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From the Desk of Professor-In-Charge

The fourth and fifth volume of the Journal of the Campus Law Centre (*JCLC)* is before the esteemed readers. This is a combined volume, as the fourth volume could not be published on time. After the completion of three year tenure as Professor-in-Charge in May 2016, I again got the same responsibility on 27th December 2016 for another term of three years. In those seven months, unfortunately, *JCLC* did not get due attention, even though submissions had been received from the authors, thus resulting in the withdrawal of papers by authors like Mr. N.K. Rohatgi, Dr. Bharat and others. In the first meeting for *JCLC,* in January, 2017, it was decided that instead of running it one year late, it is better to combine both the previous and current issue of this Journal, hence the combined volume.

All this reminded me what Professor M.P. Singh, my esteemed teacher, currently Chancellor, Central University, Haryana, said when I first gave him the news that CLC is bringing out its own Journal. Professor Singh said "congrats Usha for this endeavour, however my concern is how long it will go, as I am seeing that old ones are dying...". I took his comment very seriously and personally got involved at all stages of its publication with the result that the first three volumes were published on time. But his remarks turned out to be true for the fourth one. Having analysed the situation, to give *JCLC* sustainability, this time, I as PIC,decided to stay away from it, and see it growing from the distance by entrusting the WHOLE responsibility to my learned colleague Dr. Raman Mittal, Associate Professor, CLC and Deputy Dean, Legal Affairs, DU. I deliberately did not participate in the editorial meetings and left to him the entire task of peer-review, selection, rejection, revision and editing of articles. Though this volume could not meet the deadline for its publication i.e. July, 2017, I am delighted that the editing work is performed well by him and his team comprising Dr. Anju Sinha, Dr. Harleen Kaur, Mr Mizum and Ms Gauraan. I record my appreciation for Raman and all members of his team for reviving this publication.

I browsed the final draft, as the Editor-in-Chief of *JCLC,* and found very interesting collection of articles ranging from traditional areas such as judicial review of administrative action, democratization of justice to the emerging issues

of FRAND and homosexual parenting. This publication also contains papers on various controversial issues such as Criminal Law (Amendment) Act, 2013; anthropocentrism vs eco-centrism; tribal rights; televised trials etc.

The Campus Law Centre organised an International Conference on Conservation of Biodiversity and Sustainable Energy in February, 2016, in which various countries like United Kingdom, South Korea, South Africa, Nigeria, Algeria, Mauritius, Indonesia, Bangladesh and Uganda participated. This Volume contains the prestigious Addresses delivered at the Inaugural Session and Valedictory Session of the Conference by Mrs. Maneka Sanjay Gandhi, Hon'ble Union Cabinet Minister, Women and Child Development and former Minister of Environment and Forest; Hon'ble Mr. Justice Ranjan Gogoi and Hon'ble Mr. Justice Uday U Lalit, Justices Supreme Court of India. The speech delivered by Hon'ble Mr. Justice A.K. Patnaik, former Judge, Supreme Court of India, Mr. Mohan Parasaran, and Mr Sidharth Luthra, Senior Advocates, Supreme Court of India, have also been included in the Volume. The proceedings of the Conference have also been published and can further be viewed at http://clc.du.ac.in/ and https://archive.org/details/Conservation Of Biodiversity And Sustainable Energy. Furthermore, a book of selected and edited papers of the Conference has also been, recently, published by Routledge, Taylor and Francis Group, New York and London.

Professor P.N. Singh, former Professor and Professor-In-Charge,CLC (2000-2002); Head and Dean, Faculty of law, (2001-2003) left for heavenly abode on 20th February, 2017. This Volume contains a Commemorative Section in the memory of our revered colleague. I am thankful to Professor M.P.Singh, a great jurist, who graciously wrote a commemorative column on Professor P.N. Sigh.

In April, 2016, when I wrote my Address for another CLC publication known as Kaleidoscope, I assumed it my last Address in the capacity of PIC, totally unware of the role of destiny. My Addresses written for various CLC publications, such as Souvenirs of Conferences, Proceedings of Conferences, Kaleidoscopes and *JCLC,* repeatedly contained cries of and for CLC for good infrastructure and lack of space etc.Well, I am extremely delighted to write in this First Address of this Term, that those cries and calls seem to be being answered now. A beginning has already been made, in July, 2017, by Hon'ble Vice-Chancellor of Delhi University, Professor Yogesh K. Tyagi to construct a new ultra-modern building for CLC and Faculty of Law at the existing place and separate buildings for Law Centre- I at Suraj Mal Vihar and for Law Centre -II at Dwarka. Today, at the 94th Annual Convocation of Delhi University,

the Vice Chancellor announced this plan in his speech also,in the august presence of Hon'ble President of India, Hon'ble Union Cabinet Minister for Human Resource Development, Chairperson of University Grants Commission and the Acting Chief Justice of Delhi High Court, Hon'ble Ms Justice Gita Mittal, an illustrious *alumnus* of CLC.

It is worth mentioning that since July 2016, the entire classes of Law Centre-I, previously held at the premises of CLC since 1994, have been shifted to the new building of Law Faculty in the University Campus, thus providing CLC much needed breathing space. Hats off to those empathetic alumni who saved their *alma mater* from being choked and many thanks to our Vice-Chancellor Professor Tyagi for taking serious cognisance of the problems of Law Faculty. Thereafter in May 2017, CLC accelerated the pace of efforts for upgradation of CLC existing premises with the contribution from its generous *alumni.* Under the patronage of CLC's empathetic *alumni*,Hon'ble Mr. Justice Arjan Kumar Sikri, Judge Supreme Court of India; Senior Advocate Mr. Mohan Parasaran; Senior Advocate Mr. Sidharth Luthra; Member Bar Council of Delhi Mr. Jagdev and others, a Committee was formed for the above purpose. However, the news from the office of Vice-Chancellor in July 2017, promising to give much more than what we had been planning,put that Committee in abeyance. Now reposing our complete faith in the Vice-Chancellor, Professor Tyagi, we look forward to that 'bright future' that will carry forward the 'golden past' of CLC.

Usha Tandon
18th Nov, 2017

EDITOR'S NOTE

Any legal journal has to meet the twin goals of providing scholars with a platform to express their views and to act as an accessible repository of those views and opinions. With this issue of the Journal of Campus Law Centre we strive further in these pursuits. This issue of the JCLC provides scholars with comparative papers on recent legal developments not only in India, but also around the world. We don't have any preferences in the fields of law. All branches of law are interesting to us. Our editorial policy is governed by independent quality control and issought to be assured by the efforts of the Editorial Board.

This issue of JCLC contains fifteen essays written by professors, researchers, and lawyers. The combined issue contains an assortment of articles investigating into diverse areas of law including essays on constitutional, intellectual property, environment, criminal, administrative and international trade laws. The journal strives to combine academic excellence with professional relevance and a strong focus on research. We wish to appeal to the professional, corporate, governmental, non-governmental and academic communities.

Though we espouse and encourage an exposition of law in its internationalized and globalised setting, yet, India law is our priority. We want India legal theories, practices, legislative endeavours and judicial innovations to be known and debated in the academic environment. Thereby, we aspire to bring the India academic legal tradition closer to the international environment and make Indian legal scholarship more accessible to other scholars worldwide. That said, we are very flexible in our editorial policies and are keen to welcome articles from other countries. We want to make our journal the platform of the international comparative discussion on different legal subjects regardless of nationality. Therefore, our scope is not limited to any national law, but is open to other jurisdictions. Our effort has been to remove insularity in legal scholarship. We would cherish to become an international scholarly platform to discuss the problems that occur in the realization of similar legal constructions in different societies. We hope that this issue of the JCLC will bring about a cross section of ideas which will contribute towards advancement in legal thought.

Dr. Raman Mittal

ADDRESSES

INTERNATIONAL CONFERENCE ON CONSERVATION OF BIODIVERSITY AND SUSTAINABLE ENERGY: LAW AND PRACTICE, 12-14 FEBRUARY 2016, ORGANISED BY CAMPUS LAW CENTRE, DU

Inaugural Address by

Mrs. Maneka Sanjay Gandhi
Hon'ble Union Cabinet Minister, Women and Child Development
Former, Minister of Environment and Forest

Honorable Justice Patnaik Ji, Professor Tandon, Prof. Koh Mun-Hyun, ladies and gentlemen, I am very happy that you have called me for this conference. I am only going to talk about animal biodiversity and show you, not the laws, which Justice Patnaik Ji has talked so eloquently, but simply what we do to the animal biodiversity.

Animal law is regarded as the flip end of environmental law. Most people don't take it seriously. Most judges at Tis Hazari level don't take it seriously at all. So when you go for a case, you are likely to get a balance that tips in favor of "*Bechara ghareeb aadmi hai*" rather than what damage he has done. So I am going to explain to just a few things. The environment, all environmental law management is about trade offs. How much are you prepared to give for what you are expecting to get. If your trade off is a bad trade off then you give a lot and get nothing. And in most cases this is what has happened because we don't understand what the trade off is.

The second reason why we don't manage our environment problems efficiently is because you sitting in this great democracy do not relate environmental problems to your own living. You in a democracy have a right, before any right was established by *Maneka Gandhi v. State*, you have the right to breath, you have the right not to get ill, you have the right to get clean water, to eat unpolluted food but none of you exercise this right. None of you! So a few people, a few people who make factories, take their money, spend it in London, buy race horses, do all sorts of things, and the majority of us are at their mercy. If you look at where the factories start, all the polluting factories are in places like Kutch, places like Chhattisgarh and the owner lives in Delhi."*Aish karta hai dilli mein*" and the poor villagers around that Iron Ore factory are dying but because they die at a distance we do not relate it to ourselves.

Now I am going to come back to animals. Is there a single animal that is not vitally important to this country? Not even one. Not even the cockroach, whom we all hate. What does the cockroach do? If we don't have cockroaches we will die. Almost immediately. "*jab hum log nahatein hain, hamara jo maila nikalta hai*", human waste, if it goes directly into the water bodies, you will not last two days because all the water bodies will be so polluted. But when eaten by the cockroach it gets filtered through them. Their *"maila"* is relatively much cleaner. And that is what ultimately goes into the water bodies. Saving us! so here we have free cleaners but what do we do? Instead of rewarding them we clean them out.

You take anything, lets take the mosquito, the most vicious, dangerous creature on the earth is mosquito. Let's suppose all the mosquito will disappear one day. You would have the entire breakdown of food chain. Because mosquito kill rackets. Rackets destroys plants. So, removal of mosquitoes would mean explosion of rackets. What we have done is, we have removed mosquito predators. Having removed mosquito predators and creating conditions for them to become over populated, mosquitoes like human beings, only cause damage because of over- population.

But, let me come to things that bother us. For instance, this morning at 6: 30 a.m. I received information that a truck full of camels has come into Hissar. Now, the Rajasthan Act, which I helped make, bans camel for being part of the food chain. We cannot kill them. And the Rajasthan government has said that no camel can leave Rajasthan. Why? Seven years ago there were 10 lakh camels.,10 lakh plus. Today there are 40 thousand. And this genocide, why has it taken place? Is it to eat? First of all "*har raat ko das (10), pandarah (15), bees (20), truck aa rahein hain*"!! they are going to Bangladesh. Why are they going to Bangladesh? "*kaun unth ka maas khata hai*?" where there is so much meat available. Meat from camel stinks, it is difficult to cook, it has very little fat in it because the fat is all in the hump, and nobody eats the hump. It is a difficult meat to eat apart from being illegal. Is it being killed for the industry? No it is not because inspite of all the factories which say "*Ganesh aur Devi ko banaya hai*" out of camel bone and sell it to tourists, every single one of them is cow bone. So is it being used for tourism? No it isn't? so why is it being killed? Let me explain it to you. In 1965, the raiders when they came, the Pakistan attacked India on many fronts. One of the main attacks took place on the Kutch-Rajasthan open border and we lost many lives there. As a result the government reacted immediately and created the BSF. When BSF-Border Security Force was created, it was created only for this border. Now its on many other borders, but it was created for this. What did they do? They realized that they needed

camels because there are 30 feet high shifting dunes, these are lands that constantly change their topography. It is difficult to maneuver anykind of vehicle on them. Border is still open and is not being used for "hamala karo" but in different ways. Drugs, prostitution, women going up and down, arms being brought in. there are many ways that a country can attack another country. Which need not necessarily be open warfare. Now they decided that, BSF decide that what they needed, after all their scientific experts moved in was 1189 camels. What age? Everything was decided. They had to be over 4 years old, they had to be trained, they had to be "*surra*" free.And these now are used on the border as not only protection, night patrols or day patrols, but they are also used to take gas cylinders for cooking and sustain the troops that are on the border. Today how many camels do we have? The BSF has given an urgent SOS to the government of India saying we only have 530 camels and everyday they are getting less. Who are the people killing camels and why are they killing them? Everyday we catch them, when do we catch them? After they have slit their throats and just left them there. Now anybody who has bought the camel, why would he simply slit its throat and leave it in Mewar? In a graveyard, on a road. Why would they kill them? The entire gang is mafia gang that works out of Baghpat. None of the people in the gang are Indians. They are all Pakistani sitting there. I have been to court in last 4 years. I have been to court over 200 times. Everytime we have caught a group of camels. We have lost 99% of the cases because the judges in Haryana and Delhi (the Tis Hazari) say "*gareeb aadmi hai*". He is a "*kisan*". Not one judge has applied his mind to say or not even one lawyer, the public prosecutor, to say what "*kisani*", what "*kheti*" is done by camels. Their feet are so flat that they destroy thing. So how is it that same people are being caught again and again and who buys a camel for Rs. 50,000, gets a truck of 16 or is bringing 25 at one point, how could he possibly be a "*gareeb aadmi*".

Now the High Court ordered that "*ki jo superdari mein diya*" technically they have gone on superdari, "*jo superdari pe diya hai*", go and check out. So a team was sent under the High Court orders, last week only. And they found one man in Baghpat in the same village is sitting with 90 different "*parchas*" of superdari with not even one camel there. Now the point is this is not being done to kill camels for meat, it is a war against India. But until we understand that you will keep taking this lightly.

You take cow trafficking. Every night 300 trucks come into Delhi. Cows, buffalos get cut. The entire police get their bonuses from cow smuggler, and everybody is involved in it. It has nothing to do with Hindus, Muslims, Sikhs. It is totally secular and totally illegal. But a paper has been done, a paper has been

done by the I.G. of U.P to find out what is happening to the money that is being illegally earned through slaughter houses, illegal trafficking. And he has said that 75% of the money has gone into getting guns for the Maoists from the Nepal to the Chhattisgarh border.

Now are we going to take an illegal trade lightly? We stop trucks the judges give them back. "*Gareeb log*"! "superdari"! Has there been one case in India, not even a case in which Superdari, has gone to its logical end. After all if I give butcher 50 buffalos, when the lawssays that he can carry only 4 in one truck and he is carrying, 50 to 90 and I pick up those animals and give it back to him and say "*supardari pe rakh lo*", then at some point I should call back those animals at some time when the case finishes. But not one animal case has ever finished in India. Not even one! Even the wildlife cases, I rescued, I was on my way to Pilibhit, my constituency, 8 years ago, I stopped at a "*dhaba*", to have some food. I went to the bathroom and outside the bathroom was a cage, which had a huge Python in it. So I called the owner, confiscated the Python, brought it back here, put it into the zoo. The case has now come for its first hearing eight and half years later. When I have lost the papers, my memory is dim, and it doesn't make any difference. He never went to jail even for one day. The charge sheet was filed. But that is it. The case will go on for twenty, thirty, fifty years.The Python was in the zoo, the Python has also died by now. But the case has not started. So do we have to take this seriously or not?For the first time the "supardari" order has come for the whole of India, just asking "*ki kahan gaye wo janwar*"?

The FBI, in America made a new law and they had decided that all animal crimes any where in the United States, has to be reported to the FBI.They have an A list and a B list. The A list is of heinous crimes including murders but not armed murders, murders with extreme violence, terrorism, arson, at that level. The B crimes are the ones that don't go to the FBI because they are taken less seriously. Robbery, break-ins, mugging, etc. Now under the law, all animal crimes, including a man who beats his own dog has to go to the FBI and has been put into A register. And what is the reason for that? The reason they have found, after they have done not one, not two but hundreds of surveys, showing, and each survey has come out with the same answer, which is that all people that go into jail for violent crimes have all started their career by killing animals and have all been excused.

"*Arre bachcha hai. Titali ke pankh uttar raha hai, toh bachche toh aise karte hi hain. Agar apne jute ke saath cheetion ko mar raha hai, are bachche toh bachche hi hain. Agar kutte ki punch par fire cracker attach kar raha hai, are maze ki baat hai.*"

You know my hospital; these are the kind of crimes we get day after, day after, day.

Now, look at cows walking on the streets. Now because of many court rulings you hardly find them. But when you see a bull at near, say a shopping complex, you will find acid thrown on them. "*Jo kele wala baithta hein*", he has a bottle of acid which he throws on a bull, when that poor hungry animal comes close to him. When Pandit Nehru insisted on an Act being made in 1960, he considered it so important, that it is the only Act made in Parliament based on an independent Bill brought in by an independent member. Rukmani Devi Arun Devi.

I have been in Parliament. I am the third longest serving member of Parliament as it exists now. In my all these years there, I have never seen an independent Bill taken seriously there at all, ever. You can say the most wonderful things on Friday afternoon, on Saturday "*kude mein gaye*". Even while they are speaking, there are five members of parliament to listen to them, and a Minister who will read a book while they are speaking. When Rukmani Devi Arun Devi brought this Bill, Prevention of Cruelty to Animals , Pandit Nehru said we will adopt this Act. So this Act was taken in 1960, and made into a law. This is the only Act ever done so. Pandit Nehru and his cabinet took it so seriously, that the fine at that point, for any form of cruelty, was Rs. 50 rupees. This is when my father was a colonel earning 1200 rupees. So you can imagine the seriousness. Now the 50 rupees wont even buy you "*moongphali*". But it has never been enhanced, so we are not taking it seriously. Our attention has been detracted from the seriousness of the crime itself. As the Hon'ble Judge was talking to you about the tiger as a predator, it's not wishful thinking, it's not giving you a tale which is hallucinations. The Sahara had thick, thick forests on it. Every Middle Eastern went and shot and killed leopards, tigers, so all the predators were killed. "*Natija*"? Within a hundred years, or even less, the Sahara is a desert. The desert has expanded and expanded and expanded. When it expands into a desert, the local people lose their lives. So you kill a tiger, you kill yourself. You kill anything, and you will create a problem. Now, we have for instance, white ants in the forest, who will destroy the forest. There are only two animals that take care of that. One is, the bear, which by a series of judgments, by the Supreme Court, High Court, now the bear is no longer allowed on the road for dancing, so called dancing, but it took ten years to convince the Government and the Courts. Now they are all in shelters organized by me. But when you remove the bears from the jungles, you leave the trees to white ants. Now you have got only one predator on white ants, and that is the pangolin. Today China and Korea have 5000 pangolins.It is the only mammal in the world, which has got

scales. It's a tiny little thing like this, who only eats white ants. If you lose this predator, you will lose the jungle. But we haven't taken it seriously.

Now I will give you another example. Now as we speak, last month, one person died, of a bite, in Gujarat, and the bite was from a snake which is an extremely vicious snake. The problem is, it's not an Indian snake. It's an African snake, that has been brought and left in the jungles in India. It is a viper, that jumps out trees and bites you. Normally vipers don't and are not predatory. But this one is possibly one of the world's most vicious dangerous creatures. How did it reach here? There is a man here, who runs a pet shop, here in Meharauli. He has been in the newspapers, he has been all over the place. He and his partner, who is a politician and an ex member of Parliament today, own the entire wildlife trade in India. What do they do? They use Calcutta port, to import foreign animals, because today, the rich person, everybody has got the same houses, everybody has Italian furniture, everybody is eating avocado and whatever else, so what can they be different in? Animals! So in Mehrauli you go in, and you will find one person is running a factory that is making tables out of zebra skin. How do they get them, we don't know. Another person who has got all the worlds birds, a Parsi, he has been raided 20 times, and each time, the Judges have given him protection saying these are exotic birds, we cannot rule on them. There we have a man who runs a pet shop and he only imports snakes, and you get a snake, what the hell will you do with a snake? "*Do daffa galey pe laga diya, ek daffa bache ke galey pe tang diya, uska knot bana diya usko apne dosto ko dikha diya, aur phir uske baad*?" So they go and they get left out. Once you leave an exotic animal out, it has no predators. Therefore it will kill whatever it can kill. And this is what has happened, to the person who got killed in Kutch. Where did the snake go? We took this man to court. The police refused to support us, because, his partner was a member of Parliament from Delhi, who was very important at that time. We were told, give it back. So" *humko dena pada sab kuch wapis*". Till today he runs this pet shop.

What we call, exotic animals "*Vajrikas*", love birds, these are real birds, indigenous birds of Australia. They are brought in the millions, and 20-30% die while catching, about 70% are left, of which 40% die while travelling, and something like 10% ultimately go to the market. Australia is losing little parrot. And when they lose that parrot, they will lose all the seeds, that are spread by this little parrot. Well and we don't take any action beacause we don't take Convention on International Trade in Endangard Species of Wokd Fauna and Flora seriously. Till today your Lordship, we don't have a CITES office in India. We signed this Protocol 25 years ago, we still do not have an office, we still don't know, if I am going to "shikayat karo" and act, nobody has touched it so

far saying that it is an exotic bird.. what is it? Is it going to create harm to us or not, instead of giving exotics protection, we should apply the same law, but now as a result of that, what has happened? Your average bird seller in Delhi, he is selling owls with fevicol horns stuck to them, why because then they become South American horned owls. He is taking a "*maina*".. not a "*maina*".. what is this bird.. a "*munia*".. which is a grey coloured bird, and he dips it into paint. And when it dries, he sells it as yellow headed kingfisher from Korea. I brought out a book in which I have given you the real bird, and the bird on the market, it's the same bird. We are just taking our indigenous birds turning them into exotica and then killing them. And no Judge rules he asking where is the evidence. But where is the evidence this is not exotic even without the horns. There are no pet- shop rules. Now we are in Court for the first time. In Delhi High Court, hopefully we will get a judgement which says pet shops have to be regulated. Because I can go today to market, and I can say I want a snow leopard, I will get it. But when you don't have snow leopards any more in the Himalayas, what will you have? You will have an explosion of goats, and then what? So everything impacts you.

Let me give you a case that is still going on. You go to "*Vaishnodevi*", and many people who are ill, who are fat, who are old, who cannot walk up there choose to take what we call "*khachchars*". mules or horses. We have done a study, for the last five years, and what have we found? We have found that thanks to these 17,000 mules, of which five die every day, of overwork and exhaustion, we don't know how many people have died in India. There is a disease called glanders. Glanders is a virus which is so deadly, that it's the only virus that was used in the first world war, by Russia against its enemies Germany.It is a biological weapon. It spreads like this. If a horse or mule drinks or eats out of a trough in which any other horse with glanders eats, within one day they get it. Either the horse or the mule dies immediately, or it takes about a year to die. But the mule suffers all the time, and it's veins start coming out. So if you see horses "*jinkey veins nikley huay hein, galey se, aksar aap dikhte ye abdomen mein, tango par*", that is a glanders horse. So we did a study, and we found that glanders is not anywhere in the world except India and Iraq. And why because in every other country there is a shoot order to prevent it from spreading, so ultimately they have wiped out the disease. In India there is not. So we found that at the moment there is a glanders epidemic going on in Katra, Jammu. So I wrote to the Kashmir Government, and I said please tell me how many horses have got it. So they wrote back and said "*bahut saro ka hein.* And I said *aapne kya kiya hein ispar? Unhono kaha ji Garib aadmi hein isiliye humne kuchch nahin kiya*". But what happens… forget the horses

dying or not dying "*humari bhala s"e*. Glanders affects human being almost immediately.Some old couple, went *Vaishnodevi* come from Orissa, they get onto the horse, the horse that has glanders, they went up, they came down and got the "*bimari"*.They went back they died. It's a 94% death rate. There is no medicine for this. So we have given the figures out. Now let's see whether somebody understands the environmental impact of this.

I could go on and on about these instances. For instance in the North- East everybody was killing hornbills, and using them to make "*topis"*, it was regarded as a great tourist thing. "*Jo bhi tourist waha jaye usko di topi"*. Government tourist centres were even selling those *topis* with the hornbill bill on it. Our Prime Ministers have warned them many times on 26thJanuary, when they are dancing with tribals later on. What has happened? There are less than 200 left. Now what have we found, that the hornbill is the only bird in the world, that can by itself disseminate ficus trees like peepal. And the 98 ficus varieties are only spread by the hornbill. So now you have no hornbills, so either you go and plant that ficus yourself, or ficus is gone.

Let's talk about two things before I finish. One is dogs. What do we want? We don't want to be bitten. We don't want them to be at your face. We don't want them to be ill. These are the three things that we want. If all these dogs fulfill these criteria then we don't mind that they are alive, but all the time we have to listen to "kitney kuttey hein, kitney kuttey hein". And of course Maneka Gandhi has become eternal because "*koi bhi kutta kisi bhi insaan ko katey kahi bhi desh mein to Maneka Gandhi ko gali padti hein."*. But I am not the problem, I am part of the solution. Thanks to the Supreme Court, they understood when we went there asking for a ban on killing, they listened to it, they listened to the science, environment is nothing but science, it is not about bleeding hearts, people who hug trees, people who love animals, it is not, it is how to save human beings and let them live better lives. So the Supreme Court said, you have to sterilize them and thereafter you have to leave them back in the place they were taken from. This has science behind it. Why do we have dogs in the cities?We have dogs in the cities because they are the predators of all the garbage we throw out. You and I throw out banana peels, uneaten food. This is taken and put into the place at the bottom of the road. You have to have somebody for that. But you don't. So what do you have? You have thousands of rats. They stay underground because they are scared of their predators which are dogs, cats, vultures, and other animals. Now, when two rats make 36,000 rats in one year, now there has been no known way, in which to remove this. Within 6 weeks, a rat, a female rat, gives birth to 6, within 6 weeks those 6 give birth to 6, and ypou will find rats everywhere. I won't go into their physical

functions but how do we know that removing dogs will kill us? Because in Surat, this was tried. Many of you were not even born then. But a collector came to Surat and said "*mein usko saaf kar doonga* " You remember your Lordship? And "*jab bhi koi collectorkehta hein mein safai kar doonga, to mein to mera to dil bahut hi ghabra ta hein*". Because it means two things. "*Ek to wo sare bhikariyo ko nikal dega, doosra sare kooto ko maar dalega'*. That's it, "*yeh nahin ki kuch aur karne wala hein.*" So this is what he did. "*Bhikariyon ko maar karke, kutto ko usko sab ko zeher de diya*". Within six weeks, he had killed every single dog in Surat. "*Nateeja? Nateeja yeh hua ki*" within two weeks, there were millions of rats running all over happily in Surat. We have pictures showing millions and millions of rats. And what did they bring with them? Plague. They bit how many people. Some of whom got plague. And that fright spread to all over India. Just in terms of money, how much did we lose, calculate, we had not even one tourist for two years. Not even the Taj Mahal could overcome the fear of plague. One collector in one place removed the dogs. That is what we call bio diversity, and it's impact. When you remove one species, you will get problems with everything else.

The same thing happened in with Himachal with monkeys. The monkey case is in Supreme Court, but these wretched Himachal doctors, vets, and forest department people, decided, "*ki agar* Supreme Court *keh sakta hein ki kutto ko* sterilize *karo, to bandaro ka* sterilization *bhi karna chahiye*". So frightening, so frightening. Monkeys roam in families. "*Dada, Dada, Nani, Nana, Chacha, Chachi, Par Dadi, aur char pach dost, sab ek saath ghumte hein*". Now Himachal Pradesh is paying 500 rupees for every caught monkey. Monkeys are caught by beating. Now you have to catch the whole family of moneys, but if you catch one, or two members of that family, what happens. Rest of the family runs off, leaves the territory, and goes into a new territory. Where it is competing for food with yet another group. And the two that you catch, you have broken their limbs in the mean time, now you sterilize them. Having sterilized them, you use the Supreme Court judgment on dogs, to release them back to the same place. But when you release them back to the same place, their family has disappeared. They will go straight into a human house, and they will open fridges, they will bite you, they will tear your clothes, because "*atyant gussa*".. anything anything.. They have no idea how to get food, and that new group that has gone into a competing area, they will also go into houses. Did you know that in 1980 a census was taken, in which there were 87 lakh monkeys. Today there are less than 5 lakh. When they were 87 lakh we didn't have no problem with them. "*Koi Kissan shor nahin machata tha.. Humare yaha aa gaye humara sub kuch kha gaye*". Today all 5 lakh are sitting in villages and towns. Why?

Because of one order that went out in 1983, saying no fruit trees can be planted in forests. Why not? Why not? And secondly, an even more vicious order, which has been there for years, a law, which the British started when India was massively forested, which is .. "*shayad garmiyon mein aag lag jayegi*" so to prevent "*aag*" from spreading, every forest department has to dig a trench, in front of the forest, put leaves into it and set them on fire, so that there is a sterile area. So that when people passing by throw "*beedis*," or cigarettes, it doesn't spread to the forest. This was the thinking behind it. Now what is happening? Government of India, gives 25 crore rupees, to various people, rangers, at the lowest level, to dig these trenches every year. Why should you dig a trench every year? This is regarded as pocket money by the forest department. So you don't dig trenches, you don't do anything, but every year in January, February, you set fire to the forest, to conceal the trees that the forest department has illegally cut. Now these small forest areas would never have caught fire in thehot season, by themselves, because they are too small, for that friction to start, but we take away all the undergrowth, the new shoots, the new trees, the bushes, as a result, the monkeys, the snakes, , the "*neelguy*", their predators, they're all in human crops and habitation. So if we were to simply allow forest to grow fruit trees, if we were to simply stop fire lines, you would not have the monkey problem within one year. You would not have a "*neelguy*" problem, you would not have a wild boar problem. But the acts are being opposed from being stopped by the forest department, because that means less money in their pockets, that is a part of it, anyway. I could go on forever, explaining why we do what we do with animals, and why laws and courts need to understand, it is not about animal loving, I work for old people, for instance. I don't say I love them, I work for them, because they deserve as much right as anybody else. I don't love animals, I work for them because it's the only way we can survive. Every time we lose an animal, we lose our quality of life.

I'll just give you one story and finish off, and thank you for your patience. Mauritius was an island, with a bird called the Dodo. The dodo is a duck, or was a duck. Mauritius was the most economically advanced country about five hundred years ago. And the reason for thatwas, they had a tree called Calvaria major. Calvaria major has got the hardest wood, in the whole world, and the ships were being made out of Calvaria major trees. Now what people would do is, the nations coming to the middle east, to China, to India, they would all stop in Mauritius, spend about six months there, and get their ships repaired, or new ships made. All the Portuguese ships were made there. So that basically the Mauritians had to do nothing,they simply had to cut down a tree, and make a ship, cut down a tree, make a ship. Now all these foreigners used to stop there.

Monsoons came, they would wait, their ships would take time to get built or repaired. The Portuguese stopped, every time they stopped they wanted to eat meat. Now islands have not got goats and other indigenous cows and stuff because they're islands. This island had the Dodo. So the Portuguese killed and killed and killed the Dodo. And the Mauritians said nothing. "*Dekh chidiya hi to hein, mar gayee to mar gayee aura aa jayenge*". One day, there was no Dodo. End of problem. So there were no Dodos left, the Mauritians said Oh we're very sorry, doesn't matter, God will send something else. Within two years they discovered, no more Calveria major trees either. Because they found that the only way that the Calvaria Major tree would grow is when the seed passes through the body of the Dodo. From then to now, India, China, America, Singapore, Scientists, all these people have sent birds after birds after birds to Mauritius. "*hum logon ne mene, tote, batakh*" we have sent them hundereds of birds "*ki wo jo beej bache hain*" let the birds eat them and find out whether now it would be fertile? Nothing!! Result, Calvaria major, "*wo katate gaye, katate gaye, katate gaye*" they were not planting them. So they didn't have any trees. When they stopped Calvaria Major trees their entire economy collapsed. People stopped stopping there. They had nothing else to trade so what did they do then? They had nothing to do. So they said lets grow suger cane. so they came to India. They started sugarcane plantation, but none of them were fit to work. None of them had worked in their lives. "*Sab log ameer the*." So they took labor from Bihar and they took them to Mauritius. But the "*Bihari*" culture is so strong, that its language, attitudes overtook the local culture very quickly. So Harrold Walter within 200 years became Hari Ram Ghulam. And the language changed from French and Creole to a kind of weird Hindustani. So everything there changed. Their attitudes, their economy, their culture, their language, everything changed. Why because one bird died.

And that's what happened with us. The vulture has disappeared. What has it done, it has taken whole "*Parsi*" religion with it. Every religion is based on birth, marriage, and death. Is that right? The rituals! If you remove one of them the others start collapsing. The "*Parsi*" ritual at death is that you put them in the Tower of Silence, and let the vultures feed on them. There are no vultures. So now they have to go for cremation. So it is a matter of time that they become more Hindu or something else because their rituals have disappeared. Because of this one bird. Apart from that every village has got 10% to 20% more sickness because every time an animal would die the vultures would come in and in fifteen minutes "*saaf suf karke nikal jata. Ab kutta mar gaya toh pada raha, gaaye mar gayi toh padi rahi*."

So think what does biodiversity mean? It is simply a "*Kavach*". The more

bio diverse you have, the more protected you are by nature. The layers that you peel away, you simply expose your own naked body to the elements and that is when we should be protected by laws. When you go and learn laws about animals, about biodiversity, think about it seriously because they are the most important laws.

Thank you very much!

Valedictory Address by

Hon'ble Mr. Justice Ranjan Gogoi
Judge, Supreme Court of India

My esteemed colleague Justice Uday Lalit, Prof. Tandon, Prof. Raina, Prof. Gupta, Mr. Parasaran, Mr. Luthra, members of the faculty, the organizers of this conference, the participants, my dear students. Let me begin by thanking Prof. Tandon and other members of the organizing committee for inviting me. I am happy to be back to where I belong. This is one place where I come from. I sincerely believe that judges should normally speak only through the judgments ,but for the Campus law Centre, I make an exception. This is a great institution. I have come to know thatMr. Parasaran and Mr. Luthraare the support pillars of this institution. Mr. Parasaran and Mr Luthra, please continue your support.

This is a nearly 100 year old Law College established in year 1924. It has been the nourishing ground of some of the most eminent legal luminaries of the country. Some of them are judges, some of them are active legal practitioners and some of them are active in public life. The Law Faculty of this university of which the Campus Law Centre is the flag bearer can boast of a multi lingual and multi-cultural student body, imparting legal education on the basis of the case study method. It has withstood all challenges of time and continues to occupy a place of pride in the field of legal education in the country. It is credited with not only imparting high quality legal education but is an acknowledged centre of continuous learning, a fact-evident from the present conference which has been successfully organized by the continuous and untiring efforts of all concerned. I compliment the Campus Law Centre on holding this conference on a topic of unparallel importance over the entire humanity.

Mankind today is facing a herculean challenge to check the unstrained exploitation of natural resources, resulting in biodiversity degeneration. Biodiversity is essentially the DNA of what forms life on the planet. The International Union for Conservation of Nature (IUCN) defines 'biodiversity' as the foundation of life on earth. As we expand our influence over the world, we must also be careful to simultaneously protect and preserve the environment around us. The loss of biodiversity cannot be computed in terms of money, it is an invaluable asset that nature has bestowed on mankind on which there can be no price tag. This is the essence of the Public Trust Doctrine that brother Lalit had talked about.

It is my personal opinion and I repeat it is my personal opinion- an opinion formed on what I believe to be relevant statistics- that we always wake up a little late to address all pressing issues that concern mankind, be it pollution, be it environment, be it ground water, be it any other needs of mankind. It is only in the year 1992 that comprehensive legally binding treaties namely the 'Convention on Biological Diversity' (CBD) came into being. 196 countries are the parties to this Convention which for the first time recognized that conservation of biodiversity is a common concern of mankind and an integral part of development. Similarly, it is again in the year 1992 that the UN general body acknowledged climate change as a common concern of mankind. The over dependence on fossil fuel and a need to explore the methods of finding sources of sustainable energy gain momentum. However, to produce sizable amounts of sustainable, energy large land sites are required and care is to be taken not to exert pressure on biodiversity

Out of 9 topics that had been slated for discussion in the various working sessions in the last 3 days, some are broad and general, a few are very focused on intricate issues . All such topics have been well thought out and I am told that they have generated meaningful discussions and presentation have been of a very high order. Two of these topics which are linked to the progress of developing nations, namely "Biodiversity and Poverty Eradications" and "Biodiversity and Gender"have attracted my attention. Therefore let me specifically deal with the same,though very briefly.

The forest enables the indigenous communities to conduct activities such as gathering firewood, preparing charcoal, collecting materials for making handicrafts etc. These are the means of livelihood of these people. The effect of degradation of environment is thus felt by these communities which directly depend on such natural resources. Women in developing countries play a significant role as primary care takers and natural resource managers. The preamble of CBD recognizes the vital role that women play in the conservation and sustainable use of biological diversity and affirms the need for participation of women at all levels of policy making and implementation. Ironically these are the communities whose opinions are not taken into consideration while devising strategies and policies for developmental projects.

An example- where the affected communities were empowered to decide the fate of a development project was when the Supreme Court of India in *Orissa mining* case decided that the tribal community through the Gram Sabha should determine whether the proposed mining project by the Vedanta Group in Niyamgiri Hills should be allowed. Pursuant to the decision, the Gram Sabha of

12 villages falling within the mining zone, unanimously rejected the mining project. India is one of the 17 mega diverse countries of the world, accounting for 8% of the global species despite having only 2.5% land area. The Biodiversity Act, 2002 was enacted in furtherance of India's ratification of the CBD. Under the Act, several activities related to the conservation of biodiversity have been adopted, including the National Biodiversity Action Plan, 2008. However, the Act has been criticized and perhaps rightly as not being a comprehensive legislation.In particular the lack of representation of conservers, creators and knowledge holders of biological resources on the panel of the National Biodiversity Authority has been highlighted.

In addition to this, there are other legislations like Wildlife Protection Act, The Forest Conservation Act which overlap on the aspect of conservation of different facets of biodiversity. The need is to have an all encompassing legislation to ensure effective implementation of all policies and strategies as may be devised. Some notable human efforts and policies implemented for conservation of biodiversity will require a specific mention. In October, 2010, parties to the CBD adopted a strategic plan to tackle biodiversity loss. The strategic plan comprises a vision for 2050, a mission 2020 and 5 strategic goals which inter alia include reduction of direct pressure on biodiversity and enhancing the implementation thereof through participatory planning, knowledge management and capacity building.

Internationally speaking Costa Rica's Biodiversity Conservation Policy is based on 'save, know and use trilogy of principles'. 'Save' means protecting representative samples of the country's biodiversity through a system of protected areas, 'know' means knowing the biodiversity that exists in the country and particularly in the protected areas and 'Use' means using sustainably the biodiversity for the social and economic benefit of the country. An innovative initiative in promoting Public – Private Partnership is reflected in the Amazon Region Protected Areas Program, which was started in the year 2003 by the Government of Brazil in furtherance of the pledge taken to triple the protected area of Amazon basin. We also need to appreciate instances where pros and cons of a development project have been weighed before giving them green signal. In Mexico the Government cancelled the plan to build the world's largest Salt water plant on the shores of San Ignacio Lagoon a pristine breeding area of the Gray whale and UN designated world heritage site.

A similar example can be seen in Nepal where the proposed Rapti River Diversion Project in the Chitwan National Park a house to about 400 one horn rhinoceros characteristics of South Asia was rejected and this world heritage

site was preserved for the benefit of the future generation. Human efforts have shown encouraging results.In California the decline of small sea birds called the 'Liston' began in the late 19th century due to the desirability of the feathers of the birds for women's hats. When listed as an endangered species in 1970s just 225 numbers were record in California. Active predator control programs, protection of nest species from development and disturbance allowed the species to steadily increase to about 6500 in 2010.

Near our home, we have example of a specie which became extinct namely the "Pygmy hawk". A captive breeding program was implemented in my home state Assam and you will be glad to know the specie is now recorded at an encouraging figure of 200.It is indeed inspiring. Presently, our planet is facing an escalating loss of species across the natural environment at roughly about 1000 times the natural rate. Biodiversity hotspots are meted to identify those regions of the world where attention is needed to address biodiversity loss and to guide investments in conservation. Today, nearly, 20% world population live in biodiversity hotspot, making it more important than ever to remember that every human action would have a reaction on the ecosystem. In order to ensure the protection of biodiversity, not only an effective legal-framework is paramount but also a conscious society which realizes the significance of this natural gift is needed. The effects of continued destruction on biodiversity are not confined to the national boundaries and thus, call for a collaborative effort internationally. I compliment the organizers, the participants and the faculty of the Campus Law Centre for the enormous contribution that the present conference has made in spreading awareness and offering suggestions to resolve the imminent issues confronting mankind.

Ladies and Gentlemen, Thank You!

Address
By Special Guest of Honour

Hon'ble Mr. Justice Uday U. Lalit
Judge, Supreme Court of India

Justice Ranjan Gogoi, Mr. Mohan Parasaran, Mr. Sidharth Luthra, Prof. Usha Tandon, Prof. Raina and Prof. Gupta all the delegates who have come for this conference , the faculty, the students , ladies and gentlemen there is a personal reason why I am here. Yesterday I had gone to ILS Law College Pune that's the college where from my father studied,today I am in the college where my son is studying. It is something like an intergenerational equity, which is the scientific principle of Environmental Law.

You heard Mr. Sidhtharth Luthra giving you the insights on that Indian Chief's lovely poem which is extracted in full in Justice Chinnappa Reddy's judgement in S*achidanand Pandey*, that to my mind is the Preamble to Environmental Law. The age old wisdom of that Indian chief sums up everything we need to do on the environmental front. The first principle in the Rio Declaration is also very touching and sums up the matter very beautifully.It says "human beings are entitled to a healthy and productive life in harmony with nature". The emphasises on harmony with nature essentially sums up the Sustainable Energy or the Sustainable Development for biodiversity. I was appointed *amicus,* I was one of the *amicus* members of the matter in *TN Godavarman*. It was in 1996 that we were appointed *amicus* and the matter continued till my elevation i.e. for 18 years.Variety of problems, variety of issues, have dealt with, but I will place before you four or five matters which have been dealt with by the Supreme Court, and are milestones in this branch of law.

The first one, of course, is the judgement in *Dehradun case*, where Justice Rangnath Mishra speaking for the Bench banned all mining activities in Dehradun valley which were essentially limestone quarrying works. It was all licensed works but the tremendous effect of mining operations in Dehradun valley was that the water tables were diminishing and affecting flora fauna and animal life.Therefore under the orders of the Supreme Court it was completely prohibited. That's one case that actually shows the tremendous awareness in this context.

The second one is *T.N. Godaverman* or *Kudremukh Iron Ore Company's case*. Kudremukh was a public sector undertaking. All leases were lawfully granted. It was a public sector undertaking which was doing excellent mining work. It was a profit earning company but because it was having tremendous

adverse impact on the entire environment causing tremendous damage to the flora and fauna in the vicinity, therefore again Supreme Court stepped in and banned the work as a result of which the entire Kudremukh Iron Ore Company had to wind up its operations. So look at it this way the two cases actually show us the impact that perhaps the judicial intervention can achieve for the protection of environment.

The third case is about the buffer zone.There are various reserve forests or national parks which are the habitat of animals, birds or even the reptiles. If there is no buffer zone, if the civilisations were to touch the borders of that reserve forest,then as Mr. Mohan Parasaran said, citing the case of tiger , the animals are bound to come into your territory. The concept of buffer zone, though it was known,but was not getting implemented. The Government said default buffer zone can be 10 km. Imagine a bird sanctuary in Delhi or Sultanpur,or Okhla bird sanctuary in Noida, if you were to go 10kms away then there won't be any development around. You need to do the study, check the life, habitat, the lifestyle, the behavioural pattern of the animals and the birds and then come out with an expert analysis on the ideal buffer zone

Coming to the fourth case, in which I was also one of the *amicus* is vehicular pollution case. If you check the DTC buses they proudly proclaim world's best environment friendly fleet. I remember those days prior to the insistence of the Supreme Court in the matter we used to have air full of carbon and soot. The Supreme Court insisted upon complete change over from normal diesel to CNG fuel. As an *amicus* at one stage we felt that perhaps the public pressure of inconvenience is mounting, but the Supreme Court stood firm and I must say that I am proud of that, the reason is for you to see that today the entire fleet in Delhi has actually turned to completely environment friendly fuel.

Now, the last one and that is of course the famous *Span Resorts case*. What happened was that one resort on the banks of Beas in Himachal wanted to change the course of the river so that it becomes very friendly for the tourists there and it will be saved from floods that might occur in the river. The judgement is something like an eye opener.It actually acknowledged for the first time what we call in Environment Law the Public Trust Doctrine. The Judges said that no citizen has a right to change the course of a river and that's exactly the echoing sound of that Indian Chief's whole poetry. That small poem which was found in *Sachidanand Pandey*, telling that that all these are assets of the society, and going by the Public Trust Doctrine everyone of us has say in the matter, not just say,it is also our duty to protect that.

Go by that duty to protect and that is what I'll end my speech on.

We all Indians in our national anthem give salutations to two rivers – Ganga and Yamuna. What have we reduced our rivers to? Have you ever seen any capital cities like Budapest, London wherever there are rivers that flow through the capital; they are so beautiful that they use their rivers for river transportation, for sports, for recreation. Today ask any Delhite he won't even like to go anywhere near the river. When it enters our Delhi the river is absolutely perfect. Eleven kms down the line when it flows out of Delhi at Okhla it is reduced to the level as a sewer. What have we done? We are actually dumping all our untreated solid waste into the river. If we go by this, the Public Trust Doctrine demands that we must actually stand up and save our rivers, save our mountains and save our forests.

I will just tell you one small instance when we started *TN Godavarman,* the Bench was Justice Verma and Justice Kirpal. Our first hearing went on for three weeks. All the States were issued notices , all the conservators of forest were there in Supreme Court (the conservatives only disclosed themselves later, was an eye opener for them). As a pure forest official his perceptions are completely different. If you have seen Indian Forest Act, 1927,it contains nothing but exploiting the natural wealth. The Forest Conservation Act which came sometime in 1980, changed the perception onwards but those who have been brought in the forest service their thinking, ideologies and perceptions are still the old ones and when they came here, they actually went with a completely different perspective in the matter. One of the conservators told me *"that a fallen tree in the forest was taken as the forest wealth to be used , utilised and sold .After that three week long session in Supreme Court I have now found that a fallen tree in the reserve forest is left the way it is because that fallen tree can be an abode and habitat for animals like rabbit , it can feed multiple organisms and that is nothing but biodiversity."*

Thank you so much!

Address
By Guest of Honour

Hon'ble Mr. Justice A.K. Patnaik
Former Judge
Supreme Court of India

Mrs. Maneka Sanjay Gandhi, Chief Guest at this inaugural seminar of the International Conference, Prof. (Dr.) Koh Mun-Hyun of the Soongsil University, Seoul, Guest of Honour, Prof. (Dr.) Usha Tandon, PIC of CLC and the Conference Director, Prof. Kamala Shanakaran, Prof. of CLC, all the delegates participating in the conference, dear students, a very good morning to all of you.

Now first of all before you start participating in the conference as "Conservation of Biodiversity and Sustainable Energy: Law and Practice" you must appreciate what is biodiversity and why is conservation of biodiversity necessary. This is the most important thing first of all. Then only you will be able to participate in the conference. The best understanding of biodiversity I got when I was working on these cases in different Courts. The definition of Environment given in section (2) (a) of the Environment (Protection) Act, 1986, says "environment includes water, air and land"and this what follows is important "and the inter-relationship which exists among and in between water, air and land and human being and other living creatures, plants, microorganism and property". So this is biodiversity. Biodiversity means, air, water, land, human being, all living creatures and most important is the interdependence of all this for life to sustain.

Now, I may give a very good example. If you have gone to Kenya, which is a tiger sanctuary, you will find in the museum there is a chart given of how this biodiversity works. How they are all interdependent. Kenya is a place where tigers are preserved. And, you will find in the chart, it is clearly shown by drawing that we have forest, we have green plants, all these green grass is being eaten by herbivores animals like deer. Now if too many of this deers or herbivores animal exist in the forest, their population will go up, then what will happen. All the green cover will go. Therefore, what is necessary is someone to reduce the population of deer and thus we have tigers . Very interesting chart.

So, God has provided a natural environment by which a balance is maintained between all components of environment. Now coming to the law on the topic, itis the Supreme Court of India, which for the first timeinterpreted the Article 21 of the Constitution, in what, *Mrs. Maneka Gandhi v. UOI,* 1978 SC reported,

where she was entitled to the passport, passport was not given, she approached the Supreme Court and the Supreme Court changed the very concept of Article 21. Earlier in *A. K. Gopalan's case*, the Supreme Court took the view that procedure established by law in Article 21 means procedure established by statutory law. Therefore, if the statutory law is complied with liberty can be taken away, life can be taken away. That was *A. K. Gopalan,* way back in the 1950s. Maneka Gandhi case brought in a big change in the law. It said procedure established by law is not just statutory law, if the procedure made by the statutory law is not consistent with principles of natural justice, not consistent with due process of law, then it does not satisfy the requirements of Art. 19 to Art. 21. That is what was held. She was denied the passport without even an opportunity given to her and the Supreme Court said that passport is part of the liberty of the person to travel abroad, cannot be taken away unless the principle of natural justice is followed and a due procedure has to be followed.This is what *Maneka Gandhi* case was.

Now, the Supreme Court further expanded it, Art. 21 – Right to life means right to clean environment, without clean air, without clean water, without biodiversity, life cannot exist. Therefore, the right to life includes right to clean environment and is part of fundamental right under Art.21 of the Constitution. Courts have power to enforce that right. The SC has got that power under Art. 32 and High Courts have that power under Art. 226. This is how the law was introduced in India. There was no law earlier, and with the expansion of Art. 21, it was brought in and now it can be enforced by the Courts.

I may give some examples. You just heard your professor telling you that I was part of the Environment Bench. Besides environment, I had also decided some matters related to environment in the Supreme Court. The first illustrated case would be, this *Sterlite Industries Ltd. v. UOI.* The industry wanted to set up copper smelter plant in Tuticorin and emissions from the plant polluted the air, some discharged water polluted the soil. The High Court closed down after finding that it polluted the entire atmosphere by number of reports. The matter came to Supreme Court before us. We thought the industries also require copper, copper is required for telephones, development must also take place. Right! Then we ensured that it invested more money on plant apparatus to ensure that there is no more pollution of air and the water. Reports were taken from various scientific authorities, Pollution Control Board so on and so forth. Once we were satisfied, then we allowed the plant to open. But then after a period of 6 months or one year, it had really polluted the atmosphere. As the polluter must pay for the damage and clean the environment, we directed Sterlite to pay a compensation of Rs. 100 crores to the collector who used that to rehabilitate

the soil and the water and the atmosphere and ensure that there is a clean environment. Therefore, this is one way, there is an example of an industry.

Then you heard the Prof.Tandon saying that we were part of the Green Bench in *Goa Foundation* case.. The Goa foundation, you know Goa is a peculiar place, it is a small State. Right! One side is a sea and the other side is a sanctuary. Right! And they were mining in contravention of Forest Conservation Act, 1980. One of the issues that was raised was that, now sanctuary obviously cannot be given for mining purpose leases. But, can mining be allowed within one Kmaway from the sanctuary. We said no it cannot be allowed. That one Km has to be maintained. They said there is no law. How do you maintain it. There may not be any law, but the Supreme Court can enforce it by virtue of its power under Article 32 read with Article 21 of the Constitution. So within 1 km if any mining takes place, blasting takes place, the animal will be affected. No question of mining within 1 km. This is where Supreme Court laid down restriction where there was no explicit law made by Parliament. Right! So this is how, this is a case of mining where we said environment , the biodiversity cannot affected, wildlife cannot be affected by mining within 1 km of the sanctuary.

Third case, which again we decided. Two judge bench case. What had happed is the tiger population, my bother judge who was there in the matter earlier, before I joined the bench, suddenly took a view on a matter that came from Madhya Pradesh, that tiger population has gone down. When I joined the bench I tried to impress upon m brother judge that as far as my information is concerned tiger population has gone up. He denied.Then we called upon the Additional Solicitor General of India, Ms. Indira Jaising to file an affidavit as to whether the tiger population has gone up or gone down. And, she filed an affidavit saying that the tiger population has gone up substantially. Actually, it had gone up because I was in Madhya Pradesh, I knew the facts and he did not know. Then he agreed with me, let us relax this. But then, we said we will relax it provided there is a National Tiger Conservation Authority constituted under the Wildlife Act. But, they had not laid down, the standards and the norm of tourism vis-a-vis tiger. We directed National Tiger Conservation Authority to lay down the norms and the standards and issue it to all the states so that they can be followed. So that there is core area within which no tourism is possible, then there is outer area. And all those was done and then we relaxed it. After it was laid down, we can relax it.

These are three illustrative cases that I gave as to how the Supreme Court in exercise of its power under Article 21 read with Article 32, Right! tried to preserve biodiversity.

Not the State is not doing anything regarding this. There is a constitutional provision under Article 148A – a Directive Principle of State Policy – which states that state shall endeavour, protect and improve environment and safeguard the forest and wildlife of the country. And consistent with this Directive Principle of State Policy, a number of Acts have been made by the parliament:- Environment Protection Act, 1986, Forest Conservation Act, 1980, Water Prevention and Control of Pollution Act, 1974, the Air Prevention and Control of Pollution Act, 1981, the Wildlife Protection Act, 1972 etc. Various other Acts are also there. So they provide a mechanism by which the wildlife can be protected, the air pollution can be reduced. Under the environment protection act the environment clearance is required before any non-forest activity is taken up like industry or mining. And under Conservation Act, forest approval is required. Right! And Mrs. Gandhi when she was there as Forest and Environment Minister, she must have done all that job. Similarly after Water Act there is a consent required before you start any industry.

So there are regulatory measures, that Parliament has already introduced. But my experience is that in practice the regulatory authorities are not very tough and in other cases they are so tough that nothing is possible. A balance has to be made. Parliament has now established National Green Tribunal which is trying to bring and balance between the environment and development.

Now, coming to sustainable energy. You know energy is needed for development. But, there has to be a need for efficient use of energy. Energy cannot be consumed by the present generation at the cost of the future generation. Right! And, sustainable energy must be utilised by every generation and some energy must be left for the future and has to be managed efficiently. That I call sustainable energy. We call it as an inter-generational equity principle. Not only for this generation but for future generation yet to come. There is a recent Act of Energy Conservation Act, 2001 which provides for establishment of a Bureau of Energy Efficiency which will recommend measures. I took the help of environmental experts to write down the judgement of Goa Foundation. If you see number of experts have been referred to in the judgment. The expert body Bureau of Energy Efficiency will recommend measures and it is for the Central government and State Governments to adopt these measures by way of specifying norms and standards by which energy is not wasted unnecessarily and managedefficiently. The Act also provides for adjudication of disputes. Once

adjudication of dispute is there then of course judicial review is available under Art. 226, Art. 136 and all those appellate power will be available.

I hope all these aspects of biodiversity, conservation and efficient management of energy will be discussed in the conference. I thank Professor Usha Tandon for inviting me to share my thoughts with you.

Thank You !

Address
By Guest of Honour

Mr. Mohan Parasaran
Senior Advocate, formerly Solicitor General of India

Esteemed and Respected Hon'ble Justice Ranjan Gogoi, Esteemed and Respected Hon"ble Justice Uday Lalit, my dear friend Mr. Luthra, Dr. Prof. Usha Tandon, Prof. Raina , delegates of this conference, other members of the faculty and my dear students, once again it gives me very immense pleasure to be here for the third consecutive year. This time, CLC has held another important international conference on a very important topic for the last three days and I congratulate Prof. Usha Tandon and her team for holding such conferences. Infact, conservation of biodiversity, development and generation of sustainable energy are two very important facets of tackling the pervasive and worrisome phenomenon of climate change. Growing industrialisation and technological advances have provided all the necessary and unnecessary comforts we seek. Incredible damage has been caused to our environment due to various activities such a deforestation , habitat degradation , poaching , unchecked mining , use of fossil fuels and irresponsible waste disposal etc.

Though many of us don't realise it, our existence is intertwined with flora and fauna surrounding us. The drive for biodiversity conservation is not merely for aesthetic purposes but for the greater purpose of maintaining ecological equilibrium and productivity. According to the information published by the interim secretariat for the convention of biological diversity, while specie extension on environmental tragedy they also have performed imprecations for economic and social development and as Mr. Luthra was giving the example of vultures , I was wondering that these days we are not able to spot a single parrot or sparrow in any city or even in villages and so many species have disappeared. At least 40% of the world's economy and 80% of the needs of the poor are derived from biological resources. In addition, the richer the diversity, the greater the opportunity for medical discoveries, economic development and adaptive responses to such new challenges as climate change. The biodiversity is our insurance policy, our own lives and livelihood depend on it. Human activities have caused loss of natural habitat leading to displacement and extinction of a variety of flora and fauna which in turn has affected our own requirement of food, drinking water, shelter and medicine. Now recently, we saw a leopard attacking some people in a school on the outskirts of Bangalore and a seven year student of the same school is reported to have said *"we are destroying their homes- the forests- that is why they have come here and it isn't their*

fault". This indeed is a sad state of affairs that a seven year old school goer realises this severity of situation and yet we as adults continue devastated destruction of the environment.

Entire lakes and runlets in Chennai have disappeared due to haphazard and illegal constructions in the name of progress and development and that was infact the main reason for the resent havoc which Chennai witnessed and also Srinagar witnessed that same phenomenon last year. The aquatic ecosystems in Chennai have totally been destroyed; result of these actions was evident last year and is even evident now. And we see several cities also at the same time suffering from other problems as well, including state of Maharashtra from drought and this all because unabated use of minerals and fossil fuels and unchecked disposal of toxic waste that has created a figurative bubble of poison that is just waiting to burst one day, for instance in Delhi itself the quality of air we breathe is actually toxic and infact both the executive as well as Supreme Court have been trying their level best for several years to find out various remedial measures. It led to the Honourable Supreme Court passing an order imposing green taxes, odd-even rule imposed by the Delhi government.

We desperately need to turn to alternative sources of energy on a far wider scale- solar energy and wind energy , hydro power, non polluting fuels such as CNG etc. These ought to come in the mainstream, while the use of fossil fuels and other pollutants need to take a backseat. We require comprehensive and large scale awareness drives for the cost effective and easy utilisation of these alternative energy sources. This task cannot be left to the Government alone, all sections of the society particularly the private sector need to participate. We need our businesses and investors to promote R&D in this sector to just ensure continued innovation for development and generation of sustainable energy. Corporate entities must comprehend the magnitude of the problem and seek to contribute towards its resolution. When the Jaguar Land Rover's CEO Ralph Speth, recently remarked "that their cars of latest technical features can clean the air in Delhi" the statement was immediately and rightly slammed by the concerned authorities including the Court.

The Supreme Court has stressed the importance of sustainable development in many cases resulting in the evolution of a special branch of environmental jurisprudence and judicial recognition of the precautionary Principle, Polluter Pays Principle and Intergenerational Equity. The National Green Tribunal has often come down heavily on industries for sidelining environmental concerns while entering commercial activities. At least the repeated concern expressed by our Courts , it is high time that we as citizen ns recognise the magnitude of

the problem we are facing and take steps to fix the damage that has been caused. Once again, I wish to congratulate the Campus Law Centre in holding such conferences on these important topics which will be so useful for future.

Thank you!

Address
By Guest of Honour

Mr. Sidharth Luthra
Senior Advocate, formerly Additional Solicitor General of India

Justice Gogoi, Justice Lalit, Mr. Parasaran, Prof. Raina, Prof. Tandon, Prof. Gupta, all the faculty members and the delegates. I think the only qualification that I have and don't know where Prof. Usha Tandon figured it out from, to speak on an occasion like this is that I am the grandson of a farmer. I must say I grew up on my grandfather's knees and he was always telling me about the link we have as human beings in maintaining biodiversity and the sensitivity we must have towards our environment. Infact, I have seen him being conscious from the beginning. He was born in 1900 and at least till I saw him in 1993, I would go to him on the farm and he would tell me that we have to control the use of pesticides, we have to ensure the impact on the insects, the impact on water and he was always very sensitive.

Today, I was reading an article in the newspaper about the loss of vultures in India. If you remember, and I don't know how many of you in and around walking in Delhi in the last two or three decades, I remember in Lodhi Garden there was a whole stretch of trees where there were vultures, none of them are to be found today . And, the reason is that, there is a medicine called diclofenac, which we also use as human beings - a painkiller, given to animals as a result of which we have almost destroyed the vulture population. The government interestingly has worked out through mathematical studies and say that the cost of breeding a vulture is about 6 lakhs and once you breed a vulture and you have x no. of vultures , it is 75% of the cost of creating a unit for carcass disposal, for animal dead bodies disposal and that cost comes with an energy cost. So, today the government is seriously considering and administration has recommended that perhaps it's time that at least in the rural areas we go back to the traditional methods to breed vultures and try to provide them with an environment where they are safe and so we can save the infrastructure cost and the cost of energy and disposal of energy.

In another interesting example, today I was walking with someone who gave me an interesting insight. An hospital in Delhi covered its open air parking lot with solar panels so they get free electricity, they have excess electricity that goes back to the grid and the vehicles remain cooler and if the vehicles remain cooler in the summer, the use of fuel is much lesser due to lesser use of air conditioning. All these mechanisms of reduction of power as also of insuring

that we move to clean fuel are both parts of sustainable energy and of course protection and conservation of our biodiversity.

Now, while all these things are considered, we must also not forget that even clean energy perhaps may not be as clean as we want it to be. It may be clean from the pollution point of view but it has its own concerns. For example whether its air, water, sun or wind energy, there have been studies done to say that a dam on a river has an impact, when the level of dam is raised then the impact it has on the life within the water. With wind turbines- when you think of wind turbines it's a perfectly harmless kind of energy- there is a turbine its swinging in the air and there can be no damage to the environment. Yet studies have indicated that there is an adverse impact on birds and bats who are hit by it very often and there is a recommendation in some of the studies that I was reading this morning, that we must construct wind farms either away from breeding colonies of birds or ensure that artificial breeding colonies of birds are not placed near wind farms and wind turbines.

These are all the concerns which I am sure you debated over the last few days and as a matter of interest what has happened in this conference is something which is of great importance to all of us. To end, I remember and I would like to quote the famous judgement of *Sachidanand Pandey* in 1987 wherein Justice Chinnappa Reddy quoted a portion from the "wise Indian Chief of Seattle"stating "Every part of the earth is sacred to my people. Every shining pine needle, every sandy shore, every mist in the dark woods, every clearing and humming insect is holy in the memory and experience of my people. The Sap which courses through the trees carries the memories of the red man....This shining water moves in the streams and rivers is not just water but the blood of our ancestors"

Thank you!

MECHANISMS TO MAKE END-USERS OF COPYRIGHT WORKS PAY THROUGH COLLECTIVE RIGHTS MANAGEMENT: INTERNATIONAL TRENDS AND INDIAN PRACTICE

Raman Mittal*

I.

Introduction

In the absence of effective payment mechanisms the edifice of copyright would crumble and will not exist in the form in which we see it now. The present day business models built around copyright are marked with a strong contribution from collective management of rights which works as a facilitator for both rights owners and end-users. This paper explores the relationship between end-users and Collective Management Organizations (CMOs) with an object to find out ways to strengthen the mechanisms that could be used to make end-users pay for their use of copyright works.

The end-users of collective management of copyright would include bars, clubs, hotels, students, schools, universities, broadcasters, online music providers, theatrical companies, cinemas, background music providers among others. These end-users could be individuals or organizations; nationals or foreigners; commercial or non-commercial entities; they could be small or big in size and could operate online or offline. As the objective of this paper is to find out the worthiness of payment mechanisms, all these varied and speckled end-users are classified in terms of their status as payers of copyright royalty. Upon this classification, which seeks to rope in all users of copyright works, is built an analysis of a range of payment mechanisms. While the paper notes international experience of experimenting with these mechanisms, it cites law, cases and case studies mainly from the jurisdiction of India where collective management of copyright is still evolving and struggling to establish itself as a dependable mode of copyright exploitation.

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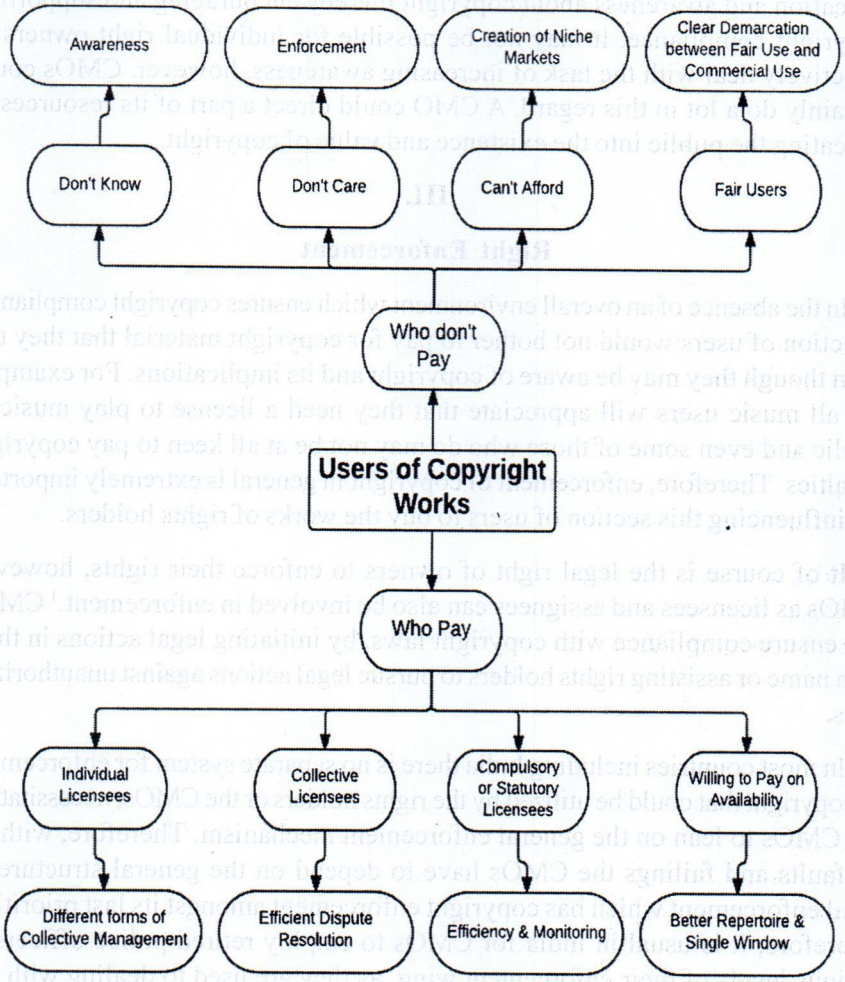

II.

Increased Awareness

There is big segment of our population that exists below the visibility line of copyright. Though they are users of copyright works in some way but they are unaware of the fact that they need to pay the owner of copyright for their use. Students making photocopies, netizens downloading songs, organizers of public meeting where music is played, etc. are examples of such persons. The best answer to bring such persons on board the copyright bandwagon may not be a lawsuit or a legal notice in the first go; it should be increasing awareness.

Therefore, CMOs should take unto themselves the task of increasing public education and awareness about copyright thereby encouraging and supporting copyright compliance. It may not be possible for individual right owners to effectively deal with the task of increasing awareness, however, CMOs could certainly do a lot in this regard. A CMO could direct a part of its resources in educating the public into the existence and value of copyright.

III.

Right Enforcement

In the absence of an overall environment which ensures copyright compliance, a section of users would not bother to pay for copyright material that they use even though they may be aware of copyright and its implications. For example, not all music users will appreciate that they need a license to play music in public and even some of those who do may not be at all keen to pay copyright royalties. Therefore, enforcement of copyright in general is extremely important for influencing this section of users to buy the works of rights holders.

It of course is the legal right of owners to enforce their rights, however, CMOs as licensees and assignees can also be involved in enforcement.[1] CMOs can ensure compliance with copyright laws, by initiating legal actions in their own name or assisting rights holders to pursue legal actions against unauthorized uses.

In most countries including India there is no separate system for enforcement of copyright that could be utilized by the rights holders or the CMOs, necessitating the CMOs to lean on the general enforcement mechanism. Therefore, with all its faults and failings the CMOs have to depend on the general structure of legal enforcement which has copyright enforcement amongst its last priorities. Therefore, it is usual in India for CMOs to employ retired police officers at various levels of their enforcement wing, as they are used to dealing with the public and to identifying wrongdoers and also have continuing connections with the police force to make them move into copyright enforcement. Many times CMOs have informers on their payrolls who are paid to give information to the CMO about any unlicensed use—whether past, present or future.

Through various enforcement mechanisms and remedies including provisional and border measures CMOs try to enforce copyright so as to prevent the release into the market of pirated goods and preserve the relevant evidence in connection with the alleged infringement. There are many who perceive copyright as

[1] In order to be able to sue in its own name for copyright infringement in India a CMO must be an exclusive licensee or assignee of copyright.

hindrance to creative activity and consider it as enemy of progress. This attitude cannot be fought just with lawsuits alone therefore, CMOs usually lobby and advocate for remedies which offer adequate compensation to the rights holders and deterrence to further infringement.

In recent times a great threat to copyright has emerged from the medium of the Internet where services like P2P have been offering free downloads of music and films without any compensation to the rights owners who themselves have been almost helpless spectators of the situation. To combat this situation legislative intervention has taken place at international[2] and national levels. In the latest amendments to the Copyright Act, India in 2012 incorporated provisions to implement protection of technological protection measures and rights management information together with the liability of internet service providers (ISPs). The information Technology Act, 2000 has incorporated specific provisions which help in determining the liability of ISPs.

(i) Technological Protection Measures

Technological protection measures (TPMs) are defined as the use of technological tools in order to restrict the use or access to a work. The latest amendments to Copyright Act in 2012 have incorporated protection for TPMs by way of creating a new offence of circumventing TPMs.[3] Accordingly, any person who circumvents an effective technological measure applied for the purpose of protecting any of the rights conferred by the Copyright Act, with the intention of infringing such rights, shall be punishable with imprisonment and fine. Copyright Act in India is a civil and criminal liability statute. It is interesting to note that the newly added provision to protect TPMs talks only about criminal liability. The cumulative requirements for establishing the offence are: (i) circumvention of an effective TMP; (ii) with intention for infringing copyright. Actual infringement of copyright is not a condition precedent for constituting this offence as the provision only talks about circumventing a TPM while harboring an intention of infringing copyright. Since the introduction of TPMs within copyright law has been controversial a number of exceptions to this offence have also been included which include doing permitted acts, encryption research, investigation, computer testing, etc.[4]

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[2] WIPO Copyright Treaty and WIPO and WIPO Performances and Phonograms Treaty were adopted in 1996 which contain special provisions for enforcement of copyright in the online environment.

[3] See, s. 65A(1), Copyright Act, 1957.

[4] See, s. 65A(2), Copyright Act, 1957.

(ii) Rights Management Information

On the information superhighway rights holders risk losing control over their work together with its identification information about authorship and ownership. Moreover, music, films, software, etc. float in the cyberspace without any carriers and containers. Therefore, certain rights management information (RMI) identifying title of a work, name of author, performer or owner, information as to conditions or usage, etc. are embedded in the work itself.[5] The 2012 amendments to the Copyright Act added statutory protection for such information by carving out a new offence together with a civil wrong for violating RMI.[6] Accordingly, any person, who knowingly removes or alters any RMI, or distributes copies of any work knowing that electronic RMI has been removed or altered, shall be punishable with imprisonment and fine. The requirements for constituting an offence is an instance of intentional removal/alteration of RMI or intentional distribution/communication to public of any work with knowledge that its RMI has been removed/altered.

(iii) Liability of Internet Service Providers

Internet service providers[7] play an extremely important role on the architecture of the Internet so they could be the keys to preventing, detecting and enforcing copyright infringements. Without their cooperation it would be impossible to enforce copyright on the Internet. Because of their technical and financial position they are often made parties to copyright infringement suits and complaints where they are made secondarily liable for copyright infringement. So, it becomes important to fix and limit the extent of their liability. The information Technology Act has incorporated provisions with an aim to provide certain exemptions to ISPs and also to state the conditions for making them liable together with their due diligence obligations.[8]

The Indian model of law as to ISP liability is to grant them certain statutory exemptions from liability which would override provisions of all statutes. If in a particular case the ISP does not come within the ambit of the exemptions then

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[5] See, s. 2(xa), Copyright Act, 1957.

[6] See, s. 65B, Copyright Act, 1957.

[7] Internet service provider or intermediary has a wide definition under the Indian Information Technology Act where an intermediary with respect to any particular electronic records has been defined as any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web hosting service providers, search engines, online payment sites, online-auction sites, online market places and cyber cafes. See, s. 2(1)(w), Information Technology Act, 2000.

[8] See, s. 79, Information Technology Act, 2000.

he remains liable in accordance with the provisions of any statute. The exemption has been provided to ISPs only when their role is limited to providing access to third party content if the intermediary observes due diligence while discharging his duties.[9] That means if an ISP acts other than mere access provider then these exemptions are not available to the ISP.

If the ISP conspires, abets, aids or induces the commission of any unlawful act then this exemption shall get withdrawn. Further, upon receiving actual knowledge, or on being notified by the appropriate Government that any information residing in a computer resource controlled by the intermediary is being used to commit the unlawful act, if the intermediary fails to expeditiously remove or disable access to that material then also the ISP loses its exemption. So, a notification procedure has been created whereby an ISP may be notified of any infringing material either stored or passing through its servers and then the ISP would be obliged to remove or block the same.[10] These provisions have been criticized by many scholars as these pose a great threat to freedom of expression on the Internet, however, these provisions have been used by the copyright owners and CMOs to remove infringing content on the Internet and also to block websites that have infringed copyright.[11] Apart from Information Technology Act, the Copyright Act also contain provisions which can be utilized by a rights owner or CMO to block or remove infringing content on the Internet with the aid of ISPs.[12]

IV.

Creation of Niche Markets

There is a segment of population especially in developing countries who uses copyrighted works but can't afford to pay for the use. CMOs can help that

[9] The Information Technology (Intermediaries Guidelines) Rules, 2011 under section 3 has laid down elaborate provisions as to what all steps an ISP must take so as to fulfill the condition of 'due diligence'.

[10] The Information Technology (Intermediaries Guidelines) Rules, 2011 require ISPs to remove within 36 hours of being notified by the authorities any content that is deemed objectionable, particularly if its nature is "defamatory," "hateful," "harmful to minors," or "infringes copyright". Cybercafé owners are required to photograph their customers, follow instructions on how their cafés should be set up so that all computer screens are in plain sight, keep copies of client IDs and their browsing histories for one year, and forward this data to the government each month.

[11] See, for example, Nikhil Pahwa, *et. al.*, "Updated: Indian Government Blocks Typepad, Mobango, and Clickatell", *MediaNama*, (4 March 2011); Lindsay Pereira, "Singham Effect: File Sharing Sites Blocked", *Mid DAY*, (22 July 2011); Javed Anwer, "Blocking Website in India: Reliance Communications Shows it is Very Easy", *Times of India*, (24 December 2011); Shubhashish and Katya B Naidu "RCom Shuts Access to File-Sharing Sites", *Business Standard* (27 December 2011).

[12] See, Rule 75, Copyright Rules, 2013.

segment to come onboard by making such business models that provide limited access in return of something which is affordable. A sum of small contributions from a large group of persons could surprisingly be more than big contributions from a smaller group. Even otherwise the pricing structure of CMOs has to be justifiable on the ground of reasonability in order to be socially relevant and acceptable.

V.

Clear Demarcation between Commercial Use and Fair Use

Often times the right of copyright owner or CMO to license a work has to compete with a corresponding right made available to the public by way of fair use or fair dealing. Fair dealing, of course, is an extremely important part of overall copyright philosophy which tries to strike a balance between the competing interests of copyright owner and public with regard to access of a copyrighted work. However, vaguely defined free usage can be a real hurdle and make the task of CMOs virtually impossible. Below I present two case studies where CMOs' activities of enforcement have come directly in conflict with fair dealing provisions under Indian law.

Music Played at Marriages

This is an example of how something which was well within the domain of copyright licensing has been taken over within the fair dealing exceptions under the Indian Copyright law without attempting any economic analysis. Marriage in India is the biggest extravaganza of splurging and indulging together with public display of wealth. Rich, middle class and poor who form the mosaic of Indian society save for that big day and when it comes they don't mind spending which has an essential element of exhibition of wealth. Music is a vital part of the marriage celebrations and ceremonies and most of the times it is Bollywood[13] music which is performed and played especially at during the marriage procession. In modern times people employ professional event managers to ensure that all the ceremonies which often span over many days go smooth and hassle free.

Legally the organizers of marriage had to take a license from the copyright owner or CMO for performance of music during marriage procession and other ceremonies. If we look at the overall marriage expenses such a license would amount to just about 0.5% of the total expenses that people incur for organizing a marriage function.[14] However, by way of 1994 amendment to Indian Copyright Act an exception was carved out which stated that music played or performed

[13] Indian film industry is popularly called Bollywood.

during marriage would be covered by fair dealing exception and shall be an exception to infringement.[15] This exception was created without any economic analysis. When marriage is such an occasion of spending and when a music license would be just a pittance in comparison with other expenses, it seems quite justified to levy a little charge for the sake of copyright. Then why was this exception created?

The reason was the methods and mechanisms adopted by CMOs to make people buy a music license. CMOs, on such occasions, would present themselves together with policemen to threaten the marriage party so that when faced with the prospect of stopping the function the people would readily opt for a legal license. This is an example of CMOs trying to make an overkill; a challenge which required creation of more awareness was instead tried to solved by legal threats. So, something which existed as a legitimate source of earning for CMOs and copyright owners was passed into fair dealing exceptions because of bad management on part of CMOs.

VI.

Choosing the Best Form of Collective Management

Copyright law grants rights to individual owners which they can administer themselves. The reason why there exists collective management of copyright is the fact that collective management is sometimes more effective than individual management for both copyright owners and end-users.[16] Copyright owners benefit because CMOs have better bargaining power and can better locate potential users, negotiate with them and enforce rights. For users, CMOs act as one-stop shops for the authorizations they seek.

The organizational structure of CMOs, their regulation by government, the kind of mandate they can get will have a lot of bearing on how effectively they can operate in the market and how attractive they would be to end-users. At the most basic level, collective management of copyright is voluntary as owners

[14] An estimate of such expenses in a typical Indian marriage is jewellery—30%; dresses—10%; entertaining guests—20%; gifts—30%; and ceremonies—10%.

[15] S. 52(1)(za), Copyright Act, 1957: "The performance of a literary, dramatic or musical work or the communication to the public of such work or of a sound recording in the course of any bona fide religious ceremony or an official ceremony held by the Central Government or the State Government or any local authority.
Explanation.- For the purpose of this clause, religious ceremony including a marriage procession and other social festivities associated with a marriage.

[16] Copyright collectives are traditionally said to reduce transaction costs in enforcing copyright; see, Robert P. Merges, "Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations", 84 *Calif. L. Rev.* 1293 (1996).

can freely decide to entrust an organization of their choice with the exercise of their copyright. However, three types of collective management approaches which though erode the contractual freedom of copyright owners in managing their rights through CMOs have been experimented with for the sake of safeguarding the interests of owners and for ease of end-users.

(i) Compulsory Collective Management

First, contractual freedom is eroded when collective management is made compulsory and imposed by law where owners of rights have no choice but to commit the exercise of their rights to CMOs. In India the usual principle is that owners of copyright in their individual capacity continue to have right to grant licenses consistent with their obligations as members of a copyright society.[17] Further, an owner of copyright also has the right to withdraw the authorization given to a copyright society.[18] However, an exception is created for works incorporated in films and sound recordings which can be administered only through a copyright society.[19]

(ii) Extended Collective Management

Second, contractual freedom is eroded in extended collective licensing (ECL) which is most widely practiced in Nordic countries. In this type of collective management when a license is freely negotiated between a CMO and a user, the same is extended to the works of rights holders who are not members of the CMO. Usually, some guarantees for outside right-owners is provided by law in such a system.[20] This legal mechanism is often used in the fields of broadcasting of literary and musical works, reprography and cable re-transmission.

Both compulsory and extended forms of collective management have been devised to ease copyright clearance, to limit fragmentation of copyrights and thus to reduce transaction costs for users. The system of ECL has, however, not been used in India so far.

(iii) Monopoly of CMOs

In some countries more than one organization may act as CMO for the same right and group of rights holders. In jurisdictions where collective

[17] Under the Copyright Act, 1957 a CMO is known as 'Copyright Society'. See, s. 33(1)(Proviso 1), Copyright Act, 1957.

[18] S. 34(1)(b), Copyright Act, 1957.

[19] S. 33(1)(Proviso 2), Copyright Act, 1957.

[20] Owners usually are given the right to claim individual remuneration from the organization concerned and sometimes they also have the right to file individual prohibition of the use of their works under the agreement.

management of copyright is new or not well ingrained in the legal system the presence of multiple CMOs for same right could create confusion as to clarity of representation of each CMO which can be taken undue advantage of by end-users. However, in many countries, there is a legal provision which mandates that only one organization may manage the same group of rights holders or the same category of right. In such a situation the law itself promotes and ensures a situation similar whereby CMOs hold a de jure or de facto monopoly. Such a situation seeks to avoid the disadvantages of a pluralistic system with many CMOs competing with each other for acquisition of rights from owner and also for licensing of rights to the end-users. If a developing country ends up with several collecting societies to manage same right then they may either collect nothing or spend whatever collections they have been able to make on their administrative expenses leaving nothing to be distributed amongst rights holders. Indian law is tilted in favour of creation of monopoly for CMOs because it states that the Government shall not ordinarily register more than one copyright society to do business in the same class of works.[21]

However, from the point of end-users, CMOs occupy a dominant position because one CMO becomes the only supplier of licenses, so there is a high risk that in this monopoly situation CMOs could indulge in customer allocation or price fixing. Therefore, it becomes extremely important for the law to provide for safeguards so that this monopoly is not abused in the marketplace. The first level of safeguards has been incorporated in the Copyright Act itself which makes the registration of copyright society with the Central Government mandatory.[22] Further, in case of bad management by a copyright society the Central Government has the power to enquire and cancel its registration.[23] The second level of safeguards has been incorporated by virtue of Competition Act, 2002 wherein a limited exception has been granted to intellectual property laws.[24] However, if a license contains unreasonable conditions which are not necessary for the protection of intellectual property then the exemption stands withdrawn. In the context of the CMO-user relationship, India's competition law can play an important role in controlling the discretion of CMOs in granting licenses as well as imposing certain terms and conditions on licenses granted, including the setting of tariffs.

In the area of collective management of copyright, it is usual for all the countries to place restrictions on the freedom of contract that is available to

[21] S. 33(3)(Proviso), Copyright Act, 1957.
[22] S. 33(1), Copyright Act, 1957.
[23] S. 33(4) & (5), Copyright Act, 1957.
[24] S. 3(5), Competition Act, 2002.

copyright owners, end-users and CMOs. These restrictions are imposed with a view to better protect the interests and rights of owners and also to be able to serve the end-users in a more efficient manner. These contractual restrictions have been discussed only in their broad perspective but in actual practice the extent, and manner of such restrictions differ from one country to another. Many times there is a mix of such restrictions which is chosen keeping in mind the economic progress or cultural traditions of the country.

VII.

Efficient Dispute Resolution between CMOs and End-Users

It is, indeed, important to expand the business for a CMO by inviting new licensees; however, it is equally important to retain those end-users who have already been licensed by the CMO. Through efficiency in management and by treating end-users in a non-discriminatory manner CMOs can achieve this objective. However, the most important aspect here is the establishment of efficient dispute resolution mechanism.

The disputes and disagreements between CMOs and end-users could be pre contractual or post contractual. Often, the end-users and the CMO will disagree on the terms of the license offered by the CMO. In such a situation, especially where a CMO enjoys monopoly position in the market, national laws must decide which type of state intervention is necessary which of course varies to a great extent from jurisdiction to jurisdiction. In some jurisdictions specialized copyright tribunals or boards have been empowered in this regard while in others the matter is left entirely to civil courts.[25] In India the Copyright Board, on an appeal, is empowered to remove any unreasonable element, anomaly or inconsistency in the tariff scheme.[26]

After a license contract has been entered between a CMO and an end-user, disputes might erupt between them which mainly concern licensing conditions including the extent of use of repertoire, payment of royalty, etc. If it is the CMO that has breached the contract then it could be held liable under the general law of contract in India which affords a remedy of damages under the Indian Contact Act.[27] Further, the remedies of injunction and specific performance are available under the law of equity as codified in the Specific

[25] In the United States a federal judge is empowered to decide the appropriate rate for the licenses by virtue of an agreement entered into between CMOs and the Department of Justice while in Canada and Australia a specialized copyright tribunal/board has been established for that purpose.

[26] S. 33A(2), Copyright Act, 1957; see also Rule 57, Copyright Rules, 2013.

[27] See, ss. 73, 74 of Indian Contract Act, 1872.

Relief Act.[28] If it is the user that has breached the contract, then it, apart from being liable for breach of contract, could also be liable for infringement of copyright. So, the remedies available to the CMO are wider than the remedies available to the users. In terms of dispute resolution standing to sue is an important factor which depends on the legal status of the CMO.

For a CMO to be able to sue the end-user for infringement of copyright in its own name, it is necessary that the CMO should be an exclusive licensee of the copyright owner. For the purpose of availing civil remedies upon infringement an exclusive licensee enjoys the same status as that of the owner.[29] It is to be noted that this right of action cannot be conferred on a CMO either by an agreement or by any specific consent.[30] Further, the CMO must, in such cases, make the copyright owner a party to the suit so that the owner gets a chance to dispute or confirm the claim of the plaintiff CMO.[31]

Dispute resolution through the court system can be costly and time consuming. In this regard, the utilization of an independent and impartial dispute resolution body, i.e. via mediation or arbitration can be extremely helpful. Moreover, as the CMO's repertoire and its exploitation become increasingly international, the submission of related disputes to an alternative dispute resolution procedure becomes more attractive and prudent. This however does not prevent the parties from going to court.

VIII.

Greater Efficiency and Monitoring the Use by End-Users

In many jurisdictions, end-users can access and use copyright works by way of compulsory and statutory licenses. While in compulsory license the end-users need to apply to the designated authority, in case of statutory license the statute has already granted a license to all those who are willing to fulfill the prescribed conditions. In India there are provisions for both these forms of license.[32] The role and function of CMOs in these areas is limited; they must collect the determined remuneration from the end-users and distribute the same to the copyright owners. However, there are certain obligations that have been

[28] See, ss. 9—25 of Specific Relief Act, 1963. See also, Raman Mittal, *Licensing Intellectual Property: Law & Management*, 47—55 (Satyam Law International 2011).

[29] S. 54(a), Copyright Act, 1957. See, *John Wiley and Sons Inc.* v. *Prabhat Chandra Kumar Jain and others*, 2010 (170) DLT 701.

[30] *Babul Products Pvt. Ltd.* v. *Global Broadcast News Ltd. And Others*, 2008 (36) PTC 492 (Del.).

[31] S. 61, Copyright Act, 1957.

[32] For compulsory license see, ss. 31, 31A, 31B and 32 and for statutory license see ss. 31C and 31D of Copyright Act, 1957.

imposed by law on the end-users before they can use the works relating to record keeping, payment of royalty, manner of use, etc.[33] The CMOs, on behalf of their members, should inspect and monitor the compliance of these conditions imposed by law so as to check the instances of under reporting, improper use, etc.

IX.

Single Window Service or Single Fee License

There is a section of users of copyright works that is ready and willing to pay for the use but is unable to get the right easily and readily and also on clear and transparent terms. This is a situation where the demand is there but the supply lacks because of non-availability or inefficiency. Therefore, for CMOs it is important to find answers to real market needs and to offer viable licensing solutions to users. By offering commercial users deals tailored to their respective needs this segment can be served and brought onboard the system.

Copyright is a bundle of various rights such as reproduction, distribution, communication to the public, public performance, translation, adaptation, etc. Each sub-right could potentially be split among many right holders. For example, in a particular musical, there could be different rights for composition, lyrics, performance and recording. Collective management of copyright is still organized mainly around these traditional fragments where one CMO licenses the right of communication to the public or public performance, while another licenses the right of reproduction. For a single use of a copyright work the end-user often requires multiple authorizations for clearing all these rights from several different rights holders or CMOs. For example, a broadcaster might require a license to copy the content on its server and another license to communicate the work to the public. Further, where law permits multiple CMOs to operate for same right, one CMO may represent an owner for a part of its repertoire and another CMO for the other.

In order to facilitate the end-users a single window service could be started which takes the licensing requests from end-users and direct them to the concerned CMO. A further build-up on the single window service is a single-fee license issued to end-users and thereafter the royalty is split between various CMOs representing different fragments of copyright. In this case the composite Royalty could be determined by the copyright authority of the country concerned.

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[33] See, for example, s. 31D, Copyright Act, 1957 imposes obligation on the statutory licensees for proper usage, record keeping along with payment of royalty. Further, the statutory licensors have been empowered to inspect and check the records.

This solution would serve the end-users in terms of ease of access and would also reduce transaction costs.

X.

Conclusion

The development of sound mechanisms whereby end-users can be made to pay for their use of copyright works fall in the domains of legislation, contract and management. Legislative intervention is very much required in making appropriate laws for enforcement of copyright and choosing the ideal form of collective management together with a clear demarcation between fair use and commercial use. A better management by CMOs which creates niche markets for users and generates more awareness about copyright with continuous monitoring of end-users will go a long way in strengthening the overall system of collective management of copyright. Choice of clauses in contracts with end-users which ensure efficient dispute resolution and offering of better repertoire with a facility of single window can certainly be helpful. As societies, laws and legal practices are different and dynamic, it a well-nigh impossible to suggest the ideal mix of these mechanisms for all times and for all jurisdictions. More importantly, because the end-users of copyright are far from being homogeneous even in a single jurisdiction, the task to select the appropriate blend of mechanisms becomes most challenging. India has tried some of these mechanisms and continues to experiment with some others with a hope to increase order and to decrease chaos which at present is so much perceptible around the scenario of collective management of copyright.

PROJECT TIGER IN INDIA - A PRODIGY OF CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA (CITES)

*Shabnam**

Abstract

Tackling the trade in endangered species gained recognition and was brought in terms of importance as a policy challenge. The near extinction of the endangered animal 'Tiger' paved the way for action plans for saving the species by specifically having specific legal provisions added to The Wildlife Protection Act, 1972 under the Indian law. The legal protection accorded to tiger because of its endangerment of extinction was initiated by the central government in 1973 for their protection in their natural habitats by combating their illegal hunting with the help of legal provisions and a Tiger Conservation Authority set up for their special protection. This authority in 2012 notified specific legal guidelines for its conservation and Tourism as well as 'ecotourism', a term for synchronization of natural environment and wildlife with the local people of these areas. Destruction of the corridors of natural habitats and the species living getting endangered brought out the C.I.T.E.S, an agreement amongst Nations, under the aegis of the World Conservation Union. The convention provides for a framework, making it legally binding on member states to percolate the same through the domestic laws of their country, coming into force in 1975. This paper seeks to analyze the project 'Tiger' in India in the backdrop of the convention as well as the Wildlife Protection Act, 1972, of Indian environmental laws.[1]

I

Introduction

Destruction of the corridors of natural habitats and the species living getting endangered brought out the C.I.T.E.S., an agreement amongst Nations, under the aegis of the World Conservation Union. The convention provides for a framework, making it legally binding on member states to percolate the same through the domestic laws of their country, coming into force in 1975. Tackling the trade in endangered species gained recognition and was brought in terms of

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importance as a policy challenge. The near extinction of the animal 'tiger' paved the way for action plans for saving this specie by specifically having specific legal provisions added to the Wildlife Protection Act, 1972 under the Indian Law. The legal protection accorded to tiger because of its endangerment of extinction was initiated by the central government in India in 1973 for their protection in their natural habitats by combating illegal hunting with the help of legal provisions and a Tiger Conservation Authority set up for their special protection. This Authority in 2012 notified specific legal guidelines for its conservation and tourism as well as 'ecotourism', a term for synchronization of natural environment and wildlife with the local people of these areas. This paper seeks to analyze project 'tiger' in India in the backdrop of the convention as well as the Wildlife Protection Act, 1972.

II

A Background Reflection for Tigers

The reflection projects that the Amur (Siberian) tiger, in Far East Russia, thought to be less than 50 in 1940, started increasing with improvisations in their natural habitats under the Soviet regime.[2] Neighboring China boasted of a substantial number as South East Asian Tigers got little attention for reasons found in their habitats in large numbers. Meanwhile in India, in 1986, several tigers were poached in the northern Indian reserve of Dudhwa speculated to be killed for their bones used in Chinese medicine as news of china establishing a tiger farm to provide bones for medicines hit the headlines.[3] Russian scientists recalled traditions of the Chinese of use of tiger bones for medicine, events of frozen carcass and skeletons buying by Chinese traders from 1930 up to 1958.[4] In 1949, the wild cat received further discrimination for elimination as the Communist Party that came into power in 1949 declared the tiger as a threat to agricultural development so was to be hunted out and as a resultant effect, 3000 skins were handed over during 1950s and 1960s.[5] Till 1980, China had a well stocked raw material of tiger bones, after which the Dudhwa incident in India was reported. This was followed by incidents narrated about Ranthambore tigers vanishing in India in 1992 supported by evidence recovered from a member of illegal hunting tribe informing about selling the same to a local butcher in contact with illegal traders. Not long afterwards, in September 1993, investigation by TRAFFIC India led to seizures of caches amounting to 400 kg of Tiger

[2] Eric Dinerstein, *et. Al.*, "The Fate of Wild Tigers", Volume 57, Issue 6 pp. 508-514., *Bio Science* (2007).

[3] *Ibid.*

[4] *Ibid.*

[5] *Ibid.*

bones in the Tibetan quarter of Delhi, apparently bound for China across the Himalayan passes.[6]

An aggravated situation came with the collapse of the Soviet Union taking its toll on hunting the tigers for sale to China[7], Korea, Japan and Taiwan. Investigation of customs' records in South Korea revealed that hundreds of kilograms of tiger bones had been legally imported in the years leading up to 1993. Countries of origin for the bones were listed, indicating that Sumatra was the major source.[8] The restraints came in a little too late when in the Russian Far East, international NGOs moved to support the establishment of anti-poaching brigades.[9] With an outcry of extinction of the tiger, in various places, including China, educational programmes were launched to create awareness for its protection and preservation.[10] Promotion of alternatives to tiger based medicine was advocated with the cooperation of Chinese medical scientists and practitioners.[11] Nevertheless, illegal trade has continued, as shown by many seizures of bones and skins in India and Nepal and the visibility of tiger products in open markets in Southeast Asia. Investigators have uncovered extensive availability in North America, Europe and Australasia of products from China said to contain tiger derivatives.[12]

Indian authorities reported that the overall population in the country, estimated at under 2000 in 1972 and declining, had risen to well over 4000 by 1989 as a result of conservation measures. [13] Historically, the expanse of the tiger's natural habitat stretched from the Caspian Sea to Bali island in Indonesia.[14] Currently the population has got reduced to the point of reaching extinction in certain regions of its natural habitat ranges.[15] These predators have been relegated to reduction in their numbers due to reasons of their persistent elimination and losses of the natural habitats which, in turn, affecting their prey which too are losing ground for want of natural habitats[16]. The juxtaposition of trade versus their protection and preservation have undermined the consistency in efforts of

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6 *Ibid.*

7 Morell Virginia, "Can the Wild Tiger Survive?", Vol. 317, pp. 1312-1314, *News Focus* (September 7, 2007); available at: www.sciencemag.org (Last visited on January17, 2016).

8 *Ibid.*

9 *Ibid.*

10 *Ibid.*

11 *Ibid.*

12 *Supra* note 2.

13 Nowell, Kristin, *Far From a Cure: The Tiger Trade Revisited,* (Cambridge, UK: Traffic International, 2000).

14 *Ibid.*

15 *Ibid.*

16 *Ibid.*

the regional governments and other agencies to conserve tigers and their habitats.[17] The ban placed on trading in tiger parts for various purposes has resulted in illegal trading and underhand demand which has brought the wild cat towards its extinction.[18]

III

Principles Underlying CITES

The international environmental law advocated 'sustainable development' as the major key to all principles governing the environmental arena. This principle has developed over a period of time since its inception from 1972 Stockholm Declaration with some features present prior to its formal declaration of being the trademark on environmental matters. It got strengthened by the World Charter for Nature, 1992 and eventually the World Commission on Environment and Development and its main document of 1987 "Our Common Future", where Gro Harlem Brundtland explicitly gave the world a precise definition of sustainable development. However, CITES for advocating compliance uses 'sustainable use'[19] of endangered species as a term rather than completely banning the trade in flora and fauna for regulated measures in trading. "Sustainable use is the '[u]se of an organism, ecosystem, or other renewable resource at a rate within its capacity for renewal.' Sustainable use originates in the broader concept of sustainable development, a philosophy whose purpose is to balance conflicting international developmental needs, or to "meet the needs of the present without compromising the ability of future generations to meet their own needs." Although the terms sustainable development and sustainable use are sometimes used interchangeably, they are not synonymous. Sustainable development implies an ongoing process of change, including changes in existing bio-systems, while sustainable use of renewable resources, including endangered species, points to a lack of significant alteration of such bio-systems and maintenance of existing resource levels. For the sake of clarity, this paper uses the term sustainable use to discuss endangered species, rather than the term sustainable development."[20] Furthermore, CITES also endorses the

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[17] *Ibid.*

[18] *Supra* note 2.

[19] Max Abensperg-Traun, "CITES, Sustainable Use of Wild Species and Incentive Driven Conservation in Developing Countries, With an Emphasis on Southern Africa", *Biological Conservation* 142, pp.948-963 (2009), available at: www.elsevier.com/locate/biocon (Last visited on January17, 2016).

[20] Catharine L. Krieps, "Sustainable Use of Endangered Species under CITES: Is It a Sustainable Alternative", 17 *Journal of International Law* 461; available at: http://scholarship.law.upenn.edu/jil/vol17/iss1/15 (Last visited on January17, 2016).

'precautionary principle' which it is said to have impliedly used prior to 1994 and explicitly afterwords in the coming years. It is much criticized for ruling out wildlife policies for implementation. Included in these factors is the impact of conservation policies on human communities. This conclusion is relevant both to the general evaluation of CITES and to any wider consideration of the value of the precautionary principle.[21] It also appears to endorse the principle of the public trust doctrine in case of the governments where according to Professor Sax[22], three restrictions are imposed by the public trust doctrine on the state: "1. The property subject to the trust must not only be used for a public purpose but it must be held available for use by the general public; 2.The property may not be sold, even for fair cash equivalent; 3.The property must be maintained for particular types of uses (i) either its traditional uses, or (ii) some uses particular to that form of resources." It enjoins a duty upon the state to act as a trustee for protection of its resources for present and future generations as well as for everyone to make use of but cannot assign it to a single entity even for a cash equivalent nor let them be used in a detrimental manner.

IV

The Convention on International Trade in Endangered Species of Wild Flora and Fauna

(i) Overview of the Provisions

The species listed under the CITES were regarded as renewable resources, where if these resources are not renewed or resulted in their decrease in reproduction would eventually lead to their extinction, despite availability of artificial conservation measures as zoological or botanical gardens, which could be considered as a small measure for delay in their extinction. The need to prevent extinction can be justified scientifically as well as economically, but ultimately depends on ethical (anthropocentric or biocentric) value judgements.[23]

CITES was regarded as an outcome of the Washington Conference having 25 Articles and four appendices and came into force in 1975 when it was ratified by the tenth state[24]. CITES was prepared under the aegis of IUCN (The World

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[21] B. Dickson, "The Precautionary Principle in CITES: A Critical Assessment", *Natural Resources Journal*, Vol. 39. Pp. 211-228 (Spring 1999).

[22] Joseph L. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" 68 *Mich. L. Rev.* 471 (1969).

[23] Peter H. Sand, "Whither CITES? The Evolution of a Treaty Regime in the Borderland of Trade and Environment" *European Journal of International Law* 29-58 (1997).

[24] See, David S. Favre, "Tension Points Within the Language of the CITES Treaty" 5 *Boston University International Law Journal* 247 (1987).

Conservation Union).[25] As a protectionist and conservationist convention of flora and fauna, it was a *quid pro quo* for trade and conserving the environment along with the various species by giving recognition to the heritage of mankind for the present and future generations. The framework of the convention was in tune with the 1933 London Convention by regulating wildlife trade with third parties through a mandatory licensing system. It also required permissions to be issued by exporting countries subject to agreed prohibitions, and controlled trade of species. It further provided for the country of origin of the specie to add the names to the list in accordance with the category of specie to the concerned Appendix and providing notifications of national restrictions to other countries through the secretariat. This further called for percolating the provisions of the convention through the national laws of each country and provide information of data on trade and enforcement measures of the country. The member states through Conference of Parties (COP) could take up various decisions and make periodic adjustments. Secretariat functions were entrusted to UNEP, with a formal mandate for assistance by 'qualified' non-governmental organizations.[26]

Creating a harmonious relationship between international trade and protection of flora and fauna called for creating regulatory controls, where international trade was to be regulated for adverse impacts on wildlife by the convention. All transactions of trade which include exports and imports were subject to a licensing system ensuring the removal of illegalities from trade in animals and their body parts. Stricter measures called for one or more management authorities for the licensing system and a scientific authority for effects of trade on the species. CITES enacted the provisions under three appendices for species to be bifurcated according to the degree of protection to be accorded to the specie, be it flora or fauna.[27] Appendix I include species threatened with extinction. Trade in specimens of these species is permitted only in exceptional circumstances.[28] Appendix II includes species not necessarily threatened with extinction, but in which trade must be controlled in order to avoid utilization incompatible with their survival.[29] The criteria for division of species into Appendices I or II based on biological and trade factors were determined at a Conference of Parties (COP) comprising of its member states.[30] Appendix II contains species that are protected in at least one country, which has asked other CITES parties for assistance in

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[25] Cyrille De Klemm, "Guidelines for Legislation to Implement CITES", *IUCN* Environmental Policy and Law Paper No. 26 at 107 (1993).

[26] *Supra* note 24.

[27] Available at: https://www.cites.org/eng/disc/how.php (Last visited on January 17, 2016).

[28] *Ibid.*

[29] *Ibid.*

[30] *Ibid*, Resolution Conf. 9.24 (Rev. CoP16).

controlling the trade. Changes to Appendix III follow a distinct procedure from changes to Appendices I and II, as each party is entitled to make unilateral amendments to it. Export and import of a specimen of CITES listed species from a state party to a convention country may be done where clearances are granted at the port of entry or exit depending on the variability of requirements of each country and the differential control measures of each country.

This is followed by regulatory measures for exports and imports of specimens under Appendices I, II and III where they require valid legal permission granted by the management and scientific authorities of the exporter or importer country by way of the licensing system with provisos added that it should not be detrimental for the survival of the species whether plants or animals, or is not being used for any commercial purposes. In article VII[31], the convention allows or requires parties to make certain exceptions to the general principles described above, notably in the following cases, for specimens in transit or being transshipped[32]; or, for specimens that were acquired before CITES provisions applied to them (known as pre-convention specimens)[33];or, for specimens that are personal or household effects[34]; or, for animals that were 'bred in captivity'[35]; or, for plants that were 'artificially propagated'[36]; or, for specimens that are destined for scientific research; or, for animals or plants forming part of a travelling collection or exhibition, such as a circus.[37]

There are special rules in these cases and a permit or certificate will generally still be required. Anyone planning to import or export/re-export specimens of a CITES species should contact the national CITES management authorities of the countries of import and export/re-export for information on the rules that apply. When a specimen of a CITES-listed species is transferred between a country that is a Party to CITES and a country that is not, the country that is a party may accept documentation equivalent to the permits and certificates described above.[38]

(ii) Cites and Gatt-XX

Since 1975, CITES is known to have provided various protectionist measures to more than 35,000 species of flora and fauna.[39] Since illegal trade goes

[31] *Supra* note 27.
[32] *Supra* note27, Resolution Conf. 9.24 (Rev. CoP16).
[33] *Ibid,* Resolution Conf. 13.6 (Rev. CoP16).
[34] *Ibid,* Resolution Conf. 13.7 (Rev. CoP16).
[35] *Ibid,* Resolution Conf. 10.16 (Rev.).
[36] *Ibid,* Resolution COP Conf. 11.11 (Rev. 15).
[37] *Ibid.* Resolution Conf. 12.3 (Rev. CoP16).
[38] *Ibid.*
[39] *Supra* note 7.

transnational, regulatory and stricter control measures are the requirements for conservationist objectives. A harmony between trade and environment is the need for consensual relations between countries where trading takes place for illegalities to be avoided in terms of detrimental effects to various species to achieve their objectives. GATT Article XX provides specific exceptions to GATT provisions, including Article XI. The burden of proof is on the country asserting the Article XX exception to justify the trade measure taken. There are primarily two exceptions which relate to environmental conservation: Article XX (b) and (g). These exceptions, together with the preamble, state: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (b) necessary to protect human, animal or plant life or health; (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."[40] In 1997, CITES was one of the first multilateral environmental agreements (MEAs) to gain permanent observer status to the WTO's Committee on Trade and Environment – setting the stage for decades worth of information exchange and coordinated technical assistance and capacity building on trade and environment issues. The new WTO Trade Facilitation Agreement (TFA) provides even further opportunities to enhance cooperation between customs, wildlife, and trade officials and support efforts by CITES to better regulate legal wildlife trade and intercept illegal trade.[41]

(iii) WWF and Project Tiger

As an implementing agency for coherently achieving its objectives to protect flora and fauna especially the Asian wild cat, the 'tiger', the World wildlife Fund for Nature (WWF) was given the onerous task to overlook all its operations from counting to protecting and providing a safe haven for its conservation. The history of WWF entails that in 1961 WWF was officially formed and registered as a charity and a global fund-raising campaign began. In 1964 WWF raised and donated almost $US1.9 million to conservation projects.[42] In 1969 WWF joined forces with the Spanish government to purchase a section of the

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[40] Christine Crawford, "Conflicts Between the Convention on International Trade in Endangered Species and the GATT in Light of Actions to Halt the Rhinoceros and Tiger Trade", *The Georgetown International Environmental Law Review*, Vol. 7 at 555-585 (1995).

[41] *Ibid.*

[42] *Ibid.*

Guadalquivir delta marshes and establish the Coto Donana National Park. In 1973 WWF helped the Indian government to launch Project Tiger[43]. In 1975 Tropical Rainforest Campaign was launched, raising money for national parks and reserves in central and west Africa, south-east Asia, and Latin America.[44] In 1976 The Seas Must Live campaign enabled WWF to set up marine sanctuaries for whales, dolphins, seals, and turtles.[45] In 1980 World Conservation Strategy was published, in cooperation with IUCN and UNEP.[46] In 1986 WWF 'family' decided to change its name from World Wildlife Fund to World Wide Fund for Nature, but US and Canada retained the old name.[47] In 1991 WWF joined forces with IUCN and UNEP again to publish Caring for the Earth. With an international secretariat based in Gland, Switzerland, WWF has developed into a global network composed of 5 million individual members, 24 national organizations, and 26 programme offices, managed and operated by 3,500 professionals in 130 countries.[48]

V

Legal Protection of Wildlife in India

The fundamental rights and duties are in consonance with the rights and duties of the state as well as citizens provided by the Constitution of India. Article 21 sets forth the basic fundamental right to a healthy living engulfing the right to live in a pollution free environment including the right not to be deprived of it except for the due procedure adopted by the law. In turn the fundamental duties, namely Article 47, 48-A and 51-A(g) provide for duties of the citizens as well as the state to protect all the natural resources which includes all flora and fauna. It is the constitution which provides sanctity to environmental laws in India. The Environment Protection Act, 1986 is a central law which provides for a central authority and a board to be set up for the purpose of protection of environment from all detrimental effects caused by polluting activities. It also provides for the powers given to the board for taking all decisions for prevention, prohibition and abatement of pollution. It further provides for penalizing the offenders for causing pollution and protecting all actions which might be taken in good faith. It also establishes a procedure on filing of a complaint when a

[43] Milan Dalal, "Tiger, Tiger Flickering Light", 31 *Boston College International & Comparative Law Review* 103 (2008), available at: http://lawdigitalcommons.bc.edu/iclr/vol31/iss1/5 (Last visited on January 17, 2016).

[44] *Ibid.*

[45] *Ibid.*

[46] *Ibid.*

[47] *Ibid.*

[48] Jacob Park, "The World Wide Fund for Nature: Financing a New Noah's Ark", *Green Globe Yearbook* 71-77 (1997).

polluting activity is taking place. Accordingly, samples may be picked from the site of pollution, tested and penalties imposed for pollution, imposing injunctions and restoring the environment back to its original form wherever possible to do so. The Forest Conservation Act, 1980 provides for various aspects related to conservation of forests in India. The forest laws further regulate forest activities for its protection and preservation by the forest laws specifically enacted and appoints officers who work for protection and preservation of forest lands. They further provide for National Parks and sanctuaries to be created and protected. The illegal cartel of the Asian wild cats from India crossing borders has been witnessed and reported for combating this illegal trafficking for its various body parts. If not managed and controlled timely, it might lead to the extinction of the Asian wild cat where evidence is found to these cats being killed for the bones and other parts. This is irrespective of the fact that the killing is taking place of those found in their natural habitats or from captive breeding facilities. The secretariat for CITES has brought out various reports for conducting transnational intelligence led operations PAWS II (Protection of Asian Wildlife Species II) initiated by INTERPOL, and India's legislative framework to prevent Asian big cat parts and derivatives from entering into illegal trade and to manage disposal of specimens from Asian big cats.[49] A set of draft decisions and recommendations to COP17 was considered by the committee, including enforcement measures to disrupt and dismantle the criminal groups involved in trafficking in Asian big cat specimens, the impacts of domestic and international trade in Asian big cat specimens on wild population, captive breeding of Asian big cats and stockpile management.[50] The CITES has placed the Asian wild cat in Appendix I where it is placed in the banned red list meaning thereby that hunting killing or illegal trading in it is banned for the danger of its extinction.[51]

The Indian law adopted a protectionist approach for the protection of wild life while defining the various aspects of protection and also constituted various authorities at the central and the state levels performing corresponding functions for the same. It also took into account the rights of the people owning the lands allocated in the form of sanctuaries and forest lands.[52] A prohibition on the hunting of animals has been notified in our schedules and maintenance of records of the wild animals killed or captured is also to be maintained.[53] It is only permitted in certain cases where it has become dangerous to human life or has become

[49] *Supra* note 27.
[50] *Ibid.*
[51] *Ibid.*
[52] The Wildlife Protection Act, 1972.
[53] *Ibid.*

disabled or diseased beyond recovery.[54] Provided that such an animal is ordered to be killed by the chief wildlife warden which cannot be captured without tranquillizers or trans located.[55] It is not considered an offence if it is done for the above purposes which otherwise is considered an offence. Such wildlife killed or wounded in defense of a person is considered government property.[56] Permission may be granted by the chief wildlife warden when applied in writing and in prescribed form for the purpose of education, scientific research, scientific management for the translocation of any wild animal to be in alternative suitable habitat or population management of wildlife without killing or poisoning or destroying any wild animals, or collection of specimens and for museums and other institutions, derivation, collection or preparation of snake venom for the manufacture of life-saving drugs, etc. No permission however shall be given without the prior permission of the central government or the state government as the case may be.[57]

VI

Project Tiger in India

The Indian situation in some of the 28 tiger reserves of India demonstrates that money is not the limiting factor in successful conservation. Under the flagship Project Tiger program, Indian tiger reserves, which cover about 37,700 km^2 in 17 states, received a budget allocation of US$17.75 million from the central government during the ninth five-year plan (1997 to 2002). The unit cost of US$ 94 per km per year provided by the government is much higher than that of the Nepalese government's expenditure on the TAL, although the TAL occupies a much smaller area. Yet despite these allocations[58] and additional support from NGOs based in India, tiger populations have seen drastic declines, primarily because of mismanagement of available funds. Most of the money allocated for conservation by the central government apparently does not percolate to the field, and the little that does reach the field is misspent. As a result, the reserves are, in aggregate, poorly managed and protected.[59] It further provides for sanctions to be imposed and activities to be regulated by way of legislative and administrative provisions, reporting and monitoring to take place regularly, provide compliance assistance where required and an environmental impact to

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[54] *Ibid.*
[55] *Ibid.*
[56] *Ibid.*
[57] *Ibid.*
[58] Badola Ruchi, *et. al.*, "An assessment of Ecosystem Services of Corbett Tiger Reserve, India", *The Environmentalist*, Vol. 30, Issue 4, pp 320-329 (Springer 2010).
[59] Majumdar B. Arya, *et. al.*, *Environment and Wildlife Laws in India*, 143-155 (2013).

be carried out for all activities.

(i) Role of WWF in Project Tiger

Being one of the major agencies working in collaboration with CITES, World Wildlife Fund[60] for Nature aims to maintain and restore the tiger in its natural corridors and is quoted to have spelled an increase in numbers across India. India has 39 Tiger reserves in 19 states.[61] It purports to conduct researches in partnership with the state forest departments by camera-trapping exercises and line-transect monitoring in all its tiger landscapes to monitor tigers, co-predators and prey base. It was the key NGO partner of the Government of India in conducting the most comprehensive tiger estimation exercise as part of the 2010-11 countrywide tiger estimation, which revealed a mean tiger population estimate of 1,706. WWF-India currently works for tiger conservation in seven tiger landscapes, namely, the Terai Arc landscape, the Sundarbans landscape, the Satpuda-Maikal landscape, the North Bank landscape, the Kaziranga-Karbi Anglong landscape, and the Western Ghats-Nilgiris landscape.[62] WWF-India also works in certain important tiger habitats that fall outside these tiger landscapes, namely Ranthambore, Similipal, Panna and Buxa tiger reserves.[63] It promotes mitigating conflicts between tigers and people living close to tiger habitats whereby providing immediate financial support as an interim relief to victims in case of loss of cattle and *ex gratia* payment in case of human injury or death. It sublimates a cause of anger among humans to eliminate tigers for their losses. Management practices include setting up of trenches around agricultural fields to reduce crop damage. It further prevents the natural habitats from venturing into human settlements by installation of solar lights in the periphery of villages in Sundarban area of West Bengal, one of the natural habitats since time immemorial.[64] It further accords protection by providing strategic and timely infrastructural support to state forest departments such as patrolling vehicles, field kits, metal detectors, LED torches, GPS, walkie talkies, construction of anti-poaching camps and wireless towers for augmenting the protection regime in the tiger reserves, other protected areas and tiger habitats.[65] It conducts regular training of the state forest departments' frontline staff for monitoring tiger and prey populations, enforcement as well as controlling wildlife crime.[66] These training programmes cover a wide range of subjects, such as

[60] Available at: http://www.wwfindia.org/ (Last visited on January 17, 2016).
[61] *Ibid.*
[62] *Ibid.*
[63] *Ibid.*
[64] *Ibid.*
[65] *Ibid*
[66] *Ibid.*

legal aspects and anti-poaching issues, crime control, forensic and wildlife management, better and more efficient patrolling methods, anti-poaching combat techniques, as well as monitoring tigers, use of new technology like GPS and compass. In certain tiger landscapes, well trained anti-poaching squads have been set up. WWF-India has partnered with the Uttarakhand Government to institutionalize capacity-building of the frontline staff through the Corbett Wildlife Training Centre, Kalagarh.[67] Such regular training is essential to enhance the enforcement capabilities of the frontline staff. It involves the local communities living around tiger reserves into its overall tiger conservation strategy by promoting sustainable livelihoods, reducing forest dependence and strengthening local support for conservation.[68] Villagers are introduced to alternate livelihood options such as production of jute and paper bags, vermi-composting, carpet weaving, mushroom and honey cultivation, and animal husbandry, which reduce their dependence on collection of Non Timber Forest Products (NTFP).[69] In order to reduce their fuel wood consumption, smokeless stoves are provided to villagers, and they are encouraged to use biogas and bio-briquettes. Regular awareness programmes are conducted for school students and villagers to encourage involvement in conservation activities. They are also made aware about different government programmes for livelihood development.[70] It provides for education and awareness programmes from the school levels. As a policy matter, it promotes government policies for tiger protection as well as conservation plans for protected Areas, wildlife corridors and tiger habitats outside tiger reserves.[71] TRAFFIC is a joint programme of WWF and IUCN, which monitors international trade in wild plants and animals[72]. In India, it operates as a division of WWF-India with an aim to monitor and investigate wildlife trade, and provide information to stakeholders as a basis for effective conservation policies. It conducts regular capacity building programmes to improve the understanding of wildlife laws and its implications for an array of enforcement agencies such as forest department, police, customs, and paramilitary forces. Sensitization programmes on wildlife are also conducted for the judiciary across the country to improve their awareness on wildlife laws.[73] The focus of their activities is on (1) Understanding: monitoring and research on tigers and their prey and habitats, dissemination and building local research and monitoring capacity. (2) Education: building schools, developing teaching capacity, developing conservation curricula

[67] *Ibid*
[68] *Ibid.*
[69] *Ibid.*
[70] *Ibid.*
[71] *Ibid.*
[72] *Supra* note 24.
[73] *Ibid.*

in schools and outreach to the general public using awareness materials, events and the media. (3) Anti-poaching: monitoring poaching incidents, outreach to hunters, enforcement activities and increasing anti-poaching capacity of reserve staff through training and provision of equipment. (4) Sustainable development: improving human well-being through development of community-based natural resource management, alternative livelihoods, community health programmes, resettlement assistance, alternative energy sources and formation of village resource committees. (5) Habitat: acquiring, restoring and consolidating tiger habitats for conservation. (6) Leadership: grooming future generations of tiger conservation leaders through speciûc leadership training or post-graduate degree programmes. (7) Trafficking: increasing capacity of enforcement officials and customs agents, monitoring trade, conducting enforcement activities and targeted education of consumer groups. (8) Zoo breeding: improving breeding facilities or management of tiger subspecies held in zoos. (9) Human-tiger conflict: providing human-tiger conflict response units, monitoring human-tiger conflict, conducting outreach and depredation compensation schemes in tiger landscapes and relocating problem tigers.[74] Unfortunately, although there have been improvements in tiger conservation in recent years, there are few reliable data on almost all aspects. The tiger's secretive way of life in dense forests and its vast range hinders attempts to obtain a clear idea of the numbers. Attempts to perform a total count in India, which has more than half the surviving tigers, have been criticized on the grounds of faulty methodology and the announced results have been attacked as exaggerated, whether they are declining in number, stable, or increasing. Whatever the truth, the remorseless erosion of habitat and prey depletion continues and are the ultimate threat to the tiger's survival in the wild. The drawbacks felt are that although trade is banned but prevention of habitat and ecosystem loses are unaccounted as destruction takes over their habitats and threaten the corridors of protected areas along with industrial activities like mining and quarrying. The core areas and buffer areas of tiger reserves are yet to be declared.

(ii) Legal Protection

Indian Judiciary and its activism has enforced several international principals as well as adjudicated in a manner that offenders are highly penalized for protection of landscapes and wildlife. The setting up and working of the National Green Tribunal has further supported action for protection of wildlife and the natural habitats of these wild animals and specifically the wild cats. In 2012, the court has asked for guidelines for to be declared for promoting tiger tourism. In

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[74] *Ibid.*

Court on its own motion[75] the court held that while expanding the road to a four lane in a forest area, the protection and movement of wildlife like the tigers should be kept in mind before such orders are passed. The area was a tiger corridor connecting Pench Tiger reserve to the Kanha Tadoba Reserve declared as Tiger reserves. In *Gauri Maulekhi* v. *Government of Uttrakhand & others*[76] the court ordered the quick recruitment of the Special Tiger Protection Force for the protection of wildlife in Jim Corbett Park in Uttrakhand. In *Centre for Environment Law, WWF-I* v. *Union of India & Others*,[77] the court ordered the shifting of Asiatic lion to a second home vis-à-vis rehabilitation of ousting families. The Asiatic lion is an endangered species and the necessity is found for its long term survival and to protect the species from extinction. The issue rooted on eco-centrism, which supports protection of all wild-life forms, not just those which are of instrumental value to human but those which have intrinsic worth. After conduct of research in Gir Forest (Gujarat), three alternative sites, namely, Darah-Jawaharsagar Wildlife Sanctuary (Rajasthan); Sitamata Wildlife Sanctuary (Rajasthan); and Kuno Wildlife Sanctuary (Madhya Pradesh) were suggested for re-introduction of Asiatic Lion. *In Sansar Chand* v. *State of Rajasthan*,[78] the court held that under the Wildlife (Protection) Act, 1972, trading in tiger, leopard and other animal skins and parts is a serious offence. Apart from that, India is a signatory to both the UN Convention on International Trade in Endangered Species (CITES) and the UN Convention against Transnational Organized Crime (CTOC). However, despite these National and International laws many species of wildlife e.g. tigers, leopards, bison, etc. are under threat of extinction, mainly due to poaching organized by international criminal traders and destruction of the habitats. *In P. K. Fravesh & Others* v. *State of Karnataka*,[79] the court held that Bandipur tiger reserve and national park is a very important and echo wildlife habitat. Two National Highways viz., NH-212 and NH-67 cut through this national park and tiger reserve area. There has been an outcry from the public at large and the wildlife and environmental protagonists in particular to ban traffic through the National Park and Tiger Reserve Area so as to protect the precious wildlife in this place. The demand for regulating and restricting the heavy traffic in this area has been mainly because of the accidents that have been taking place on these roads in the National Park killing several wild animals including endangered species. In *Suo Motu* v. *State of Karnataka & others*,[80] commenting upon the protection of

[75] Legal Eagle (Bom.) 752, 2015.
[76] Legal Eagle (Uttrakhand) 46, 2014.
[77] 2013 (5) Scale 710.
[78] 2010 (11) Scale 82.
[79] 2010 *ILR (KAR)* 3729.
[80] 2009 (4) KCCR 2360.

wildlife, the court stated that the Government of Karnataka has initiated a number of actions to protect the wildlife in the sanctuaries like anti poaching camps, elephant scaring camps, creating barriers, special force for tiger protection, employment of tribals, interstate border meetings at various levels, etc. It will be seen that in future these initiatives will be enhanced to see that wildlife is properly protected. In *Girraj Goyal* v. *State of Rajasthan*,[81] the court held that funds allocated for protection of tiger should not be diverted to other schemes for wildlife protection. In *Wildlife Protection Society, Hyderabad* v. *State of A.P. and others*,[82] the Supreme Court of India directed the states and union territories to respond to the suggestions for protection of tigers and in compliance therewith an affidavit was filed on behalf of the State of Andhra Pradesh with regard to the measures taken to strengthening of security system, pursuant to the killing of the tigress Sakhi. The court ensured precautionary measures to be taken to protect all wildlife. In *Navin M. Raheja* v. *Union of India*,[83] the issue arising out of death of tigers at Nandankanan, Bhubaneshwar as the ghastly act in which a tiger was skinned alive at one of the Zoos in Andhra Pradesh was reported, the court ordered for stricter protection and welfare of tigers in captivity. In *Krishna Minerals* v. *State of Rajasthan*,[84] the court asked for mining activities in protected areas for wildlife (in this case the tiger reserve) should be carried outside its limits with the prior permission of the government. In *Samantha and others* v. *State of A.P. and others*,[85] the court asked again for regulating mining activities in protected and reserved areas for wildlife as well as tiger areas. Prior central government permission was required for conducting such activities and creating a balance between protection of wildlife with the tribal people living and dependent upon forest lands. In *Animal and Enviroment Legal Defence Fund* v. *Union of India and others*,[86] the court prohibited fishing in the reservoir of the national park and preserving the fragile ecology of the forest area while protecting the tiger reserve in the Pench National Park Tiger Reserve in the states of Madhya Pradesh and Maharashtra. In *Ali* v. *NCT (State) of Delhi*,[87] the court commented upon the protection of the tiger species from poaching and their illegal smuggling across nations for their hides and skins which were otherwise banned internationally as illegal activities.

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[81] 2007 Legal Eagle (Raj) 349.
[82] 2002 Legal Eagle (AP) 114.
[83] 2000 (7) Scale 370.
[84] 2000 (2) RLW 943.
[85] 1997(4) Scale 746.
[86] 1997 (2) Scale 493.
[87] 1995 Cr.L.J. 3288.

In the above case[88] the court observed that, "to achieve objectives of various international conventions as also for implementation of IUCN, CITES etc. and provisions of various enactments concerning the field, Indian Government had laid down various policies and action plans — In *Lafarge' Umiam Mining Private Limited*,[89] the Supreme Court held that the National Forest Policy 1988 be read together with Forest (Conservation) Act, 1980. In *T. N. Godavarman Thirumulpad* v. *Union of India* and Others (wild buffalo case),[90] the court examined the scope of centrally sponsored schemes and directed implementation of that scheme in the State of Chhatisgarh. Centrally Sponsored Scheme of 2009 and National Bio-diversity Action Plan (NBAP), 2002-2016, have statutory force and thus as observed in *Larfage's* case have to be implemented in their letter and spirit. Thus, as of observations of the court in *Larfage's* case, with regard to Forest Policy of 1988, the court observed that integrated development of wild-life habitat under the Centrally Sponsored Scheme of 2009 and National Bio-diversity Action Plan (NBAP), 2002-2016) have to be read along with Wild-life (Conservation) Act. While giving effect to various provisions of Wild-life Act, Centrally Sponsored Scheme 2009, NWAP 2002-2016, our approach should be eco-centric, not anthropocentric".

VII

Conclusion

Shrinking of the ecosystems as a consequence of human activities has reinforced the idea of protection of our global commons. The people living in and around tiger reserve areas should be provided alternative means for their livelihoods.[91] A further difficulty for conservation efforts is that wild tigers are present only in Asia, where the high incidence of rural poverty, large numbers of livestock and high levels of human population density and growth in forest degradation make the conservation efforts extremely difficult. The human population in these habitats of buffer zones of tigers are dependent on the forest produce and hence illegal activities of poaching, prey depletion, removal of forest cover for wood and produce, etc. takes place.[92] The poorly performing projects were associated with one or more of the following factors: poor tracking of results, deviation from the proposal, poorly defined goals, lack of capacity, poor

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[88] *Supra* note77.

[89] 2011 (7) SCC 338.

[90] 2012 (3) SCC 277.

[91] Damania Richard, *et. al.*, "The Economics of Protecting Tiger Populations: Linking Household Behavior to Poaching and Prey Depletion", *Land Economics*, 79(2) at 198–216 (May 2003).

[92] *Ibid.*

evaluation practices, lack of political support, weak transparency, work at inappropriate scales or purchase of high-tech equipment that was never used.[93] Nature based tourism is on the rise as it provides support for conservation efforts.[94] Reconciling the needs of conservation and local communities is the need of the hour as absence of a balanced approach might pose danger of extinction to the Asian wild cat although criticism questions the benefits of ecotourism to not benefit the local populations as anticipated.

[93] Brian Gratwicke, *et. al.*, "Evaluating the performance of a decade of Save The Tiger Fund's Investments to Save the World's Last Wild Tigers", *Environmental Conservation* 1-11 (Foundation for Environmental Conservation 2007).

[94] *Ibid.*

THE CRIMINAL LAW (AMENDMENT) ACT, 2013 AND THE ROAD AHEAD

*Monica Chaudhary**

Abstract

The Criminal Law (Amendment) Act, 2013 amended four Central laws- the Indian Penal Code, 1860 (IPC), the Code of Criminal Procedure, 1973, the Indian Evidence Act, 1872 and the Protection of Children from Sexual Offences Act, 2012 (POCSO Act). The Amendment Act expanded the definition of rape in the IPC, raised the age of consent from sixteen to eighteen years to bring it at par with the POCSO Act and made the punishment for rape more stringent. It introduced four gender-specific offences- sexual harassment, disrobing, voyeurism and stalking- in the IPC. Acid attacks and attempted acid attacks, trafficking and sexual exploitation of a trafficked person were also included as specific, gender-neutral offences in the IPC. The amendments to the procedural laws were aimed at making the criminal justice delivery system more victim friendly, in cases of sexual offences against women. Despite the laudable object of the Amendment Act, some drafting and ideological incoherencies did creep into it. This paper analyses some of these incoherencies, and the emerging trends of the judicial interpretation of the 2013 amendments, in order to identify the challenges that lie ahead in making the amendments more effective.

I

Introduction

The brutal gang rape of a 23 year old woman in a moving bus in Delhi on December 16, 2012 and her subsequent death triggered nationwide protests in India. The protestors asked for justice for '*Nirbhaya*', as the victim was rather patronisingly christened, and for steps for ensuring a life of safety and dignity to women, so that they are not compelled to accept sexual violence as an inevitable part of their daily lives. The Central Government reacted to the public outcry by setting up a three member Committee headed by a former Chief Justice of India, Justice J.S. Verma, on December 23, 2012.[1] The mandate of the Justice Verma Committee (hereinafter JVC) was to recommend amendments of the Criminal Law so as to provide for quicker trial and enhanced punishment for sexual offenders.

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1 The other two members of the Committee were Justice Leila Seth, former Judge of the High Court of Delhi and Gopal Subramaniam, former Solicitor General of India.

Sexual violence against women and children was already on the Parliament's agenda before the *Nirbhaya* incident. A significant step in this direction was the enactment of the Protection of Children from Sexual Offences Act, 2012 (hereinafter POCSO Act), which had come into force on November 14, 2012. The Criminal Law (Amendment) Bill, 2012 (hereinafter 2012 Bill), which was based on the recommendations of the 172nd Report of the Law Commission,[2] had been introduced in the *Lok Sabha* on December 4, 2012. The 2012 Bill sought to amend the Indian Penal Code, 1860 (hereinafter IPC), the Code of Criminal Procedure, 1973 (hereinafter Cr.P.C) and the Indian Evidence Act, 1872 (hereinafter IEA). It was referred to the Parliamentary Standing Committee on Home Affairs (PSC) on December 28, 2012. So, the PSC was examining the 2012 Bill and simultaneously the JVC was working on its Report.

After widespread consultations, the JVC submitted its Report on January 23, 2013 recommending various legislative, political and systemic reforms for ensuring that women and sexual minorities can live a life of dignity.[3] Since the Parliament was not in session and the PSC Report on the 2012 Bill was still awaited, the President promulgated the Criminal Law (Amendment) Ordinance, 2013 (hereinafter 2013 Ordinance) on February 3, 2013 'to take immediate action to give effect to the provisions of the 2012 Bill with certain modifications'.[4] The PSC considered the 2012 Bill in light of the JVC Report and the 2013 Ordinance and presented its Report to the *Rajya Sabha* on March 1, 2013 and the *Lok Sabha* on March 4, 2013.[5]

The 2013 Ordinance was replaced by the Criminal Law (Amendment) Act, 2013 (hereinafter 2013 Act) which received the assent of the President and was published in the Central Gazette on April 2, 2013. But, it was deemed to have come into force from the date on which the 2013 Ordinance was issued, that is, from February 3, 2013.[6] The 2013 Act amended four Central laws- the IPC, Cr.P.C., IEA and the POCSO Act.

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2 Law Commission of India, 172nd Report on Review of Rape Laws, (March, 2000), available at: http://www.lawcommissionofindia.nic.in/rapelaws.htm (Last visited on November 14, 2016).

3 Report of the Committee on Amendments to Criminal Law, January 23, 2013, available at: http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf (Last visited on November 15, 2016).

4 2013 Ordinance, Preamble.

5 Department Related Parliamentary Standing Committee on Home Affairs, 167th Report on the Criminal Law (Amendment) Bill, 2012, available at: http://www.prsindia.org/uploads/media/Criminal%20Law/SCR%20Criminal%20Law%20Bill.pdf (Last visited on September 3, 2016).

6 The 2013 Act, section 30 reads: Repeal and savings: (1) The Criminal Law (Amendment) Ordinance, 2013 is hereby repealed. (2) Notwithstanding such repeal, anything done or any action taken under the Indian Penal Code, the Code of Criminal Procedure, 1973 and the

This background shows that the 2013 Act was not entirely a knee jerk reaction to the *Nirbhaya* incident. In fact, many of the provisions in the 2013 Act had been deliberated upon by multiple authorities over a period of time, which provided ample scope for elimination of the drafting and ideological incoherencies that crept into the 2013 Act. This paper critically analyses some of these incoherencies and the emerging trends of the judicial interpretation of the 2013 amendments, in order to identify the challenges that lie ahead in making the amendments more effective.

II

Overview of the 2013 Amendments to the IPC

(i) Amended Definition of Rape

The 2013 Act expanded the definition of rape in section 375, IPC to include all forms of non consensual penetrative assault on any orifice of the body of a woman by a man, including use of fingers and objects, as well as application of mouth to the private parts. The age of consent was raised from sixteen to eighteen years, to bring it at par with the POCSO Act. A positive definition of consent was also introduced in section 375, and it was clarified that lack of physical resistance to penetration does not imply consent of the victim.[7] The punishment for rape was also made more stringent with imprisonment ranging from seven years[8] upto remainder of the natural life,[9] and even death[10] in certain cases. The punishment for sexual intercourse by persons in authority was also increased to imprisonment ranging from five to ten years and fine.[11]

(ii) New Offences Introduced by the 2013 Act

a. Acid Attacks

Before the 2013 amendments, acid attacks in India were dealt with under general provisions relating to hurt, grievous hurt and attempt to murder and murder in the IPC. These provisions did not address the rehabilitative needs of

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Indian Evidence Act, 1872, as amended by the said Ordinance; shall be deemed to have been done or taken under the corresponding provisions of those Acts, as amended by this Act.

7 IPC, S. 375, explanation 2 reads: Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.
Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

8 *Id.*, S. 376(1).

9 *Id.*, Ss 376(2), 376A, 376D, 376E.

10 *Id.*, Ss 376A, 376E.

11 *Id.*, S. 376C.

the victims. The 2013 Act introduced acid attack by throwing or administering acid, as a specific offence under section 326A, IPC, punishable with imprisonment ranging from ten years to imprisonment for life, and with fine. Even throwing or administering acid or attempting to do so with guilty intent was made punishable under section 326B, IPC with imprisonment ranging from five years to seven years along with fine. The offences under sections 326 A and 326 B are gender neutral both *qua* the victim and the offender.

The *mens rea* requirement under section 326A is that the offender had the intention or knowledge that he/she is likely to cause 'permanent or partial damage or deformity to, or burn or maim or disfigure or disable, any part or parts of the body of the victim or cause grievous hurt'. However, under section 326B, the *mens rea* requirement is only in the form of intention that the above mentioned damage may be caused to the victim. Inclusion of a presumption of *mens rea* in case of acid attacks, as was recommended by the Law Commission in its 226th Report would have strengthened these provisions and eased the burden of proof on the prosecution. [12] But the 2013 Act did not introduce such an amendment in the IEA. The damage or deformity caused by acid attack need not be irreversible,[13] which means that the offender's liability is not mitigated if surgical interventions remove or reduce the damage caused by acid attack.

Recognising the seriousness of an assault that raises an apprehension of an acid attack, the 2013 Act made the right of private defence available to the extent of causing the death of the aggressor in case of an acid attack or attempted acid attack.[14] Apart from the difficulty of proving the dividing line between preparation and attempt in such cases, the right of private defence may not be very meaningful in case of an acid attack, because of the way such attacks are carried out. The acid is generally thrown at a victim stealthily and catches her unaware, and by the time the victim or others realise that it was an acid attack, any attack on the offender may become retaliatory and punitive and may go out of the ambit of private defence, which can only be preventive. Thus, the victim

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[12] Law Commission of India, 226th Report on The Inclusion of Acid Attacks as Specific Offences in the Indian Penal Code and a Law for Compensation for Victims of Crime (July, 2009), available at : http://lawcommissionofindia.nic.in/reports/report226.pdf (Last visited on November 16, 2016). The Law Commission had proposed section 114B in the IEA to read: 'Presumption as to acid attack: If a person has thrown acid on, or administered acid to, another person the court shall presume that such an act has been done with the intention of causing, or with the knowledge that such an act is likely to cause such hurt or injury as is mentioned in section 326 A of the IPC.'

[13] IPC, S. 326B, explanation 2.

[14] *Id.*, S. 100, seventhly.

or any other person exercising the right may still be punishable for any overstepping.

The fine imposed under section 326A is to be paid to the victim and it should be 'just and reasonable' to meet his/her medical expenses of the treatment.[15] Thus, the 2013 Act went beyond the recommendation of the Law Commission in its 226th Report regarding imposition of fine upto 10 Lakh rupees and 5 Lakh rupees for acid attacks and for intentional throwing of acid respectively. However, the compensation under section 326A is dependent on conviction of the accused, which is a long drawn process in the three tier judicial system in India, whereas the victims needs are immediate and continuous.

Despite the prevalence of female genital mutilation in certain communities in India,[16] the 2013 Act did not incorporate the suggestion of the JVC regarding penalising 'forced circumcision of a female or mutilation of her genitalia' under section 326A, nor was it introduced as a separate provision. This lack of legal regulation has been cited by some defiant clergymen as a justification for continuation of the culturally sanctioned practice in certain communities in India.[17]

b. Other Offences Introduced by the 2013 Act

Four gender specific cognizable offences were introduced in sections 354A, 354B, 354C and 354D of the IPC by the 2013 Act. These sections can only be invoked against men who do the proscribed acts against women. Many of the acts punishable under the above mentioned sections are also covered under various gender neutral provisions of the POCSO Act and the Information Technology Act, 2000. However, there are various differences in the definition of these offences and the punishment provided for them under these laws, which can lead to lack of uniformity in application of the law.

Section 354A, IPC defines sexual harassment, which includes physical contact and advances involving unwelcome and explicit sexual overtures; demand or request for sexual favours; showing pornography against the will of a woman; or making sexually coloured remarks. Assault or use of criminal force by a man with intent to disrobe a woman is punishable under section 354B, IPC. Section 354 C penalises voyeurism which is defined as a 'man watching or capturing the image of a woman engaging in a private act in circumstances where she

[15] *Id.*, S. 326A, proviso.

[16] Harinder Baweja, "India's Dark Secret", available at: http://www.hindustantimes.com/static/fgm-indias-dark-secret/ (Last visited on December 9, 2016).

[17] Mohua Das, "Clarifying His Stand - Circumcision a Religious Rite, but Abide by Law of Country: Syedna", available at: http://epaperbeta.timesofindia.com/Article.aspx?eid=31804&articlexml=CLARIFING-HIS-STAND-Circumcision-a-religious-rite-but-07062016008042# (Last visited on December 9, 2016).

would usually have the expectation of not being observed either by the perpetrator or by any other person at his behest and/or dissemination of such images'. If the woman gave her consent to the act in question or the capture of the images, but the dissemination to third persons is without her consent, it is still punishable. Section 354 D makes both physical and online stalking punishable.

The 2013 Act also re-enacted section 370, IPC which now defines trafficking for the purpose of exploitation and provides the punishment for it in a graded manner with higher punishment for the trafficking of minors. Section 370A, IPC was introduced to punish sexual exploitation of trafficked persons. However, neither the term 'minor' nor 'sexual exploitation' is defined in sections 370 or 370A. Both these sections are gender neutral *qua* the victim and the offender. A mandatory punishment of 'imprisonment for the remainder of the convict's natural life and fine' for public servants and police officers involved in trafficking of persons, without any consideration of the exact role played by them in such trafficking, is harsh and prone to challenge in the courts.[18]

The 2013 Act also enhanced the punishment for 'assault or criminal force with intent to outrage a woman's modesty' under section 354, IPC to imprisonment ranging from one year to five years and fine. The punishment for 'insulting the modesty of a woman through words, sounds or gestures etc.' under section 509, IPC was also increased to imprisonment for upto three years and fine.

(iii) Major Amendments to Procedural Laws

To encourage and improve the reporting of sexual offences against women, the 2013 Act provided for mandatory registration of FIRs in such cases by a 'woman police officer or any woman officer'[19] and non registration of FIRs was made punishable.[20] In case of victims with mental or physical disabilities, the FIR has to be recorded at the victim's residence or at a convenient place of her choice, in the presence of an interpreter or a special educator along with videography of the recording.[21]

The POCSO Act also provides for mandatory reporting of offences under the Act by every person, including the child, who has knowledge or apprehension about the commission of an offence under the Act.[22] Failure to report is made punishable, except in case of children.[23] Making a false complaint is also punishable, unless the

[18] IPC, S. 370(7).
[19] Cr.P.C., Section 154(1), proviso 1.
[20] IPC, S. 166A.
[21] Cr.P.C, S. 154(1), proviso 2.
[22] POCSO Act, Sections 19, 20.
[23] *Id.*, S. 21.

complainant is a child, but people reporting in good faith are protected.[24] In *Shankar Kisanrao Khade* v. *State of Maharashtra*,[25] while issuing extensive directions relating to reporting of sexual offences against children, including those under the POCSO Act, the Supreme Court directed that if the offender is a family member, then further action should be taken in consultation with the mother or other female members of the family of the child, bearing in mind the best interest of the child.

The 2013 Act amended section 164 of the Cr.P.C to provide that the statement of a victim of sexual offence should be recorded by a Judicial Magistrate as soon as the commission of the offence is brought to the notice of the police.[26] However, the amended section only allows the earlier statement to be admitted as examination-in-chief, if the victim is disabled.[27] So, other victims, including children, will have to depose again during trial.

The 2013 amendments also provided for use of interpreters or special educators and videography facilities while dealing with victims with disabilities at various stages of the criminal justice process.[28] Section 309 Cr.P.C was amended to provide that inquiry or trial in rape cases should be completed, as far as possible, within two months from the date of filing of the charge sheet.

The 2013 amendments also curtailed the right of the accused to cross-examine the victim in sexual offences. While recording the evidence of woman below 18 years of age, who has allegedly been subjected to rape or any other sexual offence, the court may take appropriate measures to ensure that such woman is not confronted by the accused, while at the same time ensuring the right of cross-examination of the accused.[29] Even under the POCSO Act, the court has to ensure that the child is not exposed to the accused at the time of recording of the evidence, while the accused should be in a position to hear the statement of the child and communicate with his advocate.[30] This can be achieved through video conferencing or by utilising single visibility mirrors or curtains or any other device.[31]

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[24] *Id.*, S. 22, 19(7).

[25] (2013) 5 SCC 546. This was a case of brutal rape and murder of an eleven year old intellectually disabled girl where, despite clear medical evidence of sodomy, no charges were framed for it against the accused.

[26] Cr.P.C., S. 164 (5A)(a).

[27] *Id.*, S. 164 (5A)(b).

[28] Cr.P.C, Ss. 154, 164(5A); IEA, section119, proviso.

[29] Cr.P.C., S. 273, proviso.

[30] POCSO Act, section 36(1).

[31] *Id.*, S. 36(2); *Sakshi* v. *Union of India* AIR 2004 SC 3566.

Past sexual history of the woman is irrelevant in a trial for rape.[32] After the 2013 amendments, in a prosecution for rape or any other sexual offence, evidence of the victim's character or of her previous sexual experience with *any* person is not relevant on the issue of consent.[33] In a prosecution for rape or attempted rape, it is not permissible to adduce evidence or to put questions in the cross-examination of the victim as to her general immoral character, or previous sexual experience, with *any* person for proving consent.[34] In alleged rape cases covered under various clauses of section 376(2), IPC, a presumption of lack of consent is raised based on the victim's testimony, and the burden of proof is shifted to the accused to prove that the woman had given her consent to the sexual intercourse.[35]

(iv) Amendments to the POCSO Act

The 2013 Act also amended the POCSO Act to clarify that the provisions of the POCSO Act are in addition to, and not in derogation of the existing laws and in case of any inconsistency, the POCSO Act will have an overriding effect.[36] It was also specified that for acts or omissions punishable under the POCSO Act or sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or 509 of the IPC, the offender will be punished under the provision that provides for higher punishment.[37]

(v) The Official Crime Statistics Post 2013 Amendments

According to the official statistics provided in *Crime in India*,[38] after an increase of 35.2%, and 9.0% respectively during the years 2013 and 2014, there has been a decrease of 5.7% in reported rape cases in the year 2015.[39] The surge in 2013 was attributed to the improved reporting after the *Lalita Kumari* judgment[40] and the 2013 amendments. In 95.5% of total rape cases reported during 2015, the offenders were known to the victims.[41] There has

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[32] Till the year 2002, under Sections 155(4) and 146 of the IEA, suggested that when a man was prosecuted for rape or an attempt to ravish, it could have been shown that the prosecutrix was of generally immoral character.

[33] IEA, S. 53A.

[34] *Id.*, S. 146, proviso.

[35] *Id.*, S. 114 A.

[36] POCSO Act, section 42A.

[37] *Id.*, section 42.

[38] Available at: http://ncrb.gov.in/ (Last visited on September 4, 2016).

[39] Table 5.2, *Crime in India, 2015*, available at: http://ncrb.gov.in/StatPublications/CII/CII2015/FILES/Table%205.2.pdf (Last visited on September 4, 2016).

[40] *Lalita Kumari* v. *Govt. of U.P.*, 2013 (13) SCALE 559. In this judgment, the Supreme Court held that registration of FIR is mandatory under section 154 of the Cr. P.C., if the information given to the police discloses commission of a cognizable offence.

[41] *Supra* note 39.

been an overall increase in reported cases of other sexual offences,[42] but the conviction rates remain abysmal at 29.4% for rape, 29.4% for sexual harassment, 20.1% for assault on women with intent to disrobe, 43.1 % for voyeurism, 26.4% for stalking and 21.8% for insult to the modesty of women. The pendency of these cases is over 82%.[43]

III

2013 Amendments- Areas of Concern

(i) Issue Relating to Retrospective Effect to the 2013 Act and Incongruence in Drafting of the Provisions

As mentioned above, the 2013 Act was given retrospective effect from the date of the 2013 Ordinance. But, there were significant differences in some of the corresponding provisions of the 2013 Act and the 2013 Ordinance. For example, the 2013 Ordinance, replaced the definition of rape under section 375 by a gender neutral offence called 'sexual assault' which covered all kinds of penetrative assault as well as non penetrative acts like touching of vagina, penis, anus, breast, etc. which were earlier covered under section 354 IPC. However, the 2013 Act again amended section 375, IPC to define 'rape' as a gender specific offence in the gender binary terms of male accused and female victim, going back to a hetero-normative standard of violence. Moreover, clause (d) of section 375 regarding application of mouth to vagina, anus, urethra was retained in the 2013 Act, but clause (e) regarding touching of vagina, penis, anus, breast was deleted.[44] These distinctions were bound to lead to confusion in the cases registered when the Ordinance was in force and they also raise doubts about the constitutional validity of the retrospective operation given to provisions in a substantive penal law like the IPC, in view of Article 20 of the Constitution of

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[42] According to *Crime in India*, the number of reported cases under section 354, IPC increased from 82,235 cases in 2014 to 82,422 cases in 2015. The number of cases under section 354A IPC increased from 21,938 cases in 2014 to 24,041 cases in 2015. The number of cases under section 354B increased from 6,412 cases in 2014 to 8,613 cases in 2015. The number of cases under section 354C increased from 674 cases in 2014 to 838 cases in 2015. The number of cases under section 354D IPC increased from 4,699 cases in 2014 to 6,266 cases in 2015. The number of cases registered under section 377 increased from 1148 cases in 2014 to 1347 in 2015. However, the number of cases registered under section 509, IPC decreased from 9,735 cases in 2014 to 8,685 cases in 2015. The number acid attack cases have also decreased from 309 in the year 2014 to 201 in the year 2015.

[43] Table 5.6, *Crime in India, 2015*, available at: http://ncrb.gov.in/StatPublications/CII/CII2015/FILES/Table%205.6.pdf (Last visited on September 4, 2016).

[44] 2013 Ordinance, section 375: Sexual assault: A person is said to commit "sexual assault" if that person- (e) touches the vagina, penis, anus or breast of the person or makes the person touch the vagina, penis, anus or breast of that person or any other person.

India.[45]

In *Digamber Harinkhede and Chhotu alias Hanslal Harinkhede* v. *State of Madhya Pradesh*,[46] the prosecutrix alleged that the accused had sexually assaulted her by pressing her breast. The alleged incident happened when the 2013 Ordinance was in force. The sessions court framed a charge under section 376 (1), IPC against the accused after the 2013 Act came into force. The accused filed an application for quashing of this charge on the ground that the alleged act will not be covered under section 375 as amended by the 2013 Act. Allowing the revision application the High Court of Madhya Pradesh (Jabalpur Bench) quashed the charge and held that the act of the applicants, if proved, would come within the purview of section 354A(1)(i), IPC (sexual harassment) and directed the trial court to frame charge for the same. There is no reference to the provision relating to retrospective operation of the 2013 Act in the judgment. It seems that, despite the fact that the case was registered when the 2013 Ordinance was in force, the learned judge decided the case based on the 2013 Act provisions.

However, a different view was taken in the later judgment in *Nidhi Upadhyay* v. *State of Madhya Pradesh*,[47] where the complainant alleged that the accused sexually assaulted her on two occasions by pressing her buttocks and breasts. The complaint was lodged when the 2013 Ordinance was in force and a case was registered under section 375(e) read with section 376(1), IPC. After the 2013 Act came into force, the sessions court dropped the charge under section 375(e) on the ground that this clause had been deleted by the 2013 Act and therefore, the case is only triable under sections 452 and 354 of the IPC. The case was remanded to the Chief Judicial Magistrate (CJM) for trial. Allowing the revision application filed by the complainant against this order the High Court of Madhya Pradesh (Gwalior Bench) referred to section 30 of the 2013 Act and held that whatever action was taken under the 2013 Ordinance when it was in force, would remain valid. The CJM was directed to send the case to the sessions court for trial.

The Delhi High Court has held that if the alleged incident happened before the 2013 Ordinance came into force, the pre amendment provisions of the IPC

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[45] The Constitution of India, 1950, Article 20 reads: Protection in respect of conviction for offences. (1) No person shall 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.

[46] MANU/MP/2384/2013.

[47] MANU/MP/1767/2014.

will apply, even though investigation is completed and chargesheet is filed in such cases after the 2013 Ordinance/ 2013Act came into force.[48]

Apart from the issue relating to retrospective amendments to a substantive penal law, the above cases also illustrate the incongruence in the drafting of these provisions. The same act may be covered under sections 354 and 354A (1)(i), IPC. This is significant because the punishment provided under the amended section 354 is imprisonment ranging from one year to five years and fine whereas, the act under section 354A(1) (i) is punishable with imprisonment up to three years, or fine, both. Moreover, the offence under the amended section 354 is non bailable, whereas sexual harassment under section 354A is a bailable offence.[49] The punishment for acts covered under section 375(e) in the 2013 Ordinance was seven years to life sentence and fine. This incongruence could have been avoided to some extent by adopting the new section 354 proposed by the JVC. This proposed section which defined 'sexual assault' was an amalgamation of the current sections 354, 354A and 509, IPC as amended/ introduced by the 2013 Act, albeit in a gender neutral form. The JVC also recommended repealing of section 509. The adoption of these recommendations would have also ensured that the outdated Victorian and patriarchal vocabulary of sections 354 and 509 that talk about 'outraging and insulting the modesty of a woman' would not have been a part of the legal discourse relating to sexual assault anymore. It would have also recognised the existence of people of alternative sexualities and gender identities, whose harassment has been acknowledged even by the Supreme Court of India.[50]

Unlike the IPC amendments, the amendments to the Cr.P.C. and the IEA can be applied in pending cases.[51] An appropriate use of these amendments has been made in *Lalmalsawma* v. *State of Mizoram*.[52] In this case, a 15 year old deaf and dumb girl was allegedly raped before the 2013 amendments or the POCSO Act came into force. Her statement was recorded before a Magistrate under section 164 Cr.P.C. during investigation. However, the victim was not examined in court during trial and without such examination, her statement under section 164 Cr.P.C. could not have been used as evidence, although it was exhibited and the magistrate who recorded that statement was examined as a witness. While hearing the appeal of the accused against his conviction by the sessions court, the High Court of Gauhati (Aizawl Bench) noted that the trial of

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[48] *Rahul Dev* v. *State*, MANU/DE/2778/2014.
[49] Cr.P.C., First Schedule.
[50] *National Legal Services Authority (NALSA)* v. *Union of India*, (2014) 5 SCC 438.
[51] *Gurbachan Singh* v. *Satpal Singh*, MANU/SC/0034/1990.
[52] MANU/GH/0481/2014.

the case was pending when the 2013 Act came into force and the victim could have been examined in accordance with the amended section 119, IEA. Expressing the view that injustice had been caused to the prosecution as well as the appellant by non-examination of the victim, the learned judge, instead of ordering a retrial, took recourse to section 391 Cr.P.C. and directed the sessions judge to take the evidence of the victim in accordance with section 119, IEA read with section 164(5A) (b) Cr.P.C. as amended/introduced by the 2013 Act and transmit the record to the high court to enable it to give a correct finding.

(ii) Marital Rape

Marital rape is recognised under the IPC only if the wife is below 15 years of age.[53] The JVC had recommended the deletion of this exception and expressed the view that a marital or any other relationship between the perpetrator and the victim should not be a valid defence in sexual offences and it should not be relevant on the issue of consent, nor should it be regarded as a mitigating factor justifying lower sentences for rape. However, the view of the PSC on the 2012 Bill which felt that "if marital rape is brought under the law, the entire family system will be under great stress",[54] prevailed in the 2013 Act. It must be noted that the Prohibition of Child Marriage Act, 2006, a secular legislation which prohibits marriage below the age of 18 years for girls and 21 years for boys, declares child marriages to be void only in certain circumstances mentioned in section 12 of the Act. In other cases, it is only voidable at the option of either party to the marriage.[55] Thus, by keeping a lower age of consent for marital intercourse, it seems that the Legislature has legitimised the concept of child marriage.[56]

The 2013 Act made some progress by introducing section 375B IPC which makes non-consensual sexual intercourse punishable if the wife is living separately, either under a decree of separation *or otherwise*. The pre amendment section 376 A recognised it as rape only if the wife was living separately under a decree of separation. The pre amendment punishment of imprisonment upto two years was also increased to imprisonment ranging from two to seven years and fine. But, an unreasonable distinction was still maintained in punishment for rape even after the wife is legally separated. Moreover, *prima facie* satisfaction of the court regarding the facts is necessary before it takes cognizance of the wife's complaint.[57]

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[53] IPC, S. 375, Exception 2.
[54] *Supra* note 5 at p. 47.
[55] The Prohibition of Child Marriage Act, 2006, section 3.
[56] *Lajja Devi* v. *State*, MANU/DE/3556/2012.
[57] Cr.P.C., S. 198B.

The debate surrounding marital rape has continued after the 2013 amendments. The Pam Rajput Committee has taken a stand similar to the JVC on marital rape.[58] But the Government's stand has been an ambiguous one. In a reply given in the Rajya Sabha in early 2016, the MWCD had taken the stand that "the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context" and that criminalising it will put "the entire family system under great stress".[59] The Ministry retracted its reply following widespread criticism and the amended answer only said that matter is being examined by the Law Commission without specifying the Ministry's stand on the matter.[60] Before the media, the Minister adopted the stance that "we know that marital rape happens frequently, but women need to come and complain about this aspect of violence, and once there is enough data, the government could respond".[61] The Draft National Policy for Women 2016[62] of the MWCD is silent on the issue of marital rape. A private member bill was introduced in the Rajya Sabha on April 24, 2015 for deletion of the marital rape exemption in the IPC [63] but it was later withdrawn after the Government's assurance that it will bring a comprehensive law to criminalise marital rape by amending the IPC and was awaiting the Law Commission report on the issue.[64]

According to media reports, the Supreme Court refused to entertain a woman's plea to declare marital rape as a criminal offence in February 2015 on the ground that it was not possible to order a change in the law for one person.[65]

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[58] The Ministry of Women and Child Development (MWCD), Government of India appointed High Level Committee headed by Pam Rajput, a former Professor at Panjab University, in February 2013 to make a comprehensive study on the status of women since 1989, and to evolve appropriate policy interventions based on a contemporary assessment of women's needs. The Committee submitted its Report to the MWCD in June 2015.

[59] Available at: http://mha1.nic.in/par2013/par2015-pdfs/rs-290415/656.pdf (last visited on December 21, 2016).

[60] Shalini Nair, "Recognise Marital Rape under Law: National Commission for Women", available at: http://indianexpress.com/article/india/india-news-india/marital-rape-triple-talaq-india-national-commission-for-women-recognize-law-punishment-2914511/ (Last visited on December 21, 2016).

[61] Shalini Nair, "Marital Rape: Maneka Gandhi Says Need Data to Make it Criminal Offence", available at: http://indianexpress.com/article/india/india-news-india/marital-rape-maneka-gandhi-says-need-data-to-make-it-criminal-offence/ (Last visited on December 21, 2016).

[62] Available at: http://wcd.nic.in/sites/default/files/draft%20national%20policy%20for%20women%202016.pdf.

[63] "Pvt Bill on Making Marital Rape a Crime Tabled in RS", available at: http://www.business-standard.com/article/pti-stories/pvt-bill-on-making-marital-rape-a-crime-tabled-in-rs-115042400805_1.html (Last visited on December 21, 2016).

[64] "Will Criminalize Marital Rape: Centre", available at: http://timesofindia.indiatimes.com/india/Will-criminalize-marital-rape-Centre/articleshow/50050243.cms (Last visited on December 22, 2016).

However, public interest litigations in the matter are being considered by the Supreme Court[66] and the Delhi High Court.[67] In this scenario, significant developments on the issue in the legislature and the courts are likely in the future.

(iii) Age of Consent

The 2013 Act raised the age of consent in Section 375, IPC from 16 to 18 years to bring it at par with the POCSO Act. Free consent of the children in the 16-18 years age group was relevant in the POCSO Bill, but that provision was not retained in the POCSO Act.[68] This deletion is often criticised as moral policing of teenagers indulging in sexual exploration of any kind. The new Juvenile Justice (Care And Protection of Children) Act, 2015 even provides the scope for trial of children in conflict with the law as adults in case of "heinous offences" punishable with imprisonment for seven years or more, which would include rape.[69]

In 'elopement and marriage' cases, the minority of the girl is often contested due to the allegations of kidnapping and rape that are generally made by the girl's family. In such cases, the courts often take into consideration the girl's consent and quash these charges if they think that her consent was without any force, coercion or undue influence.[70] The exception of marital rape also benefits the accused in such cases. The genuineness of the claim of marriage is rarely scrutinised in the courts in such cases.

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[65] Bhadra Sinha, "SC Rejects Plea to Make Marital Rape a Criminal Offence", available at: http://www.hindustantimes.com/india/sc-rejects-plea-to-make-marital-rape-a-criminal-offence/story-URH9IRXhJPK58Qy6AySjPM.html (Last visited on December 22, 2016).

[66] Mohit Singh, "PIL before SC for Criminalisation of Marital Rape between the Age of 15 and 18 Years", available at: http://onelawstreet.com/2015/07/pil-before-sc-for-criminalisation-of-marital-rape-between-the-age-of-15-and-18-years/ (Last visited on December 23, 2016).

[67] "'Marital Rape' of Girls Under 18 not Criminalised due to Social Realities: Home Ministry to Delhi HC", available at: http://indianexpress.com/article/india/india-news-india/marital-rape-of-girls-under-18-not-criminalised-due-to-social-realities-home-ministry-to-delhi-hc-3003245/ (Last visited on September 4, 2016).

[68] Proviso to section 3 in the POCSO Bill read: "Provided that where such penetrative sexual assault is committed against a child between sixteen to eighteen years of age, it shall be considered whether the consent for such an act has been obtained against the will of the child or the consent has been obtained by use of violence, force, threat to use force, intoxicants, drugs, impersonation, fraud, deceit, coercion, undue influence, threats, when the child is sleeping or unconscious or where the child does not have the capacity to understand the nature of the act or to resist it." Similar proviso was provided for sexual assault under Section 7 in the Bill.

[69] The Juvenile Justice (Care and Protection of Children) Act, 2015, sections 15, 18.

[70] *Lajja Devi* v. *State*, MANU/DE/3556/2012; *Yunusbhai Usmanbhai Shaikh* v. *State of Gujarat* MANU/GJ/0876/2015.

A study on POCSO Courts in Delhi[71] notes that a variety of approaches is adopted by the Special Courts set up under the POCSO Act "to sidestep the challenges posed by the age of consent and absolute prohibition of any form of sexual activity involving a child" and a majority of these cases result in acquittals.[72] The major reasons for acquittal cited in the Study are:

- marriage of the parties
- victim and/or her family members turning hostile;
- lack of scrutiny on the crucial issue of age when the witnesses contradict the documentary proof and/or the results of the ossification test.
- the court invoked the definition of assault in the IPC to draw a distinction between sexual *assault* which is punishable under the POCSO Act and sexual *acts* without subjecting the victim to cruelty, fear, coercion, undue influence, intimidation, or exploitation which are not punishable under it;
- the court asked the prosecution to prove that either the accused knew or had reason to believe that the victim was below 18 years of age on the date of commission of offence.[73]

The study also notes that in cases where the prosecutrix admitted to a romantic relationship with the accused, the voluntary nature of the relationship or the age gap between them was not scrutinized by the courts.[74] This trend shows that there is a need to revisit the age of consent under the POCSO Act as well as the IPC with a close-in-age exception for young people above 16 years of age, as has been recommended by the Pam Rajput Committee also.[75]

(iv) The Shrinking Relevance of Section 377, IPC

Section 377 IPC criminalises penile-non vaginal sex as 'carnal intercourse against the order of nature' irrespective of the age, consent, marital status, gender identity or sexual orientation of the parties concerned. After the 2013 amendments in section 375, IPC and the enactment of the POCSO Act, the issue of relevance and validity of section 377 has become more complex. The often cited justification for retaining section 377, that it is required for dealing with sexual abuse of male children, is no more valid after the enactment of the POCSO Act.

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[71] Report of Study on the working of Special Courts under the POCSO Act, 2012 in Delhi, Centre for Child and the Law, National Law School of India University, Bangalore, 29 January, 2016, available at: https://www.nls.ac.in/ccl/jjdocuments/specialcourt POSCOAct2012.pdf (Last visited on December 23, 2016). The Study analyses 667 judgments passed by 20 judges from 1 January, 2013 till 30 September, 2015.

[72] *Id.*, at 23.

[73] *Id.*, at 78-84.

[74] *Id*, at 19.

[75] *Supra* note 58 at xliv.

The amended definition of 'rape' in section 375 IPC now includes oral and anal sex also. Consequently, the same act against a woman may fall under both section 375 and section 377 IPC. Age and consent are relevant under section 375 but irrelevant under section 377. The marital rape exception in section 375 is applicable to all the sexual acts mentioned in the amended section 375. But there is no exception on the basis of marriage in section 377. This "inconsistency and uncertainty" in the amended section 375 and section 377 has been challenged before the Delhi High Court in a PIL filed by a married man who was discharged of marital rape charge by the trial court but put on trial for offences under section 377, on a complaint filed by his wife. Seeking clarification of the law from the High Court, he has contended that his prosecution under section 377, ipc was contrary to the existing law as his purported act was protected under section 375, IPC. In its submission before the High Court, the MHA has justified retention of the marital rape exception in section 375, ipc on the ground that in view of the social reality of child marriages in india, this exception protects husband and wife against criminalising the sexual activity between them.[76]

The constitutional validity of section 377 was upheld by a two judge bench of the Supreme Court in *Suresh Kumar Koushal* v. *Naz Foundation*,[77] which overturned the Delhi High Court judgment in *Naz Foundation* v. *Govt. of NCT of Delhi*,[78] that decriminalised sexual activity between two consenting adults in private by reading down section 377. The High Court had prescribed the age of consent as 18 years till a legislative intervention. The matter was reserved for judgement in *Koushal's case* on March 27, 2012 but the judgment was delivered on December 11, 2013, that is, after the 2013 amendments had come into force. Interestingly, the judgement makes a reference to the 2013 amendments, but quotes the unamended sections 375 and 376. The impact of the 2013 amendments and the POCSO Act on Section 377 was not discussed by the Court. The review petition in the case was dismissed, but a batch of curative petitions have been referred to a five-judge Constitution Bench.[79]

A significant development after the *Koushal* judgment has been the Supreme Court's judgement in *National Legal Services Authority* v. *Union of India*[80]

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[76] "Child Marriages are Taking Place in India: Ministry of Home Affairs to High Court", Indian Express, August 29, 2016, available at http://indianexpress.com/article/india/india-news-india/child-marriage-are-taking-place-in-india-ministry-of-home-affairs-to-high-court-3002690/ (Last visited on December 4, 2016).

[77] (2014) 1 SCC 1.

[78] (2009) 160 DLT 277 (Del).

[79] *Naz Foundation Trust* v. *Suresh Kumar Koushal*, (2016) 7 SCC 485.

[80] (2014) 5 SCC 438.

that formally created the "third gender" category for transgenders, recognising them as a socially and economically backward class. This interpretation breaks the binary gender construct of 'man' and 'woman' that still pervades the sexual offences under the IPC. The judgment acknowledges the discrimination and abuse suffered by transgenders and considers it violative of their fundamental rights under Articles 14, 15, 16, 19 and 21 of the Constitution. Radhakrishnan, J. goes to the extent of acknowledging that section 377, though associated with specific sexual acts, highlights certain identities, and is used as an instrument of harassment and physical abuse against *hijras* and transgender persons. However, he refused to comment on the constitutionality of section 377 on the ground that a division bench had already spoken on the issue in *Suresh Kumar Koushal* v. *Naz Foundation*.

The *Koushal* judgment clarifies that notwithstanding the verdict, the legislature shall be free to consider the desirability and propriety of deleting/amending section 377, IPC but such legislative intervention seems unlikely in the near future. Thus, the Supreme Court's opinion in the curative petition in *Koushal's case* would be eagerly awaited to clarify the position.

(v) Rehabilitative Needs of the Victims- Medical Treatment and Compensation

Sections 326 A and 376 D, IPC provide that the fine imposed in acid attack and gang rape cases respectively is to be paid to the victim and it should be 'just and reasonable' to meet the victim's medical expenses. However, imposition of fine in such cases is dependent on conviction of the accused, which is a long drawn and uncertain process. Criminal courts also have the general power to order compensation to victims under section 357 Cr.P.C. Victims can also claim compensation from State Governments under Victim Compensation Schemes framed under section 357A Cr.P.C., which was introduced in the year 2008. The 2013 amendments clarified that the compensation payable by the State Government under section 357A is in addition to the payment of fine to the victim under section 326A or section 376D, IPC.[81]

Various judicial interventions especially in writ petitions relating to acid attacks have made these schemes more meaningful for the victims. For example, in *Laxmi* v. *Union of India*,[82] the Supreme Court has issued a series of orders relating to regulation of sale of acid in India, and various measures for the proper treatment and rehabilitation of acid attack victims.[83] Noting the disparities

[81] Cr.P.C, S. 357B.
[82] MANU/SC/0428/2015.
[83] MANU/SC/1326/2013; MANU/SC/0755/2013; MANU/SC/0428/2015.

in the amount of compensation payable under their Victim Compensation Schemes, the court directed all states to include a minimum compensation of 3 lakh rupees for acid attack victims.[84] The Supreme Court has recently taken notice of lack of uniformity in the amount of compensation payable under the Victim Compensation Schemes to rape survivors also, and asked the Governments to evolve a uniform national model for compensation.[85]

In *Parivartan Kendra* v. *Union of India*,[86] the Supreme Court has clarified that the decision in *Laxmi's case* does not bar the Government from awarding compensation of more than three lakh rupees to acid attack victims, if required. The Court also directed all States and Union Territories to take appropriate steps for inclusion of acid attack victims under their disability lists.

The 2013 Act introduced section 357C in the Cr.P.C., which mandates that all hospitals, public or private, should provide free treatment to acid attack and rape victims and report the offence to the police. Non-compliance with the provision is punishable under section 166B, IPC.

Referring to section 357C Cr.P.C in *Laxmi's case*, the Supreme Court directed that private hospitals should also provide free medical treatment, including medicines, food, bedding and reconstructive surgeries, to acid attack victims. No hospital/clinic should refuse treatment citing lack of specialised facilities. First-aid must be administered to the victim and after stabilisation, the victim could be shifted to a specialised facility for further treatment, wherever required. The Court further directed that the hospital where the victim of an acid attack is first treated, should give a certificate that the individual is a victim of an acid attack. This certificate may be utilised by the victim for treatment and reconstructive surgeries or any other scheme that the victim may be entitled to with the state government or the union territory, as the case may be.[87]

In *Renu Sharma* v. *GNCT of Delhi*,[88] the Delhi High Court has reiterated that the State owes a duty to provide free medical treatment to acid attack victims and opined that the ceiling of expenditure of seven lakh rupees on medical treatment under the proposed Delhi Victims Compensation Scheme 2015, may be arbitrary and unreasonable in cases where the acid attack victim has spent a

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[84] MANU/SC/0756/2013; MANU/SCOR/20443/2015; MANU/SC/0428/2015.

[85] Amit Anand Choudhary, "Why are You Sitting on Nirbhaya Fund? SC Asks Centre", Times of India, May 27, 2016, available at: http://timesofindia.indiatimes.com/india/Why-are-you-sitting-on-Nirbhaya-fund-SC-asks-Centre/articleshow/52458997.cms (Last visited on December 25, 2016).

[86] MANU/SCOR/19315/2015; MANU/SCOR/09565/2015; MANU/SC/1399/2015.

[87] MANU/SC/0428/2015.

[88] W.P.(C) 2229/2016.

bigger amount on her treatment. In addition to directions regarding free treatment, the Court ordered scrutiny and reimbursement of the petitioner's medical bills 'on actual basis' and asked the Government to provide employment to the petitioner on compassionate basis.

It must be noted that the above mentioned directions were given in writ petitions filed by or on behalf of victims of acid attacks. The impact of the provision for compensation under sections 326A and 376D IPC, which is dependent on conviction of the accused, is yet to be seen. Moreover, despite such favourable judicial interventions, it is disturbing to note that almost three years after the 2013 amendments, lack of awareness about section 357C, Cr.P.C. leads to incidents like the one reported from Tripura, where a hospital allegedly refused to discharge a gang rape victim after treatment due to non-payment of ICU bills. Thereafter, according to the news reports, her family members had to mortgage their domestic animals to pay the dues of about Rs. 5000. In a *suo moto* intervention by the High Court, the Medical Superintendent admitted lack of knowledge about the provision.[89]

(vi) Central Victim Compensation Fund

In order to reduce the disparities in the amount of compensation payable to victims of crime under the Victim Compensation Schemes and to support and supplement their implementation, the MHA has recently proposed the setting up of a Central Victim Compensation Fund (CVCF), with an initial corpus of Rs. 200 crores, to be sanctioned out of the *Nirbhaya* fund.[90] The CVCF is also open to contributions from public. The CVCF Guidelines came into force on August 21, 2015. Under the CVCF, the Central government can reimburse the amount of compensation paid by the state governments, subject to fulfilment of the requisite conditions by the States.[91]

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[89] *Court on Own Motion* v. *The State of Tripura* , MANU/TR/0071/2016.

[90] The '*Nirbhaya* Fund', meant to finance schemes for making public spaces safer for women and for rehabilitation of victims of sexual assault and violence, was set up in the budget of 2013, with an initial corpus of 1000 crores. It received an additional grant of Rs. 1000 crores each in the years 2014 and 2015. However, the government has been receiving a lot of flak for underutilisation of the fund and downsizing of beneficial schemes like setting up of one stop centres for victims of gender based violence for easy access to legal and medical facilities from the MWCD recommended 'one in every district' to only 'one in every state'(See http://www.dnaindia.com/india/report-modi-government-says-no-to-rape-crisis-centres-in-every-district-2063977 (last visited on September 4, 2016)). Recently, the Supreme Court has sought details from the Centre on apportionment of funds to state and district administrations, while hearing a PIL on matters relating to women safety. Amit Anand Chaudhary, "Why are you sitting on Nirbhaya Fund - SC asks centre", Times of India, May 27, 2016. Available at:http://timesofindia.indiatimes.com/india/Why-are-you-sitting-on-Nirbhaya-fund-SC-asks-Centre/articleshow/52458997.cms (Last visited on September 4, 2016)).

[91] Details of the CVCF, available at: http://mha.nic.in/sites/upload_files/mha/files/CVCFFuideliness_141015.pdf (Last visited on December 1, 2016).

(vii) The Mandatory Registration of FIR

Despite the provisions for mandatory registration of FIRs in the 2013 amendments and the POCSO Act, victims of sexual offences and their families have to often face problems in registration of FIR, even when the victim is a minor.[92] If the punitive provisions for non reporting are not invoked against the errant police officers,[93] or family members trying to cover up incest cases, their purpose is defeated.[94]

In *Kamal Prasad Patade* v. *State of Chhattisgarh*,[95] the grandfather of a male child alleged before the Principal of a school that a peon of the school had committed penetrative sexual assault on the child. About two hours later, the grandfather filed an FIR, while the Principal was making his inquiry at the school level. The next day, the Principal was arrested under Section 21(2) of the POSCO Act, for non reporting of the matter to the police. Subsequently, a chargesheet was filed under the same section for trial of the Principal as a co-accused along with the peon, who was booked under Sections 377, IPC and sections 4 and 6 of the POSCO Act for penetrative sexual assault on the child.

The Chattisgarh High Court quashed the proceedings against the Principal on the ground that the purpose of the sections relating to mandatory reporting, which is to ensure expeditious reporting and quick investigation, was fulfilled when the FIR in the case was registered by the grandfather. Therefore, the Principal cannot be prosecuted for non-reporting. Moreover, according to the Court, the prosecution had to first establish commission of the principal offences by the peon beyond reasonable doubt and only thereafter, the Principal can be tried, and the prosecution will have to prove that the Principal had knowledge of commission of the offences by the peon and he had intentionally omitted to report the same to the police. Elucidating on the importance of the post of Principal in a school or college, Sanjay K. Agrawal, J. said that Head of the Institution is entitled to and should be allowed sufficient/reasonable time to find out the correct facts by making an enquiry at the institutional level before reporting the matter to the police.

(viii) Shortage of Women Police Officers

In order to address the shortage of female police officers required for effective implemention of the 2013 amendments to the Cr.P.C, the MHA had

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[92] For example, *Ram Kishore* v. *State of U.P.*, MANU/UP/2231/2013.

[93] *Ibid.*

[94] For example, *Bansari Lal* v. *State of Himachal Pradesh*, MANU/HP/0575/2016; *Ram Singh* v. *State of H.P.*, MANU/HP/0113/2016.

[95] MANU/CG/0039/2016.

issued an Advisory dated May 12, 2015, informing the states that the Government of India has approved reservation of 33% for women in direct recruitment in non-Gazetted posts of all the Union Territories and asking the States to do the same.[96] In order to augment the capacity of States for investigation of heinous crimes against women, the MHA proposed setting up of 150 Investigative Units for Crime against Women (IUCAW) in most crime prone districts of each State on a 50:50 cost sharing basis with the States in its Advisory dated January 5, 2015.[97] However, due to lack of response from most states, such advisories have been confined to paper.

(ix) Judicial Interpretations- Other Areas of Concern

A perusal of the post amendment case law highlights many areas of concern like non application of the POCSO Act provisions in cases involving minor victims in the FIRs,[98] and more seriously, even in the courts' orders.[99] Such lapses mean that the child victim may be deprived of the chid friendly investigation and trial procedure provided under the POCSO Act. Moreover, application of relatively minor charges under the IPC also means that the accused may be granted bail even by a Magistrate whereas, in a case under the POCSO Act, bail can only be granted by the designated Special Court which also has the power to order detention and remand of the accused.[100]

Section 228A IPC makes disclosure of identity of a rape victim punishable.[101] This legal restriction does not relate to printing or publication of judgments by the superior courts. But, the Supreme Court has for a long time insisted that the name of the victim should not be indicated even in judgments of the courts, in order to prevent social victimisation or ostracism of the victim of a sexual

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[96] Advisory, available at: http://mha.nic.in/sites/upload_files/mha/files/AdvisoryCompAppCrimeAgainstWomen_130515.pdf (Last visited on December 1, 2016). Similar advisories were issued in this regard by the MHA on April 22, 2013 and August 26, 2014 but not much was done by most States in this regard.

[97] Available at: http://mha.nic.in/sites/upload_files/mha/files/CrimesagainstWomen0601.PDF (Last visited on December 1, 2016).

[98] For example, *Varun Kumar* v. *State of Himachal Pradesh*, MANU/HP/1220/2015; *Gurmukh Singh* v. *State of H.P.*, MANU/HP/0357/2016; *Gangadhar Sethy* v. *State of Orissa*, MANU/OR/0172/2015.

[99] For example, *Ram Kishore* v. *State of U.P.*, MANU/UP/2231/2013, *Girish Chandra Sharma* v. *State of Bihar*, MANU/BH/1198/2015.

[100] *Thameeru Yogeshwar Rao* v. *State of Andhra Pradesh*, MANU/AP/3911/2013; *Ramrahit Singh* v. *Dhananjoy Singh*, MANU/WB/0218/2015.

[101] Section 23 of the POCSO Act also penalises disclosure of a child victim's identity, including his/her name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure of the identity in media reports. Under section 33(7) of the POCSO Act, onus lies on the Special Court to ensure that the identity of the child is not disclosed without its permission during investigation or trial.

offence.[102] However, there is a very disturbing trend noticeable in the recent reported judgments where victims of sexual offences, including minors in many cases, are being named.[103] Many a times, the Court withholds the name of the minor victim, but other details like names of parent(s) and/or or minor siblings or friends of the victim, name of locality, village, school, address of place of work of family members is disclosed, which defeats the purpose of withholding the victim's name.[104] If the names of all the family members and the village is mentioned in a case of incest, it is not very meaningful to withhold the victim's name.[105] In certain cases, the Courts have been mindful of Section 228A IPC and the POCSO Act and the judicial practice in this regard and have asked trial courts to not disclose the identity of the victim,[106] or have insisted that only the first letter of her name be used,[107] but greater sensitivity is required from the judiciary on this issue.

Due to lack of availability of reliable documents, the age of the victim is often contested in the courts. Although the Supreme Court has clarified that in case the documents relating to age are disputed or not available, medical opinion can be sought for determination of age of the victim in rape cases,[108] a perusal of the case law shows that lack of medical determination of age is leading to acquittals in many cases.[109] The Study on the POCSO Courts also notes the lack of uniform practice of referring the victim for an ossification test or age determination test by a Medical Board, where no documentary evidence regarding age is available.[110] The Study also notes that instead of following the Supreme

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[102] *Premiya alias Prem Prakash* v. *State of Rajasthan* MANU/SC/4115/2008; *State of Karnataka* v. *Puttaraja* (2004) 1 SCC 475; *Dinesh* v. *State of Rajasthan* (2006) 3 SCC 771.

[103] *Bansari Lal* v. *State of Himachal Pradesh*, MANU/HP/0575/2016; *Thameeru Yogeshwar Rao* v. *State of Andhra Pradesh*, MANU/AP/3911/2013; *State of Maharashtra* v. *Shatrughna Baban Meshram*, MANU/MH/2785/2015 ; *Girish Chandra Sharma* v. *State of Bihar*, MANU/BH/1198/2015.

[104] *Chaitu Singh Gond* v. *State of Madhya Pradesh*, MANU/MP/1454/2014; *Gangadhar Sethy* v. *State of Orissa*, MANU/OR/0172/2015; *Sushil Kumar* v. *State of Himachal Pradesh*, MANU/HP/0666/2015; *Gurudas* v. *State of Maharashtra*, MANU/MH/3336/2015; *Deepak Darjee* v. *State of Sikkim*, MANU/SI/0035/2016; *Bakshi Ram* v. *State of H.P.*, MANU/HP/1024/2015; *Bansari Lal* v. *State of Himachal Pradesh*, MANU/HP/0575/2016; *State of Maharashtra* v. *Viran Gyanlal Rajput*, MANU/MH/0221/2015; *State of Maharashtra* v. *Vitthal Tukaram Atugade*, MANU/MH/0342/2016.

[105] *Bansari Lal* v. *State of Himachal Pradesh*, MANU/HP/0575/2016.

[106] *Budha Singh Tamang* v. *State of Sikkim*, MANU/SI/0008/2016.

[107] *R* v. *State of Haryana*, CWP-6733-2016 decided by the Punjab and Haryana High Court on May 30, 2016.

[108] *State of M.P.* v. *Anoop Singh*, 2015(7) SCALE 445; *Mahadeo s/o Kerba Maske* v. *State of Maharashtra*, (2013) 14 SCC 637.

[109] *Ram Singh* v. *State of H.P*, MANU/HP/0113/2016; *Rangi Lal Nishad* v. *State of U.P.*, MANU/UP/2134/2015.

[110] *Supra* note 71 at 21.

Court's ruling in *Ashwani Kumar Saxena* v. *State of Madhya Pradesh*,[111] that courts cannot look into the correctness of the documents adduced, but must accept them at face value, the Special Courts often rely on the testimony of the victim in which it is claimed that a false date of birth was given to secure school admission.[112] This lack of uniformity defeats the object of the law which is to protect children from exploitation till a certain age.

Despite the protective provisions in Section 33 of the POCSO Act and the 2013 amendments, rreference can be found in High Court judgments to the "unwavering, consistent and cogent" testimony of the 10 year old victim of sexual assault "despite being subjected to grueling cross-examination, scant regard being paid to her tender years"[113]; or to the 13 year old prosecutrix being a deaf and dumb girl who would "obviously would not be able to face grilling cross-examination which learned counsel for the appellant attempted to do",[114] in the trial court.

Despite the Supreme Court's declaration of the two finger test as violative of the victim's right to privacy, physical and mental integrity and dignity,[115] references to it can still be found even in case of young children.[116] A 5-7 year old victim is described as 'a nubile virgin' by the doctor.[117] The focus of the Courts still seems to be on the factum of penetration or lack of it, the degree of penetration and distinctions between outraging the modesty and attempted rape.[118] There seems to be reluctance to convict for rape/penetrative sexual assault in cases alleging digital penetration,[119] or touching of private parts with sexual intent,[120] even in case of young children. There is an unjustifiable failure to convict for aggravated sexual assault despite clear applicability of the relevant clauses.[121] Despite presumption of guilt and *mens rea* under Sections 29 and 30

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[111] AIR 2013 SC 553.

[112] *Supra* note 71 at 21.

[113] *Budha Singh Tamang* v. *State of Sikkim*, MANU/SI/0008/2016.

[114] *Chander Singh* v. *State*, MANU/DE/1399/2016.

[115] *Lillu* v. *State of Haryana*, (2013) 14 SCC 643.

[116] *Varun Kumar* v. *State of Himachal Pradesh*, MANU/HP/1220/2015; *Gurmukh Singh* v. *State of H.P.*, MANU/HP/0357/2016.

[117] *Gangadhar Sethy* v. *State of Orissa*, MANU/OR/0172/2015.

[118] *Girish Chandra Sharma* v. *State of Bihar*, MANU/BH/1198/2015; *Bakshi Ram* v. *State of H.P.*, MANU/HP/1024/2015; *Bansari Lal* v. *State of Himachal Pradesh*, MANU/HP/0575/2016; *Deepak Darjee* v. *State of Sikkim*, MANU/SI/0035/2016.

[119] *Chaitu Singh Gond* v. *State of Madhya Pradesh*, MANU/MP/1454/2014; *Gangadhar Sethy* v. *State of Orissa* MANU/OR/0172/2015.

[120] *Deepak Darjee* v. *State of Sikkim*, MANU/SI/0035/2016.

[121] *Chaitu Singh Gond* v. *State of Madhya Pradesh*, MANU/MP/1454/2014; *Deepak Darjee* v. *State of Sikkim*, MANU/SI/0035/2016.

of the POCSO Act, there is insistence on proof beyond reasonable doubt by the prosecution.[122] Due to the lack of sentencing guidelines, there is a widespread disparity in the punishment given by the courts and it appears that the courts are leaning towards the minimum sentence of imprisonment prescribed. While the Supreme Court dismissed a writ petition for imposition of 'chemical castration' as an additional punishment for child abusers,[123] N. Kirubakaran, J. of the High Court of Madras (Madurai Bench) has opined that "additional punishment of castration of culprits would fetch magical results in preventing and containing child abuses specifically child rape".[124]

IV

Conclusion

The recent amendments to criminal laws have taken some positive strides towards strengthening the penal laws. However, without effective implementation, these amendments would be reduced to mere paper tigers. There is a need to strengthen the administrative and legal machinery for effective implementation of these laws. Ground level measures like capacity building, training and sensitisation of all stakeholders and strengthening of the infrastructure is the urgent need of the hour. Social and legal support to the victims and their family's right from the time of reporting of the crime can empower them and encourage more victims to bring the perpetrators to justice. It is also important to resolve the ideological dissonances and drafting incongruence in the provisions, so that confusion and unnecessary litigation in the courts can be avoided. The punitive approach has obviously not led to a decrease in the crime rate. So, there is an urgent need to need to simultaneously address the social causes behind the commission of sexual offences. The journey ahead is a difficult one, but the ultimate goal of a gender just society is worth fighting for with all our might.

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[122] *Chaitu Singh Gond* v. *State of Madhya Pradesh*, MANU/MP/1454/2014.

[123] *Supreme Court Women Lawyers Association (SCWLA)* v. *Union of India*, MANU/SC/0041/2016.

[124] *In Re: State and Ors.*, MANU/TN/3816/2015.

MISUSE OF RIGHT TO INFORMATION ACT IN INDIA

*Varun Chhachhar**

Abstract

Information to public is an essential pre-requisite to democracy. Where people do not have information regarding government functioning, there is no democracy. Democracy means government of the people, by the people and for the people and where people have no information about the functioning of the government, then it is not a government by the people. Moreover, information is like oxygen for a democratic society and is also the best disinfectant for a number of vices. I would argue that in the implementation of most laws, some people would misuse these provisions of Right to Information Act. The police often misuse their powers to subvert the law, just as criminals misuse our judicial system to prolong trials. The misuse of any law is largely dependent on the kind of people in a society and whether the justice system has the capability of punishing wrongdoers. There are people who go to places of worship with the sole objective of committing theft or other crimes. But society does not define this as the main characteristic of temples. Is it reasonable to then expect only angels to use the right to information law?

I

Introduction

The Act Should not be allowed to be misused or abused, to become tool to obstruct the national development and integration, or to destroy the peace, tranquility and harmony among its citizens. Nor should it be converted into a tool of oppression, or intimidation of honest officials striving to do their duties.

Central Board of Secondary Education v. *Aditya Bandopadhyay* (2011) 8 SCC 497

Information to public is an essential pre-requisite to democracy. Where people do not have information regarding government functioning, there is no democracy. Democracy means government of the people, by the people and for the people and where people have no information about the functioning of the government, then it is not a government by the people. Moreover, information is like oxygen for a democratic society and is also the best disinfectant for a number of vices.

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It is essential that all men and women, in all social and cultural environments, be given an opportunity of joining in the process of collective thinking thus initiated, for new ideas must be developed and more positive measures must be taken to shake off the prevailing inertia.[1] Information is a key that helps one to make decisions. Sharing information helps a nation to build a strong cadre of informed citizenry who can participate meaningfully in the democratic process and fulfill their responsibilities efficiently.[2]

This paradigm shift from secrecy in government functioning to transparency is mainly due to the forces of globalization and e-revolution in the present century which has universally made people all over the world more aware and demanding about their rights. People no longer want their governments to work under cloaks of secrecy and especially, RTI has become more prominent in almost every country with people demanding their governments to be more transparent and accountable.[3] Contributing to the evolution of international law in this significant area, the United Nations in its various declarations and conventions has repeatedly laid emphasis on information to people so that there be transparency in government functioning.

In recent years, many commonwealth countries like Australia, Canada and New Zealand have passed laws providing for the right of access to administrative information. France, United States and Scandinavian countries have also passed similar laws. Further, it is not only the developed countries that have enacted freedom of information legislations, similar trends are seen in the developing countries as well. The new South African Constitution specifically provides the RTI in its Bill of Rights-thus giving it an explicit constitutional status. In Asia, Malaysia operates an on-line data base system known as Civil Services Link, through which a person can access information regarding functioning of public administration. There is thus a global sweep of change towards openness and transparency.[4] In India, the journey of RTI can be traced to the Official Secrets Act, 1923, a legacy of the British Rule in India, which prohibited flow of information from government to people. Certain provisions of the Indian Evidence Act, 1872 also imposed unnecessary restriction upon releasing information to the public.[5] However, after Independence, the RTI emerged from Article 19(1)(a)

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1 Niraj Kumar, *Treaties on Right to Information Act, 2005* 46 (2008).

2 A.B. Srivastava, *Right to Information Laws in India*, p. xi (2006).

3 Jyoti Rattan, "Genesis of Right to Information under International and National Laws with Special Reference to India: A Critical Analysis", *The Indian Journal of Public Administration*, Vol. 55, No. 3 at 687 (July-September, 2009).

4 Available at:http://www.rrtd.Nic.in, (Last visited on August 1, 2016).

5 S. 123, 124, the Indian Evidence Act, 1872.

of Constitution, that is, freedom of speech and expression which required people to have information about functioning of the government in a democratic country. This was further substantiated by the Supreme Court of India in a number of cases. Later, at the national level, the RTI Act was enacted in 2005 which contains provisions mainly for providing information by public authority on demand by members of the public. However, many states had enacted their RTI Act before such a national legislation. Undoubtedly, the RTI raises the awareness of the public about government functioning and promotes human rights. In a fast developing country like India, availability of information regarding functioning of public organisations needs to be promoted further. Now that India has a law for RTI, it can be made more beneficial by its effective implementation leading to improved public administration for the betterment of the people. This is possible only through the government's bringing down of its iron curtains as well as people's active involvement in this process. It has rightly been observed by Henry Clay that the government is a trust and the officers of the government are trustees and both the trust and the trustees are created for the benefit of the people. Hence, the citizens being the beneficiaries of the government are entitled to demand transparency in the functioning of public authorities.

The effective implementation of the Right to Information Act, 2005 depends on three fundamental shifts, namely, from the prevailing culture of secrecy to a new culture of openness; from personalized despotism to authority coupled with accountability; and finally from unilateral decision-making to participative governance.[6] However, it has been observed that the free flow of information has often been hampered by various institutional and organisational factors, inefficient processes and mechanisms, awareness and usage issues, inadequate use of information technology, etc. Nonetheless, we must not forget that the RTI Act is a positive legislation that has brought about a great deal of transparency in day to day governance. We must always bear in mind that we are all stakeholders in the Act and must guard against allowing it to become a tool for promotion of an adversarial relationship between the various stakeholders, as this will only weaken the Act. In this paper, attempt shall be made to discuss both the positive aspects as well as the obstacles that come in the way of effective implementation of the Act.

II

Salient Features of the Act

Right to Information Act, 2005 empowers every citizen to ask any questions

[6] Abhishek Jain, "RTI Implementation at the District level: Issues and Challenges", *The Indian Journal of Public Administration*, Vol. 55, No. 3, at 347 (July-September 2009).

from the government or seek any information, take copies of any government documents, inspect any government documents, inspect any government works and take samples of materials of any government work. Any citizen can seek information from any department of the central or state government, from panchayati raj institutions, and from any other organization or institution (including NGOs) that is established, constituted, owned, controlled or substantially financed, directly or indirectly, by the state or central government.[7]

In each department, at least one officer has been designated as a Public Information Officer (PIOs). He/ She accepts the request forms and provides information sought by the people[8]. In addition to a Public Information Officer, in each sub-district/divisional level there are Assistant Public Information Officers (APIOs) who receive requests for information and appeals against decisions of the PIOs, and then send them to the appropriate authorities.[9]

A person seeking information should file an application in writing or through electronic means in English or Hindi (or in the official language of the area) along with the application fees with the PIO/APIO.[10] Where a request cannot be made in writing, the Public Information Officer is supposed to render all reasonable assistance to the person making the request orally to reduce the same in writing. Where the applicant is deaf, blind, or otherwise impaired, the public authority is supposed to provide assistance to enable access to the information, including providing such assistance as may be appropriate for the inspection.[11] Besides the applicant's contact details, the applicant is not required to either give any reasons for requesting the information or any other personal details.[12]

The Act provides for a reasonable application fee i.e. Rs 10/- as prescribed by the central government, whereas in other states the fee amount may vary. Fee will be charged for each application and supply of information. However, no fee is chargeable from persons below the poverty line or if the information is provided after the prescribed period. A fee will be charged for obtaining a copy of the documents. If the Information is not provided in the stipulated time limit then the information will be provided for free.[13]

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7 S. 2(a) and (h), Right to Information Act, 2005.
8 *Id., s.*5(1).
9 *Id., s* 5(2).
10 *Id.*, s. 6(1).
11 *Id., s.* 7(4).
12 *Id., s.* 6(2).
13 *Id.*, s. 7(6).

Whenever the Public Information Officer feels that the sought information does not pertain to his department then it shall be his responsibility to forward the application to the related/relevant department within 5 days and also inform the applicant about the same. In such instance, the stipulated time limit for provision of information would be 35 days.[14] In case PIO does not furnish information within the prescribed period or unreasonably troubles the applicant, then the applicant can file a complaint against him with the Information Commission. Where a Public Information Officer without any reasonable cause, fails to receive an application for information, or malafide denies a request for information, or knowingly gives incorrect, incomplete or misleading information, or asks for high fees for furnishing the information; the applicant can file a direct complaint to the Central or the State Information Commission.

The Public Information Officer has been given the discretion of denying information in some cases/matters. But, if the sought information is in public interest then the exemptions can also be disclosed. To simply say, any information that cannot be denied to parliament or legislative assembly cannot be denied to a common citizen.

In case a person fails to get a response from the Public Information Officer within the prescribed period or is aggrieved by the response received, or due to misuses of section 8 of the Act, then he/she can file an appeal within 30 days to an officer superior in rank to the Public Information Officer who is the first appellate authority under the Act. When the appellant is not happy with the 1st appeal then he/she has the option of filing a second appeal with the State Information Commission or the Central Information Commission within sixty days.[15]

The definition of "information" within the meaning of section 6 of the Right to Information Act, 2005 shows that an applicant can get any information which is already in existence and accessible to the public authority under the law. Under the Act an applicant is entitled to get copy of the opinions, advices, circulars, orders, etc., but he cannot ask for any information as to why such opinions, advices, circulars, orders etc., have been passed, especially in matters pertaining to judicial decisions. A judge speaks through his judgments or orders passed by him. If any party feels aggrieved by the order and or judgment passed by a judge, the remedy available to such a party is either to challenge the same by way of appeal or by revision or any other legally permissible mode. No litigant can be allowed to seek information as to why and for what reasons the

[14] *Id.*, s. 6(3).
[15] *Id.*, s. 19(3).

judge had come to a particular decision or conclusion. A judge is not bound to explain latter on for what reasons he had come to such a conclusion.[16]

The right to information is not an absolute right. It is a part of right to freedom of speech and expression. The RTI Act[17] balances right to privacy and right to information. It recognizes that both rights test of overriding public interest is applied to decide whether information should be withheld or disclosed.[18] The privacy rights, by virtue of section 8(1)(i) of the RTI Act whenever asserted would prevail. However, that is not always the case, since the public interest element, seeps through that provision. Thus, when a member of the public requests personal information about a public servant, such as asset declarations made by him – a distinction must be made between the personal data inherent to the position and those that are not, and therefore, effect only his/her private life. This balancing task appears to be easy; but is in practice, not so, having regard to the dynamics inherent in the conflict.

III

Misuse of Right to Information Act

As every coin has two sides-one is useful and other is flipside, which is not useful but misused by the people. Same is the case with the RTI act too. As the law doesn't enquire about the purpose of the information which is shared with people, which way it is used and what are the purpose of using this information? These are the basic question which one always thinks but beyond this, there is something else, which nobody knows. The purpose behind acquiring the information is not always to dispense the things in form of the administrative machinery to give it speed but sometime it is to malaise the department, person of very high stature in the government organization. This means it has taken the work of transparency into abuse of RTI. It is not a tool to put hindrances in the process of speed of administration and innovation of working style of various policies and schemes by the government.[19] The mandate of RTI Act is not to satisfy personal grudges but dispense information for the administration of justice. It is important to understand that when people don't have access to justice then justice could not be delivered but it is equally important that when people misuse the very purpose of law on information then it is also to understand that its importance and objective gets frustrated. So it is very important to comprehend

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[16] *Khanaparam Gandiah* v. *Administrative Officers and Others,* AIR 2010 SC 615.
[17] S. 8(1)(i), RTI Act.
[18] *State of Andhara* v. *Canara Bank* (2005) 1 SCC 496.
[19] Available at: https://elitedkumar.wordpress.com/2015/11/21/use-and-misuse-of-right-to-information-act-2005/ (Last visited on February 12, 2017).

the purpose and statement of the RTI Act which is to satisfy larger interest of public by the notion of access to justice.

IV

Decided Cases on Misuse of the Right to Information Act

The Right to Information is not an absolute right. It is a part of freedom of speech and expression. Section 8(1)(i) of the RTI Act balances right to privacy and right to Information. In case when a person is interested in the affairs of other colleagues without any justifiable reasons[20] or when he or she is treating RTI as a joke[21] or making a mockery of the RTI legislation[22] or by using it as tool for fishing operations[23] or fishing spree for information[24] or spate[25] or bombardment of RTI applications to settle personal scores[26] or seeking more or less similar information repeatedly[27] or by making repeated queries in the service matters[28] or stereotyped petitions targeting individual public employees[29] or free-wheeling enquiries about the entire career of an employee of the public authority[30] or asking for desperate and voluminous information from the public authority[31] or diverse and lengthy information-frivolously[32] or making frivolous complaint[33] are all termed as misuse of the Act by the Central Information Commission in decided cases.

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[20] *R.C. Jena* v. *Department of Posts* dt. 11.9 2007, CIC Digest (Vol. tl) 1795 (700).

[21] *Rakesh Agarwal* v. *Govt, of NCT* of Delhi dt 01.12.2008, CIC Digest (Vol. II) 2666 (1997).

[22] *Jitendra Kumar Gupta* v. *South East Central Railway* dt. 29.04.2008, CIC Digest (Vol II) 2200 (1220).

[23] *Prashant A. Shah* v. *Commissioner of Income Tax*, Ahmedabad dt. 03.4.2008, CIC Digest (Vol II) 2166 (1173).

[24] *Ashok Kumar* v. *Bharat Petroleum Corporation Limited* dt. 25.05.2007, CIC Digest (Vol.II) 1493 (250).

[25] *S.P. Goyal* v *Commissioner of Income Tax*-12, Mumbai dt. 22.8.2007, CIC Digest (Vol.I) 1746 (626).

[26] *S.P. Goyal* v *Director of Income Tax (Inv), Ludhiana*. dt. 24.1.2008, CIC Digest (Vol. II) 2014 (984).

[27] *Ashok M. Pandya* v. *Bank of India* dt. 5.2.2008, CIC Digest (Vol. II) 2040 (1020).

[28] *P.V. Lalitha* v. Institute of Genomics and Integrated Biology, Mall Road, *Delhi dt 11 9 2007 CIC Digest (Vol.* II) 1797 (703).

[29] *Gurbax Singh* v. *Income Tax Department, Office of the Commissioner of Income Tax-Ill, Ludhiana, Punjab* dt. 25.9.2007, CIC Digest (Vol. II) 1839 (754).

[30] *Niraj Kumar* v. *National Insurance Company Ltd., Patna* dt. 20.2.2008, CIC Digest (Vol II) 2066 (1054).

[31] Dinesh *K. Gohil* v. *All India* Radio dt. 27.02.2008, CIC Digest (Vol. II) 2079 (1074).

[32] *S.K. et. Al.* v. *Ministry of Railways* dt. 26.12.2006 CIC Digest (Vol I) 1156.

[33] *Suresh Kumar Ranga* v. *Container Corporation of India New Delhi*, dt. 16.11.2006 CIC Digest (Vol I) 1049.

When a person is using the RTI Act to promote ulterior motive for personal gains[34] or some collateral purpose[35] or unsavory mo-tives[36] or when it takes RTI as a means of making money[37] or labelling charges against the respondent[38] or soft-ening the proceedings against them[39], it comes within the ambit of misuse of RTI Act.

When the applicant is seeking access to vintage information[40] for harassing the public authority[41] or the department[42] or to intimidate others[43] or tarnishing the image of the respondents[44] or putting pressure on the respondent[45] to enhance his bargaining power[46] or pressur-ize, brow-beat or harass the public authority[47] or parallel proceeding under the RTI Act is to build pressure on the public authority;[48] in such circumstances, it is held as misuse of RTI Act by the Central Information Commission.

When the RTI application is taken as medium of settling scores either with other individuals or with the department where the applicant has worked earlier[49] or using the RTI Act to beat the very authorities which seek to impose on them certain discipline[50] or tool for vendetta of an employee against his organisation[51] or when the RTI is taken as a tool of taking vengeance against their own senior

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34 *Darshan Singh* v. *Pawan Hans Helicopters Ltd.* dt. 05.07.2007, CIC Digest (Vol. II) 1597 (415).

35 *Kalaiseivi* v. *Syndicate Bank* dt. 22.7.2008, CIC Digest (Vol. II) 2341 (1457).

36 *Rakesh Hajela* v. *Chief Electoral Officer, NCT Delhi* dt. 31.1.2008, CIC Digest (Vol. II) 2036 (1012)

37 *Yogesh Rajarao Reddy* v. *South East Central Railway, Nagpur* dt. 28.7.2008, CIC Digest (Vol II) 2358 (1493).

38 *Ramswarup Ahirwar* v. *Indian Oil Corporation Limited* dt. 27.05.2008, CIC Digest (Vol. II) 2225 (1263).

39 *Pradip Kumar Saha* v. *Mahanadi Coalfields, Sambalpur*, Orissa dt. 19.03.2O08, CIC Digest Wol II) 2138 (1126).

40 *Maha Singh Tanwar* v *Govt, of NCT of Delhi* dt. 2.8.2007, CIC Digest (Vol. II) 1684 (542).

41 *Abdul Rafique* v. *North Western Railways, Ajmer* dt. 25.1.2008, CIC Digest (Vol. If) 2019 (989).

42 *Shripal Jain* v.. North Western Railway dt. 09.05.2008, CIC Digest (Vol. II) 2206 (1235).

43 *Rachana Sharma* v. *Indian Council of Agricultural Research*, dt. 27.11.2006 CIC Digest (Vol I) 1174.

44 *Siddhartha Kumar Ghosh* v. *Department of Heavy Industry & Burn Standard Co. Ltd.* dt. 07.05.2007, CIC Digest (Vol. II) 1426 (174).

45 *Nripinder Nath Kalia* v.. *Northern Railway* dt. 30.06.2008, CIC Digest (Vol. II) 2279 (1349).

46 *H K. Chawla* v. *Indian Oil Corporation Ltd.*, dated 29.11.2006, CIC Digest (Vol I) 1227.

47 *Deshmukh Suresh Bhagwanrao* v.. *C.B.E.C., Department of Revenue*, New Delhi-110 001 dt. 31.05.2007, CIC Digest (Vol. II) 1516 (280).

48 *Rajeev Shrivastava* v. *Directorate of Defence Estates Western Command*, dated 26.2.2007, CIC Digest (Vol I) 1279.

49 *Faqir Chand* v. *North Western Railway, Jaipur*, dated 15.12.2006, CIC Digest (Vol !) 1240.

50 *Ganesh Kumar Sinha* v. *Northern Coalfields Limited* dt. 19.11.2008, CIC Digest (Vol I (1953).

51 *Uma Kanti & Ramesh Chandra* v. *Navodaya Vidyalaya Samiti* dt. 5.1.2008, CIC Digest (Vol. II)-1977 (943).

colleagues[52] by asking for certified copies of documents submitted by himself then it is regarded as misuse of Right to Information Act.

When RTI is used to influence public sector undertakings for promotion of applicant's business[53] or to force a public authority to settle his claims in a certain given frame of time[54] or when an RTI applicant is to garner evidence or contrive methodologies to defeat the processes to bring them to book[55] through incomprehensive RTI-application and the intemperate and contemptuous language[56], where the same is misused for the purpose of committing illegality or for defrauding others;[57] are clear evident cases of misuse of RTI.

V

Recent Development on Misuse of Right to Information Act

In an unusual move, the Central Information Commission took serious note of the situation where it has recommended action against RTI application for misusing the law to harass his colleagues in a Delhi college. The RTI applicant was moved by an employee, before the Central Information Commission seeking information about complaints filed by his colleagues at Bhai Parmanand Institute of Business Studies in Delhi. However, the matter got clarity, when the commission found that the applicant was "misusing" the Act by seeking information on medical expenses incurred by the principal and details of the integrity report of the committee members hearing complaints against him. In fact, the applicant had filed more than 36 applications under the Right to Information Act, 2005.

Not just that, he had also shared a video on social media platforms of a fellow teacher lecturing, without her knowledge. Coming down hard on the public authority, the information commissioner directed that disciplinary action should be taken against the applicant and ruled that the women colleagues were liable for compensation for invasion of their privacy. The RTI Act is silent on action against misuse of the law though it has provision for a penalty of Rs 25,000 on the public authority if information is not given.[58]

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[52] *S. Viswanathan* v. *Bharat Sanchar Nigam Limited* dt. 20.7.2007, CIC Digest (Vol. 11) 1640 (475).

[53] *Kishur J Aggarwal* v. *Corporation Bank*, dt. 10.4.2006 CIC Digest (Vol I) 1081.

[54] *V.G.Mundra* v. *South Eastern Coalfields Limited* dated 10.07.2006, CIC Digest (Vol I) 1228.

[55] *V.K. Gulati* v. *Directorate General of Vigilance, Customs & Central Excise Department* dt. 17.06.2008, CIC Digest (Vol. II) 2250(1303).

[56] *R.G. Nangia* v. *Kondriya Vidyalaya Sangathan* dt. 30.04.2008, CIC Digest (Vol. II) 2201 (1223).

[57] *RC. Sekhar* v. *Income Tax Department* dt. 08.07.2008, CIC Digest (Vol. II) 2292 (1370).

[58] Available at: http://timesofindia.indiatimes.com/india/CIC-wants-RTI-activist-punished-for-misuse-of-law/articleshow/51918690.cms, (Last visited on December 14, 2016).

In a meeting with officials the State Information Commissioner in Karnatka told officials at the zilla panchayat to use their discretion in deciding on RTI applications that were not bona fide. "If you know that an application has been filed only to harass officers or seek details of an officer or beneficiary's private life, there is no need to give information. You can always reject the application right away, citing specific reasons," he said. He was responding to an officer who complained that he had received a RTI application that sought the names and phone numbers of inmates of a girls' hostel.[59]

In another instance, Information Commissioner of Himanchal Pradesh in his landmark judgment, dismissed an appeal filed by the applicant, a senior assistant in the department of Information Technology, holding that application seeking information under Right to Information Act, 2005, which he filed, pertained to his own seat as Public Information Officer. Having the information, he also later filed an appeal before higher authority (appellate) on the grounds that information supplied to him was irrelevant and incomplete. The information sought by the applicant pertained to his own seat, to which he already had access. Information was also sought about other employee in the same department. Passing the order the Information Commissioner ruled: The RTI provides practical regime to citizens to access information under the control of public authority. But, a citizen and a public authority are two distinct entities. If this distinction between a citizen and the public authority disappears and officials of the public authority demand information under the RTI Act, it will lead to total lawlessness and nothing will remain secret. The provisions of section 8 (restriction on right to information and section 11 (third party information) will become redundant. While suggesting restrictions on rights of certain persons misusing the Act, he feared that if steps were not taken to curb it by invoking stringent penal provision, the Act will be used to spill the beans, settle scores and sling mud on fellow officers.[60]

In yet another case, an angry Delhi High Court slapped a fine of Rs 75,000 on an NGO, which used the Act to abuse two MCD engineers and seek distasteful personal details about them. The RTI also asked whether they suffered from sexual disorders, if they had carried out a DNA test for their mother, whether their mother was a surrogate or stepmother and also sought the name of their biological father and step mother. When the RTI Act was envisioned as

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[59] Available at: http://www.thehindu.com/news/national/karnataka/%E2%80%98Guard-against-misuse-of-RTI-Act%E2%80%99/article14181595.ece, (Last visited on December 15, 2016).

[60] Available at: http://indianexpress.com/article/india/india-others/sic-for-punitive-action-for-rti-misuse-by-officials/, (Last visited on November 5, 2016).

a tool to ensure transparency, the founders would never have imagined misuse of this proportion to hurl abuses and settle personal scores. Observing it amounted to abuse of law, Judges Chief Justice Dipak Misra and Justice Manmohan said,[61]

Seeking information on parentage of a person and his medical history is unwarranted and uncalled for. RTI law was not enacted for abusing people and seeking personal details.

In an interesting instance, Governor Ram Naik in Lucknow said that,[62] [m]isuse of RTI Act has to be checked and prevented. Speaking at the inauguration of RTI Bhawan in the city, Naik, citing an RTI application he received after assuming the office, said, "The seeker asked if I was 82-year-old and had been treated for cancer. He wanted to know what treatment I was given. I wondered if information like that could also be sought under RTI. But it also shows that the Act is popular."

In one of the interesting matter the then Chief Justice of India said a very good law like RTI was being misused to ask irrelevant and intrusive questions seriously impeding the working of the Judges and the Supreme Court.[63] Justice Kapadia said,

In RTI matters, since I took over as CJI, I have given answers to all questions except very few things. But the kind of questions and their number is also exceeding limit.

He gave samples of the irrelevant questions that were being put to the judges taking away their precious time which could have been utilized in studying petitions and case materials.

Why did you attend Nani Palkhivala Lecture? What time did you leave? Did you eat lunch or had tea? Which lawyer invited you for the function? We are working hard but we are not being able to concentrate many a times because these kinds of questions. The RTI Act is a good law but there has to a limit to it.

Undoubtedly, revolution of information law has added new dimensions to human capabilities and benefitted development of the society. Today, we are living in an age of super computers which has tremendously helped in enhancing human knowledge and expansion of communication skills. Though proliferation

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[61] Available at: http://www.hindustantimes.com/delhi/court-slams-ngo-for-misuse-of-rti/story-SiQNiyatC4qVbzCb3yIywK.html, (Last visited on December 17, 2016).

[62] Available at: http://timesofindia.indiatimes.com/city/lucknow/Misuse-of-RTI-Act-should-be-checked-says-Naik/articleshow/53163276.cms, (Last visited on July 12, 2016).

[63] Available at: http://timesofindia.indiatimes.com/india/Right-to-Information-good-law-but-being-misused-S-H-Kapadia/articleshow/12642471.cms, (Last visited on December 18, 2016).

and dissemination of information has proved a boon to mankind, it has some shortcomings as well. The right of access to information granted under RTI Act is often being misused by some persons for settling personal scores with their opponents arising out of family or matrimonial disputes, maintenance claims, rivalry, enmity or vengeance or for causing harassment to public officials. In order to put an end to this tendency, the Supreme Court in the case of *Central Board of Education & another* v. *Aditya Bandopadhyay & Ors.*[64] observed:

The RTI is not to be used as a tool for oppression of public authorities. The nation cannot afford to have the honest public officials; bogged down with all and sundry requests, unrelated to corruption. It will adversely affect the efficiency of the administration. It cannot become tool to obstruct the national development and destroy peace, tranquility and harmony among its citizens.

In an Interesting matter Central Information Commissioner said that The Right to Information Act must not be misused and it is important to see its proper implementation rather than spreading awareness. He quoted cases while explaining several points of the Act and how it should be used. Privacy limit might be crossed while getting details of a spouse's income and assets but it should stop there and no personal details should be sought, he said and wanted the activists to read the RTI Act along with court's judgments and the Constitution while the advocates are required to give the correct information to their clients.

He explained how a 16-year-old girl in America has preserved a newspaper advertisement of a cigarette company assuring smoking of its brand of cigarettes would not cause cancer, and also receipts of purchase of cigarettes for more than 40 years to file a case against the manufacturer when she contracted cancer. She received $26 billion as compensation. Thanks to the RTI Act, doctors and advocates are now afraid of being pulled up for their faults, he said.[65]

In yet another instance the Congress and NCP leaders raised concerns over the misuse of the Right to Information Act and sought to know if the government was mulling any changes to the law to guard against such misuse. Seeking answers during question hour in the Rajya Sabha, NCP's Praful Patel said that government officials were scared of taking decisions because of fear of the RTI Act. Congress member Rajeev Shukla too raised similar concerns. In his response, MoS in the Prime Minister's Office, Jitendra Singh, said, "The RTI may cut down the initiative of an officer... the government is equally concerned."[66]

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[64] (2011) 8 SCC.

[65] Available at: http://www.thehindu.com/news/cities/Visakhapatnam/dont-misuse-rti-act-says-commissioner/article8572555.ece, (Last visited on December 12, 2016).

Under fire for his stance that not all cabinet decisions can be disclosed through RTI, Pinarayi Vijayan Chief Minister has clarified there will be no attempts to water down the RTI Act. Further, he quoted his statements supporting the RTI Act.

It was mentioned that there are people who try to misuse the RTI Act for vested interests. Can the critics deny this? While saying so, I was reminding the Information Commission to be aware of this practice. I have further stated that denying information under the cover of such attempts would not be desirable. Some people allege weakening of RTI Act, by deliberately ignoring these facts.[67]

VI

Conclusion

The RTI requests, at times, are not simply to satisfy one's doubt but also to derive vicarious pleasures. Public interest, which the Act intends to secure, is missing in many RTI applications. There have been instances where applicants seek policy related information and many a time the applicants have vested interests. At times the Act is used by people to harass their colleagues or blackmail the authorities. Moreover, there are numerous instances of applicants demanding irrelevant or frivolous information. Such a selfish and unintelligent use of the Act will defeat the high objectives of the Act. It has also been observed that the Act is frequently being used by government servants, mostly disgruntled, under disciplinary proceedings to settle their service matters. It is also being misused by people interested in gathering evidence in their litigation cases.[68] There is a likelihood that the information seeker may not turn up to pay the additional fees once the information is ready. It is also unfortunate that the language being used by the seekers is, at times, intemperate and indecorous, to say the least.[69] The RTI Act is being used by business competitors of public authorities. In certain cases, some NGOs are indulging in getting projects sanctioned from international agencies which they complete by simply filing a RTI application in

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[66] Available at: http://indianexpress.com/article/india/india-news-india/mps-red-flag-rti-misuse-2775521/, (Last visited on December 17, 2016).

[67] Available at: http://www.newindianexpress.com/states/kerala/2017/jan/25/rti-act-kerala-cm-pinarayi-vijayan-slams-cpi-1563434.html, (Last visited on January 26, 2017).

[68] Abhishek Jain and Aarushi Jain, "Promoting Right to Information Through EGovernance- A Case of E-Soochna and other Initiatives in H. P.", *The Indian Journal of Public administration*, Vol. 55, No. 1, at 38 (January- March 2009).

[69] Saxena, Prabodh, "The Flip Side of RTI Act", *The Administrator*, Lal Bahadur Shastri National Academy, vol. 50, No. 1, at 23. (June 1997).

the central ministry concerned, who in turn has to procure the data from various states and districts. The commission has now started looking at some alternative remedies while dealing with information requests. It now insists that if a normal internal mechanism for assessing information is good enough, recourse to RTI Act may not be permissible.[70] There is also a need to guard against the growth of professional middlemen who use this Act for personal gain. Now the time has come when we will have to focus on better and effective implementation of Right to information Act, 2005 in India. I believe, it is the duty of every individual not to misuse the very fundamental nature of rights otherwise there is no meaning to the word 'fundamental rights' if it is not been followed in the letter and spirit in which it was intended by our Constitutional makers.

[70] *Ibid.*

RESOCIALIZATION THROUGH PRISON; EXTENT, EFFECTS AND ALTERNATIVES

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Abstract

There being no possibility to conceive a society without crime and criminals, the institution of prisons is indispensable for every society. The origin and growth of prison system across the globe corresponded to the changes in society's reaction to crime from time to time. At one point of time in the history of prison system and prison administration, prisons were considered as a "House of Captives" where prisoners were kept for punishment. However, in 1787, when a group of influential Philadelphians, known as Philadelphia Society, worked for alleviating the Miseries of Public Prisons nine (now the Pennsylvania Prison Society), a movement for prison reform started worldwide. The idea behind the movement was that each individual including prisoners is subject to environmental influence, and thus capable of being reformed as honourable citizens. From this, a web of reforms and reformatory system started through various tools and techniques including meditation. Prisoners were classified and categorized into various groups and as per the need of given group various efforts were made to bring reforms. The concept of prison in modern days is visualized as something based on reformatory jurisprudence. As often stated, the prison system is no more "dark cells" where individual life is made miserable and convict faces inhuman degrading treatment. A person in prison does not cease to be a human being and lose all his human rights, it is the duty of the State to take care of his justifiable needs and requests. There is a need to identify problems of prison system and to humanize prison environment. The idea of prisoners' reform is inclusive approach towards more dignified criminal justice system, in which every prisoner is counted as an individual human being. His basic human rights are kept intact. He is treated as a patient in the system, and all steps are taken to ensure that, after serving the prison sentence, he should join the society as a reformed individual.

I

Introduction

At one point of time in the history of prison system and prison administration, prisons were considered as "house of captives" where prisoners were kept for

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punishment. However, in 1787, when a group of influential Philadelphians, known as Philadelphia Society, worked for alleviating the miseries of public prisons (now the Pennsylvania Prison Society), a movement for prison reform started worldwide. The idea behind the movement was that each and every individual including prisoners is subject to environmental influence, and thus capable of being reformed as honorable citizens. From this, a web of reforms and reformatory system started through various tools and techniques including meditation. Prisoners were classified and categorized into various groups and as per the need of given group various efforts were made to bring reforms. The Pennsylvania System was the first attempt to rehabilitate criminals by classifying and separating them on the basis of their crimes.[1]

Any prison is made up of the synchronized actions of hundreds of people, some of whom hate and distrust one another, love one another, fight one another physically and psychologically, think of one another as stupid or mentally disturbed, manage and control one another, and vie with one another for favors, prestige, power, and money. Often the people involved do not know with whom they are competing or cooperating and are not sure whether they are the managers or the managed. Nevertheless, the social system that is a prison does not degenerate into a chaotic mess of social relations which have no order and make no sense. Somehow the people are bound together enough that most conflicts and misunderstanding are not crucial. The people remain "organized" and the prison continues to "work". Viewed in this way, the prison is a microcosm of the larger society that has created numerous disagreements, misunderstandings, antagonisms, and conflicts among its members.[2]

Historical resume of the development of the concept of prison community reveals that no systematic sociological analysis of prison was made prior to 1940. The most popular concept of the prison was a place of punishment where criminals were herded together and held in close custody. It was only in the year 1940, that Donald Clemmer[3], for the first time attempted to study the formidable nature of the latent social structure of the prison along with its formal

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1 During the eighteenth century, the New York prison officials developed two major systems of prison organization-the auburn system and the elmira system. The auburn system introduced at auburn (n.y.) Prison in 1821 and became widely adopted. Under this system, prisoners stay in solitary confinement at night and worked together during the day. The system emphasized silence. Prisoners could not speak to, or even look at one another. Prison officials hoped that this silence and isolation would cause inmates to think about their crimes and reform.

2 Edwin H. Sutherland, Donald R. Cressey & David F. Luckenbill, *Principles of Criminology* 529 (1961).

3 Clemmer - An Eminent American Sociologist.

administrative organization. He was first to study a prison from prisoner's point of view.[4] Clemmer viewed prison as a social microcosm in which the conditions and processes of the broader society were observable. His study was the first organizational study of its kind, which among other things, was first to stress the notion that the events occurring in a factory, hospital, prison or in other organizations occur because there is an organizational place for them to occur.[5]

Any probe into this so far unexplored area of prison sociology would inevitably demand two things:

(i) A close look at the sociologists' definitions of the term community; and
(ii) The analysis of those sociological characteristics of the prison life that entitle it to be called a community.

After Clemmer, social scientists from the discipline of Sociology, Psychology, Psychiatry, Social Work, Criminology and Corrections came forward with their articles and researches on prison as a social organization. But Clemmer's work on prison community, along with a few articles subsequently written by him and others, continued to remain classic until Gresham M. Sykes, published his "Society of Captives"[6]. In 1960, the American Social Science Research Council published the proceedings of a conference group on correctional organizations under the title "Theoretical Studies in Social Organization of the Prison". A year later, Donald R. Cressy edited "The Prison: Studies in Institutional Organization and Change"[7] and highlighted the social organization of the prisons. In England, Terrence Morris and Pauline Morris, conducted a Sociological Study of the Pentonville Prison on the pattern of Clemmer and Sykes.[8]

II

Prison Community

The term "Community"[9], though in constant usage in sociological parlance, founds its application in reference to a total institution[10] like prison only in the

4 Donald Clemmer, *The prison community* 140-145 (1940).

5 *Ibid.*

6 Gresham M. Sykes, *Society of Captives* (1958).

7 Donald R. Cressey, *The Prison: Studies in Institutional Organization and Change* (1961).

8 Terence Morris and Pauline Morris, *Pentonville: A Sociological Study of an English Prison* (1963).

9 Howard Roland, "Segregated Communities and Mental Health" in F.R. Moulton (ed.), *Mental Health Publication of the American Association for the Advancements of Science* 53-55 (1939).

10 Erwing Goffman, *The Characteristics of Total Institutions in Symposium on Preventive and Social Psychiatry* 43-44 (1958). The studies describe total institutions as those which have encompassing tendencies and whose total character is symbolized by barrier to social

middle of the twentieth century[11]. While tracing back the development history of the concept of "Prison Community", Korn and McCorkle observed that "although the biographical and fictional accounts of prison life have appeared since early literary periods, the scientific study of prison community is only less than a generation old."[12]

The literature on prisons, wherein, either an explicit or an oblique reference is made to prison[13] as a community,[14] the focus of enquiry is usually directed towards treating prisons as a distinct unit of social organization[15] or a viable social system.[16] It is in this context the prison is being analyzed as a community[17]. How far the prison meets or misses the fundamental ingredients of community as a social organization or system is the point under consideration.[18]

But whenever the prison is put to stand the test of community with its accompanying basic features and requirements, it is always explained that since the prison milieu is unique, where several features of a free community get drastically changed, it would not be fair to reject the prison's claim as a community only on the basic of some trivial differences. The discount on this score is desirable because the shape of human interactions in penal settings is based on entirely different patterns. The essence of human relations in prison remains

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intercourse with the outside that is often built right into the physical plant, such as locked doors, thigh walls and barbed wire, etc.

11 Amitai Etzioni, "The Organization Structure of Closed Educational Institutions in Israel", *Harvard Educational Review*, Vol. 27, 115 (1957).

12 Richard R. Korn and Lloyd W. Mccorkle, *Criminology and Penology* 512 (1959). For earlier biographical and fictional accounts of prison life, Sanford Bates, *Prisons And Beyond*, The Macmillan Co. (1936); Lewis E. Lawes, *Twenty Thousand Years in Sing Singh* (1932); Frank Tannenbaum, *Wall Shadows* (1932); Victor Nelson, *Prison Days and Nights* (1933); Thomas M. Osborne, *Within Prison Walls* (1928); Negley K. Teeters, *They Were in Prison* (1937); Lewis E. Lawes, *Cell* 202 (1935); James M.Wqinning, *Behind These Walls* (1933); Alexander Berkman, *Prison Memories of an Anarchist* (1926); J. C. Powell, *The American Siberia* (1891).

13 Norman S. Hayner, "The Prison Community" 320-24, *The Canadian Journal of Corrections*, Vol. 6, No. 3 (July 1964).

14 Donald Clemmer, *The Prison Community* (1940); Gresham M. Sykes, *The Society of Captives* (1958); Terence Morris and Pauline Morris –*Pentonville: A Sociological Study of an English Prison* (1963); Rose Giallombardo, *The Society of Women* (1966).

15 Gresham M. Sykes and Sheldon L. Messinger, *The Inmate Social System* 5 (1960).

16 George H. Grosser, *External Setting and Internal Relations of the Prisons* 130-131 (1960); Richard A. Cloward, "Social Control in the Prison" 75 (1960), *Theoretical Studies in Social Organization of the Prison*, New York, Social Science Research Council (March, 1960).

17 F. E. Haynes, "The Sociological Study of the Prison Community", 432-40, *Journal of Criminal Law and Criminology*, Vol. 39, No. 4 (Nov-Dec., 1948).

18 Norman S. Hayner and Ellish Ash, "The Prison as a Community", 577-583, *American Sociological Review*, Vol. V. No. 4 (August, 1940).

much less identical with the relations of the members of the open communities. The current penological thinking, keeping these differences in view, has come to regard penal organizations as analogous to other types of social organizations, i.e., as a member of interacting human groups that exercise power over one another, communicate and at times are in conflict, but in general form a unit that operates as an on-going concern.[19] As a social organization, remarked Grosser,[20] the prison may be conceptually viewed in relation to society as a service organization, supported by the community largely for the purpose of maintaining order and not for the production of any good which yield the individual or the community an immediate economic return. Like most other service organizations (such as mental hospitals and other social agencies) the prison is a means of safeguarding other institutions of the society.

Comparing prison community with the community in open, Gill observed that the walled-community of prison resembles in many ways to any other community of the free society.[21] Like any free-community,[22] prison community shares most of the elements of community life. In terms of free-community's first characteristics, i.e., the interdependent and interrelated group of people[23], the community of prisoners as a social group hardly needs any explanation.[24] The prison inmates are considerably interdependent and interrelated not only for the fulfillment of their individual or collective needs and assignments but also for their social and cultural life within the four walls of prison. Sanford Bates observed that prisoners are usually loyal to each other.[25] Higgins made similar observation: "these men (prisoners) cling to one another with a group loyalty not excelled in purity and inviolability of those fine emotions with animate and consolidate groups of human beings in any other relationships".[26]

(i) Prisons as 'Total Institutions'

A total institution is a place where a large number of like-situated individuals reside and work. They are cut off from the wider society for an appreciable

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19 George H. Grosser, *External Setting and Internal Relations of the Prison the Theoretical Studies on Prison*, 130-131 (1960); Richard A. Cloward, *Social Control in the Prison* 1-2 (1960).

20 *Ibid.*

21 Howard B. Gill, "What is a Community Prison?" 2-7, *The Prison Service Journal,* Vol. No. 21 (Oct. 1969).

22 F. R. Haynes, "The Sociological Study of Prison Community", *The Journal Of Criminal Law and Criminology*, 432-40 Vol. 39, No. 4 (Dec. 1948).

23 *Supra* note 18.

24 *Supra* note 18.

25 Sanford Bates, *Prisons and Beyond*, 78-88 (1936).

26 L.A. Higins, *Quoted in Sutherland's Criminology*, *supra* note 2 at 430.

period of time and together lead an enclosed, formally administered round of life.[27]

Goffman says that, "handling of many human needs by the bureaucratic organization of whole blocks of people whether or not this is a necessary or effective means of social organization in the circumstances is the key fact of total institutions".[28] His idea was that almost the entire life of the residents of such institutions those interned in the asylum, prisoners, sailors, monks, nuns or pupils in boarding schools is lived in the institution. For long periods of time the institution dictates many aspects of their life, e.g. washing, praying, eating, outdoor exercise. Free time Activities are organized by higher authority according to a plan what represents the official aims of the institution.[29]

Sociological literature has represented the power of total institutions in general and prison in particular, as cruel and harmful.[30] Goffman explains that total institutions are fateful for inmate's civilian life. This encompasses the way the person is arrested, housed in lock-ups and further transferred to judicial custody and finally on the death row. Furthermore, he explains how the arrival period involves several processes that mortify the self.[31] The most general form of this process involves role dispossession, where the individual "finds certain roles are lost to him by virtue of the barrier that separates him from the outside world".

(ii) Prisons as 'Complete' and 'Austere' institutions

No discussion about prison as a disciplinary mechanism would be complete without reflection on Foucault's work[32] where prisons are referred to as "complete and austere institutions". Foucault quotes Baltard,[33] who first refers to prison as a "complete and austere institution". Moreover, the prison has neither an exterior nor gap; it cannot be interrupted, except when its task is totally completed; its action on the individual must be uninterrupted: an unceasing discipline; it gives almost total power over the prisoners; it has its internal mechanisms of repression and punishment: a despotic discipline.[34] This is very

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27 Finzsch, Norbert & Jütte, Robert (eds.), Institutions of Confinement: *Hospitals, Asylums, and Prisons in Western Europe and North America*, 1500-1950, 175 (2003).

28 Erving Goffman's, *Asylums: Essays on the Social Situation of Mental Patients and other Inmates* 63-68 (1961).

29 Alison Liebling & Shadd Maruna, *The Effects of Imprisonment* 7 (2006).

30 *Id.* at 9.

31 *Supra* note 28.

32 Michel Foucault, *Discipline and Punish: The Birth of the Prison* 230 Tr. A. Sheridan (1977).

33 L. Baltard, *Architechtonographie Des Prisons* (1829). Cited in Foucault and Michel, *Discipline And Punish: The Birth Of The Prison* 135 Tr. A. Sheridan (1977).

34 *Ibid.*

similar to how Goffman has described total institutions.[35]

The prison must be an exhaustive disciplinary apparatus. It shall take up responsibility and the following aspects of individuals: physical training, attitude to work, every day conduct, moral attitude, state of mind, etc. The prison is much more than school, the workshop or army, which always involve a certain specialization, is omni-disciplinary[36]. Prison causes the segregation of a convict from the outside world from every aspect of that individual's life that could have motivated the offence and from the complicities that facilitated it. Solitude is the primary condition of total submission.[37]

(iii) Prison as Society of Captives

According to Sykes[38], in captive societies like the prison, the social order is unconvincing. The inmates do not feel bound by a moral duty to obey although they recognize the authority of the custodians. "In the prison," writes Sykes, "power must be based on something other than internalized morality and the custodians find themselves confronting men who must be forced, bribed or cajoled into compliance." The vast repressive power of authorities is inefficient for maintaining order. Besides penal discipline, the everyday tasks of the total institution include cooking, cleaning, and rehabilitation as well which require some independence. As Sykes observes, "The ability of the officials to physically coerce their captives into the paths of compliance is something of an illusion as far as the day-to-day activities of the prison are concerned." The stunted moral authority of the guards combined with the limited efficacy of official violence yield what Sykes memorably describes as the "defects of total power."[39]

The total power of the guards is defective, but penal harm, "the pains of imprisonment" remains extensive. Although it has discarded corporal punishment and is reasonably habitable, the modern prison corrodes the inmate's person and sense of moral worth. By losing his freedom, the inmate surrenders the powers that define citizenship in a liberal society. Deprived of nearly all personal possessions, the inmate also forfeits the markers of biography and individuality. The prisoner loses autonomy as well as individuality because movement and routine are minutely controlled.[40]

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35 *Supra* note 31.
36 *Id.* at 236.
37 *Id.* at 238.
38 *Supra* note 6.
39 *Id.* at 90.
40 *Id.* at 92.

III

Effects of Prison Culture

(i) Cultural

There are two basic approaches to the prison culture.[41] One probes the presence or absence of consensus or solidarity within the inmate community. The other approach studies the diversity of adaptive prison role and their linkage with varying inmate backgrounds and external value systems. Both perspectives represent the application of varying social model to the prison organization.

The culture consists of the habits, behaviour systems, traditions, history, customs, folkways, codes, the laws and rules which guide the inmates, and their ideas, opinions and attitude toward or against homes, family education, work, recreation, government prisons, police, judges, other inmates, wardens, ministers, doctors, guards, ball-players, clubs, guns, cells, buckets, gravy, beans, walls, lamps, rain, clouds, clothes, machinery, hammers, rocks, caps, bibles, books, radio, monies, stealing, murder, rape, sex, love, honesty, martyrdom and so on. Such an answer does not tell us exactly what the prison culture is, but it does suggest its extreme complexity, especially when one considers the multitudinous shades of attitude and opinion which may exist.[42]

The prisoner's world is an atomized world. Its people are atoms interacting in confusion. It is dominated and it submits. Its own community is without a well-established social structure. Recognized values produce a myriad of conflicting attitudes.[43] There are no definite communal objectives. There is no consensus for a common goal. The inmates' conflict with officialdom and opposition toward society is only slightly greater in degree than conflict and opposition among themselves. Trickery and dishonesty over-shadow sympathy and cooperation. Such cooperation as exists is largely symbiotic in nature. Social controls are only partially effective. It is a world of individuals whose daily relationships are impersonalized. It is a world of "I", "me", and "mine", rather than "ours", "their" and "his." Its people are thwarted, unhappy, yearning, resigned, bitter, hating and revengeful. Its people are improvident, inefficient, and socially illiterate. The prison world is a graceless world. There is filth, stink, and drabness; there is monotony and stupor. There is disinterest in work. There is desire for love of few, there is bewilderment. No one knows, the dogmas and codes notwithstanding, exactly what is important.[44]

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41 Ester Heffernan, *Making it in Prison* 4 (1972).

42 *Id.* at 295.

43 *Ibid.*

44 *Id.* at 298.

(ii) Prisonization

Prisonization is a process of assimilation of the prison culture by inmates as they become acquainted with the prison world.[45] After the inmate is stripped of most of the symbols of personal identity, he begins to attach new meanings to all the conditions of life which were previously taken for granted. These new meanings are provided by the prison culture. Every inmate, is exposed to the following "universal factors which maximize prisonization":[46]

(a) A sentence of many years, thus a long subjection to the universal factors of prizonization.
(b) Somewhat unstable personality made unstable by an inadequacy of "socialized" relations before commitment, but possessing, nonetheless, a capacity for strong convictions and a particular kind of loyalty.
(c) Dearth of positive relations with persons outside the walls.
(d) Readiness and capacity for integration into a prison primary group.
(e) Blind, or almost blind, acceptance of the dogmas, mores of the primary group and the general penal population.
(f) Chance of placement with other persons of similar orientation.
(g) Readiness to participate in gambling and abnormal sex behaviour.[47]

The over-all effect of prisonization is to produce a person who generally conforms to the prison expectations and whose behaviour upon release is contradictory to anti-criminal norms. Even if no other factor of the prison culture touches the personality of an inmate of many years residence, the influence of these universal factors are sufficient to make a man characteristics of the penal community and probably so disrupt his personality that a happy adjustment in any community becomes next to impossible.[48]

Every man who enters the penitentiary undergoes prisonization to some extent.[49] The first and most obvious integrative step concerns his status. He becomes at once an anonymous figure in a subordinate group. A number replaces a name. He wears the clothes of the other member of the subordinate group. He is questioned and admonished. He soon learns that the warden is all-powerful. He soon learns the ranks, titles, and authority of various officials and whether he uses the prison slang and argot or not, he comes to know its meanings. Even thought a new man may hold himself aloof from other inmates and remain a

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45 *Supra* note 4 at 299.
46 *Id.* at 299-300.
47 *Id.* at 301-302.
48 *Id.* at 300.
49 Alpert, G. P., "A Comparative Study of the Effects of Ideology on Prisonization: A Research Note", *Journal of the American Criminal Justice Association*, Vol 41, No.1., 77–86 (1978).

solitary figure, he finds himself within a few months referring to or thinking of keepers as "screws", the physician as referring to or thinking of keepers as "screws," the physician as the "croaker" and using the local nicknames to designate persons. He follows the examples already set in wearing his cap. He learns to eat in haste and in obtaining food he imitates the tricks of those near him.[50]

After the new arrival recovers from the effects of the swallowing-up process, he assigns a new meaning to conditions he had previously taken for granted. The fact that food, shelter, clothing, and a work activity had been given him originally made no especial impression. It is only after some weeks or months that there comes to him a new interpretation of these necessities of life. This point is intangible and difficult to describe in so far as it is only a subtle and minute change in attitude from the taken-for-granted perception. Exhaustive questioning of hundreds of men reveals that this slight change in attitude is a fundamental step in the process of prisonization.[51]

IV

Condition of Prisons and their Impact

A majority of the world's prison systems do not function at the level of the United Nations' Standard Minimum Rules for the Treatment of Prisoners. In some countries, relevant international obligations and standards are deliberately disregarded.[52]

Overcrowding is a central problem in prison management around the globe. Overcrowding per se creates serious problems including health care, food, clothing and poor living conditions. According to Prison Statistics, 2014, compiled by National Crime Record Bureau (NCRB), Ministry of Home Affairs, Union Government of India, the total capacity of jails in the country is 3,56,561. As against this capacity, 4,18,536 inmates were there in jails on record.[53]

In some jails, problem of overcrowding was so acute that inmates often had to sleep in shifts of 3-4 hours due to lack of space. Apart from this, due in overcrowding, any attempt of the prison administration to introduce skilled

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[50] *Ibid.*

[51] *Ibid.*

[52] "Report on International Prison Conditions" *United States Department of State, Bureau of Democracy, Human Rights and Labour,* available at: www.state.gov/documents/organization/210160.pdf (Last visited on January 5, 2016).

[53] "Prison Statistics India, 2014", *National Crime Records Bureau*, available at: http://ncrb.nic.in (Last visited on November 12, 2016).

prisoners in gainful employment is also affected. Some of the reasons of overcrowding are system of arrests, sentencing policies and notions of crime. The acute and widespread challenges posed by overcrowded prisons around the world often lead to other serious problems.

India's most daunting task in prison reform is about problem of under-trials. The under trial prisoners formed a major chunk of prison inmates among various types of prisoners. The number of under trial and convicted prisoners to the total prisoners in various jails was reported as Convicts: 1,31,517, Under-trials : 2,82,879[54] respectively in the country. Total convicts are 31.4% of total prison inmates whereas under-trials are 67.6% of total prison inmates.[55] Thus acute problem of overcrowding in prisons is more due to large number of under trials detained in prisons rather than convicted prisoners.[56]

The problem of prison indiscipline has always been serious penologist's curiosity across the globe. The prison staff is never equipped with any specialized training in handling the prisoners. Although over a period of time and paradigm shift strongly supported by judicial activism, prisoners now have comparatively modern facilities, but the stringency of prison life, especially the curtailed liberty does take its toll, thereby making the prisoners edgy and even many a times violent. Discipline in jails is therefore of utmost importance. But the discipline required in jail has to be scientific one, not blind barbarism.[57]

Violence and frequent quarrels between the criminals inside jail in itself is a very intricate subject. Every prisoner tries to show off his physical might and establish his superiority over his fellow inmates and while trying to do so, prisoners often concoct and share with exaggeration the tales of their adventure and the risks undertaken by them while committing crime. At the same time, on some occasions prisoners quarrel even on trivial issues like distribution of food, accessibility of toilets, sleeping places and directions, and even priority in games etc. besides even the differences of their opinion about a particular jail official. Insufficient supply of bare necessity articles in the prison also leads to petty thefts of things like soap, oil, utensils, raw salad vegetables and cloths etc. which are supplied to inmates in prisons. Such thefts also often lead to violence.

Inter gang rivalries inside the jail are another facet of indiscipline. At times the rival gangs are inimical to each other from even their pre-arrest days, which animosity is extended inside the prison as well. At times the animosity comes

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54 *Ibid.*

55 *Ibid.*

56 *Ibid.*

57 P. Frottier P. Et al. "Jailhouse Blues Revisited", *Soc Psychiatry Epidemiol* 37, 68-73 (2002).

into existence and develops during the imprisonment term itself. Criminals, especially with violent and aggressive history have an irresistible urge to create and nurture their personal fiefdom even inside the jail which they achieve with show of strength. Generally in cases of long-term imprisonment, some inmates become detached from reality, and a darker side to their personalities emerge. Violence becomes a way of life – perhaps even more so – and for some incarcerated gang members, prison doesn't stop them from still carrying out crime.[58]

Prison riots are another facet of collective violence in jails which is a combined venture of jail inmates, on account of limited space with overflowing number of prisoners; it is not possible to lodge the prisoners in separate cells. Barring the high risk prisoners, cells cannot be allotted to individual inmates. This opportunity of close and continuous interaction amongst prisoners serves as powerful breeding ground for them to unite against the prison authorities, perceived as an oppressive arm of the state. In early times when prisoners were lodged in separate cells, such a possibility was completely ruled out as prisoners had no chance of communicating with each other. However, in the present day scenario, free intermingling amongst themselves as well as with the outside world provides the prisoners opportunities to unite and raise a common front against the prison administrators. Ideally, the prison staff should be focused on the welfare of the prisoner, and staff should try to give physical and moral strength to the inmate, who is already under distress due to imprisonment. Unfortunately, prison staff is not trained to tackle a situation of an outbreak of a mass violence, nor are they able to gauge the tension that may building up among the inmates.[59] To add fuel to the fire are the provocations in the form of differences with the prison staff, arbitrary and step motherly treatment by wardens and guards against some inmates, monotonous routine of prison life, separation from members of the family, crude disciplinary incidents and even political instigations.[60]

Another aggravated form of indiscipline in jail is criminality among inmates that develops inside the prison. Prolonged societal seclusion coupled with detachment from family members has multifarious effects, including deprivation of the prisoner of sexual gratification, which is one of the vital biological urges of human life. Being not able to control the sexual craving, prisoners quite often resort to alternate sexual ventures, like homosexuality and sodomy etc. and

[58] "10 most dangerous prison gangs in the world", available at: www.criminaljusticedegreehub.com (Last visited December 5, 2016).

[59] Smita Chakraburtty, "New Draft Model Prison Manual Implicitly Explains Why Prison Riots Happen" (April 20, 2016), available at: *The Wire*, www.thewire.in (Last visited on May 2, 2016).

[60] *Ibid.*

many a times such sexual encounters are without consent of the other and are violent as well.

V

Alternatives to Imprisonment

In recent past, there has been a change in social perception towards prisoners. In consonance with the change in thinking, the prisons are being renamed as 'correctional homes' to emphasis on reformation of prisoners than punishing them. To achieve this goal, a congenial atmosphere is created in jails for their reformation. They are given education, recreational & vocational training facilities so that they can correct their hostile attitude towards society which will help them to integrate with the mainstream of society. Worse, time spent in confinement makes many inmates a higher risk and even more dangerous when they return to the community. In fact, prison is probably the last place any sensible treatment expert would choose for rehabilitation. Fortunately, cost-effective alternatives to prison do exist in the community. Even hard-line prison authorities agree that twenty percent of inmates could be effectively and safely placed in these alternative environments, and less jaundiced observers say 50 percent or more could be so housed. Therefore, one should explore alternatives to prison that are just as effective and far cheaper. Following are few alternatives to imprisonment:

(i) Probation

Imprisonment familiarizes the short-term prisoners with the prison conditions and removes their fear of the prison; it frustrates the individual, while it traumatizes and punishes the family. There is an increasing recognition of the fact that the possibility of reformation or rehabilitation cannot be realized in true terms in the prison and there is always a dangerous potential for contamination.[61]

The recognition of "Probation" system as an integral part of the criminal justice system is associated with the evolution of changing attitudes towards crime and the criminal and the greater emphasis on the reformation and reintegration of the offenders into the society has been given in the modern criminal justice system. It is also one of the methods of community-based correctional treatment of offenders. Probation began as a humanitarian effort to give first time and minor offenders a chance to remain in the mainstream and to remain out of the criminal world.

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[61] Dr. S. M. Diaz, "Probation-Concept and Usefulness- Viable Alternative To Short-Term Imprisonment" *Social Defence*, 22-29., ed. 37 (October 1995).

Probation is suspension of sentence by court, without actually serving the sentence.[62] According to the United Nations global survey, there are four elements in the definition of probation which are as follows:

(a) Probation is a method of dealing with the offenders, i.e., persons whose guilt has been established.

(b) Probation is a method which is applied on a selective basis embodying the principle of individualization of treatment and requiring the study of the individual offender so that treatment will fit the individual, and hence involving discretionary function of the court.

(c) Probation involves the conditional suspension of punishment which is not to be construed as a 'let-off', since the offender is liable to punishment throughout the probation period.

(d) Probation involves supervision and treatment providing systematic assistance and guidance in living in society without conflict with the law.[63]

While analyzing the viability of Probation as an "alternative to prisonization", it is often argued that the short-term sentences are undesirable for young offenders as the imprisonment for a short term seldom acts as a deterrent.[64] Probation is one of the alternatives to incarceration that permits offenders to live and work in the community, to support their families, receive rehabilitative services and make restitution to the victims of their crimes. In fact, it is believed that careful administration and application of Probation services brings effective rehabilitation and reintegration of the offender into society, and thereby ultimately reduces crime.[65]

(ii) Parole

Parole is releasing or the status of being released from a penal or reformatory institution in which one has served a part of his maximum sentence, on condition of maintaining good behaviour and remaining in the custody but under the guidance of the institution or some agency approved by the state until a final

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62 Walter C. Reckless, *The Crime Problem* 483 (1967).

63 Probation and Related Measures, *United Nations Department Of Social Affairs*, 4-7 (1951).

64 Unprecedented growth in the nation's prison population has placed a heavy economic burden on taxpayers in terms of the cost to build, maintain and operate prisons. According to the United States' Justice department, over 2 million Americans are behind bars. This represents nearly six times as many inmates as we had in 1970. Society must incarcerate serious and violent offenders who endanger the community. For nonviolent offenders, however, probation is a cost effective alternative that holds them accountable for their crimes.

65 *Ibid.*

discharge is granted. In many parts of the world, however, the only conditions imposed are that an offender does not commit a further offence during the remainder of the sentence and/or that they report routinely to the authorities.[66]

Parole is now days taken as changing attitude of the society towards crime and criminals. As per criminal procedure, all fixed-term sentences of imprisonment of above 18 months are subject to release on parole after a third of the period of sentence has been served. It is a provisional release from confinement but is deemed to be a part of the imprisonment. Parole provides opportunity to the prisoner to transform himself into a useful citizen. Parole is thus a grant of partial liberty or lessening of restrictions to a convict prisoner, but release on parole does not change the status of the prisoner.[67]

(iii) Community Service Order

A community service order requires an offender to do unpaid work for a specified number of hours or to perform a specific task. As its name suggests, the work should provide a service to the community. Before imposing such an order, the court needs reliable information that such work is available under appropriate supervision. The box entitled "using community service orders, to address drunk driving" provides a practical example of the use of community service orders.[68] Close supervision is required in community service to verify that the offender is doing the required work and that he/ she is neither forced nor exploited to work under unacceptable conditions.[69]

Rehabilitation and reintegration for the offenders has assumed importance in the present criminal justice system. Almost all the countries in the world, are adopting a wide range of alternatives to prisonization. Countries like, the USA,[70]

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66 *Recommendation Rec (2003)22 of the Committee of Ministers of the Council of Europe on Conditional Release (Parole),* adopted on 24 september 2003, para. 8.

67 *Poonam Lata* v. *M.L. Wadhawan*, AIR 1987 SC 1383.

68 Mike Nellis, "Electronic Monitoring and the Community Supervision of Offenders" in Anthony Bottoms, Sue Rex and Gwen Robinson (eds.), *Alternatives to Prison: Options for an Insecure Society* 224-247 (2004).

69 *Ibid.*

70 Louis P. Carney, *Corrections: Treatment And Philosophy* 211-212 (1980); the rationale for community-based corrections was clearly articulated by the president's commission on law enforcement and administration of justice, task force report: the general underlying premise for the new direction in corrections is that crime and delinquency are symptoms of failures and disorganization of the community as well as individual offenders. The task of corrections therefore includes building or rebuilding solid ties between offender and community, integrating or reintegrating the offender into community life- restoring family ties, obtaining employment and education, securing in the larger sense a place for the offender in the routine functioning of society.

the UK, African continent, Central and Eastern Europe, the continental countries have introduced the community based correction programs as alternatives to prisonization. Some of the reasons that have been instrumental in the introduction of community based correction programs are: to minimize the chances of recidivism, to prevent prison overcrowding by diverting low risk offender away from the prisons, change in the penal philosophy form deterrent to reformation and rehabilitation, etc. The underlying philosophy of community based correction programs is to provide re-integrative and rehabilitative milieu for the young, low risk and first time offenders and that too within the community. It is because of this reason that these programs assume significance.

Various authors in the field of criminal justice system recognize the importance of community based corrections programs. M.J. Bryant, described it as a unique mixture of punishment and reparation, which also provides a positive experience for most of the offenders.[71] Community sanctions and measures, the new name for alternative measures or non-custodial measures, offers member states a set of standards and measures fairly and effectively. A further object is to lay down basic criterion for ensuring that the fundamental rights of persons on whom community sanctions or measures are imposed and also complied with.[72] As an alternative to prisonization the "community service order" scheme can be utilized at any stage of the trial.

(iv) Work Release

Under work release, selected prisoners are permitted to continue in their regular jobs in the community while spending daily after work hours and unemployed weekends in confinement. If the prisoner approved for work release has no civilian job, the authorities endeavour to find one for him or her. Earnings are collected by authorities, and after deductions for board and travel to and from work, the prisoner is given allowance for immediate personal needs.

The advantages claimed for work release centre on humanitarian, economic and rehabilitative themes: reduction of prison idleness, removal of dependants from public assistant roles, increased responsibility of prisoners for dependants, preservation of family entity, avoidance of interruption in business and industrial operations in the free community caused by the incarceration of skilled workers, reduction of the problem of released prisoners in finding jobs, increasing prisoner's job skills and employability, and encouragement of a prisoner to identify

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71 M. J. Bryant, "Doing Time form the Community- The Sentence of Tomorrow in Action", in *Criminal Procedure and Police Science Abstract*, 373, Vol. 37, No. 3 (May/June, 1997).

72 J. P. Robert, "European Rules on Community Sanction and Measures", in *Criminal Procedure and Police Science Abstract,* Vol. 37, No. 3, 663 (May/June, 1997).

with the values and attitudes of a free community.[73]

As a penal reform strategy, work release is useful in providing paid employment for inmates while avoiding the opposition of private entrepreneurs and labour unions to prison industries. Another advantage is that work release centres can use regular correctional officers in a primitive version of the penal reform. By being placed in a setting where control measures are largely withheld, the officers become involved in relationships that can release the capacity of selected inmates for positive behaviour in the absence of the usual treatment services.[74]

(v) Furlough

Furlough is another reformatory tool of penal system and is different from parole. Furlough as a matter of right must be granted to the prisoner periodically irrespective of any particular reason, since the object behind this tool is merely to enable him to retain family and social ties and avoid negative effects of a continuous prison life. The period of furlough is treated as remission of sentence. Initially furloughs, usually for 48 to 72 hours, were being granted to adult inmates. Such temporary release used to be granted for family visits, especially in family emergencies, interviews with perspective employers in preparation of permanent release; training and medical care; and participation in religious, educational, social, civic, and recreational affairs. The rapid spread of this strategy reflects an interest in reintegration as well as disillusionment over institution based programs.[75]

The temporary relief from structural confinement reduces tension, leads reality to the plans for future, makes available the simple pleasures of civilian life, and offers interim time benchmarks by which to measure the serving of a sentence. yet the return to prison is and emotional shock, and sometimes the furlough only makes clear the marginal status the inmate will face on release and adds to frustrations.[76] The significance of furlough is that it opens opportunity for contacts, but the ultimate meaning of those contacts depends largely on the inmate's perceptions and the conditions of the outside environment within which the free time is spent.[77]

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[73] Elmer Hubert Johnson, *Crime, Correction and Society: Introduction to Criminology* 556-557 (1978).

[74] Elmer H. Johnson, "Finland Penal Colonies: The Federal Model and Community Based Corrections", 1 *Journal of Criminal Justice* 327-38 (1973).

[75] Michael S. Serrill, Prison Furloughs in America, *Corrections Magazine* 1, 3-6 (July-August, 1975).

[76] Hanstoch, "Prison Inmates' Reaction To Furloughs", *Journal of Research in Crime and Delinquency* 4, 248-62 (July, 1967).

[77] *Ibid.*

(vi) Open Prison Institutions

Open peno-correctional institutions, open prisons and open colonies for prisoners, in the recent past; have emerged as effective institutional reformatory and correctional measures. These institutions, which ostensibly eliminate the "tensions" and "barriers" created by the restrictions and physical restraints placed on inmates of a "closed" jail - a prison with walls - and provide them better opportunity for re-interaction and re-assimilating with "free community" and "family" strive to bridge the gulf between the traditional "closed prison" and "free community". They in fact furnish a "half-way-home" to their inmates for their smooth and effective socio-psychological rehabilitation and re-integration into the social mainstream.

Open prisons are known for reducing various known and unknown negative effects of the incarceration on the prisoners because of the lack of physical restraints; the degree of the freedom exercised by the prisoners in the open prisons is very close to the freedom exercised by the ordinary citizen; the opportunity to live with the family members and to intermingle with the outside community assist them in their resocialization and reintegration in the society; the prisoners are entrusted with the responsitility to behave in a disciplined manner. The open prisons are often described as a medicine in the penal pharmacopoeia.[78] It is a medicine that treats the prisoners in a free atmosphere,; it has an element of trust, and requires the prisoners to maintain discipline.

The philosophy behind the establishment of open prison is to bring the prisoners as near as possible to the normal living conditions as is enjoyed by the free individuals. By living in the prisons the prisoners become misfit for the society, irrespective of the education and training received by them within the four walls of the prison. It is essential that eligible young convicts should be provided an atmosphere beneficial for the physical and mental health of the prisoners and wherein they can prepare themselves to get reintegrated into the society. The open prisons have a potential to provide conditions, more closely related to the normal life which can protect the prisoners from the harmful effect of the overcrowded prisons. Open prisons are economical for the prisoners as well as the state. The strict prison rules are relaxed and more emphasis is on maintaining discipline.[79]

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[78] *Ibid.*

[79] International Penal and Penitentiary Congress, Hague, 14-19 August 1950 adopted resolution on open institutions, available at a/conf/6/c.2/l.1 annex. I, 28 available at https:// www.unodc.org/.../congress//... Congresses/...congress.../087_aconf.6.c.2.1 (Last visited on July15, 2016).

An open camp resembles to a small village. The prisoners themselves manage the camp, for all practical purposes, through an elected panchayat. However, a liaison officer assisted by adequate staff, generally, is appointed as officer in charge of an open colony. An open colony, obviously, gives the prisoners an effective exercise in self-reliance, co-operation and community living in a family atmosphere. It not only accords maximum freedom and opportunity to its inmates to shape their lives in their own way and thereby facilitates their smooth and effective re-assimilation in the social mainstream after their release but also ultimately operates as a half-way-home for its inmates. Convicts also get better facilities including remission, home leave and pre-mature release benefits.

VI

Conclusion

The concept of prison in modern days is visualized as based on reformatory jurisprudence. As often stated, the prison system is no more "dark cells" where individual life is made miserable and convict faces inhuman degrading treatment. A person in prison does not cease to be a human being and lose all human rights; it is the duty of the state to take care of their justifiable needs and requests. The idea of prisoner reform is inclusive approach towards more dignified criminal justice system, in which prisoners are counted as individual humans whose basic human rights are kept intact. They are treated as a patient in the system, and all steps are taken to ensure that, after serving the prison sentence, they should join the society as reformed individuals. There is a need to identify problems of prison system and to dehumanize prison environment. General developments are under way to reduce the difficulties of status passage for the released inmates. The isolation of prisons from the outside world is being reduced and correctional institutions are being reoriented toward preparation of the inmate for re-entry into the free community.

SURROGACY (REGULATION) BILL, 2016 AND HOMOSEXUAL PARENTING

*Harleen Kaur**

Abstract

While Assisted Reproductive Technology presents a possible option for the infertile heterosexual couples, it is generally the only option available for gay couples and single parents wanting to reproduce or choosing to raise children who are genetically related to them. Recently the Union Cabinet has approved the Surrogacy (Regulation) Bill 2016, permitting altruistic surrogacy in the country and at the same time imposing a blanket ban on commercial surrogacy with a view to prevent the exploitation of intending surrogate mothers. It also bars single men, women, heterosexual couples who choose not to opt for marriage, gay couples, queer women and transgender persons thereby reflecting discriminatory attitude towards non-heteronormative relationships. The Bill in its current form makes one think whether the Lesbian, Gay, Bisexual and Transgender (LGBT) should be allowed to rear a family through Surrogacy and whether homosexual parenting is having any negative impact on the development and psychological well being of the child. Is it not the right to procreate and raise a family through ART's vested with everybody regardless of one's sexual orientation or marital status? Does the new surrogacy law fail in balancing regulations and rights by keeping unmarried people and LGBT community out of the purview of this bill? This article is an attempt to analyze the rights of homosexuals/ the lesbian, gay, bisexual and transgender (LGBT) to rear a family through surrogacy, the most socially controversial assisted reproductive technology, while exploring the treatment meted out to homosexuals under different legal systems in comparison with India where homosexuality was and still continues to be a punishable offence as homosexuals in India have to battle out for every such right in comparisons to various other countries in the light of section 377 of the Indian Penal Code, 1860. This paper thereafter, proceeds to discuss and analyze their position under the Surrogacy (Regulation) Bill, 2016.

I

Introduction

During the last two decades, the advancement in science and technology

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has not only enabled mankind to restrict and control birth rate by the use of contraceptives; but has also enabled childless couples to become parents through artificial insemination, i.e. transmission of male seeds into the female body artificially through a syringe,[1] making it possible to procreate without the necessity of heterosexual copulation. Any procedure or method designed to enhance fertility or to compensate for infertility outside the traditional means of procreation can be labeled as assisted reproductive technology. Various techniques such as artificial insemination (AI), in-vitro fertilization (IVF), cryopreservation, egg and sperm donation and surrogacy fall within its domain.[2] It must be noted that the development of these technologies, was a direct medical response to the problems of infertility. While ART represents one possible option for the infertile heterosexual couples, it is generally the only option for gay couples and single parents seeking to reproduce a child genetically related to them.[3] The media continually reports stories of biological miracles like women past menopause having children, infertile men becoming fathers and homosexuals having babies.[4] However, at the same time the success of these technologies has brought with it, about a plethora of vexing and controversial legal questions to which answers are not readily available. At every turn, they generate questions and serious debates about the nature and meaning of the family, the welfare of the children, the treatment of women, the moral status of embryos, the sanctity of natural procreation, the legitimacy of reproductive rights, nexus between marriage and parenthood and whether these techniques can be made available to gay and lesbian couples, transgenders desirous of having a child. The answers to these questions raise controversial questions to the fundamental nature of the issue of procreative liberty. Abridging one's procreative choices on grounds of marriage or sexual preference may seem discriminatory.

However in case of failure to conceive through any of ARTs, childless couples may prefer surrogacy which may be described as the most complicated and socially controversial ART. It has been a burning topic for a long time now as various moral, legal and ethical issues are involved in the process. Strictly speaking, surrogacy is not a technique but an arrangement and is loosely included under the umbrella of ART's. The report of the Committee of Inquiry into Human

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1 Andre P Rose, "Reproductive Misconception: why Cloning is not just another Assisted Reproductive Technology", 48 *Duke LJ*, 1133-1156, 1999.

2 Samson O. Koyonda: "Assisted Reproductive Technologies in Nigeria: Placing the Law above Medical Technology" 43 *JILI*, 67, 2001.

3 Catherine De Lair, "Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women"4 *DePaul J.Health Care L.*, 147, 2000.

4 Ruth Deech, "Human Fertilization: Meeting the Challenges"2 *Inter Alia*, 23, 1996-1998.

Fertilization and Embryology[5] defines surrogacy as a practice whereby one woman carries child for another with the intention that the child should be handed over after birth. Surrogacy has provoked the most intense opposition and the great public hostility, due to its visible splitting of motherhood into genetic, gestational and social components and the uncertainty about balancing the rights and interest of the surrogate mother, intended parents and the newborns. Recently the Union Cabinet approved the Surrogacy (Regulation) Bill 2016, permitting altruistic surrogacy in the country and imposing a blanket ban on commercial surrogacy with a view to prevent the exploitation of intending surrogate mothers and children born through surrogacy. However, the bill permits altruistic surrogacy only for a family founded on conventional heterosexual marriage. Consequentially, such arrangement for heterosexual couples who choose not to opt for marriage or are live-in partners, homosexuals, single parents, gay couples, queer women and transgender persons is outlawed. This reflects a discriminatory attitude towards non- heteronormative relationships,[6] thereby widening the scope of this law being challenged for the violation of Articles 14 and 21 of the Constitution of India, 1950, which guarantees equality before the law and equal protection of laws to all persons and the right to life & personal liberty respectively. Article 21 of the Constitution has been held to be the cornerstone and heart of all fundamental rights as well as a spring of countless rights[7]. It recognizes the 'right to procreation' to be implicit in the right to privacy which in turn is embedded in Article 21.

This paper will focus majorly on the right of homosexuals to rear a family through surrogacy by exploring the treatment meted out to homosexuals under different legal systems while analyzing homosexual laws prevalent in various countries in comparison with India where homosexuality was and still continues to be a punishable offence and Indian homosexuals still have to battle out for every such right in comparisons to various other countries in the light of section 377 of the Indian Penal Code, 1860 which makes homosexual behavior punishable. This paper thereafter, proceeds to elaborately discuss and analyze the position of homosexuals under the Surrogacy Regulation Bill, 2016

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[5] Alsoknownas Warnock Report, 1984, available at: http://www.hfea.gov.uk/docs/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertili sation_and_Embryology_1984.pdf (Last visited on July. 23, 2015).

[6] Available at: http://www.livemint.com/Opinion/Ie8H1Cp09ZjEeNPU5U wwyH/Surrogacy-bill-Modi-govt-sets-new-terms,html (last visited on July 23, 2015)

[7] *Unni Krishnan, J. P* v. *State of Andhra Pradesh* (1993) 1 SCC 645.

II

Homosexual Laws: A Global Analysis

The term 'homosexual' literally means "*same sex*" formed from the Greek prefix '*homo*' which means "*same*" and the Latin root 'sex' means "*sex*" or "*gender*." An alternative, more generic term referring to same sex love, hemophilia (same lover) is also in use.[8] In order to analyze the recognition of homosexuals globally, one needs to understand Article 2 of Universal Declaration of Human Right (UDHR), 1948 which *inter alia* provides as under.

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

This article emphasis, that every human is entitled to certain rights and fundamental freedoms from birth and the enjoyment of such rights and freedoms should not be abridged in any manner on grounds of sexual orientation. The acknowledgment of this freedom to all humans, regardless of their sexual preferences or orientations, dates back to 1948 and laws against homosexuality or any other form of discrimination based on sexual orientation stand in its violation. Other international instruments such as the International Covenant on Civil and Political Rights (ICCPR) also contain provisions prohibiting discrimination on grounds of sexual orientation. Article 26 of ICCPR prohibits discrimination "on any ground" and Article 17 of the Covenant provides that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence nor to unlawful attack on his honour and reputation." In the 1980's, the European Court of Human Right (ECHR) became the first international body to hold that the laws criminalizing consensual, private sexual activity between adults violated the right to privacy as protected by the Article 8 of ECHR. The jurisprudence relating to human rights of the homosexuals was established in a series of judicial pronouncement of this Court.[9] In the case of A.D.T. v. United Kingdom[10], the European Court of Human Rights held that the criminalization of sexual activities between men, when more than two men are present, also violated the right to privacy. The court laid that "interference with privacy is not necessary in a democratic society."

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[8] Subash Chandra Singh; "Decriminalizing sexual activity of the Same Sex", 108, *Cri LJ*, 23-27, 2002.

[9] *Dudgeon* v. *United Kingdom* (1981) 45 ECHR (ser A) 1; *Norris* v. *Ireland* (1988) 142 (ECHR) (Ser A) 1; *Modinos* v. *Cyprus* (1993) 259 ECHR (Ser A) 1.

[10] 35765/97 [2000] ECHR 402.

In the US, on account of the Supreme Court decision in *Obergefell* v. *Hodges*[11], all the States license and recognize marriage between same-sex couples. In the impugned case, the court, by a 5:4 majority, held that the fundamental right to marry is guaranteed to same-sex couples by the Due Process Clause as well as the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution[12] In July 2013, the U.K. parliament passed the Marriage (Same Sex Couples) Act, 2013, allowing same-sex marriage in England and Wales. This act came into force on March 13, 2014, and the first same-sex marriage took place on March 29, 2014. Further, the Marriage and Civil Partnership (Scotland) Act 2014, allowing same-sex marriage in Scotland, was passed by the Scottish Parliament in February 2014 and came into effect on 16 December 2014.[13] However, the Homosexual acts remain punishable by death in Afghanistan, Sweden, United Arab Emirates, Mauritania, Iran, Nigeria, Pakistan, Saudi Arabia, and Yemen and by life imprisonment in India, Bangladesh, Singapore, Uganda, Bhutan, Maldives, Nepal, and Guyana.[14] The Brazilian criminal law does not punish any consensual act performed by consenting adults. Under the Malaysian Penal Code (377 B), consensual homosexual acts are punishable by up to 20 years imprisonment and whipping. The law has been enforced in recent years, most notably in the case of *Public Prosecutor* v. *Dato' Seri Anwar Bin Ibrahi*m.[15]

Though the European countries share a clement approach towards homosexuality, in India, homosexual behavior is prosecuted severely under the penal provisions as 'unnatural offences'. This is for the simple reason that, marriage in India is considered not primarily a license to have sex or to have respective benefits, but a permit to have children and for the child born there from, there is an accepted mother and a father who are responsible to the child and to each other.[16] In fact, in India, religion plays very prominent role in shaping customs and traditions. The Hindu religious texts condemn premarital and extra marital sex. The teachings of Vedanta which emphasize to pursue of '*moksha*' allow only heterosexual sex between married couple for procreation. Homosexual conduct in India is criminalized under section 377 of the Indian Penal Code

[11] 83 U.S.L.W. 4592 (June 26, 2015).

[12] "Lesbian, Gay, Bisexual, and Transgender (LGBT) Rights in the United States" available at http://en.wikipedia.org/wiki/LGBT_rights_in_the_United_States (Last visited on July 23, 2015).

[13] "LGBT Rights in United Kingdom" available at: https://en.wikipedia.org/wiki/LGBT_rights_in_the_United_Kingdom (Last visited on May 16, 2016).

[14] "Sodomy Law–Wikipedia, the Free Encyclopedia", Available at: <http://www.en.wikipedia.org/wiki/sodomy_law> (Last visited on May 16, 2016).

[15] (2001) 3 M.L.J. 193.

[16] Blackenhorn David "Protecting marriage to protect children" available at: http://www.latimes.com/la-oe-blankenhorn19-2008sep19-story.html (Last visited on April 2, 2016).

(IPC),[17] which is wide enough to cover all cases of sexual perversion and applies to both homosexual and heterosexual behavior.

Despite increased visibility, and greater social acceptance in western countries, gays and lesbians are still considered to be deviants and criminals in India. However, in recent times due to greater demand for acceptance of tolerance and equality for lesbian, gay and bisexual people and the need to control HIV/AIDS, several NGOs have demanded a legislation or at least decriminalization of homosexuality in India. For the first time in India, in the above background, a petition[18] came to be filed by one Naz India Foundation Trust before the Hon'ble High Court of Delhi seeking to scrap of 148 years old law on the ground that the same was the British legacy and had no place in the modern liberal society at least between consenting adult in private. The petition sought a declaration that section 377, to the extent it criminalized sexual acts in private between consenting adults, should be scraped being violative of Article 14 (equality before law), Article 15 (Non-discrimination), Article 19 (1) (a) – (d) (freedom of speech, assembly, association and movement) and Article 21 (right to life and personal liberty) of the Constitution of India, 1950. The petition also sought private consensual relations to be protected under Article 21 of the Constitution of India. The arguments put forth by the petitioner (Naz India) were accepted by the high court vide its judgment dated 2nd July 2009 decriminalized consensual same sex sexual relations between adults holding that the criminalization was contrary to the right to life and personal liberty and equality before law, as enshrined in the Constitution of India, 1950. The court, while reaching this decision, laid great emphasis on various judgments and relied upon comparative law of various jurisdictions including European Court of Human Rights, United Kingdom, Republic of Ireland, South Africa and the United State of America. The high court also sketched out the broadened extent of the right to life and liberty, which incorporates right to protection of one's dignity, autonomy and privacy. Finally, the court declared that, "*Section 377 IPC, insofar it criminalizes consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution. The provisions of Section 377 IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. and this clarification will hold till, of course, Parliament chooses to amend the law to effectuate the recommendation of the Law Commission of India in its 172nd Report.*"[19]

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[17] Indian Penal Code, 1860, Section 377–"*Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine*"

[18] *Naz Foundation* v. *Government of NCT*, 2010 Cri. LJ 94.

[19] *Id.* at para. 132 .

Vide this judgment; the high court gave priority to fundamental rights over and above morality, emotions and pressure. The judgment of the high court was delivered especially keeping in mind the ridicule and social pressures which lesbian, gay, bisexual, and transgender (LGBT's) were forced to bear. Therefore, the landmark judgment of the High Court displayed the progressive thinking emerging in our society that all human beings irrespective of their sexual preferences have a right to lead to a dignified life without being subjected to any kind of discrimination from any quarter. The court has recognized that pluralist societies rarely have permanent majorities or minorities. The constitution stands for the principle of minority protection. Whoever, they might happen to be.

Unfortunately, however, the matter went in appeal before the Supreme Court of India titled *Suresh Kumar Koushal* v. *NAZ Foundation*[20] and the court held that section 377 is not violative of Articles 14, 15 and 21 of the Constitution. Justice Singhvi also held that section 377 is a pre-constitutional legislation and if it were violative of any of the rights guaranteed under Part III, then the Parliament would have noticed the same and repealed the section long back. Based on this reasoning, it was held that section 377 was constitutionally valid. The Bench also held that the doctrine of severability and the practice of reading down a particular section flows from the presumption of constitutionality and that in the said case, the Delhi high court's decision to read down the section was wrong because there is no part of the section that can be severed without affecting the section as a whole and which also happens to be the only law governing cases of paedophilia and sexual abuses and assaults. Thus, Supreme Court held that Section 377 of the Indian Penal Code did not suffer from any constitutional infirmity and left the matter to legislature to consider the desirability and legitimacy of deleting the section from the statute book or altering the same to allow consensual sexual activity between two adults of the same sex in private. The Supreme Court, by this judgment put the LGBT's community back into the closet and left it to the sweet will of the parliament to consider whether an amendment to Section 377 of the IPC is at all required or not and thereby took India several years back in its commitment to protect basic rights to privacy and non-discrimination. It caused a setback to human dignity and appeared as an example of regressive thinking.

[20] (2014) 1 SCC 1.

III

Homosexuals and their Right to Parenting

Internationally, under Israeli law, a homosexual man cannot get a woman in Israel to act as a surrogate mother for him, and give birth to a baby using his sperm and a donated egg. However, if a person of homo sexual orientation succeeds in creating a child abroad, using his sperm, a donated egg and a surrogate mother in a country where it is legally permissible and obtains a birth certificate of that nation which shows him as the registered father, he gains recognition as a biological parent under Israeli law. In U.K., in the year 2010, an amendment was carried out in the Human Fertilization and Embryology Act 2008, which aimed at helping same sex and unmarried couples seeking to have surrogate children and inter alia allowed them to secure legal parenthood. In U.S.A., the laws vary from state to state. A number of states allow gay men to access surrogacy and provide legal recognition & protection. Costs too vary significantly from state to state. The state of California provides one of the most favorable legal climates for surrogacy and egg donation arrangements for same sex couples including placement of the names of both the partners or a single male/female parent on the birth certificate thereby preventing the need for 2nd parent adoption. In Canada, only altruistic surrogacy is permissible. In most of Mexico, surrogacy continues to be unregulated and is open to gay singles/couples. In Thailand, unregulated commercial surrogacy was available to gay couples/singles until August, 2014. In response to the Baby Gammy incident in the year 2014[21], when Thai surrogate Pattaramon Chanbua alleged that the West Australian couple Wendy and David Farnell had abandoned Gammy Farnell, a twin boy after they discovered that the child was suffering from 'Down Syndrome' and returned to Western Australia with his healthy twin sister, Pipah; Thailand w.e.f. July 30, 2015, banned foreign people travelling to Thailand, to have commercial surrogacy contract arrangements, under the Protection of Children Born from Assisted Reproductive Technologies Act and now only hetrosexual married couples who are residents of Thailand are allowed to have a commercial surrogacy contract arrangements. Nepal is the newest entrant to International Surrogacy. Presently, while there are no laws which regulate the surrogacy aspect, there is no bar/prohibition to enter into a surrogacy agreement nor is there any legal objection which has been made against it. The Nepalese government is still finalizing its surrogacy laws and the word is that these laws will allow gay fathers to be registered on the Nepalese birth certificate. With the closure of commercial arrangements in Thailand, and ban on seeking

[21] Available at: https://scienceandsociety.duke.edu/baby-gammy-surrogacy-and-safeguards. (last visited on July 21, 2015).

surrogacy by foreigner singles and gay couples, via the new visa guidelines issued by the Indian Ministry of Home Affairs on July 9, 2012 Nepal looks set to grow rapidly, taking advantage of near-at-hand Indian expertise and availability of surrogates and donors. Gay intended dads from the United Kingdom and Australia are already beginning their journeys to seek parenthood there. In countries such as India, Ukraine, Georgia, Russia and Thailand, Commercial Surrogacy is unregulated and is available only to heterosexual married couples. Like Russia, Ukraine's culture remains intolerant to same-sex or single parents. While gestational surrogacy contracts are legal, the country will only allow surrogacy for heterosexual married couples. Gay surrogacy is absolutely illegal in the Ukraine. Similarly Republic of Georgia allows surrogacy contracts, but only for married heterosexual couples

In India, under the draft ART Bill of 2008 and 2010 the Indian same-sex couples were not been given any right to access surrogacy since homosexual marriages or relationships are not legal in India. However, gays presenting themselves as singles still had the option to enter the surrogacy arrangements whereas, the homosexuals from the other countries where homosexual marriages or relationships were legal can avail surrogacy in India. While the draft Bill 2010 was awaiting nod by the Parliament, the Ministry of Home Affairs (MHA) issued new visa regulations for people coming to India seeking surrogacy in 2012. These regulations declared medical surrogacy visa as an appropriate visa category for intended parents to be granted subject to certain conditions such as "*The foreign man and woman intending to commission surrogacy should be duly married and the marriage should have sustained for at least two years and a letter from the embassy of the foreign country in India or the Foreign Ministry of the country should be enclosed with the visa application stating clearly that the country recognizes surrogacy and 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. The couple will have to furnish an undertaking that they would take care of the child/ children born through surrogacy, (and) the treatment should be done only at one of the registered Assisted Reproductive Treatment (ART) clinics recognized by Indian Council of Medical Research*".[22]

Pursuant to these guidelines, foreigners who were gay, single, have live-in partners or have been married for less than two years were no longer be able to

[22] See Guidelines Regarding Foreign National Intending to Visit India for Commissioning Surrogacy', available at: http://www.indianembassy.ru/index.php/en/133-consular-services/975-guidelines-regarding-foreign-nationals-intending-to-visit-india-for-commissioning-surrogacy (Last visited on July 20, 2015).

employ a surrogate in India to experience parenthood. On September 30, 2015 the Ministry of Health and Family Welfare (MOHFW), through its Department of Health Research (DHR), published the Assisted Reproductive Technology (Regulation) Bill, 2014 which too defined "commissioning couple" as infertile married couple [23] and the term, "couple" was defined as "a relationship between a male person and female person who live together in a shared household through a relationship in the nature of marriage which is legal in India".[24] From these definitions again one could draw the conclusion that a gay couple fall short of the requirements of being a *"couple"* for the purpose of this Bill.

Then the Ministry of Health and Family Welfare vide letter dated 4.11.2015, conveyed its policy decision to prohibit commercial surrogacy till the enactment of the legislation and has issued certain instructions such as prohibition on import of 'human embryo' except for research purposes; and restrictions on issuance of visa to foreign nationals and permissions to OCI visiting India for commissioning surrogacy etc to be followed mandatorily, till the enactment of the legislation. [25]

The Union Cabinet has recently approved the Surrogacy (Regulation) Bill 2016 which outlaws such arrangement for heterosexual couples who choose not to opt for marriage or are live-in partners, homosexuals, single parents and transgenders.

IV

Surrogacy (Regulation) Bill 2016 and Homosexual Parenting

The Surrogacy (Regulation) Bill, 2016 defines the term "couple under sec 2(g) as *"the legally married Indian man and woman above the age of 21 years and 18 years respectively"* and defines the term 'intended couple' under section 2(r) as "intending couple" *means a couple who have been medically certified to be an infertile couple and who intend to become parents through surrogacy"*. This places same sex couples in a disadvantageous position when compared with heterosexual couples thereby discriminating against homosexuals and raising certain questions such as whether homosexuals should be allowed to rear a family through surrogacy; whether homosexual parenting is having any negative impact on the development and psychological well being of the child; o homosexual couples really have the potential to add to the problems of

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[23] ART Bill, 2014, S.2(h).

[24] *Id,* S.2(p).

[25] Available at: http://www.dhr.gov.in/latest%20Govt.% 0instructions%20on%20ART%20 Surrogacy%20Bill.pdf (Last visited November 7, 2015).

the surrogate child and; what does section 377, which criminalizes certain forms of sexual intercourse and by inference, the Lesbian, Gay, Bisexual and Transgender (LGBT) population, have to do with surrogacy—a practice devoid of the sexual act? Since the bill privileges only one kind of family based on the conventional heterosexual marriage[26] to the exclusion of heterosexual couples who choose not to opt for marriage or live-in partners, homosexuals, single parents and transgender persons, it is clear instance of discrimination against these minorities and violates Article 14 of the Indian Constitution, which guarantees "*equality before the law and equal protection of laws to all persons*." Restricting altruistic surrogacy to only married Indian couples and disqualifying others on the grounds of marital status and sexuality infringes upon the right to equality for being an unreasonable classification. Further, every citizen is guaranteed the right to life & personal liberty vide Article 21 of the Indian Constitution and which has been held to be the cornerstone and heart of all fundamental rights as well as a spring of countless rights today.[27] Among the plethora of rights guaranteed under Article 21 of the Constitution, it was only in the case of *Kharak Singh* v. *State of Uttar Pradesh*[28] that the court in its dissenting opinion held that "*the right to privacy is also an essential ingredient of the right to personal liberty*". Then, in the case of *R. Rajagopal* v. *State of Tamil Nadu,*[29] the court held that right to privacy is implicit in Article 21.

In *B.K. Parthasarathi's*[30] case, the high court of Andhra Pradesh recognized the right to procreation to be implicit in the right to privacy by following the judgment of the Supreme Court of U.S.A. in the case of *Roe* v. *Wade*[31] wherein it was held "*that a citizen has the right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters*" and another case *Skinner* v. *Oklahoma*[32] which characterised *"the right to reproduce as one of the basic civil rights of man"*. The Andhra Pradesh High Court held *"the personal decision of the individual about the birth and babies called 'the right of reproductive autonomy' is a facet of a 'right of privacy."* With the accord of right to privacy procreation, it becomes the obligation of the state of offer protection to its citizens while exercising such rights. To put it simply, the state should not put unreasonable restrictions on the manner in which a citizen may choose to

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[26] Surrogacy (Regulation) Bill,2016, Clause 4 (ii)and Clause 4 (iii)(c).
[27] *Unni Krishnan,J.P* v. *State of Andhra Pradesh* (1993) 1 SCC 645.
[28] AIR 1963 SC 1295.
[29] AIR 1995 SC 264.
[30] *B.K. Parthasarathi* v. *State of Andhra Pradesh*, AIR 2000 AP 156.
[31] 410 U.S. 113.
[32] 316 U.S. 535 (1941).

exercise this right i.e. whether through natural means or with the aid of ART.[33] Thus, surrogacy, though an assisted one, is a method of procreation which stands sheltered under the umbrella provision of Article 21 of the Constitution of India and the parties to surrogacy agreements have a constitutional right to reproductive privacy. Any encroachment upon such right would amount to violation of Article 21 of the Constitution as well infringement of the "right to found a family" enshrined in Article 16 of the Universal Declaration of Human Rights. The Surrogacy Bill 2016 in its current form appears to be a clear reflection of homophobia, discrimination against non- heteronormative relationships and majoritarian enforcement of cultural norms. In fact, this non-acceptance of non-heteronormative relationships can also be read in the backdrop of the criminalisation of homosexuality in India where sex between consenting homosexual partners is once again declared illegal after judgement in *Suresh Kumar Kaushal* v. *NAZ Foundation*.[34] Consequently, lesbians and gays won't be allowed to use ART. However, once India makes this relationship permissible, only than lesbian and gays can also go for surrogacy.

V

Conclusion

The society in which we dwell is ever changing and ever evolving. However, the legislative enactments, having been in existence for more than 100 years now, need to evolve in a manner, which would apply regardless of sexual preferences or marital status. The barriers preventing access to modern reproductive technologies such as surrogacy should be removed by amending the Surrogacy (Regulation) Bill, 2016 in order to allow homosexual parenthood and, for this reason, the attainment of 'full personhood' as was contemplated in the case of *Naz India Foundation Trust*. It is very unfortunate that a country like India, which has fulfilled the dreams of so many foreigners, looks down upon their own citizens for a reason as personal as their sexual preferences. On the contrary, in the case of *Baby Manji Yamada* v. *Union of India*[35] the Supreme Court of India after discussing various forms of surrogacy arrangements was pleased to hold as hereunder: "*Alternatively, the intended parent may be a single male or a male homosexual couples.*" An amendment therefore, is proposed in the Indian Penal Code to decriminalize at least the homosexual acts freely entered into by consenting adult parties. This would provide equal opportunity to same sex couples enabling them to move ahead in life to bring up

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[33] *Elkapalli Latchaiah* v. *Government of Andhra Pradesh*, 2001 (5) ALT 410.

[34] *Supra* note 20.

[35] AIR (2008) 13 SCC 518.

their family at par with heterosexual couples. It is important to understand that the right to have a child is guaranteed to everybody vide Article 21 of the Constitution of India. The law of the land that prohibits discrimination on the basis of sex cannot discriminate on the basis of sexual preferences. Since, it is due to the sexual preferences that these people cannot have their own child; the law should assist them and not act as an obstacle in allowing such persons to experience parenthood. In fact, the right to life and personal liberty inter alia the right to privacy is so crucial to a human that the law does not permit infringement of the same unless there are compelling reasons threatening the interest of the state. Homosexual consensual acts between two adults in private clearly do not constitute a threat to the interest of the state as there is no possibility of harm to others. No other ground may suffice in justifying infringement. On examining the legal principles and in light of global trends recognizing the importance of decriminalization of homosexuality, it is evident that there is a need for incorporation of the recommendation in the 172nd Report[36] of the law commission of India to clearly set out the position of the homosexuals in India. Even at the International level, the right to privacy has been recognized in favor of lesbians and gay. Further, the Studies conducted worldwide have shown that the development and psychological well-being of children is unrelated to their parent's sexual orientation and the children of homosexual parents are equally likely to flourish.[37] A child needs love, care, guidance and support and there is no support in the notion that children are ideally raised by "*a*" mother and "*a*" father.

Recently the Supreme Court of India in *National Legal Service Authority* v. *Union of India*[38] also widened the horizons to prevent discrimination on grounds of sex or gender identity by recognizing transgender as the third gender.

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[36] 172nd Report of the Law Commission of India recommended deletion of Section 377 and insertion of a new Section 377 as under - *"S.377. Any adult person who has sexual intercourse with another adult person against the will and without the consent of the other adult person shall be punishable by imprisonment of either description up to seven years and with fine.*

Explanation 1:Penetration is necessary to constitute an offence under this section

Explanation 2: Penetration of the anus or mouth by the penis or penetration by an object or part of the body into the anus or vagina is necessary to constitute the sexual intercourse necessary for the offence described in this section.

Explanation 3: No consent is obtained for the purpose of the above section if it has been obtained by coercion or under undue influence or if the person giving the consent suffers from intoxication or unsoundness of mind or mistake as to the identity of the offender."

[37] E.C. Perrin & Committee On Psychological Aspects of Child & Family Health, "Technical Report: Co parent or Second-Parent Adoption by Same-Sex Parents" 109, *PEDIATRICS*, 341, 2002.

[38] (2014) 5 SCC 438.

The court held, "*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.*" It follows, that a transgender would be entitled to adoption, succession, inheritance and other privileges under law. This pronouncement initiates a new thinking process, which is based on International Covenants dealing with Human Rights. In this view, our thinking should not be traditional simply owing to large number of issues accompanying surrogacy. There is a need to have such a surrogacy law which is receptive to non heteronormative relationships, recognizing that the right to pro create and raise a family through ART's is vested with individuals regardless of their sexual orientation or marital status and, therefore, the exercise of such right should not be made restricted to some only.

THE GUILTY, THE INNOCENT AND THE TELEVISED TRIALS: IS A FAIR TRIAL STILL POSSIBLE?

*Neha Gupta**

Abstract

Freedom of press, like any other vital liberty, is one of the grand themes of human history. Till 1990s, media was largely owned by the government. 1990s was the era of liberalisation, privatisation and globalisation which largely changed the scene of Indian Media. It brought with it a flood of news channels and newspapers which were largely owned by private players. "Trial by media" made famous or infamous by the Simpson's case became an equally debated concept in India. Crime reporting by media has been an important medium to bring out in open various crimes happening in different parts of the country. Also, the positive role of media in the cases of Jessica Lal murder case, Nitish Katara murder case, Nirbhaya case etc., cannot be overlooked. However, the media is often found guilty of victimising the suspects and frequently jumping to conclusions about the guilt or innocence long before the jury returns its verdict, thereby creating a bias against them.

This paper addresses the long drawn conflict between pre-trial reporting by media and the rights of accused to presumption of innocence and fair trial. The paper re-examines various cases on the subject and looks upon the impact on the investigation, court proceedings, convictions /acquittals and traces the pattern of reporting by media in the cases of rape, murder and child abuse. It would also explore the available remedies within the legal system and the options for change. Furthermore, the paper emphasises on the need of a regularity regime which would provide guidelines for crime reporting by media.

I

Introduction

"The media is the most powerful entity on earth. They have the power to make the innocent guilty and to make the guilty innocent, and that's power; because they control the minds of the masses".

Malcom X

* Research Scholar, Faculty of Law, University of Delhi.

Man is a communicative being. Through his language and symbolic conduct, he makes himself comprehensible to others and constructs the world around him. This, perhaps, is the reason why the freedom of speech and expression is given a higher rank in the basic human rights list.[1] International and regional human rights conventions,[2] ratified by most nations, are committed to guaranteeing free speech and expression to all. Like most of the contemporary liberal democracies, the Constitution of India also seeks to secure to all its citizens, the liberty of thought, expression, belief, faith and worship. The Supreme Court acknowledges the freedom of speech and expression to be the mother of all freedoms and identifies it as the natural right inherent in the status of a citizen.[3]

In India, the right to freedom of speech and expression is contained in Article 19(1) (a) of the Constitution. This Constitutional guarantee, however, is not an absolute guarantee and is subject to the reasonable restrictions in the interests of the sovereignty and integrity of India; the security of the State; friendly relations with foreign States; public order, decency, or morality; or in relation to contempt of court, defamation or incitement to an offence.[4] Any free speech guarantee would be meaningless without the freedom of press. Media, popularly known as the fourth estate of democracy is a powerful medium of dissemination of ideas, expressing public opinion and bringing to light government policies, key political events etc. to the people. Due to its reach and influence on the masses, media plays an important role in shaping the socio-economic and political setup of a country as well as shaping the human mind.

In the last few decades, the face of media has undergone tremendous change. Till 1990s, media was largely owned by the government and a few privately owned newspapers. 1990s was the era of liberalisation, privatization and globalisation. Soon, the Indian media was flooded with a number of new channels and newspapers both national and international, largely owned by private players- the corporate houses, businessmen and the politicians. According to the data furnished by the Ministry of Information Technology, as on 31.12.2012, there are about 93,985 registered publications, 850 permitted television channels out of which 413 fall under news and current affairs category and 437 under non-news category. Doordarshan runs 37 channels. In addition to this, there are

1 Gautam Bhatia, *Offend, Shock or Disturb: Free Speech under the Indian Constitution*, 2016.

2 Art. 19, Universal Declaration of Human Rights, 1948 provides for freedom of opinion and expression. It reads: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any medium and regardless of frontiers.

3 *State of W.B.* v. *Subodh Gopal Bose,* AIR 1954 SC 92, 95.

4 Art. 19, Constitution of India, 1950.

about 250 FM channels and a number of internet websites.[5] In India, only twenty percent of the Indians have access to internet and as less as five percent have broadband subscription. So the majority of population still depends on the print and electronic media for news and information.[6]

One of the important functions of the media is to present news to the people, of which crime reporting is a part. News, according to the Press Council of India, is meant to be factual, neutral, fair and objective.[7] However, with the expansion of print, electronic and social media, and the increasing popularity of 24*7 news, it is often alleged that real news is lost amidst World Wide Web and "yellow journalism" focussing more on sensational and frivolous news. The media is also accused of donning the hat of an investigator and a judge jumping to conclusions regarding the guilt or innocence of the accused, a concept popularly termed as 'trial by media' or 'media trial'. The present paper is an attempt to understand the concept, genesis, reasons of media trial and suggest solutions to curb this menace.

II

Legislative History

The need of free speech was felt as far back in 1895, when in the Constitution of India Bill, also known as the Swaraj Bill the demand for constitutional guarantees of human rights was raised. This bill sought amongst other freedoms, the freedom of press for every citizen. Freedom of press also finds mention as one of the demands made in the Mrs. Annie Besant's Commonwealth of India Bill, which was finalised by the National Convention of Political Parties in 1925, on the recommendations of the Motilal Nehru Committee in 1928, the 1932 Karachi Resolution of the Indian National Congress, and the Constitutional Proposals of the Sapru committee, 1945.[8]

The founding fathers of the Constitution of India, also affixed great importance to the freedom of speech and expression and the freedom of press. Marred by the oppressive British regime, they affirmatively believed that freedom of expression and that of the press were imperative to the proper functioning of a

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5 Standing Committee on Information Technology Report, 47th Report, *Issues Related to Paid News*, 2012-13.

6 Telecom Regulatory Authority of India, *Recommendations on Issues Related to Media Ownership*, 2014.

7 *Supra* note 5.

8 Soli J. Sorabjee, "Constitution, Courts, and Freedom of the Press and the Media" in B.N. Kripal, Ashok H. Desai *et. al.* (eds.), *Supreme but Not Infallible: Essays in Honour of Supreme Court of India* 334, 2000.

democratic republic. Reiterating the importance of free press, Jawaharlal Nehru said, "I would rather have a completely free press with all the dangers involved in the wrong use of that freedom than a suppressed or regulated press".[9]

The liberty of thought and expression was given practical shape through Article 19(1) (a)[10] which does not explicitly mention freedom of press. Some of the members of the Constituent Assembly objected to this omission. For instance, Professor K.T. Shah, moved an amendment and advocated the inclusion of freedom of press as a separate fundamental right. He inveighed:

"The freedom of the press, as is very well known, is one of the items round which the greatest, the bitterest of constitutional struggles have been waged in all constitutions and in all countries where liberal constitutions prevail.... To omit it altogether, I repeat, and I repeat with all the earnestness that I can command, would be a great blemish".[11]

To this, the chairman of drafting committee, Dr. Ambedkar, replied, "the press has no special rights which are not to be given or which are not to be exercised by the citizen in his individual capacity. The editors of press or the manager are all citizens and therefore, when they choose to write in newspapers, they are merely exercising their right of expression, and in my judgement therefore, no special mention is necessary of the freedom of the press at all".[12] The Supreme Court of India has also reiterated this view in its series of decisions.[13] The freedom, however, is not an absolute freedom and is subject to reasonable restrictions enumerated in clause (2) of Article 19.[14]

III

Trial by Media

The media as a reporter of crime has an important role in the criminal justice system. As Justice Brennan of U.S. Supreme Court observed,

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[9] Jawaharlal Nehru's speech on June 20, 1916 in protest against the Press Act, 1910.

[10] *Supra* note 4, Art. 19(1) (a): All citizens shall have the right to freedom of speech and expression.

[11] *Constituent Assembly Debates*, Vol. VII, p. 714-16.

[12] *Ibid.* at p. 780.

[13] See, *Brij Bhushan* v. *State of Delhi* AIR 1950 SC 129; *Express Newspapers Ltd.* v. *Union of India* AIR 1958 SC 578; *Sakal Papers* v. *Union of India* AIR 1962 SC 305; *Bennett Colemon Co.* v. *Union of India* AIR 1973 SC 106.

[14] *Supra* note 4, Art. 19(2) : Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

"... Commentary and reporting on the criminal justice system is pivotal for the operation and integrity of the system. Secrecy of judicial action can only breed ignorance and distrusts of the Court and suspicion concerning the competence and impartiality of judges. Free and robust reporting, criticism and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability".[15]

Trial by media refers to 'the impact of television and newspaper coverage on a person's reputation by creating a widespread perception of guilt regardless of any verdict in the court of law'.[16] This definition does not debate that even publication of true information may constitute trial by media. This presumption of guilt even when the matter is sub-judice contradicts the basic principle of fair trial, i.e. 'presumption of innocence until proven guilty' and 'proven beyond reasonable doubt'. In the case of *State of Maharashtra* v *Rajendrajawanmal Gandhi,*[17] the Apex Court held that trial by media is the very antithesis of rule of law and can lead to miscarriage of justice.

Trial by media in many cases is closely associated with the concept of paid news. The media houses in order to earn more profit succumb to the power, money and pressure of the mighty. President Pranab Mukherjee also criticised this growing trend and remarked,

"It is distressing to note that some publications have resorted to 'Paid News' and other such strategies to drive their revenues. There is need for self-correcting mechanisms to check such aberrations. The temptation to 'dumb down' news should also be resisted. The nation faces critical challenges that go well beyond the pressures of 'Breaking News' and immediate headlines.... It is your responsibility and bounden duty to ensure that ideas are debated dispassionately and thoughts articulated without fear or favour so that the opinion is always well informed.... Sensationalism should never become a substitute for objective assessment and truthful reporting. Gossip and speculation should not replace hard facts. Every effort should be made to ensure that political or commercial interests are not passed off as legitimate and independent opinion."[18]

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[15] *Nebraska Press Association* v. *Stuart,* 427 U.S. 539 (1976).
[16] *R.K. Anand* v. *Registrar, Delhi High Court* 8 SCC 106 (2009).
[17] 1997 (8) SCC 386.
[18] Inaugural address at the Biennial Session of National Union of Journalists at Hathras on June 15, 2013.

IV

Legality of Media Trial

(i) Freedom of Press

Article 19 of International Covenant on Civil and Political Rights, Article 19 of Universal Declaration of Human Rights and Article 19 of Constitution of India, provide for the freedom of press with reasonable restrictions.

(ii) Immunity Under the Contempt of Court Act, 1971

Section 3(2) of the Contempt of Court Act, 1971 grants full immunity to publications even if they prejudicially interfere with the course of justice in a criminal case, if by the date of publication a charge sheet or challan is not filed or summon or warrant is not issued. Such publications amount to contempt only when a criminal proceeding is actually pending.

(iii) Public's Right to Know

The Supreme Court of India, in a series of decisions has held that the underlying rationale behind the freedom of press is the people's right to know.[19] In the *Bofors Case*, for instance, the Supreme Court recounted the merits of media publicity when it observed, "those who know about the incident may come forward with information, it prevents perjury by placing witnesses under public gaze and it reduces crime through the public expression of disapproval for crime and last but not the least it promotes the public discussion of important issues."[20]

(iv) Ineffective Legal Norms Governing Journalistic Conduct

Press Council Act, 1978 empowers the Press Council only to warn, admonish or censure newspapers or news agencies while it has no jurisdiction over the electronic media. The Council does not have any punitive power and only enjoys declaratory adjudication.[21]

The Working Journalists and other Newspaper Employees (Conditions of Service) And Miscellaneous Provisions Act, 1955 which provided job surety to journalists is almost not in practice anymore. At present, the reporters work on

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[19] *A.G.* v. *Times Newspaper,* 3 All ER 54 (1973); *Express Publications (Madurai) Ltd.* v. *Union of India*, AIR 2004 SC (1950).

[20] Navajyoti Samanta, "Trial by Media-Jessica Lall Case", Available at: http://ssrn.com/abstract=1003644. (Last visited on July 12, 2016).

[21] Zehra Khan, "Trial by Media: Derailing Judicial Process in India" 95 *Media Law Review*, Vol.1 (2010).

a contractual basis and due to insecurity of job they do not work in a neutral way and often succumb to the wish of the editor.

V

Media Reporting of Sexual Offences

Sexual offences are considered to be the gravest and most heinous crimes after murder and involve personal and intimate details of the parties involved in the crime. Acknowledging the sensitivity of such cases, the Code of Criminal Procedure, 1973 under section 327(2) provides for in-camera trial as an exception to the general rule of open court trials contained in section 327 (1). Under clause (3) of the above mentioned section, the Code also prohibits any person from publishing or printing any material related to such proceedings without taking a prior permission from the court.[22]

Media has largely been responsible in ensuring justice for the victim in the case of *Priyadarshini Mattoo* murder case[23], where the rich and powerful accused first raped and then brutally murdered his victim. The accused was acquitted by the trial court. This caught media attention and media highlighted the case through extensive coverage and brought into fore the loopholes in the case. The Supreme Court reversed the judgement of lower courts and convicted the accused.

At the same time, there are a large number of cases where the media has,

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[22] S. 327, Criminal Procedure Code, 1973: Court to be open.
(1)The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open Court, to which the public generally may have access, so far as the same can conveniently contain them: Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.
(2)Notwithstanding anything contained in sub- section (1), the inquiry into and trial of rape or an offence under section 376, section 376A, section 376B, section 376C, section 376D or section 376E of the Indian Penal Code shall be conducted in camera: Provided that the presiding judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the court. provided further that the *in camera* trial shall be conducted as far as possible by a woman Judge or Magistrate.
(3)Where any proceedings are held under sub- section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the court. Provided that the ban on printing or publication of trial proceedings in relation to an offence of rape may be lifted, subject to maintain confidentiality of name and address of the parties.

[23] *Santosh Kumar Singh* v *State through CBI*, (2010) 9 SCC 747.

perhaps to earn more TRPs, insensitively and in a great haste published news related to sexual offences paying little attention to the sensitivity and the grave consequences that follow such publications. For instance, the case of *Khurshid Anwar,* a social worker and director of an NGO, committed suicide by jumping from his apartment, after a hindi news channel aired an interview with a girl who alleged charges of rape on him.[24] The channel went on to use the phrases like *"India TV ladega iss ladki ko insaaf dilaane ki jung"* and *"Iske saath ku karm karne waale ko inzaam tak pahuchaye"*. The next morning he was found dead. The family blamed India TV to have abetted him to take this extreme step. Had the channel been a little considerate and patient to cross check the facts the reality could have been different.

Also, in the recent *Sheena Bora* murder case, one of the journalist claimed having been told by Indrani Mukherjea about being sexually abused by her step-father. In the heat of the moment, perhaps it did not matter to the journalist that it is not permissible under the law to disclose the identity of the victim of sexual offence. Little consideration was given to the Right to Privacy of the deceased while speculating her possible father.

VI

Media Reporting and Sting Operations

The *BMW* hit and run case[25] took a major turn when NDTV, a news channel, conducted a sting operation on the defence counsels who were trying to lure the witness to change their statement in favour of the accused Sanjeev Nanda. The High Court took note of the findings of the sting operation and barred the attorneys from practise for four months. The court convicted Sanjeev Nanda for culpable homicide. In this case, the court held that the sting operation did not amount to trial by media.

A sting operation caused severe damage to the reputation of a government school teacher, *Uma Khurana,* who was alleged to be forcing her students into prostitution. Police later discovered that the allegations were false and that the case was an attempt to frame her.[26] The media should be especially cautious against such fake stings.

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[24] NGO Boss Khurshid Ahmed Suicide, available at: http://indiatoday.intoday.in/story/ngo-boss-khurshid-anwar-suicide-rape-chargeby-23-year old/1/331842.html (Last visited on October 23, 2016).

[25] *Sanjeev Nanda* v. *State of NCT of Delhi,* 2007 CrLJ 3786.

[26] "Fake Sting: Uma Khurana Withdraws Defamation Case", available at: http://timesofindia.indiatimes.com/city/delhi/Fake-sting-Uma-Khurana-withdraws-defamation case/articleshow/3629666.cms (Last visited on October 23, 2016).

VII

Media Trial and Fair Trial: Avenues of Conflict and Harmony

As a disseminator of public opinion, media has been instrumental in helping the victims get justice against the powerful accused. It has become almost impossible to commit a crime and escape public scrutiny.

The media played an positive role in the criminal cases involving unnatural deaths of *Jessica Lall, Priyadarshini Mattoo, Nitish Katara, Satyendra Dubey,* and *Shanmughan Manjunath,* to name a few. Satyendra Dubey, the project director in National Highway Authority of India, was killed in November 2003 near Gaya, Bihar, after he exposed corrupt contractors. He even wrote to the then Prime Minister Atal Behari Vajpayee in this regard to check financial irregularities in road construction. Another whistleblower, Shanmughan Manjunath, a marketing engineer for Indian Oil Corporation, was found murdered in November 2005 for sealing a petrol pump at Lakhimpur Kheri, Uttar Pradesh, as he found it selling adulterated fuel. The wide coverage given by media to the investigation of these two murders put pressure on the government to enact The Whistle Blower Protection Act, 2011.

Jessica Lall, a Delhi based model, was shot to death by Manu Sharma, son of a minister in the state of Haryana, after she refused him a drink at a party where she was a barmaid. During the long trial many witnesses turned hostile and at several times, even the police and lower judiciary was accused of conducting the proceedings in a manner that favoured the defence. The lower court acquitted him. After intense media attention, the Delhi High Court expedited the trial, held Manu Sharma guilty and sentenced him to life imprisonment. Later, the Supreme Court of India upheld the Delhi High Court verdict in 2010.[27]

In December 2012, a girl was gang-raped and mauled in a moving bus and was left on road struggling between life and death along with her friend. The case got huge media coverage. One of the accused was a juvenile. Thus, a debate emerged should the age limit to determine a juvenile be decreased from 18 to 16 years? Government formed Justice Verma Committee to give a report on the same. The Juvenile Justice (Care and Protection of Children) Bill, 2014 was drafted. The bill permits juveniles between the age group of 16-18 years to be tried as adults for heinous offences. Also, any 16-18 year old, who commits a lesser offence may be tried as an adult only if he is apprehended after the age of 21 years. One of the accused died during the trial while, the rest were convicted. Though the victim, Nirbhaya, as she is popularly called, lost her life

[27] *Siddharth Vashisht* v. *State (NCT of Delhi)* AIR SC 235 (2010).

during treatment, but this case certainly highlights the might of media. The widespread coverage in the print, electronic and social media brought the issue of safety of women, ineffectiveness of law and order situation into limelight. Six fast track courts were established to hear rape cases.

Media also faced criticism when it published the private communication between the councils of SEBI and Sahara.[28] Though the court did not provide any set guidelines for reporting by media, but the court expressed concern about such reporting as affecting business sentiments as well as interfering in the administration of justice.

The media has also been responsible for falsely implicating people as a result of its over enthusiastic reporting without caring to know the truthfulness of the case. One such unfortunate example is that of *Yahya Kamkutti,* a software engineer working with a IT firm in Bangalore, who was taken as a terrorist and was detained for eight years in prison only to be released later as he was found to be innocent. The media coverage during this period portrayed him as a dangerous seasoned terrorist but at the time of his release did not give him the much needed media publicity to publicise his innocence.

VIII

Implications of Media's Activist Role

(i) Impact on Administration of Justice

The tension between courts and media revolves around two main concerns. The first is that there should be no 'trial by media', and, the second is that it is not for the press or anyone else to 'prejudge' a case. In order to ensure justice it is necessary that people be tried by courts and not by the press.[29]

Freedom of press, may at times interfere with the administration of justice as the articles published in the media may be prejudicial.[30] The Delhi High Court, referring to the *Reynolds*[31] has clearly stated that in administration of justice no balancing act is permissible. It is not correct to contend that the public's right to know outweighs the right to privacy and right to fair trial. Such a view may shake the very structural foundation of an impartial justice delivery system.

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[28] *Sahara India Real Estate Corporation Limited and Ors.* v. *Securities and Exchange Board of India and Anr.* 10 SCC 603 (2012).

[29] Rajeev Dhawan, *Publish and Be Damned-Censorship and Intolerance in* India, 210, 2008.

[30] *M.P. Lohia* v. *State of W.B.* (2005) 2 SCC 686.

[31] *Reynolds* v. *Times Newspapers Ltd.* 4 All ER 609 (1999).

(ii) Impact on the Judges

Regarding the impact of media publications on the judges, the American view is that media publications don't influence the jurors and judges, while the Anglo-Saxon view is that the media publications do affect the judges sub-consciously.[32] The Indian courts seem to be accepting the Anglo-Saxon view.[33] This can be at the stage of granting or refusing bail or at the trial.

In *P.C. Sen*[34] the Supreme Court observed:

"No distinction is, in our judgment, warranted that comment on a pending case or abuse of a party may amount to contempt when the case is triable with the aid of a Jury and not when it is triable by a Judge or Judges."

The Kerala High court has also expressed its fear when it held that 'the judiciary will curse the day when a judicial functionary will have to render decisions with one eye on the headline in the media next morning'.[35]

(iii) Impact on the Right to Legal Representation

The media's presumptions and wide publication of the guilt can have grave consequences like privation of Right to Legal representation. The lawyers may get intimidated to refuse to represent the accused as happened in the case of serial killings in Noida, popularly known as *Nithari Hatyakaand.* The case attracted huge media attention and it proclaimed that the accused Mohinder Singh Pandher and his domestic help Surender Kohli have confessed to killing. The local Bar Association decided that no lawyer would defend either of the two. Similarly, the noted lawyer Ram Jethmalani faced lot of public criticism when he decided to represent Manu Sharma- the prime accused in *Jessica Lall* murder case.[36] Likewise, Ajmal Kasab had to face great difficulty in finding a lawyer to defend him. Once he did, the lawyer was forced to terminate his representation due to the plethora of media's camera and questions.

(iv) Impact on the Investigation

Media's activist role can play havoc to proper investigation. Realising the impact, the Apex Court in the case of *Saibal Kumar* v. *B.K.Sen*[37] held that,

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[32] Law Commission of India Report, 200th Report, Trial by Media: Free Speech and Fair Trial under Criminal Procedure Code, 1973.

[33] See, In Re *P.C. Sen,* AIR 1970 SC 1821; *Reliance Petrochemicals* v. *Proprietor of Indian Express*, 1988 (4) SCC 1821.

[34] AIR 1970 SC 1821.

[35] *Shivaji* v. *State of Kerela* 2005 (4) KLT 995.

[36] *Siddharth Vashisht* v. *State (NCT of Delhi)* AIR SC 235 (2010).

[37] AIR 1961 SC 633.

"... it would be mischievous for a Newspaper to conduct an investigation into a crime for which a man has been arrested and to publish the results of that investigation. ... Such an action tends to interfere with the course of justice". During the Parliament Attack case, 2011 a 'media trial' began just after the arrest of the prime accused *Mohd. Afzal.* A week after the arrest, the police called a press conference where *Afzal* incriminated himself in front of the national media. The media is said to have played a major role in shaping public opinion before trial.

The Andhra Pradesh High Court in *Labour Liberation Front* v. *State of Andhra Pradesh*[38] observed that once an incident involving prominent person or institution takes place, the media is swinging into action and virtually leaving very little for the prosecution or the Courts..." The *Arushi Talwar* case is a prime example of how media can interfere in the investigation by taking the investigation in its own hands.

(v) Impact on the Court Proceedings

The idea of the Test Identification Parade is to test the truthfulness of the witness to identify among other persons, the person he had seen at the time of commission of crime.[39] Pre-trial media publicity renders the Test Identification Parades useless if the images of the persons in the parade have already been exposed by the media.[40]

(vi) Impact on Appeal or acquittal

The major cases are largely followed and publicised by media. Many of such cases go for appeal or confirmation of sentence to the higher Courts. Lauding or criticising a judgement while its confirmation is sub-judice creates a prejudice in the mind of public. If the higher Court comes to a different conclusion, it is faced with an added burden of dispelling the public opinion regarding the lower Court's decision.

(vii) Impact on the Juveniles

The juvenile offenders are often permanently stamped as thieves, criminals, terrorists etc. casting a serious impact on their future lives. Where the identity of the juveniles is disclosed by the media, it gives a chance to the mafias to exploit the minors further and drag them into crimes.

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[38] 2005 (1) ALT 740.

[39] *Kanan* v. *State of Kerela* 1979 CrLJ 919.

[40] *Simon and Ors.* v. *State of Karnataka,* JT 2004(2) SC 124.

(viii) Impact on Right to Privacy

Many a time, media reporting is based on a leaked source of information and makes it public just to earn higher TRPs. For instance in the Tehelka case, an e-mail meant for internal complaint and not for criminal complaint was leaked in the media. The police took suo-motto cognisance of the matter and registered an FIR against Tarun Tejpal for sexually assaulting his employee, the complainant. The over reporting by media made the victim a compulsive part of the trial as a key prosecuting witness. In this case, the victim was not allowed to choose from the available alternative course of actions.

The media also pays great attention to the personal lives of the parties, especially if the case is a high profile case and ends up casting serious aspirations on the character of the parties involved. The prominent example is the *Arushi Talwar* case where the deceased Arushi was portrayed as having affair with the deceased servant. Also the highly publicised *Sheena Bora* murder case revolved largely around the personal life of Indrani Mukherjea, the prime accused in the case.

IX

Conclusion

A continuously developing young democracy like India is faced with a number of socio-political and economic challenges. There is growing intolerance, lack of trust in the system and antagonism among the masses. This gets reflected in the nature of crimes occurring in the society. In such a situation, media, with its honest approach of enquiring into the facts can give great strength to the criminal justice system and the nation. For this, it is important that the media does not take the official version of police statement as the final truth. It must try to increase the scope of independent investigation. In India, nobody want to investigate the version of police rather tries to reinforce it. This may have resulted in large number of under-trial cases, many of which may be the fraud cases. It is also necessary that some effort is made on independent research. Many journalists just want to publish readymade news. Also, the working conditions of journalists must improve. They must be given security of tenure. It is high time to draw a line between news and advertisements. The media must realise the burden of the great responsibility that is given to it. After all, the fourth estate must rise when the other three fail to deliver.

The inevitable friction between the courts and the media can be treated to a large extent by adopting the following measures.

(i) ***Press Liaison Officers or Media Spokespersons:*** The courts must designate a person as the official contact person for the media. This person's duties can range from advising the press on court related information to being designated the official spokesperson for the court authorised to make public comment on behalf of the court.

(ii) ***Court/Media Liaison Committees:*** Such committees have been established in a number of jurisdictions, usually on an informal basis and sometimes include representation from the bar also. Many of these committees do not make any formal decision and merely discuss mutual problems in depth and attempt to reach resolution that can be translated into a court policy. These groups have frequently contributed to the development of written court/media guidelines.

(iii) ***Court/Media Guidelines:*** Clear, comprehensive and practical guidelines relating to media access and reporting should be laid down. Such guidelines will minimize disputes and establish consistency at all court venues.

(iv) ***Joint Conferences and Seminars:*** These can occur at a regional, state/ provincial, or national level. Mutual discussion of problems leads to mutual understanding and often to mutual solutions. These gatherings can also serve to educate the parties: judges will get trained in effective communication with reporters, and reporters in effective coverage of court news.

(v) ***Court Outreach:*** Courts can make planned and effective efforts to speak to the public, directly and through the media. These may range from 'talk shows' to 'personal interactive sessions'. Courts can also hold an "Open Court Day" or a "Meet Your Judges" event, usually in the courtrooms and in co-operation with the bar and court staff. An important aspect of any outreach program would be to involve the judiciary in the education of journalists.

(iv) ***In-house Projects:*** These would include projects that would educate the judiciary in effective community and media relations. Methods of mutual assistance, communications and support can also be developed like informal meetings, newsletters, etc. the subject matter of which would not be restricted only to court/media issues, but also to public education matters generally.

ENVIRONMENTAL GOVERNANCE, INDIAN CONSTITUTIONAL FRAMEWORK AND THE DILEMMA OF PUBLIC TRUST DOCTRINE

*Shailesh Kumar**

Abstract

Environment and 'development' have arguably stood against each other, and with ample support of the corporate frenzy of the State, the scale of 'development' has outweighed the scale of conservation of environment quite often. But, in the Indian context, the application of Public Trust Doctrine (PTD) along with other doctrines governing the environmental framework, ably supported by the Indian constitutional framework have kept a check and balance on the corporate-State nexus which tries to dismantle the process of environmental protection by alienating natural resources for private use. The Indian judiciary's proactive role in wider interpretation of the provisions of the Indian Constitution and recourse to the PTD have worked well and has arose hope among the environmentalists as weil as the general populace. In the Indian legal context, the problem lies with the persistent reference by the Indian judiciary to the Saxion conception of the PTD that derives legitimacy from the history of Roman and English law, overlooking the literature that has evolved thereafter challenging the same. None of the contemporary judicial decisions of the apex court of India, with recourse to the PTD, has considered the Huffmanian PTD's conception that questions the Saxion vision and historicity. It is understood that the PTD, along with other doctrines pertaining to environmental protection, acts as a solid base on which the statue of Environmental governance stands, but then the base itself cannot be left questionable. Huffmanian 'Inconvenient Truths' regarding the historicity of the doctrine from which it derives legitimacy should discomfit the Indian judiciary and the ecademia. It is only after exploring and tackling these contradictory conceptions, that the PTD can be authoritatively applied and the responsibility of the Indian State as a public trustee of the environmental resources can be determined.

I
Introduction

"Earth and Heaven are the universal parents who give life to all creatures and grant the means of subsistence."[1]

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1 S. Radhakrishnan, *Indian Philosophy*, 76 Vol. 1, 2006.

The earth, being the only planet with subsistence because of its natural 'resources', has been at loss because of the consistent human intervention that has disrupted the natural environmental development. Even the knowledge of being harmed by such disruption could not prohibit us from the 'developmental' agenda with which we are speeding up towards the endangerment of our natural resources, may be for the reason that we consider it as 'resources' rather than our habitat. It, therefore, depends upon our environmental governance framework, that how can we protect our environment and preserve our natural resources. The recourse to the Public Trust Doctrine (hereinafter PTD) has been a boon in this direction. The PTD in law stems from the nature of property rights in natural resources that arguably has its history from Roman law to English law to the American public trust law. One of the foremost germinal papers written on PTD by Professor Sax in 1970 has been at the core while using PTD by courts and environmental activists to govern the use of natural resources.

In the first part of the paper, I review the concept of 'governance', and attempt to trace the historical background of the PTD. Thereafter, I move on to examine the legal and constitutional environmental framework in India. In the third section, emphasis has been given to the inception of the PTD in India. The fourth section deals with the conflicting conceptions of Sax and Huffman regarding the history of the PTD and their respective implications. The next section presents the statistical analysis of the judgments of the Supreme Court of India (hereinafter SCI), the National Green Tribunal (hereinafter NGT) and the high courts, to stress upon the fact of persistent reference to only the Saxion conception of the PTD. The final section concludes the paper with the suggestions to rectify the approach towards the use of the PTD as an effective judicial tool and the way forward for the environmental governance in India.

II

Historical Background

Since the World Bank has first mentioned the term 'governance' in the late 1980s on a 'negative connotation'[2] with respect to Sub-Saharan Africa's development, it has acquired a kind of universalism in being associated with every term now and then. The precise meaning of the term 'governance' is not clear and different meanings lead to different thrusts in proposing and executing reform agenda[3]. Following the suit, the term 'environmental

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2 World Bank, "Sub-Saharan Africa: From Crisis to Sustainable Growth", *World Bank Report*, Washington DC, 1989.

3 Kuldeep Mathur, *From Government to Governance* 1 (National Book Trust, 2008).

governance' has come in, which denotes the discourse of governing the environment, i.e. how the environment is being looked after by the state and its instrumentalities. In the Indian context, 'governance' has come out as a *sine qua non* in the policy discourse since the 1991 inception of economic liberalisation in India.

'Environment' on the very first hand is an ambiguous term, as it makes us think about its possible constitutive elements. It gives rise to plethora of questions. What all can be thought of under the domain of the term 'environment'? This question plays with the discretionary and interpretational skills of different state instrumentalities. On a broader perspective, it can be said that environment consists of both physical environment and biological environment. Physical environment covers land, water and air whereas biological environment includes plants, animals and other organisms, and both physical and biological environment are inter-dependent[4]. The unlimited desires of human beings have put these natural resources to the test of survival, raising plethora of questions. Who owns the natural resources? Can they be considered as public trust? Who is the trustee? Is it the government of India or the people of India? Can they be privatised? These questions open up the debate on the issues of ownership and public trusteeship of natural resources.

Professor Sax, way back in 1970, through his germinal work that predates the modern environmental movement, has talked of a doctrine known as 'public trust doctrine', where he has termed the wider domain of environment as 'resource' and has discussed the issues pertaining to natural resources and its management[5]. The conception of the PTD has a long history. Sax has mentioned that the history of the doctrine can be traced back to Roman and English law and has argued that of all the concepts known to the American law, only the PTD seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems[6].

In the *Mono Lake*[7] case, the California Supreme Court said that actually history of public trust could be traced to the Institutes of Justinian in 533 AD.[8] It further stated that, from this origin in Roman law, the English common law

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4 V. K. Agarwal, "Environmental Laws in India: Challenges for Enforcement", 15, *Bulletin of the National Institute of Ecology*, 227-238 (2005).

5 Joseph L. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" 68 (3) *Michigan Law Review* 471-566 (1970).

6 *Id.* at 474.

7 *National Audubon Society* v. *Superior Court*, 22 Ill.33 Cal.3d 419, 189 Cal. Rptr. 346, 658 P.2d 709, 21 ERC 1490, 1983.

evolved the concept of the public trust, under which the sovereign owns 'all of its navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people'[9]. Further, the PTD under the English Common Law extended only to certain traditional uses such as navigation, commerce and fishing, which was later expanded in the USA. The credit goes actually to the American courts who, through many landmark judgments[10], have expanded the concept of the public trust doctrine[11].

On the other hand, Huffman, around four decades later, has challenged the very history of the PTD in his erudite work by arguing that, there was nothing resembling the modern idea of public trust in roman law. He further contended that the claimed restraint, on alienation of state owned waters and lands, is belied by a history of pervasive private ownership in both Rome and England[12]. Further, he has questioned it by saying that, *Magna Carta* had little or nothing to do with such public rights, nor is there significant support in Bracton, Hale, or Blackstone for the imagined doctrine. He has also suggested the courts as well as the academicians to look for other justifications to take the recourse of the PTD in invalidating the democratic choices of the elected representatives of the people[13].

In his work, Sax (1970) has argued that for the doctrine to have such power and to really act as a strong tool for the protection of natural resources it must meet three criteria which are, 'having some concept of legal right in general public', 'having enforceability against government', and 'interpretational capability consistent with contemporary concerns for environmental quality'[14]. It is this doctrine, which has acted as a respite for the general public fighting

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8 "By the law of nature, these things are common to mankind: the air, running water, the sea, and consequently the shores of the sea." Institutes and Digest of Emperor Justinian I, II.1.1, *cited in*, Turnipseed *et. al.*, *The Public Trust Doctrine and Rio +20*, 1 (2012) available at: http://wildmigration.org/pdf_bin/Brief_201202_PublicTrustDoctrine-Rio20_brief.pdf (Last visited on January 3, 2017); see also, *M. C. Mehta* v. *Kamal Nath and Ors.*, 1997 (1) SCC 388.

9 *National Audubon Society* v. *Superior Court of Alpine County*, 33 Cal. 3d 419.

10 *Arnold* v. *Mundy*, 6 N.J.L. 1 (N.J. 1821); *State* v. *Cleveland & Pittsburgh R.R.*, 94 Ohio St. 61, 80, 113 N.E. 677, 682 (1916); *Brickell* v. *Trammel*, 77 Fla. 544, 559, 82 S. 221, 226 (1919); *City of Milwaukee* v. *State*, 193 Wis. 423, 451-52, 214 N.W. 820, 830 (1927); *Illinois Central Railroad Company* v. *Illinois*, 146 U.S. 387 (1892); *Gould* v. *Greylock Reservation Commission*, 350 Mass. 410, 215 N.E.2d 114 (1966); *City of Madison* v. *State*, 1 Wis. 2d 252, 83 N.W.2d 674 (1957).

11 *Supra* note 5, at 476; see also, *M. C. Mehta* v. *Kamal Nath and Ors.*, 1997 (1) SCC 388.

12 James Huffman, "A History of the Public Trust Doctrine", 18 (1) *Duke Environmental Law and Policy*, 1-103 (2008).

13 *Id.* at 62.

14 *Supra* note 5, at 474.

for 'their' environment, and because of the trusteeship, the natural resources have been put beyond the police power of the state, which has resulted in making such resources inalienable and unchangeable in use. Under the PTD, certain common natural resources are held as a public trust and cannot be subject to private ownership. The state instrumentalities act as the trustees of this trust and both the present and the future citizens are considered as the beneficiaries of the Trust who can hold the trustees accountable for the degradation and destruction of the trust resources.

These are the reasons why today this doctrine plays a pivotal role in environmental governance across the globe. In India too, though this doctrine has not got any expressive legislative backing, but the Indian legislature and judiciary have recognised its importance and thus have provided a legal as well as a constitutional framework for it. The PTD provides a simple mandate that governments must manage common natural resources in the sole interest of their citizens[15].

III

Legal and Constitutional Environmental Framework in India

At the national level, environment was a vital issue and had protectionary measures including the PTD for it since many decades, as is evident from the national laws and judicial decisions[16] of western countries like the USA. But, on the international plane, there had been no discussion of such measures till 1972, and since then, multiple international treaties, conferences and conventions have incorporated various measures including the PTD.[17]

In the Indian context, environment had actually not been on the radar of our Constitution framers, as is evident from the fact that neither there was any fundamental right (under Part-III) nor any directive principle (under Part-IV) pertaining to environment when the Indian Constitution was drafted and came into existence. Being an agrarian nation, the founding fathers did give place to

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[15] Turnipseed *et. al.*, "The Public Trust Doctrine and Rio+20" (2012), available at: http://wildmigration.org/pdf_bin/Brief_201202_PublicTrustDoctrine-Rio20_brief.pdf (Last visited on January 3, 2017).

[16] *Arnold* v. *Mundy*, 6 N.J.L. 1(N.J. 1821); *Illinois Central R.R. Company* v. *Illinois*, 146 US 687 (1982); *Gould* v. *Greylock Reservation Commission*, 350 Mass 410 (1966); *Sacco* v. *Development of Public Works*, 352 Mass 670; *Robbins* v. *Department of Public Works*, 244 N.E. 2d 577; *National Audubon Society* v. *Superior Court of Alpine County*, 33Cal. 3d 419.

[17] The World Heritage Convention, 1972; the UN Convention on the Law of the Sea, 1982; the Rio Declaration on Environment and Development, 1992; the FAO International Treaty, 2001; UN Conference on Sustainable Development, 2012.

'organisation of agriculture and animal husbandry' under Article 48 as a directive principle. It is only very late in the year 1976 that Article 48-A and Article 51-A were inserted in the Constitution by the Constitution (Forty-second Amendment) Act, 1976 *via* sections 10 and 11 respectively.

Article 48-A[18], which talks of Protection and improvement of environment and safeguarding of forests and wild life, was put under the domain of Directive Principles of State Policy (hereinafter DPSP), acting as a non-justiciable direction to the state while formulating and implementing any policy, whereas Article 51-A, which gave way to Fundamental duties, is a set of non-justiciable duties conferred on every citizen of the country. Under Article 51-A, clause (g)[19] confers a mandatory[20] duty with respect to Protection and improvement of the natural environment. Unlike Fundamental Rights, violation of DPSP or Fundamental Duties cannot be questioned in a court of law.

Thus, it can be clearly comprehended that the non-justiciability of both these provisions has turned them into a bundle of dead letters. Jeffords has also argued that the present constitutional environmental human rights (hereinafter CEHR) is a directive principle and scores relatively low on the simple index of legal strength. The negating statement acts to further shrink the avenues through which the citizens of India can seek recourse for EHR violations. When taken as a whole, it seems that the current legal framework based in part on the constitutional structure is not entirely sympathetic towards respecting, protecting, and fulfilling EHR[21]. Further, the environmental legislative framework, which includes various legislations pertaining to environment[22], as well as to specific sections of environment such as air[23], water[24], forest[25], wildlife[26] etc. has also come up during and after this period. Sadly, this entire legal and constitutional framework in India had been proved to be futile and remained a toothless tiger.

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18 The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country.

19 It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures.

20 The term 'shall' has been used in the language of Article 51-A of the Constitution of India, though, it seems to act merely as 'may'.

21 Christopher Jeffords, "Constitutional Environmental Human Rights in India: Negating a Negating Statement", available at: http://www.christopherjeffords.com/IndiaCEHR_Jeffords.pdf (Last visited on January 3, 2017).

22 Environment (Protection) Act, 1986.

23 Air (Prevention and Control of Pollution) Act, 1981.

24 Water (Prevention and Control of Pollution) Act, 1974.

25 Forest Conservation Act, 1980.

26 Wildlife Protection Act, 1972.

More so, this entire statutory framework has been found to be inadequate and insufficient.

Thereafter, because of the inconsistency in legislative response and administrative action pertaining to natural resources and environment at large, citizens of India were compelled to move different courts, and the courts through their judicial activism, expanded the interpretation of Article 21[27] of the Constitution of India. Though Article 21 does not explicitly mention the term environment, the Supreme Court and various high courts of the country have given a wider interpretation to the word "life" used in this Article.[28] According to the courts, the right to life includes the right to a living environment congenial to human existence, which has been interpreted to include the right to live in a pollution free environment and right to water.[29] The Supreme Court in *Subhas Kumar* v. *State of Bihar*[30] held that right to environment is a fundamental right of every citizen of India and is included in the "right to life" guaranteed under Article 21 of the Constitution of India. Further, it also held that public interest litigation is maintainable in the high court or Supreme Court at the instance of affected persons or even by a group of social workers or journalists for prevention of pollution.

Also, the seventh schedule of the Constitution provided subjects related to environment as entries under the three lists i.e. the union list, the state list and the concurrent list, on which the union [under Article 246(1)], the states [under Article 246(3)], and both of them [under Article 246(2)] respectively, can enact laws. Further, it has been mentioned that in the event of a clash, the union enjoys a primacy over states, which means that union's legislations in the union and the Concurrent List prevails over state legislations. Also, under Article 248, the Parliament has residuary powers to legislate on any matter not covered in the three lists. Further, the Panchayats and Municipalities in India too have been conferred constitutional sanctity and thus the power through the 1992 Constitutional Amendments[31] in protecting environment in forms of subjects

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27 It states: 'No person shall be deprived of his life or personal liberty except according to procedure established by law'.

28 P. Leelakrishnan, *Environmental Law in India*, 3rd Ed., 2008.

29 *Hinch Lal Tiwari* v. *Kamla Devi*, (2001) 6 SCC 496; *State of Himachal Pradesh and Ors* v. *Ganesh Wood Products and Ors.*, AIR 1996 SC 149: (1995) 6 SCC 363; *Glanrock Estate (P) Ltd.* v. *The State of Tamil Nadu*, JT 2010 (9) SC 568: (2010) 10 SCC 96; *M.C. Mehta* v. *Kamal Nath*, (1997) 1 SCC 388; *Vellore Citizens' Welfare Forum* v. *Union of India*, AIR 1996 SC 2715; *Indian Council for Enviro-Legal Action* v. *Union of India*, AIR 1996 SC 1446.

30 AIR 1991 SC 420.

31 73rd and 74th Constitutional Amendment Acts, 1992.

under the Schedules 11 and 12 of the Constitution. Still, all of this has been proved to be ineffective because of political and bureaucratic hassles.

IV

Inception of public trust doctrine in India

In the Indian context, Indian judiciary has played a proactive role in safeguarding the human environment. It was the Supreme Court of India, for the first time in the history of the Indian judiciary, that referred to the PTD in the case of *M. C. Mehta* v. *Kamal Nath and Ors.*[32], when ecologically fragile large area of the bank of river Beas, which was part of protected forest, was being converted to private (mis)use *via* corporate frenzy. The Supreme Court, relying on Sax's article, declared that, "Our legal system - based on English Common Law - includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources, which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The state as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership[33].

The court further showcased the basic feature of 'separation of power' and said that if there is a law made by the legislatures then the judiciary can only serve as an instrument of determination of legislative intent by exercising its power of judicial review under the Constitution. But, the court then, hinting at the 'sustainable development' aspect, as well as strictly putting forth a warning, said that in the absence of any legislation, the executive acting under the PTD cannot abdicate the natural resources and convert them into private ownership or for commercial use[34]. It further specified that, the aesthetic use and the pristine glory of the natural resources, the environment and the eco-systems of our country cannot be permitted to be eroded for commercial purposes unless the courts find it necessary, in good faith, for the public goods and in public interest to encroach upon the said resources[35].

The court, referring to its own decisions in the cases of *Vellore Citizens Welfare Forum* v. *Union of India & Ors.*[36], and *Indian Council for Enviro-Legal Action* v. *Union of* India[37], and discussing the concepts of 'Polluter

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[32] 1997 (1) SCC 388.
[33] *M. C. Mehta* v. *Kamal Nath and Ors.*, 1997 (1) SCC 388, at 409.
[34] *Ibid.*
[35] *Ibid.*
[36] AIR 1996 SC 2715.
[37] JT 1996 (2) SC 196.

Pays Principle' and 'Precautionary Principle', held that the PTD is a part of the law of the land. It then asserted that the Himachal Pradesh government has committed patent breach of public trust, held by it, by leasing the ecologically fragile land to the motel management[38].

This was just the beginning and it proved to be an igniter, as the SCI, the NGT, as well as the high courts then went on to apply the PTD along with the other two principles in a number of cases[39] and time and again settled down the PTD as part of the Indian environmental jurisprudence. In all these judicial decisions, the courts have found shelter in the Saxion conception of the PTD. This judicial trend, though helpful to the conservation of environment practically, leads to an academic debate as to why even the judicial decisions from 2008 onwards by the SCI, the NGT, and the high courts have adopted the Saxion vision, without referring to the work of Huffman, who has clearly denied the Saxion historicity of the PTD.

This is very much evident from the analysis of the judgments passed by these Indian judicial and quasi-judicial institutions. The question, therefore, is whether the Huffmanian conception of the history of the PTD conflicts with that of the Saxion's. Also, in case there is a conflict, whether such conflict could have different and significant bearings on the cases involving the PTD as decided by the Indian courts and tribunals. For this, one needs to look at the analysis of the judgments and then the deconstruction of the difference in the conceptions of Sax and Huffman regarding the history of the PTD.

V

What the Numbers Speak: Analysis of Judgments on 'Public Trust' and the PTD

While collecting data on public trust doctrine through a legal e-resources Internet site[40], it was interesting to find that there has been a sharp increase in

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38 *M. C. Mehta* v. *Kamal Nath and Ors.*, 1997 (1) SCC 388, at 410.

39 *Th. Majra Singh* v. *Indian Oil Corporation*, AIR 1999 J K 81; *M.I. Builders Pvt. Ltd.* v. *Radhey Shyam Sahu and Ors.*, AIR 1999 SC 2468; *M. C. Mehta (Calcutta, Tanneries' Matter)* v. *Union of India*, (1997) 2 SCC 411; *M. C. Mehta* v. *Union of India*, (1997) 11 SCC 327; *T. N. Godavarman Thirumulkpad* v. *Union of India* (1997 (10) JT 697); *M. C. Mehta (Badkhal and Surajkund Lakes Matter)* v. *Union of India*, (1997) 3 SCC 715; *S. Jagannath* v. *Union of India*, AIR 1997 SC 811; *Association For Environment* v. *State of Kerala & Ors.*, Civil Appeal no. 4941 of 2013 (decided on 2 July, 2013); *Intellectuals Forum, Tirupathi* v. *State of A.P. & Ors.*, (2006) 3 SCC 549; *In Fomento Resorts and Hotels Ltd.* v. *Minguel Martins*, (2009) 3 SCC 571.

40 For the analysis of data on 'public trust doctrine', the paper has, throughout, taken the recourse of Manupatra.

the number of judgments and orders, wherein the issue of public trust has been raised in this decade, i.e. 2010-2016. Even though, the issues related to these cases were not specifically dealing with PTD, such sharp increase significantly points to the importance that issue of public trust has acquired. It can be observed from the following table that where in the last 68 years there have been 701 judgments and orders by the SCI and 524 judgments by the NGT, involving the issue of public trust, there are whopping 227 judgments and orders by the SCI and 348 judgments by mostly the NGT in the last 6 years only.

Further, the cases pertaining to public trust issues, that has gone before the constitutional or larger bench of the SCI or the tribunals, have also seen a sharp rise in their numbers in the last 6 years. Out of 168 judgments by such constitutional or larger bench over the last 68 years, 40 have been given in the last 6 years only. This again suggests the vitality of the issue of public trust, as the constitutional or larger benches sit only in the matters involving very important questions of law.

Time-period	**1949-2017**	**2010-2016**
SCI (Judgments and Orders)	701	227
Tribunals(mostly NGT's judgments)	524	348
Judge(s) Bench (5 and more)	168+	40+

Source: http://www.manupatrafast.in/pers/Personalized.aspx

Moving now to the reference of the works by Sax and Huffman, it has been found that Sax's work has been referred to for the first time by the SCI in the case of *M. C. Mehta* v. *Kamal Nath and Ors.* in the year 1996, though it was written way back in 1970. Thereafter, because of the absence of any academic work challenging Sax's historicity of the PTD, the judges of the SCI, NGT and various high courts of India in many cases referred to his work. It was only in the year 2008 that Huffman challenged the historicity of the PTD as put forth by Sax.

Including the first reference by the SCI, of the Saxion vision of the PTD in 1996, the data analysis shows that Sax's work has been cited in as many as 11 judgments, wherein, 9 judgments[41] are of the SCI and 2 judgments[42] have been

[41] *M. C. Mehta* v. *Kamal Nath and Ors.*, 1997 (1) SCC 388 (decided on December 13, 1996); *Common Cause, A Registered Society* v. *Union of India & Ors.*, AIR 1996 SC 1619 (decided on August 3, 1999); *The State of West Bengal* v. *Kesoram Industries Ltd. and Ors.*, (2004) 10 SCC 201 (decided on January 15, 2004); *Intellectuals Forum,*

pronounced by the NGT. Out of these 11 judgments, 6 judgments have come in after the year 2008, the year in which Huffman's work was published. Further, through the analysis, not a single judgment related to PTD was found where the judges have cited Huffman's work even once.

Time-period	**1996-2007**	**2008- 2016**
Prof. Sax's citations	5(SCI's judgments)	6(4 SCI's judgments+ 2 NGT's judgments)
Prof. Huffman's citations	Not Available	None

The first judgment by a high court on the Saxion vision of the PTD was from the Gujarat High Court in the year 1997[43]. Thereafter, even the high courts' judgments, when analysed, reflect on the exponential growth in the numbers of judgments that have referred to only the Saxion vision of the PTD. This is apparent from the following table, where in the period 2008-2016, there are 30 judgments with Sax's work's citation, but not a single instance of citation of the Huffmanian vision of PTD is observed. The reason for this, though, may be the dependability of the high court judges on the judgments of the SCI and the NGT, as the SCI's judgments are binding over the high courts under Article 141 of the Constitution of India.

Time-period	**1997-2007**	**2008-2016**
Prof. Sax's citations	9 (HCs' judgments)	30 (HCs' judgments)
Prof. Huffman's citations	Not Available	None

With respect to such constant reference to the Saxion vision only, thereby not referring to the Huffmanian vision, by the higher courts and the NGT, there seems to be two possible justifications. One may be the judicial unawareness, that the Indian Judiciary is still unaware of such work and has kept on looking

Tirupathi v. *State of A. P. and Ors.*, AIR 2006 SC 1350 (decided on February 23, 2006); *Karnataka Industrial Areas Development Board* v. *Sri. C. Kenchappa and Ors.*, (2006) 6 SCC 371 (decided on May 12, 2006); *Fomento Resorts and Hotels Ltd. and Anr.* v. *Minguel Martins and Ors.*, (2009) 3 SCC 571 (decided on January 20, 2009); *Centre for Public Interest Litigation and Ors* .v. *Union of India and Ors.*, (2012) 3 SCC 1 (decided on February 2, 2012); *In Re: Special Reference No. 1 of 2012*, 2012 10 SCC 352 (decided on September 27, 2012); *Association for Environment Protection* v. *State of Kerala and Ors.*, (2013) 7 SCC 226 (decided on July 2, 2013).

[42] *Then Keeranur Vivasayigal Nala Sangam* v. *The Secretary to Government, Ministry of Environment and Forests, Union of India and Ors.*, MANU/GT/0134/2015 (decided on August 7, 2015); *Conservation of Nature Trust and Ors.* v. *The District Collector, Kanyakumari District and Ors.*, MANU/GT/0118/2016 decided on September 14, 2016.

[43] *Taruben Suklal Gamit* v. *Central Pulp Mills Ltd.*, MANU/GJ/0430/1997.

to the same four and a half decades old work by Sax whose historicity now stands challenged. The other possibility, which sounds vague and impossible, may be the intentional non-reference to Huffman's erudite work. Therefore, if it is the first case, which seems the plausible one here, then the Indian judiciary needs to look beyond the 'Saxion vision'[44], by looking into the Huffmanian vision of the PTD. Only then, the Indian judiciary, if it finds Huffman's arguments and conclusion incorrect, must state reasons for its non-acceptance and may proceed further with the Saxion vision of the PTD.

VI

Understanding the History of the PTD: Difference in Saxion and Huffmanian Conceptions

When a doctrine is made applicable to a practical situation, especially by deriving legitimacy through its history, the historicity needs to be fool proof. Similar is the situation while applying the PTD in cases of environmental protection and preserving natural resources from getting privatised. The answer to the question whether the state is a trustee, and, in that capacity, entitled to alienate the 'public' natural resources for private ownership or not is based on the PTD. It is the application of this doctrine by courts across various jurisdictions and legal systems such as common law and American public trust law that it was conferred with certain legitimacy to act as a powerful tool for 'effective judicial intervention'.

On one hand, Sax argues that the PTD recognises the public right over natural resources, though limited to navigable waters and submerged lands, considering the theoretical justifications for judicial intervention in the name of public, as opposed to individual rights[45]. He has argued that the PTD is rooted in the requirements of democracy[46]. Further, arguing for the doctrine's expansion in order to impact all natural resources and environmental management issues,[47] he went ahead later on to write about the circumvention of the historic limitations that he had put in his first article on the nature of natural resources to which PTD applies[48].

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44 Michael C. Blumm and Rachel D. Guthrie, "Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision", 45 *UC Davis Law Review* 741-808, 2012.

45 *Supra* note 12 at 5.

46 *Supra* note 5 at 491-556.

47 *Id.* at 473.

48 Joseph L. Sax, "Liberating the Public Trust Doctrine from its Historical Shackles" 14 *U.C. Davis Law Review* 185, 1980.

On the contrary, and criticizing the Saxion conception of PTD's roots in the democratic requirement, Huffman argues that 'in a rule of law system committed to democratic government, this is not a simple problem since judicial intervention will often be in contravention of the actions of elected legislatures and executives.'[49] He says that there is no *per se* public right over natural resources and theoretical foundation of the PTD can be best understood as an aspect of property law[50]. He further states that scholars like Bracton, Hale and Chancellor Kent, all were either faulty or presumptive in determining the history of the PTD, which has led a generation of scholars and judges to misunderstand and misrepresent the PTD's history[51]. Therefore, one can argue that much like the case of public interest litigation (hereinafter PIL)[52], in the case of PTD too, the Indian judiciary has acquired overweening authority for judicial policy making to intervene in the name of public right.

Therefore, as precedent remains important in a common legal system, including that of India, the history of the PTD ought to be corrected for its own sake. This is why Huffman has argued that 'the expansion of the PTD cannot be rooted in history, and therefore must be founded upon a sound theory of judicial intervention in the decisions of democratic government, if a suitable theory can be devised.'[53]

VII

Epilogue: PTD, Environmental governance and the way ahead

The *Span Motel*[54] case placed itself as a watershed moment in the history of Indian environmental jurisprudence. The courts have taken the recourse of the PTD whenever there had been an attempt on our environment to destroy or convert it for commercial purposes, even in the cases of non-traditional uses. We have also seen that the American courts went ahead in comparison to the English courts with respect to the application of the PTD in saving and protecting the ecologically important resources by widening its ambit and did not restrict the use of the doctrine only to the resources having certain traditional uses such

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49 *Supra* note 12 at 5.

50 *Id.* at 6.

51 *Id.* at 8.

52 Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India* (India: Cambridge University Press, 2017). Studying the political role of the PIL and its procedure, Bhuwania has shown that how Public Interest Litigation grants the appellate courts enormous flexibility in procedure allowing them to manoeuvre themselves into positions of overweening authority.

53 *Supra* note 12 at 9.

54 *M. C. Mehta* v. *Kamal Nath and Ors.*, 1997 (1) SCC 388.

as navigation, commerce and fishing. Similarly, it can be observed from the series of judicial decisions of the Indian courts that Indian judiciary went ahead of the American courts reflecting the Saxion vision of the doctrine much better than the case law of the American states[55].

This symbolises, though on one hand the positivity and the concern of the Indian judiciary towards the ecology and environment as well as its visionary approach towards the future generations, but on the other hand its lack of demonstration of PTD's historic pedigree. The Saxion vision of PTD has proved to be an indispensable tool in environmental governance. Then the reason for its application must be sound enough and based on correct theoretical foundations. It is only then that the progressive Indian judiciary can keep on moving ahead towards better environmental governance.

Sax has argued that certainly the phrase 'public trust' does not contain any magic such that special obligations can be said to arise merely from its incantation[56]. Thus, the PTD contains the seeds of ideas and is powerful enough to usefully promote the requisite environmental governance provided that the advocates of environmental governance search for an authentic theoretical foundation. It is also evident that the state functions, not in the capacity of an owner of the natural resources, rather as a trustee, by being into a fiduciary relationship with its citizens. Thus, while playing the role of a trustee, the state is legitimately expected to be genuine to the interests of its citizens.

Indian judiciary's persistent reference to the Saxion vision was and has been the norm till date. However, Huffmanian's 'Inconvenient Truths' regarding the historicity of the doctrine from which it derives legitimacy should discomfit the Indian judiciary and the academia. It is only after exploring and tackling these contradictory conceptions, that the PTD can be authoritatively applied, its applicability domain can be expanded, and the responsibility of the Indian State as a public trustee of the environmental resources can be determined. As Huffman argues that, if courts are committed to the rule of law, democratic government, and the traditional role of the judiciary, they will not loosen the PTD's historic shackles and would search for the constitutional sources for the doctrine; Indian judiciary needs to find some Indian constitutional source for the use of the PTD[57]. Thus, it can be said with conviction that the PTD is a key component and the foundation of environmental governance, but there is a need to puzzle out the dispute between the two antithetical scholarly visions.

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55 *Supra* note 44.
56 *Supra* note 5, at 485.
57 *Supra* note 12, at 103.

INTER-STATE MIGRANT WORKERS: LACUNAE IN WORKING AWAY FROM HOME

*Leah Thomas and Priyattama Bhanj**

Abstract

The increasing pace of globalization led to international identification of issues concerning migrant workers. However, international laws are silent on the matter of internal migration within countries. Unemployment and poverty in developing areas have prompted rural workers to move to urban areas which also have a rising demand for labour, especially unskilled labour. This shift brings with it many challenges to the migrant worker in terms of differential treatment, health hazards and lack of social security benefits. In India, this situation is exacerbated by the fact that there has not been stringent implementation of the Inter-state Migrant Workmen Act, 1979. Existing case laws point out that protection of migrant workers is clubbed under contract labour regulations and no specific respite as such is provided. The paper seeks to study the Inter-state Migrant Workmen (Regulation and Conditions of Service) Act, 1979) ('Act') and critique the inadequacy of its provisions. It also proposes to discuss the social triggers that cause migration of workers from rural to urban areas., The Act is then analysed in light of other social benefit legislations and existing case law. Subsequently, the situation of migrant workers in China will be analysed and certain changes of the Indian Act based on Chinese labour laws will be proposed. The paper will then address the lacunae in the existing legislation and propose certain amendments. In conclusion, the paper will emphasize that the efficacy of the present Act is undermined by the apathy of the authorities towards the state of migrant workers and specific amendments to the law along with speedy implementation is the need of the hour.

I

Introduction

Migration is the movement of people across administrative borders for a variety of reasons ranging from the need to find work to pursuing higher education and a potential career; all in order to achieve the end goal of a lifestyle that is of a better quality. The growing pace of economic globalization has given rise to an influx in migration levels. Unemployment and poverty in developing areas

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have prompted workers to move to urban areas which also have a rising demand for labour, especially unskilled labour. Migrant workers in addition to contributing to the economy of the locality in which they work, contribute to boosting the income in their place of origin by sending home the income. Yet it is found that these migrant workers are subjected to exploitation, unequal opportunities in the labour market and are offered less or no social protection.[1]

The International Labour Organization (ILO) has identified the need to protect the migrant workers on an international level and has adopted instruments such as the Migration for Employment Convention, 1949 and Migrant Workers (Supplementary Provisions) Convention, 1975 to ensure equal treatment is afforded to migrant workers and nationals of the country and espouses other benefitting provisions.[2] However, these international instruments are silent on the matter of internal migration within countries. A 2009 UNDP Human Development Report stated that internal migration occurs at a rate that is four times as much as international migration and this involves the poorer segments of society, impacting the society as a whole.[3]

Inter-state migrant workers are often people from the rural areas who shift to cities in order to explore better skilled labour opportunities or better wages for the similar work. However, this shift brings with it many challenges to the migrant worker in terms of differential treatment, health hazards and lack of social security benefits.[4]

This paper seeks to study the Inter-State Migrant Workmen (Regulation and Conditions of Service) Act, 1979 (Act) and critique the inadequacy of its provisions. Part II of this paper discusses the social triggers that cause migration

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1 Department for International Development, Moving out of poverty- making migration work better for poor people (DFID, 2007), available at: http://www.migrationdrc.org/publications/other_publications/Moving_Out_of_Poverty.pdf (Last visited on September 28, 2016).

2 United Nations Educational, Scientific and Cultural Organization, National Workshop on Internal Migration and Human Development in India – *Workshop Compendium,* volume II, (October 2012), available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/FIELD/New_Delhi/pdf/Internal_Migration_Workshop_-_Vol_2_07.pdf, (Last visited on September 26, 2016).

3 Rameez Abbas & Divya Verma, "Internal Labor Migration in India Raises Integration Challenges for Migrant, Migration Information Source" (2014), available at: http://www.migrationpolicy.org/article/internal-labor-migration-india-raises-integration-challenges-migrants, (Last visited on September 27, 2016).

4 Ravi Srivastava & S.K. Sasikumar, "An Overview of Migration in India, its Impacts and Key Issue", Paper for the Regional Conference on Migration, Development and Pro-Poor Policy Choices in Asia, Refugee and Migratory Movements Research Unit, Bangladesh & the Department for International Development, UK (2004), available at: http://www.eldis.org/vfile/upload/1/document/0903/Dhaka_CP_2.pdf, (Last visited on September 27, 2016).

of workers from rural to urban areas. Subsequently, the Act is analysed in light of other social legislations and case law. Part III studies the situation of migrant workers in China and seeks to compare it with the regime in India, and draw parallels in the implementation of both. Part IV addresses certain issues faced by migrant workers that have not been mentioned in the Act and proposes certain amendments.

II

The Status of Migrant Workers in India

Due to significant regional disparity in India, in economically poorer sections migration is a significant livelihood strategy in most livelihoods.[5] The responsibility of formulating and implementing measures to protect migrant workers who end up in vulnerable circumstances lies with the Ministry of Labour and Labour departments at the State level.[6] Some of the important enactments that could protect these workers are Inter-State Migrant Workmen (Regulation and Conditions of Service) Act, 1979; the Minimum Wages Act, 1948; the Contract Labour (Regulation and Abolition) Act, 1970; the Equal Remuneration Act, 1976; and the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996.[7]

(i) Social Triggers Leading to Migration of Workers, Challenges Faced by Them and Impact on Society

Inter-state migration in India is mainly from States that have low agricultural productivities and face industrial backwardness. States like Orissa, Bihar, Uttar Pradesh, West Bengal and parts of Telengana fall within this category.[8] The migration pattern in India is diverse and the driving factor varies from region to region. Although unemployment and poverty are the major push factors, various other reasons also exist that lead to the displacement of native population.[9]

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5 Priya Deshingkar, "Migration, Remote Rural areas and Chronic Poverty in India" Overseas Development Institute, Chronic Poverty Research Centre (2010), available at: https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/5510.pdf pp 8. (last visited on September 27, 2016)

6 Ranjit Kumar, Uttam Deb, Cynthia Bantilan, N Nagaraj & M Bhattarai, "Economic growth and rural transformation in Eastern India: Strategies for Inclusive Growth", Paper for the Pre-conference Symposium on "Transformation in Rural Economy and Employment Opportunities in Eastern India: Implications for Inclusive Growth", Indian Society of Labour Economics (2014), available at: http://oar.icrisat.org/8774/1/Conf%20paper%2001_Rural%20Transformation.pdf, (Last visited on September 27,2016).

7 *Ibid*.

8 *Ibid*.

9 Aijaz Ahmed Turrey, "An Analysis of Internal Migration types in India and Purview of its Social and Economic Impacts in India", 4 *EPRA IJEBR* 1 (2016).

Marriage-related migration is more prevalent among women and men are generally plagued by unemployment.[10] Civil and political strife in a region also pushes people out of their homes. Environmental hazards and frequent occurrence of natural disasters or primitive conditions such as mediocre healthcare, transport facilities, education and low standard of life are also contributing factors. These workers are often attracted by the chances of getting higher wages in the more urban areas.[11]

However, migrant workers are often considered to be a burden on the governing systems and resources of the host state. The migrant workers are often deprived of rights in the city by excluding them and creating political affiliations and vote banks on the basis of ethnicity, religion and linguistic lines.[12] This exclusion and discrimination finds its place in political and administrative procedures, market mechanisms and socio-economic processes causing a rift between migrants and locals. This marginalization leads to the exacerbation of the vulnerabilities of the migrants and eventual exploitation by the labour market.[13] The host state's failure to acknowledge the presence of migrant workers also excludes them from the purview of policy-making of the state.[14]

(ii) A Critique of the Inter-State Migrant Workmen Act, 1979 and Other Related Legislations

The ILO has extended labour standards and rights related to work and social protection to cover migrant workers and has recognized that migrant issues need to be part of the overall struggle and agenda for decent labour standards.[15] The Indian Government in 2010 agreed to a Decent Work Program, however, little has been done to get rid of 'unacceptable forms of work'. India being a founding member of the ILO must strive to comply with these tenets and extend

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[10] Scott Fulford, "The Puzzle of Marriage Migration in India", Paper for the Boston College Department of Economics (2013), available at: http://fmwww.bc.edu/EC-P/wp820.pdf, (Last visited on September 27, 2016).

[11] *Supra* note 6 at 8.

[12] United Nations Educational Scientific and Cultural Organisation, *Social Inclusion of Internal Migrants in India,* UNESCO, 2013,

[13] *Ibid*.

[14] N. Ajith Kumar, "Vulnerability of Migrants and Responsiveness of the State: The case of unskilled migrant workers in Kerala, India", CSES Working Paper Series, Working Paper Number 26, Centre for Socio-economic & Environmental Studies (2011).

[15] Migrants Rights Centre Ireland, Ensuring Decent Work Standards for Migrant Workers in the Current Labour Market, Summary Document of Roundtable event, (MRCI, 2002), available at http://www.mrci.ie/wp-content/uploads/2013/05/Ensuring-Decent-Work-Standards-for-Migrant-Workers-in-the-Current-Labour-Market-MRCI-Oct-20121.pdf, (Last visited on September 26, 2016).

the concept of decent work to include the inter-state migrant workers as well.[16] Additionally, the Constitution in Articles 41 and 42 also attempts to create a right to work and makes a provision to create just and humane conditions of work and for maternity relief.[17]

The Act is a legislation specific to migrant workers, enacted to ameliorate and regulate the conditions of employment of helpless migrant workers. The need for this legislation was highlighted by the situation of *Dadan* workers in Orissa who were employed by contractors and then forced to work outside the state. Their conditions of employment closely resembled that of bonded labour and it was observed that there was lacuna in the Contract Labour Act in so far as migrant workers were concerned.[18]

The provisions of the Act do not apply to every individual migrant worker but it covers every establishment or contractor that hires five or more inter-state workers on any day in the preceding twelve months.[19] Section 2(e) of the Act provides for the definition of an inter-state migrant workman which includes any person who is recruited by or through a contractor in one state under an agreement for employment in another state with or without the knowledge of the principal employer.[20] The scope of this definition is restrictive as it recognizes only those who were brought to the new state by registered contractors and is not applicable to those workers who migrate from one state to another of their own accord in search for employment or those hired by a contractor after their arrival in the new state.[21] In order to accommodate and benefit a higher number of migrant workers and to make them eligible for a number of reliefs incorporated in the Act, it is important to amend the definition of inter-state migrant workmen to widen its ambit and make it more inclusive.[22]

The Act also requires the principal employer engaging migrant workers to have certificate or registration for the establishment of employment and contractors have to obtain a license from a licensing officer appointed by the State Government.[23] Section 6 prohibits the employment of such migrant workers

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16 Jens Lerche, "Labour Regulations and Labour Standards in India: Decent Work?, School of Oriental and African Studies", available at: https://escarpmentpress.org/globallabour/article/viewFile/1111/1167, (Last visited on September 25, 2016)

17 Constitution of India, 1950, Arts. 41 and 42..

18 G.Singh, "Interstate Migrant Workman: An Introduction", in Deep, Deep *et. al. (eds.), Migrant Workman and the Law* 137 (2002).

19 S. 1(4)(a), Inter-state Migrant Workmen Act, 1979.

20 S. 2(e., *Ibid.*.

21 George Kurian & Anurag Bhamidipaty, "The Inter-State Migrant Workmen Act: Remedies for Resolving Drawbacks & Closing Implementation Gaps", 1 *IJRA* 2 (2013).

22 *Ibid.*

23 *Supra* note 19, Ss. 4, 8,

without appropriate registration.[24] But most state authorities lack information on even this basic data as to how many establishments employ migrant workers due to the improper implementation of the Act and the lackadaisical attitude of the authorities with respect to migrant workers.[25]

Section 12 lists down the duties of a contractor as per which contractors have to issue every migrant workman with a passbook with a photograph of the worker and particulars indicating name and place of establishment of employment, period of employment, proposed rates and modes of payment, displacement allowance payable, return rate payable on expiry of employment, any deductions made and any other relevant information.[26] Section 14 also prescribes a displacement allowance that is equal to fifty percent of the monthly wages or seventy-five rupees whichever is higher. This displacement allowance is non-refundable and is in addition to wages that are to be paid to the worker.[27] A journey allowance, both to the state of employment and return to the place of residence must also be provided by the contractor.[28] In addition to this, it is the responsibility of the contractor to ensure regular payment of wages to workmen, ensure equal pay for equal work irrespective of sex, maintain suitable accommodation, provide medical facilities or any protective clothing that is required for the employment and in the event of any fatal accidents or serious bodily injuries, contractors should report to specified authorities of both states and next of kin.[29]

Section 13 specifically provides for equal wage rates, holidays, hours of work and other service conditions for migrant workers who perform the same tasks as regular workmen or that their wages will not be less than that which is fixed by the Minimum Wages Act, 1948.[30] This condition has been laid down on account of the diminished bargaining power of the migrant workers and their increased vulnerability to exploitation. Employers continue to pay lower wages than what has been fixed but the workers do not complain and do not have a mechanism to protest as most of them are not even aware of the rights accorded to them by the statute. [31]

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[24] S. 6. *Ibid.*

[25] Shyama Rajagopal, "Guidance Centre for Migrants Soon", *The Hindu*, September 3, 2016.

[26] *Supra* note 19,S. 12.

[27] *Ibid*, S. 14.

[28] *Ibid*, S. 15.

[29] *Ibid*, S. 16.

[30] *Ibid*, S. 13.

[31] Nitha SV, "Amend the Inter-State Migrant Act, Bring Them Under One Roof", *Mathrubhumi*, April 24, 2016.

What is essential is that the implementation of this act is carefully carried out and the authorities appointed under section 20 of the Act should assume a proactive role in fulfilling their duties under the Act and ensure that provisions of the Act are being complied with. Section 20 requires inspectors to examine registers and records of establishments within his limits that he reasonably believes employs migrant workmen. This section also enables state governments to extend jurisdiction to another state to ensure compliance with provisions with respect to any workman from the former state who is working in the latter and any such order can only be issued with the concurrence of the latter state government.[32] This provision is radical in nature as no other legislation grants such extraordinary power in another state.

Section 22 provides for the dispute resolution mechanism wherein a reference can be made under the Industrial Disputes Act, 1947 and provides for a departure from the usual rules where the appropriate government is of the state where the cause of action arose in so far as an application can be made in the state where the recruitment was made, if such workman has returned after completion of employment.[33] However, it is found that workers rarely ever return to their state of residence but are usually hired by contractors for further employment in other states, hence the legislation in this regard would be more helpful if the workmen could make an application to the state of their current residence.

A proviso to Section 20 also states that after an expiry of six months from the worker's return to his place of residence no application would be entertained and the concurrence of the state government where establishment of employment is situated is also required for making a reference.[34] However in this factual matrix, a six months' limitation period is too short a time given the unawareness among migrant workers of their rights and since they have no access to resources or legal advice.

Section 25 and 26 encompass the penalties imposed for contravention of any provisions of the Act which constitute imprisonment for a term that may extend upto one year or a fine extending upto one thousand rupees or both and in the event of continuing contravention an additional fine of a hundred rupees for every day that the contravention continues.[35] Any other contravention which is not covered by any legislation would amount to imprisonment upto two years and a fine of two thousand rupees.[36]

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[32] *Supra* note 19, S. 20(3).
[33] *Ibid*, S. 22 (1)(a)(ii),.
[34] *Ibid*, S. 20(1)(b)(ii)
[35] *Ibid*, S. 25.
[36] *Ibid*, S. 26..

Since the passing of this legislation in 1979 no amendments have been made to it, there have been no Law Commission reports or any reports by relevant authorities that have sought to analyse the shortcomings of the Act and incorporate any necessary changes. Even the implementation of the existing Act has been disappointing despite the fact that it has been estimated that one-third of the Indian population is comprised of migrants.[37] The government must strive to enforce the provisions of the Act to ensure that the welfare of migrant workers is adequately safeguarded.

(iii) Analysis of Existing Case Law pertaining to Inter-State Migrant Workers

There is a paucity of case law relating to migrant workers and the Act, perhaps due to the failure of proper implementation and due to gross lack of awareness among migrant workers.However, in *People's Union for Democratic Rights* v. *Union of India & Others* the Court held that non-compliance with Acts such as the Inter-State Migrant Workmen Act, 1979 and the Contract Labour Act, 1970 would be a violation of Article 21 guaranteed by the Indian Constitution.[38] These legislations are designed to ensure basic human dignity to the workmen and if the workmen are deprived of any of these rights and benefits to which they are entitled under the provisions of these two social welfare legislations, that would clearly be a violation of Article 21.[39]

In *Bandhua Mukti Morcha* v. *Union of India* the Supreme Court took cognizance of a letter that was written for the enforcement of fundamental human rights of certain workmen living under inhuman conditions. Although the provisions of the Inter-State Migrants Act were found to be inapplicable, the Court analysed them.[40] The issue before the court involved inter-state migrant workmen working in mines and quarries as bonded laborers. The petitioner contended that provisions of labour laws such as the Minimum Wages Act, Employees State Insurance Act, etc. must be afforded to these workmen. The court stated that if a 'contractor' as defined under the Interstate Migrant Workmen Act, would include a *thekedaar* in a stone quarry then such a *thekedaar* would also be a 'contractor' under the Contract Labour Act. Thus, provisions delineating the obligations of contractor or employer under the Contract Labour Act would also be enforceable against a contractor under the Interstate Migrant Workman Act.[41] In light of this interpretation, the court opined that if a workman is employed by a contractor in mines and stone quarry, he must be

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[37] Editorial, "Internal Migration Needs Attention", *Deccan Herald*, September 24, 2016.

[38] *People's Union for Democratic Rights* v. *Union of India & Others* (1982) AIR 1473.

[39] *Ibid,*

[40] *Bandhua Mukti Morcha* v. *Union of India & Others,*(1984) SCR (2) 67.

[41] *Ibid.*

paid the requisite minimum wage. In this case, the court sought to read together similar provisions of beneficial legislations in order to bring migrant workmen under the ambit of such benefits. While such an interpretation goes a long way to address the rights of migrant workmen it also underlines the need for the legislation to have independent provisions mandating benefits for migrant workers under other labour laws.[42]

In *Labourers Working on Salal Hydro Electric Project* v. *State of J&K,* migrant workers were denied benefits of the legislation and the court directed the Labour Commissioner of Jammu to visit the site who ascertained the positions and submitted two reports. The court then issued guidelines that the Central Government was to follow in order to secure observance of the legislation.[43]

In 2014 in a brutal case of chopping of the palms of two migrants, the court directed the State Governments of Odisha and Telengana and State Legal Services Authorities to intervene, file affidavits and take the necessary steps.[44]

III

Comparative Analysis with the Chinese Laws and Regulations

This part focuses on the regulation of rural migrant workers in China, due to the similarity in demographics. The migrant workforce in China does not have a specific legislation regulating them but certain policies and regulations that have come to the fore in the past two decades seek to improve the condition of migrant workers. The analysis pertains to the dispute resolution system provided to migrant workers that has ensured that these workers are at least able to seek implementation of basic rights.

(i) Migrant population in China and Labour Laws

The migrant population in China has seen a change over the past two decades. The first generation workers sought to work for a while in cities, save their earnings so as to retire and live in their farmlands after having made savings. The newer rural populace is more educated and thus apart from better job opportunities and wages, it wishes to work and even settle in the city.

Unlike India, where the legislation for migrant workers pertains only to workers recruited by contractors, the labour law in China applies to all workers. This is beneficial to the extent that the law seeks to distribute benefits to all

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[42] *Ibid.*

[43] *Labourers Working on Salal Hydro Electric Project* v. *State of J&K,* (1983) SCR (2) 473.

[44] *In Re: Chopping of the Palms of Two Migrants* W.P. (C) No. 55/2014.

workers equally, but it does not address the specific requirements of migrant workers and the loss of benefits that they may occur while moving. This has also not been addressed in the Indian Act.

The lack of formal social security regulations for migrant workers is further exacerbated by the existing household registration system, which provides access to government assisted services like healthcare and education based on where the workers have registered their home and land. These migrant workers risk losing access to services when they move to other provinces. However, the government is ensuring the implementation of the newly formed laws, and by including insurance and healthcare as mandatory stipulations on the employers, and delivering pending wage claims, the Chinese government aims to make up for the prior lack of laws.

Internal migration in China is based in the *Hukuo* system of household registration,[45] according to which the country's population is categorized in to rural and urban households. This system is extremely restrictive in nature. The *Hukuo* system allocates social benefits, rations, employer-provided housing, education and health care on the basis of geographic demarcations. This means that the rights of migrant workers who have registered their household in one province and move out to the cities for work, lose out on these benefits.

In 2014, the Chinese government proposed a change is this unfair system, and the state council removed the mandatory distinction between the rural and urban population.[46] The reforms seek to reduce the stark difference between treatment of urban and rural workforce.[47] This will result in most of the migrant workers gaining access to the basic social and health services regardless of where they register their household. But the implementation of the reforms may not have a strong impact, considering most major cities are exempted from the removal of the *Hukuo* division.[48]

It is argued that the benefit of the reforms extends to only those migrant workers who will leave their homes to work in cities, after 2014.[49] Thus, even if many millions will have access to benefits, there will still be a substantial number that will live without an official status.

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[45] *Supra* note 3, at 3.

[46] Lan Shi, "China Reforms Hukou System to Improve Migrant Workers' Rights" *The Guardian*, July 31, 2010.

[47] Prakhar Misra, "Lokking to the East for Lessons on Labour", *The Hindu*, September 14, 2016.

[48] *Ibid.*

[49] *Ibid.*

During the 1960's, after the restrictions on movements were relaxed, a lot of migrant workers left their homes and traditional agricultural occupations to work on construction sites, factories, restaurants, or as domestic help.[50] It is these workers who are responsible for the development of the Chinese economy, but at the cost of sacrificing social benefits and also leaving behind their families to work in exploitative and harsh conditions.

Apart from the hope of better pay, one of the reasons the rural population has to move from the villages to urban centers is because of land acquisition by the Chinese Government. This shift from a rural to urban setting poses problems since it is very difficult for these workers to find suitable places to live and since 2011, the frequency of such provincial shift has increased[51] and the threat of burgeoning slums and security issues is prominent.[52] Urban residents fear that the influx will lead to a dilution of their social benefits and further exacerbate the problem of housing.[53]

The labour laws in China do not allow workers to constitute independent unions or carry out collective bargaining outside of the state-based All-China Free Trade Union (ACFTU).[54] The union is strict about not recruiting migrant workers and focus on the traditional aspect of having district based residential workers as its members. Thus, like in India, the lack of an independent institution for migrant workers means that they are prone to facing social discrimination within workers and concerns pertaining to housing and healthcare are difficult to address.[55].

In India, the allocation of social benefit such as maternity benefit, provident fund, etc, is linked to employment and basic ration and food amenities are linked to the resident state. In such a situation the Chinese *Hukuo* system, though it increases the economic divide in China, can be used in India to implement a system to track the social benefits of workers as they migrate across states. The workers could register their ration and food benefits along with health services in the local *aanganwadi* and be provided with a card as proof of the same. As these workers travel to other states for work they can be provided

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[50] Li Shi, "Rural Migrant Workers in China: Scenario, Challenges and Public Policy", Working Paper No. 89, 7, Policy Integration and Statistics Department International Labour Office Geneva, June, 2008; available at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---integration/documents/publication/wcms_097744.pdf (Last visited on September 29, 2016).

[51] *Ibid.*

[52] Tania Branigan, "China Reforms Hukou System to Improve Migrant Workers' Rights", *The Guardian*, September 30, 2016.

[53] Most housing localities even in Urban China are extremely cramped and scanty.

[54] Human Rights Watch, *Years of My Blood,* HRW (2016).

Ibid.

benefits in the host state where they work on providing proof showing their registered state. This would ensure that migrant workers are not left without social benefits and a registered system would make it easy for the government to track the same. Because the migrant workers usually keep shifting within close states[56], it is prudent to have the registration in the home state.[57]

(ii) A Dispute Mechanism for Effective Implementation of Regulations

Exploitation at the hands of employers who do not even pay these workers regularly leaves very little recourse to the migrant workers. However, though there is a lack of institutional support for migrant workers, the labour laws pertaining to enforcement of wage rights, working hours and exploitation provide for a dispute resolution mechanism that gives the migrant and non-migrant workers alike the opportunity to take their claims to adjudication. This is in contrast to India, where though the Act, as exceptions provides that migrant workers can under the Industrial Disputes Act take up their claims, there have hardly been any cases where an instance of disputes pertaining specifically to migrant workmen rights have been addressed.

The Chinese labour law provides for mediation between the employers and the migrant workers as means of negotiating the pay, benefits and working conditions of workers.[58] If a decision is not reached through mediation, then the parties proceed with arbitration and in the event, this dispute resolution method is not successful the migrant workers can file lawsuits against employers.[59]

The "one mediation, one arbitration and two trials" method of dispute resolution has provided migrant workers with an avenue to seek redress and this framework accompanied by supervision of labour associations has contributed to the increase in number of law suits filed against exploitative employers.

According to the Regulations for Handling of Enterprise Labour Disputes, 1993 ('HELDR') and Labour Law, 1994, when a dispute arises the migrant workers and employees have to approach the Enterprise Mediation Committee ('EMC'). The EMC has representation of both, workers, the labour union as well as a neutral enterprise, which ensures a fair hearing.[60] The efficacy of this

[56] Rameez Abbas and Divya Varma, "Internal Labor Migration in India Raises Integration Challenges for Migrants, Migration Policy Institute", March 3, 2014.

[57] *Ibid.*

[58] Aaron Halegua, "Getting Paid: Processing the Labor Disputes of China's Migrant Workers", 26 *Berkeley J. Int'l Law.* 254. 2008.

[59] St. Council, [Regulations for the Handling of Enterprise Labor Disputes, hereinafter HELDR], No. 117, art. 6-11 (1993); Nat'l People's Cong., Laodongfa [Labor Law], No. 28, Article 79, 1994. *As cited in* Aaron Halegua, *Id.*

[60] *Supra* note 56 at 260.

system is evidenced in the rising number of claims being filed before the appropriate channels. In the past decade, since 2005 there has been an increase of almost 30,000 cases of arbitration being filed in Beijing.[61]

There are Labour bureaus at the municipal and district levels which are mandated to establish Labour Arbitration Committees ('LAC').[62] The LAC is responsible for ensuring that disputes are resolved in the first instance through conciliation and if that does not happen, it is the duty of the LAC officials to ensure an arbitration procedure and subsequently for original appeals to the People's Court. The internal report of the Chinese Labour Office states that almost 40% of these arbitration appeals reach appeal stage at the courts.[63] In Beijing and Shanghai this number is greater due to the high concentration of migrant workers in these cities. At the trial stage, the courts must hear the matter *de novo* which allows for a second opportunity at fair hearing.[64] If migrant workers are not satisfied they can appeal to a higher court. Since 2000 the number of cases filed both at original and appellate level has increased substantially. This system of adjudication has been effective in providing migrant workers a platform to put forth their grievances.

China also has a labour supervision agency that supervises employer compliance with regulations pertaining to wages and sign labour contracts.[65] This agency carries out investigations to see whether migrant labourers are being made to work without regular payment of wages or whether they are housed in slum areas etc. This agency has administrative powers that allows it to issue orders to employers to rectify their actions. The regulation[66] provides for a time period within which the case must be decided.[67] The authority is also mandated to fine employers for non-compliance with regulations, or ill-treatment of women workers and requiring labourers to work beyond regular work hours. And most importantly the regulations entitle migrant workers to claim and receive compensation from employers directly[68] if they have been paid an amount below the minimum wage or have not enforced an agency decision pertaining to the complaints by migrant workers.[69]

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[61] Labor Science Research Office, Internal Report, Woguo Laodong Zhengyi Chuli Zhidu Gaige Wenti Yanjiu [Research on the Question of Reforming China's Labor Dispute Processing System], 2005.
[62] *Ibid.*.
[63] *Supra* note 56, at 261.
[64] *Ibid.*.
[65] Regulations for the Handling of Enterprise Labor Disputes, 1994.
[66] From 60 days after filing the case.
[67] Regulations for the Handling of Enterprise Labor Disputes, 1994, Art. 26,
[68] *Ibid.*
[69] "Internal Labor Migration In India Raises Integration Challenges For Migrants", available at Migrationpolicy.org. (last visited on September 28, 2016).

However, due to their lack of residency in cities like Beijing, and absence of any contractual proof of work, their efforts are seldom met with success. Bureaucratic hurdles and apathy towards their cause prevents the workers from approaching the courts. Yet, the structured framework provided for addressing the grievances of migrant workers has ensured an effective application of the regulations. It is suggested that the in the event of possible amendments, the Indian legislation incorporate a similar system that will ensure that the migrant workers can enforce suits for violation of rights guaranteed to them under the Act.

IV

Proposed Amendments to Unaddressed Issues in the Act

The fundamental problem with migrant labour in India is the seasonal nature of work. Most of the work that migrant workmen do is on construction sites as rickshaw pullers, domestic help, etc. These workers shuttle back and forth between their home state and state of temporary employment and due to this migrant workers face multiple challenges. Migrant workers face integration issues and social exclusion as well as language barriers. Apart from these social disturbances, migrant workers face the problem of improper housing, identity documentation, formal representation in trade unions, social security benefits and entitlements.[70] Another issue is that of political exclusion and the consequent loss of opportunity to vote.[71] Unfortunately, though the Act is conclusively drafted, there has been a failure to implement rights of migrant workmen and additionally there is a lacuna in the law since it does not address ancillary social and economic concerns that migrant workman face.

(i) *Trade Unions to Champion the Cause of Migrant Labourers*

Trade unions and collective bargaining have been universally recognized as a major component of labour law which enhances the bargaining power of workers and plays a prominent role in protecting workers' rights and improving conditions of work.[72] Trade collectives bring similar kinds of workers together and present their demands and concerns to employers and governments. In the case of migrant workers, such trade unions would play a significant role in bringing the issues faced by them to the forefront which would otherwise go unnoticed.[73] Trade collectives can bring together the highly disorganized migrant

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[70] *Ibid.*

[71] Institute of Social Studies The Hague, "Trade Unions and Development", available at: http://library.fes.de/pdf-files/gurn/00168.pdf (Last visited on September 30, 2016).

[72] *Ibid.*

[73] Editorial, "Voting Right A Far Cry for Migrant Workers in Kerala", *The New Indian Express*, May 10, 2015.

workers and avail those rights which were envisaged under Chapter III of the Trade Unions Act, 1926. Having trade union support has proved to be beneficial for migrant workers as there have been instances in the past where trade unions have attempted to enroll migrants in the voters list in order to make the migrant workers a part of the decision making policy.[74] Despite the failure of the efforts of trade unions, it is of utmost importance to the migrants to have the force of the trade union behind them to champion their causes.[75]

(ii) Seasonal Nature of Work

The seasonal nature of employment also poses the risk of returning to their home state and not finding any scope of employment there.[76] Migrant workers also find it difficult to adjust in the urban setting and due to lack of regular payment of wages, they move back to their villages. Since 2012 around 12 million people have moved back from urban areas to work in Rural areas.[77] According to a Credit Rating Information Services of India Limited ('CRISIL') report,[78] unemployment in the construction sector has increased to more than half in the past decade, and during this time almost 3.7 million of the populace migrated to urban areas in search of on-site construction work that paid well.[79] But due to the slump in real estate construction there is a gross imbalance between the number of people seeking work and jobs available. In such a situation, the Act does not address how these migrant workers must be compensated by the contractors who recruited them. It is proposed that if job for which the migrant worker was recruited is not available, the Act should stipulate that the contractor should be obligated under the Act to provide any alternate work that will be adequate to support the migrant workman and ensure that he is able to send a part of his livelihood back to his family.

(iii) Political Inclusion and Voting Rights

While most migrant workers belong to that strata of the society that is more concerned about their livelihood and would not be worried about voting a better political party into power, the rights that are associated with voting are negated

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[74] *Ibid.*

[75] Editorial, "Rural Migrants Return to Villages but Find No Work there Either" *Hindustan Times*, 2015.

[76] Credit Rating Information Services of India Limited, of Growth and Missed Opportunity", CRISIL, "April 2014, available at: https://www.crisil.com/pdf/research/of-growth-&-missed-opportunity.pdf (Last visited on September 30, 2016).

[77] *Ibid.*

[78] *Ibid.*

[79] International Organisation for Migration, , "The Poverty and Vulnerability of Migrant Workers in India", IOM India.

for migrant workmen. The workers are particularly interested in the *Gram Panchayat* and *Gram Sabha* level elections since they have a stake in the grassroots level of decision making. But the present Act does not provide for any mechanism wherein the migrant workers could vote from the state in which they are working. The restrictive approach of the Election Commission to not allow for e-ballot or proxy voting for migrant worker[80] makes matters worse, since it stated that in order for these workers to vote as ordinary citizens, they must register on the voting list in the state they work in. This would lead to the workers losing their voting rights and related benefits in their home state. In the light of these issues it is suggested that there be some system that allows migrant workers to vote in their home state while working in another.

(iv) Identity Documentation and Registration

Since the migrant workers do not have proof of local residence, they are excluded from accessing public services, social inclusion initiatives, and are treated as subpar citizens.[81] This has resulted in migrant workers being unable to access public subsidized food, *grameen* financing, and housing services.[82] However, in light of the Unique Identification Authority of India ('UIDAI'), or the *Aadhar* Act, every citizen being allotted a unique identity number, migrant workers should be able to access public food, housing and financial service with more ease. The *Aadhar* based identification should be incorporated within the Act to ensure that employers comply with providing housing to migrant workers.

The *Awaz* scheme was recently introduced in 2016 to ensure proper data collection of migrant workers and to provide them with healthcare.[83] Under the scheme, it is proposed that migrant workers between the ages of 18 and 60 will be provided with registration and an identity card. Individual migrant workers joining the scheme will also be provided with accident coverage and health insurance worth Rs. 15,000 from various state government and private hospitals.[84] The enrolment of beneficiaries and distribution of the identity cards is the prerogative of the Labour Department. The implementation of the scheme at the district level will be overseen by the District Labour Office. Two levels of complaints redressal have also been provided for whereby complaints are sent to the District Labour Office and appeals to the Labour Commissioner. The scheme is still in its primary stages and more time would be required to complete

[80] *Supra* note 56, at 3.
[81] *Ibid.*
[82] "Health Insurance for Migrant Workers", *The Hindu*, December 02, 2016.
[83] *Ibid.*
[84] *Ibid.*

the project, however, proper implementation might prove beneficial to the integration of migrant workers into the society.[85]

(v) Migrant Workers as a Part of the Public Distribution System

The Public Distribution System provides weaker sections of the society with food products facilitated by the use of a ration card. Migrant workers who come from their native place generally don't possess a ration card in the state of their employment and are hence deprived of the opportunity to avail food products at a subsidized rate. The workers are unable to transfer their ration cards and there are various reasons for this such as not all members of the family migrate and there is only one ration card per family or the procedure for such transfers are cumbersome.[86]

One method to facilitate this is to bring about the option of a roaming ration card that can be used by such migrant workers upon proving their employment in the concerned state or replace the existing mechanism of a family based ration card with individual considerations.

A recently constituted task force on migration, formed by the Ministry of Housing and Urban Poverty Alleviation, has asked for portability of Public Distribution System ('PDS') within states, provision of dormitories in cities as well as better data collection so as to ensure that there are no barriers to voluntary movement of migrant workers across the country.

V

Conclusion

While the existing provisions require changes, it is imperative that any amendments reflect the changes in social and economic realities that affect migrant workers since the enactment of the legislation. The existing jurisprudence highlights the fact that this Act has not been implemented as effectively as it should have. Since its drafting, new issues such as those pertaining to identity registration, voting and workman rights have been identified. These can only be addressed by amendments that aid in effective implementation of existing provisions. For instance, expanding the definition of migrant workmen to include those workers who travel to other states for work on their own volition, and not just those who are employed through contractors, will further effectuate the purpose of the Act. The remuneration provided for in the Act may have been suitable at the time of its enactment but this meager amount will no longer

[85] *Supra* note 80.

suffice for workers and must be adapted to recent times. The amount to be paid as displacement allowance is set at a minimum of seventy five rupees or half of monthly wages which are amounts that were perhaps appropriate for the time the legislation was drafted. Prudence would suggest a much higher minimum displacement allowance, even at par with the revised actual wages.

It is pertinent to look at countries with similar demographics and yet better implementation of migrant worker laws than India, such as China. China's system of registration and record-keeping of migrant workers in their home state so as to effectively track the distribution of public and social amenities has been effective. This is important given that the proposed *Awaz* scheme will deliver healthcare benefits based on registration and identity of migrant workers. However, there could be hurdles in the implementation of the scheme such as a lack of clarity on where the workers should be registered. Another measure that could be adopted from China is the creation of dispute resolution and grievance redressal authorities specifically for migrant workers.

The efficacy of the present Act is undermined by the apathy of the authorities towards the state of migrant workers and even though the government is taking steps to introduce beneficial schemes, the need of the hour is the effective implementation of the suggested amendments.

THE PUZZLE OF FRAND IN INDIA

*Anmol Dutt Mehta**

Abstract

India, in recent times has seen a massive increase in the availability of cheap smartphones improving country's access to internet exponentially. The smartphone makers, however, have been confronted by (Standard Essential Patent) SEP holders for alleged infringement of their patents, which have been promised to be licensed on (Fair Reasonable and Non-Discriminatory) FRAND terms to Standard Setting Organizations (SSOs). Part I of the paper looks to distil out key observations from the SEP wrangle and examine the definition of unwilling licensee and appropriate royalty base for standard patents, arrived at by Delhi High Court. In its recent judgment in Telefonaktiebolaget LM Ericsson v. Competition Commission of India, Delhi High Court has opened the discussion of addressing any possible abuse of dominance by SEP holder under Patent Act itself by way of compulsory license. Part II of the paper, thus evaluates the possibility of a compulsory license for a SEP by analysing the three applications made so far seeking compulsory license over pharmaceutical drugs. Part III of the paper examines the enforceability of FRAND commitment itself in the face of rigid rule of privity of contract in India. Part IV drawing from previous discussions, and in the background of maintaining delicate balance between competition law and IP rights, argues for a greater role of competition law in regulating SEPs and correcting abuse of dominance by SEP holders. It further explores the remedies possible under the scope of Competition Act, 2002.

I

Introduction

The debate about regulating Standard Essential Patents (SEPs) to prevent abuse of rights by their owners sits at the heart of conflict between Intellectual Property (IP) rights and competition law. It has now come to the shores of India. The country has seen massive expansion in the sphere of telecommunication.[1] Availability of ultra-cheap smartphones[2] has helped in this

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1 The total wireless subscriber base in India is 1,033.63 million at the end of March 2016 which makes it the second largest telecommunication market, available at: http://www.trai.gov.in/WriteReadData/WhatsNew/Documents/Press_Release_34_25may_2016.pdf, (Last visited on July 7, 2016).

process and also allowed millions of people to get access to internet for the first time.

The producers of these smartphones have acquired sizeable market shares in few years,[3] based on a business model which relies on importing hardware from China and assembling and selling the devices after some customization.[4] These firms have recently been confronted by SEP owners for alleged infringement of their patents. While Delhi High Court has been quick to grant injunction over alleged infringement of Fair Reasonable and Non Discriminatory (FRAND) encumbered SEPs, a recent order of the same court sitting to decide the jurisdiction of Competition Commission of India (CCI) in matters of patent law has warmed up to the notion of injunction over essential patents being anti-competitive.

This paper explores three unanswered questions in this debate. Part I gives an overview of key observations made by Delhi High Court in suits for infringement. Part II discusses the possibility of correcting abuse of dominance by SEP holder through provisions of Patents Act itself. Part III explores the enforceability of FRAND commitment by a prospective licensee. Part IV drawing from previous discussions argues for a greater role of competition law in regulating SEPs and explores the remedies possible under the scope of Competition Act, 2002.

II

Part I- Story So Far: Overview of Ericsson's Patent Assertion

Ericsson has asserted its patents which form part of standards set internationally (and accepted in India),[5] against Kingtech, Micromax, Intex, Gionee, Xiaomi, Iball, and Lava before Delhi High Court. In all these disputes over unauthorized use of Ericson's essential patents, mobile phone companies have been approached by Ericsson, informing manufactures of unauthorized use and asking for negotiations on FRAND royalty rate. These negotiations have spanned over many years. In Intex the Court took note of negotiations

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2 Simon Mundy, "New Companies Offer Indians Ultra Cheap Smartphones", *Financial Times* (July 24, 2016).

3 Micromax and Intex established less than a decade ago, have now the second and third largest market share, while Lava, established in 2009 is the fifth largest by market share, available at: http://www.statista.com/statistics/269487/top-5-india-smartphone-vendors/ (Last visited on July 20, 2016).

4 Contreras and Lakshane, "Patents and Mobile Devices in India: An Empirical Study", *Vanderbilt J. Transactional Law* (forthcoming 2016-17).

5 Department of Telecommunication (DOT) in India has recognized standards approved globally by SSOs, which are required to be complied by equipment providers in India.

going on fruitlessly for over five years in declaring the company as an unwilling licensee.[6] Suits for infringement have ultimately been filed and injunctions have been granted (however in most cases these injunctions have been lifted by the court adjudicating on an interim arrangement of royalties). In response, Micromax, Intex and iBall have also knocked at the door of CCI, alleging abuse of dominance by Ericsson. The pace and direction of these proceedings will be discussed in Part IV.

In *Kingtech Electronics*, Ericsson filed for a suit to restraint the company from importing and selling mobile phones employing Adaptive Multi Rate (AMR) speech codec technology employed by Global System of Mobile Communication (GSM) phones. The suit was in Ericsson's favour with the order restraining the company from importing into India, devices with infringing AMR technology.[7] In Micromax, the court granted an interim injunction as it found Ericsson's 8 patents concerning AMR, EDGE and 3G technology infringed by imported devices employed in Micromax's assembled mobile phones.[8] The court also arrived at an interim arrangement of royalties which took the net selling price as the base rate, pending final disposition of main suit.[9] The Delhi High Court followed similar path and granted interim injunction against Intex, for infringement of same 8 patents and followed the royalty formula of Micromax as an interim arrangement.[10] In case of iBall,[11] the court decreed in favour of Ericsson when suit for infringement was brought by the patentee. An appeal was filed against the injunction by the mobile phone manufacturer, but pending the appeal, iBall and Ericsson settled the dispute by singing Global Patent License Agreement (GPLA).[12] In another suit against Xiaomi,[13] Ericsson claimed infringement for eight of its patents and succeeded in obtaining injunction restraining the company from importing and selling mobile phones employing Ericsson's patents. Xiaomi however appealed challenging the injunction order, claiming that its latest handsets employed Qualcomm chipsets, which have been licensed by Ericsson and thus

6 *Telefonaktiebolaget LM Ericsson* v. *Intex Technologies India Limited*, (Intex) CS(OS) No.1045 of 2014, Delhi High Court (2015).

7 *Telefonaktiebolaget LM Ericsson* v. *Kingtech Electronics (India) Pvt*, CS(OS) No.68 of 2012, Delhi High Court (2016).

8 *Telefonaktiebolaget LM Ericsson* v. *Mercury Electronics & Anr.* (Micromax), CS(OS) 442 of 2013, Delhi High Court (2013).

9 *Ibid.*

10 *Supra* note 6.

11 *Telefonaktiebolaget LM Ericsson* v. *M/s Best IT World (India) Private Limited (iBall)*, CS (OS) 2501 of 2015, Delhi High Court (2015).

12 Rajesh Kurup, "iBall, Ericsson Settle Patent Issue", *Hindu Business* Line (November 20, 2015).

13 *Telefonaktiebolaget LM Ericsson* v. *Xiaomi Technology & Ors.*, CS(OS) 3775 of 2014, Delhi High Court (2014).

succeeded in obtaining orders, allowing the company to sell only those mobile phones in India which contained Qualcomm chipsets.[14] Recently, the company has been successful in establishing concealment of material facts on part of Ericsson, by not divulging information about a Multi Product License Agreement with Qualcomm at the time of seeking injunction and thus succeeded in getting vacated injunction orders with respect to two patents forming part of 3G technology.[15] Another important dispute has been between Vringo and ZTE. Vringo has sought injunctions against ZTE's Indian subsidiary. Two interesting points flow out of this dispute. It is the first SEP dispute where High Court invoked section 115 of Patents Act to appoint a scientific advisor to inspect the claim of infringement and also first among all other cases where infringement suit was filed over a component and not the entire device.[16]

(i) Key Observations

(a) Conditions for Grant of Injunction

A review of decision of Delhi High Court, reveal a general lack of explanation[17] of the three condition required for grant of injunction, which are: prima facie view that patents are valid and infringed, balance of convenience lies in favour of plaintiff, and denial of injunction will result in irreparable harm.

To form *prima facie* view on infringement the court in Intex and iBall relied on evidence given by Ericsson's in house expert.[18] It was in *Vringo* v. *Indiamart*, that the court for the first time invoked section 115 of the Patent Act to appoint a scientific adviser and consider all the conflicting evidence on infringement.[19]

The second condition of *balance of convenience* requires comparison of harm between situations where injunction is granted and where it is refused. But in Micromax, iBall, Xiaomi and even in Intex which is a detailed decision there is no clear engagement with the opposing view that injunction threatens entire business of prospective licensee and thus damages should be awarded

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[14] *Telefonaktiebolaget LM Ericsson* v. *Xiaomi Technology & Ors.*, FAO(OS) 522 of 2014, Delhi High Court (2014).

[15] *Supra* note 13 (April 22, 2016).

[16] Rohini Lakshane, "Compilation of Mobile Phone Patent Litigation Cases in India, The Centre For Internet & Society", at point 6, available at: http://cis-india.org/a2k/blogs/compilation-of-mobile-phone-patent-litigation-cases-in-india, (Last visited on July 15, 2016).

[17] J. Gregory Sidak, (FRAND in India), *The Cambridge Handbook of Technical Standardization Law*, forthcoming in Vol. 1, available at: http://jiplp.oxfordjournals.org/content/early/2015/06/11/jiplp.jpv096.full, (Last visited on July 20,/2016).

[18] *Supra* note 6, para. 20; *supra* note12, para. 21.

[19] *Vringo Infrastructure Inc. & Anr.* v. *Indiamart Intermesh Ltd*, C.S.(OS) No.314 of 2014, Delhi High Court (2014).

instead. In *Vringo*, where injunction was denied the court held that patentee failed to "show how and to what extent the patent was being infringed."[20]

However, the court in this case denied injunction because no other authorized licensees, who are also likely to suffer due to alleged infringers' conduct, complained to patent holder.[21] This points towards the possibility of plaintiff's case getting stronger if he can show complaints from authorized licensees. Thus, there is a possibility of patentee colluding with other licensee, and building pressure on the alleged infringer, to shift the licensing terms in his favour— an arrangement which also favours other licensees who are competing with this prospective licensee.

The court in *Vringo* denied injunction because it felt the plaintiff can be adequately compensated in form of money or his rights protected by certain other order of court even where infringement is established.[22] But the same rationale was not followed in other cases. In Intex, the court denied arguments against irreparable loss by observing that, by not signing FRAND agreement, it was prejudicing other licensees of Ericsson.[23]

(b) Challenging Essentiality and Validity of Patents in Suit for Injunction

In Intex and iBall, the Delhi High Court drew inference from the averments made by the parties before CCI, where the parties had relied on the essentiality of Ericsson's patents to raise claims of abuse of dominance. The Delhi High Court relied on these arguments to satisfy the prima facie condition that parties were actually infringing on Ericsson's patents. Also the fact of engaging with Ericsson for years to arrive at a reasonable royalty rate, was interpreted to mean that parties believed the patent to be essential and valid.[24] According to Delhi High Court parties were estopped from challenging the essentiality of patents after having argued essentiality of Ericsson's patents before CCI.[25]

However, in the recent decision of Delhi High Court, the court has held that matter before CCI is not in the nature of private lis and is limited to examining abuse of dominance.[26] The court in this case has conclusively maintained the view taken in Huawei and Vringo[27] that a prospective licensee can enter into

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[20] *Supra* note 19, para. 34.
[21] *Id.*, para. 35.
[22] *Id.*, para. 38.
[23] *Supra* note 6, para. 159.
[24] *Id.*, para. 136.
[25] *Id.*, para. 133, 134.
[26] *Telefonaktiebolaget LM Ericsson* v. *Competition Commission of India*, W.P.(C) 464 of 2014 & CM Nos.911 of 2014 & 915 of 2014, Delhi high Court (2016).
[27] *Id.*, para. 204.

FRAND negotiations, while at the same time reserving the right to challenge the patents.[28]

(c) Conduct of Licensees

Court was not impressed by the conduct of prospective licensees, especially the substantial delay in arriving at a FRAND agreement and agitating the issue before CCI and Intellectual Property Appellate Board (IPAB) which was also considered dilatory.[29] Notion of unwilling licensee was established in *Intex*, which put the onus on the prospective licensee to conduct due diligence before importing products and approach patent holder for a FRAND license.[30]

(d) Royalty

In *Micromax*, an interim arrangement of royalties was arrived at based on net selling price of the device pending final disposal of suit.[31] The method has been followed in all other cases as well. Intex argued against this notion of FRAND rate by citing *Microsoft*[32] and *Innovatio*[33] where chipset price was taken as base rather than price of whole device.[34]

These arguments were not considered by the court, rather it agreed to rely on *CSIRO* v. *CISCO* (U.S District Court for the Eastern District of Texas), a case cited by Ericsson. The decision of High Court does not contain any evaluation of rival contentions or even complete appreciation of this cited case. The court interprets the case as one which "rejected the notion of determining royalty based on cheapest price."[35]

Recently in appeal to this decision the Federal Circuit[36] has re-stated the long standing principle that damages in patent infringement should be based on "value attributable to the infringing features of the product and no more."[37]

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[28] *Supra* note 26, para. 200.
[29] *Supra* note 6, para. 136, 137.
[30] *Id.*, para. 136.
[31] *Supra* note 9.
[32] *Microsoft Corp.* v. *Motorola, Inc.*, No. C1O-1823JLR, 2013 WL 2111217, W.D. Washington (2013). The court in this case did not determine the royalty rate but made observations which disregarded calculating royalties based on final price.
[33] *In re Innovatio IP Ventures, LLC Patent Litig.*, WL 5593609, N.D. Illinois (2013). In this case the value of wifi chipset was considered the appropriate royalty base and not the price of the electronic device.
[34] *Supra* note 6, para. 73.
[35] *Supra* note 6, para. 156.
[36] *Commonwealth Scientific and Industrial Research Organisation* v. *Cisco Systems, Inc.*, Fed. Cir., 2015.
[37] S. 284, Patent Act (United States).

Citing *Ericsson*[38], the court of Appeals for Federal Circuit holds that "...ultimate reasonable royalty award must be based on the incremental value that the patented invention adds to the end product."[39] *CSIRO* emphasises the relevance of taking smallest saleable patent-practicing unit as the base for determining the appropriate royalty relying on *Laser Dynamics.*[40] It holds that "where small elements of multi-component products are accused of infringement, calculating a royalty on the entire product carries a considerable risk that the patentee will be improperly compensated for non-infringing components of that product."[41]

In spite of this explanation, the reason these principles were not followed was because the district court had taken note of negotiations regarding appropriate royalty rate between the parties as the starting point.[42] *CSIRO* confirmed that standardization context should be taken into account when assessing the appropriate royalties for an essential patent, "... which must not include any value flowing to the patent from the standard's adoption."[43]

Quite opposite to the above discussions, the Delhi High Court has not given a sound appreciation of conflicting ideas on determination of royalties and the appropriate royalty base. This has been one of the main grounds of compliant before CCI which was not impressed by royalty calculated as percentage of final product, which increases with the product, with no contribution from the patented technology.

There appears to be considerable force in not calculating royalty based on net selling price as it amounts to compensating the patent holder of a small element of a component to be compensated for non-infringing components of the product.[44] The Delhi High Court should have considered and given proper appreciation to the rival contentions. As the new chapter on the SEP debate is being written from the perspective of competition law there is bound to be more varied consideration of rival models for calculating royalty base.[45]

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[38] *Ericsson Inc.* v. *D-Link Systems Inc.* 773 F.3d 1201, Fed. Cir., 2012.

[39] *Supra* note 36, at 11.

[40] *Laser Dynamics, Inc* v. *Quanta Computer* Inc., 694 F. 3d 51, Fed. Cir., 2012, at 67.

[41] *Supra* note 36, at 12.

[42] *Id.*, at 13.

[43] *Id.*, at 17. The decision is remarkable because it notes that standardization context is to be taken into account not simply for a FRAND encumbered patent but also for non FRAND. The case also remarked that starting point for determining royalties might itself have been influenced by standardization. Thus on remand the District Court must take this into account.

[44] *Supra* note 40, at 67.

[45] Joseph Kattan, "The Next FRAND Battle: Why the Royalty Base Matter?", 1 *CPI Antitrust Chronicle*, (2015).

(e) Grant of Injunction against FRAND Encumbered Standard Essential Patents

Delhi High Court has followed the line of granting injunction even where FRAND encumbered SEPs are involved. This strict line is visible in the observation made by the court in some of its decisions. In Intex, Delhi High Court makes it clear that it will grant injunction against "any party" that employs patents without the consent of patentee, "the statutory and monopoly rights cannot be reduced to a nullity till the term of validity of the suit patents."[46]

On the contrary, Delhi High Court's recent decision on the point of jurisdiction of CCI has warmed up to the notion of treating FRAND encumbered essential patents differently from non-essential patents.[47] The Delhi High Court also discussed Huawei,[48] where Court of Justice held that SEP holder seeking injunctive relief against a willing licensee can be a violation of Article 102 of TFEU. Delhi High Court accepting this notion observed that "injunctive reliefs by an SEP holder in certain circumstances may amount to abuse of its dominant position".[49] Considering the fate of all the previous cases filed by Ericsson where injunction were granted and arguments of dominance were not accepted, this observation by Delhi High Court shows that this debate could now be shaped with a better understanding of competition perspective.

(ii) Conclusion

The Decisions of Delhi High Court involving Ericsson's essential patents involve an incomplete explanation of the three conditions required for grant of injunctions. They also show little appreciation of unequal bargaining power that results because of threat of injunction over essential patents. Even with regard to appropriate royalty base for FRAND the court has indulged in only a limited evaluation of rival contentions. While the recent decision of Delhi High Court provides a more complete appreciation of standardization context, it has clearly limited the scope of observations by clarifying that views expressed "are in context of jurisdiction of CCI". The observations are nonetheless important in informing the subsequent discussions on this issue. The next three sections would thus explore the scope of patent, contract and competition in enforcing FRAND and preventing an impasse between SEP holder and users.

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[46] *Supra* note 6, para. 153.

[47] *Supra* note 26, 180, 200.

[48] *Huawei Technologies Co. Ltd* v. *ZTE Corp., ZTE Deutschland GmbH*, Case C-170/13, *Court of European Justice*, 2015.

[49] *Supra* note 26, para. 199. Also observing that "The position of a proprietor of an SEP cannot be equated with a proprietor of a patent which is not essential to an industry standard".

III.

Patent Law Remedy

The recent ruling of Delhi High Court in *Telefonaktiebolaget LM Ericsson* v. *Competition Commission of India*,[50] is seminal not simply for confirming the jurisdiction of CCI over matters relating to patents[51] but also for opening discussion on remedy for abuse of dominance by holder of essential patent under the provisions of Patents Act itself.[52] This remedy exists in the form of compulsory license.[53] The Delhi High Court, however, has also clarified that while there is repugnancy between the Patents Act and Competition Act,[54] in case of any conflict between the two statues, the Patent Act will prevail as it is a self-contained code.[55] In this context it is important to evaluate the possibility of a compulsory license for a SEP by considering the observations made by the Controller of Patents and court in the three applications made so far seeking compulsory license for pharmaceutical drugs.

(i) Compulsory License

Compulsory license as a remedy under patent law is not unique to India and finds place in statute books of many jurisdiction. Among the developed nations, U.S. is one jurisdiction which does not have the remedy on its statute book. However, after *ebay*[56] decision of Supreme Court, which provides for damages rather than injunction in scenarios where public interest overrides rights of patent holders, the possibility for grant of compulsory license are much higher.[57] In case of India, compulsory license has been granted only once and two other application made for compulsory license have been rejected.[58]

An application for grant of compulsory license can be made by any person under section 84 of the Act on satisfaction of two conditions: a) three years have expired from the date of grant of patent to patent holder, and b) the applicant should have made an effort, for a reasonable period, to obtain a voluntary license of patented invention from the patent holder on reasonable terms and conditions.[59]

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[50] *Ibid.*
[51] *Id.*, para. 178.
[52] *Id.*, para. 143.
[53] *Id.*, para. 159.
[54] *Id.*, para. 175.
[55] *Id.*, para. 144, 155.
[56] *eBay Inc* v. *Merc Exchange*, LLC, 547 U.S. 388, United States Supreme Court, 2006.
[57] V.K. Unni, "Compulsory Licensing of Pharmaceutical Patents in India: Whether Natco Decision Will Meet the Global Benchmarks?" 37(5), *E.I.P.R.* 296 (2015).
[58] Compulsory License has been granted to Natco and applications made by BDR Pharma and Lee Pharma have been rejected.
[59] S. 84, Indian Patents Act, 1970, Explanation- "reasonable period" shall be construed as a period not ordinarily exceeding a period of six months.

It is only on satisfaction of these prima facie conditions that the application will be served upon the patent holder as well as published in official journal, to allow the patent holder or any other person desiring to oppose the application to file their opposition to such an application for grant of compulsory license.[60]

Compulsory license is given when the application satisfies any of the three grounds given in section 84 (1). The applicant is required to establish in his application that (a) the reasonable requirement of public with respect to the patented inventions have not been satisfied; or (b) the patented invention is not available to the public at a reasonably affordable price; or (c) the patented invention is not worked in the territory of India.

(a) Reasonable requirements of Public

The Bombay High Court in the *Bayer Corporation* v. *Union of India and others*,[61] which is the only successful case of compulsory license, observed that reasonable requirement of public for the patented invention is measured as per conditions spelled out in section 84 (7) of the Act.[62]

The division bench in this case interpreted the requirement of public in terms of numbers of users requiring the patent. The exercise involves first determining the number of users of patent and then figuring out if there is difference between the demand for the patented product and the quantity supplied by the patent holder. These facts are determined according to evidence led by parties before the authorities.[63] In this case the court noted that there was demand for patented drug from 8842 patients while the quantity supplied was fit for only 200 patients. And the reasonable demand has to be met to adequate extent[64] which varies from article to article and in case of medicine is 100% and for luxury articles would be completely different.[65]

In *Lee Pharma* v. *Astra Zeneca*,[66] which is the third and latest application,

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[60] S. 87, Indian Patents Act, 1970. In *BDS* v. *BMS* the application for compulsory license was rejected. The court held that the applicant failed in establishing that he made serious attempt in procuring a voluntary license. Thus, for the application to be considered the applicant has to show serious intent in form of negotiations for at least six months with the patent holder. [*BDR Pharmaceuticals* v. *Bristol Myers Squibb*, C.L.A No.1 of 2013, available at: http://ipindia.nic.in/iponew/Order_30October2013.pdf.

[61] Writ petition No. 1323 of 2013, DB decision dated July 15, 2014. Originally, compulsory license was granted in favour of Natco an Indian generic manufacturer, in 2012, with respect to patented drug of Bayer, meant for treatment of liver and kidney cancer.

[62] *Id.*, para. 9(a).

[63] *Id.*, para. 12 (B)(b).

[64] *Ibid.*

[65] *Id.*, at para. 12 B-II (f).

[66] C.L.A No. 1 of 2015, Controller of Patents, Patent Office, Mumbai.

the applicant was seeking compulsory license for "Saxagliptin" a drug prescribed for treatment of Type-II diabetes. The Controller of Patents in this case rejected the application primarily on the ground of lack of potent and reliable evidence/ data in favour of applicant. The applicant relied on International Diabetes Federation (IDF) report to show that some 60 million Indians were suffering from diabetes and thus at least 1 million Indians could reasonably be expected to be suffering from type-II diabetes. The applicant tried to prove that patent holder's annual supply of patent product was only catering to 0.23% of total demand.[67] But the controller rejected the arguments because the data/evidence relied on was not considered authentic, as it was neither based on any specific survey or any authentic report by government agency.[68] In order to establish a case for compulsory license it was required of the applicant to provide specific number of Type II diabetes patients which were prescribed the drug and the number of patients who were deprived of it owing to its unavailability.[69] The controller noted that there were other alternatives available in the market and reasonable requirement of public can be ascertained only in context of number of patients requiring patent holder's drug over other Type II drugs.[70]

(b) Reasonably Affordable Price

The second ground for grant of compulsory license requires proof that patented invention is not made available to public at reasonable affordable price. Bombay High Court in *Bayer* noted that before determining whether the patented invention was available to public at reasonably affordable price it is necessary to first determine what is the reasonably affordable price in respect of patented invention.[71] In this regard Bombay High Court made clear that "the Act itself does not bestow any powers of investigations with regard to the reasonably affordable price and therefore, the authorities do not have the wherewithal/ personnel to carry out the above exercise."[72] The authorities under the Act cannot sit to determine the price of patented invention and the affordable price will be determined on the basis of "evidence led by parties and impeached by the other side."[73]

Since there were other alternatives available for the patented drug, the controller in *Lee Pharma* held that in order to determine reasonably affordable

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[67] *Id.*, para. 18.
[68] *Id.*, para. 19 and 24.
[69] *Id.*, para. 20 and 21.
[70] *Id.*, para. 20.
[71] *Supra* note 61, para. 14(a).
[72] *Id.*, para. 14 (a).
[73] *Id.*, para. 14 (a).

price the controller will consider the price of the patent, the price of other alternatives and whether the price of patent acts as barrier to access that patented drug.[74] The application was rejected as the question of affordability could not be determined because of lack of data on exact number of patients requiring the patented drug vis-à-vis other alternatives available.[75]

(c) Working of patent

The requirement of "worked in the territory of India" has to be interpreted according to section 83.[76] Section 83 provides that patent is not grated to allow patent holder to enjoy a monopoly with respect to importation of patent article.[77] Thus, the court hinted that some efforts have to be made by the patent holder to work the patent in form of manufacture within India. In *Bayer*, Bombay High Court clarified that "manufacture in all cases may not be necessary to establish working in India..."[78], and the question of working in India has to be ascertained on a case by case basis. However, the court also held that patent holder will have to satisfy authorities "as to why patented invention was not being manufacture in India..." and this becomes especially important where the patent holder has manufacturing facilities in the country.[79]

(ii) Compulsory License for SEP

In case of Standard Essential Patents among the three ground available for establishing a claim for compulsory license, section 84 (1)(a) and (b) appear to be the grounds where a case can be made.

Section 84 (1) (a): The applicant for compulsory license for a SEP under first ground will have to show that reasonable requirement of the public has not been met. The three applications made so far for compulsory license have argued on the basis of section 87 (a) (ii), which reads that reasonable demand of public is not satisfied if by reason of refusal to grant license on reasonable terms "the demand for the patented article has not been met to an adequate extent or on reasonable terms". This condition as has been shown above requires proof of difference between supply and demand for patented invention. In the cases mentioned above the argument was further shaped by providing that the excessive cost of product hindered satisfaction of demand.

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[74] *Supra* note 66, para. 26, 27, 28 and 31.
[75] *Id.*, at para. 32.
[76] *Supra* note 61, para. 15(b).
[77] *Ibid.*
[78] *Ibid.*
[79] *Ibid.*

In case of SEPs however the correct grounds to base the application cannot be section 87 (a) (ii). To satisfy this qualification would require proof of the fact that reasonable requirement of public for mobile phones was not met to an adequate extent because of unreasonable terms of license. The unreasonable terms in case of SEP being excessive FRAND, the applicant would have to, in turn prove that demand for excessive royalties is such that would drive up the price of mobile phones, and thus deprive the public access to cheap smartphones. This has to be statistically established considering the failure of application on grounds of reliable evidence in *Lee pharma* case. As adequate demand varies from article to article, the applicant will have to establish what the adequate demand in case of cheap smartphone is, and to what extent the demand is being affected by higher rates, depriving those who would have otherwise demanded the product had it been cheaper. Also noting from *Lee Pharma*, applicants' case becomes further problematic because, the market for cheap smartphones is highly competitive and thus would require the applicant to establish why the reasonable demand cannot be fulfilled by any other cheap smartphone when there are many other brands available which are perfectly substitutable.

Further, application can also be made on grounds that reasonable requirement of public is not met by reason of unreasonable terms in the license or outright refusal to grant license, which is affecting the existing trade of the person or his manufacturing capabilities or prejudicing the development of his commercial activities.[80] These are sound grounds to establish a case for compulsory license and the analysis and proof would be similar to establishing a case under section 4 of Competition Act for abuse of dominance against SEP holder.[81] Invoking these grounds the applicant will have to establish that excessive FRAND royalty or refusal of license by virtue of seeking an injunction was prejudicing applicant's trade in mobile handsets. Similarly to establish case under section 84(7)(a)(iv) the applicant will have to show, that SEP holders conduct is prejudicing the development of his commercial activities. To build a case on these grounds will require clear effects of refusal to license or excessive royalties or unreasonable licensing conditions on the commercial activity and trade of selling mobile handsets and how this makes satisfaction of reasonable requirement of public difficult.

Section 84 (1) (b): If the application for compulsory license is based on the ground that patented invention is not made available to public at reasonably affordable prices. The applicant will have to first establish the impact of unreasonable licensing terms, excessive royalties or threat of injunction by SEP

[80] S. 84(7), Indian Patents Act, 1970.

[81] *Supra* note 26, para. 143.

holder on the final price of the mobile handsets. The case under this ground would succeed only if the applicant is successful in establishing a correlation between the abusive conduct of SEP holder on the price of product, making it unaffordable to the public. For this reason, it would have to be determined what the reasonably affordable price (for a mobile phone) for public is and will the increase in price of the mobile phone create a barrier to access. Drawing from *Lee Pharma*, question of price of other alternatives available in the market also becomes important. Crucially, unlike a competition law analysis where the Director General does a thorough investigation, all this information would have to be led by parties as no powers of investigation are bestowed to determine reasonably affordable price under the provision of Patent Act as mentioned in *Bayer* by Bombay High Court. Failure to establish these facts would disallow grant of compulsory license. Also to be noted is the court's insistence on reliable data based on survey or report by government agency in absence of which reliance on any other privately conducted investigation becomes doubtful.

(iii) Interim Conclusion

The recent decision of Delhi High Court has opened the discussion on the possibility of patent law remedy to resolve abuse of dominance by SEP holder. An analysis of provisions for compulsory license as it stands on statue and interpreted by courts, however, reveal that such a remedy in case of SEP is likely to fail for lack of reliable data proving reasonable requirement and affordability. It is for this reason it is worth exploring the possibility of seeking resolution within the terms of FRAND itself by raising claim for breach of FRAND obligation which is attempted in the next section.

IV

Part III- FRAND as Contract

Before a patent is accepted as standard, the Intellectual Property Rights policy of many SSOs require the patent holder to give an unequivocal commitment to license the patent on FRAND terms to prospective licensees[82]. IEEE-SA requires licensing assurance on IEEE-SA Standards Board approved Letter of Assurance (LoA) form[83] from the patent holder or patent applicant before

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[82] R. Bekkers and A. Updegrove, "A Study of IPR Policies and Practices of a Representative Group of Standards Setting organization Worldwide", *US National Academics of Science, Technology and Economic Policy*, (September 2012).

[83] Letter of Assurance for Essential Patent Claims, available at: https://development.standards.ieee.org/myproject/Public//mytools/mob/loa.pdf, (Last visited on July 30, 2016).

standard is approved.[84] This licensing assurance requires the patent holder or patent applicant to agree not to enforce its essential patents, and that it will license its patents on FRAND terms to all applicants.[85]

Leaving the detailed arrangements arising from patents to parties concerned, ITU's patent policy requires that before a patent is embodied in a standard, the patent holder or the applicant to make full disclosure and provide a written statement[86], indicating whether it is prepared to grant license free of charge, on FRAND terms, or unwilling to grant license.[87]

(i) Contract or Voluntary Promise?

The rights of a prospective licensees with regard to the commitment given by patent holder to SSO is fairly settled in United States and United Kingdom.[88] In United States, *Motorola*[89] argued that its FRAND commitment is only a unilateral offer. The district court relying on the fundamentals of a valid contract, offer, its acceptance, and consideration, held that "a contract is formed through Motorola's (or any essential patent holder's) commitment to the IEEE or the ITU to license patents on FRAND terms."[90] According to District Judge, request by SSO (in this case IEEE and ITU) to patent holders to indicate their intentions of having their technology incorporated in the standard constitutes offer. Patent holder's declarations and letter of assurance constitute acceptance.[91] Requisite consideration for contract formation is considered to exist by including or at

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[84] Clause 6.2 Policy of IEEE-SA Standard Board By-Laws, available at: http://standards.ieee.org/develop/policies/bylaws/sect6-7.html#7, (Last visited on July 25, 2016).

[85] *Ibid.*

[86] Patent Statement and Licensing Declaration form of ITU, available at http://www.itu.int/dms_pub/itu-t/oth/04/04/T04040000020004PDFE.pdf, (Last visited on July 30, 2016).

[87] Common Patent Policy of ITU-T/ITU-R/ISO/IEC, available at http://www.itu.int/en/ITU-T/ipr/Pages/policy.aspx, (Last visited on July 28, 2016). Where the patent holder or the applicant is unwilling, the Guidelines, Clause 3 provides, whether the identification of the patent took place before or after the approval of the recommendation/deliverable, if the patent holder is unwilling to license under paragraph 2.1 or 2.2 of the patent policy, the organizations will promptly advise the technical bodies responsible for the affected recommendation deliverable so that appropriate action can be taken. such action will include, but may not be limited to, a review of the recommendation/ deliverable or its draft in order to remove the potential conflict or to further examine and clarify the technical considerations causing the conflict; Guidelines for Implementation of the Common Patent Policy for ITU-T/ITU-R/ISO/IEC, available at: http://www.itu.int/dms_pub/itu-t/oth/04/04/T04040000010004PDFE.pdf, (Last visited on July 30, 2016).

[88] In U.K. third parties can claim under Contracts (Rights of Third Parties) Act, 1999.

[89] *Microsoft Corp.* v. *Motorola, Inc.*, 864 F. Supp. 2d 1023 - Dist. Court, WD Washington (2012).

[90] *Id.*, page 1032.

[91] *Id.*, page 1033.

least considering the patent holders technology to form part of the standard.

In *Apple, Inc.* v. *Motorola Mobility, Inc.*[92], Apple made a breach of contract claim against motorola for reneging its binding commitment to license on FRAND terms. The district judge, held that "...the combination of the policies and bylaws of the standards-setting organizations, Motorola's membership in those organizations and Motorola's assurances that it would license its essential patents on fair, reasonable and non-discriminatory terms constitute contractual agreements."[93] The opinion of the court makes clear that IPR polices of SSO constituted essential terms of contract and stood as offer and when Motorola agreed to be bound by these policies by becoming a member of SSO and submitting letter of assurance it amounted to acceptance. The element of consideration was also satisfied as Motorola benefited from participating in the standards development process and was able to influence the choice of technology for the standards.[94]

From the above discussion the relationship between holders of essential patent which has given FRAND commitment to SSO becomes clear. However, the language used in the IPR policies of these organizations also makes clear that organizations will not enforce their policies or determine what terms constitute a fair, reasonable and non-discriminatory license. This raises the question whether the user of the standard can enforce the contract as third party beneficiary. Courts in England rely on 1999 Act which give third party beneficiaries right to claim against Patentee on the basis of their binding commitment to SSOs as they directly and primarily benefit from its existence. In United States, when this issue is also well settled. In *Microsoft Corp.* v. *Motorola, Inc.*,[95] the district court relying on *ESS Tech., Inc.* v. *PC-Tel*[96], Inc., held that Microsoft is a third-party beneficiary of Motorola's commitments to the IEEE and ITU as Motorola's commitments to the IEEE and the ITU are for the direct benefit of Motorola's potential licensees, including Microsoft. Similarly, in *Apple, Inc.* v. *Motorola Mobility, Inc*[97], the court noted that the primary purpose of IPR policies of SSO's such as ETSI and IEEE, is to reduce the risk of standard technology being unavailable and ensuring their access at reasonable rates to

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[92] *Apple, Inc.* v. *Motorola Mobility, Inc*, 886 F. Supp. 2d 1061 - Dist. Court, WD Wisconsin (2012).

[93] *Id.*, page 1084.

[94] *Ibid,* page 1084.

[95] *Microsoft Corp.* v. *Motorola, Inc.*, 854 F. Supp. 2d 993 - Dist. Court, WD Washington (2012).

[96] *ESS Tech., Inc.* v. *PC-Tel*, 1999 WL 33520483 N.D.Cal.

[97] *Apple, Inc.* v. *Motorola Mobility, Inc*, 886 F. Supp. 2d 1061 - Dist. Court, WD Wisconsin (2012).

users like apple who incorporate standards in their own products.[98] Accordingly it held apple to be third party beneficiary of the agreements made between Motorola and IEEE and Motorola and ETSI.[99]

In India, where the jurisprudence on dealing with SEP issue is still at a nascent stage, the concern is of more fundamental nature. In no case either before the Delhi High Court which has given ruling on appropriate FRAND royalty and jurisdiction of CCI or before the CCI which has up till now only given its preliminary view on possible abuse of dominance by SEP holder, has the issue of privity between user of standard technology and patentee been discussed. While under Indian law of contract, the arrangement between SSO and patent holder will be akin to a binding contract, the law of contract in India does not recognize the right of third party beneficiary to enforce a contract to which it was not a party.[100] This rigid rule if applied in the scenario of standard setting will disentitle the user of standard, who although is direct beneficiary of the contract between SSO and patentee, cannot raise a claim for breach of contract to enforce a FRAND promise.

There are some judgments which give the impression that a beneficiary to a contract though a stranger to it can raise a contractual claim. Reading the opinion of Justice Mookerji in *Debnarayan Dutt* v. *Chunilal Ghose*[101] or the ruling of Privy Council in *Khwaja Muhammad Khan* v. *Husaini Began*[102], inference can be drawn that a stranger to a contract, which was to his benefit, was entitled to enforce the agreement, even though the arrangement to his benefit was not communicated to him by the parties, to the contract, and was brought to his notice by a mere accident. But these two judgments have either not been followed, clarified to be decisions on their special facts[103] or been brought under the usually accepted exceptions to the rigid rule of privity of contract.[104] Thus the rule is, "if A contracts with B for a benefit to be given to C, although that was the object and purpose of the contract, C may not sue on that contract unless in certain excepted cases... where there was an obligation in equity amounting to a trust arising out of the contract or in case of communities where

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[98] *Ibid,* page 1085.

[99] *Ibid,* page 1085.

[100] *Jamnadas* v. *Ram Autar Pande* (1909) *I.L.R.* 31 A. 352; *Thirumulu Subbu Chetti* v. *Arunachalam Chettiar*, (1930) 58 *MLJ* 420; *Babu Ram Budhu Mal And Ors.* v. *Dhan Singh Bishan Singh And Ors.*, AIR 1957 *P H* 169 and *Ahmed Mohiuddin* v. *G. Malla Reedy*, *AIR* 1967 AP 26.

[101] *Debnarayan Dutt* v. *Chunilal Ghose*, (1913) *I.L.R.* 41 C. 137.

[102] *Khwaja Muhammad Khan* v. *Husaini Began I.L.R.* 32 A. 410.

[103] *Jiban Krishna Mullik* v. *Nirupama Gupta*, (1926*) I.L.R.* 53.

[104] *Babu Ram Budhu Mal And Ors.* v. *Dhan Singh Bishan Singh And Ors.*, AIR 1957 P & H 169.

marriages were contracted for monies by parents and guardians."[105] Accordingly, after a full review of cases on doctrine of privity the Madras High Court concluded that "a person not a party to a contract cannot sue on the contract though a benefit is secured to him and unless the case falls within the exceptions"[106] which are based on existence of constructive trust or some family arrangement.

This reasoning has been followed with approval by Indian courts even post-independence. The Division Bench of Andhra Pradesh High Court in *Ahmed Mohiuddin* v. *G. Malla Reedy,*[107] dismissed a claim on the basis of benefit derived from a contract for third party.[108] Division Bench of Punjab and Haryana High Court again relied heavily on judgment delivered by full Bench of Madras High Court and denied the claim of plaintiff who were relying on *Debnarayan Dutt* and *Hussiani Begum* praying to establish a claim as third party beneficiary.[109] The Supreme Court of India, has also upheld this rigid rule on privity in *M.C. Chako* v. *Union of India.*[110] The pronouncement by the Apex Court makes clear that "under the English Common Law only a person who is a party to a contract can sue on it and that the law knows nothing of a right gained by a third party arising out of a contract." The court also noted the limited exception to this rule which exist "in the case of a beneficiary under a trust created by a contract or in the case of a family arrangement."[111]

Thus, in the Indian scenario a claim for breach of contract will be defeated on the grounds of lack of privity of the third party beneficiary in the contract between SSO and holder of essential patents. A likely remedy available for third party beneficiaries, in case of standards set by ETSI, is to challenge the conduct of patent owner under French law as its intellectual property licensing declaration form, states that "the construction, validity and performance of this General IPR licensing declaration shall be governed by the laws of France."[112] In *Apple*'s[113] case the district court had in fact relied on French law in interpreting breach of contract claim and establishing third party beneficiaries' rights in favour of Apple Inc. Another possibility is to establish claim for breach on basis of doctrine of promissory estoppel.

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[105] *Tirumulu Subbu Chetti* v. *Arunachalam Chettiar* (1930) 58 *MLJ* 420.
[106] *Ibid.*
[107] *Ahmed Mohiuddin* v. *G. Malla Reedy,* AIR 1967 AP 26.
[108] *Ibid,* para. 41 to 46.
[109] *Ibid,* para. 7, 8 and 9.
[110] *M.C. Chako* v. *Union of India*, MANU/SC/0008/1969.
[111] *Ibid,* para. 9.
[112] ETSI's ETSI Intellectual Property Rights Policy, available at: http://www.etsi.org/images/files/ipr/etsi-ipr-policy.pdf, (Last visited July 30, 2016).
[113] *Supra* note 93, page 1082-85.

(ii) Enforcing FRAND through Principle of Promissory Estoppel

The strict rule on privity of contracts prevents prospective licensees from claiming benefits under FRAND. However, a claim for breach of FRAND commitment can still arise on basis of promissory estoppel.[114] Courts in India have recognized the doctrine "...to interpose equity shorn of its form to mitigate the rigour of strict law."[115] To invoke the principle requires that there should be a clear and unambiguous representation which should have been relied upon by a person altering his position to his prejudice. ETSI for example requires the holder of the patent declared essential to give an irrevocable undertaking.[116] If this undertaking cannot be read to the benefit of third parties and merely a voluntary promise, doctrine of promissory estoppel can certainly be employed to bind the SEP holder to his promise, if the prospective licensee has acted on the belief of this promise and geared his commercial investments to manufacture products employing SEPs believing they will be licensed on FRAND terms. Further, promissory estoppel can be successfully invoked only in cases where the condition to the promise is fulfilled. Since irrevocable undertaking as per clause 6.1 of ETSI IPR policy is subject to the licensee reciprocating, the prospective licensee must fulfil this condition.

Thus, doctrine of promissory estoppel can come to the rescue of a prospective licensee to enforce his claim in equity. As far as the current wrangle goes, Ericsson has consistently stated its commitment to license the patents declared as standard essential on FRAND terms[117] and therefore would now be estopped from challenging the basis of FRAND commitment. But considering the issue is as yet unaddressed, the courts in India should address this for sake of legal certainty.

(iii) Conclusion

Most of the SSOs require an unequivocal commitment to license patent selected as standard on FRAND terms. The law of contract in India, however, follows a rigid rule which requires privity of contract. This condition disallows a third party beneficiary to claim benefit or claim breach of contractual commitment, to which it is a stranger. This is problematic for prospective licensees in India. An analysis of doctrine of promissory estoppel however reveals the possibility of prospective licensee establishing its claim based on estoppel. Since issue of

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[114] *Union of India* v. *Indo Afgan Agencies* [1968] 2 *SCR* 366; *Motilal Padampat Sugar Mills* v. *State of Uttar Pradesh* [1979] 2 SCR 641.

[115] *Vasantkumar Radhakisan Vora* v. *Board of Trustees of the Port of Bombay*, *AIR* 1991 SC 14, para. 11.

[116] *Supra* note 113, clause 6.1.

enforceability of FRAND, till now has been left unaddressed, it creates lack of legal certainty. The analysis in the above two sections thus reveal that competition law in India has to carry the weight to tackle issues of dominance by SEP holder and correct any unequal bargaining.

Part IV

Competition Law Analysis of FRAND

At global stage there is a lively debate on whether competition law should have any role in preventing abuse of patent rights by narrowing the right to seek injunction or charging of excessive royalties by SEP holder.[118] In Indian scenario, considering the unaddressed issues on privity of contract which creates lack of clarity over the ability to claim breach of FRAND commitment and the remedy of compulsory license highly unlikely because of lack of data, the role of competition law in maintaining the balance of bargaining power and regulating the conduct of SEP holders becomes important. An interesting quirk in the negotiation for FRAND in India is evident from the research of Contreras and Lakshane,[119] which shows that unlike the global showdown between SEP holders and manufactures of mobile phones in Europe and US, in India the users of SEP hold no patents at all[120] and thus the game is overwhelmingly skewed in favour of few SEP holders who themselves are not, in any major manner, involved in manufacture of mobile handsets in the market.[121]

In the three complaints filed before the commission till date, by Micromax,[122] Intex[123] and iBall,[124] the commission has accepted the likelihood of patent hold

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[117] *Supra* note 6, para. 8: "The plaintiff contends that from 2008 onwards till the filing of the present suit, though the defendant has always averred and in fact continues to state that it is willing to discuss and enter into a FRAND license with the plaintiff..."

[118] Mark Lemley, "Ten Things To Do About Patent Hold Up of Standards (And One Not To)" 48 *Boston College Review* 149 (2007). Professor Lemley argues that issue of patent hold up should be resolved through strengthening IPR policies; Tsai and Wright, "Standard Setting, Intellectual Property Rights and the Role of Antitrust in Regulating Incomplete Contracts" 80 *Antitrust Law Journal* 157 (2015). Tsai and Wright argue that in absence of clear empirical evidence suggesting SSO's adoption of their IPR policies have been inadequate in minimizing probability of patent hold up, there is little reason to employ blunt weapons of antitrust.

[119] *Supra* note 4.

[120] *Ibid.* Out of data on top 50 firms holding patents on telecommunication only 12 are Indian firms. Of which only three have patent application (eighteen) and no issued patents. The rest nine firms hold no patents or applications.

[121] *Ibid*, page 30.

[122] Case No. 50/2013.

[123] Case No. 76/2013.

[124] Case No. 04/2015.

up and royalty stacking considering the dominance of Ericsson in the market of SEPs for 2G, 3G and 4G technologies in standard compliant mobile devices in India. It has also made clear its prima facie view on Non Disclosures Agreements (NDA), demanded by Ericsson before kick-starting negotiations process and has offered a different view on royalty when compared with interim royalty arrangements adjudicated by Delhi High Court.

In this context, I seek to analyse the main arguments made by the parties and the response of CCI in issuing the preliminary directions. I then look for possible direction that the competition analysis can take and whether the powers of CCI are restricted to exclusionary conduct or can correct exploitative practices as well.

(i) Complaints before CCI

In the three complaints, the central arguments were not limited to targeting the remedy of injunction as being anticompetitive[125] but the parties expressed concerns regarding the royalties demanded not being FRAND,[126] NDA being onerous and one sided[127] and tying and bundling of essential patents with non-essential patents.[128] In the next few paragraphs I will describe the arguments made regarding royalty and NDA and opinions offered by the commission.

On Royalty Charged: All three complainants argued that charging royalty based on value of handset was contrary to FRAND. The Commission took note of this argument and quite opposite to the notion of interim royalty arrangement arrived at by Delhi High Court based on net selling price of devices, held that such royalty rates have "no linkage to patented product, contrary to what is expected from a patent owner holding licenses on FRAND terms".[129] According to the commission, imposing royalties linked with cost of product is contrary to FRAND. It explains its view through an example, where taking net selling price of device would increase the royalty payable without any added contribution to the device. It explains for a GSM phone worth Rs. 100, royalty rate set at 1.25%, will amount to royalty payment of Rs. 1.25, while for Rs. 1000 mobile phone the royalty will increase to Rs. 12.5. This to the Commission is "discriminatory" and reflects" excessive pricing".[130]

[125] *Supra* note 123. Micromax raised this claim in its compliant while also alleging that Ericsson was also threatening to inform securities market regulator regarding the alleged infringement with the possible intention of affecting company's plan to go public.

[126] *Supra* note123, para 8.

[127] *Supra* note 123, para. 4.

[128] *Supra* note123, para. 6.

[129] *Supra* note 123, para. 17; *Supra* note 6,para 17

[130] *Supra* note123, para. 17.

On Non-Disclosure Agreement (NDA): It was contended by iball that NDA was unfair as information regarding infringement was made conditional to singing of NDA. The draft NDA that was made available contained onerous terms like ten year confidentiality and disputes to be settled by way of arbitration in Stockholm. Intex argued that NDA was suggestive of Ericsson charging different royalties from similarly placed parties.[131] Intex also argued that since it was importing the allegedly infringing devices from overseas, the NDA prevented it from discussing patent infringement with its vendors, who had represented that their products do not infringe IPR of any third parties.[132] Further the jurisdiction in the NDA was Singapore which ousted its powers to agitate the issues in a local court.[133] The Commission noted its prima facie view that NDA is contrary to the spirit of FRAND terms[134] and strengthens the belief that different royalty rates are being charged from similarly placed parties.[135] On the point of jurisdiction clause it held that it is unfair to oust the power of party to agitate issues in jurisdiction where the party is primarily engaged in business.

Thus, the three complaints were considered fit to be further investigated by Director General. As abuse of dominance was alleged, it is interesting to note the limits of section 4 in dealing with this scenario and the remedy that can possibly be given under section 27 of the Competition Act. The next section attempts to evaluate the limits of section 4, in terms whether it is restricted to exclusionary conduct or punishes exploitative conduct as well and explores the possibility of refusal to deal claim.

(ii) Scope of Competition Law Remedy

(a) Section 4

Section 4 prohibits exclusionary practices and also exploitative practices. This becomes relevant because unlike certain jurisdictions like US, where excessive FRAND cannot be a concern,[136] CCI has the power to restrict not only cases of monopoly acquisition but also correct exploitative conditions. In *Belaire Owners' Association* v. *DLF Limited, HUDA & Ors.*[137], DLF had imposed condition for purchase of residential flats which were unfair and discriminatory under section 4(2) (i) and (ii). The Commission in this case levied

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[131] *Supra* note 6, para. 7.
[132] *Ibid*., para. 9.
[133] *Id.*, para. 9.
[134] *Supra* note 124, para. 7.
[135] *Supra* note 6, para. 17.
[136] Thomas Cotter, "Comparative Law and Economics of Standard Essential Patents and FRAND Royalties", *Texas Intellectual Property Law Journal*, 22:311, pg. 311-363, at 332 (2014).
[137] Case No. 19/2010, August 12, 2011.

a penalty of Rs. 630 crores and also modified the contentious standard terms and conditions of flat buyers agreement.[138]

The Delhi High Court, in its recent decision has even compared section 4 with article 102 of TFEU,[139] while discussing cases like *Hilti AG* v. *Commission*,[140] which upheld *Eurofix Bauco* v. *Hilti*, and held that demanding excessive royalty merely for the purpose of blocking or delaying a license is an abuse.[141]

(b) Refusal to Deal

There is also the possibility of characterizing the conduct of SEP owners as an actionable refusal to deal. This could mean either arguing that the act of seeking injunction over FRAND encumbered SEP amounts to refusal to deal or arguing that SEP owner's conduct to deal only on unreasonable terms is to be read as a refusal to deal.

While clear conditions have been spelled out for the remedy of refusal to deal in E.U. and U.S.[142], this doctrine has not fully evolved in India. A landmark case where refusal to deal was raised as a claim and accepted is *Shamsher Kataria*.[143] The Commission in this case found 17 car companies dominant in the market of spare parts and abusing their dominant position by excluding independent repairers by denying access to spare parts, which were necessary for them to compete.[144] The Commission also noted the exploitative practice of car companies charging substantial mark up by reason of their dominance.[145] Thus, according to Commission there were "structural infirmities in the market" which required correction.[146]

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[138] Case No.19/2010, January 3, 2013.

[139] *Supra* note 26, para. 198.

[140] Case T-30/89, [1991] ECR II-1439.

[141] *Supra* note 26, page 141.

[142] In E.U., refusal to deal doctrine can be used even where IP rights are involved. However, only in exceptional circumstances. These have been defined as *Magill* criteria and include scenarios where refusal prevents emergence of a new product, for which there is potential demand, there is no justification for refusal and the party was reserving for itself the secondary market [The *Magill* criteria has been stretched by *Microsoft* by diluting new product requirement by technical development criteria]. In U.S, *Trinko*, makes clear that there is no general duty to deal with one's competitor. A case can be made only where there is some prior dealing which is snapped to forego a short term benefits in anticipation of long term gains.

[143] *Shamsher Kataria* v. *Honda Siel Cars India Ltd. & Ors*, Case No. 03 of 2011 (CCI, 25/10/2014).

[144] *Id.*, para. 20.5.83.

[145] *Id.*, para. 8.1.14.

[146] *Id.*, para. 8.1.15.

(iii) Conclusion

From the above discussion it is clear that CCI has statutory power to go after exploitative practices and it has exercised its authority to correct opportunistic behaviour. As the issue of regulating conduct of SEP holders proceeds through the channels of Director General's investigation and finally to a decision on the matter, the Commission can benefit from the contrary view taken by the Delhi High Court in the matter of infringement of Ericsson's patents and also the opinion of High Court when it decided the issue of CCI's jurisdiction over matters of patent law. While the former set of cases can allow the firm to engage with contrary views on injunctions where SEPs are involved, appropriate royalty base for a FRAND encumbered SEP and unfair licensing terms. The latter can enrich its understanding through its analysis of abuse of dominance cases in more mature competition law jurisdictions. In this manner CCI can formulate an approach which provides clarity on issues of abuse by SEP proprietor while also upholding the sanctity of IP rights.

THE DEMOCRATIZATION OF JUSTICE IN INDIA: THE RISE OF OMBUDSPERSON AND LOKPALS

*Gauraan**

Abstract

In a purely administrative sphere governed by no statute, the opportunity and scope for judicial review of administrative decision is very less. Even where judicial review arises, it is limited to ensuring the minimum standards of justice or fair hearing and there is no means of correcting an erroneous decision on facts or misconduct against officials. The only remedy of an aggrieved citizen in such case is to persuade the Minister. Such deficiencies, led to devise of alternative institutions – the one proposed to be discussed in this paper is the institution of 'Ombudsperson/Lokpal'. The idea of 'Ombudsperson' in terms of utility means a 'watchdog of the administration' or 'the protector of the little man'.

The continuing increase in the instances of maladministration undermines the public faith in bureaucracy underscoring the need for an Ombudsperson like institution in India. The Lokpal/ Lokayukta Act has been sought to be promulgated since the 1970's and till today efforts for the same have been all in vain, showing the lack of political will to institutionalize the Ombudsperson in India. Even though States such as Orissa, Kerala and others have enacted their own State Acts constituting the ombudsperson, they haven't achieved much success. An understanding of the importance of an Ombudsperson and the promulgation of a Central Act is the required step forward. This paper aims to discuss the importance, relevance and urgency of requirement of the 'Ombudsperson'.

I

Introduction

> *"Corruption will be out one day, however much one may try to conceal it: and the public can as its right and duty, in every case of justifiable suspicion, call its servants to strict account, dismiss them, sue them in a law court, or appoint an arbitrator or inspector to scrutinize their conduct, as it likes."*
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> - Mahatma Gandhi (1928) in Young India[1]

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1 "Role of Lokayukta in combating Corruption and Maladministation and Measures for Strengthening these Institutions", available at: http://hp.gov.in/lokayukta/page/Role-of-Lokayukta.aspx (Last visited on February 13, 2017).

The continuing increase in the instances of maladministration undermines the public faith in bureaucracy underscoring the need for an Ombudsperson like institution in India. The Lokpal/ Lokayukta Act has been sought to be promulgated since the 1970's and till today efforts for the same have been all in vain, showing the lack of political will to institutionalize the Ombudsperson in India. Even though states such as Orissa, Kerala and others have enacted their own state legislations constituting the ombudsperson, they haven't achieved much success. An understanding of the importance of an Ombudsperson and the promulgation of a central legislation is the required step forward.

The functioning of administration has also undergone a paradigm change. Focus has shifted from secrecy to transparency, from working in isolation to working with the people, from arbitrariness to accountability for actions. Clearly the time has come to herald change through institutionalizing the Ombudsperson.

This paper has been attempted with an objective of understating the conceptual framework, context and operation of the concept of Ombudsperson and its need in India. It proceeds to deal with the position of existing institutions of judicial review and parliamentary control and the need for Ombudsperson.

II

Origin and Need of Ombudsperson

In a purely administrative sphere governed by no statute the opportunity and scope for judicial review of administrative decision is very less. Even where judicial review arises, it is limited to ensuring the minimum standards of justice or fair hearing and there is no means of correcting an erroneous decision on facts or misconduct against officials. The only remedy of an aggrieved citizen in such case is to persuade the Minister. The deficiencies of the parliamentary system of administrative and judicial review of the traditional English pattern have led to devise alternative institutions which include-

i) The *Conseil d'Etat* under the French system of *Droit Administratif*
ii) The Ombudsperson in the Scandinavian system.

Jurists call the 'Ombudsperson', a 'watchdog of the administration' or 'the protector of the little man'[2]. This institution first developed in Sweden in 1809 and soon became cherished importable commodity the world over[3]. It is a unique institution, which leads to an 'open government' by providing a democratic control

[2] Manoj K. Malik and Anil K. Sharma, "Necessity of 'Lokpal' In India- A Watchdog of the Administration", *Golden Research Thoughts*, Volume 2, Issue 9, (March 2013), available at: http://aygrt.isrj.org/UploadedData/2178.pdf (Last visited on February 14, 2017).

mechanism over the powers of the state. Its primary advantage is its apparent effectiveness despite minimal coercive capabilities. It has its own role to play by bringing 'renaissance' and 'humanism' in the working of modern governments which have tended to develop an attitude to look to the paper rather than the person behind it.[4] Conceptually an ombudsperson is only a non-adversarial system for resolving disputes especially between citizens and government agencies[5]. S/he is an independent and non-partisan officer who deals with the maladministration.

(i) Ombudsperson in UK, USA and Scandinavian Countries

The functionary has different names in different countries. Her/his power and functions also vary. In the Scandinavian countries s/he is the 'Ombudsperson'. S/he can take cognizance of the citizens' grievance by either directly receiving complaints from the public or *suo moto* on the basis of information provided by the interested persons, or from newspapers, etc. However, in the U.K. the functionary - known as the Parliamentary Commissioner, can receive complains only through members of Parliament.[6]

The Ombudsmen can investigate a complaint by themselves or through any public or private agency. After investigation, in Sweden and Finland, the Ombudsperson has the power to prosecute erring public servants. In Denmark, s/he can only order prosecution. However, the power of prosecution is very rarely used. The strength of the Ombudsperson lies in the publicity attached to the office, and the negative view that attaches itself to all that the office scrutinises. In Sweden and Finland, Ombudsmen can also supervise the courts. In other countries, their authority is only over the non-judicial public servants. In almost all the cases they deal with complaints relating to both corruption and maladministration.[7]

In USA there is no Ombudsperson infiltrating the administration except in the three states of Hawaii, Nebraska and Oregon[8]. Since 1963, the Congress in its every session introduces a bill to establish an institution similar to ombudsperson[9]. The reason predominant for non-inclusion is that in USA the institution is considered as a drag on the status of the Congress. However, they have offices which work similar to that of Ombudsperson.

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3 *Ibid.*

4 D. D. Basu & A.K. Nandi, "*Administrative Law*" 363-367 (2005).

5 *Durga Hotel Complex* v. *Reserve Bank of India & Ors*, SC Appeal (civil) 1389 of 2007.

6 *Id.*, at 367-370.

7 *Ibid.*

8 *Ibid.*

9 *Ibid.*

(ii) Development in India

M.C. Setalvad in his speech at the All India Lawyers' Conference held in 1962 suggested the idea of establishing an institution similar of ombudsperson. The Administrative Reforms Commission (ARC) investigated this idea and suggested to the government to introduce a bill in October 1966[10]. Based on those recommendations, the government prepared the Lokpal and Lokayuktas Bill 1968. The government has time and again tried to get this bill passed but every time it has failed to do so consecutively in 1971, 77, 79, 85, 89, 93, 97, 98, 2003, 2005, 2008[11]. The current 'The Lokpal and Lokayukta Act, 2013' as introduced in 2011 and amended in 2013, includes Prime Minister in the institution as the Chair of 'High Powered Committee' to appoint selections to the CBI[12]. The Act extends the jurisdiction of 'Lokpal' to religious institutions, which were earlier excluded from its purview. Though there is a statute, we don't see any reactions by the states to further its objectives. A new amendment bill, as proposed in 2016 is awaited to be accommodated in the Act.

Nonetheless it is pertinent to note that even after the Act exists, the government has not been proactive in appointing the Lokayuktas in states and the Supreme Court cannot seem to accept such reluctance. On a PIL filed by the NGO, 'Common Cause', it was argued[13]:

"We don't have Lokpal even today, despite the Act being notified in 2014. Even jurist has not been appointed and the will of people is being frustrated. Do you require another Anna andolan?"

The question of legislative intent and legislative willingness seemed to be at loggerheads here. At present, the Parliament has passed the Act, it has been notified which suggests that legislative intent to make a law on the subject of 'Lokpal and Lokayukta'. At the same time, we see reluctance amongst the states to implement the law and make appointments to these positions. The

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[10] Sujata Singh, "Reforms in Governance: Six Decades of Administrative Reforms", available at: http://www.iipa.org.in/upload/Theme_Paper_Sujata_Singh_Reforms_in_Governance-2009.pdf (Last visited on February 14, 2017).

[11] *Ibid,* available at: http://www.prsindia.org/pages/all-about-the-lok-pal-bill-137/, (Last visited on February 12, 2017).

[12] "Comparison of Lokpal and Lokayuktas Bill, 2011 with the Bill as passed in the Lok Sabha", available at: http://www.prsindia.org/uploads/media/Lok%20Pal%20Bill%202011/Analysis_of_Lokpal_and_Lokayukta_Bill_passed_by_LS.pdf(Last visited on February 14, 2017).

[13] "Supreme Court Hauls Up Government for not Appointing Lokpal", Indian Express, November 23, 2016, available at: http://indianexpress.com/article/india/india-news-india/supreme-court-hauls-up-government-for-dragging-feet-on-lokpal-4391485/ (Last visited on February 14, 2017).

legislature claims that the new amendment bill of 2016, which is currently pending in the houses, is the reason for the delay. They say that the amendment is about amending the procedure related with appointment of said 'Lokpal and Lokayukta' and therefore, appointments made before passing of the amendment bill would be a futile exercise. The Supreme Court however deems it to be a case of 'legislative lethargy'.

(iii) Need for Ombudsperson

In appreciation of the usefulness of the ombudsperson a committee of justice was set up in Britain[14]. A report was published in 1961 by the Whyatt Committee[15] which gave three recommendations which are:

1) The provisions for appeal by aggrieved persons from the discretionary decisions of the administrative authority should be extended.
2) Parliament should be the channel for complaints of maladministrative against the executive.
3) Parliament should lay procedure for investigation into complaints by an impartial machinery.[16]

In India the creation of the office of Lokpal is similar to that of the Ombudsperson recommended by the Interim Report of the Administrative Reforms Commission for the following reasons-

1) Since a democratic government is a 'government of the people, by the people and for the people' it has an obligation to satisfy the citizens about its functioning and to offer them adequate means for the redress of their grievance.
2) The existing institution of judicial review and Parliamentary control are inadequate in view of the ever-expanding range of governmental activities most of which are discretionary.[17]

Two tendencies are manifested in democratic countries; one large power has been and is being conferred on the administration with the result that huge administrative machinery having vast discretionary powers has come into existence. The administration has come to play a decisive role in influencing and shaping the socio-economic order in the society. The administration enjoys

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[14] G O'Hara, "Parties, People and Parliament: Britain's 'Ombudsman' and the Politics of the 1960s", available at: https://www.ncbi.nlm.nih.gov › NCBI › Literature › PubMed Central (PMC) (Last visited on February 15, 2017).

[15] *Ibid.*

[16] H. K. Saharay, "*Administrative Law and Tribunal*" 284-286 (1987).

[17] *Supra* note 1 at 363-367.

vast power to order and affect the daily lives of people. Two, a conception among people was prevalent that the vesting of powers in Administration has generated possibilities and oppurtunities of abuse of powers by administrative functionaries resulting in maladministration and corruption.[18]

An Ombudsperson or his equivalent has become a standard part of the machinery of any modern government. In the 21st century almost all countries have witnessed a change from laissez-faire to regulation. Under the weight of new economic policy state has assumed the role of a facilitator, enabler and regulator. Therefore, the chances of friction between a government official and a private citizen have multiplied manifold. In these circumstances in the name of progress and development individual justice against administrative faults by keeping the administration on rails cannot be overemphasized.

(iv) Stats of corruption cases against the government agencies[19]:

The Central Vigilance Commission (CVC) is the premier agency tasked to tackle corruption cases within the central government. Between 2005 and 2009, penalties were imposed on 13,061 cases (average 2612 per year) based on the CVC's advice. This included 846 cases (annual average 169) in which sanction was granted for criminal prosecution. Major penalties were imposed in 4895 cases (annual average 979). These include dismissal, reduction to lower rank, cut in pension etc. Minor penalties such as censure were imposed on 5356 cases (annual average 1071), and administrative action was taken in 1964 cases (annual average 393).

Relying on the statistics, the situation does not appear very good. Such an observation warranties the establishment of a regulatory body.

III

Lokpal and Lokaukta Act, 2013 and Amendment Bill, 2016 - An Analysis

Bringing public servants under a scanner which makes them strictly accountable is the start of a movement against corruption in India. And one significant step in attacking the spectre of corruption in India will be the implementation of the Lokpal Bill. I, however, have some reservations about

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[18] M.P. Jain and S. N. Jain, *Principles of Administrative Law* 2425 (2007).

[19] "Vital Stats Corruption Cases against Government Officials", available at: http://www.prsindia.org/administrator/uploads/general/1302269425~~Vital%20Stats%20-%20Corruption%20cases%20against%20government%20officials%2008Apr11.pdf (Last visited on February 14, 2017).

the effectiveness of this scheme in a country as large as India. In theory, the Act appears to be well-drafted but it is a first attempt for us. The effectiveness of these provisions needs to be tested on the scale of time. But such test cannot begin until the 'Lokpal and Lokayukta' appointments are done. Since, as of now we only have the written legal provisions, a critique can be done only on the written part.

(i) Objectives of the Act

The Lokpal was visualized as the watchdog institution on ministerial probity. Broadly the provisions of different bills empowered the Lokpal to investigate corruption cases against political persons at the central level. Some important features of the Lokpal Bill have varied over the years. In its most recent avatar, the main objective of the Bill of 2008 was to provide speedy and affordable justice to people.[20] The aim of the Lokpal and lokayukta Act, however, is "for states to inquire into allegations of corruption against certain public functionaries and for matters connected therewith or incidental thereto"[21].

(ii) Members

Lokpal is to be a maximum nine member body with a chairperson who is or has been a chief justice or judge of the Supreme Court[22] or or an eminent person who fulfils the eligibility criteria as mentioned in the Act itself[23]. It can have a maximum of eight members, 50% of whom need to be Judicial Members.[24]

(iii) Appointment and Tenure

The chairperson and members shall be appointed by the President by warrant under his hand and seal on the recommendation of a 'Selection Committee'. It is not clear whether the committee has to make a unanimous decision or a majority decision will suffice. The committee will consist of[25]:

(a) the Prime Minister—Chairperson;
(b) the Speaker of the House of the People—Member;
(c) the Leader of Opposition in the House of the People—Member
(d) the Chief Justice of India or a Judge of the Supreme Court nominated by her/him—Member; (e) one eminent jurist, as recommended by the

[20] Pradeep K Baisakh, "The Lokpal Cycle", available at: http://www.indiatogether.org/2005/jan/law-lokpal.htm (Last visited on February 10, 2017).
[21] The Lokpal and Lokayukta Act, 2013.
[22] *Ibid*, s. 4.
[23] *Ibid*, s. 3.
[24] D.K. Basu & A.K. Nandi, *Administrative Law*, 367 (2005).
[25] *Supra* note 21, s. 4.

Chairperson and Members referred to in clauses (a) to (d) above, to be nominated by the President—Member

They shall be appointed for 5 years or until they attain the age of 70 years whichever is earlier. Bill empowers the Lokpal to punish with imprisonment and/or a fine those guilty of making false or *malafide* complaints.[26]

(iv) Independence of the Office

In order to ensure the independence of the functioning of this office, the following provisions have been incorporated:

(i) Appointment is to be made on the recommendation of a committee.
(ii) The Lokpal is ineligible to hold any office of profit under Government of India or of any state, or such similar posts after retirement.
(iii) Fixed tenure of five years can be removed only on the ground of proven misbehaviour or incapacity after an inquiry made by the Chief Justice of India and two senior most judges of the Supreme Court.
(iv) Any person appointed to this office is ineligible for a re-election.
(v) Lokpal will have its own administrative machinery for conducting investigations.
(vi) Salary of Lokpal is to be charged on the Consolidated Fund of India.

(v) Jurisdiction of Lokpal

(i) The central level political functionaries like the Council of Ministers including the Prime Minister, the Members of Parliament, members of defence services and even the religious institutions will come under the purview of the Lokpal.[27]
(ii) S/he cannot inquire into any allegation against the PM in relation to latter's functions of national security and public order[28].
(iii) Complaints of offence committed within 7 years from the date of complaint can be taken up for investigation, not beyond this period.

(vi) Matters outside the jurisdiction of the Lokpal[29]

(i) S/he shall not undertake any matter in respect of which the aggrieved person has any remedy before a court of law or statutory tribunal;
(ii) The constitutional offices like President, Vice President, Speaker, Dy. Speaker, Dy. Chairman, Rajya Sabha, sitting judges of Supreme Court and High Court, Comptroller and Auditor General, Election Commission,

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[26] *Supra* note 3 at 368; *supra* note 23.
[27] *Supra* note 21, s. 10.
[28] M.P. Jain & S. N. Jain, *Principles of Administrative Law* 2474 (2007).
[29] *Supra* note 1 at 368.

Union Public Service Commission shall not be answerable to Lokpal nor their acts shall be called into question;

(iii) Action relating to a foreign government and certified by a union minister as such;
(iv) Action taken under the Foreigners' Act or the Extradition Act;
(v) Action taken for the investigation of a crime;
(vi) Action taken with respect to passports;
(vii) Exercise of power to determine whether a matter shall go to a court or not;
(viii) Action relating to commercial relations governed by contract, except where harassment or gross delay in meeting contractual obligations is alleged;
(ix) Action taken relating to appointments, removals, etc., of personnel;
(x) A discretionary action, except where there has been no exercise of discretion at all.

The Lokpal is supposed to ordinarily complete the preliminary inquiry within a period of 90 days.[30] The Lokpal has the power of a civil court to summon any person or authority.[31] After investigation, the ombudsperson can only recommend actions to be taken by the competent authority. A number of safeguards have been taken to discourage false complains.

The Lokpal shall look into the complaints relating to corruption only and its jurisdiction is not to extend to redressal of grievances. The institution of Lokpal is not envisaged as mechanism to seek redressal of grievances. Moreover, it shall have no power to issue any order, writ or direction to any authority except seeking assistance in gathering facts relating to complaint on corruption. Lokpal shall look into corruption related complaints only and it shall have no *suo moto* powers to assume to itself the jurisdiction to inquire into any case against which there is no formal complaint. It is debatable why *suo moto* power should not be granted to Lokpal especially when it is envisaged to act as watch-dog against corruption. Absence of any judicial power including power to issue summon and punish for contempt for itself are *summum bonum* for the institution of Lokpal to succeed.[32]

S/he can order search and seizure operations. S/he shall present annually to the President the reports of investigation and the latter with the action taken report has to put it before the both houses of parliament. It may be noted that

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[30] *Supra* note 21, s. 20.
[31] *Id.*, s. 15.
[32] *Supra* note 4 at 2269-2270.

the Lokpal is supposed to investigate cases of corruption only, and not address herself/himself to redressing grievances in respect of injustices and hardship caused by mal-administration.

(vii) Complaints with the Act

Section 37 of the Act lays down that the Lokpal cannot inquire against its own members rather such complaints would be addressed by the President. Since the office bearers hold office at the pleasure of the President, the legal sanction of this provision is clear. Nonetheless, apart from having no check on the exercise of powers by the members of the Lokpal, it brings in the bias of the legislature. By extension, this would mean having a scope for political interference or bias open as the President, under the Constitution of India, acts on the aid and advice of the ministers. Adding the requirement of signature of 100 MPs on such reference might face some serious constitutional challenge on the ground of making a president's pleasure subject to the opinion of MPs.

To ensure that complaints are not frivoulous or mala fide, measures could be introduced to ensure that lodging a complaint should not be intended merely to harass or defame a public functionary. For that purpose provision can be introduced under which malicious complaints can boomerang on the complainant just as we have already provisions for registration of case for lodging false FIR. But denying a public servant from lodging complaint even if there is substance in it would only defeat the very purpose of wedging war against corruption. It makes no logical a proposal to debar a public servant from making complaint in whose case s/he is bound to be responsible for the statements and facts. The suggestions seems to have been accepted by the government whilst drafting The Lokpal and Lokayukta Act, 2013, but whether such a practice will be viable is yet to be seen.

IV

The Institution of Lokayuktas in the Indian Framework

(i) The Institution of a Lokayukta

Lokpal and Lokayuktas are Indian nomenclature for the Ombudsperson and are meant for centre and states respectively. The advantages of this institution are appreciable as this system is simple and cheap. The striking advantage of these institutions is that it can go behind the screen and investigate fully all that has happened in the case and that s/he can do this as an independent and skilled authority. This institution gives the citizens an expert and impartial agent without personal cost to the complainant, without the tension of adversary litigation and

without the requirement of counsel or intervention of those who are highly placed. A Lokayukta has administrative control over his staff and the state officials are under the disciplinary control of the Lokayukta. A Lokayukta is a great check on corruption and brings about transparency in the system and makes the administrative machinery citizen friendly.[33] Corruption has assumed alarming proportions over the years and is no longer limited to the taking of bribes and includes morally unsound conduct. The Supreme Court over the years has stressed the importance of curbing corruption[34]. An ordinary citizen instead of complaining and fighting succumbs to the pressure of the undesirable functioning in offices instead of standing against it[35]. Therefore in this regard, Lokayuktas have been established through state legislations for conducting inquiries into complaints of corruption against public officials. S/he protects the rights of citizens against mal-administration, corruption, delay, inefficiency, improper conduct etc.[36] Also, it is important that cordial relation or mutual faith in Ombudsperson i.e. Lokpal or Lokayuktas on one side and public and government on other side is maintained, the successful working of the institution can be assured. Hence all necessary efforts should be made at all levels for creating cordial relations between these institutions and all other concerning persons.[37]

Also, though the institution of an Ombudsperson is not working as efficiently at Central Level in India but this institution is working at the State level to a certain extent. Lokayukta's were established in many states including Orissa (1970, but abolished 1993), Maharashtra (1976), Bihar (1973), Rajasthan (1973), Madhya Pradesh (1981), Andhra Pradesh (1983), Himachal Pradesh (1983), Karnataka (1985), Assam (1986), Haryana (1996), and Delhi (1996). Mostly Lokayuktas examine complaints against political functionaries. We know little about how these state bodies work. The public is kept in the dark.[38]

Lokayukta shall be appointed by the Governor of the state (Lieutenant Governor in case of Delhi) in consultation with the Chief Justice of the High Court, the leader of the opposition in the Legislative Assembly. The Up-Lokayukta shall be appointed in consultation with the Lokayukta.[39]

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[33] *C. Rangaswamaih* v. *Karnataka Lokayukta*, AIR 1998 SC 2496; *A.P. Lokayukta* v. *T. Rama Subha Reddy*, (1997) 9 SCC 42.

[34] *State of M.P & Ors.* v. *Ram Singh* (2000) 5 SCC 88; *State of Andhra Pardesh* v. *Vasudeva Rao* 2003 (9) SCALE 569.

[35] *Lucknow Developmental Authority* v. *M.K Gupta*, AIR 1994 SC 787.

[36] Available at: http://hp.gov.in/lokayukta/page/Role-of-Lokayukta.aspx (Last visited on February 12, 2017).

[37] M.C. Kagzi, *The Indian Administrative Law* 207-11 (2002).

[38] Rajeev Dhavan, "Lokayukta: A Damp Squib", *The India Today* (March 10, 2010).

[39] *The Statesman*, Calcutta (December 30, 1989).

The Chief Justice (retired) of any high court in India, or a judge of a high court for seven years is qualified to be a Lokayukta. The Up-Lokayukta on the other hand should be or should have been a secretary to the government or a district judge for seven years or should have held the post of a joint secretary to the Government of India.

Lokayukta or Up-Lokayukta shall not be a Member of Parliament or a member of the Legislature of any state or union territory and shall not hold any other office of profit and shall not be connected with any political party or be carrying on any business or practice any profession. The office has a term of five years.[40]

(ii) Procedure followed

Written complaints are required from complainants by the Lokayukta office for investigation. If the complaint takes the form of an allegation, the office insists on the filing of an affidavit. Lokayuktas can either investigate the complaints using their suo motu powers under the concerned state Act or forward them to the heads of the departments under the scanner for action or act as a mediator between the citizen and the government servant against whom the complaint is made.

The Lokayukta has the ability to recommend reduction in rank, compulsory retirement, removal from office, stoppage of annual increments and censure are some of the frequently seen recommendations given by the Lokayukta to the government. The state can either accept the recommendations or modify them. The public servant concerned can challenge the decision in the state high courts or specialised tribunals.

(iii) Shortcomings of the Lokayukta

Lokayuktas have become moribund institutions. Few complaints are filed. Many are kept pending while findings are not acted upon. According to Justice Hegde, "As a judge, I could issue contempt notices, as a Lokayukta I was powerless".[41] In fact, Lokayuktas do not have strong independent investigative machinery and rely on bureaucrats who can be pressurized by government, as exemplified by Justice Hegde's own investigation into the mining scandal. The lack of uniformity in Lokayukta statutes has resulted in mixed success and plenty of confusion among complainants. Primarily, there is no uniformity in the Acts of different states.[42]

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[40] *The Statesman*, Calcutta (July 18, 1992).

[41] Justice Hegde, retired Supreme Court Judge and retired Lokayukta of Karnataka.

[42] Krishnadas Rajgopal, "A Watchdog without Teeth", *The Indian Express* (June 29, 2010).

Secondly, the powers of Lokayuktas are only recommendatory. Cogent reasons are not required for rejecting Lokayukta recommendations. The opinions of the Lokayuktas have no binding effect and are restricted only to a recommendatory character.

Third, the Lokayuktas have not inspired confidence in the people who prefer using the 'right to information' to empower themselves into campaigns with media support.[43]

Fourth, ombudsmen were designed for small countries where political integrity and public morality results in swift action by government and resignation by public servants. In India's never-say-die politics, no one is guilty as long as they evade the final decision.

Fifth, at a deeper level, in a parliamentary democracy, ministers (and bureaucrats through them) claim to be constitutionally responsible to the legislature, not to some statutorily propped up Lokpal or Lokayukta with recommendatory powers. In Indian political practice, this power to "recommend" is merely a power to "suggest". Otherwise, it is argued the administration will be answerable to the Lokpal and not to the legislature. The truth is that India's politicians and bureaucrats hate being answerable to anyone other than herself or himself. They conspire to nullify Lokayuktas into an empty and unwanted experiment.

Sixth, in some senses, the National and State Human Rights Commissions (NHRC and SHRC) and other SC, ST and Women's Commissions are also in the Lokpal-Lokayukta-Ombudsperson mould. The only difference is that they deal with specialized areas of violation of human rights. Why does the NHRC work better as a human rights ombudsperson? One reason is its prestige and governments' fear of human rights violations being exposed. But there are other practical reasons for its partial success. Under the Chairmanship of Justices Venkatachaliah and Verma, the NHRC asked for and obtained independent investigation machinery firmly under its own jurisdiction. In Hegde's resignation case, ministers controlled the investigating civil servant. The NHRC built up a rapport with ministers and officials to ensure that the recommendations were treated as decisions not suggestions.

Seventh, what is missing from the armoury of Lokayuktas is an independent power to record FIR's with the police and to prosecute without the sanction of governments. Today the Single Directive (SD) protects bureaucrats even though

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[43] Available at: www.delhi.gov.in/...lokayukta/Lokayukta/.../Right+to+Information+Act/ (Last visited on February 13, 2017).

the Supreme Court invalidated the SD in the Hawala case (1998)[44]. But to proceed further, even after investigation, trials require government's sanction. The law needs amendment so that corruption trials can proceed on the sanction of the Lokayukta.[45]

(iv) Recommendations

Comparative study of the Lokayukta Acts of different states reveals that the role of Lokayukta is advisory and not adjudicatory. A study of the legislations of those states who have taken the initiative in this direction also reveals their legislations are not in the true spirit of the concept. Only a handful of functionaries were brought under the domain of Lokayukta. The serious drawback against this legislation of various states is that the Lokayukta after investigating the complaints has no power to suggest action for remedy. S/he has only to make report of his findings to the competent authority and the rest will depend on such authority. It is for the competent authority to decide what sort of action is to be taken or not to be taken against his report. If the competent authority does not take any action against the culprit within the reasonable time, there is no remedy available in the present law for the Lokayukta. Therefore, law should prescribe the time limit for taking action on the report of the Lokayukta. The law should also define the offences, which may be constituted by the facts proved and nature of appropriate punishment.[46]

The institution of the Lokayuktas and other similar central and state enactments so as to enable the authorities concerned to take into consideration the findings, recommendations of the Lok Ayuktas and Upa Lokayuktas in respect of persons holding elective offices need immediate implementation. Since the jurisdiction of Lokayuktas and Upa Lokayuktas in some enactments is restricted to the ministers and public servants in office, it is advisable that ex-ministers and ex-public servants concerned, in regard to the action complained against them, be also expressly brought within their purview. The jurisdiction of Lok Ayuktas and Up-Lokayuktas should cover allegations and corrupt practices, but also grievances and maladministration as defined in the Central Lokpal and Lokayukta Bill of 1968. The provisions of the Bill that was finally introduced in 1985 had a very restrictive definition of the term 'public functionaries'. The instances of alleged cases of corruption, like the Auntulay's case[47] involving the CM of a state, the LIC case involving a union ministry secretary and head of a

[44] Case No. 340-43 of 1993, Supreme Court of India.

[45] Available at: http://pilsarc.blogspot.com/2010/08/lokayukta-damp-squib.html (Last visited on February 13, 2017).

[46] I.P. Massey, *Administrative Law* (2008).

[47] *A.R. Auntulay* v. *R.S. Naik* 1987 SC AIR 1140.

public corporation were included within the ambit of public functionaries.[48] There should be uniformity throughout India in regard to the service conditions of the Lokayuktas and Upa Lokayuktas. There should be no security deposit for making a complaint before the Lokayuktas. The Lokayuktas should have discretion to dispense with the requirements of filling an affidavit with the complaint. There should be a separate and independent investigating agency under the direct control of the Lokpal and Lokayuktas. However, in some states such independent investigating agencies are working but not in all. Also, Lokayuktas must be given the power to sanction search and seizure within the meaning of the Code of Criminal Procedure.[49] There has been an outcry to give 'suo moto' powers to the Upa Lokayukta to investigate class I officials and politicians. Lokayukta need power to prosecute officials and if need be, grant sanction for prosecution. It is necessary for the government to vest the power of suspending and revoking suspension of corrupt officials with the Lokayukta and to amend section 36 of CrPC, conferring police power on the Lokayukta.

As long as Lokayuktas do not have the power of independent investigation, filing criminal complaints and sanctioning trials, the institution will just growl without efficacy. The main shortcoming related to the institution of a Lokayukta are that recommendations of the Lokayuktas are not acceptable to the competent authorities; many areas of administration are outside the jurisdiction of Lokayukta; every state has fixed time limit for lodging a complaint; in some states like Maharashtra the identity of the defaulters is not disclosed; some states have prescribed fee for lodging complaints, for example Madhya Pradesh is one of them.

V

Administrative Reforms Commission and its Recommendations

(i) Brief Overview

In its report dated October 20, 1966, the Administrative Reforms Commission after carefully evaluating the pros and cons advocated the adoption of the Ombudsperson type institution for redress of citizens' grievances. In the view of the commission, an institution for the removal of the prevailing sense of injustice springing from an administrative act is the sine qua non of a popular administration. In suggesting a scheme, the commission took note on the one hand of the peoples' feeling against the prevalence of wide-spread corruption,

[48] *Supra* note 3.

[49] "Ombudsman: India And The World Community", *Central India Law Weekly*, Vol. 9: 1 (2002).

inefficiency and administrations unresponsiveness to the popular needs, and on the other hand, the necessity to give protection to the administration.

The commission made certain observations and reasoned why the Ombudsperson type system would be beneficial[50]:

1) As far as constitutional difficulties are concerned, they can be resolved by constitutional amendment, if necessary, and consequently they do not constitute any insurmountable difficulty in bringing into force the proposed system.
2) The system of Ombudsperson has been regarded as essential by some of the enlightened democracies both of British and other parliamentary models.
3) The vastness of the country and its population need not deter us from establishing an Ombudsperson. The Indian Judicial system already provides for the functioning of the judiciary and administrative tribunals and for a hierarchy of appeals against the orders of subordinate authorities to superior authorities. The Ombudsperson-system is not envisaged as coming into clash with these institutions. This would substantially reduce the number of complaints eligible for investigation and thus enable the Ombudsperson to devote its attention and energies only to those cases in which *prima facie* the need for redressing an act of injustice or maladministration exists.
4) The institution of Ombudsperson would not be overwhelmed by the number of complaints it might be receiving. Over a period of years, when the public becomes accustomed to the working of the system, it would realize the futility of approaching it with cases which do not need its attention or in which the complaints are not genuine. Apart from this, by a suitable division of functions between the Ombudsperson and other functionaries to deal with citizens' grievances, it would be possible to distribute the workload in such a manner that all the functionaries can do adequate justice to the complaints they receive.
5) The commission has also refused to accept the validity of the argument that regulatory check on the actions of the executive in the discretionary field will lead to serious delays in developmental activities or will promote a feeling of demoralization in, or have a cramping effect on, the administration. This *malaise,* the commission felt, mainly arises from a sense of frustration or lack of appreciation of good work done and from an exaggerated image of corruption, inefficiency and lack of

[50] Administrative Reform Commission's Interim Report (1966).

integrity in the public mind than from actual investigation into complaints submitted by the citizens. The working of the institution of Ombudsperson will in the long run rectify and thus restore the correct image of the Administration, create public confidence in its integrity and thereby promote, rather than impede, the progress of developmental activities.

6) The informal character of inquiries by the Ombudsperson will save the public servant from exposure to public gaze during the course of an enquiry, which often has the effect of condemning her/him in the public eye before s/he is ultimately found guilty or innocent, as the case may be. The institution will thus be a protection for, and a source of strength rather than a discouragement to, an honest official, whose susceptibilities alone are germane in this context.

(ii) Researchers' Criticism

In recommending the Ombudsperson type system, the experience of comparatively small countries like Sweden, Norway, Denmark, and New Zealand, having small areas and containing small population was taken. These cannot be necessarily a precedent for India with such a vast area and population. An institution of the type of Ombudsperson on the analogy of such countries would require a very large staff and in such a large country, it may not be possible to maintain the private and informal character of investigations which has been a prominent feature of the institution in these countries. Also, the fact that the countries aforementioned, have centralized administrations whereas India is a federation based on a division of functions between the centre and the states. This would raise the problem of separate jurisdiction of the Ombudsperson and so many authorities with which s/he would have to deal. If the Ombudsperson's functions were to be the same as in those countries, it might lead to a conflict of jurisdiction with the central and state governments, Parliament, state legislatures and judiciary.[51]

Further, India is a parliamentary democracy. In such a system, if a minister or an administrator fails in his duty or acts improperly, unjustly or illegally, a corrective is available to the citizen both in the courts and the legislature. Even when commissions are appointed to investigate into the conduct of ministers, it is the Parliament or legislature which becomes seized of the matter and is the final authority which takes action.[52]

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[51] MP Jain and SP Jain, *Principles of Administrative Law*, Vol. 2, p. 2456 (2007).

[52] *Ibid.*

Also, the Ombudsperson type system involves certain constitutional problems as well, unlike what has been reported in paragraph 18 of the interim report of the administrative commissioner's report. As regards the permanent civil servants, Article 311(2) of the Constitution lays down the requirement of a formal inquiry. An inquiry made by the Ombudsperson would not answer the requirements of Article 311 and the executive government would have to hold a separate inquiry to deal with the delinquent official. This would only lead to long drawn investigations and inquiries, and it might, in the final result, involve a conflict of findings between the Ombudsperson and the departmental inquiry. Another fact that needs to be taken into consideration is that courts in India have extensive powers to correct actions of the administrative authorities through writs and this would have to be taken into account and provisions made to avoid any conflict of jurisdiction between the Ombudsperson and the courts and suitable procedures devised for the purpose.

Lastly, it is important to note that there is a lot of possibility of the misuse of the Ombudsperson. Interested persons might misuse the institution of Ombudsperson to make false or baseless charges against the administration either to discredit it or delay the implementation of various measures that might be undertaken in pursuance of government policies and programmes.

These considerations have not been considered by the ARC in the report and the commission has gone on to take a superficially positive approach while looking at the pros and cons. The ombudsperson type system is actually a burden and is unnecessary. This will be enunciated further by the researcher in the following paragraphs.

(iii) Position of Ombudsperson: Unnecessary in India

The position of an ombudsperson is not necessary in the Indian context. The powers vested with the lokayukta are limited to conducting inquiry and to make recommendations. What needs to be mentioned is that the ombudsperson process will not close off the judicial process in most cases. If a complaint is made to an ombudsperson, and after that process the complainant is not satisfied with the action taken, they are always allowed to proceed in court.[53] Hence, if at all any individual has any grievances against any public official, the Indian system does account for it by way of the courts.

An ombudsperson is anyway selected by the executive itself. Thus, the chances of bias and preference are high in selecting the ombudsperson. If not,

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[53] *Supra* note 14.

then it may be highly doubtful how an ombudsperson would actually take up stern steps and severe action against the very people who selected her/him for that post. The essence being, that an ombudsperson's action can be easily influenced. The effectiveness of the post in our country, where corruption is anyway rampant is directly doubtful. All that the post of ombudsperson does is that it creates false hope in the individuals and encircles them in the vicious trap. If the problem with approaching courts is the time, then such cases against public servants must be treated as PIL's and be given preferential admission.

The institution of Lokpal has not as yet been created at the centre although efforts have been made since, 1959 while institution of Lokayuktas/Lokpal has been established by many states through state legislations. They provide for inquiry/investigation into complaints of corruption against public servants and protect citizens' right against mal-administration, corruption, delay, inefficiency, non-transparency, abuse of position, improper conduct etc. The procedure to be followed is informal and inexpensive; technicalities do not come in way. Complaint is supported by affidavit, making out a case for inquiry. S/he is representative of legislature, powerful friend of citizens to act against any official's action, inaction or corruption. But not anti-administration; rather helps in humanizing relations between the public and the administration—a step forward in establishing an 'open government' securing respect for the rule of law, an educator aiming at propagating the prevention of corruption, inefficiency and mal-administration in governance. S/he is, therefore, a check on corruption.[54]

However, it is a fact that everything that is claimed to be the objective of the lokayukta, that is, in essence, to drive out corruption, which exists nevertheless rather rampantly. Not only the fact that it exists, it is also safe to say that it is continuously on the rise. Being a toothless lion, the lokayukta has proved to be inefficient. And because of the kind of mindset of Indian people that has developed over the period of time, that is one of corruption becoming a way of life, a lokayukta, is not required. The researcher opines that the position of a lokayukta or a lokpal is another addition to our complex, ineffective and unresponsive system which lacks the confidence of the people. Creating this post might even result in opening new windows and another parallel line of possible corruption. With inefficiency being proved, there exists no reason as to why such a post of ombudsperson must even exist.

In our country, where political power is almost infallible and where political influence is the greatest source of any kind of development, an ombudsperson

[54] Available at: http://hp.gov.in/lokayukta/page/Role-of-Lokayukta.aspx (Last visited on February 11, 2017).

is highly likely to be a mere puppet. S/he does not have suo moto powers. All s/he can do is inquire into a matter and investigate it further. The fact that the ombudsperson is unnecessary was proven by recent situation in which Justice Hegde, the lokayukta of Karnataka wished to resign because of the unresponsiveness of the government.

(iv) Separation of Powers

The creation of an Ombudsperson is against the principles of separation of powers. The doctrine of separation of powers, entailed by Montesquieu who stated, "There would be an end of everything, were the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."[55] This concept of separation of powers has been discussed by the courts in *I.R. Coelho (Dead) By Lrs* v. *State of Tamil Nadu and Others*[56] and *Indira Gandhi Nehru* v. *Raj Narain*.[57] It has also been held to be a part of the basic structure doctrine in the *Keshavananda Bharti* case.[58]

Although the ombudsperson has been given independent powers, however, the government has the prerogative to select the Ombudsperson. This implies there is direct bearing of the executive upon the powers given to the lokayukta. While ombudsperson is given certain limited judicial powers to look into complaints against public authorities, however, the cloud of the executive looms large simply because of the fact that it was the government itself which gave her/him the power to enquire, investigate and recommend. An ombudsperson generally acts as an advocate for an individual or class within an organization (a government, corporation, etc.). They may have powers to bring forward grievances formally and investigate complaints, but they don't typically make binding rulings. The advantages of an ombudsperson are that they are generally cheaper, and they may have the power to negotiate creative solutions to problems and effect policy changes within an organization. However, the fact that despite being paid to advocate for the interests of others, an ombudsperson is generally appointed and paid by the organization complained against, i.e. the executive. This may mean they are less accountable to the individual complainant, and more accountable to the organization complained against - meaning a complainant will have less control over the ombudsperson complaint than in a judicial process.[59] This reflects the fact that the decision/recommendation of a lokpal

[55] Available at: www.legalserviceindia.com/article/details.asp?id=16 *(Last visited on February 13, 2017).*
[56] AIR 1999 SC 3179.
[57] (1980) 3 SCC 625.
[58] AIR 1973 SC 1461.
[59] *Supra* note 55.

or a lokayukta will possibly be affected if matters or complaints against the government that selected her/him, come into question.

It should also be noted that the ombudsperson process will, generally, be 'closed door' - while some ombudsperson will make public reports (especially in government settings) they will often make their findings fully known only to their own superiors within the organization. Where there is a formal 'complainant' that person will only be informed of the action taken as a result. This will directly affect the transparency.[60]

Not only appointment, but once a report has been made, it needs to be sent to the Chief Minister of the state for his approval. This again signifies how the Ombudsperson is heavily executive driven. The extent of executive control upon a lokayukta was perfectly depicted when the mining scam hit Karnataka, where the lokayukta was forced to submit a report which required an interstate and nationwide analysis, before his retirement, which was round the corner.[61] This clearly depicts how the powers given to the ombudsperson are actually very superficial. The ombudsperson is controlled directly or indirectly by the executive and this is against the spirit of the Constitution of India.

(v) Other Reasons

The Ombudsperson's intervention is free, but the Ombudsperson can refuse to become involved in a matter. The Commonwealth Ombudsperson's ability to resolve problems is limited to investigation. The state Ombudsperson has powers to investigate and conciliate. Both also have the ability to publish reports, and do so on a regular basis. Reports typically address systematic issues within an agency or issues with the delivery of a government program. They have a good record of success. However, neither the state nor Commonwealth Ombudsmen are normally able to provide quick solutions to complex problems.[62]

The greatest disadvantage of ombudsperson is that they do not have any determinative powers but can only make recommendations to the agency concerned. When a recommendation is not followed, the ombudsperson can make a report to the government or Parliament and seek media attention.[63] Also, some surveys show a high level of dissatisfaction among the complainants. A NSW survey found that 62 percent saw the outcome of their complaints as

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[60] *Ibid.*

[61] Available at: http://www.mediaclubofindia.com/profiles/blogs/the-inefficient-lokayukta (Last visited on February 14, 2017).

[62] Available at: http://www.lawhandbook.sa.gov.au/ch07s02s02s01.php (Last visited on February 13, 2017).

[63] Michael Head, *Administrative Law: Context and Critique*, 4th ed. The Federation Press (2017).

'no resolution received'. *Chairperson ATSIC* v. *Commonwealth Ombudsman*[64] demonstrates that an ombudsperson cannot make definite findings of guilt against an office holder and must inform an affected official of all the grounds of criticism before publishing an adverse report.

(vi) Alternative to Ombudsperson

Instead of having a separate post of an ombudsperson, which does not do much more than open new avenues of corruption, the judiciary must be strengthened. It is a fact that in many cases, questions have been raised against the integrity of lokayuktas. Their efficiency has also been questioned from time to time. The need of the hour is to have a body, which is absolutely independent of any kind of government control or bearing. The need of the hour is to have a body which has the confidence of the people at large.

Thus the best alternative is to empower the judiciary to take up such matters of complaints against public authorities. Instead of setting up a new post altogether, the existing structure can be worked upon. Given the integrity of the judiciary and the confidence deposed on it by the people, the best forum for redressal of peoples grievances, as laid down as the objective by the Administrative Reforms Commission's 1966 report is the judiciary.

(vii) Earmarking Judges

The alternative lies in adding a specific number of judges who will be earmarked for the purposes of such complaints against public authorities who are corrupt and who indulge in maladministration. These designated judges must be given the powers to investigate, inquire, recommend as well as take action against the perpetrators. Thus, all powers of an ombudsperson, along with certain extra powers, i.e. to take action and impose sanctions against the offenders must be given to judiciary. They must also be given contempt powers which will ensure the prospect of them being efficient by ensuring that culprits respond and submit to the court's decision, unlike the situation that exists with Lokayukta's.

If there is a manifold increase in the number of cases regarding such complaints, the number of earmarked judges can be increased as and when required. Earmarking judges for such complaints will also prevent any kind of delays; as such judges can take immediate action for redressal of grievances. Such an alternative is also beneficial since the government can solve the problem within the already existing structure in the country. There will be no need to create a new post in the form of an ombudsperson which in turn requires several

[64] 1995 (134) ALR 238.

constitutional amendments and additions. Thus such an alternative has a twofold benefit:

1. People have confidence in the judiciary. They will be empowered to take up such cases without letting the prospect of delay coming to the forefront.
2. The government will benefit since creation of a new post requires all sorts of amendments to the Constitution, which can be averted by concentrating and strengthening the existing structure.

VI

Conclusion

In the regular dispensation of government there are implicit and explicit ways that citizens can voice their grievances and demand change. But these are often difficult. Within administrative departments, for example, any decision of one official can be appealed to a higher official, all the way up to the head of a department. However, this mechanism has inherent flaws.

The serious infirmity from which the proposed Lokpal and Lokayukta Act, 2013 suffers, relates to its dependence on the government for mechanism to investigate into complaints. It is a fact that in many cases, questions have been raised against the integrity of Lokayuktas. Their efficiency has also been questioned from time to time. The need of the hour is to have a body, which is absolutely independent of any kind of government control or bearing and has the confidence of the people at large.

Thus, the best alternative is to empower the judiciary to take up such matters of complaints against public authorities. Instead of setting up a new post altogether, the existing structure can be worked upon. Given the integrity of the judiciary and the confidence deposed on it by the people, the best forum for redressal of peoples' grievances, as laid down by the Administrative Reforms Commission's 1966 report is the judiciary.

Ombudsperson is a highly personalised institution. There can be limited regulation on the office, which will be a highly centralised organisation. Accountability of administrative and executive branches will be difficult to maintain. In case, we aim to democratise justice, the best way I can suggest, would be to resort to the panchayat system. Nonetheless, discussing its merits and demerits could be a subject matter of another paper.

The last criticism I have is about increasing the number of regulatory bodies. As a famous English saying goes "too many cooks spoil the dish", I believe having too many regulatory bodies would not only give way to subjectivity in justice delivery system, it would also consequently lead to an increase in 'forum shopping', ultimately making the justice delivery system a mockery. Therefore, focussing on improving the already existing ways, appears a better solution.

OWNING UP TO NATURE: ANTHROPOCENTRICISM TO ECO-CENTRISM AND IMPACT ON ENVIRONMENTAL POLICY FRAMING

*Upasana Singh**

Abstract

The past century has witnessed an unprecedented progress in economic development and human prosperity. However, simultaneously it has been a bystander to an unparalleled environmental destruction, which is not primarily mechanical or developmental, but behavioral and cultural. In the second half of this century the world community realized the danger towards which we were rampantly heading. This paper is an attempt to highlight the gradual advancement of the world community in general and Indian environmental jurisprudence in particular towards a more Eco-centric approach from an established Anthropocentric approach. Anthropocentrism is a "human-focused" approach wherein the non-humans (animals, wilderness and upto a certain extent the uncontacted people) only possess an instrumental value to fulfill the intrinsic human needs. On the other side under Eco-centrism "Nature includes humans" and its intrinsic worth is not inferior to humans.

Although ancient Indian literature indicates the expansive eco-centric vision of thinkers of that time, yet by the medieval times anthropocentric approach percolated in the Indian policy making. Buddhism advocates that environment and its component are not meant for humans alone. Human beings are only a part of it and should not show their supremacy over different biotic and antibiotic components of nature. However historical evidences from as early as the time of Chandragupta Maurya (340-298 B.C) indicate the instrumental-deference associated with "non-humans"; Kautilya, in his Arthashastra, illustrated elephants as the most important forest resource because of its immense military value (something like a modern day tanks). Lord Macaulay, being a silent admirer of Bentham's utilitarianism, in his Indian Penal Code kept the anthropocentric perspective streamlined and defined acts damaging environment and harming animals as offences against humans. Even our visionary forefathers, comprising the constituent assembly, did not contemplate the need of a part in our Constitution dealing purely with environment issues with an eco-centric approach.

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The paper does not suggest that it was a specific Indian phenomenon. On the contrary this was the attitude of the world community at the advent of the twentieth century. Between 1908 and 1913, America witnessed its first national debate over environmental preservation when the growing city of San Francisco, California proposed building a dam in the Hetch-Hetchy Valley to provide a steady water supply. India witnessed her most powerful and sustained preservationist mass movement in the Narmada Bachao Andolan, when the Sardar Sarovar Dam project was introduced by the government in 1985. Large-scale industrial pollution, the growing threat of nuclear radiation, documented mass destruction of entire ecosystems around the globe: the 1960s witnessed the advent of widespread international concern about a global environmental crisis. The Stockholm Conference (1972) marked a watershed in the evolution of humanity's relationship with the earth and global concern about the environment. In India, the otherwise widely shunned, 42nd amendment inserted Article 51-A (g) in the constitution of India making environmental protection as the fundamental duty of every citizen of India. The Wild Life Protection Act, 1972; the Forests Conservation Act, 1980; Water (Prevention and Control of Pollution), 1980; the Environment Protection Act, 1986 are the evidence in black and white of the shift in the realm of environmental jurisprudence in India as well.

I

Introduction

The past century has witnessed an unprecedented progress in economic development and human prosperity. However, simultaneously it has been a bystander to an unparalleled environmental destruction, which is not primarily mechanical or developmental, but behavioral and cultural. The modern man has attained expertise in realizing the vicious repercussions of his conscious or sub-conscious activities for satiating his never-ending instrumental desires. Unbridled industrialization, irresponsible urbanization, injudicious policies and constant scapegoating resulted in defilement of the formerly friendly man-environment relationship. Degradation of environment initiated by anthropogenic (man-oriented) activities cannot be adequately compensated by a negative feedback mechanism or a self-regulating system known as 'Homeostatic mechanism'[1].

[1] Homeostasis is the tendency of the body to seek and maintain a condition of balance or equilibrium within its internal environment, even when faced with external changes. In 1970s James Lovelock, a chemist, and Lynn Marguls, a microbiologist, formulated the Gaia hypothesis, suggesting homeostatic nature of Earth. The scientific investigation of the hypothesis focuses on observing how the biosphere and the evolution of life forms contribute

Environmental degradation is caused when this natural assimilative capacity is crossed by the modern man himself. The biggest contributor of this self-destruction is the rampantly increasing world population[2], which has led to depletion of natural resources, increased fossil fuel combustion and greenhouse emissions, decreased water quality, rising pollution index and global climate change. Environmental degradation has reached its peak and there is a need of a philosophy of life based on symbiosis i.e., cordiality between man and nature, instead of Darwinian 'survival of the fittest'.[3] The solution to most of present-day ecological problems is rooted in realizing the intrinsic worth of all non-human elements of the environment by humans.

The pivotal problem today is the manner in which humans interact and perceive environment surrounding them which results in absolute disregard for earth and her components, which includes humankind as well. This peculiar behavior is because of the misconceived notion, of superiority of humans over other beings, entertained by humankind. This ideology gained popularity during the renaissance period and attained its zenith during industrial revolution and advent of capitalism. This was the time when man was perceived as the only rational being, almost the manifestation of God himself on earth, entitled to all the rights and privileges and best suited to make all the decisions for him and other beings on earth. The rigidity of this ideology is directly proportionate to the level of environmental degradation. Social and environmental scientists are endeavoring assiduously to break this ideological barrier of humankind and pursue it to start considering itself a 'part of' nature and not over it. Slavoj Zizek, a Slovenian cultural critique, psychoanalyst, philosopher and social commentator, in his 2013 documentary movie, *The Pervert's Guide to Ideology*, explained ideology as usually a wrong way of perceiving reality and may consider to be 'common knowledge'. He depicts that we see everything with a filter of our ideological sunglasses and believe the adulterated version as filtered through our sunglasses which pleases

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to the stability of global temperature, ocean salinity, oxygen in the atmosphere and other factors of habitability in a preferred homeostasis. Initially received with hostility by the scientific community, it is now being accepted by higher echelons in world scientific community. In 2001, scientists from International Geosphere-Biosphere Programme (IGBP), the International Human Dimensions Programme on Global Environmental Change (IHDP), the World Climate Research Programme (WCRP) and the international biodiversity Programme DIVERSITAS met at the European Geophysical Union meeting and signed the 'Declaration of Amsterdam', starting with the statement, "*The Earth System behaves as a single, self-regulating system with physical, chemical, biological, and human components.*"

2 Stephen Emmott in his 2013 book titled '*10 billion*' projected that by the end of this century the world population might reach 10 billion mark from its current account of seven billion.

3 Arpana Dhar Das, "Ethical Responsibility towards Environmental Degradation" 30 *IPQ* 587 (2003).

our imagination and societal standards. The herculean task today is changing this ideology. Anthropocentric view of the world is tried to being abandoned today for the adoption of ecocentric view.

A central precept of green thinking is the belief that the current ecological crisis is caused by human arrogance towards the natural world, which legitimizes its exploitation in order to satisfy human interests. Human arrogance towards nature is rooted in anthropocentrism: a way of thinking that regards humans as the source of all value and human needs and interests are of highest, perhaps exclusive significance- humans are placed at the center of the universe independent of nature, and endowed with unique values[4]. Aristotle maintains that "nature has made all things specifically for the sake of man" and that the value of non-human things in nature is merely instrumental.[5] Generally, anthropocentric positions find it problematic to articulate what is wrong with the cruel treatment of non-human animals, except to the extent that such treatment may lead to bad consequences for human beings. Immanuel Kant for instance, suggests that cruelty towards a dog might encourage a person to develop a character, which would be desensitized to cruelty towards humans.[6] From this standpoint, cruelty towards non-human animals would be instrumentally, rather than intrinsically, wrong.

Ecocentrism is based on an ecologically informed philosophy of internal-relatedness, according to which all organisms are not simply interrelated with their environment but also constituted by those very environmental interrelationships. What is referred to here as an 'ecocentric' ethic comes from the term 'biocentric' first coined in 1913 by an american biochemist, Lawrence Henderson, to represent the idea that the universe is the originator of life. This term was adopted by the 'deep ecologists'[7] in the 1970s to refer to the idea that all life has intrinsic value. In an ecocentric ethic nature has moral consideration because it has intrinsic value, value aside from its usefulness to humans. Using this ethic, for example, one could judge that it would be wrong to cut down the rainforests because it would cause the extinction of many plant and animal species.

The obvious question that would arise here is 'are ecocentric ethics really necessary?' The critics of Ecocentric ethic often contend that a more

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4 Satish C. Shastri, "Environmental Ethics Anthropocentric to Ecocentric Approach: A Paradigm Shift" 55 *JILI* 522 (2013).

5 See generally, Aristotle, *Politics* (1948).

6 Immanuel Kant, *Lectures on Ethics* 240-41 (1963).

7 Arne Naess invented the term deep ecology in a famous 1973 paper: "The Shallow and the Deep, Long-Range Ecology Movement: A Summary."

meticulously drafted environmental legislation and its stricter implementation can solve the environmental problem that our generation faces today. However, experience illustrates that this hypothesis was a hasty attempt by environment scientists to push the environmental emergency a little further away from a point of complete hopelessness and it has failed miserably. The two major limitations of this hypothesis are- firstly, fair standards of environment protection and conservation would continue to be set by human index and needs. Thus, environment quality would be determined by societal welfare, right of an individual to safe environment and its aesthetic value. The intrinsic interest of environment which falls below this benchmark would be left unguarded. By taking into consideration these eco-centric environmental standards, more adequate and better environmental laws can be drafted. Secondly, in the absence of a voluntarily shift to an ecocentric ethic the decision makers would never be able to protect nature for its own sake. Worse, in cases where decision-makers felt morally committed to take such a paradigm jump, they would be forced to find constrained logic justify their decisions.[8]

To understand how recently green thinking is getting even greener by attempting to adopt an ecocentric ethic in decision making it is essential to understand the historical development of anthropocentric environmentalism and the realization of world community that it is not sufficient to tackle the impending catastrophe. Ecocentrism in reality grows at the bottom of a muddy and murky pool of the inadequacies of anthropocentrism and slowly emerges to the surface. Indian lawmakers have developed a mammoth anthropocentric jurisprudence in tandem with international law and it is essential to analyze both. This study is even more relevant today to understand the stand taken by the Supreme Court of India in the contentious *jallikattu* episode and the supposed ongoing tussle between Tamil identity and culture versus fundamental right of dignity of animals. The supporters of *jallikattu* also argue that the continuance of the sport is essential for protecting the indigenous breeds of bulls, which are bred particularly for the event, now the authenticity of this argument is still to be verified in court.

II

International Environmental law

In the year 1963, an American marine biologist and conservationist, Rachel Carson, released her book, *Silent Spring* (1963), which consisted of a number of essays detailing how pesticides such as DDT, aldrin and deildrin concentrated through the food web. The government and the chemical agencies were

[8] Prue Taylor, *An Ecological Approach to International Law: Responding to Challenges of Climate Change* 39 (2008).

extremely critical of her and accused her of being a 'fanatic defender of the cult of balance of the nature' but academic scientists and environmentalists applauded the book. Meanwhile the book zoomed to the top of the bestseller list and suddenly the environment was on national agenda. In 1969, the first iconic pictures of the Earth were transmitted to world from Apollo 8 and such was its impact on public consciousness that it launched a thousand environmental movements. It later became known as 'Earthrise' and the image of the Earth rising in the dark became the symbol of the collective movement of protection of our planet Earth.

In 1972, the Stockholm Conference,[9] with its motto 'Only one Earth', marked a watershed in the evolution of humanity's relationship with the earth and modern environmental diplomacy. It brought the world community together to arrive at an unprecedented level of agreement that environment protection is a matter of utmost importance and requires expeditious investigation. The focal theme of this first international conference was 'to defend and improve the human environment for present and future generations', and 'to safeguard the natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, for the benefit of present and future generations through careful planning or management, as appropriate'.[10] Thus, anthropocentric approach was the essence of the declaration, which was adopted in numerous subsequent conventions and declarations, which were held in next four decades. The Stockholm Declaration recognizes in Principle 1 the requirement for a basic standard of environment as a tool to achieve other substantive goals: "Man has the fundamental right to freedom, equality, and adequate conditions in life, in an environment of a quality that permits a life of dignity and well-being..."[11] The Declaration also contains a balance in its principle 11, which states that "the environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all...." The Rio declaration of 1992[12] stated categorically in its first principal that "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature".[13] This principle tenuously hints at a marginal standard of environmental

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9 United Nations Conference on Human Environment (UNCHE) was held in Stockholm, Sweden from June 5-16 in 1972.

10 Principle 2, Stockholm Declaration.

11 Principle 1, Stockholm Declaration.

12 United Nations Conference on Human Environment (UNCHE) was held in Rio De janeiro from June 3-14 in 1992.

13 Principle 1, Rio Declaration.

fitness which every individual 'should' have but it does not metamorphose into a right to environment. Instead, the Rio Declaration as a whole rejects what can be regarded as a balance in the Stockholm Declaration between a nascent right to environment on the one hand and attention to development imperatives on the other.[14] The first sentence of Rio Principle 1, stating, "human beings are at the center of concerns for sustainable development," implies that people's needs drive environmental policies, such as the preservation of natural resources.[15] Rio principle 3 identifies a 'right to development' instead of a right to environment. Undeniably, by putting the human needs and standards at the core of environment policy making the Rio Declaration has achieved the character of being more anthropocentric in nature than its earlier counterpart.[16]

The same approach was displayed in the follow up World Summit on Sustainable Development held in Johannesburg from 26th August to 4th September 2002 and great concern was exhibited for the children who will be the future of Planet Earth. The Rio Declaration on Environment and Sustainable Development in the year 2012 mentioned that:[17]

We recognize that people are at the center of sustainable development and in this regard we strive for a world that is just, equitable and inclusive, and we commit to work together to promote sustained and inclusive economic growth, social development and environmental protection and thereby to benefit all.

The Brundtland Commission Report of 1987 defined sustainable development as development that meets the needs of the present without compromising the ability of future generations to meet their own needs. The concept of sustainable development was a compromise between progress and preservation, modernization and maintenance and development and conservation. Thus it is not ideologically impartial, because it was designed as a pro-environment developmental alternative to zero-growth and therefore relatively inclined towards developmental perspective. Time has shown that in the backdrop of sustainable development lies anthropocentric ideology more than ecocentric ones, but environmental concerns were a part of policy discourses. The inherent nature of sustainable development is paradoxical resulting in its incomplete and half-heartedly implementation by the world community for the conservation of environment.

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[14] David A. Wirth, "The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa' 29 *Georgia Law Review* 614 (1995).

[15] *Ibid.*

[16] *Id.* at 615.

[17] "The Future We Want", available at: http://www.un.org/disabilities/documents/rio20_outcome_document_complete.pdf. (Last visited on 28 March, 2017).

However, international law has not completely failed to acknowledge the ecocentric approach in environmental policy making. Ecocentrism has begun voicing itself in international conventions, although the threads are interwoven with anthropocentricism. The preamble to the 1972 UNESCO World Heritage Convention declares that the cultural and natural heritage of outstanding universal value should be preserved 'as part of the world heritage of mankind as a whole'. One of the greatest value of the conventions the establishment of the 'common heritage' and 'outstanding universal value' as very captivating notions which enjoin a consideration of conservation beyond the immediate needs and values of local, national or political concerns. It is the duty of the world community as a whole to cooperate and protect it. Convention on international Trade in Endangered Species of Wild Fauna and Flora (CITES, 1973) seeks to resolve the difference between legitimate trade n renewable resources with protecting endangered species. Commercial activities in wild plants and animals and their species and specimen are allowed when it does not threaten the existence of those species. Although it is not directly an environmental protection convention yet the strict obligations and implementation guidelines make it a more ecocentric document. Convention on Biological Diversity (CBD, 2000) is intended to function as a parent organization to the other conventions with the directive to reduce the global decline in biodiversity. A key function is a process-oriented body whereby the progress of protocols and legal principles are facilitated with a realistic evaluation of present environmental global concerns. United Nation Convention on the Law of the Sea (UNCLOS) is the sole convention that protects the marine environment in armed conflict whereby it is the duty of the States to act in a manner which is reasonable and practicable. This convention has evolved to facilitate equitable sharing of marine water resources and is an accepted part of international foreign policy. The Ramsar Convention on Wetlands signed in 1971 could have been a progenitor of international ecocentric conventions with its good intentioned and crisply worded draft with the mission: *"the conservation and wise use of wetlands through local, regional and national action and international cooperation, as a contribution toward achieving sustainable development throughout the world"*. However the usage of the phrase 'wise use' of wetlands blurred the true meaning of the convention. although the convention itself did not define the term, the 1987 meeting of the parties agreed that 'wise use' means the 'sustainable utilization for the benefit of humankind in a way compatible with the maintenance of the natural properties of the ecosystem' and, in turn, explained that '*sustainable utilization*' means 'human use of wetlands so that it may yield the greatest continuous benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations'.[18]

The two approaches, anthropocentric and ecocentric are best synergized in The World Charter for Nature adopted by the UN in 1982. Article 1 of the charter states that: 'Nature shall be represented and its essential processes shall not be impaired'. There is no reference to human kind. The obligations implied in the sentence are in fact imposed upon human kind. This is consistent with Article 24 of the charter which imposes a duty to act in accordance with the charter on every person acting individually or in association with others. Article 4 of the charter creates a balance between the two approaches stunningly:

Ecosystems and organisms, as well as the land, marine and atmospheric resources that are utilized by man, shall be managed to achieve and maintain optimum sustainable productivity, but not in such a way to endanger the integrity of those other ecosystems or species with which they coexist.

III

Indian Environmental Law

Ancient Indian civilization originated and spread in close association with nature. It evolved by balancing the human needs and surrounding environment. Indians enjoy a plethora of natural resources gifted to them by their ancestors who used them wisely. Ancient Indian scholars were farsighted enough to realise that environment possess its own intrinsic worth and it is an obligation upon human kind to not to exploit it. The four Vedas, *Rig, Sama, Yajur and Atharva*, form one of the oldest literatures in the world. Rig Veda describes various components of eco-system which were later rediscovered by advanced sciences. In Rig Veda natural components are alleviated to the status of God and deities to ensure their preservation to recognize their relevance: water becomes *Jal* god, wind becomes *Vayu*, *Pusan* depicted the pastoral god, sun becomes the *surya* god, etc. Yajurveda mentions that a ruler shall never kill animals which are useful in agriculture like bullocks or cows.[19] Although it's an anthropocentric understanding, yet it is quite important if seen in relation with that time. The religious belief and sacredness kept the public away from exploiting and wasting the resources. This reason can be attributed to the association of plants and animals with gods and deities created in various religions spread in the Indian subcontinent. For example the bird *garuda* (eagle) is considered as the vehicle of Lord Vishnu, seven horses as the vehicle of Lord *Surya* (sun), owl and rat as

[18] David Wilkinson, *Environment and Law*, 1st edn. (2002).

[19] Chandan Kumar Gautam and Anand Prem Ranjan, "Ecocentrism in Indian: An Incredible Model of Peaceful Relation with Nature" 4 *Universal Journal of Environmental Research and Technology* 91 (2014).

the vehicles of goddess *Laxmi* and Lord *Ganesh* respectively. The *Purans,* one of the holy books of Hindus states that sacred basil brings fortune if planted in the house. In India Peepal, Sam and Banyan have been given a holy status.

Ramayana, the great epic of Hindu mythology, depicts many non-human characters that helped the human king, Lord Ram, to seek his wife and defeat the demon king, Ravana. The monkey king *Sugriv* supported Lord Ram with his army of monkeys, *Nal* and *Neel,* the two monkeys helped Lord Ram to build the present day Ram setu between the Gulf of Mannar and Palk Strait, *Gidh-raj Jatayu* (the vulture king) demonstrated great valor in fighting Ravan when he was abducting Sitaji, *Hanuman*, the most loyal friend of Lord Ram, was shown as a monkey with mystical powers and *Jaamwant* (the bear king) lead the bears in war against Ravan. This shows a very high level of understanding and interaction between the humans and animals which could only be arrived at by a coordinated effort on the part of both.

Jainism originated in India even before the era of Christ began. Jainism advocates and preaches non-violence towards all living beings and it also stresses spiritual independence and equality between all forms. Another religion which falls in almost the same timeline is Buddhism. According to Buddhism environment and its component are not meant for humans. Human beings are only its part and should not show their supremacy over the different biotic and abiotic components of nature.[20] This level of ecocentric understanding is laudable at that time and age.

This man-environment relationship was adversely affected primarily by foreign invaders, who destabilized the Indian civilization, and secondarily by the all-pervasive aftermath of global events like industrial revolution, scientific revolution, renaissance and the colonization of the world by British Empire.

The present Indian environmental jurisprudence can be divided into four sub-categories[21] for better understanding and clarity:

1. Pre-independence
2. Post-independence
3. Indian judiciary (anthropocentric)
4. Indian judiciary (eco-centric)

(i) Pre-independence:

During the British period, legal control on environmental pollution began with

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[20] *Id.* at 93.

[21] This categorization is only for the purpose of better understanding and clarity and it is not in a chronological order or in a defined process.

the enactment of Indian Penal Code, 1860. Section 277 of the code provides punishment for voluntarily corrupting or fouling the water of any public spring or reservoir, *so as to make it less fit for the purpose for which it is ordinarily used.* The code also punishes voluntarily vitiating the atmosphere so as to make it 'noxious' to the health of the persons in general dwelling or carrying on business in the neighborhood.[22] British India had a number of other enactments also on pollution control, mainly dealing with three areas, namely, regulation of factories[23], preservation of forests[24] and protection of animals and wildlife[25]. Among others the important acts were the Northern India Canal and Drainage Act, 1873; the East India Irrigation and Canals Act, 1859; the Oriental Gas Company Act, 1857. Common law remedies were also available under the law of torts[26].

(ii) Post-independence:

Before Stockholm Declaration, the landscape of Indian environmental jurisprudence was made of scattered legislations of British and Independent India.[27] In the early decades of independence, water pollution laws were put on the statute book of many states. Even the Code of Criminal Procedure, 1973, which contain some general provisions to cover ordinary situations[28], came to be regarded as an instrument to combat pollution in the 1980's and was utilized in *Municipal Council, Ratlam* v. *Vardhi Chand.*[29] Based on the broad guidelines given by the Stockholm Declaration the Indian government enacted the Water (Prevention and Control of Pollution) Act, 1974, to provide for the prevention and control of water pollution and the maintaining or restoring of wholesomeness of water; the Air (Prevention and Control of Pollution) Act, 1981, to provide for the prevention, control and abatement of air pollution. A comprehensive legislation covering all aspects of preservation of environment was enacted only in 1986 by passing the Environment (Protection) Act, 1986 (EPA). The purpose of EPA was to implement decisions of the Stockholm Conference in so far they relate to the protection and improvement of the human environment and the prevention of hazards to human beings, other living creatures, plant and property. EPA

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[22] S. 278, Indian Penal Code, 1860.

[23] See, Boilers Act, 1923; Explosives Act, 1884; Explosive Substances Act, 1908; Petroleum Act, 1871; Destructive Insects and Pests Act, 1914.

[24] Cattle Trespass Act, 1879; Destructive Insects and Pests Act, 1914.

[25] E.g., Elephant Preservation Act, 1979; Fisheries Act, 1897.

[26] Furqan Ahmad, "Origins and Growth of Environment Law in India" 43 *JILI* 358, 365-366 (2001).

[27] See e.g., Atomic Energy Act, 1962; Insecticides Act, 1968; Mines Act, 1952; Factories Act, 1948; and Industries (Development and Regulations) Act, 1951.

[28] S. 133 and 144, Code of Criminal Procedure 1973.

[29] AIR 1980 SC 1622.

defines 'environment' as including water, air and land and the 'inter-relationship' which exists among and between water, air and land, and human beings, other living creatures, plant, micro-organisms and property. It is laudable that the act gives an expansive definition of environment however section 2 which deals with definitions shows a total lack of understanding of the modern concept of environmental pollution and the factors that led to the imbalance of the ecosystem. The accent is on the physical condition of air and water. The major urban environmental ills like noise, traffic, overburdened mass transportation systems, slums and congestion are conspicuously absent from the Act and no provisions have been made for their control.[30] A deeper scrutiny shows that the act is more of enabling umbrella legislation rather than an operative law. Section 24 of EPA makes the penal provision redundant by limiting the scope and purpose of the Act. In 2002 the Indian government, guided by the principles set out by the Rio Declaration 1992, enacted the Biodiversity Act to regulate access to biological resources of the country with equitable share in benefits arising out of the use of biological resources; to conserve and sustain use of biological diversity. The Public Liability Insurance Act, 1991, the National Green Tribunal Act, 2010 and the recent Environment Law (Amendment) Bill, 2015[31] are launched with a common objective of providing for an effective deterrent penal provisions and introducing the concept of monetary penalty for violation and contraventions.

Environmental law has found special mention in the Indian Constitution. Prior to the 42nd amendment, environmental protection was availed solely through Article 21 of the Constitution. Article 47 declares that the state has a duty to prohibit hazardous activities and directs the state to remove unsanitary conditions. Constitution (Forty-Second Amendment) Act, 1976 has inserted specific provision relating to the environment. It added Article 48-A, which requires the state to make an endeavor to protect and improve the environment and to safeguard the forests and wildlife of the country. In chapter IV-A, Article 51-A(g) was inserted which requires the citizens 'to protect and improve the natural environment, including forests, lakes, rivers and wildlife and to have compassion for all creatures. These directives have been read as complementary to the fundamental rights[32]. In several environment cases[33], the courts have been guided by Article 48-A and 51-A (g) of the Constitution.

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[30] K. Jayakumar, "Environment Protection Act: A Critical Overview" *Cochin University Law Review* 33, 34-35, (1987).

[31] The Bill is still pending with the Parliament.

[32] *Som Prakash Rekhi* v. *Union of India,* AIR 1981 SC 212.

[33] E.g., *M.C. Mehta* v. *Union of India,* AIR 1988 SC 1037; *Rural Litigation and Entitlement Kendra, Dehradun* v. *State of U.P.,* AIR 1988 SC 2187.

(iii) Indian judiciary (anthropocentric approach)

The development of environmental jurisprudence is largely a story of judiciary responding to the complaints of its citizens against environmental degradation and administrative sloth[34]. Judicial interpretations have strengthened the constitutional mandate. Although part III of the Constitution, acknowledging the fundamental rights and providing the constitutional remedy to claim them, does not refer to any specific provision granting right to environment yet the Apex Court has adopted a liberal and purposive interpretation of 'right to life and liberty' provided under Article 21 read with Article 48-A and Article 51-A (g) and incorporated 'right to wholesome environment' in its ambit. Justice P.N. Bhagwati categorically stated that right to life under Article 21 includes right to life with dignity and all that goes with it.[35] Hygienic environment is an integral part of the right to a healthy life. It would be impossible to live with human dignity without humane and heathy environment.[36] *Maneka Gandhi*[37] case has added further dimensions to the concept. A law effecting life and liberty of a person has to stand the scrutiny of Articles 14 and 19 of the Constitution and the procedure laid down must be reasonable, fair and just. This case has broadened the scope of right to life and therefore it included many things which are essential for survival, for example, clean air, water and healthy environment.

Greening the law on public nuisance, the Supreme Court in *Municipal Council, Ratlam* v. *Vardichand*[38] identified the responsibilities of local bodies towards the protection of the law of public nuisance in the Code of Criminal Procedure as a potent instrument for enforcement of their duties. Justice Krishna Iyer observed that:

"Decency and dignity are non-negotiable facets of human rights and are a first charge on local self-governing bodies".

In a pro-active action, the Supreme Court later entertained a letter petition from an NGO called the Rural Litigation and Entitlement Kendra. This initiated the first case[39] that directly dealt and concerned itself with the environment and

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[34] Shyam Divan and Armin Rosencranz, *Environmental Law and Policy in India* 1 (2001); see, e.g. how the court expanded *T. N. Godavaraman* case (AIR 1996 SC 1040) from a matter of ceasing illegal operations in one forest into a reformation of the entire country's forest policy.

[35] *Francis Coralie* v. *Union Territory of Delhi,* AIR 1980 *SC* 849.

[36] In *Subhash Kumar* v. *State of Bihar,* AIR 1991 SC 420, the Supreme Court observed that Right to live is a fundamental right under Art. 21 and it includes the right of enjoyment of pollution free water and air for full enjoyment of life.

[37] *Maneka Gandhi* v. *Union of India,* AIR 1978 SC 597.

[38] AIR 1980 SC 1622.

[39] *Rural Litigation and Entitlement Kendra* v. *State of U.P.* (1985) 2 SCC 431.

ecological balance. Favoring ecological integrity against industrial demands on forest resources, the court considered the hardship caused to the lessees but thought that '*it is a price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment with minimal disturbance to ecological balance*'.[40]

In 1985 there was a leak of oleum gas from the factory premises of Shriram Foods and Fertilizer India.[41] The importance of this decision lies in the creation of 'Absolute Liability Principle'[42]. The Supreme Court observed that an enterprise engaged in a hazardous or inherently dangerous industry owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of its activity. If any harm does result, then the enterprise is absolutely liable to compensate for such harm and it is no answer to say that it had taken all reasonable care or that the harm occurred without any negligence on its part[43].

(a) Sustainable Development: Precautionary Principle, Polluter Pays Principle and Intergenerational Equity:

In *Indian Council for Enviro-Legal Action*[44] the Supreme Court accepted the Polluter Pays principle. In this case some chemical factories produced hazardous substances (e.g., oleum) without proper permissions, permits and precautions resulting in contamination and degradation of air, water and soil. The court held that the respondents were absolutely liable[45] to compensate for the harm caused by them to the villagers in the affected area, to the soil and to the underground water and bound them to take all necessary measures to remove the sludge and other pollutants lying in the affected area and also to defray the cost of the remedial measures required to restore the soil and the underground water resources. The polluter's liability is irrespective of the care taken by him while dealing with the hazardous substance because it is premised on the very nature of the activity carried on.

The concept of sustainable development was articulated in India by the Supreme Court in *Vellore Citizens Welfare Forum*[46]. The Supreme Court also

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[40] *Id.* at 656.
[41] *M.C. Mehta* v. *Union of India* (1986) 2 SCC 176.
[42] The Supreme Court rejected the exceptions taken in *Ryland* v. *Fletcher* (1868) LR 3 HL 330.
[43] Justice Madan B. Lokur, *Environmental Law: Its Development and Jurisprudence,* World Wide Fund for Nature India, available at: http://awsassets.wwfindia.org/downloads/green_law_lecture___july_3__2006.pdf (Last visited on February 10, 2017).
[44] *Indian Council for Enviro-legal Action & Ors* v. *Union of India* (1996) 3 SCC 212.
[45] Absolute liability extends not only to compensate the victims of the pollution but also the cost of restoring the environmental degradation.
[46] *Vellore Citizens Welfare Forum* v. *Union of India & Ors* (1996) 5 SCC 647.

recognized the Precautionary Principle as one of the principles of sustainable development. Precautionary Principle is mentioned in principle 15 of Rio Declaration[47] and in the context of municipal law it means:[48]

1. Environmental measures by the state government and the statutory authorities must anticipate, prevent and attack the causes of environmental degradation.
2. Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as reason for postponing measures to prevent environmental degradation.
3. The 'onus of proof' is on the actor or the developer/industrialist to show that his action is environmentally benign.

The Precautionary Principle led to the evolution of the special principle of burden of proof mentioned in *Vellore Citizens Welfare Forum.* As per this special principle, the burden is on the person wanting to change the status quo to show that the actions proposed will not have an injurious effect, the presumption operating in favour of environmental protection. The Supreme Court in, *A.P. Pollution Control Board cases*[49], unequivocally declared that Precautionary Principle is the law of the land and noticeably it observed that *environmental protection should not only aim at protecting health, property and economic interest but also protect the environment for its own sake*[50].The Precautionary Principle is relatable to risk assessment and environmental impact assessment.

In *Vellore Citizens Welfare Forum*, the Supreme Court while accepting the definition given by Brundtland Commission talked about the third component of Sustainable Development: Intergenerational equity. It includes: Conservation of options, Conservation of quality and Conservation of access.

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[47] Before the Stockholm Conference 1972, the *Assimilative Capacity Principle* was recognized at the international level. As per this the nature has the capacity to absorb the ill-effects of the pollution but beyond a certain limit the pollution may cause damage to the environment requiring efforts to repair it. It assumes that science could provide the policy makers with necessary information and means to avoid encroaching upon the capacity of the environment to assimilate impacts and it presumes that relevant technical expertise would be available when environmental harm is predicted and there would be sufficient time to act. But pollution cannot wait for action to be postponed for investigation of its quality, concentration and boundaries. So there was shift of assimilative capacity to precautionary principle.

[48] Arvind Jasrotia, "Environmental Protection and Sustainable Development: Exploring the Dynamics of Ethics and Law" 49 *JILI* 21, 30 (2007).

[49] *A.P. Pollution Control Board* v. *M.V. Nayudu,* (1999) 2 SCC 718.

[50] This principle was directly applied by the Supreme Court in *M.C. Mehta* v. *Union of India,* (1997) 2 SCC 353, for protecting the Taj Mahal from air pollution.

(b) Public Trust Doctrine:

This doctrine came up for consideration in the *Kamal Nath case*[51]. Briefly, this doctrine postulates that the public has a right to expect that certain lands and natural areas will retain their natural characteristics. Under English common law the sovereign could own natural resources but the ownership was limited in nature. The Crown could not grant these properties to private owners if the effect was to interfere with the public interests in navigation and fishing. Resources that were suitable for these uses were deemed to be held in trust by the Crown for the benefit of the public. The court observed that Indian legal system is based on English common law and includes the public trust doctrine as part of its jurisprudence. The natural resources are meant for public use and cannot be converted into private ownership.

(iv) Indian Judiciary(Eco-centric approach)

Indian judiciary is gradually adopting an ecocentric approach towards a just world. Ecocentrism rejects human chauvinism of anthropocentrism and argues that all of nature has intrinsic value.[52] The strongest reason for this paradigm shift is the disappointing outcome of anthropocentric environmental policies. Justice Radhakrishnan in *T.N Godavarman Thirumulpad* v. *Union of India*[53] expounded the requirement of an ecocentric approach as opposed to anthropocentric:

"Environmental justice could be achieved only if we drift away from the principle of anthropocentric to eco-centric. [E]co-centric approach to environment stresses the moral imperatives to respect intrinsic value, inter dependence and integrity of all forms of life. Eco-centrism supports the protection of all life forms, not just those which are of value to humans or their needs and underlines the fact that humans are just one among the various life forms on earth."

The Supreme Court in *T.N. Godavarman* v. *Union of India*[54] dealt with the issue of Asiatic wild buffalo, specie on the verge of extinction. The court highlighted the 'Human-Wildlife Conflict' and observed that since laws are manmade there is a likelihood of anthropocentric bias. In *T.N. Godavarman Thirumulpad* v. *Union of India-II*[55] the preservation of 'red sandalwood' which is found in Andhra Pradesh, was in question. In both the cases the court explained the eco-centric approach and narrated the necessity to apply it but in *Centre*

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51 *M.C. Mehta* v. *Kamal Nath* (1997) 1 SCC 388.
52 Neil Carter, *The Politics of Sustainable Development* 15 (2001).
53 (2012) 4 SCC 362, 374.
54 (2012) 3 SCC 277.
55 (2012) 4 SCC 362, 374.

for Environment Law, WWFI v. *Union of India*[56] , which was about safeguarding the 'Asiatic wild Lion', an endangered species, the court started the judgment with the application of 'eco-centric approach' as they have instrumental as well as intrinsic value/worth. The issue was to relocate the Asiatic lion to a second natural home for their better conservation. Gujrat state in response to this call took a stand that Asiatic lion is a part of 'Gujrat Family' and it is best placed at its home. The dispute was looked upon as a battle between states of Gujrat and Madhya Pradesh until the Supreme Court in its landmark judgment held that this anthropocentric approach is not helping anybody. It has asked for lions to be re-introduced to Madhya Pradesh. The court, in attempt to dilute the man made territorial boundaries and their procedural loopholes, stated that animals in the wild are not property that can be owned by anyone:

Several migratory birds, mammals, and animals in wild cross national and international borders created by man and every nation have a duty and obligation to ensure their protection. No nation or organization can claim ownership or possession over them, the Convention on the conservation of migratory species of wild animals held at Bonn, 1979, supports this principle and the convention recognizes that wild animals in their innumerable forms are irreplaceable part of the earth; natural system and must be conserved for the good of the mankind.

The judgment calls for something that policymakers have neglected — what it calls the 'specie's best interest standard'. The court read 'right to environment' as 'right of environment' under Article 21 of the Constitution and held that it is a constitutional duty of the State to protect and preserve the environment to get a proper 'right to life'. The Apex court held that there is a need to see the principles of sustainable development and doctrine of public trust in an ecocentric light contrary to the anthropocentric approach taken today. In answering the classic question of 'what to save?' the judgment outlines the concept of intrinsic worth. It emphasizes that all species have the right to exist, whether humans deem them worthy or not. This is especially important for a country like ours, where many conservationists believe that conservation attention has gone to a few charismatic species deemed 'worthy' of this attention. As human beings, we have chosen who to save.

As opposed to 'wildlife' in the above mentioned case, in *Nagaraja case*[57], the issue before the Supreme Court was whether the practice of *jallikattu* (taming of bulls by youth), historically prevalent in the state of

[56] (2013) 8 SCC 234.

[57] *Animal Welfare Board of India* v. *A. Nagaraja* (2014) 7 SCC 547.

Tamil Nadu, violated sections 3 and 11 of the Prevention of Cruelty to Animals Act, 1960, along with Article 21 and clauses (g) and (h) of Article 51A of the Constitution by allegedly inflicting barbaric cruelty on bulls/bullocks. Favoring the ecocentric approach of "species' best interest" over anthropocentrism, the SCI observed that the PCA is a welfare legislation (aimed at ensuring animals' well-being) that must be liberally construed from the standpoint of animals' welfare, "subject to just exceptions, out of human necessity." Most importantly, the SCI interpreted sections 3 and 11, PCA, Articles 21 and 51A(g) of the Constitution, and the World Health Organization of Animal Health (OIE) Guidelines as recognizing the intrinsic worth and inherent right of every species to a peaceful life, protecting their well-being, honor, dignity, privacy, and security, and conferring correlative duties on all humans, including person-in-charge/ custodian of animals, to safeguard the same. The SCI held that the five internationally recognized freedoms of animals[58], as incorporated in chapter 7.1.2 of the OIE Guidelines, to which India is a signatory, must be read into sections 3 and 11 of the PCA, along with Article 51A(g) of the Constitution. Despite advocating eco-centrism, the SCI allowed human necessity to prevail and the property status of animals to continue. However, this differential treatment of wild animals and domestic animals is actually a blessing in disguise for the domesticated animals. Because the reduction of right to property from an erstwhile fundamental right to a mere legal right in India allows the Indian Parliament sufficient flexibility to safeguard the rights of animals, despite their property status.

Although the complete freedom of personality was not granted to animals in this case yet the judgment is laudable. It recognizes the intrinsic worth of animals and grants them the equality of status to claim fundamental right of life and dignity. *Nagaraja* unequivocally asserted that sections 3 and 11 repose corresponding duties on all persons, including the person-in-charge/care-taker/ owner/custodian of the animal, in addition to AWBI and the state to initiate legal process against violations.

Year 2017 has witnessed almost an unprecedented uproar by public for a matter concerning animal rights. This, however, was not done keeping the animals rights in focus but for the protection of traditional and cultural identity of humans. Thousands of students flooded the streets of Chennai in January 2017 against the ban imposed by the Supreme Court on the free conduct of the *jallikattu* event. It would be too quick and incorrect to attribute any ulterior motive to this

[58] These five freedoms are: "(i) freedom from hunger, thirst [,] and malnutrition; (ii) freedom from fear and distress; (iii) freedom from physical and thermal discomfort; (iv) freedom from pain, injury[,] and disease; and (v) freedom to express normal patterns of behaviour."

mass movement, news reports suggest that this was not facilitated by any political party or leader. This was done because a large section of the society believes that it is a blow on their fundamental right to conserve their heritage and identity, which is a justified fear. The Tamil Nadu government in a knee-jerk reaction came out with an ordinance against the judicial ban. Subsequently the Tamil Nadu Assembly unanimously passed the bill that removes bull from the list of performing animals specific to the state. The law adds *jallikatrtu* as another item in a list of 'exemptions' from the rule against using some animals as performing animals. The original list contained use of animals by the police and military after training them and for use for scientific and educational purposes. According to the new law *jallikattu* can be conducted between January and May every year in Tamil Nadu by individual, organization or group in places and days notified by the government after informing and taking permission from the district collector. The central government in its complete political Pontius Pilate leap gave its tacit support to the bill and with the president's assent it became an act. Thereupon the event of *jallikattu* was held at three popular venues; Alanganallur, Avaniapuram and Palamedu. The State amendment act is pending for judicial review in Supreme Court and now the petitioners demanding its repeal have to do more than just show that the PCA Act stands violated by *jallikattu*; they would have to prove that its practice infracts at least one of the fundamental rights guaranteed by the Constitution of India. The framers of our Constitution never intended to give fundamental rights to animals and the constitutional text goes with this reasoning. Thus to follow the path set in *A. Nagaraja* would require a giant leap of purposive constitutional interpretation by specifically holding animals as legal persons entitled to possess fundamental rights. What the fate has in store for animal welfare in India is yet to be seen but this conflict offers a paramount opportunity in the hands of judges of Supreme Court to alter the present landscape of Indian ecological jurisprudence.

IV

Impact on Policy Framing

Environmental policy is guided by environment ethics and traditionally ethics concerned only human beings. As has been discussed earlier in this paper, in western thought dominated by the scientific and industrial ideas, the substantial identity between human beings and moral patients (recipients of actions judged from the ethical point of view) has historically prevented expanding moral concerns beyond human communities. However, the contemporary challenge is that the multiple environmental issues are seriously undermining this traditional belief that the moral community should exclude non-humans.

In the past three decades protecting global environment has materialized as one of the major challenges for policy makers. The countries of the world are going about the business of environmental protection at their own different pace, with different levels of passion and their own unique methods and policies. While industrialization, population growth and urbanization intensifies environmental pollution in developed countries, poverty and socio-economic needs make the situation worse for developing countries. The biggest task for public officials, particularly in developing countries, is dealing with today's short-term pressing needs while preparing for tomorrow's climate-related impacts and surprises.

The shift (still embryonic) towards more ecocentric paradigm can be highlighted by appreciating efforts at international, national, community and individual levels.

I. Japan in the late 20th century came to the conclusion that exploiting waste as a profitable resource (economic and environmental) instead of a cost incurring burden, by creating a circular economy, would be a good way to resolve simultaneously the environmental and economical challenge. Circular economy lays emphasis on the synergized growth and sustainable development of economic system, social system and eco-system; integrating environment, technology, society and economy.[59] The policy, perceptively, tickles the anthropocentric nature of human beings to produce ecocentric results. It aggregates various concepts related to the efficient use of resources and refers to a new industrial model that is "restorative by design". It opposes the existing linear model of "take-make-dispose" that is progressively leading to resource depletion. The cycle is basically divided into two parts: *Eco-design*, an approach that takes into account the environmental impact of the product during its whole lifetime, and *Waste management*, where waste is treated as resource rather than a burden. Japanese circular economy efforts follow a three-point outlook. The first constitutes of core structural adjustments to minimize dependency on oil as a sole energy source, and optimize industrial structure to ameliorate the efficiency of energy utilization within industries. The second step involves concrete legislations for improving environmental policies, establishing a comprehensive legal system, monitoring and controlling waste management, and systematizing the approach to addressing violations. The third is to improve societal participation through education and public awareness campaigns.[60] This three-pronged

[59] Gao Ling, "An Analysis of Japan's Circular Economy and Its Effects on Japan's Economic Development" 13 *IBM* 1 (2016).

[60] Favorable Alignment of Enablers, available at: http://reports.weforum.org/toward-the-circular-economy-accelerating-the-scale-up-across-global-supply-chains/favourable-alignment-of-enablers/#view/fn-46 (Last visited on March 28, 2017).

approach has started yielding results. Japan's recycling rate for metal is 98%. In 2007, only 5% of Japan's waste went into landfill. The majority of electronic appliances/electrical products are recycled; and upto 89% of the materials they contain are recovered. As a rule, recovered materials are used to manufacture the same type of products- a closed-loop system in action, in a genuinely recycling-based economy.[61]

This policy runs overlapping with the 3Rs model of sustainable development. The 3 'Rs' represent; "Reduce", "Reuse" and "Recycle". It is closely bound to the Japanese feeling known as *"mottainai"*[62], which means not letting things that have value go waste. The policy can be explained simply as:[63]

- "*Reduce*" the amount of waste generated by using resources more efficiently and wisely by extending the useful life of products.
- "*Reuse*" is to use the same items again. As products or parts, as long as they are usable, after proper treatment if necessary.
- "*Recycle*" refers to material recycling; "recyclable resources" should be used as raw materials to make new products.

II. Developing countries face their set of hurdles and policy makers often oscillate between their promise of economic development and obligation of environmental protection. India is emerging as one of the fastest growing economic markets, sailing on the ship of industrialization and globalization. The liberalization process of the 1990s opened Indian markets for bigger private players and it was observed that the exports and Foreign Direct Investment grew in the more polluting sectors in the post-liberalization period. As a result, ecological and social groups started the demand for effective, powerful, technically equipped Green Courts for achieving justice and fairness. The Supreme Court has affirmed, through several decades of judicial commitment to environment, the relevance and need of a system of 'multi-faceted' environmental courts with judicial and technical/scientific inputs. Consequently, National Green Tribunal of India (NGT) was established in 2010 facilitated by several factors: political will, notably the 'green-turn' in the policy of Government of India, necessity to remedy past failures of other institutions designed for the enforcement of environmental legislation (like the National Environmental Tribunal, 1995 and the National Environmental Appellate Authority Act, 1997),

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61 *Ibid.*

62 'What a waste!' Or 'Don't waste'.

63 Christine Yolin, Waste Management and Recycling in Japan Opportunities for European Companies (SMEs focus), available at: http://cdnsite.eu-japan.eu/sites/default/files/publications/docs/waste_management_recycling_japan.pdf (Last visited on March 30, 2017).

international movement towards a more ecocentric approach and ever growing need to aid the access to environmental justice. Without underscoring the weight of political will and democratic process it can be said that establishment of NGT in India is a 'judge-driven reform'. This peculiar aspect is important because it highlights that the new green courts were designed according to the needs indicated by the judiciary and not on abstract models.

The National Green Tribunal is a federal judicial body whose specific mission is 'the effective and expeditious disposal of cases relating to environmental protection and conservation of forest and other natural resources.[64] The key features of the 'green court' are: vast range of jurisdiction (original and appellate), its composition (synergizing judicial members and technical experts) and its locus standi (open access to the individuals and public at large). The National Green Tribunal (NGT) covered new ground for the 'polluter pays' principle by invoking it in two landmark judgments in 2016. First, it ordered Alaknanda Hydro Power Co. Ltd., a hydroelectric power company, to pay INR 9 crore as compensation to people affected by Uttarakhand floods in 2013 because the dam constructed by the company contributed to the flooding experienced by residents of the region. Second, it fined Delta Marine Shipping Co., a marine shipping company, INR 100 crore for the oil spill and ensuing ecological damage caused when one of the company's ships sank off the coast of Mumbai in 2010. The judgments in both cases are important instances of the NGT exercising its power to fix liability and hold private companies responsible for the environmental damage they cause.[65]

Upendra Baxi, emeritus professor of law at the University of Warwick, wrote in an email, "These decisions are truly inaugural. They subject economic enterprises to a code of environmental jurisprudence." The environmental courts with their several advantages like speedy judgments, efficiency, trained and specialized judges and non-judicial experts from the field, are more eco-sensitive and ecocentric in their conduct resulting in environmental justice.

III. In a step to move beyond utilitarianism and towards ecocentrism realizing the inherent right of all ecosystems to exist at levels of ontology and altruism, on March 20, 2017, the High Court of Uttarakhand ruled that "the Rivers Ganga and Yamuna, all their tributaries, streams, every natural water flowing with

[64] Eeshan Chaturvedi, 'Green Courts: The Way Forward?' *CPR* (2017), available at: http://www.cornellpolicyreview.com/green-courts-the-way-forward/ (Last visited on April 01, 2017).

[65] Nehmat Kaur, "Private Firms, Not God or Government, Responsible" *The Wire* (Aug. 30, 2016), available at: https://thewire.in/61508/ngt-gvk-delta-polluter/ (Last visited on April 01, 2017).

flow continuously or intermittently of these rivers, are declared as juristic/legal persons/ living entities having status of a legal person with all corresponding rights, duties and liabilities of a living person in order to preserve and conserve river Ganga and Yamuna."[66] The court cited the case of the Whanganui River in New Zealand, which had been declared a living entity with full legal rights by the country's parliament on March 15. Although it is too early to comment upon how effective the decision would be to protect these rivers, yet these decisions give an opportunity to us to revisit our relationship with our commons. Rivers include the forests and the mountains that charge them with water and the seas that receive them. In the Anthropocene epoch, where *homo sapiens* are impacting the planet as never before, the worldviews of our indigenous communities ought to push us to look beyond the dominant exploitative relationship that we have with each other and with nature.[67]

IV. A policy can be best understood by looking at it from the perspective of those who get affected by it and who got the potential of affecting it: community as a whole. The Vedantangal village community is a classic example of group-level efforts towards establishing ecocentrism. Situated in the Kanchipuram district of Tamil Nadu the Vedantangal Bird Sanctuary is the oldest bird sanctuary in India. For over 200 years, the villagers around the district have zealously protected the winged visitors to this sanctuary. This is one of the most striking example of human-environment synergies one could find today. The villagers know that large numbers of birds translate into droppings, resulting in plenty of guano- one of the finest natural fertilizers. The birds in the process also devour many of the harmful insects, pests and rodents. Consequently, the fertility of the land, as well as the crop yield per hectare in and around the Kanchipuram area is high and free of artificial fertilizers and insecticides. This is symbolic of true ecocentric synthesis between land, human and the birds, each understanding the needs of the other. The 3,000 odd villagers, who live here, avoid any kind of noisy activity near the sanctuary, particularly during the breeding months. They even resort to silent marriages and extremely muted celebrations around these months.[68]

V. The culmination of this discussion on policy making can be best done by appreciating the individual understanding of an ecocentric approach. Among India's tiger-obsessed conservationists, Mohammad Dilawar is an oddity. The former lecturer in environmental studies once turned down an offer to work

[66] *Mohd. Salim* v. *State of Uttarakhand* 2017 SCC Online Utt 367.

[67] Radha Gopalan, "Why the Court Ruling to Humanise the Ganga and Yamuna Rivers Rings Hollow", *The Wire* (March 27, 2017).

[68] Narasimhan P.L.L, *ibid.*

with tigers, dedicating himself instead to saving the sparrow. Using his own money, from home in Nasik, Dilawar runs a project to preserve what he believes is one of India's most threatened birds.[69] He believes that the fate of the diminutive bird is a potent of larger problems. "The sparrow is to urban ecosystems what the canary was to mines," he explains.[70] He started conservation process on his own more than 10 years ago by conducting awareness drives and encouraging people to set up bird houses. After a decade, he set up Nature Forever Society (NFS), an NGO that has been doing commendable work. In a bid to attract national and international attention to the cause, NFS lobbied for March 20 to be declared as World Sparrow Day. After 2010, when India observed her first World Sparrow Day, the idea has caught on in almost 50 countries! This remarkable feat is evidence of how an individual effort can become a people's movement globally.

V

Conclusion

A careful perusal of majority of Indian legislations and judicial decisions results into an irresistible conclusion; the environmental policy discourse in Indian green jurisprudence is dominated by "right to environment" and not by "right of environment". Today both the internationally and nationally the public discourse is steered by a more ecocentric approach because human beings have started to realize that even the non-human actors of the environment possess the same right to life with dignity which they cherish. The policy decisions are generally choices which a human being would make in an ecological moral dilemma. Individual differences and situational variations play a major role in producing anthropocentric, ecocentric or non-environmental moral reasoning.[71] An important situational variation is information about the impact of the act. Social psychologist S.H. Schwartz in his norm-activation theory (NAM) states that an awareness of the consequences of environmental damage will compel a person who believes his or her actions can ameliorate those consequences "to feel a sense of moral obligation to the act". Thus it is very essential that on one hand government should remain absolutely transparent about its impact assessment documentation and on the other hand with the help of Right to Information the public is able to intervene. Environmental awareness should be taught at school

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[69] A Compilation of Stand-out Eco practices from the world over, available at: http://www.wipro.com/documents/investors/pdf-files/eco-practices-stories.pdf (Last visited on April 02, 2017).

[70] *Ibid.*

[71] Katherine V. Kortenkamp and Collen F. Moore, "Ecocentrism and Anthropocentrism: Moral Reasoning about Ecological Commons Dilemmas" 21 *JEVP* (2001).

level to generate individual pro-environment attitudes in the students. Indian environmental jurisprudence in its present form is directly because of judicial activism of our Supreme Court and indirectly because of the role played by external players like NGOs, public spirited persons and other institutions who take the matter to the Supreme Court. In turn it is the duty of the government to take proactive measures to execute the court's decisions and implement its guidelines. This progression can never be lopsided and it is essential that policy making process takes place in harmony and with cooperation. Factors like knowledge and innovation; social, economic and political circumstances; legal framework; specific events; institutional and external influences have to be kept in mind while making a policy decision. Thus an Eco-centric behavior can be achieved at individual, community, national and international standards by keeping mind a Six-C framework of control. 1) Consciousness of public 2) Conceptual attitude towards environment, 3) Characteristic gains at individual level, 4) Corporeal availability of green facilities, 5) Cost of choosing green and 6) Concrete policy framing.

JUDICIAL REVIEW VIS-A-VIS ADMINISTRATIVE ACTION: EXPLORING THE HORIZON IN INDIAN CONTEXT

*Gautam Arya**

Abstract

Power corrupts and absolute power corrupts absolutely. – Lord. Acton

Complete freedom of action may often lead to arbitrary exercise of power, in turn, threatening individual liberty. Therefore, it becomes imperative to control such 'discretionary powers' through certain measures. Judicial review is one such measure, which has turned out to be rather effective in regulating the administrative discretion. It is a Constitutional principle, helping in balancing the separation of powers in a country largely governed by the administrative machinery. This paper aims at understanding the role-play and interactions of judiciary in administrative decision making. The paper begins with the mention of development of the principle of judicial review in India, followed by its inclusion in the 'Doctrine of Basic Structure'. The paper goes on to discuss the ways in which judiciary maintains 'separation of powers' between these two pillars of the State. As much as judicial review is essential, it needs careful regulations as well. The author concludes by asserting that though there are numerous instances where in the judicial review has saved the day, the nation needs to maintain a distance from judicial activism turning into judicial overreach.

I

Introduction

A nation cannot march along the true democratic way of life without a true and continuous realization of the importance of rule of law and of judicial review of legislative and executive action[1]. It is for this reason that our Constitution, in its Preamble, contains terms such as justice, liberty, equality and fraternity, which are the ideals upon which our notion of sovereign, democratic and republican pillars rests. To attain these ideals, provisions embodied in the Constitution expressly provide for the power of judicial review in the courts of the land. Such a power was recognized in the United States only after a long struggle.

Owing to the fact that it is the administrative machinery, which runs the wheel of the country like ours in true sense, it is widely taken or assumed to be understood that there is an expansive ambit of administrative discretion in the

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1 Law Commission of India, 14th Report on Reform of Judicial Administration (September, 1958).

hands of administrative bodies. As is well known that 'absolute power corrupts absolutely', it is obvious that there are chances of administrative authorities misusing their powers. Complete freedom of action conferred on these authorities may often lead to arbitrary exercise of powers, in turn, threatening individual liberty. In this light, it becomes necessary that these widely conferred discretionary powers, be controlled in a certain and proper manner so that it puts in place a "government of laws and not that of men".[2] There are certain ways to do so, namely, application of the procedural safeguard of natural justice; application of doctrine of excessive delegated legislation in relation to delegated legislations, other substantive grounds based on which the courts control the actual exercise of the discretionary powers through the constitutional remedies, mainly writs.

Judicial review does two things, it affirms as well as negates. To put it aptly, it is both a power releasing and a power breaking function[3]. Today, the main question is not whether there should be judicial review in the constitution of a country, but to what extent and how it should remain and what purposes should it fulfill. The success or failure of a scheme of judicial review depends very much on how and to what extent it is attuned to the lofty ideal of constitutionalism as well as to the spirit and temper of a dynamic society.[4]

There are two values that are in conflict. First, legislations confer power on administrative authority, and do not give any power to the courts to hear appeals against the decisions of these authorities. It shows that reliance has been placed on the judgment of the authority instead of the courts. Second, nevertheless, it is assumed that authorities must act within the confines of law and power, and since legislatures cannot have intended that the executive itself be the final judge of the extent of its powers, the courts are inevitably bound to come into picture in order to keep these authorities within the confines of law. Hence, the pattern of judicial review shows the reconciliation of these values in India. It is the interaction of these two values, which determines the scope of judicial review of discretionary powers of the administrative authority in India.

II

Constitutional Mandate

The power of judicial review of the administrative actions by the Supreme Court has been provided for in Articles 32 and 136 and the power of judicial

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2 M.P. Jain & S.N. Jain, *Principles of Administrative Law* 650 (2013).

3 B.N. Cardozo, *The Nature of the Judicial Process* 94 (1921).

4 "The Crisis of Judicial Review in India" 29 *IJPS* 29-31 (1968).

review of the administrative actions by the high courts have been dealt with under Articles 226 and 227 of the Constitution of India. Thus, under the Constitution, legislative and administrative actions can be reviewed by courts under Ar-ticles 32, 136, 226 and 227. Such review is called public law review.

Article 32 in itself is a guaranteed remedial right as any citizen whose fundamental right has been infringed, can directly approach the Supreme Court, if s/he chooses to do so, without having to go to the high court in first instance.[5] All actions of the administration- judicial, quasi-judicial or semi judicial, ministerial or even purely discretionary fall within the realm and control of the Supreme Court. But this power is restricted only to the cases of infringement of fundamental rights. However, power conferred under Article 136 is plenary in nature and enables the Supreme Court to entertain appeals from the determination or an order made or passed in any cause or matter by any tribunal in the territory of India, barring the tribunal constituted under the law relating to the armed forces[6]. Regarding the powers conferred under Article 136, Mahajan J., the then CJI, in *Dhakeshwari Mills*[7] case suggested that it is neither possible to define precisely any limitation on the exercise of discretionary jurisdiction vested in the Supreme Court by virtue of Article 136, nor is it feasible to fetter the exercise of this power by any set formula or rule.

Article 226 can be, and is, used more often, for reviewing the action of administration. One can say that there is an increase of litigation in this respect. The real constitutional protection available against arbitrary administrative action is under Article 226 which empowers the high courts to issue any directions, orders or writs in the nature of *habeas corpus, mandamus, prohibition, quo warranto, and certiorari* not only for the enforcement of fundamental rights but for "any other purpose".[8] Article 227 gives the high court only the power of superintendence and does not empower it in a manner similar to Article 136. It is important to mention that prior to the commencement of the Constitution, the jurisdiction to issue prerogative writs existed only with the three high courts of Calcutta, Madras and Bombay in the exercise of their original jurisdiction, which they inherited from the Charter establishing the Supreme Courts in three presidency towns[9].

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5 Available at: http://lawcommissionofindia.nic.in/1-50/Report14Vol2.pdf (Last visited on April 10, 2017).

6 *Ibid.*

7 *Dhakeshwari Cotton Mills Ltd.* v. *Commissioner of Income Tax, West Bengal,* AIR 1955 SC 65.

8 *Supra* note 1.

9 Available at: http://lawcommissionofindia.nic.in/1-50/Report14Vol2.pdf (Last visited on April 10, 2017).

(i) Meaning

The power of judiciary to review and determine the validity of a law or an order may be described as the powers of judicial review. It means that the Constitution is the supreme law of the land and any law inconsistent therewith is void through judicial review. It is the power exerted by the courts of a country to examine the actions of the legislatures, executive and administrative arms of government and to ensure that such actions conform to the provisions of the nation's Constitution. Judicial review has two important functions; they are legitimizing government action and the protection of constitution against any undue encroachment by the gov-ernment.[10]

(ii) Origin & Development

Judicial Review under the Constitution of India stands in a class by itself. The system of judicial review of administrative action has been taken from Britain. The whole law of judicial review of administrative action has been developed by judges on a case-to-case basis. Consequently, one of its facets is the inconsistency and technicality that surrounds it.[11] Present trend of judicial decisions seems, on one hand, to widen the scope of judicial review of administrative actions and on the other, to restrict the doctrine of immunity from judicial review to class of cases relating with the deployment of troops and entering into international treaties, etc.[12]

Members of the Constituent Assembly were agreed upon one fundamental point, that judicial review under the Constitution of India was to have a more direct basis than in the Constitution of the U.S.A. where the doctrine was more an 'inferred' than a 'conferred' power, and more 'implicit' than 'expressed' through constitutional provision.[13] Foundation of the Indian Supreme Court's power of review was laid truly and well in the case of *A.K. Gopalan* v. *State of Madras*.[14] This case not only elucidated the principle of judicial review and the basis on which it would rest in future, but at the same time, evolved a set of guidelines which would eventually set the pattern for fundamentals of judicial approach to the Indian Constitution. From '*Gopalan*[15]' (1950) to '*Golaknath*[16]'

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[10] Mohita Negi, "Judicial Review in India: Concept, Provisions, Amendments and Other Details", available at: http://www.yourarticlelibrary.com/essay/judicial-review-in-india-concept-provisions-amendments-and-other-details/24911/, (Last visited on November 29, 2016).

[11] I. P. Massey, *Administrative Law* 283, 7th edn. (2008).

[12] *Available at:* http://indiankanoon.org/doc/777136/ (Last visited on November 29, 2016).

[13] "The Crisis of Judicial Review in India" 29 *IJPS* 31 (1968).

[14] AIR 1950 SC 27.

[15] *Ibid.*

[16] I.C. Golaknath & *Ors.* v. State of Punjab & Anr, AIR 1967 SC 1643.

(1967) is indeed a long march, not only in respect of nature and scope of judicial review itself, but in regard to the impact and consequences of such review on the attainment of social objectives, too.[17] These two cases constitute, so to say, an interesting study in contrast; both are landmarks in the history of constitutional jurisprudence in this country. In a way, they may be said to represent two distinct lines of judicial thinking, two distinct tendencies, and two separate sets of social philosophy. One represents a halting, over-cautious and tradition-bound attitude of the judiciary in restricting its own freedom of action by sticking to the express phraseology of the Constitution; scrupulously avoiding the notions of 'natural justice' and 'due process'; and construing the law in favour of the legislature. While the other represents a big, bold, and almost revolutionary effort to resurrect judicial review by expanding its horizon beyond a literal interpretation of the Constitution, introducing novel concepts like 'prospective overruling' and convening a Constituent Assembly to amend fundamental rights, and by prohibiting any legislative amendment of fundamental rights in future.

III

Judicial Review as the Basic Structure

Judicial review is not only an integral part of the Constitution but also a 'basic structure' of the Constitution and hence, cannot be abolished or whittled down even by an amendment of the constitution.[18] In the case of *Indira Nehru Gandhi v. Raj Narain,*[19] sub-clause (4) and (5) of Article 329A, that tried to keep the election matters outside the purview of the courts, were struck down by the court as they were found to be violative of the 'basic structure' of the Constitution. It was asserted that even after a statue is included in the Schedule IX, its provision would be open to challenge on the ground that they took away or abrogated all or any of the fundamental rights and therefore damaged or destroyed the 'basic structure'. The view that the legislation included in the Schedule is subject to the test of basic structure, expressed by Justice Mathew in *Indira Gandhi*[20] case, found the support of a unanimous court in *Waman Rao v. Union of India*[21], wherein the court identified Article 32 as part of the 'basic structure'. In *Minerva Mills* Case[22], by the majority of 4:1, the Supreme Court struck down clauses (4) and (5) of Article 368 which provided for exclusion

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17 "The Crisis of Judicial Review in India" 29 *IJPS* 33-34 (1968).

18 *Keshavanand Bharti* v. *State of Kerela* (1973) 4 SCC 225.

19 Appeal (Civil) 887 of 1975, Available at: indiankanoon.org/doc/936707/ (Last visited on 29 November, 2016).

20 *Indira Nehru Gandhi v. Shri Raj Narain & Anr, AIR 1975 SC 2299.*

21 (1981) 2 SCC 362.

22 *Minerva Mills Ltd. v. Union of India,* AIR 1980 SC 1789.

of judicial review and unlimited amendment power to the Parliament respectively and judicial review was held to be a basic feature of the constitution. Similar views were reiterated in *L. Chandra Kumar v. Union of India & Ors*[23]. In *S.R. Bommai & Ors. v. Union of India & Ors*[24], it was again reiterated that the judicial review is a basic feature of the Constitution and that the power of judicial review is a constituent power that cannot be abrogated by judicial process of interpretation.

Citing all the aforementioned cases and recognizing the judicial mandate on doctrine of 'basic structure' and the power of judicial review, Hon'ble Supreme Court in *I.R. Coelho* v. *State of Tamil Nadu*[25], concluded that no laws placed in the Ninth Schedule after 24th April 1973 (the date of the decision in *Kesavananda Bharati* case), would enjoy blanket immunity. That the court will examine the nature and extent of infraction of a fundamental right by a statute, sought to be constitutionally protected, and on the touchstone of the 'basic structure' doctrine as reflected in Article 21 read with Article 14 and Article 19 by application of the rights test and the essence of the right test.[26]

(i) Grounds of Judicial Review of Administrative Action

Generally, judicial review of administrative action can be exercised on four grounds[27].

(1) Illegality, i.e., lack of jurisdiction, excess of jurisdiction, abuse of jurisdiction, and failure to exercise jurisdiction.

(2) Irrationality, i.e., also known as *Wednesbury test*, a decision based on no evidence, without authority of law, based on irrelevant and extraneous consideration or so unreasonable as to be described as done in bad faith.

(3) Procedural Impropriety, i.e., if procedure is not fair, decision cannot be trustworthy. Where statue provides for procedure, it must be complied with; where statute is silent, two principles of natural justice have to be complied with. These are: (1) Rule against Bias- No one should be made judge in his own case, and (2) Rule of fair hearing –No one should be condemned unheard.

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[23] (1997) 3 SCC 261.
[24] (1994) 3 SCC 1.
[25] AIR 2007 SC 861.
[26] Available at: http://lawlex.org/lex-bulletin/case-analysis-i-r-coelho-v-state-of-tamil-nadu-air-2007-sc-861/10158 (Last visited on November 29, 2016).
[27] *Supra* note 11 at 393.

(4) Proportionality, i.e., administrative action should not be more drastic than it should be so as to obtain the desired result.

These grounds of judicial review were developed by Lord Diplock in *Council of Civil Services Union* v. *Minister of Civil Services*[28]. It is important to note that though these are not exhaustive, yet these provide sufficient base for courts to review the administrative action.

(ii) Modes of Judicial Review of Administrative Actions

(1) Public Law Review: The power of public law review is exercised by the Supreme Court and high courts through writs of *certiorari*, *prohibition*, *mandamus*, *quo warranto* and *habeas corpus* and also through Articles 136 and 227 of the Constitution. The object of public law review is two-fold. It does enforcement of private rights as well as keeps the administrative as well as quasi administrative authority within proper control.

(2) Private Law Review/Non Constitutional Review[29]: Private law review refers to the powers of the ordinary courts of the land to control administrative action. It is exercised through injunction, declaratory action and suit for damages. This non-constitutional mode of judicial review of administrative action can be done by the civil and criminal courts, tribunals, special courts, e.g., one constituted under the Scheduled Castes, Scheduled Tribes (Prevention of Atrocities) Act, consumer fora and environmental authorities, etc.

(3) Non-Binding (Advisory) Review[30]: This kind of review of administrative action is done by Human Rights Commissions, Lokayukta (Ombudsman), and various other statutory commissions like Women Commissions, Child Commissions, Minority Commissions, Scheduled Castes and Tribes Commissions, etc.

IV

Extent of Judicial Review

The apex court has clearly stated that the administrative action is subject to control of judicial review on the grounds of illegality, irrationality and procedural impropriety.[31] The courts have held that the scope of judicial review is limited to the legality of decision-making power and the legality of order per se.[32]

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[28] (1984) 3 All ER 935 (HL).
[29] *Supra* note 12 at 423.
[30] *Id.* at 433
[31] *Indian Railway Construction Co. Ltd.* v. *Ajay Kumar* (2003) 4 SCC 579.
[32] *State of NCT of Delhi* v. *Sanjeev* (2005) 5 SCC 181.

In *Rameshwar Prasad* v. *Union of India*[33], while defining the parameters of the scope of judicial review, the Supreme Court said that it is limited to the deficiency of decision-making process and not the decision. Recently speaking on the scope of judicial review, the apex court in the *Centre for P.I. L & Others* v. *Union of India & Others*[34] has clearly stated that, "There cannot be any quarrel with the proposition that the court cannot substitute its opinion for the one formed by the experts in the particular field and due respect should be given to the wisdom of those who are entrusted with the task of framing the policies. We are also conscious of the fact that the Court should not interfere with the fiscal policies of the State. However, when it is clearly demonstrated that the policy framed by the State or its agency/instrumentality and/or its implementation is contrary to public interest or is violative of the constitutional principles, it is the duty of the Court to exercise its jurisdiction in larger public interest and reject the stock plea of the State that the scope of judicial review should not be exceeded beyond the recognised parameters."[35]

At this juncture, it would be apt to mention that the scope of judicial review of administrative action has been varied. It has not been consistent and the court's stance has kept changing from case to case. Some decisions have shown the limited extent of judicial review whereas some have come out with expanding the horizon of review power of the court. Therefore, it entails an analysis of plethora of case laws, which would make the scope of judicial review quite clear and also demarcate as to what has been the extent of judicial review of administrative action so far.

(i) Limited Powers of Judicial Review

What courts can't do? Perhaps, this should be the premise to understand the court's limited role in making review of an administrative action. The basic principle says that the court would not go into the merits of exercise of discretion[36] by an authority, as it is not a forum to hear appeals from the decisions of the authority. The court should not be concerned with the question whether the option formed by the concerned administrative authority is right or wrong.[37]

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[33] (2006) 2 SCC 1.

[34] Available at: http://supremecourtofindia.nic.in/outtoday/39041.pdf (Last visited on November 29, 2016).

[35] Available at: http://supremecourtofindia.nic.in/outtoday/39041.pdf (Last visited on November 29, 2016).

[36] M.P. Jain & S.N. Jain, *Principles of Administrative* 651 (2013).

[37] *Partap Singh* v. *State of Punjab* AIR 1964 SC 72.

(ii) Preventive Detention Laws

The Supreme Court in *A.K. Gopalan* v. *State of Madras*[38] took the view that whether a person has to be detained or not was purely a subjective decision of the detaining authority and no court would sit in place of detaining authority to decide it objectively. Here, section 2 of the Preventive Detention Act, 1950 had authorised the executive authority to make an order of detention if it was deemed necessary under the concerned section. A year after this decision, the court reiterated the same view in *Bhimsen* v. *State of Punjab*[39] and held that an order of detention which was otherwise in accordance with the laws would not be quashed on the basis that the grounds of order were insufficient.

(iii) Land acquisition Laws

Arora v. *State of Uttar Pradesh*[40] is another example of judicial policy of non-intervention with the exercise of administrative discretion. In this case, Arora's land was acquired by the state government under the Land Acquisition Act, 1894 for a company for construction of its textile-manufacturing factory. Arora challenged the acquisition on the ground that the said land, which he intended to use for public purpose, i.e., for erecting a factory can't be acquired for another public purpose. But the court refused to quash the acquisition and held that so long as the government acquired the land for a public purpose, it was for the government to decide whether or not to acquire that particular piece of land for the purpose in view. In a later judgment of 1996, the Apex Court in *Jainarain* v. *Union of India*[41], held that unless reasons given are wholly irrelevant, court cannot interfere with the satisfaction of the government that the land is likely to be needed for a public purpose.

(iv) Admission Issues

Whether the high court has power to direct the legislature to enact a law of a specified matter, while dealing with the impugned executive action?

In *Asif Hameed* v. *State of J. & K.*[42], the court had, before it, an issue that whether the high court has the power to issue directions to the state government to constitute a 'statutory body' for making admissions.[43] The courts, construed entry 25 of list III of seventh schedule (education, including technical, medical

[38] AIR 1950 SC 27.
[39] AIR 1951 SC 481.
[40] AIR 1964 SC 1230.
[41] (1996) 1 SCC 9.
[42] AIR 1989 SC 1899.
[43] Case material, Administrative Law, LL.B. IV Term, Page 17, Faculty of Law, University of Delhi (2011).

and universities) and Article 246 (subject matter of laws made by the parliament and by the legislature of states) along with section 5 of Constitution of Jammu & Kashmir (extent of executive and legislative power of the state). It concluded that the high court's direction for constituting a "statutory independent body" obviously means that the state legislature must enact a law in this respect. The legislature is supreme in its sphere under the mandate of the Constitution and it is solely for the legislature to consider as to when and in respect of what subject matter, the laws are to be enacted. No directions in this regard can be issued to the legislature by the court.[44]

Kuldip Singh, J. on judicial review: Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of power is the self-imposed discipline of judicial restraint.[45]

V

Limits on Jurisdiction of High Court while issuing a writ of Certiorari

Certiorari is a Latin equivalent for the term "to inform". It is a judicial order operating *in personam*, made in the original legal proceedings, directed by the Supreme Court or high court to any constitutional bodies (legislature, executive, judiciary or their officers), statutory bodies (corporations, other bodies created under a statute), non-statutory bodies (corporations and cooperatives societies) or person, requiring the records of any action to be certified by the court and dealt with according to law.[46]

Earlier, it was issued against judicial or quasi-judicial action only. But now it can be issued against the administrative action as well. In *A.K. Kraipak* v. *Union of India*[47], writ of *certiorari* was issued to quash the action of a selection board.

When the writ is issued – Grounds

(1) Lack of Jurisdiction;
(2) Excess of Jurisdiction;
(3) Abuse of jurisdiction;
(4) Violation of principles of natural justice (rule against bias and *audi*

[44] *Id.* at 19.
[45] *Id.* at 17.
[46] *Supra* note 11 at 404.
[47] (1969) 2 SCC 262.

alteram partem, i.e., right to fair hearing); and

(5) Error of law apparent on the face of the record.

***(i) Syed Yakoob* v. *K.S. Radhakrishnan*[48]**

The term 'error apparent on the face of record' cannot be defined with exactitude. Whether or not an error is an error of law and an error which is apparent on the face of the record must always depend on the facts and circumstances of each case and upon the nature and scope of the legal provision which is alleged to have been misconstrued or contravened.[49]

While deciding on the limits within which high court can exercise its power to issue a writ of *certiorari* under Article 226, the Apex Court held that the jurisdiction to issue a writ is a supervisory jurisdiction and the court exercising it is not entitled to act as an appellate court. This implies that finding of facts reached by the inferior court or tribunal as a result of appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may be. If tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence in recording the said finding and which influenced the impugned finding, writ of *certiorari* can be issued. However, it must be kept in mind that the finding of the fact recorded by tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the tribunal was insufficient or inadequate to sustain the impugned finding.[50]

No power to judiciary to issue writs- When nothing on record to show that decision of the government was arbitrary or capricious or not reached in good faith or influenced by extraneous considerations.

(ii) *B. J. R. Raghupathy, Etc.* v. *State of A. P. & Ors.*[51]

Issue: whether the location of revenue mandal headquarters the state of Andhra Pradesh under s 3(5) of the Andhra Pradesh District (Formation) Act, 1974, was a purely governmental function, not amenable to the writ jurisdiction of the high court?

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[48] (1964) 5 SCR 64.

[49] *Id.* at 407, 408.

[50] Case material, Administrative Law, LL.B. IV Term, Page 253, Faculty of Law, University of Delhi (2011).

[51] AIR 1988 SC 1681.

In this case, the state government had statutory power to decide location of mandal headquarters. The government asked collectors to send proposals for this purpose for consideration of the government. The government issued certain guidelines to keep in view while making proposals.[52] The court held that it was difficult to sustain the interference by the high court in some of cases with the location of the mandal headquarters and the quashing of the impugned notification on the ground that the government had acted in breach of the guidelines. The location of headquarters by the government by the issue of the final notification under sub-s (5) of s.3 of the Act was on a consideration by the cabinet sub-committee of the proposals submitted by the collectors concerned and the objections and suggestions received from the local authorities like gram panchayats and the general public, keeping in view the relevant factors. Even assuming that any breach of the guidelines for the location of the mandal headquarters was justiciable, the utmost that the high court could have done was to quash the impugned notification in a particular case and direct the government to reconsider the question. There was no warrant for the high court to have gone further and direct the shifting of the mandal headquarters at a particular place.[53]

Speaking on the enforceability of guidelines, the court held that the guidelines were not enforceable as they had no statutory force and they had also not been published in the official gazette. They were mere departmental instructions for the collectors and merely in the nature of instructions issued by the state government. These guidelines have only advisory role to play and by their very nature, they do not fall into the category of legislation, direct, subsidiary or ancillary.[54]

Ratio of the case:- The high court would not have issued a writ of mandamus to enforce the guidelines which were nothing more than the administrative instructions not having any statutory force and also which didn't give rise to any legal right(s) in favour of the writ petitioners.

VI
Scope for Judicial Control

(i) Malafide

***G. Sadanandan* v. *State of Kerela*[55]**

In this case, a kerosene dealer was detained under the Defence of India

[52] *Supra* note 11 at 205-206.
[53] Available at : http://indiankanoon.org/doc/728749/ (Last visited on November 29, 2016).
[54] *Supra* note 34 at 206.
[55] (1966) 3 SCR 590.

Rules. He alleged that his detention was unjustified as D.S.P. (Civil Supplies Cell) had made false report against him in order to eliminate him from the business of kerosene and help his own relative to obtain the distributorship of kerosene. The D.S.P. didn't file counter reply to this allegation in his affidavit and also the affidavit filed by the home secretary on behalf of the government was defective in many respects. After considering all the material and relevant facts, the court declared the order of detention to be "clearly and plainly mala fide". However, the court didn't attribute malice on the part of D.S.P., who was the reporting authority to the authority passing the order of detention. However, at the same time, it said that detaining authority should have carefully examined the report before passing the order of detention.

(ii) High Court- Not to Constitute itself as Court of Appeal

Vice Chancellor, Utkal University* v. *S.K. Ghosh & Others[56]

In the present case, the syndicate of a university cancelled the examination in a subject and directed that another exam be held as it was satisfied that there has been leakage of questions. The high court, while examining the facts for itself concluded that even if "the evidence is sufficient to indicate a possibility of some leakage, there was no justification for the syndicate to pass such a drastic resolution in absence of the proof of quantum and the amplitude of leakage." The Supreme Court reversed the decision of the high court and emphasised that the high court could not constitute itself into a court of appeal from the university. It was not for high court to require proof of the quantum and amplitude of leakage.[57]

(iii) Policy Matters: Disinvestment Policy of Union Government

Challenging Disinvestment policy through PIL

Disinvestment involves the conversion of money claims or securities into money or cash. Disinvestment also assumes significance due to the prevalence of an increasingly competitive environment, which makes it difficult for many PSUs to operate profitably. The following main objectives[58] of disinvestment were outlined:

- To reduce the financial burden on the government
- To improve public finances

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[56] 1954 SC AIR 217.

[57] M.P. Jain & S.N. Jain, *Principles of Administrative Law* 653 (2013).

[58] Available at: http://www.bsepsu.com/importance-disinvestment.asp (Last visited on November 29, 2016).

- To introduce, competition and market discipline
- To fund growth
- To encourage wider share of ownership
- To depoliticise non-essential services

***Balco Employees Union (Regd.)* v. *Union of India & Ors*[59]**

Issue: The validity of the decision of the Union of India to disinvest and transfer 51% shares of M/s Bharat Aluminium Company Limited (hereinafter referred to as 'BALCO') is the primary issue in the present case. In this case, employees' union had challenged the disinvestment policy and the implementation thereof through a PIL. The Apex Court held that the decision to disinvest and the implementation thereof is purely an administrative decision relating to economic policy of the state and challenge to the same at the instance of a busybody can't fall within parameters of PIL. In other words, administrative powers cannot be challenged in the PIL unless there is a violation of Article 21 of the Constitution and persons adversely affected are unable to approach the court. This limits the power of the courts.[60] The court emphasised that the PIL is meant to protect the violation of Article 21 (right to life and personal liberty) or human rights. It can be initiated for the benefit of poor and the under-privileged who are unable to come before court and not be used to challenge the financial or economic decisions taken by the government.

VII

Broad Ambit of Judicial Control- via Article 32 & 226

***M. Nagraj and Others* v. *Union of India*[61]**

Under Articles 32 and 226, the courts enjoy a broad discretion in the matters of giving proper relief if warranted by the circumstances of the case before them. In the present case, it was held that Parliament while enacting a law does not provide 'content' to a right. Content of a right is defined by courts and final word on content of a right is that of the Supreme Court.[62]

The key issue: whether by virtue of the impugned constitutional amendments, the power of the Parliament is so enlarged as to obliterate any or all of the constitutional limitations and requirements?

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[59] (2002) 2 SCC 333.
[60] *Supra* note 11 at 449.
[61] (2006) 8 SCC 212.
[62] *Supra* note 57 at 521.

In this case, three constitutional amendments were challenged.

(1) The Constitution (77th Amendment) Act, 1995, which inserted a new clause (4-A) in Article 16 of the Constitution. This provision was inserted to allow reservation in promotion for SCs/STs. It sought to reverse the judgment of *Indra Sawhney and Others* v. *Union of India And Others*[63], popularly known as Mandal judgment, where the 9-judge bench of the Supreme Court decided that Article 16(4) of the Constitution did not provide for reservation in promotion to SCs/STs but only at the time of initial recruitment.

(2) The Constitution (81st Amendment) Act, 2000 which inserted Article (4-B) in Article 16 of the Constitution. This amendment sought to end the 50 percent ceiling on reservation for SCs/STs and BCs in backlog vacancies which could not be filled up in the previous years due to non-availability of eligible candidates from the concerned category.

(3) The Constitution (85th Amendment) Act, 2001 which inserted certain words in Article 16(4A) of the Constitution to provide reservation in promotion with "consequential seniority" retrospectively from 17.6.1995.

Contention:- Petitioner contended that these amendments were violative of the basic structure of the Constitution as these sought to alter the fundamental right to equality and appropriated the judicial power to itself.

VIII

Judicial Review of Constitutional Amendment

Speaking on the standard of judicial review of these amendments, the Supreme Court opined that a constitutional provision must be construed not in a narrow and constricted sense rather in a wide and liberal manner. This would help to anticipate and take account of changing conditions and purposes so that constitutional provisions do not get fossilized but remains flexible enough to meet the newly emerging problems and challenges.

As regards the intervention by the courts in reservation issues, the Apex Court in *M. Nagraj*[64] has clearly stated that whether in a given case reservation is desirable or not, as a policy, it is not for the court to decide as long as the parameters given in Articles 16(4) and 16(4A) are maintained. Equality as given in Article 16(1) is individual-specific whereas reservation provided for under Articles 16(4) and 16(4A) are enabling in nature. However, discretion of state

[63] AIR 1993 SC 477.

[64] *Supra* note 55.

in providing reservation is qualified by certain restrictions, i.e., subject to existence of backwardness and inadequacy of representation in public employment. "Backward" has to be based on objective factors whereas inadequacy has to be supported by factual representation. This is the grey area where judicial review comes in and as long as it is reasonably done, the court may not intervene.[65]

The court held these amendments as constitutionally valid but with certain conditions. This can be evident from the following paras of the judgement.[66] "The impugned constitutional amendments by which Articles 16(4A) and 16(4B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). They retain the controlling factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for reservation keeping in mind the overall efficiency of the State administration under Article 335 of the Constitution of India. These impugned amendments are confined only to SCs and STs. They do not obliterate any of the constitutional requirements, namely, ceiling-limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBC on one hand and SCs and STs on the other hand as held in *Indra Sawhney* [67], and the concept of post-based roster with in-built concept of replacement as held in *R.K. Sabharwal* [68]."

IX

PIL and the Increasing Role of the Apex Court

The traditional rule of *locus standi* that a petition under Article 32 can only be filed by a person whose fundamental right is infringed, has now been considerably relaxed by the Supreme Court in its recent rulings. The court now permits public interest litigation (in short, PIL) or social action litigation (SAL) for the enforcement of Constitutional or other legal rights of any person or group of persons who owing to their poverty, state of destitution, or socially or economically disadvantaged positions are unable to approach the door of Court for appropriate relief.[69] In *Judges Transfer* cases[70], a 7-judges bench of the Supreme Court held that any member of public having "sufficient interest" can approach the court for enforcing the constitutional or legal rights of other persons and seeking redressal of their common grievances.

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[65] Available at: indiankanoon.org/doc/102852/ (Last visited on November 29, 2016).
[66] *Supra* note 55, para. 121.
[67] *Ibid.*
[68] *R.K. Sabharwal and Ors* v. *State of Punjab and Ors* (1995) 2 SCC 745.
[69] J. N. Pandey, *The Constitutional Law of India* 400, 50th edn. (2013).
[70] *S.P. Gupta & Ors.*v. *President of India & Ors,* AIR 1982 SC 149.

PIL entered the judicial process in 1970 as a judicial innovation and this type of litigation was invented and gradually developed by judges in India. It may be pointed out that in hearing of the PIL, the court does not exercise any extra-constitutional jurisdiction as this strategy is firmly rooted in Articles 14 and 21 of the Constitution.[71] Prof. Upendra Baxi prefers to call it social action litigation instead. According to him, we have borrowed the label of public interest litigation from America which is more concerned with participation by the people before regulatory agencies such as consumer forum, environmental regulatory forum, etc. whereas ours deal with government lawlessness[72].

In *Bandhua Mukti Morcha* v. *Union of India*[73], Bandhua Mukti Morcha was allowed standing to seek release of bonded labourers from stone quarries in Faridabad.[74] Similarly, in *Orga Tellis* v. *Bombay Municipal Corporation*[75], popularly known as pavement dwellers case, the case was brought by 11 residents, the Peoples Union for Civil Liberties, Committee for the Protection of Democratic Rights, and two journalists, one of whom was Olga Tellis against the eviction of all pavement dwellers from the city of Bombay. This case opened up a big debate on whether right to life includes right to livelihood. Similarly, in *Upendra Baxi (Dr.)* v. *State of U.P.*[76], two professors from the Faculty of Law, Delhi University, were allowed to initiate proceedings for investigation into the functioning of a Women's Protective Home in Agra, Uttar Pradesh, though neither of these professors, nor any of their relatives/friends were personally affected by the deplorable and sub-human conditions that existed in the protective home. In another landmark judgment involving environmental concerns, in the case of *M. C. Mehta* v. *Union of India*[77], the SC has further widened the scope of PIL under Article 32. Justice Bhagwati, speaking for majority held that the poor in India can seek enforcement of their fundamental rights from the Supreme Court by writing a letter to any judge.[78]

Despite its significance, PIL strategy has been misused a number of times. It has now become the private or publicity litigation as the evidence suggests.

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71 *Supra* note 39 at 438-439.

72 Interview with Prof. Upendra Baxi, Prof. of Law, University of Warwick, Live Mint, e-paper (last modified Dec 27, 2014) Available at: http://www.livemint.com/Politics/5hhv9cYP6x98pK91Twv2lM/Supreme-Court-is-essentially-acting-as-an-institution-of-gov.html (Last visited on 10th April, 2017).

73 (1984) 3 SCC 161.

74 *Supra* note 11 at 321.

75 (1985) 3 SCC 545.

76 (1981) 3 Scale 1137.

77 (1986) 2 SCC 176.

78 J. N. Pandey, *The Constitutional Law of India*, 404-405 (2013).

One of the best examples is *BALCO Employees Association* case[79] and the second notable case in line is that of *Janta Dal* v. *H.S Choudhary*[80], where it has been used for political purpose.

Undoubtedly, PIL as a catalyst has contributed in widening the scope of Article 32. There are several instances where court has given appropriate remedy to various needy persons, e.g., slum dwellers case[81], abolition of bonded labour case[82], release of under-trial prisoners in Bihar case[83] etc. Today, the PIL jurisdiction has grown so much that a view prevails within the judiciary itself that under the garb of PIL, court is usurping the powers of the executive and legislature.[84]

X

Judicial Activism and Overreach

There is no reason why the courts in India should adopt activist approach similar to courts in America and judiciary has been assigned this role under the constitution. Judicial activism and self-restraint are the two facets of courageous creativity and pragmatic wisdom in judiciary. The activist approach of the court can be seen in various judgments, directions and orders ranging from seeking status report on the government's willingness to bring uniform civil code[85], pollution control, preservation of historical monuments like Taj Mahal, cleaning both Ganga and Yamuna, protecting working women from sexual harassment, and many more.[86]

However, at the same time, in doing all this, it is expected that the judiciary shall not transgress its limits. At times, it has been put forth that it has crossed its prescribed limit and below is one such example.

***Divisional Manager, Aravali Golf Club & Another* v. *Chander Hass & Anr*[87]**

Facts of the case: The plaintiffs (respondents in this appeal) were appointed as mali (gardener) in the service of the defendant-appellant, which is a golf club

[79] *Balco Employees Union (Regd.)* v. *Union of India & Ors.*(2002) 2 SCC 333.
[80] (1992) 4 SCC 305.
[81] *Olga Tellis & Ors.* v. *Bombay Municipal Corporation & Ors.*(1985) 3 SCC 545.
[82] *Bandhua Mukti Morcha* v. *Union of India and Ors* (1984) 3 SCC 161.
[83] *Hussainara Khatoon & Ors* v. *Home Secretary, State of Bihar, Patna* (1980) 1 SCC 98.
[84] *Supra* note 39 at 453.
[85] Available at: http://www.ndtv.com/india-news/supreme-court-seeks-status-on-uniform-civil-code-in-country-1231879 (Last visited on 8 April, 2017).
[86] J. N. Pandey, *The Constitutional Law of India* 408, 50th edn. (2013).
[87] Appeal (civil) 5732 of 2007.

run by the Haryana Tourism Corporation on daily wages. Subsequently, they were told to perform the duties of tractor drivers, though there was no post of tractor driver in the employer's establishment. However, for a number of years they continued to be paid wages for the post of mali. Though they continued to work for about a decade as tractor drivers, their services were regularized against the post of mali and not as tractor driver. When despite representations their grievance was not redressed, the respondents herein filed civil suit claiming regularization against the posts of tractor driver. Their claim was rejected by the trial court, which observed that there was no post of tractor driver in the establishment, and the suit was dismissed. The trial court held that plying a tractor is part and parcel of the job of mali in a golf club, since the golf field of the club is vast and needs to be maintained with mechanical gadgets.

Their appeal was accepted and the judgment and decree of the trial court was set aside. The first appellate court observed that the defendants were taking the work of tractor driver from the plaintiffs, and hence it directed the defendants to get the post of tractor driver sanctioned, and to regularize the plaintiffs on that post.[88]

In pursuance of the said order, the respondent no.1 made representation for regularization of his service. The plaintiff- respondent was informed that there was no post of tractor driver and his case for regularization would be considered as and when sanctioned post of the tractor diver will be available.

- ***Court's Observation on the limits of Power of Judiciary:***

While making a reference to the judgment in *India Drugs & Pharmaceuticals Ltd.* v. *The Workmen of Indian Drugs & Pharmaceuticals Ltd.*[89], the court observed that the judges must exercise judicial restraint and must not encroach into the executive or legislative domain.[90] Judges must know their limits and must not try to run the government. They must have modesty and humility, and not behave like emperors. There is a broad separation of powers under the Constitution and each organ of the state 'the legislature, the executive, and the judiciary' must have respect for the others and must not encroach into each other's domains.[91] Here, the court dwelt its premise on certain case laws on deviation from the scheme of separation of powers.

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[88] Available at: http://indiankanoon.org/doc/47602/ (Last visited on September 17, 2016).
[89] (2007) 1 SCC 408.
[90] Case material, Administrative Law, LL.B. IV Term, Faculty of Law, University of Delhi 24 (2011).
[91] *Id.* at 24, para. 20.

- ***Election Issues:***

The court cited the glaring example of deviation from clearly provided constitutional scheme of separation of powers in *Jagdambika Pal* v. *Union of India and Ors*[92], involving the Uttar Pradesh legislative assembly debacle. In the instant case, in 1998, Jagdambika Pal was sworn in as Chief Minister of Uttar Pradesh, which lasted merely for three days in February. Previous state government led by Kalyan Singh was dismissed on February 21, 1998 by the then Governor Romesh Bhandari. Aggrieved by this, Mr. Singh moved the Allahabad High Court which termed the dismissal of his government as unconstitutional on February 23 and reinstated his government. This followed an appeal by Jagdambika Pal against the high court's order to Supreme Court. The court, instead of ruling on the legal issues involved and deciding as to which of the two CMs was the legitimate occupant of CM chair, ordered a composite floor test to be conducted on 26 February in the U.P. Assembly when both Mr. Kalyan Singh and Jagdambika Pal sat as Chief Ministers[93]. This order by the Apex Court, as was widely accepted that it had upset the delicate constitutional balance amongst the three organs of the government, namely, legislature, executive and the judiciary, came to be termed as 'judicial aberrations' by J. S. Verma, the former CJI, which he hoped that Supreme Court would soon correct.[94]

However, regarding the 2005 direction of the Apex Court[95] to conduct floor test in Jharkhand State Assembly cannot be equated on the same pedestal with the UP Assembly case[96]. Here, the court was encountered with the problem of ascertaining as to who enjoyed the majority in the house – the Chief Minister, Shibu Shoren, who was appointed by the Governor or the former Chief Minister, Arjun Munda[97]. It is submitted that here the decision of the Supreme Court cannot be said to be in violation of Article 212 of the Constitution of India, which enjoins that courts shall not inquire into the proceedings of the state legislature on the ground of alleged irregularity of procedure. The rationale that supports putting forth this argument is that although the courts cannot interfere with the working of the house on the ground of irregularity of procedure in the light of Article 212, but they may scrutinise the proceedings of the house on the

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92 *Jagdambika Pal* v. *Union of India and Ors,* AIR 1998 SC 998.

93 Available at: http://www.thehindu.com/opinion/lead/Jugaad-jurisprudence-the-Tamil-Nadu-way/article17314028.ece (Last visited on April 10, 2017).

94 *Supra* note 76 at 27, para. 28.

95 Available at: http://www.thehindu.com/2005/03/10/stories/2005031007940100.htm (Last visited on November 29, 2016).

96 AIR 1998 SC 998.

97 *Jharkhand Party* v. *State Of Jharkhand And Ors.,* 2005 (2) BLJR 1559.

grounds of illegality or unconstitutionality. The court's stance in Jharkhand Assembly case seems to be quite correct as the court did not interfere with the procedure of floor test, but it merely gave a direction to conduct the floor test in the state assembly as the JMM Government was formed without conducting floor test[98] in the house and it was also in minority. A three-judge bench held that the petitioner, Arjun Munda, the former CM, had made out a strong *prima facie* case for grant of interim relief.[99] Nonetheless, a question mark seems to have been raised by some on this judgment as well as it has been termed as both misadventure of taking over function of the house itself as well as nothing but usurpation of authority in breach of the principle of separation of powers.[100]

At this juncture, a reference to the view of former Chief Justice of India, Mr. A.S Anand is of wide import. What he asserted is worth taking note of: With a view to see that judicial activism does not become "judicial adventurism", the courts must act with caution and proper restraint. They must remember that judicial activism is not an unguided missile and failure to bear this in mind would lead to chaos. Public adulation must not sway the judges and personal aggrandizement must be eschewed. It is imperative to preserve the sanctity and credibility of judicial process.[101]

Since there is no sanctioned post of tractor driver against which the respondents could be regularized as tractor driver, the direction of the first appellate court and the learned single judge to create the post of tractor driver and regularizing the services of the respondents against the said newly created posts was, in our opinion, completely beyond their jurisdiction.

The courts cannot direct the creation of posts. Creation and sanction of posts is a prerogative of the executive or legislative authorities and the courts cannot arrogate to itself this purely executive or legislative function, and direct creation of posts in any organization. This court has time and again pointed out that the creation of a post is an executive or legislative function and it involves economic factors. Therefore, the directions given by the high court and first appellate court to create the posts of tractor driver and regularize the services of the respondents against the said posts cannot be sustained and were set aside.

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[98] Available at: http://www.legalservicesindia.com/article/article/indian-judiciary-238-1.html (Last visited on November 29, 2016).

[99] *Supra* note 50.

[100] Vijay Kumar, "*Did the Supreme Court Err in Jharkhand Case?*" 40, Economic & Political Weekly 13 (26 March, 2015), available at: http://www.epw.in/journal/2005/13/commentary/did-supreme-court-err-jharkhand-case.html (Last visited on 10 April, 2017).

[101] Case material, Administrative Law, LL.B. IV Term, Faculty of Law, University of Delhi 28-29 (2011).

XI

Conclusion

What follows the ensuing discussion is the logical corollary that judicial review as a tool seems to have been shying away from the designated role that it was entrusted with, though not *in toto,* but certainly yes to some extent, as has been clearly visible in the discussion at length that preceded by. Terminology such as 'judicial adventurism' bears testimony to this fact[102]. It cannot be out rightly refuted that judicial line has been crossed in many instances. Nonetheless, on several occasions, court was encountered with such a necessity, which warranted it to come out with activist approach that ultimately turned out to be a judicial adventurism. Apt would be to say judicial review, as a tool, is to be used and treaded cautiously and not in haste.

Another instance of growing imbalance of separation of power that has surfaced in the recent past is the face-off between judiciary-legislature when T.S Thakur, the then CJI, in August, 2016 threatened to pass judicial orders if the government did not clear the logjam over judges' appointments.[103] Government saw this episode as an instance of judicial overreach. *Prime facie*, this might seem as the showdown over selection of judges, but the real issue underlying is the growing imbalance in separation of power. However, prior to this, in October, 2015, Supreme Court had struck down the NJAC Act as unconstitutional and void and rejected the 99th constitutional amendment on the ground that it violated the basic structure of the constitution.[104] While doing so, the Apex Court declared that judiciary cannot risk being caught in a "web of indebtedness" towards the government and with this judgment NJAC's fate was put to rest and the court stated that the ''collegium system" that existed before NJAC would continue to be "operative"[105].

Recent judicial development also suggests that judiciary is taking concrete steps to widen the platform for judicial review of administrative action. In a

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[102] *Ibid.*

[103] Satya Prakash, "*Real Issue is Judicial Overreach, Not Judges' Appointment*" Hindustan Times (August 15, 2016), available at: http://www.hindustantimes.com/india-news/real-issue-is-judicial-overreach-not-judges-appointment/story-XmsnGM28KL5nIAeSmPYcKI.html (Last visited on 10th April, 2017).

[104] Upendra Baxi, "*NJAC Vedict: The 3 Decisions Establish One Simple Fact- Judicial Review is a Constitutional Affair",* Indian Express (October 20, 2015), available at: ndianexpress.com/article/opinion/columns/and-the-courts-remain-free/ (Last visited on 10th April, 2017).

[105] Krishnadas Rajagopal, *SC Bench Strikes Down NJAC Act as 'Unconstitutional and Void'.* The Hindu (May 23. 2016), available at: http://www.thehindu.com/news/national/supreme-court-verdict-on-njac-and-collegium-system/article7769266.ecet/ (Last visited on 10th April, 2017).

blow to 'Ordinance Raj', a 7-judge bench of the Supreme Court, while deciding on the constitutionality of seven successive re-promulgations of "The Bihar Non-Government Sanskrit Schools (Taking Over of Management and Control) Ordinance", 1989, widened the boundaries of judicial review to the extent that it can now examine whether the President or the Governor was spurred by an "oblique motive" to bypass the Legislature and promulgate an ordinance[106].

Of late, the triple talaq and uniform civil code issues have take centre stage, especially in the echelons of civil society and corridors of both politics and religion. Law Commission of India is also seeking opinion from different stakeholders in this regard[107]. Taking into account the hue and cry and the enormity of the problem and stakes involved in the issue, it is incumbent upon the government to act swiftly and also rationally. Here comes the role of court in balancing the rights of individual with rights of the society. With a batch of petitions laying in the court's docket on constitutionality of triple talaq and polygamy due to be heard, all eyes are on the Supreme Court only. Perhaps, commoners view it as the only 'saviour' or benefactor in times of distress and when all hopes are in vain and despair looms large, the only last resort is the door of the Supreme Court. This batch of petitions includes a *suo motu* PIL instituted by the Apex Court itself on whether personal law practices like triple talaq (talaq-e-bidat), niqah halala and polygamy violate dignity of Muslim women and promote gender bias[108]. This activist approach is not alien to our judicial activism culture. Only time will tell what outcomes it yields and whether it changes the future course of society. It must be noted that whenever the government is apathetic and fails to bring about required legislations in accordance with the need of society and time; the Supreme Court, has inevitably stepped in as a precursor of change. Nonetheless, it has to tread cautiously and should not knowingly or unknowingly usurp the domain of legislature or executive; it is the master who is to be guided by the self-imposed judicial discipline, integrity and restraint. Needless to say, no other set principle or newly carved machinery can guide and control the ultimate guide which is Supreme Court but its own sense of morality, judicial self restraint and caution.

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[106] Krishnadas Rajagopal, "*SC Widens Boundaries of Judicial Review of Ordinance*", The Hindu (January 3, 2017), available at: http://www.thehindu.com/news/national/SC-widens-boundaries-of-judicial-review-of-ordinance/article16980378.ece (Last visited on 10th April, 2017).

[107] Available at: http://www.lawcommissionofindia.nic.in/ (Last visited on 10th April, 2017).

[108] Legal Correspondent, "*Judicial Opinion on Personal Law Needs Review: Jaitley*" The Hindu (April 15, 2017), available at: http://www.thehindu.com/news/national/judicial-opinion-on-personal-laws-needs-review-jaitley/article18032833.ece (Last visited on 10th April, 2017).

SUSTAINABLE DEVELOPMENT AND RIGHTS OF TRIBALS

*Aarushi Batra**

Abstract

India has the largest concentration of tribal people anywhere in the world except Africa. The tribals are children of nature and their lifestyle is conditioned by the ecosystem. India presents a varied tribal population throughout its length and breadth. On the whole, as per rough estimates, the prominent tribal area constitutes about 15 per cent of the total geographic area of the country. Tribes have been closely associated with their lands but due to large infrastructure projects, they have been displaced from their homes. Our Constitution guarantees plethora of rights to tribals. Despite enactment of The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 India is estimated to have the highest number of people displaced annually as a result of ostensible 'development' projects. Independent experts estimate the number of those displaced by such projects since India's independence (1947), at between 60 and 65 million. Of these displaced, over 40% are tribals. The vast majority of the displaced have not been rehabilitated. There is a need for sustainable integral tribal development with ethno development. The tribals should have the right to freely negotiate with the state the kind of relationship they wish to have. Judiciary in every country has an obligation to protect human rights of citizens and because of statutes and Constitution providing and recognizing tribal rights, the role of judiciary has expanded in recent times. This paper gives an insight into rights of tribal and discuss how sustainable development will ensure protection of these rights. The paper also examines how far Indian judiciary has gone in discharging its duty of balancing economic development, environment protection and safeguarding tribal rights.

I

Introduction

"The environment left to itself, can continue to support life for millions of years. The single most unstable and potentially disruptive element in the scheme is the human species. Human beings, with modern technology, have the capacity to bring about, intentionally or unintentionally, far reaching and irreversible changes in the environment[1]."

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[1] "Environment and sustainable development", available at: http://ncerttextbooks.in/chapter/English/Class+11/63/Economics+ +Indian+Economic+Development/819/09+Environment +and+Sustainable+Development.html (Last visited on August 30, 2016).

In the course of human history, the nature of plans and policies followed by various stakeholders to meet economic needs show an evolutionary trend from growth to development and now to sustainable development. Each being an improvement over the previous, and addressing concerns overlooked by the former. While growth is quantitative and value neutral, development is a qualitative change which is always value positive. Therefore, development encompassed social parameters which the economic oriented growth overlooked. Likewise, sustainable development incorporates the environmental concerns, which have so far been overlooked to further the development projects. It aims at promoting a development that minimizes environmental problems and meets the needs of the present generation without compromising the ability of future generation to meet their own needs. Various international conventions have given due acknowledgement to this novel concept and have also brought out the need to align our policies with the environmental aspect.

Development activities may have a positive as well as negative aspect. Even though they help in building up an economy, sometimes they play havoc by weeding out thousands of families, particularly, tribals who share a very close relationship with the forests. Development displacement has a direct link with tribal population. Displacement causes disruption of production systems and kinship groups, loss of assets and jobs, disturbance of local labour markets and ties between producers and consumers, dismantling of social and food security, credit and labour exchange networks and deterioration of public health among displaced communities.

Rights of the indigenous population form an integral part of human rights issues. Various national and international laws aim to safeguard these rights. At the national level, The Constitution of India, along with Forest Rights Act, Panchayats (Extension to Scheduled Areas) Act, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act are a battery of laws to empower them and give to them, what is rightfully theirs. At the international level, we have United Nations Declaration on the Rights of Indigenous People, ILO Convention 169 and Universal Declaration of Human Rights, to name a few.

Indian Judiciary has played a commendable role in furthering the principle of sustainable development through its judgments, sometimes by imposing obligations for strict adherence to the principle. However, the road in front of the judiciary has not been a smooth one as it has often been made to choose between rights of the people vis-à-vis development.

The article deals with how development, even though necessary has led to exploitation of tribals by displacing them from their origins. It focuses on the

problems faced by tribals and how can sustainable development help in achieving a balance between rights of the tribals and economic development. Further it takes into account the role played by judiciary in protecting these rights and their violation. It highlights the importance of having an integrated tribal development programme, which can be achieved through sustainable development.

II

The Concept of Sustainable Development: A Paradigm Shift

The development policies of the nations of the world are not only of disturbing nature, but have also failed to generate employment and equity. Rapid urbanisation is taking place in many countries resulting in large scale migration from country side to urban centres. Development through industrialisation is showing its baneful effects on environment. The concept of sustainable development has been the mantra of the environmental jurisprudence all over the world and that has to be applied in true spirit of the term while conceiving developmental policies and projects.[2]

Sustainable Development has emerged as one of the most important subjects in academia in the recent history. It is defined as "development which meets the needs of the present without compromising the ability of future generations to meet their own needs"[3]. It stresses that 'the satisfaction of human needs is the major objective of development'.

Until recently, the principles of sustainable development were not followed due to ad hoc mannerism in 'development policy' framing and implementation by nation states. Nonetheless, nations have realised the importance of sustainable development and thus try to imbibe the principle in spirit in their laws and policies.

At the international level, there have been many conferences which have dealt with sustainable development; a mention may be made here of the Earth Summit (Rio 1992). It led to the adoption of two legally binding conventions i.e. UN Convention on Biological Diversity and the UN Framework Convention on Climate Change[4] along with the Statement of Forest Principles, Rio Declaration

[2] A. Narsing Rao, "Sustainable Development and Environment Protection in India- A Study of Judicial Response", 3 *SCJ*, 18-25, 2012.

[3] It evolved as a concept with the 1987 report of the World Commission on Environment and Development: Our Common Future or the Brundtland Report so named after the Norwegian Prime Minister who chaired the Commission.

[4] The parties to the convention have met annually from 1995 in Conferences of the Parties (COP) to assess progress in dealing with climate change. Last COP was held in Paris in 2015. The Paris Agreement was adopted, governing emission reductions from 2020 on through commitments of countries in ambitious Nationally Determined Contributions.

and Agenda 21. Another major convention was the 2002 World Summit on Sustainable Development (WSSD) held in Johannesburg, South Africa, wherein, sustainable development was reaffirmed as a central component of the international agenda. Johannesburg Declaration has also taken note of the fact that in order to achieve the goals of sustainable development, we need more effective, democratic and accountable international and multilateral institutions.[5] One of the most important agreement on sustainable development has been the Rio+20 Conference held in 2012. The main objectives outlined for this conference were that state governments should find ways to reduce poverty, promote social equity and achieve protection of the environment.[6] *The Future We Want* is the final agreement of 193 member states of the United Nations (UN) who were represented at the Rio+20 Conference. The common vision in this agreement is that national governments will strive for a sustainable future for people and the planet and take action to eliminate poverty. Underlying the challenges for addressing how to make progress on sustainable development is the view that all people should adopt a holistic attitude to sustainable development where human beings can exist in harmony with the natural environment.[7] The two main themes for the Rio+20 Conference were:

1. Green economy in the context of sustainable development and poverty eradication; and
2. Strengthening the institutional framework for sustainable development.

One of the major outcomes of the conference was adoption of sustainable development goals. In order to pursue focused and coherent action on sustainable development, the document advocates the adoption of the Sustainable Development Goals (SDGs) which should be, "Action-oriented, concise and easy to communicate, limited in number, aspirational, global in nature and universally applicable to all countries while taking into account different national realities, capacities and levels of development and respecting national policies and priorities."[8] The goals should be "based on Agenda 21, Johannesburg Plan of Action and the Rio Principles so as to addresses the three dimensions of sustainable development"[9].

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[5] N.M. Swamy, "Sustainable Development: The Objective behind Environmental Legislation- A critical Analysis" 4 *Andhra Law Times* 26, 2003.

[6] United Nations Conference on Sustainable Development, About Rio+20, available at: https://sustainabledevelopment.un.org/rio20 (Last visited on September 2, 2016).

[7] Laura Horn, "Rio+20 United Nations Conference on Sustainable Development: Is this the Future We Want", 9 *Macquarie Journal of International and Comparative Environmental Law* 18 (2013).

[8] "The Future We Want", UN General Assembly Resolution No. 66/ 288. UN Document No. A/ RES/ 66/288, September 11, 2012, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=%20A/RES/66/288 (Last visited on September 5, 2016).

[9] *Supra* note 7.

The call for adoption of SDGs is influenced by the Millennium Development Goals. "SDGs merely supplement MDGs and do not divert from them"[10]. Setting goals will provide a direction to the task of pursuing sustainable development. It can also help in setting targets whose achievement can be assessed by measurable indicators.

In this way the document has recognized the inter link between human rights and sustainable development. It can be said, without these rights, development cannot be sustainable.

Sustainable Development is a global phenomenon and interplay of sustainable economy, of social equity and a healthy environment, with the core being sustainable development. It is wrongly perceived to be concerned with only global warming, environmental degradation and green-house gas emissions.[11] It is also a realisation of the present generation meeting their own needs but without adversely affecting the future generation to meet their own needs or the ability to provide a better environment than that inherited.

The concept of sustainable development is still vague enough to bring a pragmatic and concerned response from every stake holder and shows a kind of fake greenery, where the focus is on cosmetic environmentalism on the part of both government and business. It leads us to ponder on the question that how a particular product is "green", "environmentally benign" or "socially responsible".

As pointed out by several authors like Kirkby and Redclift, the problem is with the definition of sustainable development given by Brundtland Report. It does not elaborate on the notion of human needs and wants, and the concern for future generations is problematic in its operationalization. Given the scenario of limited resources, this assumption becomes a contradiction because most potential consumers (future generations) are unable to access the present market, or as Martinez Alier puts it, "individuals not yet born have ontological difficulties in making their presence felt in today's market for exhaustible resources".[12] Further, the term sustainability means different things to different people. The terms 'sustainability' and 'sustainable development' are used interchangeably in both academic and popular discourses and the concept is promoted by 'situating it against the background of sustaining a particular set of social relations by way of particular set of ecological project'. Thus, the debate about resource

[10] *Ibid.*

[11] D.K. Upadhyay and Vinod Sen, "Promoting Sustainable Development from the Grassroots Level: Indian Perspectives" 14(2), *Madhya Pradesh Journal of Social Sciences* 77 (2009).

[12] Martinez-Alier, Juan, *Ecological Economics: Energy, Environment and Society* 17 (1987).

scarcity, biodiversity, population and ecological limits is ultimately a debate about the 'preservation of a particular social order rather than a debate about the preservation of nature per se.'[13]

III.

Tribals' Displacement and its Consequences

The tribal people have become strangers in their own homes. The undisputed master of all forests has now become a meagre wage earner. The root cause for the same could be attributed to extensive commercialization and increase in forest based industry. The impacts have been so devastating that one could feel the effects in the change in environment, eco-system and climate that we are talking about now a days. In fact, one could very easily conclude that this change has thrown the ethos of tribal culture, civilization and habitat completely out of gear and through rough winds.[14]

(i) Tribals: The Indian "Pride"

India has the largest concentration of tribal people in the world next only to Africa. The tribals are children of nature and their lifestyle is conditioned by the ecosystem. India with a variety of ecosystems, presents a varied tribal population throughout its length and breadth.[15] The areas inhabited by the tribals constitute a significant part of underdeveloped areas of the country. The tribals live mostly in isolated hamlets. On the whole, as per rough estimates, the prominent tribal area constitutes about 15 per cent of the total geographic area of the country.[16]

The main concentration of tribal people is in the central tribal belt in middle part of the country and in the north eastern states. However, they have their presence in all the states and union territories except the state of Haryana, Punjab, Delhi and Chandigarh. The predominantly tribal states of the country i.e. where tribal population is more than 50 per cent of the total population, are Arunachal Pradesh, Meghalaya, Mizoram, Nagaland and the UTs of Dadra and Nagar Haveli and Lakshadweep.[17]

Twentieth century discourses on tribals in social history and anthropology have predominantly reflected an approach of impassioned concern. Tribes were classically depicted as an anthropological category, although they were viewed

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[13] David Harvey, *Justice, Nature and the Geography of Difference* 148 (1996).

[14] C. Basavaraju and N. Vanishree, "Tribal Welfare – Legislation and Enforcement" 3 *Karnataka Law Journal* 33 (2012).

[15] R.R. Prasad, "Empowerment of Tribals for Self-Governance" 62, *Social Action* 16 (2012).

[16] *Ibid.*

[17] *Supra* note 18.

on occasion as evidence of plurality.[18]

Modern India, with its industries, highways, markets, and merchants, has inexorably moved closer to the tribes, and they too have begun to assimilate. The tribes have been drawn in by the politics of economic development, rapacious "consumerization" of cultural lifestyles, and the allurement of "better" lives in an integrated environment.[19] For the earliest members of the "Indian" family now facing the prospect of extinction, the processes of subjugation, dispossession, and usurpation of traditional rights live in their memory. Their inability to fight the invasions of colonial rulers and, more recently, the State, has resulted in the denigration of tribal identities and hastened the unfortunate prospect of an India without her "pride."[20]

(ii) Rights of Tribals in India

Tribes in India have come to be conceptualized primarily in relation to their geographical and social isolation from the larger Indian society and not in relation to the stage of their social formation. This is why a wide range of groups and communities at different levels of the social formation have all come to be categorized as tribes.[21] By virtue of the fact that tribes lived in isolation from the larger Indian society, they enjoyed autonomy of governance over the territory they inhabited. They held control over the land, forest and other resources and governed themselves in terms of their own laws, traditions and customs. The problem remains that the so called 'isolated group' is no more left isolated. It was the advent of colonial rule that brought tribes and non-tribes into one single political and administrative structure by means of war, conquest and annexation. This was followed by introduction of new and uniform civil and criminal laws as well as setting up of administrative structures that were alien to tribal tradition and ethos.[22]

The Constitution of India contains a number of provisions to safeguard of interests of Scheduled Tribes and their protection, notably Articles 15(4)[23],

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[18] Shubhankar Dam, "Legal Systems As Cultural Rights: A Rights' Based Approach To Traditional Legal Systems Under The Indian Constitution", available at http://ssrn.com/abstract=976501 (Last visited September 8, 2016).

[19] *Ibid.*

[20] *Ibid.*

[21] Virginius Xaxa, "Constitutional Provisions, Laws and Tribes" 58 *Yojana* 4-7 (January 2014).

[22] *Ibid.*

[23] A.15(4), Constitution of India: "Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

16(4A)[24], 46[25], 243M[26], 243ZC[27], 244[28], first and second provisos to 275(1), 334, 335, 338A, 339(1), the Fifth and Sixth Schedules[29]. Besides a plethora of laws has been enacted by the Central Government like the Protection of Civil Rights Act, 1955, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989[30], the Provisions of the Panchayats (Extension to Scheduled Areas) Act, 1996, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006.[31] Further, there is also a Draft National Tribal Policy[32]. Recently, "The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act" came into existence in 2013 which regulates land acquisition and lays down the procedure and rules for granting compensation, rehabilitation and resettlement to the affected persons in India. The Act has provisions to provide fair compensation to those whose land is taken, brings transparency to the process of acquisition of land to set up factories or buildings, infrastructural projects and assures rehabilitation of those

[24] Art. 16(4A), Constitution of India: "Nothing in this article shall prevent the State from making any provision for reservation 3[in matters of promotion, with consequential seniority, to any class] or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State."-

[25] Art. 46, Constitution of India: "The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

[26] The provision related to Part IX- Panchayats are not applicable to tribal areas.

[27] The provision related to Part IX-A Municipalities are not applicable to tribal areas.

[28] Article 244(1), Constitution of India: "The provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State other than [the States of Assam Meghalaya, Tripura and Mizoram].
(2) The provisions of the Sixth Schedule shall apply to the administration of the tribal areas in [the States of Assam, Meghalaya, Tripura and Mizoram]."

[29] The 5th Schedule Area provides for the establishment of Tribal Advisory Councils in tribal dominated areas of mainland India and the 6th Schedule Area provides for the Autonomous District Councils which operate in the North Eastern Region of India.

[30] As cases of atrocities on SCs/STs were not covered under the provisions of Protection of Civil Rights Act, 1955, Parliament passed another important Act in 1989 for taking measures to prevent the atrocities. This act known as the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, became effective from 30.1.1990. For carrying out the provisions of this Act the Govt. of India have notified the SCs and the STs (Prevention of Atrocities) Rules, 1995 on 31.3.1995.

[31] Bhupinder Singh, "Tribal Scenario in the context of Economic Liberalisation and Globalisation" 53(4) *Indian Journal of Public Administration* 760 (2007).

[32] Both PESA and FRA aim to provide renewed space for tribal traditions. The FRA aims to restore the traditional rights -tribes earlier used to enjoy over forest, which the colonial and postcolonial state have taken away from them. PESA, much more controversially, claims to restore a traditional system of governance in tribal areas that has either ceased to exist, or has never existed at all.

affected.[33]

At the international level, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the most comprehensive statement of the rights of indigenous peoples, was adopted by the general assembly in 2007. It ascertains collective rights eg. right to own land collectively to an extent, greater than any other document in international human rights law. The Declaration establishes the rights of indigenous peoples to the protection of their cultural property and identity as well as the rights to education, employment, health, religion, language and more[34].

Indigenous Peoples' rights overlap with many other human rights. Many important Indigenous Peoples' rights are not framed in specific Indigenous Peoples' rights treaties, but are part of more general treaties, like the Universal Declaration of Human Rights[35] or International Covenant for Civil and Political Rights[36], ILO Convention 169[37] to name a few.

IV

Impact of Development on Tribals

Development is not a new phenomenon. Man started as a hunter and gradually learned how to grow food. This paved the way for the first human settlements where humans left behind their days as nomads and became agriculturalists. The invention of wheel, the discovery of fire, the invention of the first alphabets, the development of first laws and the early river valley civilizations can be cited

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[33] "The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013", available at: https://en.wikipedia.org/wiki/Right_to_Fair_Compensation_and_Transparency_in_Land_Acquisition,_Rehabilitation_and_Resettlement_Act,_2013 (Last visited on March 30, 2017).

[34] See, "The Rights of indigenous people", available at: http://hrlibrary.umn.edu/edumat/studyguides/indigenous.html (Last visited on January 20, 2017).

[35] The Universal Declaration of Human Rights is the first international document that states that all human beings are "equal in dignity and rights." Everybody is entitled to the rights in the Declaration, "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." See, Articles 1 and 2, UDHR, 1948.

[36] See, Art. 27, ICCPR: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

[37] International Labour Organization (ILO) Convention 169 (1989). The ILO Indigenous and Tribal Peoples Convention was the first international convention to address the specific needs for Indigenous Peoples' human rights. The Convention outlines the responsibilities of governments in promoting and protecting the human rights of Indigenous Peoples.

as examples of development and progress. These changes did not occur suddenly but were slow and gradual, spanning centuries of human evolution.

However, it was, probably, not until the industrial revolution in Europe and the ensuing changes that it brought, that economic development and economic growth as we understand it today came about. Renaissance, Industrial revolution[38] and the concept of markets changed the world in ways that are difficult to describe in a short space.

The pursuit of development has led us to an undesirable place. Industrialization became the way to create wealth and to improve living standards. However, this economic growth or the development (in its narrow sense) was tragic for two reasons. Firstly, it did not benefit everybody. In fact most of the early industrial growth came at the expense of majority of people (colonized and working classes) who were denied their human rights. It was also at the cost of the colonized countries whose resources were plundered without consent. There were violations of human rights and such violations and deprivations continue till this day where colonies no longer exist but development has still not become inclusive, it has still not become just.[39] On one hand, we have a large number of people who are leading a less-than-human life. On the other hand, we have a degraded environment that is increasingly unable to sustain our growth. The other problem was that this economic growth and industrialization did not take into account the environmental degradation that it was causing. Our development had, hitherto, caused damage to the planet and misery to majority of its inhabitants.

People are still denied their basic rights and wants. "There are millions who are without food, shelter, health, education and other necessities. Development, which was supposed to alleviate such problems, has often increased them, especially by allowing the powerful sections of the society to appropriate the natural resources of poor and resource dependent people"[40]. We have increasingly marginalized many to benefit a few.

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[38] The term industrial revolution is often used to describe England's economic development from 1760 to 1840 and from there industrial revolution spread to the rest of the world. Encyclopaedia Britannica describes industrial revolution as "*... the process of change from an agrarian, handicraft economy to one dominated by industry and machine manufacture*". This process began in England in the 18th century and from there spread to other parts of the world.

[39] John Rapley, "Understanding Development: Theory and Practice in the Third World" 1, *Lynne Rienner, Boulder*, 3rd edn., 2007.

[40] Ashish Kothari and Anuprita Patel, "Environment and Human Rights" 10, *National Human Rights Commission*, 2006.

(i) Impact of Development on Tribals in India

Development in India has not percolated down to the weakest and there are issues which cast a doubt on the Indian growth story. In spite of being one of the fastest growing economies and having a considerably high economic growth rate, India still has not ensured inclusiveness. "77% of Indians live on a consumption expenditure of less than INR 20 (around USD 0.4) a day"[41]. "0.8% was the decline in poverty during 2007-11, whereas the average growth rate was 8.2%."[42]

In fact, development in India has raised more and more human rights and environment concerns. It has been reported that, "Not taking into account displacement due to armed and ethnic conflict, India is estimated to have the highest number of people displaced annually as a result of ostensible 'development' projects. Independent experts estimate the number of those displaced by such projects since India's independence (1947), at between 60 and 65 million. This amounts to around one million displaced every year since independence. Of these displaced, over 40% are tribals and another 40% consist of Dalits and other rural poor. The vast majority of the displaced have not received adequate resettlement.... NHRC's monitoring finds that usually those displaced are given neither adequate relief nor the means of rehabilitation."[43]

According to statistical estimates, 2 crore people out of which 85 lakh are tribals have been displaced from their native places from 1957 to 1990 due to construction of irrigation projects, mining projects and national highway. In Odisha, 27 per cent have been displaced during the period from 1996 to 1997 due to construction work of National Aluminium Company (NALCO) at Anugul, Hindustan Aeronautics Limited (HAL) at Koraput, National Thermal Power Corporation (NTPC) at Kaniha project and IB Valley Project at Sundergarh.[44]

V

Relationship between Sustainable Development and Rights of Tribals

Development is of utmost importance for any nation to progress. However, this development should not come at the cost of environmental degradation and violation of human rights of citizens. To feed India's growing appetite for energy, we need to open up new mines, lay pipelines and power transmission across the

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[41] Working Group on Human Rights in India and the UN, *Human Rights in India Status Report* (2012). The report was prepared for India's second Universal Periodic Review at the UN.

[42] *Ibid.*

[43] *Ibid.*

[44] *Infra* note 68 at 2.

country. All this calls for land to be put to new use. Therefore, displacement of tribals has been continuing since a long time back. Further, when natural disasters like earthquake, flood, cyclone, construction of development projects like new industrial set-up, building of new hydro-electric projects, construction of dams and national highways take place, many people become homeless.[45] Large infrastructure projects, which include activities such as mining, construction of dams and designation of large areas as tax-free Special Economic Zones (SEZs), have led to the "displacement of millions of rural families, most of whom have not received rehabilitation".[46] Such projects have changed the patterns of the use of land, water and other natural resources that prevailed in the area.[47] People dependent upon land and forests for their livelihood who are mainly the tribals, have been dispossessed of their subsistence through land acquisition and displacement. These indigenous people become the most tragic victims of development and thoughtless urbanization.

One may wonder why these purely human rights concerns should be seen as sustainable development concerns. Sustainable development takes into account the environment and incorporates intra-generational and inter-generational equity. If development is not inclusive, there is no intra-generational equity. The children born to these 'deprived' people will continue to be deprived, adding to the poverty, and degrading the environment further by adoption of unsustainable lifestyles. The need of the hour is to have sustainable tribal development which will take care of both economic development and safeguarding the tribal rights.

Tribals are forest dwellers. Even today 90 per cent of them still live in forests. Their intricate link with the forest as their *anna, aarogya, aasra* (food, well-being and security) has been the basis of their symbiotic relationship, their physical and cultural survival.[48] The forest departments and forest development corporations are responsible for degradation of natural environment and destruction of tribal survival resources while subsiding commerce and industry.[49] The individual oriented developmental process has further damaged their ethics of sharing, values of co-operation, heritage of self-control and management of forest resources, marine and animal life.

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[45] A.K. Sahay and Prabira Sethy, "Tribal Displacement and Resettlement: Effective Safeguards" 58 *Social Action* 1 (2008).

[46] *Ibid.*

[47] Biswaranjan Mohanty, "Displacement and Rehabilitation of Tribals" 40 *Economic and political Weekly* 1318 (2005).

[48] Pradip Prabhu, "Sustainable Tribal Development" 39 *Indian Journal of Public Administration* 481 (1993).

[49] *Ibid.*

Although "sustainability" is not found in tribal's vocabulary, we can still see that they have incorporated the concept of sustainable development in their way of life. The idea of prudent management of available natural resources and the avoidance of over-exploitation of nature, keeping in view the needs of future generation, remained ingrained in the psyche of the tribal elders and administrators down the ages in different tribal societies.[50] However, there is a need for sustainable integral tribal development with ethno development. Ethno implies respect for people, societies, cultures and their wishes while the development refers to total phenomena combining economic, politics, defined by the concerned people themselves.[51] It is required that tribals have the right to freely negotiate with the state the kind of relationship they wish to have.

The basic tenets of ethno development would include, firstly, self-sufficiency with dependency progressively rooted out of the development process. In order to achieve this, it is necessary to revive models of technology and systems of knowledge so as to integrate them with modern system. Secondly, social justice through a process geared to resolve and not create questions of social inequality. This demands they are the subjects of present and future development. Thirdly, control of their development according to their priorities, values and customs with full participation in the actual process of planning and implementation. Fourthly, decentralisation with the village at the centre, with a revival of their traditional systems of community management is required. Lastly, ecological equilibrium or environmentally sensitive development which has been the cornerstone of the tribal people across the world should be emphasized.

The problem of displacement of tribals needs to be addressed by having a proper legislation. The displaced tribals should be provided with proper rehabilitation along with the compensation for land acquisition. The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (also Land Acquisition Act, 2013) has been an important legislation in this regard and deals with the problem of rehabilitation and resettlement of displaced tribals. One of the aims of the Act is to provide just and fair compensation to the affected families whose land has been acquired or proposed to be acquired or are affected by such acquisition. Another relevant objective is to make adequate provisions for such affected persons for their rehabilitation and resettlement. Tribals whose forest rights have been snatched away, are covered under the category of "affected family" under the Act.[52]

[50] Rajendra Prasad (ed.), *A Historical- Developmental Study of Classical Indian Philosophy of Morals* 503 (2009).

[51] *Supra* note 48 at 485.

[52] S. 3(c)(iii), Land Acquisition Act, 2013.

Further, tribals who have been granted forest rights by Forest Rights Act, 2006 qualify to be "land owners".[53] This is the first law that links land acquisition and the accompanying obligations for resettlement and rehabilitation. Over five chapters and two entire schedules have been dedicated to outlining elaborate processes (and entitlements) for resettlement and rehabilitation. The second schedule in particular, outlines the benefits (such as land for land, housing, employment and annuities) that shall accrue in addition to the one-time cash payments.[54] The Act also stipulates provision of fair compensation to land owners whose lands have been taken away.[55]

Further, the government should devise means to give compensation to the tribals. Although provision regarding compensation has been well laid out in Land acquisition Act 2013, it is usually seen that they are not provided with due compensation and even if they receive it, they are provided the whole compensation at one go. This compensatory payment should be given in piecemeal because at the end, the tribals are left with no money. They should be provided with accommodation in return from the land snatched from them. Building settlement colonies for dislocated tribals will be beneficial to them. We cannot disassociate tribals from land, but we have to ensure their progress. This can be done by providing them education, constructing schools for their children. Further, they should be given employment opportunities by making them part of large development projects. Thus the focus should be not only on economic development but progressive development of the tribals as well.

VI

Role of Judiciary in Protection of Tribal Rights

Development is a continuous process enabling human beings to expand and utilize their potentialities to attain a greater goal. Sustainability is not an option but it is imperative since without it environmental deterioration and economic decline will be feeding each other leading to poverty, pollution, poor health, political upheaval and unrest. It is a welcome feature emphasizing the need to strike a delicate balance between environment protection and economic development.[56] Environment cuts across all sectors of development.

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[53] S. 3(r)(ii), Land Acquisition Act, 2013.

[54] See, "Salient Features of the new Land Bill", available at: http://enactments.blogspot.in/2013/09/salient-features-of-new-land.html (Last visited on March 30, 2017).

[55] *Supra* note 52 s. 27 - Determination of amount of compensation.–The Collector having determined the market value of the land to be acquired shall calculate the total amount of compensation to be paid to the land owner (whose land has been acquired) by including all assets attached to the land.

[56] Tarun Arora, "Sustainable Development and Role of Indian Judiciary" 1 *Punjabi University Law Journal* 260 (2007).

In developing countries like India, exploitation of natural resources is essential for economic progress through industrial development. While the international and national laws and policies have already provided various guidelines – legal or executive, the concept of sustainable development requires still a special attention and emphasis to bring awareness among industrialists and others engaged in exploitation of natural resources for economic progress. With a view to achieve this goal, the Supreme Court of India in a series of landmark judgments[57] not only explained the principle of sustainable development but also imposed obligations for adherence thereto.

However, when we talk about protection of rights of tribals, the situation may not be that simple. Many a time judiciary is faced with the problem of making choices between development, rights of tribals and environment protection. One of the important landmark judgments which upheld rights of tribal over big corporates was *Samatha* judgment. However, we have come a long way if we look at the judgment in the case of *Narmada Bachao Andolan*[58] or *Lafarge case*[59], and compare it with *Vedanta* judgment[60].

The *Samatha* judgment[61] was the first case wherein judiciary gave priority to tribal rights over development. In the early nineties, Samatha, an advocacy and social action group working or the rights of tribal communities and for the protection of the environment in Andhra Pradesh, was involved in an apparently local dispute over leasing of tribal lands to the private mining industries. The tribal community wanted to regain control over their lands rather than work as labour force in the mining operations on their own lands. After losing the initial battle in the lower and High Court, Samatha filed a Special Leave Petition in the Supreme Court of India. The four year legal battle led to a historic judgment in July 1997 by a three-judge Supreme Court bench. It was a land-mark judgment in favour tribal rights.[62] It permitted the mining activity to go on as long as it is undertaken by the government, or instrumentality of state or a cooperative society of the tribals. The judgment nullified all mining leases granted by the state government in the scheduled areas and asked it to stop all mining operations.

[57] *A.P. Pollution Control Board – II* v. *M.V. Naidu* (2001) 2 SCC 62; *B. L. Wadhera* v. *Union of India* (1996) 2 SCC 594.

[58] *Narmada Bachao Andolan* v. *Union of India* (2000) 10 SCC 664.

[59] *Lafarge Umiam Mining Pvt. Ltd.* v. *Union of India & Ors.* AIR 2011 SC 2781.

[60] *Orissa Mining Corporation* v. *Ministry of Environment & Forest & others* WP(C) 180/2011, available at: http://www.menschenrechte.uzh.ch/entscheide/Vedanta_Orissa.pdf (Last Visited on September 8, 2016).

[61] *Samatha* v. *State of Andhra Pradesh* 1997 Supp (2) SCR 305.

[62] "The Samatha Judgment and Fifth Schedule of the Constitution", available at: https://socialissuesindia.wordpress.com/2012/09/06/the-samatha-judgment-and-the-fifth-schedule-of-the-constitution/ (Last visited on March 29, 2017).

Only the State Mineral Development Corporation or a cooperative of the tribal people, it ruled, could take up mining activity and that too in compliance with the Forest Conservation Act and the Environment Protection Act. It also recognised the Constitution (73rd) Amendment and the Panchayat (Extension to Scheduled Areas) Act, under which *gram sabhas* are competent to preserve and safeguard community resources, and reiterated the right of self-governance of Adivasis. It was further held, where similar laws in other states do not prohibit the grant of mining leases in the scheduled areas, a committee of secretaries and state cabinet sub-committees should be constituted and a decision taken. Before granting leases, it is obligatory for the state government to obtain the concurrence of the centre, which would, for this purpose, constitute a sub-committee consisting of the Prime Minister and the union ministers for welfare and environment so that the state's policy is consistent with that of the nation, it said. The judgment also noted that at least 20 per cent of the net profits should be set apart as a permanent fund for the establishment and provision of basic facilities in the areas of health, education, roads and other public amenities.[63]

The *Narmada Bachao Andolan* (NBA) case had a long and twisted history[64]. Sardar Sarovar dam was to be constructed and the proposed project was supposed to provide great irrigational facilities, employment opportunities and rehabilitation to the displaced. The NBA which was at the forefront of the protests against the construction of the dam[65] approached the Supreme Court in 1994 to, inter alia; stop the construction of the dam. They argued that it will cause displacement of thousands of tribal families and damage to the ecology. In the meantime, construction of the dam continued; which by the time the matter came before court, had cost almost 4000 crore rupees taking into account the relief and rehabilitation also. This ultimately led to the *Narmada* judgment wherein, in a non-unanimous opinion, the Court gave its nod to the project[66]. The approval of the court caused widespread agitation and indeed was violation

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[63] "The Samata Judgment", available at: http://www.frontline.in/static/html/fl2119/stories/20040924006001200.htm (Last visited on March 29, 2017).

[64] The factual matrix given here is based on the detailed history of the Narmada Valley projects provided in *Narmada Bachao Andolan* v. *Union of India* (2000) 10 SCC 664, the main matter on the river valley project which is being dealt here.

[65] NBA or the Narmada Bachao Andolan was a consortium of various NGOs that were against the construction of the dam. It was under the leadership of activist Medha Patkar that the anti-dam movement gained momentum. Baba Amte, a noted social worker also provided support to the movement.

[66] Smita Narula, "The Story of Narmada Bachao Andolan: Human Rights in the Global Economy and the struggle against the World Bank", *New York University School of Law, Public Law & Legal Theory Research Paper Series,* Working Paper No. 08-62, 351 (December 2008), also available at: http://ssrn.com/abstract=1315459 (Last visited on September 10, 2016).

of tribal rights. The human rights angle in this case was of course, the interests of the displaced but these were pitied against the interests of those positively affected by the project. The project was expected to benefit vast populations in terms of providing water, power and irrigation facilities. Faced with two conflicting interests, the Court had to decide which interest should be given more priority. It was in short, "a case of harm to the interest of the minority to better promote interests of the majority"[67].

However, there can be seen a sense of cautiousness which courts adopt nowadays when faced with the question of balancing tribal rights and economic development. This can be highlighted through the *Vedanta* case. The Vedanta matter has had a long and complex history. It is a global metals giant. The group sought to invest an amount running into several millions (approximately 800 million dollars) in projects involving an aluminium refinery and bauxite mining unit in the Kalahandi and Rayagada districts of Odisha and in 2003 entered into an MOU with the Government of Odisha. While these districts are poor but an area, Niyamgiri hill falling in Lanjigarh Tehsil of Kalahandi district is extremely rich in bauxite. The mining was planned there. A refinery was proposed to be established in the nearby area of Lanjigarh. Large numbers of petitions were filed by environmentalists alleging gross violations of norms by Vedanta group that it had started working on the project without obtaining all clearances. The Supreme Court had set up a centrally empowered committee (CEC) which had objected to the clearance on the ground that bauxite for the refinery was to be taken from Niyamgiri hills, Lanjigarh and the area was an elephant corridor and the project would disturb the proposed wildlife sanctuary apart from causing havoc for the tribes including, Dongria Kondh. The hill also served as a water source for two rivers and the project would destroy plant and animal life in the region that was an ecologically sensitive area[68]. Another Report was submitted by the Naresh Saxena Committee. The report is full of details as to how the project is going to ruin an ecologically sensitive area and spell doom for the indigenous and the Dongrias living in the region who regard the Niyamgiri hill as a sacred site. The hills are intrinsic to their lifestyles[69]. Immediately thereafter the issue assumed political dimension also.[70] The Supreme Court gave its order on April 18th, 2013 and decided that it shall be left to Gram Sabhas to decide the

[67] Benoit Mayer, "Judicial Review of Human Rights Impacts of Hydroelectric Projects", *Legal Working Paper Series on Legal Empowerment For Sustainable Development*, Centre for International Sustainable Development Law 4 (2012).

[68] Debabrata Mohanty and Anirban Das Mahapatra, "The Vedanta Affair-The nub of the CEC report is the issue of forest land", *The Telegraph* (November 27, 2005).

[69] Report Of The Four Member Committee For Investigation Into The Proposal Submitted By The Orissa Mining Company For Bauxite Mining In Niyamgiri, Ministry of Environment & Forests, Government of India, at 13 (August 16, 2010).

fate of Vedanta's Niyamgiri mining project which will make it difficult for the government to divert forest land for industry without the consent of tribals and local population. The apex court's ruling puts gram sabhas or village assemblies virtually at par with statutory and regulatory bodies, and gives a broader prism of rights to indigenous communities by defining the Forest Rights Act[71] as more than just heritable property rights.[72]

As a result of the verdict, there was a landmark referendum on August 13, 2013 wherein forest dwellers and tribals unanimously decided that Orissa Mining Corporation with Vedanta group should not be allowed to extract bauxite as it will destroy their pristine forests and livelihoods.

Recently the Supreme Court asked the union government to detail the mechanism put in place to evaluate the traditional community rights of tribals and the compensation paid to them before permitting projects on forest land. Under the Schedule Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, most of the project proponents and governments have taken steps to relocate and rehabilitate tribals but have seldom evaluated the compensation they deserved for forfeiting their community rights, like grazing cattle or gathering minor forest produce. An appeal was filed by Himachal Pradesh Power Corporation Limited (HPPCL) in a matter relating to diversion of 17.68 acres of forest land for augmentation of Kashang Hydroelectric Project in Kinnaur district. The MOEF had granted stage 1 clearance to HPPCL in March 2011. Though the query was specific to the hydel project in Himachal Pradesh, it could have fallout on all projects set up on forest land since forest rights of tribals are protected under the central legislation.[73]

Thus, we have seen judiciary has played a vital role in protection of tribal communities. It has often been given the task of balancing between development and protection of environment as well as tribes. We can conclude it has performed its task quite well.

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[70] Priya Ranjan Sahu, "Rahul Woos Anti-Mine Orissa Tribals", *Hindustan Times* (August 26, 2010).

[71] Schedule Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.

[72] "Supreme Court's decision on Vedanta Niyamgiri Mining to hit the Government Panels", available at: http://articles.economictimes.indiatimes.com/2013-04-20/news/38693298_1_forest-rights-act-gram-sabhas-forest-dwellers (Last visited on 9th September, 2016).

[73] "Are Tribal Rights Protected before Allowing Forest Projects?" *The Times of India* (September 6, 2016).

VII

Conclusion

Development displacement has a direct link with tribal population. In projects involving displacement of tribals, the primary principle should be 'no displacement' or 'minimum displacement' in case of imperative carefully selected projects. *A priori*, the principle of land for land should be followed in case of unavoidable displacement. The sustainable development should encompass within itself protection of tribals and other minority communities. Our tribes have been our pride. They have a long and rich history. The preservation of their history and culture is of paramount importance and should be ensured at all costs. Thus, sustainable development along with the welfare of tribals is the need of the day. The Constitution of India provides for number of rights for safeguarding the interests of tribals. Many statutes have been enacted for their welfare. One such key piece of legislation is the Forest Rights Act. At the international level also there are legal instruments to ensure tribal welfare. The Indian judiciary has immensely contributed in protecting the rights of tribals. It has played an active role in balancing economic development, environment protection and safeguarding tribal rights.

However, there are certain suggestions which government can incorporate to ensure tribal welfare in cases of displacement. Government can address the resettlement plans and policies by doing a social cost-benefit analysis in case of projects that displace people, i.e. how the benefits are in excess of costs to justify them. Social benefits however can be spread over a large number of people on a large area and hydro-electricity power generation by a dam can benefit millions living over thousands of square kilometres for decades. But the significant costs fall on relatively small number of project-affected people who often lose their livelihood. The asymmetry between gains to individual beneficiaries and the loss suffered by individual project oustees is one reason why the market value of the land in question is not fair compensation.

Another possible solution is for the acquired land to be transferred not directly to the project in question but to a Special Purpose Vehicle (SPV) whose sole purpose is to own land for the project and to give the project oustees a stake in SPV.

Bulldozers and other construction equipment should not move unless and until proper rehabilitation of oustees is completed to the satisfaction of those affected. Also, cash compensation for land is not a solution. If comparable land is not available as a substitute, other options to rebuild livelihood should be tried.

The ousted should be made stakeholders in the project and given the option of employment. Lastly, the right of threatened people to protest and demand should be respected.

There is no single solution to the problem of development and displacement. There has to be a basket of solutions, each according to nature and context of problem at hand they have to be localized, arrived after negotiation with the local communities and compatible with the needs of affected people.

WTO AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES AND DEVELOPING COUNTRIES: BENEFIT OR BURDEN

Rohin Koul[*]

Abstract

Sanitary and phytosanitary (SPS) measures have become predominant in the international trade regime. The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) has imposed a new and comprehensive set of rules to regulate sanitary and phytosanitary measures of member countries. It has allowed member countries to establish these measures to protect human, animal and plant health but at the same time it has ensured that such measures should not create unreasonable barriers to the international trade.

Ever since the SPS Agreement has come into force, the developing countries are using this instrument for the international trade. Though the SPS Agreement has facilitated trade, these countries find it difficult to cope with the demanding sanitary and phytosanitary standards of the developed world and have raised numerous issues with respect to the application of the Agreement.[1] The present paper has attempted to assess the impact of the SPS Agreement on the ability of the developing countries to trade and to identify problems experienced by them.

The SPS Agreement has provisions which are entirely for benefit of the developing countries with the objective to facilitate exports from these countries by increasing transparency, harmonization and by preventing trade barriers that do not have scientific justification.[2] In spite of these benefits, the developing countries are not satisfied with the manner in which SPS Agreement has been applied. They feel that it has limited their export potential and provided barriers to their trade. The concerns of these countries are related to technical assistance, special and differential treatment, harmonization, equivalency, transparency, notification, dispute settlement, adaptation to regional conditions, mutual recognition

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[1] Arijay Chaudhary, *GATT: A Developing Country Perspective* 87-88 Asian Books Private Limited, Delhi (2002).

[2] Akram A. Khan, "The Effect of Trade Liberalization on Indian Livestock Sector: Issues and Options" in Anil Kumar Thakur and Nageshwar Sharma *et.al.* (eds.), *WTO and India* 462 (2007).

agreements and triennial review. The application of science and risk assessment has also put them at disadvantage due to the lack of technical expertise, well equipped national laboratories and testing centres.[3] *In addition to this, the manner in which developed countries manage and apply SPS measures is also creating problems for the developing countries in implementing the provisions of the Agreement.*

I

Introduction

Trade is essential for growth and no county can achieve economic growth by remaining immune to international trade. International trade together with liberalization has offered great opportunity for all countries particularly to the developing countries to expand their trade and increase their welfare. This is clear from this fact that in 1960, the share of agriculture in exports from the developing countries was 50 per cent whereas the share of manufacturing was 12 per cent but in 2001 agriculture accounted for 10 per cent and manufacturing accounted for 65 per cent of exports from these countries.[4]

In due course of time these countries with their aspiration for development sought to shape international law in such a manner so that it can provide economic justice. Their claims of the 1960s and 1970s for a New International Economic Order (NIEO) were attempts to introduce structural reform of the world economy embedded in the principles of international law.[5]

The General Agreement on Tariffs and Trade (GATT) overlooked welfare of developing countries. As soon as the developing countries realized that their export earning has declined, they came together and advocated for more equitable international trading system.[6] In further years to come these countries continued to work for expansion of the international trade and for reforms in the trading system so that it can be more beneficial and supportive to them.[7]

It is generally said that the benefit of any global agreement is difficult to obtain if the burden is made to fall disproportionately on the developing counties.[8]

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3 Filippo Fontanelli, "ISO and CODEX Standards and International Trade Law: What Gets Said is Not What's Heard" 60 *International and Comparative Law Quarterly* 4, 910 (2011).

4 Simon Lester and Bryan Mercurio, *World Trade Law Text Materials and Commentary* 10-12 (2010).

5 Margot E. Salomon, "From NIEO to Now and the Unfinishable Story of Economic Justice" 62 *International and Comparative Law Quarterly* I, 31 (2013).

6 Geetanjali Sahni, *Globalization and Sovereignty of Nation States* 9-13 (2007).

7 *Id.* at 27.

8 David Palmeter, "Environment and Trade: Much Ado About Little?", 27 *Journal of World Trade* 3, 58-59, (1993).

Emphasizing on this view the World Trade Organization (WTO) in addition to reducing tariffs has also established real equality by providing certain flexibilities to the developing countries so that while participating in trade at international level they can develop side by side.[9]

However, reducing tariffs has increased concerns over the impact of other measures which are related to trade in agricultural and food exports.[10] Among them non-tariff barriers have remained significant obstacles for trading capacity of the developing countries. It has also been observed that the use of non-tariff barriers in post Uruguay Round setting is more prevalent in the developing countries than in the markets of the developed countries.[11] The sanitary and phytosanitary (SPS) measures as a non-tariff barrier have gained importance for countries not only because the safety of people, animal and plant health was essential but also of this fact that there was a need to offer some protection for their trade as the tariff barriers were considerably reduced.

With the growth of the international trade the use of sanitary and phytosanitary measures as trade barrier has increased.[12] Therefore, the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) has set out rights and obligations for the member countries regarding these measures.[13] In addition to the fact that the SPS Agreement has aimed to reconcile free trade with legitimate concerns for health and life of humans, animals and plants, it is of particular importance for the developing countries which deal with agriculture exports and depend on access to the foreign markets for their income.[14]

Ever since the SPS Agreement has come into force, the member countries, particularly the developing countries are using this instrument for international

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[9] Pascal Lamy, "The Place of the WTO and Its Law in the International Legal Order" in Charlotte Ku, Paul F. Diehl *et.al.* (eds.), *International Law Classic and Contemporary* 223-224 (2010).

[10] Mushin Serwadda, *An Assessment of the Application of the Sanitary and Phytosanitary Agreement of the WTO and its Impact on International Trade: A Sub-Sahara African Perspective* 2006 (Unpublished LL.M. Thesis, University of the Western Cape).

[11] Robert W. Staiger, "Non-tariff Measures and the WTO" World Trade Organization Economic Research and Statistics Division Staff Working Paper *ERSD* 1,3 (2012).

[12] T. Ademola Oyejide and E. Olawale Ogunkola, "Quantifying the Trade Impact of Sanitary and Phytosanitary Standards: What is Known and Issues of Importance for Sub-Saharan Africa" in Keith E. Maskus, John S. Wilson *et.al.* (eds.), *Quantifying the Impact of Technical Barriers to Trade: Can it be Done?* 206 (2001).

[13] Palle Krishna Rao, *WTO Texts and Cases* 45 (2005).

[14] United Nations Conference on Trade and Development (WTO Dispute Settlement 3.9 SPS Measures), UNCTAD/EDM/Misc.232/Add.13, p. 1 (2003), available at: http://www.unctad.org/en/DOCS/edminise232add13_en.pdf (Last visited on December 22, 2014).

trade. These countries are of this view that though the SPS Agreement has enhanced their share in the international trade, there are certain issues and concerns that need to be addressed.[15]

Some of these concerns include lack of resources on part of the developing countries to participate effectively in the World Trade Organization, thereby restricting them to exploit effectively the opportunities provided by the SPS Agreement. The SPS measures are also established by the international standard setting organizations and it has also raised various issues concerning developing countries which are needed to be examined. In addition to this, it is being said at various forums that the WTO with a major mission to facilitate free trade has failed to accommodate interests of developing countries.[16]

The aim of this paper is to assess the SPS Agreement from the view point of the developing countries. The paper attempts to analyze opportunities offered by the SPS Agreement to the developing countries and the problems experienced by them in its application. Further it formulates suggestions required to address these problems. The paper is organized as following: (a) section II provides definition of the developing countries and criteria of such classification at various international forums; (b) section III examines the participation of the developing countries and issues raised by them in multilateral trade negotiations; (c) section IV provides the scheme of the SPS Agreement where the special needs of the developing countries are accommodated; (d) section V deals with the impact of SPS measures on the developing countries and their participation in the SPS Agreement; (e) section VI examines grey areas in the SPS Agreement where developing countries are experiencing difficulties with respect to its application and implementation; (f) section VII discusses the *India-Agricultural Products* dispute and examines its implications on the developing countries; and (g) section VIII concludes.

II

Definition of Developing Country

Internationalization, globalization and liberalization have created opportunities for economic development and for raising the living standard of people all over the world. These opportunities should be distributed equitably among the

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[15] R. K. Khetrapal and Kavita Gupta, "Sanitary and Phytosanitary Measures: Implications on India and other Developing Countries" in A. K. Vasisht, Alka Singh *et.al.* (eds.), *WTO and New International Trade Regime Implications for Indian Agriculture* 149-150 (2003).

[16] Aysel Asgarova, *Developing Countries at the International Crossfire of GMO Regulation: The Case of Former Soviet Countries* 2013 (Unpublished Master of Law and Technology Thesis, Tilburg University).

countries without which a large number of people will remain marginalized from the benefits of the global economy.

In light of this, the greatest challenge the developing countries has faced is how to balance the creation of wealth with the realization of having equitable, transparent, non-discriminatory and rule based international trading system.[17] This has in turn created division between the developing and the developed countries and has marked the deepest rift in the contemporary international system.[18]

As far as the definition of the developing country is concerned, it is vague because there is a lack of international consensus with respect to the basis of this classification and secondly, this term is used for different purposes in various international contexts.[19]

(i) Under World Trade Organization

The World Trade Organization has not defined the term 'developing country' nor was it defined in the General Agreement on Tariffs and Trade regime. However, it has provided a reference for the least developed country (LDC) namely those recognized by the United Nations.[20]

The rules of the WTO provide for the degree of self selection as to which members fall into the category of developing country. It is the prerogative of the member countries to announce for themselves whether they are developing country or not.[21] This declaration itself is a political decision to be made by a member and reflects informal and formal negotiations with other members on this issue.[22] Also in the WTO certain countries have adopted their own definition of the developing country for purpose of their national preference programmes.[23]

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17 United Nations, *Year Book of the United Nations*, 1014 (2002).

18 Melaku G. Desta and Mosche Hirsch, "African Countries in the World Trading System: International Trade, Domestic Institutions and the Role of International Law" 61 *International and Comparative Law Quarterly* I, 128 (2012).

19 Mitsuo Matsushitra and Thomas J. Schoenbarum, *The World Trade Organization Law Practice and Policy* 374 (2003).

20 Agreement Establishing the WTO, Article XI.2 (The least developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities).

21 Available at: http://www.wto.org/english/tratop_e/devel_e/d1wto_e.htm (Last visited on December 31, 2015).

22 Simon Lester and Bryan Mercurio, *World Trade Law Text Materials and Commentary* 779-782 (2008).

23 *Supra* note 16 at 374, 375.

(ii) Under World Bank

In 1978, the World Bank for the first time provided for a country classification system. This classification was based on World Developed Index and it defined developing countries as low income and middle income countries.[24]

At present the World Bank does not provide for a permanent definition of developing country. Every year in the month of July, it revises the classification of world's economies on the basis of Gross National Income (GNI). According to the classification for the year 2015, low income economies were defined as those with a GNI per capita of $ 1045 or less, middle income economies as those with GNI per capita of $1276 or more and upper middle income economies more than $ 4125 GNI per capita for the year 2014.[25]

(iii) Under United Nations

According to the United Nations (UN) there is no commonly agreed definition of the developing country.[26] United Nations Development Programme (UNDP) has classified countries on the basis of Human Development Index (HDI) which is a composite index measuring countries' achievement in longevity, education and income. On the basis of this classification, the developing counties are those countries with HDI between 51-75 per cent.[27]

With respect to the identification of the least developed countries, the Committee for Development reviews the list of least developed countries (LDCs) every three years and makes recommendations. The Economic and Social Council (EOSOC) is responsible for endorsement of these recommendations and the General Assembly of the United Nations decides on them. These countries are defined as low income countries having structural impediments to sustainable development based on the following three criteria (a) Gross National Income per capita; (b) Human Assets Index; and (c) Economic Vulnerability Index.[28]

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[24] Lynge Nielson, "Classification of Countries based on their Level of Development: How it is Done and How it Could be Done", IMF Strategy Policy and Review Department Working Paper, WP/11/31 (2011), 11 (2011), available at: http://www.imf.org/external/Pubs/ft/WP/2011/WP1131.pdf (Last visited on December 31, 2015).

[25] Available at: http://www.dataworldbank.org/new/new_country_classification_2015 (Last visited on December 31, 2015).

[26] Available at: http://www.stats.oecd.org/glossary/detal.asp?ID=6326 (Last visited on December 31, 2015).

[27] *Supra* note 21 at 8.

[28] Available at: http://www.un.org/en/development/desra/policy/cdp/ide_criteria_id-sh2 (Last visited on December 31, 2015).

Developing countries have proposed that such criteria should not be used for determining them because it could lead to their further classification which will be averse to their unity. Thus, procedure of defining a developing country was based on the principle of 'self election'.[29] It clearly points to the fact that identification of a country as a developing country depends on political considerations rather than on economic criteria.[30]

III

Developing Countries and the World Trading System

More than 80 per cent of the world's population lives in over 100 developing countries but they produce less than 20 per cent of the world's products and services.[31] In spite of this fact, developing countries have a great significance due to the presence of enormous natural and human resources which are essential for industrialized economies and also important for the world economy. Therefore, their interests were considered and protected in the multilateral trade agreements.

(i) Historical Account

Developing countries fought for the establishment of an equitable world order at the floor of the United Nations General Assembly. In 1962, the General Assembly approved a resolution calling for a United Nations Conference on Trade and Development (UNCTAD). The UNCTAD from its inception remained preoccupied with issues of the developing countries demanding reforms in the world economic order.[32]

The General Agreement on Tariffs and Trade in addition to promoting multilateralism in the international trade system has also bridged the gap between the developing and the developed countries.[33] When GATT came into existence only ten developing countries participated in its negotiation.[34] With time the participation of the developing countries increased in the GATT system but the ministerial decision of November, 1957 stated that trade of the developing countries has not increased as was expected.[35]

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[29] Vinod Rege, "Economies in Transition and Developing Countries Prospects for Greater Cooperation in Trade and Economic Fields" 27 *Journal of World Trade* 1, 94 (1993).

[30] *Id.* at 93.

[31] *Supra* note 15 at 128.

[32] Ash Narain Roy, *The Third World in the Age of Globalization* 9 Zed Books Ltd (1999).

[33] Naushad Ali Azad, "Multilateralism under GATT-WTO Regime: A Conceptual and Methodological Investigation" in Shahid Ahmed, Shahid Ashraf *et.al.* (eds.), *Regional and Multilateral Trade in Developing Countries* 367 (2011).

[34] India, Brazil, Burma, China, Ceylon, Chile, Cuba, Pakistan, Syria and Lebanon were ten original developing country members of the GATT.

[35] *Supra* note 16 at 375.

In 1965, the contracting parties adopted Part IV of the GATT which consists of Articles XXXVI, XXXVII and XXXVIII. Article XXXVI (Principles and Objectives) states that in order to raise living standard in the developing countries, their export earnings should be expanded by increasing access of their products in the world markets. Article XXXVII (Commitments) include legal reasons[36], obligations to consult and report[37] and aspirations of the developing countries to obtain a stand still on tariff[38] increases on their products and exemptions from actions otherwise permitted under the GATT.[39] Secondly in the year 1971, the GATT adopted following two waivers for two types of preferences to favour the developing countries (a) to set aside the most favoured nation obligation to permit 'generalized system of preferences'; and (b) permission for the developing countries to exchange tariff preferences among themselves. These waivers were made permanent through the enabling clause.[40]

The GATT under Article XVIII allowed developing countries to grant tariff protection and other assistance to promote establishment of industries with a condition that it is consistent with the policies of economic development designed to raise the general standard of living of their people.[41] It provided following privileges to the developing countries (a) a developing country can withdraw or modify a schedule concession in order to promote the establishment of a particular industry so that standard of living of people could be improved[42]; (b) a developing country can impose quotas for balance of payments reasons[43]; (c) a developing country can grant governmental assistance for promoting the establishment of a particular industry in order to improve living standard of people[44]; and (d) a country which do not meets the criteria of low living standards but is in the process of development can deviate from GATT rules to establish a particular industry.[45]

(ii) Developing Countries and Standard Code

It was in Tokyo Round (1973-1979) that for the first time in the GATT multilateral trade negotiations the problems of the developing countries assumed

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[36] GATT Art. XXXVII, para. 1.
[37] GATT Art. XXXVII, paras. 2, 5.
[38] GATT Art. XXXVII, para. 3.
[39] *Supra* note 16 at 382, 383.
[40] GATT contracting members, decision of November 28, 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries.
[41] Eliza Patterson, "GATT and the Environment Rules Change to Minimize Adverse Trade and Environment Effects" 26 *Journal of World Trade* 3, 103 (1992).
[42] GATT Art. XVIII, s. A.
[43] GATT Art. XVIII, s. B.
[44] GATT Art. XVIII, s. C.
[45] GATT Art. XVIII, s. D.

a prominent place. This reflected their increased economic and political significance in the international affairs and importance of their participation in the trade negotiations.[46]

The Standard Code was of special assistance to the developing countries by ensuring that national or international standards, quality certification systems and testing requirements do not create unnecessary obstacles to their trade. The Code provided for technical assistance to the developing countries in matters of preparing technical regulations, establishing national standardizing and certification bodies and establishing methods by which technical regulation of importing countries could be met. It also provided for special and more favourable treatment for the developing countries.[47]

(iii) Developing Countries and Uruguay Round

The Uruguay Round (UR) involved more comprehensive trade negotiations as both the developed and the developing countries made significant commitments to increase market access by reducing tariffs and dismantling non-tariff barriers.[48] It involved intense negotiations between the developed and the developing countries on various issues.[49]

During the Uruguay Round the developing countries fought for their interest and benefits. But due to their diverse interests, development constraints and dependence on industrial economies they were unable to provide a unified front on the negotiating issues. Therefore, at the end of this round the spirit of the developing countries was dampened as the outcome of the round were highly imbalanced in favour of the developed countries.[50]

(iv) Developing Countries under WTO Regime

Around two third of the World Trade Organization's membership consists of the developing countries. The WTO has acknowledged the special needs of developing countries. The Preamble of the Agreement Establishing the WTO states that:

Recognizing further that there is a need for positive efforts designed to ensure

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[46] The Tokyo Round of Multilateral Trade Negotiations (The General Agreement on Tariffs and Trade) Report by Director General of GATT Geneva, p. 1 (April, 1979).

[47] *Id.* at 66, 67.

[48] Taranath P. Bhat, "An Assessment of Gains to Developing Countries from Uruguay Round" XXX *Foreign Trade Review* 1, 77 (1995).

[49] Syed Aziz Anwar, "Third World Interests in Renewed Multilateralism: A New Agenda for WTO" XXIX *Foreign Trade Review* 4, 301 (1995).

[50] T. K. Bhaumik, *The WTO & Discordant Orchestra* 40-42 Sage India (2006).

that the developing countries, and especially the least developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development.[51]

To achieve the aim of the preamble the following methods were incorporated with respect to the developing countries (a) reduction of tariff; (b) reduction of other barriers to trade; (c) elimination of discriminatory treatment in the international trade; (d) facilitation of concessions of obligations to the developing countries; and (e) granting technical assistance and favourable treatment to them.[52]

The WTO agreements contain provisions for developing countries consisting of longer transition period, exemptions from obligations, technical assistance and special and differential treatment.[53] It provides obligation on the developed countries and international institutions for providing technical assistance to developing countries in areas in which they are hampered by institutional weakness.[54] With respect to the special and differential treatment, it is advocated that they should focus on establishing realistic transition periods to address their capacity constraints.[55] At present the WTO is facing various challenges before it, among them the issue of the developing countries need immediate attention.

These countries have experienced difficulties in implementing their obligations arising from the Uruguay Round. They are facing resource crunch which limit their capacity to participate in the WTO decision making process. Some developing country members do not have their delegation in Geneva and delegation of some countries is very small and under resourced compared to developed countries.[56] There are concerns in the WTO dispute settlement system which include the following (a) they lack financial means and expertise to protect their rights under covered agreements; (b) they do not have effective way of enforcing a favourable report; and (c) litigation at the WTO is expensive for smaller developing countries as they are unable to cover its legal fee.[57] Though developing countries are in majority, they do not play important role due to the fact that

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[51] Agreement Establishing the World Trade Organization, para. 2 of Preamble.

[52] Surendra Bhandari, *World Trade Organization (WTO) and Developing Countries* 312 Deep & Deep Publications (2007).

[53] Kumar Ratnesh, *WTO (World Trade Organization) Structure Functions Tasks and Challenges* 109 (2004); Also refer: http://www.wto.org/english/thewto_e/whatis_e/hf_e/dev1_e_htm (Last visited on December 31, 2015).

[54] Constantine Michalopoulos, "Developing Countries Strategies for the Millennium Round" 32 *Journal of World Trade* 5 (1999).

[55] *Id.* at 28, 29.

[56] Anne Capling, "The Multilateral Trading System at Risk?" in Ross P. Buckley (ed.), *WTO and the Doha Round: The Changing Phase of World Trade* 51-52 (2003).

they lack institutional and administrative capacities.[58] WTO is ineffective in preventing the developed countries to impose new obligations, which is making it difficult to address the imbalance between the developed and the developing countries within the system.[59]

(v) Developing Countries and Doha Round

The limitation and shortcoming of the WTO has been acknowledged in the post Uruguay Round ministerial conferences.

In Seattle Ministerial Conference the developing countries were apprehensive about developed countries for failing to advance liberalization.[60] It was stressed that the developing countries should be given bigger role in the WTO decision making and this call for reform was strongly encouraged by the developing countries.[61]

In Doha Round negotiations many issues involving the interests of the developing countries were discussed.[62] It has called for following initiatives with respect to the developing countries (a) to provide market access in product areas of particular concern to the developing countries; (b) additional special and differential treatment provisions in the WTO agreements to benefit the developing countries; and (c) technical assistance to increase the capacity of the developing countries to implement the WTO obligations.[63]

In post Doha scenario the conflict between the developed and the developing countries with respect to many unsolved issues has increased and it is going to have great impact on the World Trade Organization in future.[64] The developing countries can influence trade policy of trading partners and generally cannot

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[57] Kim Vander Borght, "The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current debate", 1226, available at: http://www.auilr.org/pdf/14/14-4-7.pdf (Last visited on August 5, 2011); Gregory Shaffer, "Weakness and Proposed Improvements to the WTO Dispute Settlement System: An Economic and Market Oriented View" 18, available at: http://www.ppl.nl/bibliographies/wto/files/5300a.pdf (Last visited on August 5, 2011).

[58] *Supra* note 16 at 389.

[59] *Supra* note 1 at 785.

[60] *Supra* note 53 at 51.

[61] William A. Dymond and Michael M. Hart, "Post Modern Trade Policy Reflections on the Challenges to Multilateral Trade Negotiations after Seattle" 34 *Journal of World Trade* 3, 35 (2000).

[62] WTO Ministerial Conference Fourth Session (Doha), held between 9-14 November 2001, *Ministerial Declaration,* WT/MIN (01)/DEC/1, 20 November 2001.

[63] *Supra* note 16 at 379, 380.

[64] Michael Hart, "The WTO and the Political Economy of Globalization" 31 *Journal of World Trade* 5, 75-93 (1997).

affect their terms of trade.[65] The question of whether international trade and liberalization has benefited the developing countries also depends on the behaviour and commitment of the developed countries.[66]

IV

Provisions of SPS Agreement for Developing Countries

The developing countries have encountered difficulties in complying with sanitary and phytosanitary measures of importing members and in the formulation and application of these measures in their territories.[67] Therefore, the SPS Agreement provides that in the application of sanitary and phytosanitary measures, the member countries should take into account the special needs of the developing countries.[68]

(i) Special and Differential Treatment

The SPS Agreement provides that where the appropriate level of sanitary and phytosanitary protection allows scope for the phased introduction of new SPS measures, longer time scales for compliance should be accorded on products of interest to the developing country members so that opportunities for their exports are maintained.[69]

The Committee on Sanitary and Phytosanitary Measures (SPS Committee) has granted developing countries, specified time limited exceptions from obligations according to their financial, trade and development needs.[70] In addition to this, the developing countries are encouraged to actively participate in the international standard setting organizations such as the Codex Alimentarius Commission (CODEX), the International Office of Epizootics (OIE) and the International Plant Protection Convention (IPPC).[71]

(ii) Technical Assistance

The developing countries are provided technical assistance for the purpose of allowing such countries to meet the level of sanitary and phytosanitary

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[65] Patrick Low, "Is the WTO Doing Enough for Developing Countries?" in George A. Bermann, Petros C. Mavroidis *et.al.* (eds.), *WTO Law and Developing Countries* 355-356 (2007).

[66] Charles Sampford and Teresa Chataway, "Living Up to the Promises of Global Trade" in Ross P. Buckley (ed.), *WTO and the Doha Round: The Changing Phase of World Trade* 9 (2003).

[67] SPS Agreement, para 7, of Preamble.

[68] SPS Agreement, Art. 10.1.

[69] SPS Agreement, Art. 10.2.

[70] SPS Agreement, Art. 10.3.

[71] SPS Agreement, Art. 10.4.

protection required in export markets.[72] Such assistance is given in the areas of processing technologies, research, establishing national regulatory bodies and in seeking technical expertise and training.[73]

(iii) Final Provisions

The SPS Agreement permits additional time to the developing countries to implement all or some of its provisions. The developing countries were permitted additional two years (until 1997) to comply with all provisions except those associated with transparency.[74]

(iv) Publication of Regulations

The SPS Agreement provides that all sanitary and phytosanitary regulations which have been adopted by the member countries should be published.[75] Except in urgent circumstances, members should allow a reasonable interval between the publication of a sanitary or phytosanitary regulation and its entry into force in order to allow time for producers in the developing country members to adapt their products and methods of production to the requirements of the importing member.[76] These provisions assist the developing countries to comply with sanitary and phytosanitary requirements enshrined in the SPS Agreement and facilitate their effective participation.[77]

In spite of the fact that the SPS Agreement has facilitated trade from the developing countries, these countries find it difficult to cope with the demanding sanitary and phytosanitary standards of the developed world. These countries have raised numerous concerns and issues with respect to the application of the Agreement.[78]

V

Impact of SPS Agreement on Developing Countries

The impact of the SPS Agreement on the developing countries is immense.

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[72] SPS Agreement, Art. 9.1.

[73] *Ibid.*

[74] SPS Agreement, Art. 14. For developing countries all provisions except Art. 7 and Art. 5.8 of the SPS Agreement. The least developed countries (LDC) were permitted an additional five years (until 2000) to comply with the SPS Agreement.

[75] SPS Agreement, Annex B, Item 1.

[76] SPS Agreement, Annex B, Item 2.

[77] Yukyun Shin, "An Analysis of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures and Its Implementation in Korea" 32 *Journal of World Trade* 1, 95 (1998); S. R. Myneni, *World Trade Organization (WTO)* 104-105 (2005).

[78] Arijay Chaudhary, *GATT: A Developing Country Perspective* 87-88 Asian Books Private Limited (2002).

This is retreated by the fact that the SPS Agreement recognizes difficulties faced by the developing countries in complying with the obligations under the Agreement and also in formulation and application of SPS measures in their respective legal frame work.[79]

(i) SPS Measures and Developing Countries

Sanitary and phytosanitary measures are important for the developing countries because agricultural products are predominant in their exports.[80] Unilateral imposition of sanitary and phytosanitary measures reflects the norms and interests of the developed countries.[81] These countries consider stricter sanitary and phytosanitary protection as compared to the developing countries due to demanding population, better organised class groups and social pressure.[82] In addition to this, general public in these countries demand more humane treatment for animals which in turn affect sanitary measures.[83]

The United States of America ranked third among markets for which sanitary and phytosanitary requirements are most significant impediment to trade behind Australia and the European Union.[84] Sometimes sanitary and phytosanitary requirement of these countries is even stricter than the international standards. During the outbreak of Bovine Spongiform Encephalopathy (BSE), the OIE did not agree to ban exports from countries where BSE was present. It advocated safety measures that must be taken in accordance with country's risk level. In spite of these guidelines Canada and the US enforced regulations banning import of beef and cattle from countries with BSE.[85]

Trade barriers increase the cost of trading, it is therefore difficult and costly for the developing countries to meet the quality standard imposed by the importing

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79 Refer SPS Agreement, para. 7 of Preamble, Annex B Item 1 and Articles 9, 10, 14.

80 Spencer Henson and Rupert Loader, "Barriers to Agricultural Exports from Developing Countries: The Role of Sanitary and Phytosanitary Measures" 29 *World Development* 1, 89 (2000).

81 Faizel Ismail, "Mainstreaming Development in the World Trade Organization" 39 *Journal of World Trade* 1, 15-16 (2005).

82 Rafael Leite Pinto de Andrade, "The Positive Consequences of Non-tariff Barriers" 43 *Journal of World Trade* 2, 365 (2009).

83 Terence J. Centner, "How Regulations Incorporating Environment Values Transcend International Commitments and Affect Production Agriculture" 27 *Journal of World Trade* 2, 136-137 (1993).

84 *Supra* note 9 at 195, 196.

85 Laura J. Loppacher and William A. Kerr, "The Efficacy of World Trade Organization Rules on Sanitary Barriers: Bovine Spongiform Encephalopathy in North America" 39 *Journal of World Trade* 3, 430-439 (2005).

from developed country.[86] It is claimed that SPS measures are impediments to exports from the developing countries in markets of the developed countries due to the difference in quality requirements and governmental regulations.[87] The SPS requirements for meat, marine and agricultural products has created problem for exports from the developing countries. This indicates that for these products there is a strict sanitary and phytosanitary control due to microbiological and pest risks.[88]

It clearly points to the fact that sanitary and phytosanitary measures have made the fault lines between the developing and the developed countries visible. The developed countries are of this view that much laxer SPS standard of the developing countries is threat to their more stringent standards, whereas developing countries on the other hand propose that these stringent regulations are discriminatory to their exporting capacity.[89]

(ii) Participation of Developing Countries in SPS Agreement

The SPS Agreement has facilitated exports from the developing countries by increasing transparency, promoting harmonization and preventing the imposition of trade barriers that cannot be justified scientifically.[90]

The benefits to the developing countries based on commitments of the member countries under the SPS Agreement are (a) enhanced transparency and reducing transaction costs of exports to countries with divergent SPS measures; (b) structured procedures for the settlement of disputes on the legitimacy of divergent national SPS measures; (c) minimizing the problems faced by the developing countries in the promulgation of SPS standards by the developed countries; (d) harmonization of national SPS measures; and (e) technical assistance from the developed countries.[91]

The developing countries have also actively participated in the SPS Committee. They have overall raised 173 trade concerns and in 169 cases, the measure at

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[86] Rina Oktaviani and Erwidodo, "Indonesia's Shrimp Exports: Meeting the Challenge of Quality Standards" in Peter Gallaghar, Patrick Low *et.al.* (eds.), *Managing the Challenges of WTO Participation: 45 Case Studies*, 261 (2005).

[87] *Supra* note 77 at 90.

[88] *Id.* at 92.

[89] Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade* 136 (1995).

[90] Akram A. Khan, "The Effect of Trade Liberalization on Indian Livestock Sector: Issues and Options" in Anil Kumar Thakur and Nageshwar Sharma *et.al.* (eds.), *WTO and India* 462 (2007).

[91] S. J. Henson, "Impact of Sanitary and Phytosanitary Measures on Developing Countries" *Report of Department of Agricultural and Food Economics of University of Reading*, p. 53, available at: http://www.cepaa.esalq.usp.br/pdfs/134.pdf (Last visited on April 26, 2012).

issue was maintained by them.[92] Between November 1995 and September 1998, only fifty percent of the developing countries participated in the SPS Committee's meeting and less than 20 percent attended five or more of these meetings.[93] These countries have stated that attending meetings of the SPS Committee and the international standard setting organizations is not important but what really matters to them is how much they have contributed in the discussions. The key constraint in this respect is the inequality between delegates from the developing countries and the developed countries and with respect to technical and scientific expertise.[94]

It is said that the developing countries as a whole have not actively participated in the SPS Agreement. In 1996 and 1998 ministerial conferences, the developing countries have called for assessment and evaluation of all benefits of the SPS Agreement.[95] These countries have raised following issues (a) insufficient attention is given to their needs in the standard setting procedure; (b) insufficient time is given to them to comply with such standards; (c) they do not have access to advanced scientific and technical expertise; (d) lack of information on SPS measures which impede exports; and (e) lack of expertise to determine the impact of such measures.[96] In addition to this, the developing countries have encountered other difficulties which are needed to be investigated and assessed.[97]

VI

Main Issues for Developing Countries

The developing countries lack resources to participate effectively in the WTO, therefore there is an apprehension that these countries are unable to exploit the benefits and opportunities provided by the SPS Agreement.[98] These countries are experiencing following difficulties and concerns with respect to application and implementation of the SPS Agreement.

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92 Veronique Fraser, "Horizontal Mechanism Proposal for the Resolution of Non-tariff Barrier Disputes at the WTO: An Analysis" 15 *Journal of International Economic Law* 4, 1037 (2012).

93 *Supra* note 88 at 57.

94 *Id.* at 58.

95 Asoke Mukerji, "Developing Countries and the WTO: Issues of Implementation" 34 *Journal of World Trade*, 6, 39 (2000).

96 *Supra* note 87 at 462.

97 Arun Goyal and Noor Mohd, *WTO in the New Millennium* 326 Academy of Business Studies (2001).

98 *Supra* note 77 at 85.

(i) Concerns in Technical Assistance

Technical assistance means giving consultation and grants to the developing countries so that they can comply with sanitary and phytosanitary requirements of an importing member. The SPS Agreement provides that technical assistance should be given to the developing countries bilaterally or through the international organizations. The effective implementation of this provision has assisted the developing countries to establish necessary infrastructure for effective implementation of the SPS Agreement[99]

Technical assistance is beneficial to the developing countries in the following manner (a) it helps to upgrade the technical skill of personnel working in laboratories, certification bodies and accreditation institutions in these countries; (b) it covers capacity building of the officials who are in charge of enquiry points in these countries; and (c) it assists these countries to cope with the scientific requirement particularly risk assessment.[100]

The provision of technical assistance has remained a statement of good intention rather than mechanism for lowering the costs of meeting sanitary and phytosanitary standards.[101] The general perception is that technical assistance fails to address problems of the developing countries which arise due to low level of economic development. It is provided to the developing country when it fails to comply with sanitary and phytosanitary requirements of the developed countries. Therefore, it is generally believed that this provision is reactionary in nature.[102]

Developing countries face problems in complying with sanitary and phytosanitary requirements due to the lack of technical knowledge.[103] They fear that maintaining scientific procedures and standards necessary to comply with the provisions of the SPS Agreement is beyond their technical and financial means.[104] These constraints impede their ability to promote their interests through the WTO and in implementing the provisions of the SPS Agreement.[105]

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[99] SPS Agreement, Articles 9.1 and 9.2.

[100] Mohammad Saqib, "The SPS Agreement and Developing Countries: Is It a Lost Cause?" in Bibek Debroy, Mohammad Saqib *et.al.* (eds.), *WTO at Ten Looking Back to Look Beyond* 399 (2005).

[101] *Supra* note 9 at 213.

[102] *Supra* note 77 at 98.

[103] David Collins, "Health Protection at the World Trade Organization: The J-Value as a Universal Standard for Reasonableness of Regulatory Precautions" 43 *Journal of World Trade* 5, 1084 (2009).

[104] Gavin Goh and Andreas R. Zielger, "A Real World Where People Live and Work and Die" 32 *Journal of World Trade* 5, 287 (1998).

[105] Gregor Shaffer, "Can WTO Technical Assistance and Capacity-Building Serve Developing Countries" in Ernst Ulrich Petermann (ed.), *Reforming the World Trading System Legitimacy, Efficiency and Democratic Governance* 249 (2005).

The provisions of technical assistance should be improved so that the developing countries get fully integrated in the world trading system and are able to implement the provisions of the SPS Agreement without any hindrance. The Doha Ministerial Conference provided that the WTO Director General should cooperate with the international standard setting organizations facilitating technical and financial assistance. It has urged developed countries to provide technical and financial assistance to the developing countries where they are incompetent to respond to SPS measures which impede their trade.[106]

(ii) Concerns in Special and Differential Treatment

Special and differential treatment is an expression which strikes for equitable world economic order. It involves all regulations advocated by the developing countries which are now a permanent feature of international trade obligations.[107]

According to the WTO Secretariat, special and differential provisions can be of following types (a) provisions which increase trade opportunities; (b) provisions which protect the interests of the developing countries; (c) technical assistance provisions; (d) provisions dealing with transitional periods; (e) flexibility of commitments; and (f) provisions concerning the least developed countries. The secretariat has also classified these provisions as mandatory and non-mandatory. The provisions containing the word 'should' are considered non-mandatory whereas those containing the word 'shall' are mandatory. The latter are flexible in their implementation and can be limited in their binding character.[108]

The SPS Agreement provides that members must take into account special needs of the developing country members while applying sanitary and phytosanitary measures.[109] This provision demands that prior to the application of SPS measures the needs of developing countries must to be considered. These countries have stated that sanitary and phytosanitary requirements of the developed economies are hurdle to their exports as non-compliance is difficult

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[106] United Nations Conference on Trade and Development (WTO Dispute Settlement 3.9 SPS Measures), UNCTAD/EDM/Misc.232/Add.13, p. 52-53, (2003), available at: http://www.unctad.org/en/DOCS/edminise232add13_en.pdf (Last visited on December 22, 2014). The World Trade Organization and the World Bank has established a new fund on September 27, 2002 to provide funding to the developing countries to assist them to meet sanitary and phytosanitary standards. The World Bank has already provided US$ 300,000 for the fund and the WTO has contributed through the Doha Development Trust Fund.

[107] Michael Hart, "The WTO and the Political Economy of Globalization" 31 *Journal of World Trade* 5, 84 (1997).

[108] Thomas Fritz, "Special and Differential Treatment for Developing Countries" *Global Issues Paper*, No. 18, 13 (2005), available at: http://www.thomas-fritz.org/special-and-differential-treatment-thomas-fritz.pdf (Last visited on July 20, 2015).

[109] SPS Agreement, Art. 10.1.

to prove in such cases.[110]

Developing countries have also stated that special and differential treatment has not been favourable to the extent which was expected as these provisions have not been converted into specific obligations.[111] In *EC-Approval and Marketing of Biotech Products* dispute, it was held that Article 10.1 of the SPS Agreement does not make it mandatory for the developed countries to grant special and differential treatment to the developing country members. The panel in the above dispute stated that the phrase 'take account of' in the above provision does not prescribe a specific result to be achieved and if a developed country member does not provide special and differential treatment to a developing country then it is not established that the former did not took into account the needs of the latter.[112] With respect to the burden of proof, the panel stated that burden is on the complaining party to demonstrate that the developed country member has not taken into account the needs of the developing country while making its decision.[113] The non-mandatory nature of this provision is a barrier for its strict application. In addition to this, there are a number of provisions which provides for differential treatment on the basis of development status. At present there is no guidance on the manner in which a development dimensions may be included in the main terms of the SPS Agreement.[114]

It has been observed that there is little assistance from the developed countries keeping in view special and differential treatment provisions. Several developed countries have shown their unwillingness to permit additional time for compliance and transitional arrangements. These countries have also not agreed to take sanitary and phytosanitary measures of the developing countries as equivalent to their own measures and has advocated stricter compliance.[115]

There is a need that special and differential treatment provisions must be reviewed and such review must include following points (a) identifying the current provisions; (b) considering whether non mandatory provisions should be made mandatory; and (c) how these provisions should be made more effective for the developing countries.[116]

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[110] *Supra* note 105 at 18.

[111] *Supra* note 97 at 398.

[112] Panel Report on *EC-Approval and Marketing of Biotech Products,* WT/DS291/R WT/DS292/R WT/DS293/R, paras 7.1620, 7.1621.

[113] Panel Report on *EC-Approval and Marketing of Biotech Products,* WT/DS291/R WT/DS292/R WT/DS293/R, paras 7.1623, 7.1624.

[114] Joanne Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary* 287 (2009).

[115] *Supra* note 77 at 98.

The SPS Committee in the first review has made following observations with respect to special and differential treatment (a) it has no information on the extent to which these provisions have been provided to the developing countries in accordance with Articles 10.1 and 10.2 of the SPS Agreement; and (b) it has no information on the extent to which the developing country members have used special treatment provision.[117] In October 2004, the SPS Committee has established a procedure to enhance transparency of special and differential treatment provisions.[118]

The Doha Ministerial Declaration has stated that all provisions regarding the special and differential treatment should be reviewed with a view to strengthening them and making them more effective and operational.[119] It has given mandate to the Committee on Trade and Development to identify those special and differential treatment provisions which are mandatory and to consider the legal and practical implications of making mandatory those which are currently non-binding. The developing countries have always insisted on the enforceability of special and differential provisions and have stated that the Doha mandate on special and differential treatment requires amendment of the text and rebalancing of rights and obligations. To this, the developed countries have stated that special and differential treatment provisions are voluntary commitments assumed by them in favour of the developing countries and that the recommendations of the developing countries will harden their negotiating position in future multilateral trade negotiations and compel them to insist on full reciprocity.[120]

The current discussion for strengthening special and differential treatment has not advanced as expected and a number of issues need to be discussed and resolved. The WTO has failed to work through the eighty eight proposals that would have filled the legal vacuum.[121] These eighty eight proposals were

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[116] Peter Kleen and Sheila Page, "Special and Differential Treatment of Developing Countries in World Trade Organization" *Global Development Studies No. 2*, EDGI Secretariat Ministry of Foreign Affairs Sweden (2005), p. 37, available at: http://www.worldfuturecouncil.org/fileadmin/user-upload/papers/40725-GI-Der-Stud-2.pdf (Last visited on July 15, 2015).

[117] G/SPS/12.

[118] G/SPS/33. The World Bank has stated that the developed countries should make assessment of a particular sanitary and phytosanitary measure on the developing countries and provide alternate measures to reduce its adverse effects.

[119] The Doha Ministerial Conference, 9-14 November 2001, WT/MIN (01)/17, para. 44. The Doha Declaration mandates the General Council to examine problems and to make recommendations to the next Ministerial Conference as to what measures could improve the integration of the developing countries.

[120] Seung Wha Chang, "WTO for Trade and Development Post Doha" 10 *Journal of International Economic Law* 3, 556 (2007).

[121] Ravinder Rena, "Impact of WTO Policies on Developing Countries: Issues and Perspectives" 4 *Transnational Corporations Review* 3, 12 (2012).

submitted by the developing and the least developed countries suggesting new wording in the WTO Agreements to introduce new special and differential treatment provisions and to strengthen the existing ones. In 2003, the chairman of the General Council subdivided these proposals in the following three categories (a) category I consisted of 38 proposals on which there was greater likelihood of reaching agreement with little changes; (b) category II consisted of 38 proposals which were in areas that were under negotiations as a part of the Doha Agenda and for them there was greater likelihood to get a better response within the framework of the negotiations; and (c) category III consisted of 12 proposals on which members have divergent views. The members at fifth Ministerial Conference agreed on 28 proposals which remained as 'agreed in principles'. By early 2004, difference of opinion erupted among the member countries and they even disagreed with respect to the adoption of already agreed proposals. In 2005, the chairman finally proposed that the members should work on the proposals submitted by the least developed countries.[122] Though the five proposals have made progress, the chairman in July 2005 stated that for other proposals it is difficult to make specific recommendations to the General Council. The Doha mandate on special and differential treatment has made little progress and the gap between the developed and the developing countries is widening.[123]

(iii) Concerns in Harmonization

World Trade Organization has recognized international harmonized standards and has encouraged member countries to use them in order to reduce distortions in market access.[124]

The SPS Agreement has played an important role in promoting harmonization of sanitary and phytosanitary measures by encouraging that the member countries should adopt these measures while taking into account recommendations and guidelines of the CODEX, the OIE and the IPPC.[125] It also provides liberty to the member countries to set their appropriate level of sanitary and phytosanitary protection.[126]

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[122] These proposals included the following (a) greater flexibility for the least developed countries to take up commitments consistent with their level of economic development; (b) improved access for the least developed countries to temporary waivers regarding one or more of their obligations; (c) duty free and quota free market access for goods originating from the least developed countries; and (d) greater flexibility to use trade related investment measures as a development tools.

[123] *Supra* note 117 at 553.

[124] Bijendra Shakya, "Nepal: Exports of Ayurvedic Herbal Remedies and SPS Issues" in Peter Gallaghar, Patrick Low *et.al.* (eds.), *Managing the Challenges of WTO Participation: 45 Case Studies* 432 (2005).

[125] SPS Agreement, Art. 3.1.

[126] SPS Agreement, Art. 3.

The international standard setting procedure is often criticised for the lack of transparency, representation and independence.[127] In case of sanitary and phytosanitary measures the reason for this is that the SPS Agreement does not define in clear terms when a standard should be considered as an international standard. In absence of a clear definition of an international standard, a standard is deemed to be an international standard even if only a limited number of countries have participated in developing such standard and adopted by a majority vote.[128] Even though harmonization of sanitary and phytosanitary standards has potential to facilitate exports from the developing countries, these countries are of this view that insufficient attention is given to their needs in the standard setting process.[129] It has been observed that these countries do not participate effectively in the standard setting process.[130] They have often criticised the manner in which standards are negotiated at the Codex Alimentarius Commission, the Office International des Epizootics and the International Plant Protection Convention.[131]

The reasons for the developing countries not participating effectively in the international standard setting process include the following (a) level of certain international standards is too high; (b) they are not satisfied by the decision making process; (c) they have insufficient capacity to participate effectively due to limited finances and lack of research and technical resources; (d) they find international standards inappropriate to be used as basis for domestic regulations; and (e) international standard setting process fails to take into account characteristics of the products and production methods of the developing countries.[132]

The SPS Agreement has not mentioned the procedure that international organizations should follow for setting international standards. In the CODEX and the OIE, standards are formed on the basis of simple majority rule where as in the IPPC, two-thirds majority is required. This traditional practice of standard setting has restricted participation of the developing countries.

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[127] Sara Pardo Quintillan, "Free Trade, Public Health Protection and Consumer Information in the European and WTO Context" 33 *Journal of World Trade* 6, 188 (1999).

[128] Ministry of Commerce and Industry (Government of India), *India and the WTO*, Volume 1, Number 7, 1999.

[129] *Supra* note 87 at 462.

[130] WT/GC/W/202.

[131] *Supra* note 112.

[132] Thorsten Muller and Matthias Leonhard, "Fixing the Codex? Global Food Safety Governance Under Review" in Christian Joerges, Ernst Ulrich Petersmann *et.al.* (eds.), *Constitutionalism, Multilevel Trade Governance and International Economic Law* 273-274 (Hart Publishing, Oregon 2011). Vinod Rege, "GATT Law and Environment Related Issues Affecting the Trade of Developing Countries" 28, *Journal of World Trade* 3, 108 (1994).

The developed countries have employed every mechanism to protect the interest of their consumers and have edge over their developing counterparts, who lack resources and expertise.[133] Since developing countries do not participate effectively in the international standard setting process they are unable to implement standards established by the developed countries.[134] In addition to this, participation of public interest groups, private entities and non-governmental organizations has also restricted participation of the developing countries. The reason for this is that, such groups based in the developing countries do not have expertise to be at par with those from the developed countries.[135]

The SPS Agreement has allowed sanitary and phytosanitary measures at a level more stringent than the international standards, if there is a scientific justification or as a consequence of the level of SPS protection the member determines to be appropriate in accordance with the provisions of Article 5 of the Agreement. In *EC-Hormones* dispute, the Appellate Body stated that the right of the member to establish its own level of sanitary protection is an autonomous right and not an exception from a general obligation under Article 3.1.[136] This has in turn limited exports from the developing countries.[137]

The CODEX in its fourteenth session (19-23 April 1999) has advocated following points to improve the standard setting process (a) with respect to formation and adoption of standards effort should be made to reach at the consensus; (b) effort should be made to avoid voting on adoption of standards; and (c) steps should be taken to facilitate consensus.[138]

The SPS Committee has adopted provisional procedures to monitor the use of the international standards.[139] Such standards are identified under the following two criteria (a) non use of an existing international standard; and (b) non existence of international standards.[140]

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[133] *Supra* note 79 at 373.

[134] Marsha A. Echols, *Food Safety and the WTO: The Interplay of Culture, Science and Technology* 101 (2001).

[135] *Supra* note 129 at 275.

[136] Appellate Body Report on *EC-Hormones*, WT/DS26/AB/R WT/DS48/AB/R, para. 172.

[137] John S. Wilson and Tsunehiro Otsuki, "Food Safety and Trade: Winners and Losers in a Non Harmonized World" 18 *Journal of Economic Integration* 2, 285 (2003).

[138] *Supra* note 97 at 385.

[139] Gabrielle Marceau and Joel P. Trachtmann, "The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement and the General Agreement on Tariffs and Trade" 36 *Journal of World Trade* 1, 840 (2002).

[140] Yoshiko Naiki, "Accountability and Legitimacy in Global Health and Safety Governance: The World Trade Organization, the SPS Committee and International Standard Setting Organization" 43 *Journal of World Trade* 6, 1274 (2009).

In the Doha Ministerial Conference it was stated that the WTO, the Food and Agriculture Organization (FAO), the World Health Organization (WHO) and the OIE should take important steps to enhance the participation of the developing countries in development and application of the international standards and these organizations should established funds for this purpose.[141]

It is advocated that harmonization should be achieved in establishing recognition and application of sanitary and phytosanitary measures throughout all member countries. In order to make harmonization beneficial for the developing countries, it is essential that role of the international standard setting organizations should be reorganized in such a manner so that it can facilitate their effective and large scale participation.[142]

(iv) Concerns in Equivalency

The SPS Agreement has stated that the member countries should accept sanitary and phytosanitary measures of other member countries where they can be demonstrated to be equivalent and offering same level of protection.[143] The benefit of this provision is that it protects exporting countries from unjustified trade restrictions even when their products are produced under different sanitary and phytosanitary regime.[144]

The language of equivalency provision states that the member countries should take sanitary and phytosanitary measures of other countries equivalent if the exporting country demonstrates to the importing country that its measures achieve the importing country's appropriate level of sanitary and phytosanitary protection.[145] From the above wording, it can be concluded that if a particular member country is unwilling to import products from another member country, it can do so under the pretext that the exporting member is not in a position to demonstrate that its measures achieve the importing country's appropriate level of sanitary and phytosanitary protection.[146]

The provision of equivalency is an important issue for the developing countries due to the following reasons (a) it provides inputs regarding their technical capacity to comply with sanitary and phytosanitary requirements; and (b) it is

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[141] Rudiger Wolfrum, Peter Tobias Stoll, *et.al.* (eds.), *WTO Technical Barriers and SPS Measures* 510-511 (2007).

[142] *Supra* note 88 at 73.

[143] SPS Agreement, Art. 4.

[144] *Supra* note 77 at 94.

[145] SPS Agreement, Art. 4.1.

[146] N. N. Varshney, "Sanitary and Phytosanitary Measures" in A. K. Vasisht, Alka Singh *et.al.* (eds.), *WTO and New International Trade Regime Implications for Indian Agriculture* 213 (2003).

evidence of the fact that the developing countries and the developed countries follow different sanitary and phytosaniatry system due to diverse climatic, developmental and technological conditions.[147] The application of this principle has been limited with respect to the developing countries. These countries have stated that in most of the cases the importing countries have asked for 'sameness' of SPS measures instead of 'equivalency'.

There is a link between equivalency and appropriate level of protection.[148] The exporting country has to identify the importing country's acceptable level of sanitary and phytosanitary protection and the importing country should supply correct information with respect to acceptable level of risk so that the exporting country is able to comply and demonstrate that its measures are equivalent. The importing member is not free to determine its level of protection in arbitrary manner.[149]

The decision on implementation of Article 4 of the SPS Agreement has stated following considerations for the importing country (a) it should explain the objective of sanitary and phytosanitary measures; (b) it should identify the risk which is to be addressed by sanitary and phytosanitary measures; (c) it should indicate the appropriate level of protection that sanitary and phytosanitary measure is deemed to achieve; and (d) it should provide technical assistance to the developing country.[150]

The SPS Committee is the forum where discussion involving draft guidance for the recognition of equivalence of products on basis of categorization of trade patterns and risks is held.[151] It has adopted 'Decision on the Implementation of Article 4 of the SPS Agreement' in October 2001 and this decision provides guidance for the governments negotiating the recognition of equivalent measures.[152] In spite of various limitations associated with equivalency provision with respect to the developing countries, it has facilitated access for their products in the international markets and most particularly in the markets of the developed countries.[153]

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[147] Simonetta Zarrilli and Irene Musselli, "The Sanitary and Phytosanitary Agreement, Food Safety Policies, and Product Attributes" in Merlinda D. Ingco, John D. Nash *et.al.* (eds.), *Agriculture and the WTO Creating A Trading System for Development* 221-222 (2005).

[148] SPS Agreement, Art. 4.1, 5.4 and 5.5.

[149] Appellate Body Report on *Australia-Salmon,* WT/DS18/AB/R, paras 199, 206.

[150] *Supra* note 144 at 222, 223.

[151] G/SPS/20 (Equivalence Program for Further Work Decision by the SPS Committee).

[152] G/SPS/19, G/SPS/20.

[153] *Supra* note 97 at 391.

(v) Concerns in Transparency and Notification

The SPS Agreement provides for transparency by providing obligations on the member countries to publish their respective sanitary and phytosanitary measures.[154] It also states that the member countries should provide information regarding use of risk assessment and national regulatory processes.[155] This is done by publishing and notifying all implemented and proposed sanitary and phytosanitary measures. Under transparency the member countries are also obliged to establish 'enquiry points'.[156]

The SPS Agreement has not specified a period of time between the publication of sanitary and phytosanitary measure and its coming into force. The mention of 'a reasonable interval' therefore provides for different periods between publication of regulation and date of entry into force.[157] Developing countries have expressed concern with respect to notification. They have stated that in certain instances notification have been issued on the last date of the month indicating next month as the date of entry in force, thereby providing no time to respond to a proposed measure.[158] These countries are of this view that current arrangements do not take into account their limitations in the cases where the time given between notification and application of sanitary and phytosanitary measure is inadequate to respond effectively.[159]

The developing countries face difficulties in participating effectively in transparency mechanism due to the following reasons (a) government officials in these countries do not have required expertise and awareness regarding transparency provisions; (b) these countries have inadequate scientific expertise to comment effectively on notifications; (c) they have insufficient surveillance modes and toxicological/epidemiological data; and (d) they have insufficient finances.[160] The capacity of these countries to comment on draft regulation is further obstructed by the language problem.[161] If the notifying country is a developed country then it is specified that the summary of the proposed regulation should be in one of the official languages (English, French and Spanish) of the WTO.[162]

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[154] Konstantinos Adamantopous (ed.), *Anatomy of the World Trade Organization* 10 (1997).
[155] *Supra* note 50 at 164.
[156] SPS Agreement, Art. 7 and Annex B.
[157] *Supra* note 75.
[158] *Supra* note 92 at 50.
[159] *Supra* note 77 at 98.
[160] *Id.* at 61.
[161] *Supra* note 144 at 228.
[162] SPS Agreement, Annex B, Item 8.

Transparency is an important provision for ensuring that the international trade should not be subjected to barriers.[163] Article 7 of the SPS Agreement is an effective tool to strengthen transparency and ensures effectiveness of the international trading system.[164] In this regard the WTO Secretariat has frequently assisted the member countries in understanding and developing notification procedure.[165] It is rightly said that the fate of the WTO depends on investigation of transparency.[166]

(vi) Concerns in Dispute Settlement

Dispute settlement procedure as provided in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) is applicable to the SPS Agreement. In addition to this, the SPS Agreement also provides liberty to the member countries to use dispute settlement system of other international organizations.[167] As the disputes involving sanitary and phytosanitary measures involves scientific and technical issues, the panel has discretion to seek advice from experts.[168]

The developing countries have participated in the dispute settlement system as complainants, co-complainants, defendants and third parties, but these countries are at greatest disadvantage in the area of the dispute settlement system. The WTO dispute settlement system provides special treatment to the developing countries. It includes legal assistance, presence of one developing country representative in the panel, good offices of the Director General and allowances as to time limits.[169] In spite of this, following problems are associated with the dispute settlement system (a) the present dispute settlement process is costly; (b) it is difficult to penalize the developed countries; (c) special and differential treatment principles has not been implemented effectively; and (d) the developing countries do not have sufficient representatives and delegates.[170]

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[163] *Supra* note 143 at 216.

[164] Chris Downes, "The Impact of WTO Transparency Rules: Is the 10,000TH SPS Notification A Cause of Celebration?- A Case Study of European Practice" 15 *Journal of International Economic Law* 2, 504 (2012).

[165] Eun Sup Lee, *World Trade Regulation International Trade under the WTO* 91 (2012).

[166] Robert Wolfe, "Regulatory Transparency, Developing Countries and the Fate of the WTO", p. 13, available at: http://www.cpsa-acsp-ca/paper-2003/wolfe.pdf (Last visited on July 24, 2015).

[167] SPS Agreement, Art. 11.1 and 11.3.

[168] SPS Agreement, Art. 11.2.

[169] Kim Vander Borght, "The Review of the WTO Understanding on Dispute Settlement: Some Reflections on Current Debate" p. 1230, available at: http://www.auilr.org/pdf/14/14-4-7.pdf (Last visited on August 5, 2011).

[170] Biranchi N. P. Panda, "Is Dispute Settlement System of the World Trade Organization An Adjudicative or Adjustive System?" 5 *Nalsar Law Review* 1, 82-86 (2011).

The WTO dispute settlement system has also pronounced judicial rulings based on the SPS Agreement.[171] With respect to the interpretation of provisions of the SPS Agreement, the Appellate Body has not addressed non-discriminatory sanitary and phytosanitary measures.[172] The panel proceeding with respect to SPS issues has a secretive nature.[173] There is no procedure to submit new scientific evidence by defendant government against whom the panel has given a ruling.[174]

The SPS adjudication is so complicated that the lack of scientific expertise and financial resources make it difficult for the developing countries to challenge sanitary and phytosanitary measures of other member countries.[175] They face difficulty while enforcing the panel's and the Appellate Body's decisions and in the application of law.[176] In disputes involving sanitary and phytosanitary measures the initial burden of proof rests on the complaining party to make a *prima facie* case. To collect scientific evidence and connect it with legal and factual argument is a tough task for the developing countries.[177] Further legal complexity coupled with scientific uncertainty has made SPS disputes tricky for the developing countries.[178] The strict interpretation of the SPS Agreement has also made the markets of the developed countries inaccessible to the products from the developing countries.[179]

The WTO has taken many steps to strengthen the position of the developing countries in the dispute settlement system. The Advisory Centre for WTO Law (ACWL) has provided legal advice and assistance to these countries in finding and financing relevant experts.[180] Secondly at the Doha Ministerial Conference, the member countries have agreed to 'Negotiations on Improvements and Clarification of the DSU'.[181]

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[171] *Supra* note 137 at 1256.

[172] *Supra* note 124 at 191, 192.

[173] Steve Charnovitz, "Improving the Agreement on Sanitary and Phytosanitary Standards" in Gary P. Sampson, W. Bradnee Chambers *et.al.* (eds.), *Trade Environment and Millennium* 186 (1999).

[174] *Id.* at 187.

[175] *Supra* note 101 at 287.

[176] *Supra* note 89 at 1064.

[177] *Supra* note 111 at 308.

[178] *Ibid.*

[179] *Supra* note 15 at 144.

[180] Gregory Shaffer, "Weakness and Proposed Improvements to the WTO Dispute Settlement System: An Economic and Market Oriented View" p. 24, (2005), available at: http://www.ppl.nl/bibliographies/wto/files/5300a.pdf (Last visited on August 5, 2011).

[181] Marc Iynedjian, "The Case for Incorporation Scientists and Technicians into the WTO Panels", 42 *Journal of World Trade* 2, 290 (2008).

(vii) Concerns in Adaptation to Regional Conditions

The SPS Agreement has recognized the concepts of 'pest or disease free areas' and 'areas of low pest or disease prevalence'.[182] It has stated that countries should ensure that SPS measures are adopted according to sanitary and phytosanitary characteristics of area of the product.[183] It puts obligation on the members to take into account the following factors (a) level of prevalence of specific diseases or pests; (b) existence of eradication system; and (c) appropriate criteria developed by the relevant international organizations.[184]

The developing countries have not been able to reap the benefits of this provision because eradicating a pest or disease from specific areas requires large investments and procedures. This is burdensome for these countries as they encounter difficulties associated with scientific side.[185] The assistance provided by the CODEX, the OIE and the IPPC to the developing countries is minimal for effective application of this provision.[186] This is clear from the fact that the CODEX has still not recognized the concept of regional conditions.[187]

The developed countries have favoured conducting risk assessment to confirm existence of free zone by their own appropriate level of disease control protection and this has made the parameters provided by the developing countries useless.[188]

(viii) Concerns in Mutual Recognition Agreements

Mutual Recognition Agreement (MRA) is a framework arrangement established in support of liberalizing and facilitating international trade.[189] These agreements can take following forms (a) they can be limited to testing methods; (b) they can cover conformity assessment certificates; and (c) they can be full-fledged and include standards themselves.[190]

These agreements negotiated between several developed countries have increased barriers for exports from the developing countries.[191] The developing countries have participated at a very small scale in these agreements. This is due to the limited capacity of these countries to carry out the functions of

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[182] SPS Agreement, Art. 6.
[183] SPS Agreement, Art. 6.1.
[184] *Ibid.*
[185] *Supra* note 144 at 229.
[186] *Supra* note 97 at 396.
[187] *Supra* note 143 at 215.
[188] *Supra* note 138 at 475.
[189] Available at: http://www.investasean.asean.org (Last visited on May 21, 2015).
[190] *Supra* note 97 at 391.
[191] *Supra* note 78 at 16.

certification and accreditation of laboratory testing. Secondly, the regional standard setting bodies in the developing countries have accomplished little due to the lack of interest on part of these members.[192]

(ix) Concerns in Triennial Review

The Committee on Sanitary and Phytosanitary Measures is responsible for reviewing the operation and implementation of the SPS Agreement.[193] In the first review (1999), the SPS Committee suggested that the SPS Agreement had improved international trading relationships. No modifications were made to the text of the Agreement but the recommended procedures for notification of sanitary and phytosanitary measures were slightly amended.[194] Since the review was regarded not exhaustive, it was decided that the member countries could raise any issue to be considered by the SPS Committee. This power has opened a proactive approach for the developing countries.[195]

The basic concern raised by the developing countries in the review was with regard to implementation issues. The reason for these issues was the lack of knowledge of sanitary and phytosanitary measures applied by the developed countries and the arbitrary manner in which such measures were introduced by them. It was stated that there is no information with regard to the extent of application of special and differential treatment provided to the developing countries. With respect to harmonization, these countries stated that international standards should be formulated with their effective participation in the standard setting procedure.[196]

The SPS Committee has also accomplished very little with respect to providing technical assistance to the developing countries. Though they have raised many issues related to sanitary and phytosanitary measures in the SPS Committee, their participation is still limited in its proceeding.[197] The developing countries have asked for effective reforms in decision making at the WTO. It is

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[192] Simonetta Zarilli, "WTO Sanitary and Phytosanitary Agreement: Issues for Developing Countries", *Trade-Related Agenda Development and Equity Working Paper*, p. 18, 1999, available at: http://www.carib-export.com/obic/documents/WTO_Agreement_On_Sanitary_and_Phytosanitary_Measures.pdf (Last visited on December 7, 2014).

[193] SPS Agreement, Art. 12.7.

[194] Joost Paulwelyn, "The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three SPS Disputes *EC-Hormones, Australia-Salmon and Japan-Varietals*", 2 *Journal of World Trade* 4, 643 (1999).

[195] *Supra* note 189 at 2.

[196] Review of Operation and Implementation of the SPS Agreement, SPS Committee Document, G/SPS/12, para. 4, dated March 11, 1998.

[197] Henrik Horn and Petros C. Mavroidis, "In the Shadow of the DSU: Addressing Specific Trade Concerns in the WTO SPS and TBT Committees", 47 *Journal of World Trade* 4, 740 (2013).

evident that imbalance and concerns of these countries will raise disputes for resolution before the WTO dispute settlement body.[198] The *India-Agricultural Products* dispute is an important dispute between India and United States and was the first challenge to the sanitary and phytosanitary measure imposed by the developing country.

VII

India-Agricultural Products Dispute

Avian Influenza (AI) also known as 'Avian Flu' or 'Bird Flu' is an infectious viral disease of birds. It spreads to domestic poultry and causes large scale outbreak of serious diseases. Sometimes, it over shoots species barriers and infects human beings.

The dispute involved those AI measures which India has imposed on agricultural products imported from countries where Avian Influenza was reported. India has maintained these measures through Livestock Importation Act, 1898, Livestock Importation (Amendment) Act, 2001 and by Notification S.O. 1663(E) issued by the Department of Animal Husbandry, Dairying and Fisheries. The United States challenged India's measures on the basis that they are inconsistent with the provisions of the SPS Agreement. Earlier consultations which were held between India and United States on 16th and 17th April, 2012 did not resolv the dispute. Therefore, on 11th May 2012 the United States requested the establishment of a panel and the Dispute Settlement Body established it on 25th June 2012.

(i) Panel Report

With respect to the question whether India's AI measures fall under the category of sanitary measures, the panel stated that Livestock Act and Notification S.O. 1663(E) are applied for protection of animal and human health from avian influenza. Therefore, they are sanitary measures in accordance with the Annex A (1) (a) through (c) of the SPS Agreement and also qualify as 'laws', 'decrees' or 'regulations' as defined in the second sentence of Annex A (1) of the SPS Agreement.[199]

The panel further stated that these measures are inconsistent with the provisions of the SPS Agreement in the following manner (a) they are not based on the relevant international standards and are therefore inconsistent with Article

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[198] Michael J. Trebilcock, *Understanding Trade Law* 160 (Taschenbuch 2011).

[199] Panel Report on *India – Measures Concerning the Importation of Certain Agricultural Products,* WT/DS430/R, paras. 7.154, 7.159.

3.1; (b) they are not based on risk assessment and risk assessment techniques and hence are inconsistent with Article 5.1; (c) they are inconsistent with Article 2.2 since they are not based on scientific principles and are maintained without scientific evidence; (d) they are applied in a manner which constitutes disguised restrictions on the international trade and are therefore inconsistent with Article 2.3 and Article 5.5; (e) they are inconsistent with Article 6.1 and 6.2 since they are not adapted to sanitary characteristics of the areas from where products have originated and has failed to recognize the concept of disease free areas and areas of low disease prevalence; (f) they have failed to allow reasonable interval between publication of Notification S.O. 1663(E) and its coming into force and are therefore inconsistent with Annex B.2; (g) they are inconsistent with Annex B.5(b) as other members were not informed through WTO secretariat at the early stage of the proposed Notification S.O. 1663(E); and (h) since they are not in accordance with Annex B.2, Annex B.5 (a) (b) and (d) therefore, they are inconsistent with Article 7 of the SPS Agreement.[200]

The panel held that India's Avian Influenza measures has acted as barriers to US agricultural products including poultry and are in violation with respect to its obligations under Articles 2.2, 2.3, 3.1, 5.1, 5.2, 5.6, 6.1, 6.2, 7 as well as Annex B.2 and Annex B.5 (a) (b) and (d) of the SPS Agreement. Therefore, panel recommended that India should bring AI measures in conformity with these provisions.[201]

(ii) Appellate Body Report

India appealed against the panel report and on 26th January 2015 notified to the Dispute Settlement Body that it intends to appeal certain issues of law and legal interpretations covered in the report.

With respect to the panel's findings that India's measures are inconsistent with Articles 2.2, 5.1 and 5.2 of the SPS Agreement, India concluded that scientific evidences submitted by it establishes the risk of trade and fulfils the requirements of Article 2.2 of the SPS Agreement. It further stated that separate risk assessment is not required under Articles 5.1 and 5.2 of the SPS Agreement.[202]

India stated that analysis of the panel with respect to the relationship between Article 6.1 and Article 6.7 is incorrect and inconclusive. In case of harmonious reading of Articles 6.1 and 6.3, it should be taken that exporting member should

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[200] *Id.*, paras. 7.275, 7.318, 7.319, 7.334, 7.472, 7.479, 8.1.

[201] *Id.*, para. 8.6.

[202] Appellate Body Report on *India – Measures Concerning the Importation of Certain Agricultural Products,* WT/DS430/AB/R, para. 2.11.

first make a formal proposal under Article 6.3. After such proposal is made the importing member should take into account the factors outlined in the second sentence of Article 6.1.[203] India further raised the following arguments before the appellate body (a) its measures are not inconsistent with Articles 5.6 and 2.2 of the SPS Agreement because the United States failed to present a *prima facie* case under Article 5.6; and (b) it challenged the panel's consultations with individual experts on Avian Influenza surveillance regime with particular respect to India's domestic measures and disease situation.[204]

United States stated that India has not been able to establish that panel has erred and the panel's findings are consistent with Articles 2.2, 5.1 and 5.2.[205] It argued that while analyzing its claims under Article 6 of the SPS Agreement, panel did not commit any legal errors. It further concluded that India do not recognize the concept of pest- or disease- free areas and areas of low pest or disease prevalence.[206]

The appellate body stated that during the interpretation of the Articles 6.1 and 6.3 of the SPS Agreement, the panel has not made any mistake with respect to the application of law. Therefore, measures imposed by India are inconsistent with Articles 6.1 and 6.3 of the SPS Agreement. It also ruled that panel has not acted inconsistently while conducting objective assessment of the matter under Article 11 of the Dispute Settlement Understanding and in findings with respect to the United States claims under Article 2.3 of the SPS Agreement.[207]

The findings of the appellate body can be summarized in the following points (a) panel has not made any error with respect to the interpretation of Articles 2.2, 5.1 and 5.2 of the SPS Agreement and in understanding the relationship between Article 2.2 on one hand and Articles 5.1 and 5.2 on other; (b) these measures were inconsistent with Article 3.1 as India was not entitled to benefit from the presumption of consistency of its AI measures with other relevant provisions of the SPS Agreement and the GATT 1994 as provided under Article 3.2; and (c) the panel's interpretation of relationship between Articles 6.1 and 6.3 was upheld and AI measures imposed by India were held inconsistent.[208]

The Appellate Body while ruling that India's Avian Influenza measures are inconsistent with the provisions of the SPS Agreement has stated.

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[203] *Id.*, para. 2.33, 2.34.
[204] *Id.*, para. 2.38, 2.43, 2.44.
[205] *Id.*, para. 2.38, 2.56, 2.80.
[206] *Id.* , para. 2.68.
[207] *Id.*, para. 5.287.
[208] *Id.*, para. 5.287.

Appellate Body recommends that the Dispute Settlement Body request India to bring its measures, found in this report, and the panel report as modified by this report, to be inconsistent with the SPS Agreement, into conformity with the obligations under that Agreement.[209]

In *EC-Hormones* dispute it was observed that Article 5.1 is a specific application of the basic obligation given under Article 2.2 and thereby acknowledging the linkage between these provisions.[210] Similarly, the appellate body in *Australia-Salmon* dispute stated that maintaining measures inconsistent with Articles 5.1 and 5.2 amounts to violation of requirements as provided in Article 2.2.[211]

It was only in *Australia-Apples* dispute where panel differed from the above view and stated that such linkage does not mean that they are identical provisions. The focus of Article 2.2 is on the necessary link between SPS measures and scientific principle and evidence, whereas in case of Articles 5.1 and 5.2 such link is indirect as it rests on the requirement for a risk assessment. Hence SPS measure should be based on risk assessment which in turn must rest on scientific evidence.[212]

The *India-Agricultural Products* dispute is going to have a far reaching effect on the developing countries. The reason for this is that the obligation as specified under Article 2.2 has been linked with that of Articles 5.1 and 5.2 of the SPS Agreement. The appellate body in this dispute stated that the preferred means of complying with Article 2.2 is to follow the path of conducting risk assessment mentioned in Articles 5.1 and 5.2.[213] The consequences of this interpretation would be that the developing countries will have to invest their deficient resources in conducting risk assessment and in presenting scientific evidence. Further it will hamper their ability to deal with any sanitary or phytosanitary emergency due to outdated technical capacity and scientific knowledge.

VIII

Conclusion

Developing countries have played a decisive role in the international trade regime and have increased their economic growth. These countries have reduced

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[209] *Id.*, para. 6.2.
[210] Appellate Body Report on *EC-Hormones,* WT/DS26/AB/R WT/DS48/AB/R, para. 180.
[211] Appellate Body Report on *Australia-Salmon,* WT/DS18/AB/R, para. 1338.
[212] Panel Report on *Australia-Measures Affecting the Importation of Apples from New Zealand,* WT/DS367/R, para. 7.214.
[213] *Supra* note 196, paras. 5.21, 5.24, 5.26.

their trade barriers which is beneficial not only for the developed countries but also for other developing countries as majority of them import agricultural products from the developing world. In the international trading regime, the developed countries force their developing counterparts to acknowledge their interest without taking into consideration the concerns of latter. The latter should present a uniform platform and agree on a set of concrete objectives to receive uniform benefits of the multilateral trading system and thereby resisting the hypocrisy of the former.

The SPS Agreement has provisions which are entirely for benefits of the developing countries. The objective of these provisions is to facilitate exports from these countries by increasing transparency and by preventing trade barriers that do not have scientific justification. In spite of these benefits, the developing countries are not satisfied with the manner in which SPS Agreement has been applied. They feel that it has limited their export potential and provided barriers to their trade. The concerns of these countries are related to technical assistance, special and differential treatment, harmonization, equivalency, transparency, notification, dispute settlement, adaptation to regional conditions, mutual recognition agreements and triennial review. The application of science and risk assessment has also put them at disadvantage due to the lack of technical expertise, well equipped national laboratories and testing centres.[214] In addition to this, the manner in which developed countries manage and apply SPS measures is creating problems for the developing countries in implementing the provisions of the Agreement.

It is suggested that the developing countries should respond to the expectations of consumers by providing them safe products and for this they need to invest in research and in improving knowledge and skill.

The financial and technical assistance should be given to the developing countries so that they can implement effectively the provisions of the SPS Agreement. This technical assistance should include (a) assistance for eradication of diseases; (b) improving practice of manufacturing, packaging and transportation; and (c) demarcating disease free areas in case of any sanitary and phytosanitary crisis. The provision of technical assistance can be strengthened by taking following steps (a) if trade of the developing countries has been restricted by SPS measure implemented by a particular developed country then the latter should be asked to reconsider the measure; (b) the developed countries should be encouraged to develop alliances with the

[214] Filippo Fontanelli, "ISO and CODEX Standards and International Trade Law: What Gets Said is Not What's Heard", 60 *International and Comparative Law Quarterly* 4, 910 (2011).

developing countries so that latter could participate effectively in the international standard setting organizations; and (c) coordination between the developing countries, the developed countries and the international standard setting organizations should be encouraged.

Special attention should be given to improve the market access of the developing countries and in this respect special and differential treatment provisions should be improved. A modified framework of special and differential treatment should be included in the SPS Agreement which will make them mandatory for the developed countries and will enhance capacity of the developing countries in meeting obligations of the Agreement.

International standard setting procedure should be made transparent and efficient so that it can sort out all apprehensions of the developing countries. Standards developed by the CODEX, the OIE and the IPPC should be made mandatory for the developed countries in situations where sanitary and phytosanitary measures are creating barriers to exports from the developing countries.

The principle of equivalency should be applied at a regional level to mitigate concerns of the developing countries. This can be done by introducing regional agreements between them which will restrict the developed countries from taking decisions on the basis that the exporting developing country's SPS measures do not confirm with its own thus restricting them from creating barriers to trade.

Transparency should be improved by increasing time period between issuing of notification of sanitary and phytosanitary measure and its implementation. Following measures should be taken to improve Mutual Recognition Agreements (a) they should be formed in a transparent manner; (b) the SPS Committee should be informed while entering into these agreements; (c) other member countries should have access to the draft of these agreements; and (d) adopted text of these agreements should be published. Article 6 of the SPS Agreement which deals with 'adaptation to regional conditions' should be made beneficial for the developing countries in the following manner: (a) procedures should be simplified; (b) expert guidance and financial assistance should be given to these countries so that they can take appropriate measures to eradicate pest or disease; (c) if a particular area has been declared pest or disease free by any international organization, then the trading partner should not be allowed to challenge such decision; and (d) the SPS Committee should take appropriate steps to increase coordination between the developing countries and the international standard setting organizations.

The disputes involving sanitary and phytosanitary measures mostly involve scientific data and risk assessment techniques. The effective participation of the international standard setting organizations in the dispute settlement system should be encouraged which will assist in settlement of disputes amicably and on scientific and technical basis. The current system of remedies should be reformed in order to make it more beneficial for the developing countries.

In case of any sanitary and phytosanitary emergency, the developing countries can manage only when their institutional framework allows for a fast response and there is coordination between authorities and industry.[215] This coordination can be enhanced by providing training to respective authorities and exporters so that they can cope with sanitary and phytosanitary requirements.

In order to make provisions of the SPS Agreement to have substantive effect on the developing countries, considerable good will is required on part of the developed countries. These countries should take into consideration the concerns and problems of the developing countries while establishing sanitary and phytosanitary standards in their respective areas.

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[215] Claudia Orozco, "The SPS Agreement and Crisis Management: The Chile-EC Avian Influenza Experience" in Peter Gallaghar, Patrick Low *et.al.* (eds.), *Managing the Challenges of WTO Participation: 45 Case Studies* 166 (2005).

BOOK REVIEW

Lectures on Administrative Law by C. K. Takwani

Eastern Book Company, Fifteen Edn., 2016, Pg. 540

On 15th August 1947, when the new sovereign India was born, the citizens of this country were for long suffering from atrocious Rule of a foreign umpire and were overburdened with innumerable controls and regulations. The citizens had hardly any justiciable right. There were no effective remedies. During the foreign Rule, "Administrative Law" had virtually no relevance in the Indian subcontinent.

On 26th January 1950, when the Constitution of India came into force, citizens of India acquired justiciable rights which operate as one of the checks on the exercise of powers and functions of all the constitutional organs and functionaries. Part - III of the Constitution contains fundamental rights. Article 13 thereof declares that laws inconsistent with or in derogation of the fundamental rights shall be void. The word "Law" has been given an extensive, meaning.

Article 14 declares that the "State"shall not deny to any person equality before the law or equal protection of laws within the territory of India. The definition of the word "State"as set out in Article 12 is all pervasive to include all the constitutional and statutory institutions and functionaries. From these provisions, the Supreme Court of India has culled out the foundational principles of Administrative Law for upholding the Constitutional governance in India.

It is now well-settled as a result of the decisions of the Supreme Court in *E.P. Royappa* v. *State of Tamil Nadu*[(1974) 4 SCC 3 : (1974) 2 SCR 348] and *Maneka Gandhi* v. *Union of India* [(1978) 1 SCC 248] that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory: it must not be guided by any extraneous or irrelevant considerations, because that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected by Article 14 and it must characterise every State action, whether it be under authority of law or in exercise of executive power without making of law. The State cannot, act arbitrarily even in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory[1].

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[1] *Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489 at page 511

In their treatise "Administrative Law" (Tenth Edition), Wade and Forsyth have defined this branch of law as the 'law relating to the control of governmental powers'. The law they referred to is the English law. There Parliament as legislature is sovereign and is beyond legal control. This is not so in India. India is governed by Constitutional supremacy and not by Parliamentary supremacy. In India even the Parliament and the other legislative bodies are subject to the checks and balances engrafted under our Constitution as interpreted by the Supreme Court of India[2].

Further, "Rule of Law" is one of the basic features of our Constitution. It means that every person including the citizens ("the governed") and the authorities empowered to govern, are all bound by the law. In India Constitution is the fundamental and the supreme law. It is the touchstone for testing the validity of the rights, responsibilities, functions and powers of all, whether the governed or empowered to govern. The question is where we find the said checks and balances which ensures compliance with our Constitutional framework and thus the rule of law. Some of the parameters of such checks and balances have been expressly provided in the Constitution itself but the rest of it have been supplemented through statutory provisions or else have been developed by the Judiciary on case to case basis as and when the occasion arose.

I have closely gone through the sixth edition (2017) of the book "Lectures on Administrative Law" by Sri C. K. Takwani. The lectures contained in the book are divided in eleven chapters. These areIntroduction, Basic Constitutional Principles, Classification of Administrative Actions, Delegated Legislation, Natural Justice, Administrative Tribunals, Judicial Review of Administrative Discretion, Liability of Government and Public Corporations.

Before we try to understand the rationale of the eleven topics clubbed together under the title "Administrative Law" and their relevance under this branch of law, let us examine how and with what purpose it was developed as a separate branch of learning.

According to the learned authors "Administrative Law is that branch of Constitutional Law, which deals with the powers and duties of administrative authorities, the procedure followed by them in exercising the powers and discharging the duties and remedies available to an aggrieved person when his rights are affected by an action of such authorities."

According to me the above definition has to be understood in a wider sense particularly in the background of India's Constitutional scheme. It is for two

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[2] Supreme Court Advocate- on Record Association vs. Union of India, (2016) 5 SCC 1

reasons. Firstly, our Constitution does not provide for a strict separation of powers. Secondly, as already noticed above, the Constitutional limitations equally applies to all the organs and functionaries whether administrative, legislative or judicial.

In the case of *Sheonandan Paswan v. State of Bihar & Ors.*, Bhagawati, CJ. had observed: *"It is significant to note that the entire development of administrative law is characterised by a consistent series of decisions controlling and structuring the discretion conferred on the State and its officers. The law always frowns on uncanalised and unfettered discretion conferred on any instrumentality of the State and it is the glory of administrative law that such discretion has been through judicial decisions structured and regulated*[3]*."*

The book under review is essentially meant for the students. Chapter- 1 is an introduction to the Administrative Law as has been understood and defined by the jurists of eminence. It also summarises the primary function of this branch of law and how it has developed in different jurisdictions among the democratic countries. Chapter- 2 gives an insight to the basic Constitutional principles some of which has been declared to be the basic features of the Indian Constitution and are unamendable even by the Parliament.

Traditionally, Administrative Law deals only with the powers and functions of the executive authorities in their various capacities. Apart from discharging pure administrative functions, such authorities are quite frequently entrusted with the duties of framing subordinate legislations and also acting as adjudicatory authorities having direct bearing on the rights of the citizens andtheir associations, incorporated or otherwise. In whatever capacity such authorities function, they have to abide by the Constitutional and statutory limitations. Their actions and decisions have to be objective, transparent and in compliance with the rules of fair play and natural justice.

The book under review crystallises all the essential principles which are required to be followed by the administrative authorities in the discharge of their duties and functions and in case of violation of those principles, the type and extent of remedies available to the aggrieved persons.

The present updated edition of the book is bound to be immensely useful for the students, lawyers and judges alike and will be of interest for everyone who wants to understand the principles of administrative law.

Justice (Dr.) G.C. Bharuka*

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[3] In the case (1987) 1 SCC 288, Para 22 : 1987 SCC (Cri) 82 at page 323

* Former Karnataka High Court Judge.

Vepa P. Sarathi's *LAW OF EVIDENCE* Revised by Abhinandan Malik, Eastern Book Company, Seventh Edition, 2017, pp. 473, Rs. 445/-

Any judicial determination of a dispute, be it criminal or civil, is considered judicial for it being based on the evidence[1] rather than on the whims and fancies of the arbiter. Fair trial of a dispute is possible only when the judges apply the law of evidence in its proper letter and spirit. This makes the law of evidence the backbone of the entire judicial system. In other words, a legal system of a state can be assessed on the basis of the nature of the law of evidence applicable in that state. If the law of evidence applied by the legal system is fair, just and rational, the legal system can be understood to be fair, just and rational.

It is not any and every law of evidence that will suffice the need of civilised legal system. We find various principles of evidence made applicable in various legal systems in the past which will not be considered appropriate in the modern context. For example, trial by battle or trial by ordeal has been part and parcel of various ancient legal systems. However, not all these principles can be understood as rational and justified in the current context.

The law of evidence based on the principles of rationality must confirm with the human reason. Further, law of evidence should be objectively applicable to every person governed by it in an impartial manner. This is possible only when the law is made to accord with the case in hand in order to do complete justice. Another important facet of any law is that it should not, on one hand, be so rigid as to leave no room for discretion to the judge to apply law in varying circumstances. On the other hand, it should also be not so liberal so as to allow deposition of anything which is of mere remote relation to the fact in issue. Such flexibility would lead to wastage of time and money of the court as well as of the state machinery.

The book at hand for review was originally written by Prof. Vepa P. Sarathi. The book has ever since its first publication, been considered as a 'must read' for beginners in law as well as for professionals in law. A celebrated book, as this is, requires utmost labour when being revised and any such author must have certainly toiled hard to match the expectations of the reader as well as to ensure quality contribution to the existing stock of knowledge. The present work of revision by author Abhinandan Malik meets the expectation of the readers as it has maintained the standard for which the book is known in the legal fraternity.

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[1] See the definition of judicial proceeding as given in Section 2 (i) of The Code of Criminal Procedure, 1973.

One of the most unique attributes of this book is its unconventional manner of writing. A break from the typical style of section wise commentary gives it a fresh flavour making it a treat to read. Prof. Sarathi adopted the topical manner and goes on to explain the law of evidence dividing the chapters on the basis of various topics. This way the author discusses the entire topic in one place and provides cross reference. The topics are then further divided into subcategories and explained in detail making use of various judicial precdents, landmark cases and interpreting the legal principles of the statute.

The book contains eleven chapters and two append ices in total. The introductory chapter of the book, by raising questions such as that of relevance of studying the law ofevidence in law schools, gives an insight as to where and what is the importance of the law of evidence in the entire judicial process. The chapter gives a bird's eye view of civil as well as criminal trial and then contextualises the place of evidence law. The chapter also explains the concept of *lex fori* and traces the origin of evidence law in India.

The second chapter titled 'Theory of Relevancy' begins with a discussion on meaning and types of evidence which are permissible to be given in the court of law. It goes on to deal with the nature of admissibility and relevancy, hearsay evidence and circumstantial evidence. Every aspect has been dealt with in an appropriate manner along-with latest case laws. This chapter also discusses the latest developments in evidence law such as video conferencing, electronic evidence and audio CD etc.

The third chapter of the book is the biggest and the most detailed as it deals with 'Relevant Facts' which is the most important aspect of the law of evidence. The chapter is divided into twenty one parts discussing different topics covered in the Chapter II of the Indian Evidence Act i.e., Of The Relevancy of Facts. The topics discussed herein are *Res Gestae,* Admission, Confession, Opinion of Third Person, Relevancy of Previous Judgments among others. The author has not only broken every section into basic ingredients but also explained the various illustrations which give a comprehensive understanding of every aspect.

Chapter four deals with facts of which evidence *need not* be given, whereas, Chapter five deals with facts of which evidence *cannot* be given. The fifth chapter discusses the issue of 'estoppel' in a crisp, yet in a detailed manner. It includes a discussion on comparison of estoppels with other terms such as admission and *Res Judicata.* The sixth chapter deals with the burden of proof.

Chapter seven titled 'Witnesses' begins with the issue of competency of witnesses and that of the party and their spouse. The chapter comprises the

discussion on Privileged Communication and Accomplice testimony. It also deals with the procedure of examination of witnesses such as the order of examination, meaning of terminologies such as examination-in-chief, cross-examination and re-examination. It goes on to discuss the law relating to judging the credibility of witnesses.

The eighth chapter moves on to other forms of proof in the law of evidence by discussing 'Documentary Evidence'. The ninth chapter deals with the exclusion of oral evidence by documentary evidence. The chapter discusses the best evidence rule and the exceptions comprehensively with the help of various case laws.

Chapter ten of the book deals with the 'Weight of Evidence' . This chapter can be considered as a pre-emptory chapter and it is advisable that this chapter be read in the very beginning rather than after finishing the first nine. This chapter offers clarification as to how the evidence, though relevant and admissible, mayor may not be sufficient to fasten the liability or guilt of a person.

The last, and the eleventh, chapter ofthe book deals with the power of an Appellate Court.

Ever since the first edition of the book, there have been various amendments relating to criminal justice administration, especially in the Code of Criminal Procedure and Indian Evidence Act. The latest of such amendments is the Criminal Law Amendment Act, 2013. The various amendments have been incorporated in the book at the due place. The book also discusses the impact of these amendments in sufficient details.

The revising author has made an attempt to give more detailed explanations of certain topics in various chapters. For instance the discussion on the topic of circumstantial evidence is much better than the earlier edition with latest case laws on the subject. Similarly we find better discussion on the topic like documentary evidence, test identification parade, identification by voice. The book also relates the evidence law with the emerging technology like electronic evidence, video conferencing. The book also relates evidence law with the crimes like honour killing, cyber crime and other recent phenomenon.

The publisher of the book should be appreciated for the margins provided on all the sides of the book, as it helps to jot down the relevant points instantly. The leading cases has been highlighted by the publisher by making them bold which is also indicative of the fact that the revising author as well as the publishers have put extensive research while revising the book. Another feature of this new edition is that the book avoids the first person usage of the language.

The book is priced reasonably and containing the book to below five hundred pages on the subject of law of evidence is commendable. The jacket of the book is also attractive and it catches the attention immediately. It being a paperback edition makes it easy to carry.

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COMMEMORATIVE SECTION

Remembering Professor Parmanand Singh
(15.7.1941 – 20.2.2017)

Professor Parmanand Singh made exemplary contribution to the University of Delhi, Faculty of Law from 1971 to 2006 through inspiring teaching, socially relevant research and efficient and effective administration as Professor In-Charge of Law Centre II and the Campus Law Centre and as Dean, Faculty of Law. With equal distinction he also served the Banaras Hindu University, Faculty of Law for a few years in between. A quite unassuming but individualistic person, he never gave chance to anyone to get offended by his words or action. While he was nice to everyone, he was very selective in making close friends among his colleagues. For friends like me he could go to any extent in giving right advice and defending them against all odds. I was one of his such friends who enjoyed it from the year 1961 when I joined LLM class with him at Lucknow University until he breathed last. I would rather say that it may continue until I also breathe last because of my close contacts with his family. Going by our mythology it may continue forever in the lives beyond this life.

For us as family at the Faculty of Law along with his personal qualities his contribution to quality teaching, research and publications need to be highlighted more than ever because of their continuing downward index. In 1970s, when Professor Parmanand Singh joined the Faculty, its teaching, research and publications index was still rising quite fast. Almost all the Faculty members and the students were trying to do their best in teaching and learning. Research was considered as *sine qua non* for good teaching and, therefore, every one of us tried to research and publish as well as to earn research degrees either within the country or abroad. It is in that environment that Professor Singh started publishing and also earned his PhD degree from Delhi University soon after joining it. With passing time he continued to refine these qualities so much so that not only he visited several universities and institutions abroad for teaching and research, he was continuously in demand for them until he was unexpectedly taken over by his fatal disease which confined him to home and hospitals. Institutional heads and students continued to wish him early recovery until the end so much so that one of his writings appeared posthumously.



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