power to arrest greatly contributes to its arrogance so also the failure of the Magistracy to check it. Not only this, the power of arrest is one of the lucrative sources of police corruption. The attitude to arrest first and then proceed with the rest is despicable. It has become a handy tool to the police officers who lack sensitivity or act with oblique motive.

The supreme court in this judgment in order to ensure that police officers do not arrest accused unnecessarily and Magistrate do not authorise detention casually and mechanically gave the directions of which the major are:

(1) All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A of the IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41, Cr.PC;

(2) The police officer shall forward the check list duly filed and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;

(3) The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;

(4) The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of police of the district for the reasons to be recorded in writing;

XII

Case no. 12 ***M/S Shabnam Hashmi v Union Of India & Ors*** on 19 February, 2014[12]

Bench: P Sathasivam, Ranjan Gogoi, Shiva Kirti Singh.

On the request of the petitioner for the Court to lay down optional guidelines enabling adoption of children by persons irrespective of religion, caste, creed etc. and further for a direction to the respondent Union of India to enact an

[12] Shabnam Hashmi v. Union of India, (2014) 4 SCC 1

optional law the prime focus of which is the child with considerations like religion etc. taking a hind seat, the supreme court upheld the secular nature of the laws that enable adoption.

The supreme court in this case held that JJ Act, 2000, as amended, is an enabling legislation that gives a prospective parent the option of adopting an eligible child by following the procedure prescribed by the Act, Rules and the CARA guidelines, as notified under the Act. The Act does not mandate any compulsive action by any prospective parent leaving such person with the liberty of accessing the provisions of the Act, if he so desires. Such a person is always free to adopt or choose not to do so and, instead, follow what he comprehends to be the dictates of the personal law applicable to him. The Act is a small step in reaching the goal enshrined by Article 44 of the Constitution. Personal beliefs and faiths, though must be honoured, cannot dictate the operation of the provisions of an enabling statute.

XIII

Case no 13 ***State of Karnataka by Nonavinakere Police v Shivanna @ Tarkari Shivanna*** on 25 April, 2014.[13]

Bench: Gyan Sudha Misra, V. Gopala Gowda

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The Supreme court exercising powers under Article 142 of the Constitution, issued interim directions in the form of mandamus to all the police station in charge in the entire country to follow the direction of this Court realting to fast tracking of the rape cases. The major directions are as follows

(i) Upon receipt of information relating to the commission of offence of rape, the Investigating Officer shall make immediate steps to take the victim to any Metropolitan/preferably Judicial Magistrate for the purpose of recording her statement under Section 164 Cr.P.C. A copy of the statement under Section 164 Cr.P.C. should be handed over to the Investigating Officer immediately with a specific direction that the contents of such statement under Section 164 Cr.P.C. should not be disclosed to any person till charge sheet/report under Section 173 Cr.P.C. is filed.

(ii) The Investigating Officer shall as far as possible take the victim to the nearest Lady Metropolitan/preferably Lady Judicial Magistrate.

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[13] http://judis.nic.in/supremecourt/imgs1.aspx?filename=41487

(iii) The Investigating Officer shall record specifically the date and the time at which he learnt about the commission of the offence of rape and the date and time at which he took the victim to the Metropolitan/preferably Lady Judicial Magistrate as aforesaid.

(iv) If there is any delay exceeding 24 hours in taking the victim to the Magistrate, the Investigating Officer should record the reasons for the same in the case diary and hand over a copy of the same to the Magistrate.

(v) Medical Examination of the victim: Section 164 A Cr.P.C. inserted by Act 25 of 2005 in Cr.P.C. imposes an obligation on the part of Investigating Officer to get the victim of the rape immediately medically examined. A copy of the report of such medical examination should be immediately handed over to the Magistrate who records the statement of the victim under Section 164 Cr.P.C.

XIV

Case no 14 ***Animal Welfare Board Of India v A. Nagaraja & Ors*** on 7 May, 2014[14]

Bench: K.S. Radhakrishnan, Pinaki Chandra Ghose.

The supreme court in this case was concerned with an issue of seminal importance with regard to the Rights of Animals under our Constitution, laws, culture, tradition, religion and ethology, which we have to examine, in connection with the conduct of Jallikattu, Bullock-cart races etc. in the States of Tamil Nadu and Maharashtra, with particular reference to the provisions of the Prevention of Cruelty to Animals Act, 1960 (.the PCA Act, the Tamil Nadu Regulation of Jallikattu Act, 2009 and the notification dated 11.7.2011 issued by the Central Government under Section 22(ii) of the PCA Act.

The supreme court in this case held that Animal Welfare Board of India is right in its stand that Jallikattu, Bullock-cart Race and such events per se violate Sections 3, 11(1)(a) and 11(1)(m)(ii)

of PCA Act and hence we uphold the notification dated 11.7.2011 issued by the Central Government, consequently, Bulls cannot be used as performing animals,

either for the Jallikattu events or Bullock- cart Races in the State of Tamil Nadu, Maharashtra or elsewhere in the country. The court made further declarations and directions of which major are as follows

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[14] http://judis.nic.in/supremecourt/imgs1.aspx?filename=41513

(1) We declare that the rights guaranteed to the Bulls under Sections 3 and 11 of PCA Act read with Articles 51A(g) & (h) are cannot betaken away or curtailed, except under Sections 11(3) and 28 of PCA Act.

(3) AWBI and Governments are directed to take appropriate steps to see that the persons-in-charge or care of animals, take reasonable measures to ensure the well-being of animals.

(4) AWBI and Governments are directed to take steps to prevent the infliction of unnecessary pain or suffering on the animals, since their rights have been statutorily protected under Sections 3 and 11 of PCA Act.

(5) AWBI is also directed to ensure that the provisions of Section 11(1)(m)(ii) scrupulously followed, meaning thereby, that the person-in-charge or care of the animal shall not incite any animal to fight against a human being or another animal.

(6) AWBI and the Governments should take steps to impart education in relation to human treatment of animals in accordance with Section 9(k) inculcating the spirit of Articles 51A(g) & (h) of the Constitution.

(7) Parliament, it is expected, would elevate rights of animals to that of constitutional rights, as done by many of the countries around the world, so as to protect their dignity and honour. 10) The Governments would see that if the provisions of the PCA Act and the declarations and the directions issued by this Court are not properly and effectively complied with, disciplinary action be taken against the erring officials so that the purpose and object of PCA Act could be achieved.

(11) TNRJ Act is found repugnant to PCA Act, which is a welfare legislation, hence held constitutionally void, being violative or Article 254(1) of the Constitution of India.

LEGISLATIVE TRENDS

I

THE SEXUAL HARASSMENT OF WOMEN AT WORK PLACE (PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013

*Neeraj Gupta**

Constitutionally guaranteed right to equality has not always found place in the reality of Indian society. This is also true in case of women at workplace. Women at workplace suffer from various forms of harassment and sexual harassment at workplace is considered as "part and parcel" of the "work". To curb such a torturous practice of sexual harassment, voices have been raised at domestic as well as international level. The demand to curb sexual harassment at workplace is visible in Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). This convention was ratified by India. However, even after the ratification, there was no special law to ensure protection of women against sexual harassment at workplace. The Indian Penal Code (IPC) covered criminal acts that outrage or insult the 'modesty' of women. It did not cover situations which could create a hostile or difficult environment for women at the work place.

The Parliament has finally yielded to the long drawn battle to ensure a better workplace environment for women by enacting THE SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013.[2] (hereinafter as the Act). THE Preamble of the Act refers to Article 14, 15 and 21 of the Constitution of India. The Preamble also refers to CEDAW.

The Act consists of 30 Sections which are divided in eight chapters. Chapter one of the Act deals with the preliminary matters, chapter two talks about constitution of Internal Complaints Committee (hereinafter as ICC) and its composition. Chapter three deal with the constitution and composition of Local Complaints Committee (hereinafter as LCC). Chapter four prescribes the manner and limitation period of filing complaints. Chapter five relates to inquiry into complaints, chapter six with the duties of the employer and chapter seven with duties and power of the district officer. The last chapter is on miscellaneous aspects of the Act.

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* Research Scholar, Delhi University

[1] No. 14 of 2013. The President of India gave assent to the Bill on 22nd April 2013.

The Act is made applicable to women of any age harassed in the workplace[2] including women working as domestic workers[3], daily wagers, temporary or permanent, full-time or part-time, as well as volunteers.[4] The law is only applicable to women and women only.

The definition of Sexual harassment includes any one or more of the following unwelcome acts or behavior such as physical contact or advances, demand or request for sexual favors, making sexually colored remarks, showing pornography, any other unwelcome physical, verbal or non-verbal conduct of sexual nature.[5] Apart from these acts if any act is done under the following circumstances that would also count as sexual harassment[6]:

- Implied or explicit promise of preferential treatment in employment
- Implied or explicit threat of detrimental treatment in employment
- Implied or explicit threat about her present or future employment status
- Interferes with work or creates an intimidating/hostile/offensive work environment
- Humiliating treatment likely to affect her health and safety.

Definition of workplace has been given a broader sweep to include work place in government, private, NGO, co-operative society, trust, sports, stadium, education, entrainment, hospitals, industry, complex, service provider and dwelling house. It includes the place of production, supply, sale, distribution or service. The definition also includes circumstances where a woman is harassed while visiting a place arising out of or during the course of employment including transportation provided by the office.[7]

The Act requires every employer of workplaces, if they have more than 10 employees to set up ICC to address the issue of sexual harassment. Chairperson of ICC will be the senior most women worker of the workplace. Apart from chairperson there will be not less than two members who are committed to the cause of women or social work or having legal knowledge. ICC will also comprise a member from a non-governmental organization committed to the cause of women.[8]

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[2] Section 2(a)(i)
[3] Section 2(a)(ii)
[4] Section 2(f).
[5] Section 2(n).
[6] Section 3(2).
[7] Section 2(O).
[8] Section 4.

For those who have less than 10 workers, there has to be a LCC at the district level.[9] It is submitted that these LCC will be more helpful in cases of domestic workers. Any District Magistrate, Collector or Deputy Collector may be appointed as District officer for District under the Act.[10] District officer shall constitute LCC.[11] Chairperson of LCC has to be eminent women in the field of social work related cause of women. One member from *taluk* level, two members from non-governmental organization, at least one member should have the knowledge of law, and at least one member should be from the schedule cast or tribe or backward community or minority. Social welfare officer is *ex officio* member of Committee.[12] For example, a domestic help can approach the LCC for complaints against her employer.

An aggrieved woman can file a complaint within 3 months of the incident (or later if allowed by the committee).[13] The Act also provides the option of a settlement between the aggrieved woman and the responded through conciliation but only on the request of the woman. However, money compensation cannot be a basis for the settlement.[14] The inquiry under the Act has to be completed within 90 days.[15]

In case of malicious complaints or false evidence, the Committee may take action against the woman/person. However, simply not being able to prove an allegation will not mean that it is a false/malicious complaint.[16]

The identity of the aggrieved woman, respondent, witnesses as well as other details of the complaint cannot be published or disclosed to the public.[17]

The Act also places a duty on employers to hold regular workshops awareness programs as well as, display the consequences of harassment in the workplace.[18] These provisions are aimed to prevent incidences of harassments. Every employer has a duty to provide a safe working environment to all employees.

The Act also prescribes punishment against Employer who fails to constitute Committee or fails to implement the recommendations of committee. They may be punished to the extent of Rs 50000 fine. Further if he commits non-compliance second time he may be fined to the extent double amount of the first fine but it

[9] Section 6.
[10] Section 5.
[11] Section 6(1).
[12] Section 7.
[13] Section 9.
[14] Section 10.
[15] Section 11(4).
[16] Section 14.
[17] Section 16.
[18] Section 19.

cannot exceed the maximum amount of 50000. Further government can take action of cancelling the license, non-renewal, withdrawal of his registration.[19]

Critics are susceptible on the efficiency of the Act as it provides for punishment in case of malicious complaints. They argue that such provision in the Act will lead to non filing of complaint at least in cases where the victims belong to uneducated and unaware sections of the society.

It is hoped that the Act will lead to a better workplace environment for women and thereby the women will be able to contribute to the better and more equal India.

II

THE STREET VENDORS (PROTECTION OF LIVELIHOOD AND REGULATION OF STREET VENDING) ACT, 2014

The Parliament has passed the Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014[20] (hereinafter as the Act). The Street Vendors Act seeks to provide for protection of livelihood of the Street Vendors and also measures for regulation of street vending[21] to prevent congestion and overcrowding. Also, it adheres to an important need that is to enable the Street Vendors to work in a congenial and a harassment free atmosphere.

The Act consists of 39 Sections which are divided in 10 Chapters. The Act also contains two Schedules. The first chapter deals with the preliminary aspects such as short title, territorial extent, commencement and definitions. Second chapter deals with regulation of street vending and it consists of Ss 3 to 11. Third chapter of the Act deals with Rights and obligations of street vendors from Ss.12 to 17. Fourth chapter deals with aspects of relocation and eviction of street vendors and this chapter consists of only two sections i.e. 18 and 19. Fifth chapter deals with dispute redressal mechanisms consisting of one section only. Chapter six talk about plan of street vending. Chapter seven relates to Town Vending Committee whereas chapter eight provides provision relating to prevention of harassment of street vendors. Chapter nine provides penalties in case of contravention of provisions of the Act. The last chapter deals with miscellaneous aspects.

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[19] Section 26.

[20] No. 7 of 2014. The President of India gave his assent to the Bill on 4thMarch 2014.

[21] Preamble of the Act.

Chapter one says that the Town Vending Committee shall do a survey and thereby find out the number of street vendors in a local area. These vendors will be issued a certificate or license to carry on the occupation of street vending. However, a limit has been provided in the Act on the number of license to be issued.[22] The survey is periodic in nature and it will be carried on in every five years.

The certificates will be issued under three categories. These categories consist of stationary vendor, mobile vendor and any other category as may be specified in the scheme made by the Town Vending Committee.[23]

The Act seeks to provide for protection of livelihood for mobile vendors who are to work by moving around in a designated area. This seems very restrictive and will certainly affect their income. It would have been helpful if they were provided with more than one certificate. Also, the Act makes no provision for the sales which are seasonal in nature.

A large number of powers have been delegated to Central and State Governments. The extent of delegation as provided may defeat the whole purpose of the legislation. The local authorities are not required to consult the town vending committee members and the stakeholders before taking many important decisions. This could lead to arbitrariness by authorities. A conjoining lacuna is that the Act does not provide for any statutory penalties in cases of misuse of power by administrators. Thus, in absence of checks on misuse, it could lead to various administrative issues that Indian mass is facing every day.

Also, the Act does not provide for any fixed time period within which the certificates would be issued. Delegation of this power may lead to conflict between different State laws. This would affect the universalisation of the process which is the need of the hour.

The Act that the Street Vendors are required to maintain cleanliness of the vending zones and the adjoining areas.[24] It is submitted that the meaning of the term adjoining areas is incomprehensible and may lead to disputes among the vendors.

While it is appreciable that as per Sections 33 and 34 of the Act, there are provisions to secure social security of the Street Vendors, they are discretionary in nature. In absence of a statutory mandate, one could just hope for proper implementation of these provisions. These provisions are the heart of the legislation and needs to be properly construed.

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[22] Section 3.
[23] Section 6.
[24] Section 15.

While it is a matter of happiness and hope for a large amount of urban population, it is saddening to note that the Street Vendors Act has been passed without much of debate and discussion. This, in turn, leads to non addressal of certain nuances which may in the longer run affect the larger interests of those for whom the legislation is meant for.

It can be presumed that street vendors form an integral part of the urban population which provides various services to us on the doorstep our houses. They also contribute in the economic growth process in the urban areas. We hope that this welfare legislation will improve the condition of the marginalized section of society for which it needs to be implemented in letter and spirit!

III

THE NATIONAL FOOD SECURITY ACT, 2013

The Constitution of India Guarantees the right to life under Article 21. The basic requirement for right to life is right to food. To ensure such right the Parliament has recently enacted landmark legislation for ensuring this right to food. THE NATIONAL FOOD SECURITY ACT, 20132[25] (hereinafter as the Act).

The Act consists of 45 Sections which are divided in thirteen chapters. The Act also contains four schedules. Chapter one of the Act deals with the preliminary matters such as short title, extent, commencement and definitions of important words and phrases. Chapter two talk about the provision for food security and chapter three talks about food security allowance. Chapter four deal with the issue of identification of eligible households. The Act also contains chapters on other important aspects relating to food security. These are reforms in targeted public distribution system[25], women empowerment[26], grievance redressal mechanisms[27], obligations of the Central Government[28], State Governments[29], and Local Authorities[30] for food security. The Act also contains provision relating to transparency and accountability.[31]

The Act seeks to provide for food and nutritional security in human life cycle approach, by ensuring access to adequate quantity of quality food at

[25] NO. 20 OF 2013. The President of India gave his assent to the Bill on 10th September 2013
[26] Chapter V.
[27] Chapter VI.
[28] Chapter VII.
[29] Chapter VIII.
[30] Chapter IX.
[31] Chapter X.

affordable prices to people to live a life with dignity and for matters connected therewith and incidental thereto.[32]

The Act provides that every person belonging to the priority households shall be entitled to five kilograms of food grain per month at subsidized rates specified in the schedule I from the State Government. However, the households belonging to *Antyodaya Yojna* are entitled for 35 kilograms of food grain. These entitlements for shall be made available to 75 percent of the rural and up to 50 percent of the urban population.[33] The Act also ensures nutritional support to pregnant women and lactating mothers by providing free meals during pregnancy and six months after pregnancy through *Anganwadi*.[34] The Act also provides scheme for nutritional support to children of various age groups.[35] The Act also casts a duty on the State Government to prevent child malnutrition and implement the schemes for realisation of entitlements.[36] It is interesting to note that the Act also talks about food security allowance in case of non-supply of entitlements.[37]

It is the duty of the State Government to prepare guidelines and to identify priority households.[38] The State Government has to publish and display the list of eligible households.[39] The Act also casts a duty on State as well as Central government to bring reforms in Targeted Public Distribution System.[40] These reforms may include doorstep delivery of food grain, application of information and communication technology tools, full transparency of records etc. The Act also provides that the State Government shall establish Internal Grievance Redressal mechanism[41], District Grievance Redressal Officers[42] and State Food Commission.[43]

An obligation has been created on the Central Government to allocate required quantity of food grains from central pool to State Governments.[44] The Act also contains provisions relating to disclosure of records of Targeted Public Distribution System and conduct of social audit.

It is hoped that the Act, which is a purely welfare measure for the hungry and poverty stricken of Indians, will be implemented in letter and spirit.

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[32] Chapter XI.
[33] Preamble.
[34] Section 4.
[35] Section 5.
[36] Sections 6 and 7.
[37] Section 8.
[38] Section 10.
[39] Section 11.
[40] Section 12.
[41] Section 14.
[42] Section 15.
[43] Secton 16.
[44] Section 22.

BOOK REVIEWS

PRINCIPLES OF HINDU LAW- PERSONAL LAW OF HINDUS, BUDDHISTS, JAINS & SIKHS, 2014, by Tahir Mahmood, Universal Law Publishing Co., New Delhi, India, ISBN, 978- 93- 5035- 437- 7, Pages 417 Price Rs. 625/-.

The Personal Law System has for centuries been, and remains, a distinctive feature of pluralist Indian Legal Culture. Personal laws occupy a unique position in today s age and play pivotal role in keeping the society within moral and civil bounds. It is trite to say that every person is covered under the ambit of such personal laws and is greatly affected by changes that are brought about in this field. Hindu Law is one of the most dynamic personal legal systems of the world. The Hindu Law is actually the Personal Law, largely reformed and codified, of four Indian communities Hindus, Buddhists, Jains & Sikhs.

The Book under review is arranged in three parts- Matrimonial Laws, Family Rights and Relations, and Property and Succession laws. The book comprises of an elaborate Prologue introducing the Subject and Statute, Ten Chapters, one Table of Cases and Table of Statutes. Text of other laws relevant to the subject has been provided in three appendices to the book.

An elaborate Prologue deals with History, Nature, Scope, School and Sources of The Hindu Law. Author has also put light on legislative reform till date. Since this law, like all other personal laws has to be applied along with and subject to a number of general statutes and supplemental laws their provisions have also been brought into discussion in this chapter. The Author has also provided a brief mention of Local and Foreign Personal Laws. Statutory provisions and their judicial interpretations have been viewed and presented in it in a historical, Constitutional and human rights perspective.

Part - I of the book under review deals with Matrimonial Laws which comprises of four chapters. Chapter One deals with Governing Statutes I. Provisions of Hindu Marriage Act 1995, Hindu Marriage (Madras Amendment) Act 1967, Hindu Marriage Act 1909, Arya Marriage Validation Act 1937 have been discussed in this chapter. Proposed changes in Hindu Law to be inserted by Marriage Laws (Amendment) Bill 2010 are also discussed.

Chapter Two, deals with Laws for Marriage & Cohabitation. The Author has discussed Legal Requirement for Marriage, Solemnization & Completion of Marriage, Remedies for Unlawful Marriages and Marital Rights in Lawful Marriages.

Chapter Three of the book under review deals with Divorce and Post-divorce

subsistence. The Author has discussed Nature and Scope of Divorce Law, Theories of Divorce with Specific Reference to Fault and Disability Theories, Breakdown and Consent Theories. The Author has dealt with the Traditional Law Position on Divorce, Legislative Recognition of Divorce, Divorce Law saved by 1955 Act and Divorce Policy and Procedure. The Author further discusses Grounds of Divorce based on different theories, available Ancillary Reliefs after Divorce, Maintenance & Residence, Property Issues and Custody of estranged couples children and their Rights without Liabilities.

Chapter Four of the book under review deals with Settlement of Matrimonial Disputes. In this chapter the author has discussed Bars to Granting Relief, different provisions related to Limitations for Courts, Taking Advantage of Own Wrong, Condoned and Abetted Wrongs, Collusive and Delayed Legal Action and Bars to Consensual Divorce. The Hindu Marriage Act, 1955 empowers the Courts to grant certain temporary reliefs to either party during the pendency of any matrimonial proceeding under its Provisions. The Author has discussed Nature and Scope of Pre-decision Reliefs, Expenses of Proceedings and Maintenance during Proceeding under the head of Litigation and Conciliation. The Author further discusses Jurisdiction of Civil Court and Family Court and provisions for Reconciliation. The Author also discusses statutory provisions, High Court Rules and Application of Civil Procedure Code under the head of Procedures and Pleadings.

Part - II of the book under review deals with Family Rights and Relations. This part comprises of three Chapters- Chapter Five, Six and Seven. Chapter Five deals with Governing Statute - II. In this Chapter the Author has discussed Hindu Minority and Guardianship Act, 1956, Hindu Adoption and Maintenance Act, 1956 with changes made by Personal Laws (Amendment) Act, 2010, Related provisions in General Acts with reference to Guardians and Wards Act, 2010 and Juvenile Justice (Protection and Care of Children) Act, 2000 as amended by Juvenile (Care and Protection of Children) Amendment Acts of 2006 and 2011.

Chapter Six of the Book under review deals with Natural Family Relations. This Chapter is divided in three Sections. Section I deals with Child and law. It provides legal framework of Childrens Rights, Legitimacy and Illegitimacy of Children, Abortion and Surrogacy laws, Childhood and Minority and Minors Disabilities and Privileges. Section II deals with provisions for Guardianship and Custody. The Author further discusses General Principles of Guardianship and Custody, Guardianship of person, Custody and Visitation, Guardianship of property and Forums and Procedures for disputes related to guardianship and custody. Section III of Chapter Six deals with maintenance rights and Liabilities.

The Author also discusses General Principles related to Maintenance Rights & Liabilities, Right to Maintenance of Children and Daughter in Law. Liabilities of Parent, Grand Parents and Legal Heirs and Forums & Procedures for disputes related to Maintenance.

Chapter Seven of the Book under review highlights Laws of Family Relations by Adoption. In this chapter the Author discusses concept and General Principles of Adoption with reference to traditional Hindu Law and Modern Law of 1956. The Author further discusses eligibility to be Adopted and Adoptees Rights and Liabilities, Legal Capacity to Adopt a Child, Adoption by Married Persons, Adoption by Single Person, Natural Children Barring Adoption and Giving a Child in Adoption. The Author also discusses Adoption process and Procedures with reference to Guidelines for Inter Country Adoption, Adoption under Juvenile Justice Act 2000, Jurisdiction of Courts and Facilitation Agencies.

Part - III of the Book under review deals with Property and Succession Laws. This part comprises of three Chapters- Chapter Eight, Nine and Ten. Chapter Eight deals with Governing Statutes - III. In this chapter of the book under review, provisions of Hindu Succession Act 1956 with Hindu Succession (Amendment) Act 2005, Hindu Succession (Karnataka Amendment) Act 1900, Hindu Succession (Andhra Pradesh Amendment) Act 1986, Hindu Succession (Tamil Nadu Amendment) Act 1989, Hindu Succession (Maharashtra Amendment) Act 1994, Kerala Joint Hindu Family System (Abolition) Act 1975, Hindu Disposition of Property Act 1916, Hindu Inheritence (Removal of Disabilities) Act 1928, and Hindu Gains of Learning Act 1930 have been discussed by the Author.

Chapter Nine is on Succession Rights and Liabilities where the Author discusses Concepts and Kinds of Property with reference to Mitakshara and Dayabhaga Schools of Hindu Law, Pre-Independence Legislation, New Succession Law of 1956, Succession Law Terms defined by Hindu Succession Act 1956 and definition of other Succession Law Terms. The Author further discusses about Individuals Separate Property, Shares in Joint Family Property, Womens Properties in General, Womens Property under Gift or Will and Agricultural Property and Land reform governed by 1956 Act. The Author further discusses Law of Inheritance with reference to Mens Property and Womens Property. Recent Judicial rulings related to Succession, Principles of Common Application regarding Succession of Illegitimate Children, Blood preference, Distribution among Multiple Heirs, Disability to Inherit, Dwelling Houses, Preemption and Escheat have been discussed. The Author also discusses Laws for Gifts and Wills with reference to traditional Law and Customs, Legislation on Wills from 1870-1925, Legislation for Unborn Persons 1916, Indian

Succession Act, 1925 and Hindu Succession Act, 1956. The Authors research in this regard is commendable.

Chapter Ten deals with laws related to Joint Families and Impartible Estate. In this Chapter the author discusses traditional law with reference to Mitakshara and Dayabhaga Schools of Hindu Law. Decisions of the Supreme Court on traditional laws also find mention in this chapter. Author further discusses Pre-independence Legislation with reference to Hindu Inheritance (Removal of Disabilities) Act 1928, Hindu Gains of Learning Act 1930 and Hindu Womens Right to Property Act 1937. The Author also discusses Modern Law, Impact of Supreme Courts Interpretation and total subjection to Succession Law 2005.South Indias traditional Institution like Matrimonial Joint Families also finds mention in this chapter. The Author concludes the chapter mentioning revolutionary changes in succession laws. This chapter talks about abolition of Joint Families in Kerala 1975, States Laws in Daughter Coparceners 1986-1994, Central Law on Daughter Coparceners 2005 and Abolition of Obligation for Debts 2005.

This book critically analyses the development of Hindu Law from the ancient period to its emergence as a post modern phenomenon in the twenty first century .This book is an advancement over the Author's earlier work studies in Hindu Law and registers all legislative developments and judicial verdicts of the new millennium. In Chapters in the book under review are placed under three different Parts, each beginning with the edited texts of Government Statutes. A large number of cases have been decided in the last two decades by the Supreme Court of India and various High Courts covering almost all provisions of the four Hindu law Acts of 1955-56. In dealing with case law the focus of the book is on the recent cases reported till April 2014; old cases have been referred to only where considered necessary. Texts of other laws relevant to the subject have been provided in three Appendices to the book.

The book offers a critical study of major components of Hindu Law from certain new angles. Statutory Provisions and their judicial interpretations have been viewed and presented in it in a historical, constitutional and human rights perspective. Since this law, like all other personal laws, has to be applied along with and subject to a number of general statutes, their provisions have also been brought into discussion in all chapters. The book deals not only with the laws directly governing Hindu Law but also with related provisions scattered over numerous general laws of the country. A glance through the contents would reveal its extensive coverage of the entire gamut of laws relevant to or having a bearing on its theme. The legislative and judicial decisions mentioned on every

subject are result of extensive collection from a number of sources and have been carefully edited to cover each realm of the subject. Legal principles have been succinctly extracted from these decisions and lucidly interpreted. The book under review is therefore, an exhaustive amalgamation of legislative provisions, judicial decisions and legal principles. Further, an extensive subject index has been provided for an uncomplicated search of the points under reference, keeping in mind the wide nature of laws that this book covers. It would not be incorrect to say that going through the entire book has been highly enriching experience for me. The reviewer is of the sincere belief that this book is highly useful and will be well received by the members of the Bench, Bar and in the fraternity of law teachers, researchers and students.

The book has been published with due care and caution and is written in precise and systematic manner. The book is reasonably priced and recommendable for all law libraries being a good reference work in the field of Hindu Law.

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COMPARATIVE CONSTITUTIONAL LAW , by Dr Durga Das Basu,3rd Edition, 2014, Justice G B Patnaik, Yasobant Das, Rita Das(eds)Lexis Nexis, ISBN 978-93-5143-142-8, Pages 459, Price Rs 695.

The field of Comparative Constitutional Law has grown immensely over the past couple of decade. Never before has the field had such a broad range of interdisciplinary interests with lawyers, political scientists, sociologists and even economists making contribution to our collective understanding of how Constitutions are formed and how they operate. Comparative Constitutional Law has now moved front and centre, which was once a minor and obscure adjunct to the field of domestic Constitutional law. Driven by the global spread of democratic Government and the expansion of international human rights law, the prominence and visibility of the field, among judges, politicians, and scholars has been growing increasingly.

Comparative Constitution law is not a principle or body of rules of law, but rather is an approach to or method, or in other words a technique of studying law or any branch or topic of it, arising from diversity of legal systems in the world. In the United States too, where domestic Constitutional exclusivist has traditionally held a firm grip, use of comparative Constitutional materials has become the subject of a lively and much publicized controversy among various justices of the U.S. Supreme Court.The trend towards harmonization and international borrowing has often seemed to been controversial. Whereas it seems fair to assume that there ought to be great convergence among industrialized democracies over the uses and functions of commercial contracts that seems far from the case in Constitutional law. Can a parliamentary democracy be compared to a presidential one? A federal republic to a unitary one? Moreover, what about differences in ideology or national identity? Can Constitutional rights deployed in a libertarian context be profitably compared to those at work in a social welfare context? Is it perilous to compare minority rights in a multi-ethnic State to those in its ethnically homogeneous counterparts? Comparative Constitutional law deals with the background of these controversies, challenging not only legal scholars, but also those in other fields, such as philosophy and political theory.

The book under review is concerned with legal interpretation of various Constitutions and universal prepositions emerging there from. Though the discussion is primarily concerned with the Constitutional law of the countries which have adopted the Anglo American system, occasional reference has been made by way of contrast, to the Constitutions of countries like the U.S.S.R., China or France which do not have Judicial Review and cannot, therefore, offer judicial decisions containing legal interpretation of those respective

Constitutions. The book is divided into 18 chapters and it has incorporated precedents till early 2014 of major Constitutions.

Chapter One is Introductory in nature and discusses the scope of the comparative study of Constitutional law. As per this Chapter while Comparative Politics or Comparative Government deals with ideology and political or functional behaviour, Comparative Constitutional Law works on law and judicial decisions. Thus according to Author the study of Comparative Constitutional Law is indispensable for Constitution making in any country today. Where a Constitution is framed with material borrowed from other Constitutions, the need for a comparative study assumes a special importance because, in interpreting and applying the borrowed Constitutions, the national Courts must necessarily have to refer to the foreign precedents to discover what meaning had been imputed to the borrowed materials in the countries of their origin, conscious of which the framers of borrowed Constitutions had adopted to those materials.

In the Second Chapter the Author explains the history of Constitution making and its development in India and also discusses that how foreign juristic concepts have influenced the interpretation of Indian Constitution.

Chapter Three discusses the doctrine of natural justice, a common law principle, laid down in numerous English decisions. The Author says that the aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. The concept of natural justice has undergone a great deal of change in recent years and many more subsidiary rules came to be added in the course of years. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of law under which the enquiry is held and the Constitution of the Tribunal or body of persons appointed for that purpose.

Chapter Four explains the departure from foreign precedents because in importing foreign precedents in the matter of interpreting a national Constitution, the distinctive features of national Constitution should not be overlooked.

In Chapter Five the Author discusses about bill of rights, the topic is so encyclopaedic that it has been dealt separately and Chapter Six deals with judicial decision violating due process from procedural as well as substantive standpoint.

Chapter Seven discusses the scope of comparative study from the legal standpoint which works on the basis of sovereign State founded on national Constitutions, but places the legal interpretations given to those Constitutions by their respective Courts on the same platform, so that the merits and demerits of the divergent interpretations may be examined in order to help building up a

universal body of Constitutional law. This chapter also discusses alteration of the Constitution and the doctrine of "basic features "along with the limitations on the amending powers

Chapter Eight explains in detail that in order to appreciate the legal implications of a written Constitution, it is essential to grasp the basic concepts involved, such as State, Constitution, Constitutional law and the like.

Chapter Nine discusses the incidents and justiciability of a written Constitution and provides that subjects to exceptions, if any, a written Constitution is justiciable or enforceable in the Court like a statute or any other legal instruments and for the same reason capable of being interpreted by the Courts like any other statute. It also discusses provisions which are, in their nature, not justiciable, example, fundamental duties (Article-51A of the Constitution).

In Chapter Ten the Author deals with interpretation of the Constitution as a legal instrument and limitations to the scope of interpretation and in Chapter Eleven he explains equality and rule of law.

Chapter Twelve explains that the final interpretation of the Constitution, as legal instrument, lies with the highest Court of the land .The Author has also highlighted that how supremacy of judicial interpretation accounts for expansion of the Constitution through the judicial process without formal Amendment.

Chapter Thirteen is a vast chapter ranging over 56 pages wherein the Author has deeply analyzed the admissibility of extraneous evidence to interpret a written Constitution. According to him ,as per relevant rule for interpretation, express enactment shuts the door to further implication (expressum facit cessare facitum) and express mention of a thing excludes things which are not mentioned(expression unius est exclusion alterius).

Chapter Fourteen focuses upon the amendability of the Constitution and implied limitation over amending power in view of basic structure of the Constitution laid down in *Keshavananda Bharti* v *State of Kerala.*

In Chapter Fifteen the Author discusses the Constitution as" Higher Law" which permeates the entire body of Constitutional decisions in U.S.A. In India also express provisions in the Constitution, such as Article 13 and 254(1), make it clear that the Constitution is the paramount law, inconsistency with which renders a law made by legislature void.

Chapter Sixteen discusses the written Constitution as a limitation. As per Author a written Constitution is a legal instrument, which sets up and limits the powers and functions of different organs of the State. Since the powers of all

organs of the State are defined by the Constitution, it follows that under a written Constitution, no organ or branch of Government can claim omnipotence or sovereignty in the English senses.

Chapter Seventeen explains the principle against delegation of Constitutional powers as a limitation and in chapter eighteen the Author has discussed judicial review, role of judiciary and the doctrine of State action. As per Authors view the judicial review has got a definite significance in countries having a written Constitution which is treated as a legal instrument because once it has been held that the Constitution is a legal instrument, it would follow that its interpretation and application should be a function of the Courts.

The book under review can be undoubtedly termed as resourceful and an all-round information package. The topics have been detailed in a manner that makes it most intelligible and fluent. The book is quite exhaustive on the topics that are covered. To add to its pros it is written in a simple and a lucid manner. The balanced and straight forward approach towards every possible related topic makes it a user friendly. The price of the book is very reasonable taking into account the exhaustive information contained in the book. It is a useful book for lawyers, researchers and other interested in the subject. To conclude, the book has been published with due care and caution and is written in a precise and systematic manner.

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CRIMINOLOGY AND PRISON REFORMS, 2014, by Girish Kathpalia.Lexis Nexis, India.Pages 262.ISBN:978-93-5143-129-9.Price Rs.350/-

Prisoners are one of the weakest constituencies in a society. They have no voting rights, have very limited access to the outside world, and are under the complete control of the prison authority. As such, therefore, Prison Reform is an attempt to improve conditions inside prisons as well as making the penal system more effective .Such Prison Reforms owe lot to Criminology since Criminology has brought an emerging philosophy of liberalism and utilitarianism to the justice system, advocating principles of rights, fairness and due process in place of retribution, arbitrariness and brutality.

The book under review comprises of fifteen chapters and one Table of Cases. Chapter One and Two are introductory in nature. Chapter one deals with the origin and growth of criminal law, nature of criminal law, definition of crime, and its ingredients. Since criminology and penology are interrelated as well as inter-dependant, the author has also provided a preliminary reflection of a relatively new branch of study *Victimology*.

Chapter Two deals with the nature of criminology and how it aims to study the various factors behind crime conception, different kinds of crimes and curative measures for minimization of aggression in the society. The use of statistics in the study of criminal science has also been discussed in this chapter by the author.

Chapter Three deals with the concept of crime and classification of offences in ancient Hindu Laws. The author also deals with the classification, quantum and principles of punishment penology under ancient Hindu Law. While doing so, the author has referred to Kautilyas Arthshastra. The author, in this chapter, also talks about the extent of punishment to be awarded as to act as a deterrent to strike fear in the hearts of potential criminals. The author further discusses Capital punishment as prevailing under ancient Hindu Law, during the Buddhist realm as well as during the Maratha period. The concept of Jail and remission of sentences also find mention in this chapter by the Author.

Chapter Four of the book under review studies Islamic Jurisprudence with reference to the Holy Quran, Islamic law schools and the law of Homicide as prevailing under Islamic Criminal Jurisprudence. While discussing Islamic Law Schools, the Author refers to the Hanafi School, the Maliki School, Shaifi School and the Hanbali School. The Authors research in this regard is commendable.

Chapter Five of the book under review deals with Transition of Criminal Justice system after the advent of the British rule. The author has discussed the modifications made by Warren Hastings as well as reforms introduced by the Lord Cornwallis. The Author has dealt with modifications with respect to Indian

customs such as *Sati*, the discontinuance of Islamic Criminal law and the development of Criminal Law in various Indian Provinces such as Banaras, Madras and Bombay.

Criminology and its various schools find elaborate discussions in Chapter Six of the book under review. The Author has carefully analyzed pre-classical, classical and neo classical schools of criminology. The Author also discusses the Clinical School of criminology and modern criminology. The Author in this chapter advocates for expansion of criminology to post punishment or treatment stage as well and also suggests a more zealous and spirited approach from judicial officers especially in the area of deciding quantum and nature of punishment.

Crime Causation and its approaches find discussion in Chapter Seven of the book under review. The Author divides the entire Chapter in two Sections Section I dealing with Individualistic Approaches to Crime Causation and Section II which deals with the Objective Approaches. Chapter seven is a vast chapter ranging over 23 pages wherein the Author has deeply analyzed crime causation by referring to various theories professed by both the approaches. The Author finally concludes that though every individual is born good, it is only the social strains that introduce criminal tendencies in a person.

The manner in which a society responds to crime has been analyzed in Chapter Eight of the book under review and which chapter is titled as Societal Responses to Crime. The Author talks of two kinds of societal responses to crimes. One being the punitive response and, the other being the therapeutic one. The Author finds that these responses may sometimes overlap and co-exist as parts of the overall system in the society. The Author also then discusses Judicial *Sentencing* as the formal out print of the kinds of societal response to crimes. The Indian practice of judicial sentencing has been discussed with reference to a plethora of case law.

Chapter Nine is on punitive reaction to crime where the author talks of rationalization of punishment by dividing into two classes based on retributive and utilitarian theories. According to the Author, retributive theory justifies infliction of punishment as a natural reaction to the offence, the utilitarian theory regards punishment as an evil which should be used only if it serves some fruitful purpose like deterrence from commission of crime. The Author then discusses "deterrence" in detail as well as incapacitation by death. The Hybrid theory of punishment also finds discussion in this chapter by the Author.

In Chapter Ten various kinds of punishments recognized in many parts of the world including India have been discussed by the Author. Punishments such as corporal, branding, stoning, banishment, fines, corrective labour, capital punishment find mention in this chapter.

Chapter Eleven will provide the readers an insight to capital punishment and the concern which criminologist and penologists across the world have with capital punishment. The author also discusses the judicial approach on the issue of death sentence in India and various procedural safeguards evolved by the judiciary while deciding to award death sentences. While discussing various modes of execution of death sentence adopted in middle ages the author calls the process of hanging as "inhuman" and quotes from expert opinion reproduced in judicial verdicts to describe the inhumane nature of hanging. The book also quotes the Law Commission of India as comparing in a consultation paper the three main methods of execution hanging, shooting and lethal injection. According to the consultation paper, the process of lethal injection takes only five to nine minutes to declare a person dead in contrast to the 40 minutes taken when he is hanged. In lethal injection, no mutilation takes place. It is also painless and swift besides being the best controlled way of execution. The book says: "It is high time Indian system of executions be revisited and options other than hanging be analyzed for the purpose of execution of the death sentence."

The Author in Chapter Twelve discusses the origin and growth of Prison System. The Author analyzes the American Prison System, the British & European Prison system as well as the prison system in India through different phases i.e. the pre British era, British era and post independence era.

Chapter Thirteen focuses on some very common problems across the prisons in India such as overcrowding, prolonged detention of under-trial prisoners, unsatisfactory living conditions, lack of treatment programmes, torture and allegations of indifferent and even inhuman approach of prison staff etc. Out of these problems overcrowding in turn leads to many further multifarious problems such as gang rivalries, violence over the space food and other amenities, unsafe sexual assaults, drug abuse, communicable and especially sexually transmitted diseases, extortions and various violent activities. The Author elaborately discusses all these issues in detail with reference to case law.

Chapter Fourteen of the book deals with Prison Reforms-I wherein the author has discussed the concept of prisons and has highlighted the role of judiciary in bringing about the desired goal of reformation and /or rehabilation of criminals specially the inspecting Judge in order to bring about jail reforms and to protect the fundamental rights of the prisoners. Chapter Fifteen is an extension of Chapter Fourteen since it has been devoted to discuss various tools of reformatory penology such as probation, parole, furlough, suspension of sentence, remission of sentence and clemency. The author has discussed the good time laws which was adopted in France first and then in America. In India the system of allowing prisoners the benefits of the good time allowance is prevalent ever since the

British period and even earlier, though not specifically with the name good time allowance. At the same time, the honour system is used in many jails across India and the significant changes have been or are in the process of being introduced in penology aimed at meaningful treatment of criminals. The author has further discussed the system of self Governance in prisons whereby the inmates select some of their fellow prisoners as their representatives and the entire prison management is run by that elected body of prisoners. The author has also discussed some general techniques such as after-care scientific programming, spiritual training programme of the prisoners, the continuing education of the prisoners as well as vocational training of inmates, counselling by professionally trained psychologists helping the prisoners in their rehabilitation.

Analytic in presentation, holistic in interpretation, with examples drawn from Indian and western situations with simple language narration, this book is a sure shot success on the subject. Though the book is the 1st edition in the journey of its publication, it is comprehensive, well researched and contains an up-to-date work on the issue it seeks to address. The book under review is a walkthrough the subject criminology and penology and is concerned with the nature, causes, prevention, punishment, correctional administration etc., of crime. The book is quite exhaustive on the topics that are covered. The author has cited practices from various countries across the globe, important judgments and recent cases along with the policy formulation issues. The balanced and straight forward approach towards every possible related topic makes it a user friendly guide. As a user guide and manual for the law students, the book is designed as a route map to provide an overview of criminology and penology. The author has reminded a need to ensure the rule of law by upholding the fundamental rights of prisoners. It is a must have for all students of criminology.

The book has been published with due care and caution and is written in a precise and systematic manner. It may, however, be pointed that where the detailed contents are given in the beginning, the title of the book given is "*Criminal Jurisprudence and Prison Reforms*" instead of "*Criminology and Prison Reforms*" and there is no need of repetition of detailed contents and Table of Cases at the end of the book. The author has put forward his submissions in a very humble manner. The book is reasonably priced and recommendable for all law libraries being a good reference work in the field of criminology.

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HANDBOOK ON ELECTION LAW, First Edition, 2014. by P. Rathna Swamy. Lexis Nexis, India. ISBN-978-93-5143-056-8. Pp. xxvi+406. Price Rs. 350/-.

The Preamble to the Constitution of India, 1950 declares the country to be a sovereign socialist secular democratic republic. Democracy is one of the inalienable basic features of the Constitution of India and forms part of its basic structure[1]. As Justice V.R. Krishna Iyer stated in his inimitable style:

"Democracy is government by the people. It is a continual participative operation, not a cataclysmic, periodic exercise. The little man, in his multitude, marking his vote at the poll does a social audit of his Parliament plus political choice of this proxy. Although the full flower of participative Government rarely blossoms, the minimum credential of popular government is appeal to the people after every term for a renewal of confidence. So we have adult franchise and general elections as constitutional compulsions. It needs little argument to hold that the heart of the Parliamentary system is free and fair elections periodically held, based on adult franchise, although social and economic democracy may demand much more."[2]

Giving due importance to the conduct of free and fair elections in a democratic set up, the founding fathers of the Constitution devoted a separate part, Part XV, containing Articles 324 to 329, in the Constitution to elections. Article 324 provides for the setting up of an independent Election Commission of India that has been charged with the constitutional duty of ensuring free and fair elections to the Parliament and State Legislatures and to the offices of the President and the Vice President of India.[3] The legislative framework for elections to the Parliament and the State Legislatures in India is provided by the Representation of the People Act, 1950 and the Representation of the People Act, 1951[4] along with the relevant Rules. The elections to the offices of the President and Vice President of India are governed by the Presidential and Vice Presidential Elections Act, 1952 along with the relevant Rules. The elections to the *panchayati raj* institutions and other institutions of local self governmentare conducted by the respective State Election Commissions[5] and are governed by state specific laws.

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1 *Kesavananda Bharati* v. *State of Kerala,* AIR 1973 SC 1461.

2 *Mohinder Singh Gill* v. *The Chief Election Commissioner,* (1978) 1 SCC 405 at 424, para 23.

3 The Constitution of India 1950, Article 324(1).

4 Hereinafter, the R.P. Act, 1951.

5 The Constitution of India, 1950, Articles 243K, 243ZA.

The book under review primarily deals with the laws relating to elections to the Parliament and State Legislatures and elections to the offices of the President and the Vice President of India. The book is divided into ten chapters.

The First Chapter is Introductory in nature. It traces the history of elections and the evolution of the electoral system and practices in pre and post-independence India. It explains the election machinery established under the Constitution and electoral laws of India. This Chapter also discusses six different kinds of Election Commissions from across the world. It delineates basic concepts like delimitation of constituencies, nature of the right to vote, the role of the Election Commission of India, the manner of voting adopted in independent India. It also introduces modern day challenges to our democracy like criminalization of politics, poll related violence, unaccounted election expenditure, exit polls, opinion polls and enforcement of the Model Code of Conduct for the Guidance of Political Parties and Candidates that are discussed in detail in the subsequent chapters.

The Second Chapter discusses Part XV of the Constitution of India with special emphasis on the functions of the Election Commission of India under Article 324. The procedure for filing of election petitions and their trial under the R.P. Act, 1951 is also explained in this Chapter. The procedure for filing an appeal to the Supreme Court against an order/judgment of the High Court in an election petition, as well as the procedure for withdrawal and abatement of election petitions under the R.P. Act, 1951 is also explained succinctly. Public interest litigation in the field of Election Law finds a very brief mention in this Chapter.

The Third Chapter discusses the composition of the Parliament and the principles for delimitation of constituencies. It also deals with elections to the offices of the President and the Vice President of India and the forum and the grounds for challenging such election under the Presidential and Vice Presidential Elections Act, 1952.

The Fourth Chapter discusses the composition of the Election Commission of India and its Constitutional and statutory powers and functions in detail.

The Fifth Chapter discusses the qualifications and disqualifications prescribed by the Constitution of India and the R.P. Act, 1951 for being elected as, and for being, a member of Parliament or State Legislature in India. This chapter also makes a reference to certain corrupt practices under Section 123 of the R.P. Act, 1951. The consequences of commission of corrupt practices and illegal practices in England are also discussed in this chapter.

The Sixth Chapter is an extension of chapter five, since it deals with the Constitutional disqualification of defection. The Anti-Defection Law is explained in detail in this chapter.

The Seventh Chapter explains the procedure for filing of nominations under the R.P. Act, 1951. It discusses the grounds for rejection of nomination papers and the consequences of improper rejection and acceptance of nomination papers.

The Eighth Chapter deals with various corrupt practices under Section 123 of the R.P. Act, 1951 and the consequences of commission of such corrupt practices by the candidates and their supporters during elections. It again makes a reference to the consequences of commission of corrupt practices and illegal practices in England.

The Ninth Chapter deals with the voters right to know the antecedents of candidates at elections and the role of the Indian judiciary in securing this right to the citizens.

The Tenth Chapter discusses various recommendations regarding electoral reforms that need to be carried out in India especially with respect to issues like criminalization of politics, corruption, unaccounted election expenditure, state funding of elections, electorate education and empowerment, proxy voting. While making the recommendations, the author has cited best practices from various countries across the globe.

The book is quite exhaustive on the topics that are covered. It is written in a simple, lucid manner. The prevalent position in other countries, wherever discussed, is quite informative. Keeping in mind the dynamic nature of the subject, the efforts of the author to bring forth a book that addresses most pertinent issues in about 400 pages is commendable. The book is reasonably priced. It would prove useful for all stakeholders in our democracy, which includes law students, academics, lawyers, judges, politicians and even lay persons. It would be a useful addition to law libraries.

A little more meticulousness in editing and incorporation of latest judgments, especially in the chapters on Anti-Defection Law, Corrupt Practices and Voters Right to Know the Antecedents of Candidates would have further added to the quality of the book. Amidst increasing use of social media by political parties and candidates for election campaigning, the violation of electoral laws in cyberspace has become an area of concern for the Election Commission of India. Some discussion on the steps taken by the Election Commission to check such misuse and the application of the Model Code of Conduct for the Guidance of Political Parties and Candidates to the social media would have been welcome.

Some significant recent developments relating to freebies promised by political parties in their election manifestos which affects the level-playing field,[6] the contentious issue of paid news,[7] the Law Commission of Indias recommendations for dealing with criminalization of politics[8] would be welcome additions in future editions of the book.

Monica Chaudhary*

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[6] *See S.Subramaniam Balajiv. State of Tamil Nadu,* (2013) 9 SCC 659.

[7] See Supreme Court judgment dated May 05, 2014 in *Ashok Shankarrao Chavanv. Dr. Madhavrao Kinhalkar,* Civil Appeal No. 5044 of 2014 (@ SLP (C) No. 29882 of 2011).

[8] See The Law Commission of India, Report No. 244 on Electoral Disqualifications (February, 2014) available at http://lawcommissionofindia.nic.in/reports/Report244.pdf (visited on June 2, 2014).

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Book on SEXUAL HARASSMENT AT WORKPLACE (A Detailed Analysis of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013). by Dr. Ritu Gupta, LexisNexis Publishers, pages 294, price Rs. 325.

The problem of sexual harassment of women at workplace results in violation of the fundamental rights of a woman to equality under Articles 14 and 15 of the Constitution of India and her right to life and to live with dignity under Article 21 of the Constitution and right to practice any profession or to carry on any occupation, trade or business which includes a right to a safe environment free from sexual harassment.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ensures that women are protected against sexual harassment at all the work places, be it in public or private. This will contribute to realization of their right to gender equality, life and liberty and equality in working conditions everywhere. The sense of security at the workplace will improve women's participation in work, resulting in their economic empowerment and inclusive growth.

The Supreme Court of India gave new definition of sexual harassment of women at workplace in *Vishaka* v. *State of Rajasthan, AIR 1997 SC 3011.*The case ruling establishes that sexual harassment violates a woman's rights in the workplace and is thus not just a matter of personal injury.

Before this Act of 2013, there was no Act in force which directly dealt with sexual harassment of women at workplace. After the Judgment pronounced by the Supreme Court of India in *Vishaka case*, the Bill was first introduced by women and child development minister Krishna Tirath in 2007 and approved by the Union Cabinet in January 2010. It was tabled in the Lok Sabha in December 2010 and referred to the Parliamentary Standing Committee on Human Resources Development. The committee's report was published on 30 November 2011. In May 2012, the Union Cabinet approved an Amendment to include domestic workers. The amended Bill was finally passed by the Lok Sabha on 3 September 2012. The Bill was passed by the Rajya Sabha (the upper house of the Indian Parliament) on 26 February 2013. It received the assent of the President of India and was published in the Gazette of India, Extraordinary, Part-II, Section-1, dated the 23rd April 2013 as Act No. 14 of 2013.

The Act defines sexual harassment at the work place and creates a mechanism for redressal of complaints. It also provides safeguards against false or malicious charges. The definition of "aggrieved woman", who will get protection under the Act is extremely wide to cover all women, irrespective of her age or

employment status, whether in the organized or unorganized sectors, public or private and covers clients, customers and domestic workers as well. While the "workplace" in the Vishaka Guidelines is confined to the traditional office set-up where there is a clear employer-employee relationship, the Act goes much further to include organizations, department, office, branch unit etc. in the public and private sector, organized and unorganized, hospitals, nursing homes, educational institutions, sports institutes, stadiums, sports complex and any place visited by the employee during the course of employment including the transportation. Every employer is required to constitute an Internal Complaints Committee at each office or branch with 10 or more employees. The District Officer is required to constitute a Local Complaints Committee at each district, and if required at the block level. The Complaints Committees have the powers of civil Courts for gathering evidence. The Complaints Committees are required to provide for conciliation before initiating an inquiry, if requested by the complainant. Penalties have been prescribed for employers. The Committee is required to complete the inquiry within a time period of 90 days. On completion of the inquiry, the report will be sent to the employer or the District Officer, as the case may be, they are mandated to take action on the report within 60 days. Non-compliance with the provisions of the Act shall be punishable with a fine of up to ₹ 50,000. Repeated violations may lead to higher penalties and cancellation of licence or registration to conduct business

This book, under review, comprises of Nine Chapters and Two Annexures. Chapter One deals with introduction. It defines the acts which amount to sexual harassment, trouble equation and sexual discrimination. Chapter Two explains the problems, its extent and types. Same also covers the perception and attitudes towards sexual harassment, power game and discrimination amounting to sexual harassment. Chapter Three is the study of guidelines given by the Hon'ble Supreme Court of India in *Vishaka case* and the enactment of the new Act. Chapter Four is the case study related to sexual harassment of women at work place and the new Act. Chapter Five illustrates the provisions given under Constitution of India, Indian Penal Code, Indian Evidence Act, Criminal Procedure Code, The Contract Act, Law of Torts, The Factories Act and other laws related with the issue of sexual harassment at work place. Chapter Six is the detailed analysis of the new Act, Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. Chapter Seven explains the provisions under law of different nations, treaties, various international instruments and conventions regarding sexual harassment, sex discrimination and equality of sexes. Chapter Eight explains the procedure to conduct enquiry in the line of Vishaka guidelines along with the relevant provisions of Criminal Law, Service Law and other relevant laws in India prior to the enactment of the new Act. Chapter Nine explains the policies need to be adopted as preventive mechanism.

The book is the 1st edition in the journey of its publication. The book under review is a comprehensive, well researched and up-to-date work on this sensitive issue. The book contains chapters dedicated to the definition and extent of the problem, national as well as international scenario, important judgments and recent cases, along with the policy formulation issues. It also illustrates relevant updated provisions of the Indian Penal Code,1860, the Code of Criminal Procedure, 1973, the Indian Evidence Act, 1872 (as amended by the Criminal Law (Amendment) Act, 2013), and service rules. The Sexual Harassment of Women at Workplace (Prevention, Protection and Redressal) Act, 2013 has been analyzed minutely and every Section has been examined critically explaining their full import and highlighting their intricacies. Simple, easy and lucid language binds the reader and helps them to go through the contents quickly. The balanced and straight forward approach towards every possible related topic makes it a user friendly guide. It is useful to both the lawman and the layman equally who wish to have an insight into the much talked about problem. It will be of immense use to the students, the legal fraternity in general, NGOs, organized as well as unorganized sectors, researchers and policy makers etc.

This book is a good compilation of the existing laws in India and the case laws on the subject of sexual harassment at work place.

Apart from the above, the reviewer has observed that the book has several grammatical, spelling and typographic errors and it seems that the proof reading has not been done properly or have been done in a casual manner, for example, at page no. 47, line no. 26, the word 'helpless' is wrongly written as 'hapless'. At many places, the language used in the book under review, is not proper and the meaning is not clear, e.g. at pg. no. 292, para 19 (b), display at, my conspicuous place in the workplace, ... Also at pg. no. 293, the heading '45 of 1860' does not give the clear idea about what the heading all about. At pg. no. 285, para 9(1), 4th line - within a period or three months from the date of .....Here instead of 'or' the word 'of' should have been used. Contents at page no xvii indicates Annexure II at page no. 299 but book contains only 294 pages thereby excluding the said Annexure from the book. Therefore the book requires to be published again after making all the corrections properly. The corrected edition may be recommended for the law library and the other libraries.

The price of the book is very reasonable taking into account the exhaustive information contained in the book. It is a useful book for lawyers, researchers and other interested in the subject.

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ENVIRONMENTAL LAWS AND POLICIES IN INDIA, by Dr. Rinku Gupta, Commercial Law Publishers (India) Pvt. Limited, Pages 288, Price Rs. 250.

In this age of competing developments and advancements in various fields, industrial and technological sectors has been playing the most vital role with its advantages and disadvantages. Humans have for comfort and efficiency invented from a simple needle to Rocket engines and nuclear technologies and weapons. Of course, we all need comfort and efficiency, however, an excess with a slight negligence in industrial and technological endeavours has caused tremendous loss to environment and human life. In the words of the author Dr. Rinku Gupta "this unprecedented crisis has been spearheaded by mens greed, rampant consumerism and unsustainable pattern of development which have all but left our environment badly mutilated and mauled with terrible consequences for all." We all want to breathe fresh air avoid disasters. There has been lot of initiatives undertaken for sustainable development, abetment of water and air pollution etc. Governments, judiciary, statutory authorities, NGOs and other societies have been actively engaged in maintaining ecological balance to sustain the environment and its resources. To regulate and control human activities that harm environment, law is, the strongest element of force by which we can control those developments hampering environment and maintain ecological balance. Since the Vedic Age, India has adopted environment friendly measures in all its developmental activities, as a nation which worship and believe in nature and its resources. Statutory environmental laws were enacted as early as 1853 viz., the Shore Nuisance (Bombay and Kolaba) Act, 1853, the Oriental Gas Company Act, 1857, the Forest Act, 1857, etc. Chapter XIV of the Indian Penal Code, 1860 makes several acts affecting environment as an offence. The Directive Principles of State Policy under the Constitution of India provide several provisions for environmental protection, conservation, improvement and environmental rights of individual and societies. Article 48A is one such provision which make the Constitution of India one of the rare constitutions of the world where the State is made obligated to protect and improve the environment by the Supreme law of the land. Article 51A (g) of the Constitution of India imposes a fundamental duty upon every citizen to protect and improve the natural resources. The Indian judiciary "the bulwark" of democracy through its interpretation has made protection of environment, right to a wholesome environment and right to healthy environment as a fundamental right under Article 14 and Article 21 of the Constitution of India. Since the 1972 Stockholm Conference on Human Environment India has played the key role in the international environmental regime and has adopted the principles of international environmental agreements in her domestic policies and planning. India has left no stone untouched in protection, conservation, improvement and

sustainable development of environment, the Government has been sincerely working in this field by applying different strategies and policies through the Ministry of Environment & Forest and National Action Plan on Climate Change. The Indian parliament too has been in constant effort to make stronger laws for environment.

The key environmental challenges that India faces today is the nexus of environmental degradation with poverty and economic growth. The consequence of dynamic interplay between socio-economic institutional and technological activities is also another factor for environmental degradation in India. India as a developing country is also faced with critical energy demands which again is another cause for environmental degradation. Poverty, population growth, urbanization, intensification of agriculture, rising energy use, transportation etc. are the key environmental challenges in India. Unless the relationship between our multiplying population and its life support system is stabilized, development of programmes howsoever innovative are not likely to yield the desired results. The societys demand should be regulated in such a way that our natural environment is able to sustain all developmental activities. Sustainability is not an option but an imperative to be allowed by every person living in this planet. Thus a proper management of environment is vital. The Government of India has from time to time promulgated various policies viz, the National Water Policy, 1987, the National Forest Policy, 1988, the Policy Statement for Abatement of Pollution, 1992, the Wildlife Conservation Strategy, 2002, the National Environmental Policy, 2006. The bedrock statutory environmental legislation includes the Wildlife Protection Act, 1972, the Forest Conservation Act, 1980 and the Environmental Protection Act, 1986.

The book contains Ten chapters. Chapter One is Introductory which examines the problem of environmental degradation and its impact that is threatening the world today. It also brief the ancient Indian practices for protection of environment. Chapter Two makes a brief history of international efforts for protection of environment. Chapter Three elaborates the key environmental legislations in India. Chapter Four analysis the important issue of planning process versus environmental policies enunciated by the Government of India post Indias independence. Chapter Five discusses the role of Indian judiciary and its landmark judgements in protection of environment. Chapter Six explores environmental ethics and constitutional provisions. Chapter Seven discusses the public participation in environmental decision making and right to information. Chapter Eight highlights some recent developments. Chapter Nine is dedicated to some landmark judgements by J&K High Court. Finally, Chapter Ten concludes the book with some significant suggestions and summation of

the book. The book also contains three annexure of statutory provisions (Acts) with comments.

The book is of soft cover bound, 229 x 152mm approx. in size and about half inch thick. So, it is easy to hold and read. The print quality is excellent so as the front size is easily readable. The book has footnotes which is very helpful to a researcher. The reviewer has found everything perfect except that the book has no index for table of cases and words which would be helpful to easily locate cases and words, secondly, the book has no year of publication and finally, the book has also no ISBN. Nonetheless, the book is reasonably priced and is useful to law students, researchers, lawyers, activists and all others who are interested in environment. The book is recommended to keep not only in law library but in other libraries as well.

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FORM IV

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I, Prof. Usha Tandon, hereby declare that the particulars given above are true to the best of my knowledge and belief.

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