॥ विद्या परमं बलम्॥
CPJ
Group of Institutions
GATEWAY TO KNOWLEDGE

Volume VI July 2016
ISSN: 0976-3562

LAW JOURNAL

A Journal of Chanderprabhu Jain College of Higher Studies & School of Law

CPJ LAW JOURNAL

VOL VI **JULY 2016** **ISSN: 0976-3562**

A Journal of Chanderprabhu Jain College of Higher Studies
&
School of Law

Narela, Delhi-110040

2016

Price ₹ 500 (India)

$ 20

FOUNDER'S MESSAGE

It gives me a great pleasure to present our July, 2016 issue of 'CPJ Law Journal' published annually. CPJ Law Journal has successfully completed its 6th Anniversary serving the Law Fraternity. Our Journal continues to thrive as a storehouse of contributors to the broad area of law. This journal wants to accomplish lots of milestone in terms of defining and redefining paradigms to achieve excellence in the area of legal research. We will rely on honesty, integrity, strength and ability of our contributors to place 'CPJ Law Journal' among the very best. The Editorial Board is dynamic; it will offer a platform to the contributors to address the evolution and new areas of interest in law. We endeavor to attract and publish high quality papers which are aimed essentially and substantially towards bridging the gaps between the legal loop holes of the society. I take pride in congratulating all contributors of this issue & give my heartiest thanks to the whole editorial board of this Journal.

All the young dudes
Carry the news
Boogaloo dudes
Carry the news

- David Bowie, "All the Young Dudes"

We would like to hear from you about your views, suggestions and feedbacks for our journal so that we can improve and understand our readers mind. Please feel free to drop us mail at *lawjournal.cpj@gmail.com*

For Courses, Events, Updates and other information, visit our Online Portal *www.cpj.edu.in*

With Regards,

Shri Subhash Chand Jain
Founder, CPJ Group of Institutions

FROM THE DESK OF PATRON

The initiative of the Chanderprabhu Jain College of Higher Studies & School of Law in regularly publishing CPJ Law Journal containing insightful research papers is a praise worthy attempt by the Editorial Team in spreading legal awareness and knowledge.

Change is the law of nature. Nothing remains static and therefore we should always strive for the best and adapt ourselves to the changing times, technology and the needs of the changing society.

Quality legal research and standard publications constitute one of the important mandates of a leading law school like Chanderprabhu Jain College of Higher Studies & School of Law and I am confident that readers will find the present insure of the CPJ Law Journal interesting and thought provoking CPJCHS & SOL solicits valuable suggestions from all our learned readers for making the journal more useful, relevant and dynamic.

Love & Best Wishes!

Mr. Abhishek Jain
General Secretary
CPJ–CHS & SOL

FOREWORD

I'm extremely delighted to read and possess the July, 2016 Issue of the *CPJ Law Journal.* A glance through the pages of this Journal will show that it is an unusual type of publication. It consists of words and complete analysis of the articles covered. This issue of the Journal touches upon a number of issues worthy of note in present scenario. A highly evolved and complex justice system makes enormous demands on the people who work in it. Law Students and Professionals need up-to-date information as well as professional analysis on land mark judgments. *CPJ Law Journal* delivers this vital information to them.

Life is less about the destination and more about the opulent Journey. No journal will be the same as compared to other because the approach to contemplating and completing the entries will be as unique as the experiences of the writers. On behalf of all of the authors of *CPJ Law Journal,* I hope you find this particular edition both enlightening and informative. What has impressed me most while perusing the manuscript handed over to me is the diligence and meticulous care with which each of the authors of their respective articles which includes law professor, advocates as well as law students have approached the subject matter of their respective articles. Such a journal for the practitioners, law professors and law students is the need of the hour.

CPJ Law Journal is in its 6th year of continuous publication, with a diverse, professional, highly engaged and expert global readership. This journal welcomes and encourages original research based papers, articles etc., which is an attempt to cover almost all the subjects relating to the legal field. It is a matter of immense pleasure for me to be associated with it. I congratulate the Founder of *CPJ Law Journal* that he has established such a great platform, where any legal scholar can enhance his legal skills at the stroke of one click. Ultimately, it aims to foster the profession of law and to provide leadership in the field of legal information.

Dr. Sanjay Singh
Editor–in–Chief

EDITORIAL NOTE

Dear Readers,

We are presenting to you June, 2016 Issue of CPJ Law Journal. Our Basic aim behind introducing this journal is to create a new forum for exchange of ideas on all aspects of legal studies and we assure to keep you updated with recent developments in the legal world. Future scope of journal is open to your suggestions. You are invited to contribute for the Journal, your submissions should include original research articles and commentaries on legal aspects.

The CPJ Law Journal is a peer reviewed journal which is published annually. The journal publishes scholarly articles and commentaries on various aspects of law contributed by jurists, practitioners, law professors and students. The primary aim of this journal is to provide close insights into the various contemporary and current issues of law to the readers. Contributing to this journal provides an opportunity to authors to take an in depth study for in specific areas of the law and enhances their skills in legal research writings and analysis.

Talking about this Journal, it is great to be part of such a great initiative which provides all possible services to legal fraternity. It is not only confined to being a paper collection activity, rather it aims at providing services for all round development of law students, professionals and all others in this field .

Also being from law background we feel that it is our prime duty to contribute for development of the society and we have taken many initiatives in this regard also by organizing various events of social relevance.

I hope you find this issue of journal informative and interesting. The success of this enterprise depends upon your response. We would appreciate your feedback.

Happy Reading!

Dr. Neeta Beri
Editor

MESSAGE FROM THE ADVISORY BOARD

Dear Readers,

Getting published is something all law professionals strive to achieve & it feels great to me that CPJ law journal is providing that platform. CPJ law journal is a prestigious law journal of India. It is dedicated to express view on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the minds of young law professionals to contribute to the field of law.

I wish to express my sincere thanks to the editorial team who have extended their unflinching support for the launch of 6th volume of the CPJ law journal. I wish CPJ journal my very best.

Prof. A.K. Bansal
Ex. Dean
Faculty of Law
University of Delhi

Dear Readers,

It is quite heartening to know that Chanderprabhu Jain College of Higher Studies & School of Law (Affiliated to Guru Gobind Singh Indraprastha University, Delhi) is bringing out the sixth volume of the **CPJ Law Journal** with eagerness, enthusiasm and missionary zeal. The CPJ Law School is now gaining much attention in legal education circles and is attracting students in good numbers to make their careers in law and allied services and professions. Offering B.A.LL.B and BBA LL.B courses it gives ample opportunities to legal research also without which legal education cannot flourish in the country in its real sense. The CPJ Law Journal Team deserves very high appreciation for this endeavour. I cherish my association with the journal since its inception and wish it all success and endurance.

Prof. M. Afzal Wani
Dean
University School of Law and Legal Studies
Guru Gobind Singh Indraprastha University

CONTENTS

POVERTY AND THE CONSTITUTION

Prof. A. P. Singh[#]

ABSTRACT

Poverty, a social evil and one of the most debilitating factors in the growth of a socio-political system is a day to day reality of Indian system. And this is so despite seven decades of planned development. The framers of Indian Constitution were very much conscious of this dastardly fact of Indian life and therefore in the very document of our socio-political existence provided for a large number of provisions in terms of obligations of the State to ameliorate the conditions of poor and the deprived. The judicial system with Supreme Court at the Apex has creatively interpreted the constitution to ensure that the basic needs of the people are properly taken care. This paper is an attempt to evaluate this interface of the Constitution of India and the poverty of a large number of Indian people.

INTRODUCTION

Poverty is but the worst form of violence, so said Mahatma Gandhi and vowed to wipe out the tears from the eyes of every poor. Mahatma is no more but poverty continues to afflict the system which Gandhi dreamt of making poverty free. Poverty has been described as a social evil because of its debilitating effects on people's lives. This has also been described as a trap – a constraining force that prevents people from achieving their aspirations……if you're poor, you're struggling all the time - you have no choices in life. That's what poverty does to you, it gives you no choice. Poverty is also found to be the root of other social evils, for example in a deprived community, making money from drug dealing can seem an appealing option to young people, reflecting the notion that poverty is the keystone to other social problems. Poverty in India can be defined as a situation when a certain section of people are unable to fulfill their basic needs. According to the definition by Planning Commission of India, poverty line is drawn with an intake of 2400 calories in rural areas and 2100 calories in urban areas. If a person is unable to get that much minimum level of calories, then he/she is considered as being below poverty line.

India has the world's largest number of poor people living in a single country. Out of its total population of more than 1 billion, 350 to 400 million people are living

Professor (Law), University School of Law and Legal Studies, GGS IP University, New Delhi; available *at amarpalsingh@ipu.ac.in &* at +91 8860303226

below the poverty line. Nearly 75% of the poor people are in rural areas, most of them are daily wagers, landless labourers and self employed house holders. There is a bit of confusion as to the exact number of poor people in India. While World Bank presents a figure of 400-450 million people, planning commission of India puts this figure somewhere around 300 to 350 million people based on the criterion given above. Whatever be the figure, the instances of grinding poverty in India are legion and hunger deaths in Kalahandi and Koraput district of Orissa and Dungarpur of Rajasthan are not the thing of a very distant past. What is disturbing is that poverty ratio exists despite the variety of anti-poverty measures by governments in post-independent India.

The causes of poverty in India are said to be manifold, unequal distribution of income, high population growth, illiteracy, caste system etc. These causes of poverty existed at the time of independence and the framers of the Constitution were aware of these features that allow the poverty to flourish in this country. Therefore they provided for elaborate measures in the constitution itself whereby the problems of grinding poverty could be addressed to by the state system.

Indian Constitution to begin with, vowed to secure to all its citizens: Justice, social, economic and political; liberty of thought, expression, belief, faith and worship; and equality of status and of opportunity for the purpose of establishing a socialistic pattern of society. Number of directive principles of state policy commands the state to remove existing socio-economic inequalities by special measures. These provisions set forth a programme for the reconstruction and transformation of Indian Society by a firm commitment to raise the sunken status of the pathetically neglected and disadvantaged sections of our society.

A full fledged affirmative action programme was envisaged under the Indian Constitution to meet the goals set out in the preamble of the Constitution. The array of affirmative action programmes in India can roughly be divided into three broad categories. First are Reservations which allot or facilitate access to valued positions or resources; such as reservations in legislatures, including the reservations for Scheduled castes and scheduled tribes in Lok Sabha (House of the People; the lower house of Indian Parliament),[1] reservations in government services and reservations in educational institutions. Second type of protective measures are employed though less frequently in land allotment, housing and other scarce resources like, scholarships, grants loans and health care etc. Third type of protective measures is specific kinds of action plans for removal of untouchability, prohibition of forced labour etc.

1 Indian Parliament is a Bicameral Legislature. Rajya Sabha is the upper chamber of the Parliament having 250 members elected indirectly for 6 years. Lok Sabha is the lower chamber, consisting of 544 members elected directly for five years.

For the purpose of providing protection in terms of political representation, article 330 of Indian Constitution provides that seats in proportions to the population of scheduled castes and scheduled tribes in particular states are reserved in the Lok Sabha. The states which are predominantly tribal are excluded from the operation of article 330. Earlier section 2 of 23rd amendment of the constitution 1969, excluded the operation of article 330 to the tribal areas of Nagaland, but the exclusion has now been extended in respect of the state of Meghalaya, Mizoram and Arunachal Pradesh by 31st amendment Act as these states are predominantly tribal in nature.[2] Similarly under article 332, seats are reserved in the legislative assemblies of the states in favour of scheduled castes and scheduled tribes in proportion of their population in that particular state. Once again the state of Meghalaya, Nagaland, Mizoram and Arunachal Pradesh are excluded from the operation of article 332, simply because of the predominant tribal population in those states. Article 331 and 333 does the same in favour of members of Anglo-Indian Community.

It may be noted that initially these reservations were provided for only 10 years from the commencement of the Constitution under article 334. But this duration has been extended continuously since then by 10 years each time. Now the period of reservations in Lok Sabha and State legislative assemblies stands for 60 years from the commencement of the constitution.[3] It is felt that the handicaps and disabilities under which these people live have not yet been removed and that they need this reservation for some time more so that their condition may be ameliorated and they may catch up with the rest of the nation. The number of Lok Sabha seats reserved in a state of Union territory for such castes and tribes is to bear as nearly as possible the same proportion to the total number of seats allotted to that state or Union Territory in the Lok Sabha as the population of the scheduled castes and scheduled tribes in the concerned state or Union Territory bears to the total population of the state or the union territory.[4]

The fact that reservation of seats for scheduled castes and scheduled tribes in the legislatures is not on a permanent basis, but is at present provided for 10 years period at a time, shows that it is envisaged that the scheduled castes and scheduled tribes would ultimately assimilate themselves fully in the political and national life of the country so much so that there would be no need for any special safeguards for them and there would be no need to draw a distinction between one citizen and another. Their condition would improve so much that they would feel their interests secure without any kind of reservations.

2 V.N.Shukla, Constitutional law of India, Eastern Book Company Lucknow, 2004.
3 This has been effected vide, 79th Constitutional Amendment Act 1999, brought into force wef.25.1.2000.
4 Article 330 and 332 of Indian Constitution.

Reservation in government services as a measure of protective discrimination has been incorporated under article 16 (4) of the Indian Constitution. This particular provision falls under the head of "Right to Equality". In order to give effect to general right to equality under article 14, the constitution secures to all citizens a freedom from discrimination on grounds of religion, race and caste. In the specific application of this equality guarantee; the State is further forbidden to discriminate against any citizen on grounds of place of birth, residence, descent, class, language and sex.[5] Untouchability has been abolished and the citizens are protected against discrimination even on the part of the private persons and institutions.[6] The constitution after guaranteeing the general right of equality under article 14 defines equality in terms of justice by non discrimination provisions contained in article 15 (1) and 16 (1) and proceeds to incorporate provisions of preferential treatment so as to permit the State to achieve equality to disadvantaged sections by giving them preferential treatment in all its dealings and particularly in the area of public employment. While article 16 (1) guarantee equality of opportunity for all citizens in matters of employment or appointment to any office under the State, article 16 (2) provides that no citizen shall on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for or discriminated against in respect of any employment or office under the State. And article 16 (4) which provides for protective measure of reservations of seats in government employment lays down, that nothing in this article shall prevent the state from making any provision for reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the state is not adequately represented in the services under the state.

Provisions for reservations in educational institutions to deprived sections of scheduled castes and scheduled tribes have been secured under article 15(4). Article 15 (1) specifically bars the state from discriminating against any citizen, race, caste, sex, place of birth or any of them. Article 15 (4) on the other hand lays down that the state is not prevented from making any special provision for the advancement of any socially and educationally backward classes. The expression "making any special provision" is evidently an open ended provision and government can really go on providing a whole array of facilities for promoting the interests of socially and educationally backward classes, for example waiver of fees, waiver of age requirements, special coachings, scholarships, grants, loans etc. Interestingly, however, the use of article 15 (4) has exclusively been made so far for providing reservations in educational institutions.

The second type of affirmative action programme aimed at removal of poverty

5 Article 15 (1), and 15 (2) of Indian Constitution.
6 Article 17 of the Indian Constitution, also see the Protection of Civil Rights Act 1957.

and establishment of an egalitarian social order was provided for in the Directive principles of state policy. These provisions may better be described as the active obligations of the state.[7] The State shall secure a social order in which social, economic and political justice shall inform all the institutions of national life[8]. Wealth and its source of production shall not be concentrated in the hands of the few but shall be distributed so as to sub-serve the common good. And there shall be adequate means of livelihood for all and equal pay for equal work.[9] The state shall endeavour to secure the health and strength of workers, the right to work, to education and to assistance in cases of want, just and humane conditions of work and living wage for workers[10] a uniform civil code,[11] and free and compulsory education for children.[12] The state shall take steps to organise village panchayats[13], promote the educational and economic interests of the weaker sections of the people, raise the level of nutrition and standards of living, improve public health, organise agricultural and animal husbandry,[14] separate the judiciary from executive[15] and promote international peace and security.[16] Article 46 which specifically refers to the obligation of the state towards the weaker sections and scheduled castes and scheduled tribes etc provides that "The state shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular of the scheduled castes and scheduled tribes and shall protect them from social injustices and all forms of exploitation".

In pursuance of these directives, various land re-distribution and allotment programmes have been initiated. In fact so great was the enthusiasm of the government in this particular respect that hundreds of land reform laws were passed in the first five years of Indian Republic. This ensued a spate of litigation in the courts, as the land reforms laws infringed the right to property of the land owners.[17] However the government was so determined to effect land reforms that the right to property which was provided under article 31 of the constitution was modified six times and finally was done away with for the purpose of avoiding litigation in land reform measures of the government.[18]

For the purpose of providing legal aid to the poor and indigent a vast network of

7 V.N. Shukla, Constitutional Law of India, Easern Book Company, Lucknow, 1990.
8 Article 38 of Indian Constitution.
9 Article 39 of Indian Constitution.
10 Article 41, 42 and 43 of the Constitution.
11 Article 44 .
12 Article 45.
13 Article 40.
14 Article 47 and 48.
15 Article 50.
16 Article 51.
17 See Kameshwar Singh v. State of Bihar, AIR, 1962, SC 1116
18 44th Constitutional Amendment Act of 1978 abolished the Right to Property from Indian Constitution.

legal aid programmes involving judicial officers, Bar Councils and law Schools, have been established all over the country. Legal Services Authority Act, 1987 which was meant to provide legal aid to all those who cannot afford access to legal services either due to poverty indigence or illiteracy or backwardness, has been a big success and apart from legal services authorities at the central and state level various legal aid committees have been successfully and effectively working at the district and taluka level.

Apart from this various health care programmes such as primary health centres all over the country have been established and various scholarships grants, loans etc for the deprived sections of the population have been contributing their bit towards the socio-economic transformation of the country. These distributive schemes are accompanied by efforts to protect the backward classes from exploitation and victimisation.

It must be noted that the provisions included in Directive Principles of State policy are not enforceable in the courts, however the principles laid down in this part of the Constitution are fundamental in the governance of the country. Apart from this the Constitution provided for measures to ensure equality amongst all, which has been said to be one of major causes of poverty in India.

In the third group of affirmative action policies, the aim is at protective discrimination in various action plans for the removal of in-capabilities on the part of the underprivileged groups. Constitution itself talks about prohibitions of forced labour under article 23, in pursuance of which Bonded Labour Abolition Act was passed in 1976. In recent years there have been strenuous efforts to release the victims of debt bondage, who are mostly from scheduled castes and scheduled tribes. Anti-untouchability programme is another area of governmental concern. Constitution itself abolished untouchability vide article 17 which lays down that " Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of untouchability shall be an offence, punishable in accordance with law. It is noticeable that the word "Untouchability" is not to be construed in its literal sense which would include persons who are treated as untouchables either temporarily or otherwise for various reasons, such as their suffering from an epidemic contagious disease or on account of social observance such as are associated with birth or death etc. On the other hand Untouchability is to be understood in the sense of a practice as it has developed historically in India. The word refers to those regarded as untouchables in the course of historical developments in this country.

Anti-untouchability propaganda and the Protection of Civil Rights Act, attempts to relieve untouchables from the social disabilities under which they have suffered. These measures may not strictly be called compensatory discrimination in the

formal sense of the term, but in substance it is special undertaking to remedy the disadvantaged position of the untouchables and certainly be designated as affirmative action programmes as part of state's larger obligation of ushering into socially egalitarian order.

A very important point that is required to be understood and has remained a point of controversy is as to how long the scheme of affirmative programmes would continue. From the above discussion one might have noticed that out of the three broad types of classifications of affirmative action programmes it is only in case of reservations in legislative bodies under article 330 that some kind of time limit under article 334 has been talked about i.e. 10 years to begin with, which has been consistently extended and now stands at 60 i.e. until the end of 2010. Applying the principle of interpretation "expressio unius est exclusio alterius", i.e. that the express rule of similar nature in one provision of the statute excludes a similar reading in an alternative provision of the same statute, would result in an inference that the express mention of time limit in one type of affirmative action excludes the similar reading in other type of affirmative action programmes. Thus apparent position, as I argue here-under is not the reality. The constitutional position is rather different and the framers of the constitution intended to limit the application of the affirmative action programme. The affirmative action programme that we have under Indian Constitution, was never intended to be a permanent feature of Indian Constitution and that would also be the jurisprudential dictate on the issue.

Justice O'Connor's, one of the judges in the now famous case of Grutter v. Bollinger,[19] sought to articulate the legal position as to the longevity of affirmative action programme. He observed "We are mindful, however, that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that governmental use of race must have a logical end point. The Law School, too, concedes that all "race conscious programs must have reasonable durational limits."[20] Obviously Justice O'Connor is talking about the duration of affirmative action plans.

The fact that the framers of Indian Constitution too wanted that the affirmative action programme should not become a permanent feature of India's political

19 123 United States Supreme Court, 2325 (2003)
20 Quoting Palmore v. Sidoti, 466 US 429 (1984)

system can be evidenced by the fact that they had included provisions like 340-341 in the Indian Constitution. Article 340 contemplates appointment of a commission to investigate the conditions of socially and educationally backward classes and such other matters as are referred to the commission.[21] Article 341 provides that the President may by notification in a particular state; after due consultations with governor in a particular state specify the castes, races or tribes which shall for the purpose of this constitution be deemed to be scheduled castes in relation to that state. The second clause of this article provides that the list of scheduled castes specified in the notification issued under clause (1) may be amended by a law passed by the Parliament. Article 342 provides a similar provision for Scheduled Tribes. However it may be noted that the courts are not precluded from going into the questions whether the criteria used by the state for the purpose are relevant or not.[22]

The provisions of article 341 and 342 would also imply that if some new castes and tribes can be included by way of presidential order, some others may also be struck out on the basis of the rational that they have now ceased to be backward and therefore no more need the protective umbrella of affirmative action programme. The concept of creamy layer, enunciated by the Supreme Court in Indira Sawhney v. Union of India[23] and endorsed in the recent case of Ashok Kumar Thakur v. Union of India,[24] whereby the affluent sections of the society have to be skimmed off and are not be considered eligible for affirmative action programme, is another instance which evidences the fact that the basic scheme of the constitution is not to treat the affirmative action programme as permanent feature of the constitution. Rather the intention of the framers of the constitution was to ensure that the scheduled castes and scheduled tribes would ultimately assimilate themselves fully in the political and national life of the country so much so that there would be no need for any special safeguards for them and

21 **Appointment of a Commission to investigate the conditions of backward classes. -**
(1) The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State and the conditions subject to which such grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission.
(2) A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.
(3) The President shall cause a copy of the report so presented together with a memorandum explaining the action taken thereon to be laid before each House of Parliament.

22 Moosa v. Kerala, AIR 1960, Ker 355.
23 AIR, 1993 SC 477
24 Manu/SC/1397/2008

there would be no need to draw a distinction between one citizen and another. Their condition would improve so much that they would feel their interests secure without any kind of reservations.

Further, it must be noted that the intention of the framers of the constitution by introducing provisions like article 17 and number of provisions for affirmative action programme as we have seen above, was to ensure the establishment of egalitarian social order by removing the evils of caste and race etc. If we continue to adhere to caste-lines for the purpose of providing benign discrimination the ideals of egalitarian social order would continue to evade us. Supreme Court in a number of judgments have been underlying this. In the recent case of Ashok Kumar Thakur v. Union of India,[25] Supreme Court once again emphasises that "As long as caste is a criterion, objective of casteless society can never be achieved — Exclusively economic criteria should be used — Government needs to ensure that for a period of ten years caste and other factors such as occupation/income/ property holdings or similar measures of economic power may be taken into consideration and thereafter only economic criteria should prevail". This, once again can be taken as an affirmation of the fact that affirmative action programme in any form was not intended to be a permanent feature of the Constitution.

CONCLUSION

It may be summed up by way of concluding remarks that the present model of affirmative action policies aimed at reducing poverty and inequalities presents a very perplexing conundrum, which can be said to be sui generis. In such a system nothing can remain sans controversies. However an impartial observer of the Indian scene may not have difficulty in concluding that the contemporary protective discrimination policies in the name of affirmative action programmes have vigorously been followed in post independent India. And they have produced substantial redistributive effects as well. Reserved seats provide a substantial legislative presence and swell the flow of patronage, attention and favourable policies to scheduled castes and scheduled tribes. The reservation in jobs and educational institutions has given to a sizable portion of the beneficiary group earnings, and the security, information, patronage and prestige that go with government job in India. However this has not gone without costs. In fact the costs have been enormous. Lot of frustration amongst those who have been deprived off the jobs, which they would have got in the absence of preferential policies, undermining the efficiency of administration, underlining the differences and leading invidious discriminations, making the beneficiary groups dependent and blunting their development and initiative etc could be said to be costs of these preferential policies in the form of affirmative action programmes. The criticism

25 Ibid

that these policies have evoked and the debates that take place in India today, represent the vivacity of the India's democratic experiment. However to ensure that this vivacious experiment moves on a stronger footing, certain direction need be given to the process of affirmative action programmes and time appears to be ripe now to start some kind of roll-back process of reservation system as it has come to be established now so as to usher into a healthy democratic order.

*****

WITNESS PROTECTION UNDER CRIMINAL JUSTICE SYSTEM IN INDIA

Prof. (Dr) Sanjay Singh*

ABSTRACT

In any criminal Justice system the witness assumes a pivotal role in adjudication of the final verdict. Because of this, the gatherings of the case frequently threaten the witnesses, turning them hostile and interfering with the fair trial of justice and equity. Henceforth, it turns out very important to protect and secure the witnesses so that they do not get threaten or fear revealing the reality in court. There is witness protections programmed in a substantial number of nations everywhere throughout the world. Lament, India still does not have well-functioning witness protection programmed in spite of various attempts to enhance it.

INTRODUCTION

Witness protection would imply protection to a witness from physical harm, but in the Indian context it has been given a restricted meaning. Law is a mean to achieve an end, and that is justice. If this end is to be achieved law cannot remain stagnant. It has to be dynamic and must change according to the transition of the society. One may raise question why Judge should involve himself in "Witness Protection" or "Witness Protection Programme". It is the function and duty of the state. The function of the Court is to conduct trial in free and fair manner and deliver final verdict on the basis of record. In fact the Judge has an important role to play in witness protection.

The role of a Judge is to strike a balance fair trial to accused as well as to the prosecution or the victims. The primary object of the criminal procedure is to bring offenders to books and to ensure a fair trial to accused persons. A fair trial has two objectives i.e. it should be fair to accused and should also be fair to the prosecution or to the victims. The judge is supposed to play an innovative role in conduction of the fair trial. The duty of a judge is to ensure that witnesses are giving evidence without any force, fear and pressure in the courts and also to provide necessary protection if required.

* Principal, School of Law, Chanderprabhu Jain College of Higher Studies, Narela , Delhi ; available at *iips.alg@gmail.com* & +91 8909254600.

Protection against Publication of Evidence

A rather interesting aspect of witness protection came up for consideration before the Supreme Court in somewhat unusual circumstances in a defamation case. In *Naresh Shridhar Mirajkar v. State of Maharashtra*,[1] a witness for the defence repudiated in the witness box all statements earlier made by him. With the permission of the High Court, he was cross-examined by the defence, but he maintained his stance. Later the defence came to know of some other proceedings where the witness had substantially stated what was alleged by the defence. Accordingly, the defence recalled him to the witness box. At that stage, the witness sought protection of the High Court against the publication of his evidence because, he said, the publication of his earlier evidence had caused him business losses. Protection against publication of his evidence was given by the High Court and affirmed by the Supreme Court because it was "thought to be necessary in order to obtain true evidence in the case with a view to do justice between the parties." This may well be the only case in which the business interests of a witness were sought to be protected rather than the witness himself. It is a novel and unexplored dimension to witness protection.

Case Transferred Anticipating Communal Violence

In *G.X. Francis v. Banke Bihari Singh*[2], the Supreme Court was deciding a transfer petition filed under section 527 of the Cr.P.C. 1898 for the transfer of a criminal case from Jashpuranagar, in the state of Madhya Pradesh, to some other State, preferably New Delhi or Orissa. The complainant in the case was a member of the royal family of Jashpur, who used to reside at Jashpurnagar. All the seven accused, except one, were Roman Catholics and the other one was a Jacobite Christian. One of the grounds for asking transfer of the case was that there was bitterness among the communities of the accused and the complainants i.e. Christians and Hindus, in the area of Jashpurnagar. In view of the unanimity of testimony from both sides about the nature of surcharged tension in Jashpurnagar, the Supreme Court ordered transfer of the case from Jashpurangar to the State of Orissa, for fair trial. Vivian Bose J, speaking for the Court observed that the good grounds for transfer from Jashpurnagar are made out because of the bitterness of local communal feeling and the tenseness of the atmosphere there. Public confidence in the fairness of a trial held in such an atmosphere would be seriously underminded, particularly among reasonable Christians all over India, not because the Judge was unfair or biased but because the machinery of justice is geared to work in the midst of such conditions. The calm detached atmosphere of a fair and impartial judicial trial would be wanting and even if justice was done it would not be seen

1 A.I.R. 1967 SC 1
2 A.I.R. 1958 SC 209

to be done.

Transfer of Case can be made if there are Local Tensions:

The Supreme Court in *Maneka Sanjay Gandhi v. Rani Jethmalani*[3] stressed the need for a congenial atmosphere for fair and impartial trial. Krishna Iyer J while defining the need for congenial atmosphere for a fair and impartial trial, observed:

"This tendency of roughs and street roughs to violate the serenity of court is obstructive of the course of justice and must surely be stamped out. Likewise the safety of the person of an accused or complainant as an essential condition for participation in a trial and where that is put in peril by commotion, tumult, or threat on account of pathological conditions prevalent in a particular venue, the request for a transfer may not be dismissed summarily. It causes disquiet and concern to a court of justice if a person seeing justice is unable to appear, present one's case, bring only witnesses or adduce evidence. Indeed, it is the duty of the court to assure propitious conditions which conduce to comparative tranquility at the trial. Turbulent conditions putting the accused's life in danger or creating chaos inside the Court hall may jettison public justice. If this vice is peculiar to a particular place and is persistent the transfer of the case from that place may become necessary. Likewise, if there is general consternation or atmosphere of tension or raging masses of public in the entire region taking sides and polluting the climate, vitiating the necessary neutrality to hold a detached judicial trial, the situation may be said to have deteriorated to such an extent as to warrant transfer".

Accused not allowed to Cross Examine Witnesses

In *Hira Nath Mishra v. Principal, Rajendra Medical College*[4] Court considered the validity of an internal inquiry in a college where some male students behaved indecently in the presence of some female students. In the internal inquiry, the statements of the female students were recorded and they were asked to identify the male students from some photographs. The male students were not allowed to cross-examine the female students. The Supreme Court did not find the procedure adopted as being violative of the principles of natural justice. The court observed that Due Care is taken to see that the witnesses who gave statements would not be identified. In such cases there is no question of the witnesses being called and the goonda being given an opportunity to cross-examine the witnesses. The reason is obvious. No witness will come forward to give evidence in the presence of the goonda. However unsavory the procedure may appear to a judicial mind, these

3 (1979) 4 S.C.C. 167
4 (1973) 1 S.C.C. 805

are facts of life which are to be faced. The girls who were molested that night would not have come forward to give evidence in any regular enquiry and if a strict enquiry like the one conducted in a court of law were to be imposed in such matters, the girls would have had to go under the constant fear of molestation by the male students who were capable of such indecencies.

Protection of Witnesses from Media

The High Court of Punjab and Haryana in *Bimal Kaur Khalsa's case (P&H High Court, Full Bench)*[5] observed that neither the Court nor the government can ensure the 'total safety' of a prosecution witness. A witness deposing in a criminal case does so with a sense of public duty. The Court can however take steps to stop the dissemination of information regarding the identity and address of the witness ensuring that the name, address and identity of the witness are not given publicly in the media. Even this judgment does not deal with all the aspects relating to witness protection.

Preventive Detention in the Interests of Maintaining 'Public Order'

Harpreet Kaur v. State of Maharashtra[6] arose under the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers and Drug offenders Act (1981). An order of preventive detention was passed against the detenu for indulging in transportation of illicit liquor and keeping arms with him while transporting liquor. He was also creating fear psychosis. Four witnesses, on condition of anonymity gave statements to the police and clearly stated that they would not depose against the detenu for fear of retaliation as the detenu had threatened to do away with anyone who would depose against him. The Supreme Court held that the activities of the detenu affected the even tempo of the society by creating a feeling of insecurity among those who were likely to depose against him as also the law enforcement agencies. The fear psychosis created by the detenu in the minds of the witnesses was aimed at letting the crime go unpunished.

Keeping the Identity and Address of Witness Secret

Kartar Singh v. State of Punjab[7] is a landmark judgement and is a case nearest to the subject matter of this study. That case was dealing with the provisions of Section 16(2) and (3) of the Terrorist and Disruptive Activities (Prevention) Act, 1987. Section 16(2) gives discretion to the Designated Court to keep the identity and address of any witness secret on the following three contingencies:

5 A.I.R. 1988 P&H p. 95
6 A.I.R. 1992 SC 779
7 1994(3) S.C.C. 569

(a) on an application made by a witness in any proceedings before it; or

(b) on an application made by the Public Prosecutor in relation to such witness; or

(c) on its own motion.

Section 16(3) refers to the measures to be taken by the Designated Court while exercising its discretion under subsection (2).If neither the witness nor the Public Prosecutor has made an application in that behalf nor the Court has taken any decision of its own, then the identity and address of the witnesses have to be furnished to the accused. The measures are to be taken by the Designated Court under any of the above contingencies so that a witness may not be subjected to any harassment for speaking against the accused. Section 16(3) refers to the measures that the Court without prejudice to its general power under section 16(2), may take. These include:

(a) the holding of the proceedings at a place to be decided by the Designated Court;

(b) the avoiding of the mentioning of the names and addresses of the witnesses in its orders or judgments or in any records of the cases accessible to public;

(c) the issuing of any directions for securing that the identity and addresses of the witnesses are not disclosed;

(d) directing, in the public interest, that all or any of the proceedings pending before such a Court, shall not be published in any manner.

Plight of Witnesses in Criminal Cases

The expenses payable to witnesses provided in Section 312 of the Code of Criminal Procedure, 1973 as amended up to date came up for discussion in *Swaran Singh vs. State of Punjab*[8]. The Supreme Court described the plight of witnesses in criminal courts as follows: "Not only that a witness is threatened; he is maimed; he is done away with; or even bribed. There is no protection for him."

Need for Law of Witness Protection:

In the public interest case, (W.P. Crl. No. 109/2003 and batch) in National *Human Rights Commission v. State of Gujarat*[9] a series of orders were passed

8 AIR 2000 SC 2017
9 2003(9) SCALE 329

by the Supreme Court. There, the National Human Rights Commission (NHRC) filed a public interest case seeking retrial on the ground that the witnesses were pressurized by the accused to go back on their earlier statements and the trial was totally vitiated. The Supreme Court observed:

"A right to a reasonable and fair trial is protected under Articles 14 and 21 of the Constitution of India, Article 14 of the International Covenant on Civil and Political Rights, to which India is a signatory, as well as Article 6 of the European Convention for Protection of Human Rights and Fundamental Freedoms. On perusal of the allegations in the special leave petition and number of criminal cases coming to this Court, we are prima facie of the opinion that criminal justice delivery system is not in sound health. The concept of a reasonable and fair trial would suppose justice to the accused as also to the victims. From the allegations made in the special leave petition together with other materials annexed thereto as also from our experience, it appears that there are many faults in the criminal justice delivery system because of apathy on the part of the police officers to record proper report, their general conduct towards the victims, faulty investigation, failure to take recourse to scientific investigation etc."

Role of State in protecting the witnesses

The apex Court in *Zahira Habibulla H. Sheikh and Another V. State of Gujarat and Others*[10], was emphatic on the role of the State to play in protecting the witnesses. It has been observed that as a protector of its citizens, the State has to ensure that during the trial in the Court the witness could safely depose the truth without any fear of being haunted by those against whom he had deposed. Supreme Court reminded the State that it has a constitutional obligation and duty to protect the life and liberty of the citizen.

COMMISSIONS & COMMITTEES ON WITNESS PROTECTION

14th Report of the Law Commission[11], 'witness protection' was considered from a different angle. The Report referred to: Inadequate arrangements for witnesses in the Court premises, the scales of traveling allowance and daily allowances paid for witnesses for attending the Court in response to summons from the Court.

10 2000 (4) S.C.C. 187

11 11 Law commission of India, Reforms of Judicial administration 14th law commission154th report.

154th Report of the Law Commission (1996)

154th Report of the Law Commission[12], in Chapter X, the Commission, while dealing with 'Protection and Facilities to Witnesses', referred to the 14th Report of the Law Commission.

It was stated that the plight of witnesses appearing on behalf of the State was pitiable not only because of lack of proper facilities and conveniences but also because witnesses have to incur the wrath of the accused, particularly that of hardened criminals, which can result in their life falling into great peril. The following points emerge from the above report:

(a) Realistic allowance should be paid to witnesses for their attendance in Courts and there should be simplification of the procedure for such payment.

(b) Adequate facilities should be provided to witnesses for their stay in the Court premises. Witnesses must be given due respect and it is also necessary that efforts are made to remove all reasonable causes for their anguish.

(c) Witnesses should be protected from the wrath of the accused in any eventuality.

(d) Witnesses should be examined on the day they are summoned and the examination should proceed on a day-to-day basis.

The Law Commission did not suggest any measures for the physical protection of witnesses or even suggest how witnesses could be protected from "the wrath of the accused".

178th Report of the Law Commission (2001)[13]

In December, 2001, the Commission gave its 178th Report for amending various statutes, civil and criminal. That Law Commission Report dealt with antagonistic witnesses and the precautions the Police should take at the stage of investigation to prevent prevarication by witnesses when they are examined later at the trial. The Law Commission recommended the insertion of Section 164A in the Code of Criminal Procedure, 1973 (as amended upto date) to provide for recording of

12 154th Report, Fourteenth Law Commission under the Chairmanship of Mr. Justice K. J. Reddy 1995-1997, in 1996

13 178th Report, Sixteenth Law Commission under the chairmanshio of Justice B.P. Jeevan (2001)

the statement of material witnesses in the presence of Magistrates where the offences were punishable with Imprisonment of 10 years and more[14]. On the basis of this recommendation, the Criminal Law (Amendment) Bill, 2003 was introduced in the Rajya Sabha. The Commission recommended three alternatives, (in modification of the two alternatives suggested in the 154th Report). They are as follows:

(a) "The insertion of sub-section (1A) in Section 164 of the Code of Criminal Procedure (as suggested in the 154th Report) so that the statements of material witnesses are recorded in the presence of Magistrates" [This would require the recruitment of a large number of Magistrates].

(b) Introducing certain checks so that witnesses do not turn hostile, such as taking the signature of a witness on his police statement and sending it to an appropriate Magistrate and a senior police officer.

(c) In all serious offences, punishable with ten or more years of imprisonment, the statement of important witnesses should be recorded, at the earliest, by a Magistrate under Section 164 of the Code of Criminal Procedure, 1973. For less serious offences, the second alternative (with some modifications) was found viable."

198th Law Commission Report (2006)[15]

The issues of 'Witness Identity Protection and Witness Protection Programmes' were taken up by the Law Commission suo moto in the light of the observations of the Supreme Court in NHRC vs. State of Gujarat[16], PUCL vs. Union of India[17]; Zahira Habibullah H Sheikh and Others vs. State of Gujarat[18], and Shakshi vs. Union of India[19] that a law in this behalf is necessary. More recently the same view was expressed by the Supreme Court in Zahira Habibulla Sheikh vs. Gujarat[20]. The Court stated in all the above cases that having regard to what is happening in important cases on the criminal side in our Courts, it is time a law is brought forward on the subject of witness identity protection and witness protection programmes. The Law Commission of India released a Consultation Paper on 'Witness Identity Protection and Witness Protection Programmes' in August 2004. The Law Commission of India has published a substantial Consultation Paper (pp. 337), "Witness Identity Protection and Witness Protection

14 14 ibid
15 Report of the Law Commission (2001)
16 2003(9) SCALE 329
17 2003(10) SCALE 967
18 2004(4) SCC 158
19 2004(6) SCALE 15
20 2006 (3) SCALE, 104

Programmes" (August 2004). The paper covers two broad aspects of the need for witness protection. The first addresses the questions of whether and to what extent provision ought to be made for witnesses to give evidence anonymously during criminal trials. One of the remarkable features of the paper is the breadth of the research that has been undertaken. Chapter 6 of the paper comprises a comparative study of case law on witness protection and anonymity which, in addition to common law jurisdictions, encompasses the procedures adopted by the respective International Criminal Tribunals for Yugoslavia and Rwanda, and reviews the jurisprudence of the European Court of Human Rights. The second aspect of witness protection covered by the paper concerns "the physical and mental vulnerability of witnesses" and the need to take care of "various aspects of the welfare of witnesses which call for physical protection of witnesses at all stages of the criminal process".

Witness Protection Programmes

Witness Protection Programmes refer witness protection outside the Court. At the instance of the public prosecutor, the witness can be given a new identity by a Magistrate after conducting an ex parte inquiry in his chambers. In case of likelihood of danger of his life, he is given a different identity and may, if need be, even relocated in a different place along with his dependents till be trial of the case against the accused is completed. The expenses for maintenance of all the persons must be met by the State Legal Aid Authority through the District Legal Aid Authority. The witness has to sign an MOU which will list out the obligations of the State as well as the witness. Being admitted to the programme, the witness has an obligation to depose and the State has an obligation to protect him physically outside Court. Breach of MOU by the witness will result in his being taken out of the programme."

A detailed framework for Witness Identity Protection and Witness Protection Programmes is recommended by the Law Commission of India in its 198th Report.

Guidelines for Witness Protection Issued by Delhi High Court

Certain guidelines were issued by the Delhi High Court in *Neelam Katara v. Union of India*[21] to the police on providing protection to witnesses to curb the menace of their turning hostile leading to acquittal of accused in heinous crimes.

This decision given by a bench comprising Justice Usha Mehra and Justice Pradeep

21 ILR (2003) II Del 377 260

Nandrajog on a petition filed by Neelam Katara whose son Nitish was allegedly kidnapped form a marriage party. Apparently, fearing that the investigation may not be free or fair and the subsequent trial may also be affected.

The Government of India filed its response by way of an affidavit[22] in which it stated that:

(a) An inadequate and non-realistic allowance is paid to witnesses to compensate for the loss of earning and pocket expenses.

(b) Witnesses in important cases are under constant fear of criminals.

(c) There is an urgent need to provide adequate protection to a witness from harassment and intimidation of criminals, and

(d) Government feels that framing of a scheme for protection of witnesses is of prime importance in the administration of justice.

(e) These guidelines are applicable to cases where an accused is punishable with death or life imprisonment. The significance of the guidelines is that they are not confined to cases of rape, or sexual offences or terrorism or organized crime. The Court suggested the following scheme.

Witness Protection Guidelines

(Under Criminal Procedure)

i. 'Witness' means a person whose statement has been recorded by the Investigating Officer under section 161 of the Code of Criminal Procedure pertaining to a crime punishable with death or life imprisonment

ii. 'Accused' means a person charged with or suspected with the commission of a crime punishable with death or life imprisonment.

iii. 'Competent Authority' means the Secretary, Delhi Legal Services Authority.

iv. Admission to protection: The Competent Authority, on receipt of a request from a witness shall determine whether the witness requires police protection, to what extent and for what duration.

22 Affidavit dated 25th February 2003 of Venu Gopal v. Director (Judicial) in the Ministry of Home Affairs.

(a) Factors to be considered:

i. In determining whether or not a witness should be provided police protection, the Competent Authority shall take into account the following factors:

ii. The nature of the risk to the security of the witness which may emanate from the accused or his associates.

iii. The nature of the investigation in the criminal case.

iv. The importance of the witness in the matter and the value of the information or evidence given or agreed to be given by the witness.

v. The cost of providing police protection to the witness.

(b) Obligation of the police:

i. While recording statement of the witness under sec. 161 of the Code of Criminal Procedure, it will be the duty of the Investigating Officer to make the witness aware of the 'Witness Protection Guidelines' and also the fact that in case of any threat, he can approach the Competent Authority. This, the Investigating Officer will inform in writing duly acknowledged by the witness.

ii. It shall be the duty of the Commissioner of Police to provide security to a witness in respect of whom an order has been passed by the Competent Authority directing police protection."

The court further said that the guidelines shall operate for the protection of witnesses till enactment of a suitable legislation.

In the above case guidelines laid down by the Delhi High Court are the first of its kind in the country and have to be commended. But, they deal only with one aspect of the matter, namely, protection of the witnesses.

Protection of Witnesses

Hon'ble Supreme Court in *Zahira Habibulla H. Sheikh and Another v. State of Gujarat and Others*[23] came down heavily on the State administration in general and the investigating agency in particular for rashly and negligently handling

23 (2004) 4 S.C.C. 158

their duties and abdicating their responsibilities. The categorical finding is that the whole machinery of a State failed in maintaining the confidence of public in the justice delivery system. Apex Court in strong words reminded the trial Courts to be alive to the reality about the witness hostility. One of the predominant points taken note of by the Hon'ble Supreme Court is the lack of witness protection in our country. The apex court observed that state has a definite role to play in protecting the witnesses. It has also pointed out that at least in sensitive cases, where accused person, are closely connected with the powerful, having political patronage could wield muscle and money power, to avert fair trial, full protection to witnesses deposing before them must be provided by the state. In this case, the Supreme Court dealt with 'witness protection' and the need for a fair trial, whereby fairness is meted out not only to the accused but to the victims/ witnesses.

Critical analysis of cases relating to witness protection

Dayanand B Nayak vs Ketan Thirodkar & anothers[24]

In another instance, the Bombay High Court had given police protection to an ex- journalist Ketan Thirodkar, because he had been under threats soon after he had filed the police complaint, which disclosed a series of illegal acts allegedly committed by the police in connivance with the underworld. Thirodkar had filed a petition seeking police protection as well as a police enquiry into the police underworld nexus. However, the public prosecutor opposed the grant of police protection on the ground that Thirodkar himself was involved with the underworld. Here the public prosecutor failed to comprehend the fact that: Thirodkar has admitted his links with the underworld and is ready to face the legal consequences. That even former criminals/ mobsters are also given police protection if they turn approver. The High Court, in this case, had given Thirodkar police protection only for a limited period; not realizing that the persons that he is to implicate would cause serious injury to him the moment the temporary police protection is removed.

Beant Singh Assassination Case: Witness Made To Pay For His Own Security (Case Pending)

The case of Balwinder Singh, a prime witness in Beant Singh (former Chief Minister of Punjab) assassination case, shows the state of witness protection in the country. The administration issued a .32 Italian revolver for self protection to Balwinder Singh after he paid a sum of rupees 15,000. However he was neither

24 2004 CriLJ 2177.

given any ammunition nor imparted training to use the weapon. As a result, his life was now in danger. It may be mentioned in this context that three main accused of the Beant Singh assassination case escaped from the high security Burail Jail on 22 January, 2004.

The witness, earning a meager salary of Rs.2, 700 per month as a home guard, had to beg for money from his friends and relatives. It was funny that the administration gave him a choice of making a cash down payment of Rs.5, 000, while the rest could be paid in monthly installment at 10 percent interest per annum. Further, the administration did not care to know whether Balwinder was in a position to buy ammunition (Rs.180 per round).The situation was aptly described by the witness himself: "They made me pay Rs.15,000/- for a confiscated weapon. But the resolver is nothing but a piece of metal for me. I do not have any ammunition nor has anyone instructed me how to use the weapon. This is sheer mockery of my security".

In September 2003, the Punjab and Haryana High Court ruled that it would be appropriate for both the Central and State Government to expeditiously adopt a programme for the protection of witnesses[25].

Vinod Kumar vs State of Punjab[26]

If one is asked a question, what afflicts the legally requisite criminal trial in its conceptual eventuality in the country the main reasons that may earn the status of phenomenal significance, first procrastination of trial due to non availability of witness when the trial is in progress . In the instance case the cross examination has taken place after a year and eight months allowing ample time to pressurise the witness and to gain over him by adopting all kinds of tactics.

Himanshu Singh Sabharwal vs State of Madhya Pradesh[27]

In this case FIR was lodge and after investigation charged sheet was filed and charges have been framed against several persons. During the examination of witness who were stated to be eyewitness such witness resiled from statement made during examination. Grivenance of the petition is that the witness are been coerced, threaten and ultimately justice is casualty.

25 'Mechanism Required for Protection of Witnesses, High Court,' the Tribune, 9 September 2003

26 Criminal appeal no.554/ 2012

27 Decided on 12 march,2008

CONCLUSION

Today, we need to enact strict laws on witness protection keeping in mind the needs of the witness in our system. Stringent laws against persons giving false evidence and against witnesses that turn hostile are the need of the hour. Recently in Times of India[28] In the Gulbarg massacre case the key witnesses have alerted authorities to serious lapses provided to them at the direction of the Supreme court The security cover missing over the past five days, star witness Firoze khan Pathan, who lived in Bungalow of ill- fated gulbarg society and lost seven family members in the massacre, is horrified. Pathan now lives in Juhapura had been provided a three shift 24x7 security. Saeed who is also a witness in the case, said one guard did turn up on Friday noon ,but left after a few hours. Another witness Sharif Khan, who lost his wife and two daughter in the massacre, also expressed similar concerns. He has been provided security over a single shift. The security personnel are irregular and come only for two or three hours. They leave citing various excuses, so they are worried about their security. While the legislature is thinking over making laws pertaining to hostile witnesses and laws for witness protection and security, it is imperative to note that witness protection program works on the premise that all the officials involved in the secret exercise of changing somebody's identity are absolutely trustworthy. The plain truth is that the level of polished methodology requested by the witness assurance project is thought to be past the ability of our police in the current framework, making it as helpless as it is to unessential impacts. Today, strict laws against persons giving false evidence and against witnesses that turn hostile are especially the need of great necessity. By and large, it is on the basis of the evidence given by witnesses that the State initiates the prosecution process. It is therefore not a question of funds, as they could be generated in due time by some means or the other; but a question put to the integrity of the system upon which thrives the sustainability of the witness protection program as well as the life of the witness and his family.

*****

28 The Times Of India ,New Delhi, Saturday, May 21,2016 Page 13 column 1

LAW ON HUMAN TRAFFICKING IN INDIA AND NEPAL: A COMPARATIVE STUDY

Ms. Leena Kumari*

ABSTRACT

Trafficking in Persons is considered a contemporary form of slavery. It is a growing phenomenon globally, which is highlighted by national authorities and United Nations Office of Drugs and Crimes (UNODC). This Article is going to discuss Laws on Human Trafficking in India and Nepal. The Article will mainly compare the Constitutional Provisions, Penal Codes and Specific Acts on Trafficking available in both countries.

INTRODUCTION

Trafficking in Persons is considered a contemporary form of slavery. It is a growing phenomenon globally, which is highlighted by national authorities, United Nations Office of Drugs and Crimes (UNODC), and Trafficking in Persons Report (TIP) published annually by the Government of the United States of America.[1] In recent years, it has become the third largest source of transnational illegal activities after drugs and arms. It has been the fastest form of transnational crime because current world conditions have created increased demand and supply. Migration flows are enormous and this illicit trade is hidden within the massive movement of people[2]. The supply exists because globalization has caused increasing economic disparities between different countries along with the feminization of poverty and marginalization of many rural communities.

South Asian region has attracted attention for its growing trafficking problem. Within this region, Nepal and Bangladesh have been designated as "sending" countries or countries of origin in the regional web of human trafficking. India and Pakistan are usually referred to as countries of "transit" or "destination." Activists and governments are increasingly acknowledging that the trafficking of women and girls occurs both within the borders of a country and across regions and continents beyond South Asia.

* Assistant Professor, CPJ CHS & School of Law, Affiliated to G.G.S. Indraprastha University, Delhi; available at +91 9968953340 and at *jhaleenu@gmail.com*

1 L. Dominelli, "Globalization, Contemporary Challenges and Social Work Practice", 53 International Social Work 5 (2010)599-612, at 600

2 Moises Naim, Illicit: How Smugglers, Traffickers and Copycats Are Hijacking the Global Economy, New York: Anchor Books (2007)

In this article, I examine the law on trafficking in persons in India as well as in Nepal. Further it discusses whether domestic laws are sufficient to control human trafficking between India and Nepal. For this discussion and analysis, this article is divided into five main parts: the first deals with the reasons of flourishing human trafficking, the second deals with the definition and essential elements of this problem of human trafficking, the third one deals with the position of law in India regarding human trafficking, the fourth one deals with the position of law in Nepal on the issue, and the last part analyses the legal position of these two countries with the conclusion.

Why has Human Trafficking Flourished?

There are numbers of factors for trafficking, so it is very difficult to find out a single cause for trafficking. The root causes of trafficking are many and often differ from one place to another. Trafficking is often driven by social, economical and cultural and other factors. There are, however, many factors that tend to be common to trafficking in general or found in a wide range of different places[3]. They include lack of employment opportunities, poverty, economic imbalances among regions of the world, corruption, decline of border controls, gender and ethnic discrimination and political instability and conflict. These push and pull factors of demand for workers, the possibilities of higher standers of living and the perceptions of many in poor communities that better opportunities exist in larger cities or abroad[4]. There is a demand in market which fuels the growth of human trafficking. The business of human trafficking is mainly built on individual human suffering, yet human trafficking is hard to combat because it has financial advantages for many legal businesses.

The problem is particularly acute in Nepal. Nepal is one of the least developed countries of the world, lacking in sufficient economic capital, infrastructure, and developed human resources to forge an independent path of development. Overwhelmingly agrarian in nature, 90 percent of its 21 million inhabitants rely on subsistence agriculture. Adult literacy is as low as 23 percent for females and 57 percent for males; infant and maternal mortality rates are the highest in South Asia. The historically high level of out migration of people searching for sustainable livelihood options is escalating. In certain districts in the country the out migration of men and women of prime productive and reproductive age is particularly high. Trafficking is an important offshoot of migration in Nepal, and

3 Addressing the root causes of trafficking, Available at www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_9-2.pdf last visited on 1st February 2016

4 Alexis A. Aronowitz, Humuan Trafficking, Human Misery: The Global Trade in Human Beings(Westport, CT: Praeger, 2009),11-12

one of its most abusive forms[5].

Definition of Trafficking

United Nation Protocol to Prevent, Suppress and Punish Trafficking in Persons

The most wide definition of Human Trafficking provided under the 'UN Protocol to Prevent, Suppress and Punish Trafficking in Persons especially women and children, 2000', which is also called Palermo Protocol.

Article 3, paragraph (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons defines Trafficking in Persons as the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

Elements of Human Trafficking

On the basis of the definition given in the Trafficking in Persons Protocol, it is evident that trafficking in persons has three constituent elements;

The Act (What is done)

Recruitment, transportation, transfer, harboring or receipt of persons

The Means (How it is done)

Threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim

The Purpose (Why it is done)

For the purpose of exploitation, this includes exploiting the prostitution of others, sexual exploitation, forced labor, slavery or similar practices and the removal of organs.

This definition is very wide it includes trafficking done for prostitution as well

5 An Assessment of Laws and Policies for the Prevention and Control of Trafficking in Nepal, Available at https://asiafoundation.org/resources/pdfs/nepaltraffickingassesment.pdf last visited on 2nd February,2016

as labour purposes. Exploitation for labour purposes includes domestic help, agricultural workers and workers in dangerous industries as well as those trafficked as child soldiers. It also includes trafficking for adoption into begging and less well known and analyzed problem of organ trafficking[6].

The definition of trafficking developed by the United Nations is a consensual document that was agreed on by member states. It is therefore, represents the interests of governments rather than individuals. It does not focus on the needs of trafficking victims as do some national and regional legislation on human trafficking.

The SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002

The SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution defines Trafficking as "Trafficking" means the moving, selling or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking[7]. Further under clause 5[8] provides the "Persons subjected to trafficking" means women and children victimized or forced into prostitution by the traffickers by deception, threat, coercion, kidnapping, sale, fraudulent marriage, child marriage, or any other unlawful means.

The definition of Trafficking provided under SAARC Convention is very limited one. This Convention covers trafficking of women and children only, it does not deal the trafficking of men. Again it is limited to prostitution purpose, it means the definition of trafficking includes when a child or a woman is trafficked for prostitution purpose only not for any other purposes such as domestic worker or forced labor etc.

The definition of trafficking provided under Palermo Protocol is much wider than SAARC Convention. The SAARC Convention covers only the act of buying and selling of women and children but Palermo Protocol includes also the act of transportation, transfer, recruitment, harbor or receipt of person for trafficking. The purposes for trafficking are much wider under Palermo Protocol in comparison to SAARC Convention, as SAARC Convention provides trafficking of women and children for the purpose of prostitution whereas under Palermo Protocol it also includes the purposes of forced labor, removal of organ or any other form of exploitation.

6 Louise Shelly, Human Trafficking a Global Perspective, Cambridge University Press,(2010)

7 Article 1(3) of SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002

8 Article 1(5), Id.

Definition and Law on Trafficking in Persons in India

India faces a very difficult problem of human trafficking in modern times. The gravity of the problem could be understood in the light of Trafficking in Persons Report released by the United States annually. According to the 2015 Trafficking in Persons Report published by the Government of the United States of America, India is a source, destination, and transit country for men, women, and children subjected to forced labour and sex trafficking[9]. Forced labour constitutes India's largest trafficking problem; men, women, and children in debt bondage are forced to work in brick-kilns, rice mills, agriculture, and embroidery factories. According to this report, 90% of India's trafficking problem is internal[10].

A proper and contemporary definition of human trafficking is the need of the present times in India. Although India has a specific law[11] on human trafficking, yet it does not define it. There has been an attempt to define it in one specific State legislation, such as the 'Goa Children's Act, 2003'. Section 2 of this Act defines human trafficking[12] but it has limited application i.e. limited to (a) the State of Goa in India and (b) child trafficking only. The National Human Rights Commission has adopted the definition given by the United Nations in its action research report "Women and Children in Trafficking 2003"[13]. The SAARC Convention

9 Trafficking in Persons Report, 2015 (US Department of State), at 184; available at *http://www.state.gov/documents/organization/243559.pdf* (Last visited on 10 December 2015)

10 Ibid.

11 Immoral Trafficking Act ,1956

12 Section 2 of Goa Children's Act, 2003- Child trafficking means the procurement, recruitment, transportation, transfer, harboring, receipt of persons, legally or illegally, within or across borders, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of giving or receiving payments or of a position of vulnerability or of giving or receiving payments or benefits to achieve the consent of the person having control over another person, for monetary gain or otherwise.

13 The UN Protocol to Prevent, Suppress and Punish Trafficking in Person, Especially women and children also called the Palermo Protocol, provides the definition of trafficking in human beings as currently they agreed upon by international community. Trafficking in persons is defined as under:

(a) Trafficking in persons shall mean the recruitment, transportation, transfer, harboring or receipt of persons by means of threat or use of force or other forms of coercion or abduction or fraud or deception of the abuse of power or of a position of vulnerability or of giving or receiving of payments or payments or benefits to achieve the consent of a person having control over another person, for the purposes of exploitation. Exploitation shall include at a minimum, the exploitation of the prostitution of others or forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set froth in subparagraph shall be irrelevant where any of the means set forth are used.

(c) The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of

on Preventing and Combating Trafficking in Women and Children, 2002, adopts a narrow definition of trafficking, limited to its purpose of prostitution, whereas women and children are also forced into other exploitative forms of labor, such as domestic work, garment labor, organ transplantation etc. The offence of Trafficking in Persons is extended under Indian Penal Code, 1860 by 2013 amendment. The definition of Trafficking in Persons as defined under Palermo Protocol is incorporated in Indian Penal Code after amendment of 2013 to define the offence of Trafficking in Persons. According to the amended provision of the Indian Penal Code, 'whoever, for the purpose of exploitation recruits, transport, harbors, transfer or receives a person or persons by using threats, using force or any other form of coercion or by abduction or by practicing fraud or deception or by abuse of power or by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harbored, transferred or received, commits the offence of trafficking[14]. Explanation 1 to Section 370 provides, "exploitation shall include any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude or the forced removal of organs". After the new amended section, the ambit of the term "exploitation" has been widened to include sexual exploitation, slavery, servitude or the forced removal of organs. However, under SAARC Convention on Trafficking in Women and Children for Prostitution, trafficking of women or children is done for the limited purpose of prostitution only. Therefore definition of trafficking provided under Indian Penal Code has been recently made wider than the SAARC Convention.

Providing for penal norms apart, trafficking in human beings is prohibited by the Constitution of India[15]. India is considered a source, destination and transit country for human trafficking primarily for commercial sexual exploitation and forced labor. Sex ratio has been coming down for the last few decades in many parts of India[16]. Forced marriage is another big factor for trafficking of women and girls in India. Movement of persons is largely from Nepal and Bangladesh into India and sometimes beyond, through the borders that these countries have with India which are porous and very long. There are 14 legal entry points with Nepal, but illegal cross border movements take place easily. Since India has an open border policy with Nepal, trafficking may be difficult to identify[17]. Bangladeshis

exploitation shall be considered "trafficking in person" even if this does not involve any of the means set forth in subparagraph.

14 Section 370, Indian Penal Code, 1860 (inserted by Criminal Law Amendment Act, 2013)

15 The Constitution of India, 1950, Article 23

16 For further details, see "Sex Ratio in India", available at http://www.census2011.co.in/sexratio.php (last visited on February 12, 2016)

17 P.M.Nair, Sankar Sen, Trafficking in Women and Children in India, Orient Longman Private Limited, Asaf Ali Road New Delhi,pp 10-12, , (2005)

don't have similar access but trafficking from both these countries takes place. Within India number of women and girls are trafficked due to cultural practice such as the *devadasi* system[18]. There are many women who willingly migrate to Middle East, Europe and United States to work as a domestic labor that are defrauded by the placement agencies and sometimes trafficked. The 2010 Report on 'Trafficking in Persons' pointed out that 90% of those trafficked belongs to the most disadvantaged groups. It also carried evidence of NGO reports on duping of girls from North East India with promises of jobs and then forcing them into prostitution as well as forced marriage. Brides are in high demand in the State of Haryana and other states due to the low sex ratio caused by sex selective abortion.

Being a signatory to the International Convention for the Prevention of Immoral Traffic, which was signed in New York on 9th May 1950, India developed a specific Act against trafficking; the Immoral Trafficking (Prevention) Act 1956. The national legislations like Indian Penal Code 1860, Immoral Traffic Prevention Act 1956, Juvenile Justice (Care and Protection of Children) Act 2000, Child Labor (Prohibition and Regulation) Act 1986, and Child Marriage Restraint Act 1929, Bonded Labor System (Abolition) Act 1976 made attempts at addressing the multiple dimensions of trafficking indirectly.

Immoral Traffic (Prevention) Act, 1956

India's Immoral Traffic (Prevention) Act, 1956 is the only legislation specifically addressing trafficking. However, it does mix up issues of trafficking and prostitution and is currently pending amendment. It penalizes trafficking of women and children for commercial sexual exploitation. Keeping a brothel is a punishable offence[19], as is living on the earnings of the prostitution of others[20]. The latter would inadvertently also cover family members or dependents of the woman, which was not the intention of the legislation. There have been cases at times where the trafficked woman has herself been charged under this provision. Some of the major elements of trafficking are covered by the enactment. These include procuring, inducing or taking a person for prostitution[21], detaining a person in premises where prostitution is carried on[22] and soliciting[23]. Soliciting has also been used against women themselves and is sought to be addressed by the proposed amendment which seeks to drop the provision. If a person is found with a child in a brothel, there is a presumption that the child has been detained in

18 Dedicating a girl to prostitution, through ostensibly dedicated to serve a goddess
19 Immoral Traffic Prevention Act, 1956, Section 3
20 Ibid Sec 4
21 Ibid Sec 5
22 Ibid Sec 6(1)
23 Ibid Sec 8

that place for sexual exploitation[24]. It is a presumption which can be rebutted by the defense on production of appropriate evidence. On rescue and rehabilitation, the Act also provides for rescue on the directions of a Magistrate[25]. In order to ensure that the women rescued are not harassed, it requires that two women police officers be present during the search procedures and also that the interrogation be done by a woman police officer[26]. There is a provision for placing the woman or child in intermediate custody in a safe place and to refrain from placing her with those who might have a harmful influence on her[27]. If trafficking has been by the members of the family, or there is suspicion that they may be involved, the trafficked persons may not be released to their families. As mentioned earlier, the Act is under amendment, and it is hoped that the concerns often raised in its implementation will be adequately addressed.

The Indian Penal Code, 1860

There are multiple provisions provided in Indian Penal Code, 1860 (IPC) which can be used against the traffickers and brothel owners. In the process of trafficking a series of offences under the Penal Code are traffickers such as kidnapping[28], kidnapping or abduction for the purpose of begging'[29], with the intent to secretly and wrongfully confine such person'[30], 'compel women to marry'[31], to grievous hurt or slavery or unnatural lust[32]. The IPC also prescribes punishment for procurement of a girl for the purpose of forced seduction or illicit intercourse [33]. In order to control cross-border human trafficking for commercial sexual exploitation, a specific provision was added in the IPC with regard to the offence of importation of girls from foreign countries for such illicit sexual intercourse[34]. Section 372 of the IPC provides punishment for selling a minor for the purpose of prostitution while Section 373 prescribes punishment for buying a minor for the purpose of prostitution. Section 376 prescribes punishment for rape. The Criminal Law (Amendment) Act, 2013 has made several changes in the penal provisions, including defining the term human trafficking in Section 370[35]. It has also

24 *Ibid* Sec 6(2A)
25 *Ibid* Sec 16
26 *Ibid* Sec 15(6A)
27 *Ibid* Sec 17
28 Indian Penal Code, 1860, Section 363
29 *Ibid*, Section 363A
30 *Ibid*, Section 365 - Kidnapping or abducting with intent secretly and wrongfully to confine person
31 *Ibid*, Section 366 - Kidnapping, abducting or inducing woman to compel her marriage, etc
32 *Ibid*, Section 367 - Kidnapping or abducting in order to subject person to grievous hurt, slavery, etc
33 *Ibid*, Section 366A
34 *Ibid*, Section 366B
35 *Ibid*, Section 370 (1) Whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c) harbours, (d) transfers, or (e) receives, a person or persons, by— First.— using threats, or

prescribed rigorous punishment for the commission of the offence of trafficking and a more severe punishment may be inflicted when the victims are more than one or the trafficking involves minor victims[36]. The legislation is more stringent if such offences are committed by police officers and a higher punishment had been laid down for them[37].

Juvenile Justice (Care and Protection of Children) Act 2000

The Juvenile Justice Act prohibits the employment of children for begging and makes such an act punishable with imprisonment and fine[38]. As per Juvenile Justice Act, whoever having the actual charge of or control over a juvenile or a child, abates the commission of the offence punishable under sub section 1, shall be punishable with imprisonment for a term which may extent to one year and shall also be liable for fine[39]. According to this Act, whoever ostensibly procures a juvenile or the child for the purposes of any hazardous employment keeps them in bondage and withhold their earnings or uses such earning for his own purposes shall also be punishable with imprisonment for a term, which may extend to three years and shall also be liable to fine[40].

Definition and Law on Trafficking in Persons in Nepal

In Nepal, "the new Constitution of Nepal" does not provide any definition of trafficking; it provides that trafficking in human beings, bonded labor and forced labor is prohibited. The Children's Act 1991 prohibits involving a child in immoral profession. The *Muluki Ain,* 1963 (the General Code of Nepal) provides that "taking a person out of country for sale is prohibited"[41]. All these legislations

---

Secondly.— using force, or any other form of coercion, or Thirdly.— by abduction, or Fourthly.— by practising fraud, or deception, or Fifthly.— by abuse of power, or Sixthly.— by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking. etc

36 *Ibid*, Section 370(2) Whoever commits the offence of trafficking shall be punished with rigorous imprisonment for a term which shall not be less than seven years, but which may extend to ten years, and shall also be liable to fine.

37 *Ibid*, Section 370 (7) When a public servant or a police officer is involved in the trafficking of any person then, such public servant or police officer shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

38 Juvenile Justice (Care and Protection of Children) Act, 2000, Section 26

39 *Ibid* , Section 24

40 *Ibid* , Section 26

41 Chapter 11, Number 1 (*Muluki Ain)*, available at *http://nepalconflictreport.ohchr.org/files/docs/1963-04-12_legal_govt-of-nepal_eng.pdf* (last visited on February 11, 2016)

have prohibited trafficking in persons directly or indirectly but none of these define Trafficking in Persons. The "Human Trafficking in Persons and Transportation (Control) Act 2007" defines the offence of trafficking as anyone who acts, to sell or purchase a person for any purpose, to use someone into prostitution, with or without any benefit, to extract human organ except otherwise determined by law, to go for in prostitution[42].

Comparison of laws of India and Nepal

After considering the definition of two countries we can easily say that India's definition is much wider than the Nepal. Under Indian Penal Code[43] it is defined as similar to the Palermo Protocol but in Nepal 'trafficking' is defined as "selling and purchaging of a person for the purpose of exploitation" in Human Trafficking and Transporation (Control) Act, 2007. In Nepal the action done for trafficking is limited one e.g. it does not criminalize the act if trafficking is done by action of recruitment,harboring or transfer. Further this definition also does not include the means i.e. how it is done. In addition, this definition does not specify that how a victim is traficked by the offender.

The *Muluki Ain* stipulates that no person shall separate or lure to separate a minor below the age of 16 years or even a major who is mentally unsound, from his or her guardianship without the consent of his or her legal guardian[44]. If someone is so separated or lured, the offender shall be liable to the punishment of a fine of up to five hundred rupees or imprisonment for a term not exceeding three years or with both[45]. No person shall make any other person a Kamara, Kamari (sub-servant), slave or bonded labor. A person who makes another person a sub-servant, slave or bonded labor shall be liable to the punishment of imprisonment for a term ranging from three years to ten years, and the court may issue an order for the provision of a reasonable compensation by the offender to the victim[46].

The implementation mechanism in India with respect to the law on human trafficking seems to be better than that of Nepal. As Nepal is currently witnessing instability of political institutions and processes, it faces difficulties in implementing the laws and Constitutional provisions at the moment. Despite putting in place appropriate institutions, such as National Human Rights Commission of Nepal, the identification and rehabilitation of the victims of human trafficking in Nepal

42 Human Trafficking and Transportation (Control) Act, 2064(2007), Section 4

43 Indian Penal Code ,1860, Section 370

44 Chapter 11, Number 2 *(Muluki Ain)*, available at *http://nepalconflictreport.ohchr.org/files/docs/1963-04-12_legal_govt-of-nepal_eng.pdf* (last visited on February 11, 2016)

45 *Ibid*

46 *Ibid*, Number 3

suffers from situational challenges of the current times. Having said that, the following sub-sections of this article deal with the Constituional and legal provisions of Nepal and India.

Constitution of Nepal and India

Nepal is going through a transitional phase currently, with the system of monarchy now abolished. Constitution drafting process had started in Nepal after the overthrow of monarchy, which was finally adopted in the late 2015.[47] Earlier, the Interim Constitution dealt with the issue of human trafficking. According to the provisions of that Interim Constitution, 2007[48], all forms of trafficking against human beings were included by its broad prohibition of trafficking[49]. It dealt with all forms of forced labor, again broadly[50]. In an attempt to break existing patterns of indebtedness, it abolished serfdom. Slavery is a gross violation of human rights, and that too is specifically covered under this provision. Considering the attention given to the problem of trafficking in its recent past, the newly adopted Constitution of 2015 also provides for a rule against exploitation[51]. According to the new provisions, no person shall be subjected to human trafficking or bonded labour, and such an act shall be punishable by law. It further provides that no person shall be subjected to forced labour. To protect the children against human trafficking, the new provision says, "no child shall be subjected to child marriage, illegal trafficking, kidnapping, or being held hostage'[52].

Trafficking is prohibited by the Constitution of India. The right against exploitation is a fundamental right guaranteed by the Constitution of India under Article 23(1) which provides that 'traffic in human beings and other similar forms of forced labor are prohibited and any contravention of this provision shall be an offence punishable in accordance with law'. The Constitution specifically mentions trafficking in human beings as well as forced labor and also indicates the special protection to be provided to the vulnerable groups in society.

The Constitution of India as well as the new Constitution of Nepal prohibits trafficking in persons for the purpose of bonded labor, forced labor or any form of exploitation.

47 See, Constitution Bill of Nepal (2015) , available at *http://www.inseconline.org/linkedfile/Bill%20Of%20Constitution%202015%20Sept.pdf* (last visited on February 12, 2016)

48 Article 39 (5), The Constitution of Nepal, 2015.
49 Interim Constitution of Nepal 2007, Art 29(3)
50 *Ibid* Art 29(4)
51 Article 29, Constitution of Nepal, 2015
52 Interim Constitution of Nepal 2007, Art 22

Domestic law on Trafficking

In Nepal , there is a separate enactment to deal with the problem of trafficking, i.e. 'Human Trafficking and Transportation (Control) Act 2007. Nepal promuglated the Human Trafficking (Control) Act in 2007, which replaced the previous Human Trafficking (Control) Act of 1986. The new Act provides a number of legal safeguards, including the provison of rehabilitation and integration of victims of trafficking, protection of victims and witness, compensation and others. Recently, the 'Human Trafficking (Control) Regulation', 2008 has been enacted in order to implement the provision under that Trafficking Act effectively.

This act defined human trafficking as,

(1) anyone who acts,

(a) To sell or purchase a person for any purpose,

(b) To use someone into prostitution, with or without any benefit,

(c) To extract human organ except otherwise determined by law,

(d) To go for in prostitution[53]

This Act strictly prohibits that 'no one shall commit or cause to commit human trafficking'[54]. Further this Act provides protection to the person who reports the incidents of trafficking and puts written request to remain unnamed, the police office which registers the report should maintain his/her confidentiality[55]. The Act protects whistle blowers and protects their identity. This may go a long way in encouraging people to come forward if they know of any incidents of trafficking. Similarly, informant's identity, even from within the rings of trafficking, is kept confidential[56], as is the identity of the trafficked person[57]. Publicity is usually shunned by those who have been trafficked, especially those who have been trafficked for commercial sexual exploitation, as they would ideally like to be reunited with families and communities who may not accept them back if the truth is known. It also makes rehabilitation under the Act much easier.

In order to make it easier to prove the offence, the burden of proof is shifted from the prosecution to the accused, presumably when a prima facie case is made out. Since getting witnesses to testify is difficult in prosecution of trafficking cases and also because gathering proof in cross border cases is a daunting task, a shifting

53 *Supra* Note 11
54 *Ibid* Section 3
55 *Ibid* Section 5
56 *Ibid* Section 20
57 *Ibid* Section 25

of the burden of proof makes the prosecutor's job easier[58]. Further, Section 6 of the Act provides that, if the person reporting as a victim, the police office should take the statement immediately and the victim shall be taken to the nearest district court to certify the statement as soon as possible. If a police officer brings to certify a statement, the district judge, notwithstanding anything contained in the prevailing law and even if the offence related with that statement does not fall within the jurisdiction of that district court, shall certify the statement after reading it aloud and noting whether there is difference or not in the statement. Therefore, the testimony of a trafficked person which is authenticated in court is sufficient evidence even if she does not appear before the court further in the case[59]. Such evidence is admissible and will go a long way in preventing witnesses turning hostile and will also shorten trials.

Usually in criminal cases, only the defense has a right to counsel who will represent him/ her. However, the statute provides that the victim of trafficking would also be represented by a counsel[60]. This would go a long way in ensuring that the trafficked person's other rights under this statute would be well protected. Having a representative who is competent in legal matters may do a lot to bolster the confidence of a trafficked person. A similar empowering provision is the right to have a translator[61]. Usually victims find themselves at a double disadvantage; firstly, they may not be aware of legal procedures and, secondly, they may not understand the language the proceedings are in and would not be able to judge whether what they say is being accurately presented. With a counsel and translator, they will be in a position to know what is happening and how best to ensure that their interests would be protected. In camera trials are specifically provided in the Act[62], and while it was earlier discretionary, it was not followed in many cases. With its specific inclusion in the Act, in camera trials will help maintain confidentiality and protect the identity of those involved. It will also prevent to some extent the intimidation of prosecution witnesses.

Rescue and rehabilitation provisions abound in the Act. A positive duty has been cast upon the State to rescue victims of cross border trafficking[63] and also to rehabilitate them. Police protection and also accommodation at a rehabilitation centre must be provided if required[64]. Compensation is to be provided to victims

58 *Ibid* Section 9,Burden of Proof- : Notwithstanding anything contained in the prevailing law, a person accused of an offence under this Act shall provide evidence proving that the/she did not commit the offence.

59 *Ibid* Section 6
60 *Ibid* Section 10
61 *Ibid* Section 11
62 *Ibid* Section 27
63 *Ibid* Section 13
64 *Ibid* Section 26

of trafficking[65], regardless of the conviction of offenders, and a rehabilitation fund is required to be established by the government to take care of this[66].

Criticism of Human Trafficking in Persons and Transportation (Control) Act 2007

The Human Trafficking in persons and Transportation (Control) Act 2007 provide slavery and bonded labor as an offence; but it does not provide any punishment for the recruitment, transportation, harboring, or receipt of persons by force, fraud, or coercion for the purpose of forced labor. It provides punishment for forced prostitution but, in a departure from the 2000 UN TIP Protocol definition, does not consider the prostitution of children as a form of trafficking absent force, fraud, or coercion. It fails to address such issues as witness protection, repatriation of victims, and immigration status of foreign victims in Nepal, international counter-human trafficking cooperation, and border measures. It shifts the burden of proof on the accused, creating a confession-centric system of justice in violation of the internationally recognized rights to a fair trial and presumption of innocence until proven guilty. The definition of trafficking in persons contained in the HTTCA partially complies with the UN Trafficking Protocol. Among others, it places undue emphasis on sex trafficking without mentioning labor exploitation, and does not explicitly reference "other forms of sexual exploitation," "forced labor or services," "practices similar to slavery," and "servitude" as forms of exploitation. Furthermore, the law does not include a clause rendering the consent of a trafficking victim irrelevant if any of the means defined in the crime are utilized. Lastly, a number of offences which are considered trafficking in persons under the UN Trafficking Protocol are covered in other legal acts which prescribe significantly lower penalties than the HTTCA and place the jurisdiction over the crimes in the hands of quasi-judicial bodies.

Judicial Pronouncement

It is believed that thousands of women and children are trafficked across borders and within countries. The women and children are trafficked for various purposes such as for commercial sex, domestic servant, organ removal and other forms of exploitative works. According to one estimate, annually 5000-7000 women are being trafficked from Nepal to Indian sex market alone which is a matter of national concern. However, the filing and reporting against this crime is very low. The court of Nepal in *Permanent Resident v HMG* on the FIR of Tara Devi Dahal[67], where the victim Tara Devi was allured by a man who promised to marry

65 *Ibid* Section 17
66 *Ibid* Section 14
67 Criminal Case No. 1042 of 2051 BS (1995 A.D.)

her with the help of his partner. Later on she crossed the border of Nepal and went to India where she stayed for some time in a hotel with him. He had sexual intercourse with her on the pretext of marrying her and then took her to Patna where she was sold to a brothel owner for Sixteen Thousand Indian rupees. The girl shouted and screamed, and the police was alerted, and she was rescued. The question was whether a crime had been committed under the Human Trafficking Transportation (Control) Act for the sale of the woman abroad since the sale did not actually took place in Nepal. Nevertheless, the act amounted to trafficking. The court said[68], "In a case like human trafficking, the statement of the victim-complainant needs to be considered trustworthy until otherwise proved by the defendant." The court then upheld the sentencing which had been pronounced by the lower court[69].

In *Urmila Thapa Magar*[70] , a woman, who claimed to be trafficked, had agreed to go with an acquaintance to another part of Nepal. However, the intention was to cross the border. A timely police check prevented cross border trafficking. When the case came before the courts in Nepal which had jurisdiction over the matter, the question was whether there was cross border trafficking or not. This was an important issue, as the woman continued to remain within the territory of Nepal and had not crossed into India. The court held that the crime of cross border trafficking which had a higher penalty in the laws in Nepal would be considered proved if - one, trafficking is proved and, two, if it can be shown that trafficking was for the purposes of taking the person to another country. This was sufficient, and there was no need for the person to actually be taken across the borders of Nepal.

The Supreme Court of India has pronounced various decisions on Human Trafficking and also given number of recommendations for the rehabilitation of the victims. In *Vishal Jeet vs. Union of India and others*[71] there was a PIL against forced prostitution of girls, devadasi and jogin, and for their rehabilitation. The Supreme Court held that in spite of stringent and rehabilitative provisions under the various acts, results were not as desired and, therefore, called for evaluation of the measures by the central and state governments to ensure their implementation. The court called for severe and speedy legal action against traffickers such as pimps, brokers and brothel owners. Several directives were issued by the court, which, inter alia, included setting up of a separate Zonal Advisory Committee,

68 *Ibid* para 28

69 Landmark Decisions on Violence Against Women and Children in South Asia, SARI/EQUITY available at *http://www.childtrafficking.com/Docs/judge_woman_childvio_0607.pdf* (last visited on 15 January2015)

70 Urmila Thapa Magar v Krishna Prasad Pudasaini Criminal Appeal no 1610 of the Year 2051 BS (1995 A.D.)

71 (1990) 3 SCC 318

providing rehabilitative homes, effectively dealing with the devadasi system etc[72] . In *Gaurav Jain vs. Union of India*[73], the Supreme Court passed an order dated 9 July 1997, directing, inter alia, the constitution of a committee to make an in-depth study of the problem of prostitution, child prostitutes and children of prostitutes, and to evolve suitable schemes for their rescue and rehabilitation. The Supreme Court directed that: "segregating the children of prostitutes by locating separate schools and providing separate hostels would not be in the interest of the children and the society at large" "… be allowed to mingle with others and becomes a part of the society." In a PIL *Prajwala v. Union of India*[74] seeks direction for action at the pre-rescue, rescue and rehabilitation stages of trafficking. Directions sought from the Court include the right to confidentiality of victims, the need for trauma counseling, minimum quality requirements for the diet and nutrition, adequate clothing, livelihood options, the right to information and proper follow up of cases of rehabilitation. In several cases traffickers traffic children in the guise of adoption. The case of *Lakshmi Pandey v. Union of India*[75] was a lanmark judgment, wherein it was brought to the notice of the government how children were exploited during the process of adoption. The Supreme Court gave certain directions to ensure that children are not exploited under the guise of adoption.

CONCLUSION

India and Nepal have gone a long way during recent decades to deal with the challenges of trafficking in human beings with formulating new rules and adapting to the international norms related to it. At one level, India has not only signed the United Nations Palermo Protocol to prevent, suppress and punish Trafficking in Persons but also it has signed the regional SAARC Convention on Prevention and Combating Trafficking in Women and Children for Prostitution, at another level, Nepal has not signed the UN Protocol, but it has signed and ratified the SAARC Convention. To implement the obligations contained in international agreements, India has recently amended its Criminal Law in 2013 to incorporate the wider definition of trafficking in human beings into its penal code. Its Constitution has remained an enabling norm against exploitation of human beings, which has been given concrete shape in the form of Immoral Traffic Act, 1956, Juvenile Justice (Care & Protection of Children) Act, 2000. Its judiciary has also played an active role in promoting compliance of India's laws to international obligations, such as the decisions in *Vishal Jeet* and *Vineet Jain.*

Nepal has also made several attempts to broaden the definition of human trafficking by making changes to its earlier laws to protect women and children. Apart from

72 Available at *http://nhrc.nic.in/Documents/ReportonTrafficking.pdf* (visited on 12 May 2013)
73 (1997) 8 SCC 114
74 Writ Petition (Civil) 56 of 2004, Supreme Court
75 AIR 1984 SCC 469

the Constitutional provisions and the provisions contained in *The Muluki Ain*, the National Human Rights Commission of Nepal and the judiciary have also done positive efforts to deal effectively with human trafficking. The landmark decisions of its judiciary, such as *Permanent Resident v HMG* and *Urmila Thapa Magar* were hailed not only by Nepali citizens, but also by international community. However, the internal conflict in Nepal which started in 1996 and came to an end in 2006 made many people vulnerable to threats of human traffickers. The implementing institutions, such as the judiciary and the National Human Rights Commission were also facing challenges to curb the human trafficking. In the year of 2007, Human Trafficking in Persons and Transportation (Control) Act broadened the definition of human trafficking and made the intermediate persons also liable for recruiting, harbouring, and sheltering the trafficked victims. The new Constituion of Nepal, 2015 has also provided a new hope to the future legialtive and instituional legitimacy to the overall efforts to deal with the problem of human trafficking.

*****

LEGISLATIVE FRAMEWORK ON CHILD LABOUR IN INDIA

Ms. Sonu Sharma*

ABSTRACT

A number of legislations have been made in regular intervals to stop the unethical practice of child employment in the most hazardous areas of economy and to control and regulate it in the other areas of productive activity .Government has passed various Acts to minimize the exploitation of the most vulnerable group of the society. The legislative measures, which have been taken from time to time, have been discussed in this article in chronological order.

INTRODUCTION

India has been showing a great concern for child labour which is growing at an unprecedented rate over the last many years. It is believed to be one of the foremost countries from amongst the category of developing world to reckon with certain gravity the prevalence of child labour and to take pledge for its control if not complete abolition through some programmatic action plans, statutory provisions and legislations. Child labour in India has received considerable attention in the recent years from social scientists, social activists, Government and voluntary organizations[1]. A number of legislations have been made in regular intervals to stop the unethical practice of child employment in the most hazardous areas of economy and to control and regulate it in the other areas of productive activity[2]. Apart from setting up various committees to look in to the conditions of working children and suggesting measure to improve the lot, government has passed various Acts to minimize the exploitation of the most vulnerable group of the society. The legislative measures, which have been taken from time to time, have been discussed below in chronological order[3]. The Legislative history, in India, with respect to child labour has traversed a long path since 1881 progressively

* Assistant Professor, Department of Laws, Maharishi Markandeshwar University , Mullana (Ambala); available at *sonusharma16386@gmail.com* and +91 _____

1 B.D.Rawat, "Human Rights And Child Labour : An Appraisal of Legislative Trends and Judicial Response in India", Journal of Legal Studies, Vol.29, at 43 (1998).

2 B.K.Swain, Child Labour in India, at 59(2005).

3 Anil Trehan, "Concept of Child Labour, its impact on the Child , Legislative framework before and after Independence and measure for its eradication",Labour and Industrial Cases, Vol. 42(2),at 101 (2009).

extending protection of the law to working children. Over this long period, the statutory provisions on child labour have concentrated mainly on a few aspects like reducing the working hours, raising the minimum age in defining a child and different activities which a child can undertake. Probably, this could have happened due to the presumption that child labour is an inevitable reality. The employment of Children Act, 1938 was the first comprehensive Act which banned the employment of children less than thirteen years of age. This Act was repealed by the Child Labour (Prohibition and Regulation) Act, 1986. The 1986 Act has been the culmination point of several legislations and amendments thereof[4]. In India, there exists a wide gamut of legislations to tackle the problem of child labour[5].

Legislation before Independence

In 1850, an Act was passed regarding Apprentice Contractors, according to which any child, would be bound as an apprentice for a learning trade, craft or for employment up to a maximum of seven years[6].

1. The Indian Factories Act, 1881:

The first major step to control and regulate child labour in the post-independence phase of the industrial development in the country has been initiated through the child labour legislation made by the Factories Act, 1881. The contents of the Act were uniformly made applicable to all the factories which were running on the basis of employing machineries and engaging a minimum number of 100 and more persons and working for duration more than four months annually. The provisions which were laid down by this Act included (a) denial of employment for children in any factory below the age of seven years, (b) nine hours of work per day with a rest break of one hour for the children in the age group of 7 to 12 years, and (iii) permission for weekly holiday to all the working children[7].

2. The Mines act 1901

The Mines Act was passed, which prohibited the employment of children less than 12 years in mines, as it was dangerous to their health and safety[8].

4 R.K. Sabharwal, "Child Labour- National and International Perspective", *Civil and Military Law Journal* , Vol.37, at 28&29 (2001).

5 Subhash Chandra Singh, "Child Labour: Nature and Issues", *Labour and Industrial Cases,* Vol. 3 6, at 196 (2003).

6 Central Act 9 of 1850.

7 B.K.Swain, Child Labour in India, at 60(2005).

8 Central Act 8 of 1901.

3. Factories Amendment Act 1922

The Act was passed, which (1) raised the minimum age to 15 years in general, (2) fixed the working hours to a maximum of 6 hours and an interval of half an hour in between[9].

4. The Indian Mines Act, 1923

The Act raised the minimum age from 12 to 13 years in mines[10].

5. The Indian Ports (Amendment) Act, 1931

Laid 12 years as a minimum age for handling goods in ports[11]

6. The Indian Mines (Amendment) Act, 1935

Prohibited the employment of children in mines below fifteen years of age

7. The children (Pledging of Labour) Act, 1933

(Pledging of Labour) Act[12]. This Act was passed to eradicate the evils arising from the pledging of the labour of young children by their parents or guardian to employers for raising loans or advance. The Act calls for penalties to be levied against any parent, middleman, or employer involved in making or executing a pledge of child's labour. Such a pledge is defined as an 'agreement written or oral, express or implied whereby the parent or guardian of a child, in return for any payment or benefit received or to be received by him, undertakes to cause or allow the services of the child to be utilized in any employment[13]. Consequently, the Act prohibits the making of agreements by a parent or guardian to pledge the labour of children, below the age of fifteen years for employment and any agreement made has been declared void being opposed to public policy. The Act has also made both the consenting parties liable to fine[14]. Though the civilized society does not need such a law but even then the pledging of child labour continues[15]. The fines

9 Central Act 2 of 1922 Amending Act 12 of 1911.

10 Anil Trehan, "Concept of Child Labour, its impact on the Child , Legislative framework before and after Independence and measure for its eradication",Labour and Industrial Cases, Vol. 42(2),at 101 (2009).

11 Central Act 11 of 1931.

12 Asha Bajpai, Child Rights in India – Law , Policy and Practice, at 25&26 (2006)

13 The Children (Pledging of Labour) Act 1933, Sec. 2. 'Child' is a person less than fifteen years old.

14 The fines for violating this law are fifty rupees against parent and two hundred rupees against either the middleman or employer.

15 Devinder Singh, Child Labour & Right to Education, at 68 (2013).

for violating this law are fifty rupees against parent and two hundred rupees against either the middleman or employer[16].

8. The Employment of Children Act, 1938

The main object of the Act is to prevent employment of children in hazardous employment and certain categories of unhealthy occupations these are:[17]

(a) The Act prohibits the employment of children below the age of 15 in any occupation connected with the transport of goods or mail by railways, connected with a port authority within the limits of any port , or connected with any work on railway premises[18]

(b) No child who has not completed his fourteenth year will be allowed to work in any workshop where any of the processes set in the schedule is carried on[19]. The Schedule : (1) Bidi- making, (2) Carpet weaving, (3) Cement manufacture, (4) Cloth printing and dyeing and weaving, (5) Manufacture of matches, explosives and fireworks, (6) Mica cutting and splitting, (7) shellac manufacture and soap manufacture, (8) Tanning , and (9) wood cleaning. The (State) Government after a notification in the gazette and a notice period of three months may add any description of process to the schedule.

(c) The Act clearly states in Section 3(3) that family units and training schools of Government will not come under this provision.

(d) Section 3-B states that before any work set out in the schedule is carried out in any workshop, the inspector must receive a notice from the 'occupiers' giving full details about name and situation of the workshop, name of actual manager, and the nature of the processes to be carried on in the workshop.

(e) Certificate of age of the child workers are required from a prescribed medical authority.

(f) All employers employing children must maintain registers (Section 3-D), showing the name and date of birth of every child under 17 years of age so employed or permitted to work , the work and rest periods, the nature of work, etc.

16 Asha Bajpai, Child Rights in India – Law , Policy and Practice, at 26 (2006)
17 Tapan Kumar Shandilya & Shakeel Ahmad Khan, Child Labour: A Global Challenge, at 88 (2006).
18 Section 3(1) of The Employment of Children Act, 1938.
19 Section 3(3) of The Employment of Children Act, 1938.

(g) Notices clearly stating abstracts of sub-sections 1 and 2 of section 3 and section 4 are to be prominently displayed at all railway stations and ports.

(h) Violation of this Act can mean imprisonment from 3 months to one year and a fine from Rs. 500 to Rs. 2,000. For someone who has been convicted earlier, the period of imprisonment can go up from 6 months to two years.

It is, however imperative to mention here that this Act has been replaced to the extent it is consistent with Child Labour (Prohibition and Regulation) Act, 1986.[20]

Legislation after Independence

1. The Factories Act, 1948

The Factories Act, 1948 is an important Act which provides for prohibition of employment of young children and prescribes working hours for minors.

Section 67 provides that:

"No child who has not completed his fourteenth year shall be required or allowed to work in any factory."

The Act prohibits the employment of child below14 years in any factory and also imposes some restrictions on the employment of young persons to safe-guard their health. Young person means a person who is either a child or an adolescent. Persons between the age of 15 and 18 years are defined as adolescents. Such young persons are required to obtain a certificate of fitness from a Certifying Surgeon statutorily. Such certificate should be in the custody of manager of the factory and the young person should carry while be at work a token giving a reference to such certificate of fitness. The certificate of fitness granted remains valid for one year and may be renewed or revoked before the expiry of the said period of one year if in the opinion of the certifying surgeon the holder of the certificate is no longer fit to work in the capacity stated there in a factory. An adolescent who is not granted certificate of fitness to work in the factory is considered to be a child for all purposes of the Act.

The Act imposes restrictions in the matter of working hours of the young persons. A person who is below the age of 17 years shall not be allowed to work in any factory during night. Night means a period of at least twelve consecutive hours which shall include interval of at least seven consecutive hours falling between 10 am to 7 am Restrictions are also placed on their employment in certain dangerous occupations. The hours of work of children is limited to 4 hours in any day; period

20 Mamta Rao, Law Relating to Women and Children, at 448 (2008).

of work to two shift and spread over to 5 hours a day. They cannot be employed between 10 pm to 6 am. The manager of a factory has to maintain in a register of child workers furnishing the necessary details.

A young person between the age group of 15 years and 18 years is considered to be an adult for the purpose of the Act provided he has a certificate from a certifying surgeon in support of being declared fit for a full day's work in a factory; otherwise he will be considered a child. A young person shall not work on any dangerous machine unless he has been fully instructed as to the dangers thereof and the precautions to be observed, has received sufficient training in work at machine, and is under adequate supervision.

There is also prohibition on the employment of child in pressing cotton in which a cotton opener is at work. These are broadly the provisions in the Act for the protection of children employed in the factories to work. Section 98 of this Act provides for penalties on adolescent for using false certificates of fitness or allowing certificates issued to them for being used by others. Similarly, Section 99 provides for penalty on a parent or guardian for permitting double employment of a child. The Act also makes provision for crèches to be provided by the employer in factories employing 30 or more women workers for the use of children less than 6 years of age.[21]

2. The Minimum Wages Act, 1948

The minimum Wages Act, 1948 provides for fixation by state Governments of minimum time rates of wages, minimum piece rate of wage, guaranteed time rates of wages for different occupations and, localities or class of work and adult, adolescents, children and apprentices. The Act is aimed at occupations which are less well organized and more difficult to regulate and where sweated labour is more prevalent or where there is much scope for the exploitation of labour.[22]

3. The Plantation Labour Act, 1951

As per Section 4(a) of the Act it covers in the first instance all tea, coffee, rubber, cinchona, cordamory plantations and areas 10.117 hectares or more in which 30 or more persons are employed or were employed or were employed on any day of the preceding 12 months. Further, the State Government is empowered to extend all or any of the provisions of this Act to any land used or intended to the used for growing and plantation even if it measures less than 10.117 hectares and the

21 A.S. Verma , " Child Labour and the Law in India: A Critical Analysis" Kanpur Law Journal, Vol. 9 &10, at 29 (1996)

22 Saleem Akhtar, M. Zafar Mahfooz Nomani & Haris Umar , " Legislative and Institutional Framework for Elimination of Child Labour: An Analysis", Aligarh Law Journal, Vol.12, at 23(1997).

number of persons employed is less than thirty.[23] This Act Provides for the welfare of labour and regulates the condition of work in plantation. The employment of children below the age of 12 years is prohibited under the Act. A child worker (a person who has not completed 15 years) can be allowed to work if employed only between 6 am. to 7 pm. The total maximum working hours in a week for a child and an adolescent prescribed under the act are 40. A child who has completed his twelfth year and adolescent will not be allowed to work in any plantation unless he is certified to be fit by a duly appointed Certifying Surgeon and such child or adolescent is required to carry with him while he is at work a token giving a reference of such certificate. A certificate granted under Section 27 of this Act remains valid for the period of one year. The Act prescribes a few welfare measures in the nature of suitable rooms for the use of children below the age of 6 years and education for the children of workers employed in plantations.[24]

4. The Mines Act , 1952

The Mines Act, 1952 also regulates the employment of children in mines. It prohibits the employment of persons below 18 years of age to work in any mine and also prohibits the presence of any child in any part of a mine which is below ground or in any open excavation in which any mining operation is being carried on. The provisions regarding working hours and rests have been taken care of. There are penal provisions also to ensure the observance of the Act. The relevant sections are Section 40 which prohibits the employment of persons below 18 years in a mine.

5. The Merchant Shipping Act, 1958

This is also a specified piece of legislation relating to the shipping industry. It contains provisions prohibiting and regulating child employment. The Act bars employment of children below 14 years of age in any capacity in the shipping industry except as provided under Section 100,

(a) In a schoolship or trainingship in accordance with the prescribed conditions;

(b) In a ship in which all persons employed are members of one family;

(c) In a home trade ship of less than two hundred tons gross; or

(d) Where such person is to be employed on nominal wages and will be in charge of his father or other adult near male relative.[25]

23 Mamta Rao, Law Relating to Women and Children, at 447 (2008).

24 A.S. Verma , " Child Labour and the Law in India: A Critical Analysis" Kanpur Law Journal, Vol. 9 &10, at 30 (1996)

25 Mamta Rao, Law Relating to Women and Children, at 447 (2008).

Act also prohibits employment of young person below the age of 18 as trimmers and stockers except under certain specific conditions[26]. The responsibility of administering the Act rests with the Director General of Shipping.[27]

6. The Motor Transport Workers Act, 1961

Motor transport undertaking is defined under section 2 (g) of the Act which means a motor transport undertaking engaged in carrying passengers or goods or both by road for hire or reward and includes a private carrier. The Act applies to every motor transport undertaking employing two motor transport workers. Motor Transport worker is defined under section 2 (h) of the Act. Child is defined under section 2 (c) of the Act, means a person who has not completed his fourteenth years. Section 21 of the Act prohibits the employment of a child in any capacity. According to the provisions of section 14 read with section 15 of " Child Labour (Prohibition and Regulation) Act, 1986" the breach of section 21 of Motor Transport Workers Act, 1961 is punishable under section 14 of the Child Labour (Prohibition and Regulation) Act, 1986 and not under section 31 and section 33 of Motor Transport Workers Act, 1961.[28] Section 22 mandates that adolescents employed as motor transport workers are to carry tokens. "No adolescent shall be required or allowed to work as a motor transport worker in any motor transport undertaking unless:

(a) A certificate of fitness granted with reference to him under Section 23 is in Custody of the employers; and

(b) Such adolescent carries with him while he is at work a token giving a reference to such certificate."

7. The Apprentices Act, 1961

The Act provides for the regulation and control of training of apprentices and for matter connected therewith. A person below 14 years of age under this Act is not qualified for being engaged as an apprentice to undergo apprenticeship training in any designated trade. A person to be eligible as apprentice in the designated trade must satisfy two conditions. Firstly, a contract of apprenticeship must be entered into between the apprentice of whom he is guardian if he is minor on the one hand and employer on the other. Secondly, such contract must be registered with the Apprentice ship advisor. The children between 14 and eighteen years of age and adults are eligible for training. In the matters of health, safety and welfare of apprentices, the relevant provisions of the Factories Act, 1948 or the Mines Act, 1952, as the case may be , shall apply to apprentices as if they were workers

26 Section 110 of The Merchant Shipping Act, 1958.

27 Saleem Akhtar, M. Zafar Mahfooz Nomani & Haris Umar , " Legislative and Institutional Framework for Elimination of Child Labour: An Analysis", Aligarh Law Journal, Vol.12, at 24(1997).

28 M.P. Shrivastav, Child Labour Laws in India, 45 (2006).

employed in a factory or mine.[29]

The Act enjoins upon the employer to pay compensation to apprentices in accordance with the provisions of Workmen's Compensation Act, 1923, if personal injury is caused to them by accident arising out of and in the course of their training duration. No apprentice, other than a short term apprentice, shall be engaged on such training between 10 p.m. and 6 am except with the prior approval of the Apprenticeship Advisor .Thus, the Act adopts a flexible approach and leaves most of the matters to be decided by the executive and the other authorities. Violating the provisions of this Act on the part of the employer is punishable for a term which may extend to six months or with fine or with both.[30]

8. The Beedi and cigar Workers(Conditions of Employment) Act, 1966

The Beedi and Cigar Workers (Conditions of Employment) Act, 1966 is a special enactment to regulate the conditions of work of beedi and cigar workers. This is an area where a large number of children work and are being exploited. The Factories Act, 1948 is no doubt applicable but because of the special nature of the work its provisions were violated easily by splitting a single unit into many small units. However, after this special legislation evasion is not possible.[31]

The provision of section 24 of the Act prohibits the employment of child in any industrial premises, who has not completed fourteen years of age.

9. Radiation Protection Rules, 1971

Persons below 18 years cannot be employed under these rules.

10. Bonded Labour System (Abolition) Act, 1976

Though the Act is not directly concerned with the child labour, yet the entire object is to protect the interest of poor, unorganized and illiterate work-force. The basic object of the Act is to check the miseries of ill-faded persons deprived of basic human needs and are compelled for "Begar" and forced labour. The Act has been enacted basically to prevent the economic and physical exploitation of the weaker sections of the society.

11. Atomic Energy Act, 1982

The subject of atomic energy is completely under the control of Government of India and the chances to employ child labour are very remote. In spite of this the Central Government under section 30 of the Act, has formulated "Radiation

29 Section 14 of The Apprentices Act, 1961.

30 A.S. Verma , " Child Labour and the Law in India: A Critical Analysis" Kanpur Law Journal, Vol. 9 &10, at 31 (1996)

31 Mamta Rao, Law Relating to Women and Children, at 446 (2008).

Protection Rules, 1971" and Rule 5 prohibits the employment of person below the age of 18 years as " radiation workers" except with the prior permission of in writing from the competent authority Appointed and duly notified by the Central Government.[32]

12. The Shops and Establishments Acts

The Different States have made special provisions for regulating the employment of children in their Shops and Establishments Acts. Generally speaking, a child is a person who has not completed the age of 12 years. Though in few states like Tamil Nadu, Pondicherry and Uttar Pradesh the age is 14 years. The working hours of the children are usually from 6 am or 7 am to 7 pm or 8 pm. The maximum hours of work for children are usually 5 per day or 30 per week, for adolescents they may be higher (7 per day and 42 per week).

13. Juvenile justice Act, 1986 (Act No. 53 of 1986)

This Act was enacted prior to Child Labour (Prohibition and Regulation) Act, 1986. The fields of operation of both the Acts are quite different, but the provision of this Act has impact on the problem of child labour in the country. The Act deals with and provides for the care, protection, treatment, development and rehabilitation of neglected or delinquent child and juveniles and for the adjudication of certain matters relating to them. If the wide definition of neglected juveniles is tested on the touchstone of the definition of 'child labour', it is obvious some of the juveniles below the age of fourteen years may because child labour, but Child Labour having their place of abode and residence and consent of their parents and guardians and having their employer cannot be called juvenile delinquent. The juvenile justice Act deals only and concerned with those children who are delinquent and wrong doers or neglected by their parents for any reason and living in the conditions explained and enumerated under section 2 (e) of the Act. However, the Act has provided separate procedure and machinery to deal with such juveniles.[33]

14. The Child Labour (Prohibition and Regulation) Act, 1986

The Child Labour (Prohibition and Regulation) Act of 1986, was enacted on the basis of the recommendations made by a number of committees,[34] with the objective of creating a uniform comprehensive legislation to eradicate child labour in a phased manner.[35] The legislation prohibited employment of children in certain occupations, and sought to regulate the conditions of work of children in other areas, where employment of child labour was not expressly prohibited.

32 *Ibid*, at 47

33 M.P. Shrivastav, Child Labour Laws in India, 48 (2006).

34 The National Commission on Labour, 1969; the Committee on Child Labour, 1979; the Gurupadswamy Committee on Child Labour, 1976, and the Sanat Mehta Committee, 1984.

35 Asha Bajpai, Child Rights in India – Law , Policy and Practice, at 163 (2006)

According to this Act, the Employment of Children Act, 1938 is repealed. All rules made in this Act will be in addition to the provisions of the Factories Act, 1948, the Plantation Labour Act, 1951 and the Mines Act, 1952.[36]

The main objectives of the Act are: (a) to bring uniformity in the definition of child in the related laws; (b) to ban the employment of children in specific occupations and processes; (c) to modify the scope of banned industries and processes by laying down a procedure; (d) to regulate the conditions of work of children when they are not prohibited from working; and (e) to lay deterrent punishment for violators.[37]

Under the Act, 'child' means a person who has not completed fourteenth year of age.[38] In this regard, the Minimum Wages Act, 1948, the Plantation Labour Act, 1951 the Merchant shipping Act, 1958 and the Motor Transport Workers Act, 1961 have been amended by substituting the word "fourteen" in place of the word "fifteen" in these enactments.[39]

The Act has no application to the employment or engagement of children who have completed their fourteenth year of age, since they cannot be considered as children for the purpose of the Act as per the above definition.[40] The word "establishment" includes a shop, commercial establishment, farm, workshop, and residential hotel, restaurant, eating house, theatre or other place of public amusement or entertainment.[41]

As per Section 2(vi), the term "occupier", in relation to an establishment or a workshop, means the person who has the ultimate control over the affairs of the establishment or workshop and as per Section 2 (x), the word "workshop' means any premises wherein any industrial process is carried on, but does not include any premises to which the provisions of Section 67 of the Factories Act, for the time being, apply.

The Act is divided into four parts. Part I and IV deal with the definition and miscellaneous aspects respectively while Parts II and III, being the most important, deal with Prohibition of Employment and Regulation of Conditions of Work respectively.

Prohibition of Employment of Children in Certain Occupations and

36 TapankumarShandilya, Nayan Kumar &Navin Kumar, Child Labour Eradication, at 153 (2006).
37 Mamta Rao, Law Relating to Women and Children, at 453 (2008).
38 Section 2(ii) of the Child Labour (Prohibition and Regulation) Act, 1986.
39 Section 23-26 of the Child Labour (Prohibition and Regulation) Act, 1986.
40 N. Maheshwara Swamy, "Child Labour- Whether Eliminated or Regulated under The Indian Law: A Special reference to the Child Labour (Prohibition and Regulation) Act, 1986",Andhra Law Times,Vol.93, at 3 (1998).

41 Section 2(iv) of the Child Labour (Prohibition and Regulation) Act, 1986.

Processes:

Under Section 3 of the Act, no child shall be employed or permitted to work in any of the occupations set forth in Part A of the Schedule or in any workshop wherein any of the processes set forth in Part B of the Schedule are carried on.

Part A of the Schedule contains 13 occupations while Part B contains a list of 51 processes. The Central Government has been given power to amend the schedule vide Section 4 of the Act. The Central Government after giving, by notification in the Official Gazette, not less than three months notice of its intention so to do, may, by like notification, add any occupation or process to the Schedule.

Among the major occupations set forth in Part A are those connected with:

(a) Transport of passengers, goods or mails by railway;

(b) Cinder picking, clearing of an ash pit or building operation in the railway premises;

(c) Work in a catering establishment at a railway station, involving the movement of a vendor or any other employee of the establishment from one platform to another or into or out of a moving train;

(d) Work relating to the construction of a railway station or with any other work where such work is done in close proximity to or between the railway lines;

(e) A port authority within the limits of any port or any workshop where in any of the process like bidi making, carpet weaving, cement manufacturing, cloth printing and fine work, mica cutting and spitting etc. are carried out by the employer;

Some of the processes mentioned in Part B are:

(a) Bidi making;

(b) Carpet weaving;

(c) Cement manufacture;

(d) Cloth printing, dyeing and weaving;

(e) Manufacture of matches, explosives and fireworks;

(f) Mica-cutting and splitting;

(g) Shellac manufacture;

(h) Soap manufacture;

(i) Tanning;

(j) Wool cleaning;

(k) Building and construction industry.[42]

Section 14 of the Act provides punishment in contravention of the provisions of Section 3. *The Amendment to the Child Labour (Prohibition and Regulation) Act, 1986:*

The Amendment Act of 2006 amends the Schedule (Part A) to add to the list of occupations in which employment of children is prohibited. This amendment prohibits the employment of children as domestic workers or servants and the employment of children in dhabas (road –side eateries), restaurants, hotels, motels, tea shops, resorts or other recreational centres. This amendment comes into force on 10-10-2006.

Child Labour Technical Advisory Committee:[43]

Section 5 of the Act envisages the constitution of an Advisory Committee to be called the Child Labour Technical Advisory Committee to advise the Central Government for the purpose of addition of occupations and processes to the Schedule.

Constitution- The Committee shall consist of a Chairman and members, not exceeding ten, to be appointed by the Central Government.[44] The Committee has the power to regulate its own procedure and meet as and when it considers necessary.[45] It may also constitute one or more sub-committees, if it feels necessary, on some particular matter or generally.[46]

The Central Government framed the Child Labour (Prohibition and Regulation) Rules, 1988 which are related to the Child Labour Technical Advisory Committee.[47]

Section 7 prescribes working hours for a child labour. It lays down that no child shall be required or permitted to work in any establishment in excess of such number of hours as may be prescribed for such establishment or class of establishments. No child shall work for more than 3 hours before he has had an interval for rest for at least one hour. The period of work of a child shall be so arranged that inclusive of this interval for rest it shall be spread over more than six

42 Mamta Rao, Law Relating to Women and Children, at 453 & 454(2008).
43 Mamta Rao, Law Relating to Women and Children, at 454 (2008).
44 Section 5(2) of the Child Labour (Prohibition and Regulation) Act, 1986.
45 Section 5(3) of the Child Labour (Prohibition and Regulation) Act, 1986.
46 Section 5(4) of the Child Labour (Prohibition and Regulation) Act, 1986.
47 In exercise of Rule- making power conferred by Section 18(1) of the Act.

hours, including the time spend in waiting for work on any day. No child shall be permitted or required to work between 7 p.m. and 8 a.m. or do overtime. No child shall be required or permitted to work in any establishment on any day on which he has already been working in another establishment.

Section 8 lays down that every child employed in an establishment shall be allowed in each week, a holiday of one whole day, which day shall be specified by the occupier in a notice permanently exhibited in a conspicuous place in the establishment and the day so specified shall not be altered by the occupier more than once in three months.

Section 9 makes provision for furnishing of Information regarding employment of a child labour to inspector.

1. Every occupier in relation to an establishment in which a child was employed or permitted to work immediately before the date of commencement of this Act in relation to such establishment shall, within a period of thirty days from such commencement, send to the Inspector within whose local limits the establishment is situated, a written notice containing the following particulars, namely

2. The name and situation of the establishment;

3. The name of the person in actual management of the establishment;

4. The address to which communications relating to establishment should be sent ; and

5. The nature of the occupation or process carried on it establishment.

6. Every occupier , in relation to an establishment , who employs, or permits to work , any child after the date of commencement of this Act in relation to such establishment, shall within a period of thirty days from the date of such employment, sent to the Inspector within whose local limits the establishment is situated , a written notice containing the particulars as are mentioned in sub-section(1)

7. Explanation: For the purpose of sub-section (1) and (2), “date of commencement of this Act, in relation to an establishment “means the date of bringing into force of this Act in relation to such establishment.

8. Nothing in Sections. 7, 8 and 9 shall apply to any establishment wherein any process is carried on by the occupier with the aid of his family or to any school establishment by, or receiving assistance or recognition from, Government.

As per Section 10, the question regarding the age of child shall be decided as per the birth certificate issued by the prescribed medical authority and in absence of

such certificate, issued by the prescribed medical authority and in absence of such certificate, the question of age shall be referred by the Inspector for decision to the prescribed medical authority. Such certificate shall be conclusive evidence of age of child to whom it relates. In the recent case of Subash Chandra Jaswal v. State of U.P.,[48] the Labour Enforcement Officer stated that the labourer working was about 11 years but there were no documents or any medical certificates which could justify his view. It was held by the court that in the absence of proper ascertainment of age, such labourer cannot be termed as 'child' as defined in Section 2 (ii) and accused employer was not convicted for offence covered under this Act.[49]

Section 11 of The Act imposes duty on the employer to maintain register. Section lays down that there shall be maintained by every occupier in respect of children employed or permitted to work in any establishment, a register to be available for inspection by an inspector at all times during working hours or when work is being carried on in any such establishment showing:

(a) The name and date of birth of every child so employed or permitted to work;

(b) Hours and periods of work of any such child and the intervals of rest to which he is entitled;

(c) The nature of work of any such child; and

(d) Such other particulars as may be prescribed.

Section 12 makes provision that every railway administration, every port authority and every occupier shall cause to be displayed in a conspicuous and accessible place at every station on its railway or within the limits of a port or at the place of work, as the case may be, a notice in the local language and in the English language containing an abstract of section 3 and 14.[50]

Section 13 lays down that the appropriate Government is authorized to make rules for the health and safety of the working children taking care of their following basic necessities:

(a) cleanliness in the place of work and its freedom from nuisance;

(b) disposal of wastes and effluents;

(c) ventilation and temperature;

48 2002 CrLJ 1223
49 Devinder Singh, Child Labour & Right to Education, at 72 (2013).
50 Usha Sharma, *Child Labour in India*, at 234 (2006).

(d) dust and fume;

(e) artificial humidification;

(f) lighting;

(g) Drinking water;

(h) Latrine and urinals;

(i) Spittoons;

(j) Fencing of machinery;

(k) work at or near machinery in motion;

(l) employment of children on dangerous machines;

(m) instructions, training and supervision in relation to employment of children on dangerous machines;

(n) device for cutting off power;

(o) self- acting machines;

(p) easing of new machinery;

(q) floor , stairs and means of access ;

(r) pits, sumps, opening in floors, etc;

(s) excessive weights;

(t) protection of eyes;

(u) explosive or inflammable dust, gas etc;

(v) precautions in case of fire;

(w) maintenance of buildings; and

(x) safety of building and machinery .

Section 14 of the Act prescribes the penalties. It provides that whoever employs any child or permits any child to work in contravention of the provisions of section 3 shall be punishable with imprisonment for a term which shall not be less than three months but which may extend to one year or with fine which shall

not be less than ten thousand rupees but which may extend to twenty thousand rupees or with both. Whoever , having been convicted of an offence as mentioned above, commits a like offence afterwards, shall be punishable with imprisonment for a term which shall not be less than 6 months which may extend to 2 years. If person fails to give notice under Section 9, 11, 12 then he shall be punished with fine which may extend to ten thousand rupees or with both.

Section 15 of the Act provides that even when any person found guilty and convicted of contravention of any of the provisions of Section 67 of the Factories Act, 1948, Section 40 of the Mines Act, 1952, Section 109 of the Merchant Shipping Act, 1958 and Section 21 of the Motor Transport Workers Act, 1961.[51] He shall be punished under section 14 of the Child Labour Act, 1986.

In the case of *Mahesh Kumar Garg and others v. State of U.P. and others,*[52] it has been held that civil liability for paying compensation has nothing to do with the criminal prosecution under this Act and both can continue simultaneously.

It has been held by the Court in a case,[53] that burden of proving that child is below 14 years of age is on prosecution. Burden cannot be shifted on the employer. Accused cannot be convicted if prosecution fails to prove the age of child.

The Act itself prescribes the relating to offences. Section 16 lays down that any person, police officer or inspector can make a complaint regarding commission of offences. It also lays down the procedure for disposal of such a complaint. Further Section 17 of the Act empowers the appropriate Government to appoint inspectors for securing compliance of the provisions of the Act. The inspector appointed under the Act is deemed to be public servant within the meaning of the Indian Penal Code, 1860.

CONCLUSION:

To conclude it may be submitted that the problem of employment of children in agriculture and industrial sectors in India is a producer of economic, social and among others, inadequate legislative measures. Child Labour Act was enacted in 1986 has been in operation from last 28 years and being a social legislation need to revisited on account of the societal changes having occurred since then. Section 3 of the Child Labour (Prohibition and Regulation) Act, 1986 requires proper attention of the legislature as it permits the occupier, even where hazardous process is carried on, to employ child labour where he is working with the aid of his family or in any school establishment run or receiving assistance from the Government. This provision raises the issue whether a hazardous process becomes less dangerous if child labour is employed in a school or by a family. Here no minimum age is required. This in effect legitimizes child labour. Suitable amendment is made in this direction. The efforts that have been put so far and the

51 Usha Sharma, Child Labour in India, at 237 (2006).
52 (2000) 2 UPLBEC 1426 (1435) All.
53 2002 All LJ 96 (98) [2000 CrLJ 1253].

solutions thereof, to tackle the enormity of the problem of child labour in India need to be evaluated, it altogether indicate that the problem of child labour needs to be solved at war-footing.

*****

INTERNATIONAL AND INDIAN LEGAL APPROACH APROPOS CRIME VICTIM JUSTICE: A POSITION REVIEW

Dr. Jyothi Vishwanath*

ABSTRACT

Presently the societies are strongly affected by crime. Overwhelming and ever increasing instances of crime and violence encompass all societies. For prevention of crimes and punishment of the offenders, major focus of the criminal law machinery rivets around the criminal and the crime, negligible attention being paid to the crime victims. The latter unfortunately face unfair treatment and institutionalized disinterest. Most of the systems have relegated the victim to the position of a mere complainant setting the law into motion by informing the concerned investigating and law enforcement authorities about the commission of the offence of which he is victimised. In India no governmental agency is authorised to address the issue of protection of the rights of crime victims. Despite growing awareness at the international level, legal and social awareness about the victims' rights is at the minimal at the national level. Amidst this scenario, this research paper examines concept of crime victim; sheds light on the International and national legal scenario pertaining to the rights of crime victims; analyses judicial approach towards victims' rights; examines the most prominent of the victims' rights and attempts to chalk out the future course of action in this regard.

INTRODUCTION

Presently the societies are strongly affected by crime, much due to the cost of crime and the resultant decline in the quality of life which the citizens suffer as a result of crime. Overwhelming and ever increasing instances of crime and violence encompass all societies, none being free from the clutches of crimes. For prevention of crimes and punishment of the offenders, major focus of the criminal law machinery rivets around the criminal and the crime, negligible attention being paid to the crime victims. The latter unfortunately face unfair treatment and institutionalized disinterest. Most of the systems have relegated the victim to the position of a mere complainant setting the law into motion by informing the

* Assistant Professor of Law, University Law College & Post Graduate Department of Studies & Research in Law, J.B.Campus, Bangalore University, Bangalore- 560056; available at +91-9448585797 and *drjyothiv012@gmail.com; jyothispalkonda@gmail.com*

concerned investigating and law enforcement authorities about the commission of the offence of which he is victimised. Post-investigation, he is inevitably made a prosecution witness for participating in the sacred task of securing the conviction of the accused. Since times immemorial, crime has from been considered as an offence against the whole society rather than a mere violation of the victims' rights. The victim stands transformed into a relevant piece of evidence to prove the guilt of the accused, to be discarded, forgotten and written off post the criminal trial. Rather he is thrust with the duty of cooperating with the investigating and prosecuting team, his own rights and plight receiving least attention. Most basic of his rights have been ignored. Often he and his family are left in dark isolation to face the consequences of the crime, apart from social censure in most of the cases.

In India no governmental agency is authorised to address the issue of protection of the rights of crime victims. Despite growing awareness at the international level, legal and social awareness about the victims' rights is at the minimal at the national level. Amidst this scenario, this research paper examines concept of crime victim; sheds light on the International and national legal scenario pertaining to the rights of crime victims; analyses judicial approach towards victims' rights; examines the most prominent of the victims' rights and attempts to chalk out the future course of action in this regard.

Crime Victims: Conceptualization

Victimology is the study of victimization including the relationships shared by the victims with the offenders and the criminal justice system including the police, courts and corrections officials. The term victim is derived from the Latin term *vik-tim* which means a person who suffers from a destructive or injurious action or agency.[1] Oxford dictionary defines victim as a person harmed, injured or killed as a result of a crime, accident or other event or action.[2] International Criminal Court Statute defines victims as natural persons who have suffered harm due to any crime[3] and also includes organizations/institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art or science or charitable purposes and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 (hereinafter referred as Declaration, 1985) defines victims as persons who, individually or collectively, have suffered harm, whether physical

1 Available at *http://dictionary.reference.com/browse/victim accessed 19 September 2015 at 3.15 p.m.*

2 Available at *http://www.oxforddictionaries.com/definition/english/victim accessed 19 September 2015 at 3.17 p.m.*

3 Rule 85of the ICC Rules of Procedure and Evidence (RPE- *http://www.trial-ch.org/en/resources/international-law/the-victims-statuts-in-international-criminal-trials/the-victims-before-the-icc.html* accessed 19 September 2015 at 4.36 p.m.

or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, due to acts/omissions violating criminal laws operating in the Member States.[4] A person is here considered a victim regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim and also includes the immediate family or dependants of the direct victim.[5] Mendelson[6] has classified victims as completely innocent victims like children; victims with minor guilt and victims of ignorance; voluntary victims like those committing suicide or killed by euthanasia; victims who are more guilty than the offender like the ones provoking others to commit crimes and criminal type of victims who commit offences against others and get killed or hurt by others in self-defence.

Victim Justice - An International Perspective

In the 1980s, UN Commission on Crime Prevention and Criminal Justice[7] widened the Criminal Justice Program's focus to include better treatment for crime victims. This led to adoption of two very relevant documents pressing upon the international community to pay attention to the status and rights of victims in the year 1985. The first one being Declaration, 1985[8] and the second being the Council of Europe Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure.[9] Other international documents of a similar nature are Statement of Victims' Rights in the Process of Criminal Justice issued by the European Forum for Victim Services, 1996[10] and the European Union Framework Decision on the Standing of Victims in Criminal Proceedings,

4 Article 1 of the Declaration- *http://www.un.org/documents/ga/res/40/a40r034.htm accessed 6 September 2015 at 22.12 p.m; Akash Shah., Victims, victimization and victimology. – http://www.legalservicesindia.com/article/article/victims-victimization-and-victimology-1349-1.html accessed 14 September2015 at 8.04 p.m.*

5 Article 2 of the Declaration -Ibid.

6 Ahmad Siddique., Criminology Problems & Perspectives. Lucknow: Eastern Book Company, 4th edition, 1997, pp.505-506.

7 Commission on Crime Prevention & Criminal Justice (CCPCJ) was established by the Economic & Social Council (ECOSOC)resolution 1992/1 upon request of General Assembly (GA)resolution 46/152.It develops, monitors & reviews the implementation of the UN Crime Prevention & Criminal Justice Program (Criminal Justice Program). Criminal Justice Program has sought to replace retributive criminal justice with more effective & humane policies. Respect for the human rights of offenders & prisoners were key early considerations behind the standards & norms for crime prevention & criminal justice adopted by the UN in subsequent decades. - *https://www.unodc.org/unodc/en/commissions/CCPCJ/ accessed on 19 September 2015 at 5.00 p.m.*

8 It was adopted by the United Nations General Assembly in resolution 40/34, 29th November 1985.

9 This was adopted by the Committee of Ministers on 28 June 1985 at the 387th meeting of the Ministers Deputies.-*http://ec.europa.eu/civiljustice/comp_crime_victim/docs/council_eur_rec_85_11_en.pdf accessed 19 September 2015 at 5.17 p.m.*

10 Available at *http://www.apav.pt/apav_v3/images/pdf/criminal_justice_rights.pdf accessed 19 September 2015 at 5.09 p.m*.

2001.[11] The most recent one is the Council of Europe Recommendations, 2006 on Assistance to Crime Victims.[12] Most recently, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 2005 makes it obligatory for States Parties to "respect, ensure respect for and implement" the treaties in such a way that "their domestic law provides at least the same level of protection for victims as required by their international obligations."[13]

The right to a remedy for violations of human rights is recorded in numerous international instruments ratified by India including the Universal Declaration of Human Rights, 1948,[14] International Covenant on Civil and Political Rights, 1966,[15] International Convention on the Elimination of All Forms of Racial Discrimination, 1969[16] and Convention on the Rights of the Child, 1990.[17] Declaration, 1985 advocates access to justice and fair treatment; restitution; compensation and assistance. These are discussed below:

(a) Access to justice and fair treatment:

Articles 4 emphasize treatment of victims with compassion and respect for their dignity and provide them access to the mechanisms of justice and seek redress for the harm suffered. Article 5 emphasizes establishment of judicial and administrative mechanisms for enabling the victims obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. These mechanisms should inform victims their rights in seeking redress. Article 6 emphasizes that the victims ought to be informed about their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information. It also seeks to allow views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected without prejudice to the accused and consistent

11 Available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32001F0220 accessed 19 September 2015 at 5.13 p.m.

12 This was adopted on 14 June 2006. – *http://www.coe.int/t/dlapil/codexter/Source/CM_Recommendation_2006_8_EN.pdf accessed 19 September 2015 at 5.17 p.m.*

13 It emphasizes the need to prevent repetition of the same offenses by promoting the observance of codes of conduct & ethical norms by public servants; strengthening the independence of the judiciary & reviewing & reforming laws. -*http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx accessed 19 September 2015 at 5.30 p.m.*

14 Article 8, UDHR.

15 Article 2 (3)(a).

16 Article 14.

17 It also promotes physical & psychological recovery & social reintegration of a child victim of any form of neglect, exploitation or abuse; torture or any other form of cruel, inhuman or degrading treatment or armed conflicts in an environment which fosters the health, self-respect & dignity of the child.

with the relevant national criminal justice system; providing proper assistance to victims throughout the legal process; taking measures to minimize inconvenience to victims, protect their privacy, when necessary and ensure their safety as well as that of their families and witnesses on their behalf from intimidation and retaliation; avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims. Article 7 advocates the use of informal mechanisms for the resolution of disputes including mediation, arbitration and customary justice or indigenous practices.

(b) Restitution:

Article 8 provides that the offenders or third parties responsible for their behaviour should make fair restitution to victims, their families/dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights. Article 9 appeals the governments to consider restitution as an available sentencing option in criminal cases in addition to other criminal sanctions. Article 11 advocates restitution from the State or whose officials or agents have caused the harm or its successor in title.

(c) Compensation:

Article 12 provides that if the offender is unable to pay compensation, then States should pay financial compensation to the victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes and also family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization. Article 13 advocates establishment, strengthening and expansion of national funds for compensation to victims.

(d) Assistance:

Article 14 provides for the necessary material, medical, psychological and social assistance to the victims through governmental, voluntary, community-based and indigenous means. Article 16 emphasizes sensitization of the police, justice, health, social service and other personnel concerned towards the needs of victims and ensuring proper and prompt aid. Article 17 emphasizes attention towards victims of severe harms. Some of the important recommendations of the Council of Europe Recommendations, 2006 on Assistance to Crime Victims include the following elements: assistance, role of the public services, victim support services, information, rights to effective access to other remedies, state compensation, insurance, protection, mediation, raising public awareness of the effects of crime and so on. It also recommended for provision of restitution and compensation to victims of crime. It recommends provision of compensation by the state for victims of serious, intentional, violent crimes including sexual violence. It further states that the state compensation should be awarded to the extent that the damage is not covered by other sources such as the offender, insurance or state-funded

health and social provisions.

Victim Justice - An Indian Perspective

Despite few victim friendly legal provisions, Indian legal and criminal justice system can be said to be characterised with magnanimous permissiveness towards the accused and the convicted criminal with the corollary of subordination of the rights of the victims. Indian Constitution indirectly endorses the principle of victim compensation. Guarantee against unjustified deprivation of life and liberty enshrined in Article 21 obligates the state to compensate victims of criminal violence. Article 41 mandates the state to make effective provision for securing public assistance in cases of disablement and in other cases of undeserved want. Article 51-A declares it to be the fundamental duty of every citizen of India "to protect and improve the natural environment…and to have compassion for living creatures" and "to develop humanism."

Investigations in India are exclusively a police function with victims playing negligible role.[18] Victims have certain general remedies under Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C, 1973). Upon the victim of a cognisable offence informing the police, the latter is required to reduce it into writing and read it to the informant. The informant is required to sign it and receive a copy of the FIR.[19] Upon the police refusing to record the information, the victim-informant is allowed to send it in writing and by post to the Superintendent of Police concerned.[20] Upon refusal to investigate the case for whatever reason, the police officer is required to notify the informant.[21] Alternatively, victims can directly approach the Magistrate with their complaint.[22] Despite these legal safeguards, blatant violations result in inexplicable hardship to the victims. Poor police response, most probably in gender and caste related crimes; manipulation of the facts stated by the informant; defective and sloppy investigations due to political and caste influences upon police; not filing charge sheet within the statutory time limit and long delay in initiation of trials due to non-filing of charge sheet lead to grave injustice to the crime victims.

Criminal law is yet to endorse the voice of the victim at the stage of grant and cancellation of bail though the concerned victim has substantial interest. Section 439 (2), Cr.P.C, 1973 allows a victim to approach the Court for cancellation of bail, still much depends upon the stance taken by the prosecution. Further the prosecution can seek withdrawal at any time during trial without consulting the victim[23] and victim cannot challenge the prosecution decision to withdraw at the trial stage itself though right of the victim to prosecute the case as a private

18 N.R.Madhava Menon -*http://www.thehindu.com/todays-paper/tp-opinion/victims-rights-and-criminal-justice-reforms/article3169888*.ece accessed 8 September 2015 at 7.19 p.m.

19 Section 154 (1) and (2), Cr.P.C, 1973.

20 Section 154(3), Cr.P.C, 1973.

21 Section 157(2), Cr.P.C, 1973.

22 Section 190, Cr.P.C, 1973.

23 Section 321,Cr.P.C, 1973.

complainant is not impaired.

Cr.P.C, 1973 provides for compensation to crime victims under Section 357. The other relevant provisions are Sections 237, 250 and 358. U/Section 250, magistrates can direct complainants/informants to pay compensation to people accused by them without reasonable cause. Section 358 empowers the court to order a person to pay compensation to another person for causing a police officer to arrest such other person wrongfully.[24] U/Section 357, the court imposing a sentence in a criminal proceeding has discretion to grant compensation to the victim and order the payment of costs of the prosecution. This compensation provision turns out to be of little value. Section 357 provides that when the sentence of fine is imposed as the sole punishment or as any additional punishment, the whole or part of it may be paid to the victim as per the discretion of the Court. Section 357 (3) provides that even if a fine does not form part of the punishment, the magistrate may order any amount to be paid by way of compensation for any loss or injury caused by the accused. There is no question of compensation if there is acquittal or where the offender could not be apprehended since Section 357 applies only when the accused is convicted.[25] Only limited judicial discretion is possible u/ Section 357(1) since it can give compensation only out of the fine if imposed on the offender. But under Section 357(3), it has much more discretion. Though power of the court is unlimited, compensation can be imposed only keeping in mind the practical considerations and the capacity of the accused to pay.

Probation of Offender's Act, 1958 also protects Victims' rights. Section 5 provides that the court directing the release of an offender under Section 3 or Section 4 on probation of good conduct may make an order directing him to pay such compensation as the court thinks reasonable for loss or injury caused to any person by the commission of the offence and such compensation may be

24 Compensation not exceeding Rs.1000/- is allowed under this Section.

25 Section 357: (1) When a Court imposes a sentence of fine/sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied (a) in defraying the expenses properly incurred in the prosecution; (b) in the payment to any person of compensation for any loss/injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court; (c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death; (d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating or of having dishonestly received or retained or of having voluntarily assisted in disposing of stolen property knowing or having reason to believe the same to be stolen in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto. (2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed or if an appeal be presented, before the decision of the appeal. (3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment order the accused person to pay, by way of compensation such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

recovered as a fine in accordance with the provisions of Sections 357 and 358, Cr.P.C, 1973.

Code of Criminal Procedure (Amendment) Act, 2008[26] has introduced certain commendable changes with respect to protection of the victims' rights. 2008 Amendment Act provides that Section 2(w)(a) shall be inserted in the Cr.P.C, 1973 and it defines victim as a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and it includes his or her guardian or legal heir'. Further by inserting proviso to Section 24(8), Cr.P.C, 1973, it provides that the Court may permit the victim to engage an advocate of his choice. Further, Section 26(A), Cr.P.C, 1973 has been amended to the effect that offence under Section 376 and 376 (A) to 376 (D), Indian Penal Code, 1860[27] shall be tried as far as practicable by a court presided over by a woman. 2008 Amendment has also inserted Section 357 A which provides for Victim compensation scheme. It provides that the State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensating the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation. Upon the court recommendation for compensation, the District Legal Service Authority or the State Legal Service Authority shall decide the quantum of compensation. Further if the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation. Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation. On receipt of such recommendations or on the application by the victim, the State or the District Legal Services Authority shall after due enquiry award adequate compensation by completing the enquiry within two months. The State or the District Legal Services Authority to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned or any other interim relief as the appropriate authority deems fit.

Criminal Law Amendment Act, 2013 has introduced changes to protect the interest of rape and acid attack victims. A proviso has been added to Section 154, Cr.P.C, 1973 to provide that upon information being given by the rape or acid attack victim, such information shall be recorded by a woman police officer. Provision is also made for recording the information at the residence of the rape victim. Section 357 B has been inserted to provide that the compensation payable by the State Government under Section 357 shall be in addition to the payment of

26 Code of Criminal Procedure (Amendment) Act 2008 amends Section 2, 24, 26 & 41,Cr.P.C, 1973.

27 These provisions deal with the offence of rape.

fine to the rape or acid attack victim under Section 326 A or Section 376D, Indian Penal Code, 1860.[28] Section 357 C provides that all hospitals, whether public or private shall provide first-aid or medical treatment free of cost to the rape or acid attack victims.

Role of Commissions:

Law Commission of India has played an active role in the direction of emphasising protection of victims of different crimes. It has submitted many reports in this regard. In the year 1987, it has submitted Report No.119 on Access to exclusive Forum for victims of motor accidents; Report No. 226 submitted in 2009 on the Inclusion of Acid Attacks as Specific Offences in the Indian Penal Code and a Law for Compensation for Victims of Crime.

Committee on Reforms of Criminal Justice System[29] (hereinafter referred to as Justice Malimath Committee) headed by Justice V.S.Malimath gave impetus to justice to crime victims. While referring to the position of victims in the criminal justice system in India, the committee observed "that victims do not get at present the legal rights and protection they deserve to play their just role in criminal proceedings which tend to result in disinterestedness in the proceedings and consequent distortions in the criminal justice administration." It reviewed the position and role of victims under the criminal justice system including provisions for compensation to the victims. The prominent recommendations[30] of the Justice Malimath Committee were that the victim and if he is dead, his legal representative shall have the right to be impleaded as a party in every criminal proceeding where the offence is punishable with seven years' imprisonment or more; right of an approved voluntary organization to implead in court proceedings; victim's right to be represented by an advocate and at the cost of the State if the victim cannot afford a lawyer; victim's right to participate in criminal trial include the right to produce evidence; to ask questions to the witnesses; to be informed of the status of investigation and to move the court to issue directions for further investigation; to be heard on issues relating to bail and withdrawal of prosecution; to advance arguments after prosecutor's arguments; right to prefer an appeal against any adverse order of acquittal of the accused, convicting for a lesser offence, imposing inadequate sentence or granting inadequate compensation;

28 These provisions deal with the offence of acid attack and rape respectively.

29 The Government of India, Ministry of Home Affairs by its order dated 24 November 2000 constituted this Committee to consider measures for revamping the criminal justice system. One of the objectives of the committee was "to suggest ways and means of developing synergy among the judiciary,prosecution and the police to restore the confidence of the common man in the criminal justice system by protecting the innocent and the victim and by punishing unsparingly the guilty and the criminal."

30 The recommendations were based upon the committee study of the rights of the victims in different criminal justice systems worldwide. It was impressed with the report on "Criminal Justice: The Way Ahead" presented to the British Parliament in February 2001proposing various amendments & recommendations. The Committee opined that the strategies being introduced in the United Kingdom for reforming the criminal justice system to give a better deal for victims should be considered for adoption in India.

legal services to victims may be extended to include psychiatric and medical help, interim compensation and protection against secondary victimization; victim compensation to be a State obligation in all serious crimes. It also recommended constitution of Victim Compensation Fund under Victim Compensation Law to be administered possibly by the Legal Services Authority.[31]

Judiciary and Victims 'Justice:

In *National Human Rights Commission vs State of Gujarat and Ors,*[32] Supreme Court held that protection of witnesses and victims' imperative and essential in a criminal trial since testimonies of witnesses and victims establish guilt of accused. It emphasized rights of the victims have to be protected and cannot be marginalized. From the victims' perception the perpetrator of a crime should be punished. In *Suresh vs State of Haryana,*[33] State Legal Services Authority was directed to pay interim compensation to deceased's mother. In *Abdul Rashid vs State of Odisha and Ors,*[34] the court raised question whether the Court has legal duty to award compensation irrespective of conviction or acquittal. When the State fails to identify the accused or fails to collect and present acceptable evidence to punish the guilty, the duty to give compensation remains. Victim of a crime or his kith and kin have legitimate expectation that the State will punish the guilty and compensate the victim. There are systemic or other failures responsible for crime remaining unpunished which need to be addressed by improvement in quality and integrity of those who deal with investigation and prosecution apart from improvement of infrastructure but punishment of guilty is not the only step in providing justice to victim. Victim expects a mechanism for rehabilitative measures including monetary compensation. In *Lillu vs. State of Haryana,*[35] court held that two finger test and its interpretation violates right of rape survivors to privacy, physical and mental integrity and dignity. *Nilabati Behera vs. State of Orissa*[36] and *Chairman, Railway Board vs. Chandrima Das* [37]illustrative of the new trend of using constitutional jurisdiction to do justice to the victims of crime. Substantial monetary compensations have been awarded against the instrumentalities of the state for the failure to protect the rights of the victims. In *Guruswami vs. State of T.N,*[38] court held that in a case of murder, it was fair that proper compensation should be provided for the dependants of the deceased. In *Baldev Singh vs State of Punjab,*[39] Supreme Court observed that in appropriate cases, award of compensation to the victim is better than the deterrent

31 *http://www.mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/criminal_justice_system.pdf accessed 19 September 2015 at 6.08 p.m.*
32 2009(3)ACR2927(SC).
33 AIR2015SC518.
34 (2014) 1 ILR-CUT-202.
35 AIR2013SC1784.
36 1993 2 SCC 746.
37 2000 Cr LJ 1473.
38 (1979) 3 SCC 799.
39 (1995) 6 SCC 593: AIR 1996 SC 372.

punishment to the offender. In *Sukhdev Singh vs. State of Punjab*,[40] *Balraj vs. State of U. P.*[41] and *Giani Ram vs. State of Haryana*[42] the court has adopted the concept of restorative justice and awarded compensation or restitution or enhanced the amount of compensation to victims. In B*odhisattwa Gautam vs. Subhra Chakraborty,*[43] Supreme Court held that if the court trying an offence of rape has jurisdiction to award compensation at the final stage, it also has the right to award interim compensation. The court, having satisfied the prima facie culpability of the accused, ordered him to pay a sum of Rs.1000 every month to the victim as interim compensation along with arrears of compensation from the date of the complaint. Supreme Court recognized the need for state compensation in cases of abuse of power by the State machinery. In the landmark case of *Rudal Shah vs. State of Bihar,*[44] Supreme Court ordered the Government of Bihar to pay the petitioner a further sum of Rs.30,000 as compensation, which according to the court was of a "palliative nature", in addition to a sum of Rs.5,000, in a case of illegal incarceration of the victim for long years. In *Nalini Bhanot vs. Commissioner of Police, Delhi Police*[45] the Court awarded a sum of Rs.75, 000 as state compensation to the victim's mother since the victim had died due to beating by the police. In *Palaniappa Gounder vs. State of Tamil Nadu,*[46] Supreme Court reduced the amount of fine and achieved a proper blending of offender rehabilitation and victim compensation. It reduced the fine from Rs.20,000 to Rs.3,000 and directed that the amount recovered shall be paid to the son and daughters of the deceased. In *Sarwan Singh vs. State of Punjab,*[47] Court observed that while awarding compensation, the court ought to decide whether the case is fit for awarding compensation and then determine the capacity of the accused to pay fine. Supreme Court in *Mangilal vs. State of Madhya Pradesh*[48] held that the power of the court to award compensation to the victims under Section 357 is not ancillary to other sentences but in addition thereto. The basic difference between subsection (1) and (3) of the Section 357 is that in the former case, the imposition of fine is the basic and essential requirement while in the latter even the absence thereof empowers the court to direct payment of compensation. Such power is available to be exercised by an appellate court, the High Court or the Court of Sessions when exercising revisional powers. In *Bhaskaran vs. Sankaran Vaidhyan Balan,*[49] the apex court laid down that the Magistrate cannot restrict itself in awarding compensation under Section 357(3) since there is no limit in sub-section (3) and therefore the Magistrate can award any sum of compensation which is reasonable.

40 1982 SCC (Cr) 467.
41 1994 SCC (Cr) 823.
42 AIR 1995 SC 2452.
43 AIR 1996 SC 922.
44 AIR 1983 SC 1086.
45 AIR 1990 SC 513.
46 AIR 1977 SC 1323.
47 AIR 1978 SC 1525.
48 AIR 2004 SC 1280.
49 AIR 1999 SC 3762.

The judicial reasoning apparent in the aforementioned decisions substantiates that the Indian courts have started realizing the need to ameliorate the plight of the victim.

Victims' Justice and the Ways Forward

Based upon the aforementioned discussion, it appears that the following are the core rights of victims of crime and deserve to be protected:

1. Right to attend criminal proceedings: Crime victims and their families should be given the right to be present during criminal proceedings and witness the whole process and hear counsel's arguments, view reactions of the judge, witnesses and the accused. They should be allowed to attend the trial, sentencing and parole hearing of the offender. This right should be allowed even if the victims themselves are witness in the case. They should also be given right of having a support person like advocate/any family member.

2. Right to apply for compensation: Need is there to evolve a government programme to compensate the victims. This becomes more relevant in the cases where the criminal could not be traced or the accused could not be punished for reasons whatsoever. This right ought to be made available to the victims and the family members. Efforts should be made cover the medical and legal counselling expenses, lost wages and funeral expenses.

3. Right to be heard and participate in criminal justice proceedings:[50] is of utmost significance since the concerned criminal proceedings affect the victims' interests. They should have right to be heard at the time of framing of charges, dismissal of charges and sentencing. Rules can be made that the prosecution side minatorily consults the victim before withdrawal of the trial. Further, it is of utmost important to know whether the victims desire retribution, rehabilitation of the offender or compensation. The court ought to give them a chance to present their views in this regard.

4. Right to be informed of proceedings: Victims/their family has right to be notified of important, scheduled criminal proceedings and the outcomes of those proceedings. They should be notified about the cancellation and rescheduling of hearings. They ought to be informed regarding the arrest of the accused, bail hearings, pre-trial release, dismissal of charges, plea bargaining, trial dates and times, sentencing hearings, final sentence, conditions of probation or parole, post-trial relief proceedings, appeals proceeding, pardon/commutation of sentence and related proceedings, final release from confinement, escape and subsequent recapture of offender.

50 Jyosna Dighe., *Victims Rights in India.* -http://www.legalservicesindia.com/article/article/victims-rights-in-india-1315-1.html accessed 8 September 2015 at 19.02 p.m

5. Right to protection from intimidation and harassment: Victims ought to be protected from any kind of intimidation and harassment. If need be, arrangement should be made for police escorts to and from court, separate waiting places during court proceedings.

6. Right to restitution: Victims ought to be given right to restitution[51] from the offender in terms of money for all the subsidiary expenses following suffering of the harm including medical expenses, legal charges and lost wages.

7. Right to prompt return of personal property seized as evidence[52] ought to be recognised immediately.

8. Right to a speedy trial: is of utmost importance to reduce the emotional trauma of the victim. Unnecessary delay in the trial leads to adverse impact and mental harassment.

9. Right to employment: If the breadwinner of the family has suffered death or injury due to the crime, government ought to make suitable arrangements for providing suitable employment to the family members.

Victims like elderly persons, woman, children, minority groups and weaker sections are prone to victimisation in the worst manner either sexual or general abuse. Thence apart from these general rights, they deserve special treatment.

Further trial court needs to be empowered to award compensation depending on the injury suffered by the victim and the capacity of the criminal and limits on its powers laid down by the Indian Penal Code, 1860 ought to be made flexible. Further the process of recovering the compensation ought to be made easier since the process of recovery laid down under section 421 and section 422, Cr.P.C, 1973 is lengthy and cumbersome. Compensation ought to be awarded irrespective of the results of the case since victim suffering cannot be negated. Arrangements ought to be made for payment of compensation by the government, if not the accused/criminal at the earliest not only for the private criminal wrongs but also for the criminal acts perpetrated by its agencies.

Mere conferring these rights without a proper implementation will be of little value. Need is there to implement these rights properly and sensitize the investigating, prosecuting and adjudicating authorities towards the plight of the victim. Better and quicker justice is possible only if the rights of victims are recognised and restitution for loss of life, limb and property is made easier. It is important to realise that the position and role of victim in the criminal justice

51 Restitution refers to restoration of the harm caused by the defendant most commonly in the form of payment for damages. It can also refer to the return or repair of property stolen or damaged in the course of the crime. - *https://www.victimlaw.org/victimlaw/pages/victimsRight.jsp accessed 8 September 2015 at 00.14 a.m.*

52 *Supra* n.50.

system cannot be confined to the minimal since it is he who has suffered direct loss. Obligations towards victims cannot be ignored on the ground of scarcity of resources. Undermining their rights may lead to failure of the criminal justice system.

Crimes damage the social fabric and make the victims suffer. As a community, we respond by apprehending the perpetrator and punishing them for their criminal acts. But the criminal justice system must do more than punishing the criminal. It must seek to heal the wounds of the victim, emotional, physical and financial caused by crime. Improvement in the mechanisms for preventing crime is called for since it will reduce victimisation.

*****

ENVIRONMENTAL IMPACT ASSESSMENT NORMS: AN APPRAISAL OF THE INDIAN SCENARIO

Nikita Singh* & Aijaj Ahmed Raj*

ABSTRACT

India first experienced Environmental Impact Assessment around 20 years back. It was in 1976-77 when the Planning Commission asked the Department of Science and Technology to examine the river valley projects from an environmental angle. In 1994, the Union Ministry of Environment and Forests (MoEF), Government of India, under the Environmental (Protection) Act 1986, promulgated an EIA notification making Environmental Clearance (EC) mandatory for expansion or modernization of any activity or for setting up new projects listed in Schedule 1 of the notification. The MoEF recently notified new EIA legislation in September 2006. India, being one of the fast developing countries, falls in the grasp of environmental degradation for unplanned developmental projects. So, an effective EIA legislation and its implementation has become utmost important for ensuring a balanced sustainable development. This paper seeks to study the present EIA norms provided under various legislations, methods provided for EIA along with their applicability and also suggests initiatives to be taken for ascertaining a vibrant EIA regime in India.

INTRODUCTION

India, being a country with the highest demographic variations and rich bio-diversity regions necessitates a comprehensive environmental impact assessment (EIA) law and policy for ascertaining the sustainable development. India, being a fast growing developing country, has been the victim of severe water, air and soil pollution from the unmanaged pollution sources, untreated material waste and unplanned expansion of the cities. So, the green environmental planning and management strategies have become the need of the hour for securing clean and green India. For making India a sustainable country with the commitment for achieving highest environmental protection we have framed laws and policies for EIA. This paper seeks to study the present EIA norms provided under various legislations, methods provided for EIA along with their applicability in India.

* Assistant Professor, School of Law,. Chanderprabhu Jain College of Higher Studies, Delhi; Available at +91 9999663973 and *nikita.nv@gmail.com*

** Research Scholar, Department of Law, Aligarh Muslim University, Aligarh, U.P., Available at *a.raj2011@rediffmail.com*

CONCEPT OF EIA

IA is a management tool that seeks to ensure sustainable development through the evaluation of those impacts arising from a major activity (policy, plan, program, or project) that are likely to have significant environmental effects. It is anticipatory, participatory, and systematic in nature and relies on multidisciplinary input. By using EIA both environmental and economic benefits can be achieved, such as reduced cost and time of project implementation and design, avoided treatment costs and impacts of laws and regulations. After an EIA, the precautionary and polluter pays principles may be applied to prevent, limit, or require strict liability or insurance coverage to a project, based on its likely harms.

The EIA process is an interdisciplinary and multistep procedure to ensure that environmental considerations are included in decisions regarding projects that may impact the environment. EIA process can be defined as the study that helps to identify the possible environmental effects of a proposed activity and how those impacts can be mitigated. EIA systematically examines both beneficial and adverse consequences of a project and ensures that these effects are taken into account during project design. Identifying the possible environmental effects of a proposed project proposes measures to mitigate adverse effects and also predicts whether there will be significant adverse environmental effects, even after the mitigation is implemented.

THE PURPOSE OF EIA

Every anthropogenic activity has some impact on the environment. More often it is harmful to the environment than benign. However, mankind as it is developed today cannot live without taking up these activities for his food, security and other needs. Consequently, there is a need to harmonies developmental activities with the environmental concerns. EIA is one of the tools available with the planners to achieve the above-mentioned goal.

The purpose of the EIA process is to inform decision-makers and the public of the environmental consequences of implementing a proposed project. EIA is integral part of environmental planning and management. It starts from the planning stage of the project and is carried on throughout its implementation, operation and final closure. The EIA process also serves an important procedural role in the overall decision-making process by promoting transparency and public involvement. By considering the environmental effects of the project and their mitigation early in the project planning cycle, environmental assessment has many benefits, such as protection of environment, optimum utilization of resources and saving of time and cost of the project.

GENESIS OF EIA

The phrase Environmental Impact Assessment comes from Sec. 102 (2) of the *National Environmental Policy Act* (NEPA), 1969, USA. Provisions related to EIA

began appearing in developing countries' legislation during the 1970s, shortly after the United States enacted the first national EIA law the NEPA of 1969. References to EIA were made in the environmental legislation of Malaysia, Ecuador and the Philippines. In addition, the Philippines promulgated supplemental legislation which set forth a more detailed EIA procedure. Throughout the 1980s, more countries decided to establish EIA as an element of environmental policy and a legal requirement for proposed development activities. Again, many countries elected to insert EIA provisions within their framework environmental legislation(e.g. Algeria, Costa Rica, Cuba, Guatemala, India, Pakistan, Palau, Senegal, South Africa, Togo, Turkey), while other also elaborated EIA requirements within a complementary decree or regulation (Brazil, Congo, Indonesia, Mexico).[1]

EIA FRAMEWORK IN INDIA

Environmental Impact Assessment Notification, 1992

India first experienced Environmental Impact Assessment around 20 years back. It was in 1976-77 when the Planning Commission asked the Department of Science and Technology to examine the river valley projects from an environmental angle. This was subsequently extended to cover those projects, which required the approval of the Public Investment Board. But, it was only with the enactment of the Environment Protection Act, 1986, that there was a broad move towards institutionalizing environmental norms. The Central Government under S. 3(1) and S. 3(2) of the Environmental Protection Act, 1986, and under Rule 5(3) (a) of the Environmental Protection Rules, 1986, issued a draft notification in 1992 laying down norms and procedures for impact assessment.[2]

As per the notification of 1992, the expansion or modernization of any existing industry, or the establishment of new of new projects listed in Schedules I and II shall not be undertaken without obtaining an environmental clearance from the Central Government and the State Governments respectively. An application submitted to the appropriate authority should include an EIA Report and an Environmental Management Plan (EMP) prepared in accordance with the guidelines issued by the Central Government. These reports are then assessed by the Impact Assessment Agency (IAA) which is the Ministry of Environment and Forests at the Central and State levels in consultation with a committee of experts.[3] The IAA then prepares a set of recommendations based on technical assessment of the documents and data furnished by the applicants. The clearance is given subject to the recommendations.

1 B. Ganeshkumar Gobinath, N. Prabhakaran, K. Rajeshkumar, "Modified EIA for small and medium projects – An effective method to make the projects Eco – friendly" 1 *IJES* 57-58 (2010).

2 George Cyriac and Shamik Sanjanwala, "Environmental Impact Assessment in India: An Appraisal" 10 Manupatra 74 (1998).

3 *Ibid* at 75.

Environmental Impact Assessment Notification, 1994

Till 1994, environmental clearance from the Central Government was an administrative decision and lacked legislative support. On 27 January 1994, the Union Ministry of Environment and Forests (MoEF), Government of India promulgated an EIA notification making Environmental Clearance (EC) mandatory for expansion or modernization of any activity or for setting up new projects listed in Schedule 1 of the notification.

The EIA notification of 1994 introduced a process for prior environmental approval of certain kind of projects. The MoEF issued a notification making environmental clearance legally mandatory for expansion and modernization and for construction of new projects and listed in Schedule I of the notification of 1994. The project proponents were required to submit an environmental assessment report, environmental management plan and the details of the public hearing conducted in the vicinity of the project (exceptions to these requirements were permitted for certain projects). The MoEF would function as Impact Assessment Agency which could consult a Committee of Experts set up for this purpose.[4] The EIA notification 1994 decentralized the responsibility of environmental clearance for certain categories of thermal power plants to the State Governments. This delegation of powers to the state government is subject to area restrictions. For example, environmental clearance is required for any project located within 25 km of reserve forests, ecologically sensitive areas (including National Parks, Sanctuaries, Biosphere Reserves and critically polluted areas) and within 50 km of interstate boundaries.[5] Since then there have been 12 amendments made in the EIA notification of 1994.

Environmental Impact Assessment Notification, 2006

The MoEF notified the new EIA Notification on 14th September 2006. The objective of EIA Notification 2006 is to address the limitations in the old EIA Notification (1994). Therefore, various modifications have been incorporated in the old notification, which the ministries claims have been done after taking into account the feedback from the different stakeholders.[6] The 2006 Notification has tried bringing in more number of projects within the purview of the environmental clearance process. As a result, a revised list of projects and activities has been redrawn that requires prior environmental clearance. Most importantly, there is

4 Nupur Chowdhury, "Environmental Impact Assessment in India: Reviewing Two Decades of Jurisprudence" 5 *IUCNAEL EJournal* 28-29.

5 R.B. Khadka and U.S. Shrestha, "Process and Procedure of Environmental Impact Assessment Application in Some Countries of South Asia: A Review Study" 4 Journal of Environmental Science and Technology 215-233 (2011).

6 Center for Science and Environment, EIA Legislation, available at: http://www.cseindia.org/node/402 (Visited on February 9, 2016).

no categorization of projects requiring EIA based on investment, rather size or capacity of the project determines whether it is cleared by the central or state government.

The notification makes it mandatory for various projects such as mining, thermal power plants, river valley, infrastructure (road, highway, ports, harbours and airports) and industries including very small electroplating or foundry units to get environment clearance. However, unlike the EIA Notification of 1994, the new legislation has put the onus of clearing projects on the state government depending on the size of the project.

Three significant changes were initiated through the 2006 amendment that superseded the 1994 notification. The decentralization of regulatory functions to State level Environment Impact Assessment Agencies (SEIAAs). SEIAAs were to oversee smaller scale projects (Category 'B') and the MOEF would continue to regulate larger scale projects (Category 'A'). Second, although the final regulatory approval would be decided by the MoEF or the concerned SEIAA, they in turn were to base their approvals on the recommendations of the State Expert Appraisal Committee (SEAC) and the Expert Appraisal Committee (EAC) functioning in the MOEF. Third, the State Pollution Control Boards (SPCB) or the Union Territory Pollution Control Committee (UTPCC) was given the responsibility for conducting the public hearing, taking responsibility away from the project proponents. These three changes were designed to make the appraisal process more streamlined, transparent and independent of politicking.[7]

The major difference in the EIA Notification 2006 from the earlier one (1994) is its attempt to decentralize power to the State Government. Earlier all the projects under schedule 1 went to the Central Government for environmental clearance. However, as per the 2006 notification, significant number of projects will go to the state for clearance depending on its area. For this, the notification has made a provision to form an expert panel, the Environment Appraisal Committees (SEAC) at the State level. Though this is a good attempt to reduce the burden on the central government, however, this provision can be misused as in many cases state government is actively pursuing industrialization for their respective state. The notification has also failed to mention if there would be some sort of monitoring of state level projects by the central government.

Certain activities permissible under the *Coastal Regulation Zone Act*, 1991 also require similar clearance. Additionally, donor agencies operating in India like the World Bank and the ADB have a different set of requirements for giving environmental clearance to projects that are funded by them.[8] The notification also talks about 'Scoping', which was completely missing earlier. The terms of reference (ToR) of the project will now be decided by the SEAC at the state-level

7 *Supra* note 2 at 29.

8 Center for Science and Environment, Understanding EIA, available at: http://www.cseindia.org/node/383 (Visited on February 9, 2016).

and by Environment Appraisal Committees (EAC) at the Central level. This will be decided on the basis of the information provided by the proponent. If needed the SEACs and EACs would visit the site, hold public consultation and meet experts to decide the ToR. The final ToR has to be posted in the website for public viewing.

The Ministry of Environment and Forests (MoEF) of India has been in a great effort in EIA in India. The main laws in action are the *Water Act* (1974), the *Indian Wildlife (Protection) Act* (1972), the *Air (Prevention and Control of Pollution)* Act (1981), the *Environment (Protection) Act* (1986) and the *Biological Diversity Act* (2002).[9]

THE EIA PROCESS IN INDIA

The stages of an EIA process will depend upon the requirements of the country or donor. However, most EIA processes have a common structure and the application of the main stages is a basic standard of good practice. The environment impact assessment consists of certain steps with each step equally important in determining the overall performance of the project. The EIA process begins with the submission of the project proposal, followed by screening to ensure time and resources are directed at the proposals that matter environmentally and end with some form of follow up on the implementation of the decisions and actions taken as a result of an EIA report. The steps of the EIA process are presented in brief below:

1. Project Proposal

   Any proponent embarking on any major development project shall notify IAA in writing by the submission of a project proposal. The project proposal shall include all relevant information available including a land use map in order for it to move to the next stage which is screening. The submission of a project proposal signifies the commencement of the EIA process.

2. Screening

   Screening is done to see whether proposed project requires environmental clearance as per the statutory notifications. At this stage, the project proponent decides the type of project and also about requirement of Environmental Clearance. If required, the proponent may consult Impact Assessment Agency (IAA).

3. Scoping and consideration of alternatives

   Scoping is a process of detailing the terms of reference of EIA. This stage

9 Shibani Ghosh, "Demystifying the Environmental Clearance Process in India", available *at: http://www.nujslawreview.org/pdf/articles/2013_3/03shibanighosh.pdf,* NUJS LAW REVIEW (Visited on January 2, 2016).

identifies the key issues and impacts that should be further investigated. It has to be done by the consultant in consultation with the project proponent and guidance, if need be, from IAA. This stage also defines the boundary and time limit of the study.

4. Base line data collection

Base line data describes the existing environmental status of the identified study area. The site specific primary data should be monitored for the identified parameters and supplemented by secondary data if available.

5. Impact Analysis and Assessment of Alternatives

This stage of EIA identifies and predicts the likely environmental and social impact of the proposed project and evaluates the significance. Impact prediction is a way of mapping the environmental consequences of the significant aspects of the project and its alternatives. For every project, possible alternatives should be identified and environmental attributes compared. Alternatives should cover both project location and process technologies. Alternatives should then be ranked for selection of the best environmental optimum economic benefits to the community at large. Once alternatives have been reviewed, a mitigation plan should be drawn up for the selected option and is supplemented with an Environmental Management Plan (EMP) to guide the proponent towards environmental improvements. The EMP is a crucial input to monitoring the clearance conditions and therefore details of monitoring should be included in the EMP.

6. EIA Reporting

This stage presents the result of EIA in a form of report to the decision – making body and other interested parties. An EIA report should provide clear information to the decision maker on the different environmental scenarios without the project, with the project and with project alternatives. The proponent prepares detailed Project report and provides information in logical and transparent manner. The IAA examines if procedures have been followed as per MoEF notifications.

7. Public hearing

After the completion of EIA report the law requires that the public must be informed and consulted on a proposed development after the completion of EIA report.

8. Decision making

It decides whether the project is rejected, approved or needs further change. Decision making process involves consultation between the project proponent (assisted by a consultant) and the impact assessment authority (assisted by an

expert group if necessary). The decision on environmental clearance is arrived at through a number of steps including evaluation of EIA and EMP.

9. Monitoring the clearance conditions

Monitoring has to be done during both construction and operation phases of a project. It is done not just to ensure that the commitments made are complied with but also to observe whether the predictions made in the EIA reports are correct or not. Where the impacts exceed the predicted levels, corrective action should be taken. Monitoring also enables the regulatory agency to review the validity of predictions and the conditions of implementation of the Environmental Management Plan (EMP). The Project Proponent, IAA and Pollution Control Boards should monitor the implementation of conditions. The proponent is required to file once in six months a report demonstrating the compliance to IAA. [10]

SHORTCOMINGS OF THE NOTIFICATION OF 2006

However, a close look at the EIA in India reveals that some improvement is needed in the following aspects. EIA's are controversial in India because of little participatory democracy in the formulation and implementation of environmental legislation. The area where there could have been major improvements in environment clearance process, i.e. public consultation, the 2006 EIA notification is a major disappointment. The public consultation as was earlier done will still be conducted at the end of the environment clearance process where there is very little scope for the public to play any active role.

There have been instances where, more than one EIA for the project has been approved by an authorized agency and subsequently revoked by judicial action initiated by public interest litigations. A fresh outlook at the EIA requirement is essential, especially a public review, which would help in the development of a sound normative framework for guiding the entire process. Moreover, the 2006 Notification has made few changes that weaken the public consultation process. There is a provision in the notification where a public consultation can totally be foregone if the authorities feel the situation is not conducive for holding public hearing. This can limit the involvement of people.

Further, the consultation process has been divided into public hearing for local people and submission in writing from other interested parties. If this is the case, then NGOs or civil society organization will not be able to take part in the public hearing process, which will significantly affect the efficiency of the consultation process.

It is also unclear as to how an EIA is to be prepared, what norms it must satisfy how it is to be approved. The requirements for EIA in India are generally

10 Center for Excellence – Madras School of Economics, Environment Impact Assessment - Procedure, available at: *http://coe.mse.ac.in/EIAprocedure.asp* (Visited on February 9, 2016).

comprehensive and include information on land use pollution sources in air, water and solid waste quality. But the problem arises here because of no proper set of guidelines for project types covered by the rule.[11]

The handing over of the responsibility of granting clearance to a large number of projects to the state governments without any system of checks and counter checks is not acceptable. In many instances, the state government is directly involved in seeking investments. Handing over the entire function of environment regulation into their hands will most certainly mean that projects are cleared indiscriminately.

Moreover, the notification deals only with process of grant of environment clearance, i.e., screening, scoping, public consultation and appraisal. And it stops there. The most critical issue of monitoring and compliance which is an integral part of the Environment Clearance regime is dealt with in precisely three sentences. There is only a mention of the six monthly compliance reports which are to be submitted by the project proponent. The EIA notification 1994 mandated the MoEF to maintain its independent monitoring report. This role of the MoEF finds no mention whatsoever in the new notification. This could mean several things. One, that the MoEF does not see the need to independently monitor the projects that it has cleared and that its function ends with granting clearance; two, that the project proponents will monitor themselves adequately.

CONCLUSION

The EIA norms in India are at par excellence in comparison to many other developing countries. The Indian legislators have tried to bring out a flawless and comprehensive EIA mechanism to deal with the environmental issues. However, still due to the lack of proper political will, public participation, the system of EIA in our country is yet ineffective in environmental protection.

The EIA preparation and approval process is fairly well established. However, the implementation part is very weak and monitoring of the implementation is not effective, although, there is clear provision in legislation and regulation, but the enforcement agencies in these countries tend to be weak. EIA has become a ritual process to comply with the environmental legislation and regulations. But its implementation part has been forgotten completely. Unless, it is not implemented in the project construction and operation, the EIA system of this region is not going to improve, because of the lack of the feedback information on implementation.

Moreover, the lacunas coming out of the new legislation on EIA should be taken care of properly. The proper implementations of the EIA plans are to be scrutinized

11 Arvin Thapliayal, "Public Participation in Environment Impact Assessment" Legal Service India, available at: *http://www.legalserviceindia.com/article/l435PublicParticipationinEnvironmentImpactAssessment.Html* (Visited on February 9, 2016).

during and after the completion of the project as well. Public participation must be assured at all levels of EIA mechanism as well as application. The State level functioning for EIA should be strengthened both at institutional level as well as in enforcement. A clean and green sustainable India can only be assured only with an effective, fully functional EIA framework for the same.

*****

RIGHT TO SET UP MATRIMONIAL HOME: WORKING LADIES

Dr Deepak Miglani *

ABSTRACT

Marriage is a holy relationship depends on mutual loyalty, honesty, trust and love which is performed to establish legal rights and obligations between the spouses, the spouses and their children, the spouses and their in-laws. This article will focus on the rights of working women to setup their matrimonial home and also to the problem faced by them due to the societal pressure.

INTRODUCTION

Marriage is a holy relationship depends on mutual loyalty, honesty, trust and love which are performed to establish legal rights and obligations between the spouses, the spouses and their children, the spouses and their in-laws. Being a patriarchal society in India, there is mainly a bias towards men and their superiority in marital relationships. While women ought to be respected, protected and kept happy by their husbands, their happiness being vital for the prosperity, peace and happiness of the whole family – they are to be kept under constant vigilance, since they cannot be completely trusted or left to themselves. The prime reason behind this idea was financial dependency of women over husband. But with passage of time India is moving away from the male dominated culture because woman is giving the tough competition to man in every field after becoming self independent. The modern management and technical education made them employable and changed the thinking of employers with the advent of multinational companies in India. Number of working women in the offices is increasing day by day. Many times not some time, wife is in more sound position than husband.

If we talk about old traditions , existing cultural and social ethos of India, a married girl / woman was no longer considered to be part of the family of her birth, instead she had become part of the family of the groom, has given an implied right to husband for setting up matrimonial home at his place. But with empowerment and financial independency of women especially wife, is now challenging the domination of patriarchal society and also challenging the cliché that matrimonialhome has to be at doorstep of husband. The moot question here is ," Can a husband force his wife to give up her job and join him at his place or whether the wife can choose to live separately where she is gainfully employed?"

* Assistant Professor in Shamsher Bahadur Saxena College of Law. Available at legalbuddy@*gmail.com. & deepakmiglani@outlook.com ……phone no…..*

Matrimonial Home

Matrimonial Home is not defined in any statutory provisions. It refers to house, apartment, condominium, mobile home or other type of dwelling inhabited by husband and wife. The matrimonial home (also known as the marital home, family home or family residence) is a family law concept. It refers to the place which is dwelling house used by the parties i.e. husband and wife or a place which was being used by husband and wife as the family residence. Matrimonial home is not necessarily the house of the parents of the husband. In fact the parents of the husband may allow him to live with them so long as their relations with the son (husband) are cordial and full of love and affection. But if the relations of the son or daughter-in-law with the parents of husband turn into sour and are not cordial, the parents can turn them out of their house. The son can live in the house of parents as a matter of right only if the house is an ancestral house in which the son has a share and he can enforce the partition. Where the house is self-acquired house of the parents, son, whether married or unmarried, has no legal right to live in that house and he can live in that house only at the mercy of his parents up to the time the parents allow. Merely because the parents have allowed him to live in the house so long as his relations with the parents were cordial, does not mean that the parents have to bear his burden throughout the life.[1]

However, matrimonial home was not just a building made of bricks and walls. It was a home/place comprising of sweetness of relations of family members and elders, full of blessing. In the matrimonial home, matrimonial rights and obligations are to be equally observed. Practically speaking, the residence of husband should be the home of the wife where both the spouses have equal right to reside.[2] The matrimonial home is deemed as part of the assets that make up "matrimonial property," or "family assets."[3] There is no such law in India, like the British Matrimonial Homes Act, 1967 and in any case, the rights which may be available under any law can only be as against the husband and not against the father-in-law or mother-in-law.[4]

RESTITUTION OF CONJUGAL RIGHTS

The term "conjugal rights" means matrimonial rights i.e. the right of the parties to society and comfort of each other. The word "society" means companionship, cohabitation i.e. consortium (living together as husband and wife). The words "withdrawal from the society of other" means withdrawal from the totality of conjugal relationship, such as refusal to stay together, refusal to have marital intercourse and refusal to give company and comfort.

1 Neetu Mittal vs Kanta Mittal , CM(M) 105/2006, Delhi High Court, *http://indiankanoon.org/doc/444223/* , Dated 4th of May 2013, Time:- 12:09 P.M.

2 Available at *http://ipc498a.wordpress.com/2008/10/07/justice-dhingra-explains-the-meaning-of-shared-household/* , Dated 4th of May 2013, Time 12:09 P.M.

3 Available at *http://www.canadian-money-advisor.ca/what-is-a-matrimonial-home.html,* Date:- 4th of May 2013, Time:- 12:09 P.M.

4 S.R. Batra vs. Taruna Batra AIR 2007 SC 1118

The necessary implication of marriage is that parties will live together. The 'restitution of conjugal right' means that if one of the parties to the marriage withdraws from the other's society, the latter is entitled to compel the former to live with him or her. Thus, it is a positive relief which aim 'to preserve marriage' and not disrupting it as in the case of divorce or judicial separation. Section 9 of the Hindu Marriage Act, 1956[5] provide this relief. The court on being satisfied of the truth of the statement made in such petition and that there is no legal ground why the application should not be granted may decree restitution of conjugal rights.

When it is found that conduct of husband created reasonable apprehension in mind of wife that it would be unsafe for her to stay with husband, the decree for restitution of conjugal rights in favor of husband cannot be granted.[6]

HUSBAND VS WIFE RIGHT REGARDING SETTING UP OF MATRIMONIAL HOME

Under the Hindu shastra, obligation of wife to live with her husband in his home and under his roof and protection are clear and unequivocal. The logic behind this was that a husband was traditionally the wage earner. However, the above logic is no more relevant in modern society. In *Tirath Kaur vs Kirpal Singh*[7] *and Kailashwanti vs Ayodhya Parsad Case*[8], the court took a conservative view. In the latter case, wife was willing to join her husband on holidays. But the court held that the concept of marriage couldn't be reduced to a 'weekend marriage'. The court, however, added that the husband must actually establish a matrimonial where he can maintain his wife in dignified comfort. It was also held that under the Hindu Law, the obligation of wife to live with her husband in his home and under his roof and protection in clear and equivocal. The husband is entitled to determine the locus of the matrimonial home. This right of husband is aptly born out by statutory provision and the dictates of Hindu Law. Under section 125 of Code of Criminal Procedure, 1973, a person is bound to maintain his wife, children, both legitimate and illegitimate and parents who are unable to maintain themselves. Under section 18 of the Hindu Adoption and Maintenance Act, 1956, a hindu wife is entitled to be maintained by her husband during her life time.

5. Section 9 of the Hindu Marriage Act, " When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal right accordingly."
Explanation :-Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.

6 Kamaladevi vs Shiva Kumar Swamy, AIR 2003 Kar 36.
7 (1975 PLR 572).
8 (1977) P&H 642 (FB).

In *Shanti Nigam vs Ramesh Nigam* [9], and *Swaraj Garg vs K.M. Garg*[10], the court took a progressive view and observed that any law which gives such exclusive right to the husband would be contrary to Art. 14. Where the wife is financially well off than her husband, she may be better situated to choose the place of matrimonial home than the husband. The court observed: As long as the wife doesn't refuse to cohabit with husband or doesn't deny access to him whenever she visits him or he visits her, the mere fact that she is herself working at a different place, even contrary to wishes of husband, will not furnish a ground for restitution of conjugal rights. In other words, her refusal to resign the job will not amount to withdrawal from society. However, if the circumstances are "equally balanced" in favour of wife and husband, then there would be a stalemate and neither of them would be able to sue the other for restitution of conjugal rights. In such a case, there is a 'breakdown of marriage'.

It may be noted that a respondent can be ordered to take up residence with the spouse where the marriage has been consummated or where the parties have provisionally lived together or at a new place, depending on the facts and circumstances of each case.

The spouses cannot live on love alone. They have to eat, be clothed, have a shelter and have such other amenities of life as may be obtained from the income of that spouse who is earn ore. Normally, the husband would be earning more than the wife and, therefore, as a rule the wife may have to resign her lesser job and join the husband, who would be expected to set up the matrimonial home. But Lord Denning I... J. said, "It is not a proposition of law It is simply a proposition of ordinary good seems arising from the fact that the husband is usually the wage earner and has to live near his work It is not a proposition which applies to all cases".[11]

At the present day, numerous women have taken up jobs to help their families and also to be useful members of the society. It may be that the wife is financially and in other respects better situated to choose the place of the matrimonial home than the husband. The existence of such circumstances in a particular case would make the law stated in paragraph 442 of Mulla's Hindu Law[12] inapplicable to such a case. It would appear, therefore, that the said statement of law deserves to be reconsidered. It may be brought in line with the modern conditions as has

9 1971 A.L.J. 67.

10 AIR 1978 Del 296.

11 Dunn v. Dunn, (1949) Pd 9.8 at p. 103.

12 (1) Paragraph 442 of Mulla's Hindu Law, 14th Edition, is as follows:

"(1) The wife is bound to live wither husband and to submit herself to his authority. An agreement enabling the wife to avoid a marriage or to live separate from her husband if he leaves the village in which his wife, and her parents reside, or if he marries another wife, is void. Such an agreement is against public policy and contrary to the spirit of the Hindu law. An agreement of this kind is no answer to a suit for restitution of conjugal rights by a husband against his wife.

(2) The husband is bound to live with his wife and to maintain her."

been done in Halsbury and Rayden referred to above. Alternatively, an exception to paragraph 442 deserves to be added to apply to working wives who are better situated than their husbands to choose the place of the matrimonial home. It has been recognized that social change among the Hindus has been generally - accompanied by appropriate changes in the Hindu law, particularly that part which relates to the unequal conditions in which Hindu women had been placed. This movement for the uplift of the status of the Hindu women is not nearly a century old.

It would appear that there is no warrant in Hindu law to regard the Hindu wife as having no say in choosing the place of matrimonial home. Art. 14 of the Constitution guarantees equality before law and equal protection of the law to the husband and the wife. Any law which would give the exclusive right to the husband to decide upon the place of the matrimonial home without considering the merits of the claim of the wife would be contrary to Art. 14 and unconstitutional for that reason.

CONCLUSION

We can conclude from the above discussion Conjugal Rights are not merely creature of statue. Restitution of Conjugal Rights is not contrary to personal freedom and liberty under Hindu Marriage Act either partner can claim this right. No spouse who commits cruelty or desert the other spouse without any reason can be allowed to file the application of restitution of conjugal rights for harassing the other spouse. If one party commits cruelty on the other party, the other party should not be called to endure. The approach of the court of law in matrimonial matter should be constructive, affirmative and productive rather than abstract, theoretical or doctrinaire. Matrimonial matters must be considered by courts with human angle and sensitivity. The minor differences do not constitute sufficient cause for the wife/husband to abandon him/her or to withdraw herself from company of her husband. Delicate issues affecting conjugal relations have to be handled carefully or legal provisions should be construed and interpreted without being oblivious or unmindful of human weakness.

*****

ANALYSIS OF CORPORATE CRIMINAL LIABILITIES OF DIRECTORS UNDER THE COMPANIES ACT 2013

Mr. Suneet Dwivedi*

ABSTRACT

The emerging problem of corporate crime poses a serious threat to nations around the world. This problem is hard to control because of the large profit these crimes can yield plus the grim fact that most of the perpetrators wield a wide sphere of influence, being corporate entities with huge financial resources at their disposal. They can afford to offer "hard to resist" bribes to law enforcers and if bribes do not work, they can also afford to hire the best lawyers in the world to defend them during court litigation. More so, with the aid of modern technology, corporate crimes are mostly committed with a sophistication that gives prosecutors a harder time proving their guilt in court. The evolution of the concept of criminal liability of corporations is characterized by the judiciary's relentless struggle to overcome the problem of assigning criminal blame to fictional entities. This is particularly relevant in a legal system based on the moral accountability of individuals. This article outlines the broad range of principles governing the law related to corporate criminal liability and the essential elements required to incur such liability in a comparative perspective. The study is based on Secondary sources, which includes books, journals, reports, news papers, internet websites, government publications and records.

INTRODUCTION

Much of our lives and daily routines are affected by corporate activities. To a great extent, companies provide the food we eat, the water we drink, the necessities and luxuries of everyday living. Increasingly, particularly with growing privatization, it is not the State that provides these amenities but companies. Such companies generate wealth for the economy and their shareholders and provide employment for much of the population. Short of a revolutionary restructuring of the economy and the political institutions of the country, it is certain that the power and influence of companies will grow and not diminish in the foreseeable future.

But, with great power comes great responsibility. Just as individuals owe a duty not to harm or injure others in society without justification, so do companies owe a duty not to poison our water and food, not to pollute our rivers, beaches and air,

* Assistant Prof. of Law, Reliable Institute, Available at sunit1215@gmail.com, and at +91 8285788149

not to allow their workplaces to endanger the lives and safety of their employees and the public, and not to sell commodities, or provide transport, that will kill or injure people.[1]

In the Indian and International scenario, the entire legal framework to make corporations and multinational companies to accountable is being systematically dismantled. The corporate sector now enjoys far more rights with laws being amended to empower corporations with right to control and regulate their own governance.[2]

HISTORICAL BACKGROUND

The growth of corporate criminal liability can be traced in the terms of the following four stages. This is also a chronological account of how the courts overcame the following obstacles:

Public Nuisance - Courts in England and the United States first imposed corporate criminal liability in cases involving non-feasances of quasi-public corporations such as municipalities that resulted in public nuisances.

Crimes not requiring criminal intent- As the presence and importance of corporations grew, courts extended corporate criminal liability from public nuisance to all offences that did not require criminal intent. In the *Queen v. Great North of England Railways Co.*[3] Lord Denman ruled that corporations could be criminally liable for misfeasance and American courts soon began following this trend.[4] This development eventually encouraged courts to extend corporate criminal liability to all crimes not requiring intent.

Crimes of intent- Courts were slow to extend corporate criminal liability to crimes of intent. Not until *New York Central and Hudson River Rail Road Co. v. United States*[5] in 1909 did the Supreme Court clearly hold a corporation liable for crimes of intent. The motivating factor of this result was the need for effective enforcement of law against corporations. Creation of corporate personality had otherwise created too large a vacuum vis-a-vis application of criminal law to corporations.

Expansion of corporate criminal liability- Various historical developments in Western Europe as well as United States further contributed to the growth and expansion of corporate criminal liability. However one of the most important

1 Available at *http://www.legalserviceindia.com/articles/corp1.htm,* last seen on 4.01.2016.
2 Available at *http://www.halsburys.in/corporate-crimes.html*, last seen on 4.01.2016.
3 115 Eng Rep 1294 (QB 1846).
4 State v. Morris & Essex Rail Road Co., 23 N J L 360 (1852); see Commonwealth v. Proprietors of New Bedford Bridge, 68 Mass (2 Gray) 339 (1854). American Courts followed English precedents and indicated corporations for affirmative acts (misfeasance) that resulted in public nuisance
5 212 US 431 (1909).

factors favouring criminal liability over civil liability was that the public civil enforcers did not possess as much enforcement power as criminal enforcers did.

There emerged specific statutes, rules, regulations and notifications which spelt out corporate criminal liability in clear terms. However, even in western countries, standards vary with each legal system applying a different model of corporate criminal liability.[6] The following part discusses two categories of these models.

Meaning of Corporate Crime

Corporate crimes are offenses committed by corporate officials for their corporation and the offenses of the corporation themselves for corporate gain. Typically a corporate criminal bribes a government, dumps toxic industrial waste into rivers. Corporate crimes are often called quiet acts because people not only don't know whom to blame but may not even know that they have been victimized.[7]

Erich Goode describes the corporate crime whereby executive and officers engages in illegal actions intend "to further the interest of that corporations" actions which thereby become actions taken on the behalf of corporations". Because individuals in an organization act within a corporate social structure, often the organization and / or industry climate plays important role in whether an actor commits a crime on the behalf of the organization. But if corporate culture secretly rewards such behavior, is that behavior actually deviant? Goode posits that corporate crime is a form of deviant behavior when actions include the harm of the people, sanctions against the actor and or company, and the discrediting of the corporate actor. In sum, corporate crime is an important form of the organizational deviance.[8]

But, it should be remembered that the punishment of companies decreases their overall wealth. Accordingly, shareholders and employees have an incentive to encourage and monitor better corporate practices. Costs can only be passed on the public to the extent that the company remains competitive. Arguments that shareholders and employees need protection must be outweighed by the greater societal interest in ensuring the safety of employees, the public and the environment.

Twin Model of Corporate Criminal Liability

There are two model of corporate criminal responsibility which is given below:-

1. Derivative Model

   This model is individual centered model. It derives to attach the liability to the corporation only because an individual connected to the corporation incurred some liability for which the individual is to be punished, but since

6 G. Stessens, Corporate Criminal Liability: A Comparative Perspective, 43 ICLQ 493 (1994).
7 Available at *http://www.julianhermida.com/contcorporate.htm,* last seen on 4.01.2016.
8 PrakashTalwar, *Corporate Crime,* Isha Books, Delhi, 2006 page

it is connected to the corporation the liability is put on the corporation to having that individual with it and letting it incurred some liability.[9] Derivative model can be understood in two sub-categories: A) Vicarious Liability; B) Identification Doctrine.

(a) *Vicarious Liability:* The concept of vicarious liability is based on two Latin maxims- first, qui facit per alium facit per se, it means that he who acts through another shall deemed to have acted on his own, and second, respondent superior which means let the master answer. In Bartonshill Coal Co. v. McGuire[10] Lord Chelmsford LC said: 'every act which is done by an employee in the course of his duty is regarded as done by his employer's orders, and consequently is the same as if it were his employer's own act.' Vicarious liability generally applies to civil liability but Massachusetts court in *Commonwealth v. Beneficial Finance CO*.[11] held three corporations criminally liable for a conspiracy to bribe, the first company, for the acts of its employee, the second, for the act of its Director, and the third, for the acts of the Vice-President of a wholly owned subsidiary. The Court seemed to believe that corporate criminal liability was necessary since, a corporation is a legal fiction comprising only of individuals. US courts are not the only courts which have incorporated the concept of vicarious liability in the cases of criminal liability, but now this model has been rejected considering it to be unjust to condemn one person for the wrongful conduct of another.[12]

(b) *Identification Doctrine:* This doctrine is an English law doctrine which tries to identify certain key persons of a corporation who acts in its behalf, and whose conduct and state of mind can be attributed to that of the corporation. In case of *Salomon v. Salomon & Co.*[13] House of Lords held that c*orporate entity is separate from the persons who act on its behalf.* The Courts in England had in various judgments like *DPP v. Kent & Sussex Contractors Ltd.,*[14] *R v. ICR Haulage Ltd.,*[15] ruled that the corporate entities could be subjected to criminal liability and the companies were held liable for crimes requiring intent. Judgment like these led to the promulgation of 'identification doctrine'.

As to the liability of these key persons who act on behalf of company, it was held in Moore v. Brisler[16] that *the persons who are identified with the corporations must be acting within the scope of their employment or authority. The conduct*

9 Sumit Baudh, Corporate Criminal Liability, The Student Advocate (Vol. 10), 1988, pp. 45-46.
10 *Bartonshill Coal Co. v. McGuire*, (1853) 3 Macq 300
11 Scoff Massachusetts, 1971 360 Mass 188,cfWR Lafare, Modem Criminal Law (West Publishing)
12 *State of Maharashtra vs. M/s Syndicate Transport Co. (P) Ltd.* AIR 1964 Bom 195
13 Salomon v. Salomon & Co., 1897 AC 22: (1895-99) All ER Rep 9 (HL).
14 DPP v. Kent & Sussex Contractors Ltd., (1944) 1 All E.R.119
15 DPP v. Kent & Sussex Contractors Ltd., (1944) 1 All E.R. 691.
16 *Moore v. Brisler,* [1944] 2 All ER 515.

must occur within an assigned area of operation even though particulars may be unauthorized. It will be wise to infer that identification doctrine is narrower in scope than the vicarious liability doctrine, instead of holding corporation liable for act of any employee; identification doctrine narrows it down to certain persons.[17]

2. Organizational Model

Unlike derivative model which focuses on individual, organizational model takes corporation into consideration. Offences require mental state (*mens rea*) to commit a crime along with physical act (*actus reus*), but the problem that arises while holding corporations criminally liable is how a corporation which is juristic person could possess requisite mental state to commit a crime.

Derivative model was one way to attribute mental state to corporation. Other way could be by proving that there existed an environment in the corporation which directed, tolerated, led-on, and even encouraged the non-compliance of specific law which made it offence.[18] Moreover, physical act that too is required to complete the requirement of commission of an offence can be derived rather be proved from the act of its employees, officers, directors, etc. Thus, culture of a corporation is to be seen while determining its criminal liability.

Corporate culture may help for commission of an offence requiring mental state by- *firstly*, providing the environment or necessary encouragement that it was believed by the offender working in the corporation that it was perfectly alright to commit that offence, or corporation has psychologically supported the commission of offence; *secondly*, it is quite possible that the corporation created an environment which led to commission of crime. Both ways it was the corporation and its working culture that let the offence committed.

CORPORATE CRIMINAL LIABILITY IN INDIA

Criminal Liability is attached only those acts in which there is violation of Criminal Law i.e. to say there cannot be liability without a criminal law which prohibits certain acts or omissions. The basic rule of criminal liability revolves around the basic Latin maxim actus non facit reum, nisi mens sit rea. It means that to make one liable it must be shown that act or omission has been done which was forbidden by law and has been done with guilty mind.

Hence every crime has two elements one physical known as actus reus and other mental known as mens rea.[19] This is the rule of criminal liability in technical sense

17 Smith and Hogan, Criminal Law 178 (1992).

18 Criminal Law Officers Comm. [Code Committee] of the Standing Comm. of Attorneys-General, Austl., Model Criminal Code: Chapter 2, General Principles of Criminal Responsibility Section 501 (1992).

19 Actus reus connotes those result of human conduct which is forbidden by law and hence constitutes of Human action; result of conduct and act prohibited by law. One other hand mens rea is generally taken as blame worthy mental condition: Russell, W.O., Russell on Crime p.17-

but in general the principle upon which responsibility is premised is autonomy of the individual, which states that the imposition of responsibility upon an individual flows naturally from the freedom to make rational choices about actions and behavior.[20]

Although the general rule as stated above is applicable to all criminal cases but the criminal law jurisprudence has seen one exception to the above said concept in form of doctrine of strict liability in which one may be made liable in absence of any guilty state of mind. This happens in cases of mass destructions through pollution, gross negligence of the company resulting in widespread damages like in the Bhopal Gas tragedy, etc[21]

Recently, The Supreme Court in *Standard Chartered Bank & Others v. Directorate of Enforcement & Others*[22], considered the issue as to whether a company, or a corporation, being a juristic person, could be prosecuted for an offence for which mandatory sentence of imprisonment and fine is provided; and when found guilty, whether the court has the discretion to impose a sentence of fine only. The Supreme Court held that there is no dispute that a company is liable to be prosecuted and punished for criminal offences.

Although there are earlier authorities to the effect that corporations cannot commit a crime, the generally accepted modern rule is that except for such crimes as a corporation is held incapable of committing by reason of the fact that they involve personal malicious intent, a corporation may be subject to indictment or other criminal process, although the criminal act is committed through its agents.

Corporations play a significant role not only in creating and managing business but also in common lives of most people. That is why most modern criminal law systems foresee the possibility to hold the corporation criminally liable for the perpetration of a criminal offence. The doctrine of corporate criminal liability turned from its infancy to almost a prevailing rule[23]. But, because a corporation is not a natural person and cannot be subject to one of the most important sentencing options, namely, imprisonment, it requires special consideration in an inquiry into sentencing law. Punishing a corporation undermines the theoretical foundations of criminal law, which presupposes that crimes involve an act and a culpable mental state. Corporate criminal liability or corporate crime is very difficult to

51 (J.W.C. Turner Ed., New Delhi; Universal Law Publishing Pvt., 2001).

20 A. Ashworth, Principles of Criminal Law p. 79-81 (Oxford: Clarendon Press, 1991) cited by Fisse, Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions, 56 S. Cal. L. Rev. 1141

21 Assn. of Victims of Uphaar Tragedy v. UOI, 104 (2003) DLT 234, Rylands v. Fletcher, (1868), L.R. 3 H.L. 330.

22 (2005) 4 SCC 530.

23 Thiyagarajan, T. Sivanathan; "Corporate Criminal-concept", available at: *http://www.manupatra.com/Articles/artlist.asp?s=Corporate/Commercial (last visited on May 7, 2008 at 3.00 P.M.)*

define because this phrase in present day scenario covers wide range of offences. However for understanding purpose it can be defined as illegal act of omission or commission, punishable by criminal sanction committed by individual or group of individual in course of their occupation[24]. It can be even defined as socially injurious acts committed in course of occupations by peoples who are managing the affairs of the company to further its business interest.[25]

DIRECTORS UNDER THE NEW COMPANIES ACT, 2013

Directors of a company hold the most crucial position in the Company. With the new Companies Act, 2013 already in force, their position has become even more significant than ever before. They are now formally included within the definition of "key managerial personnel" or "KMP" under Section 2(51) of the New Act.

Number of Directors

The New Act has also increased the maximum number of directors that a company can have from twelve to fifteen. The number can be further increased by passing a special resolution instead of requiring approval from Central Government as was under the Old Act.[26]

Appointment of Directors

Section 152 of the New Act governs the appointment of directors. Certain specific requirements for appointment of director as lay down in the New Act are-[27]

1. If there is no provision for appointment of Director in the Articles (AoA), the subscribers to the memorandum, i.e. the shareholders, who are individuals shall be deemed to be the first directors of the company until the directors are duly appointed;

2. Director to be appointed in a general meeting. If it is so done, an explanatory statement for such appointment, annexed to the notice for the general meeting, shall include a statement that in the opinion of the Board, he fulfills the conditions specified in this Act for such an appointment;

3. The proposed Director has to furnish his DIN (Director Identification Number) mandatorily. DIN is allotted by the Central Government on application by a person intending to be the Director of a company. DIN can be obtained in pursuance of section 153 and 154;

4. The proposed Director has to also furnish a declaration stating that he is not

24 Williams, K.S.; "Text Book on Criminology", Universal Law Publishing Pvt., New Delhi, 2001, p.64
25 Siegal, L.J.; "Criminology" , Wadsworth/ Thomson Learning, London, 2000, pp.398-99
26 Section 149 (1) (b) of Company Act 2013.
27 Section 152 of Company Act 2013.

disqualified to be a director.

5. Furthermore, such appointment should be with his consent. Earlier such consent was not mandatory for private companies. Consent implies that being appointed a director and taking the charge of the office are two different things;

6. Consent has to be filed with the Registrar of Companies within 30 days of appointment

New Categories and Qualifications of Directors

1. Resident Director

The new Act has made certain important changes in the earlier regime, particularly in respect of the appointment of directors Board of Directors of a company, must have at least one resident director, i.e. a person who has lived not less than 182 days in India in the previous calendar year. The second proviso added to section 149 in the New Act requires all companies to comply with section 149 within a year.[28]

2. Woman Director

Similarly, a new provision is introduced, which requires certain categories of companies to have at least one woman director on the board. Such companies are any listed company, and any public company having-

- paid up capital of Rs. 100 cr. or more, or
- Turnover of Rs. 300 cr. or more. [29]

3. Independent Director

Independent Director is for the first time introduced in the New Act, and has been clearly defined as "*any director other than a managing director, a whole time director, and a nominee director.*" Such a director not having any significant pecuniary relationship with the company is more efficient. Section 149 (4) requires that one third of the directors should be independent directors.

4. Additional Directors

Additional Directors may be appointed by a company the article should confer such power on the Board of Directors of the Company. A provision further added in 2013 with regards to such appointment is that the proposed person should not have failed to get appointed as a Director in a General Meeting.[30]

28 Section 149 of the Company Act 2013.
29 Section 149 the Company Act 2013.
30 Section 161 of the Companies Act, 2013

5. Nominee Director

He is a Director nominated by any financial institution pursuant to any law for the time being in force, or of any agreement or appointed by any Government or any other person to represent its interest.[31]

6. Alternate Directors

Alternate Directors, may be appointed by a company if the articles confer such power or a decision is passed by a resolution if an independent Director is absent from India for not less than three months. He must be qualified to become an independent director, but should not hold any Directorship. An alternate Director cannot hold the office longer than the term of the Director in whose place he has been appointed. Additionally, he will have to vacate the office, if and when the original Director returns to India. Any alteration in the term of office made during the absence of the original Director will apply to the original Director and not to the Alternate Director.[32]

Criminal Liabilities of Directors under the Companies Act 2013

"Director" means a director appointed to the Board of a company.[33] Companies Act 2013 has increased monetary penalties and imprisonment. The civil and criminal liabilities are not just on directors but include "Officers in Default". There is heightened corporate governance requirements even for startups and unlisted companies, even though there is no public money invested.

Officer in default would broadly cover whole-time directors, Key Managerial Personnel (KMP) and such other directors as specified by the Board in the absence of KMP and every director who is aware of contravention of law by virtue of receipt of board proceedings or participation therein without raising any objection or where non-compliance has taken place with his consent or connivance.

Below table is indicative of some of the sections which deal with imprisonment

Provisions	**Who is liable and the Civil/ Criminal liability involved**
Prohibition on issue of shares at discount	Company-Fine- Not less than Rs. 1 lakh and may extend to Rs. 5 lakhs
	Officer in default- Maximum imprisonment of 6 months or Fine- Not less than Rs. 1 lakh and may extend to Rs. 5 lakhs or with both.

31 Section 149 of the Companies Act, 2013
32 Section 161(2) of Companies Act, 2013
33 Section 2(34) of the Companies Act, 2013

Power of Company to purchase its own securities	Company-Fine- Not less than Rs. 1 lakh and may extend to Rs. 3 lakhs
	Officer in default- Maximum imprisonment of 3 years or Fine- Not less than Rs. 1 lakh and may extend to Rs. 3 lakhs or with both.
Debentures	Officer in default- Maximum imprisonment of 3 years or Fine- Not less than Rs. 2 lakh and may extend to Rs. 5 lakhs or with both.
Annual return	Company-Fine- Not less than Rs. 50,000 Thousand and may extend to Rs. 5 lakhs
	Officer in default- Maximum imprisonment of six months or Fine- Not less than Rs. 50,000 Thousand and may extend to Rs. 5 lakhs or with both.
Minutes of proceedings of general meeting, meeting of Board of Directors and other meeting and resolutions passed by postal ballot.	Any person found guilty of tampering with the minutes- Maximum imprisonment for 2 years and Fine- Not less than Rs. 25,000 but which may extend to Rs. 1 lakh
Books of account, etc., to be kept by Company	Officer in default- Maximum imprisonment of 1 year or Fine- Not less than Rs. 50,000 and may extend to Rs. 5 lakhs or with both.
Financial statement	Officer in default- Maximum imprisonment of 1 year or Fine- Not less than Rs. 50,000 and may extend to Rs. 5 lakhs or with both.
Financial statement, Board's report, etc	Company-Fine- Not less than Rs. 50,000 and may extend to Rs.25 lakhs
	Officer in default- Maximum imprisonment of 3 years or Fine- Not less than Rs. 50,000 and may extend to Rs. 5 lakhs or with both.

Vacation of office of director	Director – Maximum imprisonment for 1 year or Fine- Not be less than Rs. 1 lakh and may extend to Rs. 5 lakhs or with both.
Loan to directors, etc.	Company-Fine- Not less than Rs. 5 lakhs and may extend to Rs.25 lakhs
	Officer in default- Maximum imprisonment of 6 months or Fine- Not less than Rs. 5 lakhs and may extend to Rs. 25 lakhs or with both.
Loan and investment by Company	Company-Fine- Not less than Rs.25,000 and may extend to Rs. 5 lakhs
	Officer in default- Maximum imprisonment of 2 years or Fine- Not less than Rs. 25,000 and may extend to Rs. 1 lakh or with both.
Related party transactions	In case of unlisted Company, be punishable with fine which shall not be less than 25,000 rupees but which may extend to 5 lakh rupees
Punishment for personation of shareholder	Such person in default- Minimum 1 year to Maximum 3 years imprisonment or Fine- Not less than Rs. 1 lakh and may extend to Rs. 5 lakhs.
Refusal of registration and appeal against refusal	Such person in default- Minimum 1 year to Maximum 3 years imprisonment or Fine- Not less than Rs. 1 lakh and may extend to Rs. 5 lakhs.
Rectification of register of members	Company-Fine- Not less than Rs.1 lakh and may extend to Rs.5 lakhs
	Officer in default- Maximum imprisonment of 1 years or Fine- Not less than Rs. 1 lakh and may extend to Rs. 3 lakhs or with both.

Chapter-IV- Registration of Charges	Company-Fine- Not less than Rs.1 lakh and may extend to Rs.10 lakhs
	Officer in default- Maximum imprisonment of six months or Fine- Not less than Rs. 25,000 and may extend to Rs. 1 lakh or with both.
Copy of financial statement to be filed with Registrar	Company-Fine- Not less than Rs.1000 for every day in default but not more than 10 lakhs
	Officer in default- Maximum imprisonment of 6 months or Fine- Not less than Rs. 1 lakh and may extend to Rs. 5 lakhs or with both.
Prohibitions and restrictions regarding political contributions.	Company-Fine- 5 times of the amount of contribution in contravention
	Officer in default- Maximum imprisonment of 6 months and Fine- 5 times of the amount of contribution in contravention
Disclosure of interest by director	Such person in default- Minimum 1 year imprisonment or Fine- Not less than Rs. 50,000 and may extend to Rs. 1 lakh or both.
Investments of Company to be held in its own name	Company-Fine- Not less than Rs.25,000 and may extend to Rs.25 lakhs
	Officer in default- Maximum imprisonment of 6 months or Fine- Not less than Rs. 25,000 and may extend to Rs. 1 lakh or with both
Punishment for fraud	Any person who is found to be guilty of fraud- Maximum imprisonment of 6 months may extend to 10 years
	Such person also liable to fine which may extent to 3 times the amount involved.

CONCLUSION

In the case of corporate criminal liability, the approach has changed over the years from there being no concept of a liability for criminal acts for corporations to liability based on the identification of some persons as the alter ego of the company.

Today, corporate criminal liability is a subject of concern for a wide range of groups campaigning on issues including human rights, environment, development and labour. Corporate crimes committed on all continents across a range of industrial activities in various sectors (e.g. chemicals, forestry, oil, mining, genetic engineering, nuclear, military, fishing, etc.) clearly point towards the need for greater control, monitoring and accountability of corporate activity in a globalised economy. Corporate criminal liability is complementary to individual liability. The present liability regime that makes both corporate and individual prosecutions available to regulatory authorities has undeniable advantages over one that does not. Where crime arises from intra-organisational defects, the dismissal or discipline of a few individuals is clearly an inadequate response. Further, where individual liability is difficult to determine, prosecution of the corporation is an attractive alternative. There are many other situations where the prosecution of the corporation may be the only way to allocate responsibility for white-collar crime. Where both a corporation and its officers can be prosecuted, the prosecution of one over the other, or both, is a matter that is largely left to the discretion of the prosecuting authority. The prosecution's choice should be aimed at achieving the effective regulation of corporate activities, as well as the general objectives of sentencing.

The criminal law jurisprudence relating to imposition of criminal liability on corporations is settled on the point that the corporations can commit crimes and hence be made criminally liable. However, the statutes in India are not in pace with these developments and the above analysis shows that they do not make corporations criminally liable and even if they do so, the statutes and judicial interpretations impose no other punishments except for fines. Apart from fines, punishments such as winding up of the company, temporary closure of the corporation, heavy compensation to the victims, by stepping on the weakness of the corporation i.e., its goodwill, etc. Such means of punishment would have a deterrent effect on the corporate and the sole aim of punishment under criminal jurisprudence would be achieved.

****

RIGHT TO HEALTH- CONSTITUTIONAL PERSPECTIVE OF INDIA AND SOUTH AFRICA

Dr. M.P Chengappa*

ABSTRACT

Mental and physical health constitutes the very basis of human personality. Diseases and mishaps have had their grip over humans ever since they came into existence. The disablement, disfigurement and loss of life caused due to illness have alarmed the human race. The multiple sources causing such agony are both external and internal ranging from natures' wrath to lack of proper hygiene. If the human race is to survive and progress, preservation of good health is a must

INTRODUCTION

Mental and physical health constitutes the very basis of human personality. Diseases and mishaps have had their grip over humans ever since they came into existence. The disablement, disfigurement and loss of life caused due to illness have alarmed the human race. The multiple sources causing such agony are both external and internal ranging from natures' wrath to lack of proper hygiene. If the human race is to survive and progress, preservation of good health is a must.

Though personal hygiene can to a large extent ward off ordinary ailments caused due to lack of hygiene, there are many factors, over which an individual can have no control, which cause health problems.

In such cases, the state agencies are better equipped to prevent the causes and deal with the ailments in a more regulatory, effective and authoritative manner. The legal responsibility of the state agencies to take care of the individual's health and ensure his physical and mental well-being will therefore be a measure of the individual's right to health in a welfare state. Every sovereign state has plenary power to do all things which promote the health, peace, morals, education and good order of the people and tend to increase the wealth and prosperity of the State. Maintenance and improvement of public health have to rank high as these are indispensable to the very physical existence of the community, and on the betterment of these depends the building of the society which the Constitution makers have envisaged.

* Assistant Professor, WB National University of Juridical Sciences, Kolkata; available at mpchengappanls@gmail.com & at +91 8902104976

With the change in the world scenario, nation states have created constitutional courts to look after the violation of certain socio-economic rights. As the name suggests, socio-economic rights are related to both the social and economic rights of the common people as well as the State, and therefore, right to health qualifies within this domain. Although the decision as to whether a country's Constitution should make provisions for social and economic rights is a political one, the task of interpreting and enforcing such rights is undoubtedly judicial in nature.[1]

The right to health is fundamental to the physical and mental well-being of all individuals and is a necessary condition for the exercise of other human rights[2] including the pursuit of an adequate standard of living. The right to health care services is provided in three sections of the South African Constitution. These provide for access to health care services including reproductive health and emergency services; basic health care for children, and medical services for detained persons and prisoners.[3] Universal access is provided for in section 27(1) (a) which states that "Everyone has the right to have access to health care services, including reproductive health care..." Section 27(1) (b) provides for the State to "take reasonable legislative and other measures, within its available resources to achieve the progressive realization of the right." According to the Limburg Principles, progressive realization does not imply that the State can defer indefinitely, efforts for the full realization of the right. On the contrary, state parties are to "move as expeditiously as possible towards the full realization of the right" and are required to take immediate steps to provide minimum core entitlements.[4] Section 27(3) states that no one can be denied emergency medical treatment. Section 28(1) (c) provides for "basic health care services" for children, while Section 35(2) (e) provides for "adequate medical treatment" for detainees and prisoners at the State's expense.

SOUTH AFRICA'S CONSTITUTIONAL RIGHT TO HEALTH CARE

Van Biljon and others v. Minister of Correctional Services and others[5] are a case related to prisoners' right to health. Though the issue was not directly related to access to health care service, it was related to "the provision of getting medical treatment at the expense of state" under Section 35(2)(e) of the Constitution of South Africa[6].

1 Goldstone, Richard J, 'A South African Perspective on Social and Economic Rights', Human Rights Brief, Vol. 13, No. 2, 2006, pp. 4 - 7

2 General Comment No.14 (2000) The Right to the Highest Attainable Standard of Health, (Article 12 of the International Covenant of Economic, Social and Cultural Rights). UN Committee on Economic, Social and Cultural Rights, 2000, para 1.

3 Sections 27 (1) (a), (b) &(c); Section 28 (1) (c) and Section 35 (2) (e) of the Constitution of the Republic of South Africa, Act 108 of 1996.

4 Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, Para 21.

5 1997 (4) SA 441 (C), 1997 (6) BCLR 789 (C).

6 Constitution of South Africa Act 108 of 1996.

In this case, Van Biljon, a prisoner, and other inmates of prison were diagnosed and found to be HIV positive. They sought a declaration from the Cape High Court affirming , the right to adequate medical treatment of the applicants and other HIV positive prisoners, who had reached the symptomatic stage of the disease and whose CD4 counts were less than 500/ml. It was also contended that they were entitled to medicine and to receive apposite anti-viral treatment at the State expense.

The respondents argued that prisoners were entitled to equal treatment at the provincial state hospitals as received by other persons. And that what could be provided to HIV positive prisoners was therefore determined by the policy of the provincial hospitals in that regard. The policy was that the use of the AZT antiretroviral at those hospitals was limited. Prescription of those drugs at state expense was: (i) Limited to only AZT monotherapy; (ii) The HIV patients who are considered for AZT treatment are essentially those with a CD4 count of less than 200/ml and whose condition had developed to full-blown AIDS; and (iii) In order to qualify for AZT at state expense, the patient in question had to have a CD4 count of more than 50/ml.[7]

Thus, the two major issues involved in this case are: (i) whether the applicants who fell within the category of the HIV positive patients above stated were entitled to have anti-viral therapy prescribed for them on medical grounds? And (ii) whether the applicants were entitled to have therapy prescribed for them at state expense?[8]

On the first issues, drawing from findings of American Court, J. Brand held that it was not within the capacity of the courts to direct doctors as to when and on what grounds should they draw up prescriptions. On the second issue, the Court agreed with the applicants that prisoners were entitled to medical treatment at the expense of the State as enshrined under Section 35(2) (e) of the Constitution. Section also provides to the effect that inmates in conditions of detention are entitled to live with human dignity including the provision of medical treatment at the expense of the state. But the courts need to decide on the issue that whether prisoners were entitled to the expense of medical care which is not available to persons outside prison. So in this regard, the Court held that "standard of medical care of prisoners could not be determined according to the standard afforded to persons outside prison... as the state kept prisoners in conditions where they were more vulnerable to opportunistic infections than HIV positive patients outside". Therefore, adequate medical treatment needs to be provided to them so that they can get better immune system than the on that the state provided to HIV patients outside. Thus, when the fact can be established that, 'anything less than a particular form of medical treatment would not be adequate', the prisoner would get the constitutional right to get medical treatment. But such right will be subjected to financial conditions or budgetary constraints. What is 'adequate medical treatment' cannot be determined without necessary information. Thus

7 Ibid.
8 Ibid.

the word 'adequate' in this regard is what is permissible by the state's financial capacity[9].

So in this case important points based on which the Court decided the issue are: first, the Court rejected the very argument that adequate medical treatment can be equated with treatment that is available to a common person. And second, that authority cannot establish the fact that they are unable to provide the required treatment[10].

The first case that the South African Constitutional Court heard on social and economic rights was the worst possible beginning. In Soobramoney v. Minister of Health, an Indian South African living in the city of Durban had an ischemic heart, a failed liver, and a life expectation of approximately 18 months.[11] Soobramoney's condition required that he receive treatment at least once a week. He went to a public government hospital for dialysis, but was denied treatment because the hospital only had provisions for 78 patients in any given week. Therefore, the hospital gave priority to patients who were in line to receive transplants, who needed only short-term treatment, and who would make a full recovery. In other words, giving Soobramoney dialysis treatment would have prevented another patient from receiving the long-term benefits of treatment. When hospital authorities reluctantly explained to him that the treatment was not available, Soobramoney brought an urgent application to the High Court at Durban, which ordered the government to provide him with the dialysis treatment. The government urgently appealed, and the Constitutional Court heard the appeal.

The Constitutional Court held that it could not order the dialysis treatment. First, the Court rejected Soobramoney's argument that this was emergency treatment, which is an absolute right under the South African Constitution and not, like other forms of health care, something to which the government must only provide reasonable access.[12] The Court said emergency treatment is the sort of treatment that an individual receives in trauma and emergency wards following a serious accident. Soobramoney's situation, as grave as it was, did not require such a level of care. Second, the Court unanimously held that it could not order the hospital to purchase more dialysis machines. The budget had been carefully drafted in the state hospitals, and more machines would have meant less money for medicines, which would have altered the hospital's budgetary determinations. In the judges' conference room, it was noted that ordering more dialysis machines would open the door to situations where individuals could demand non-emergency treatments that would cost hospitals significant amount of money.

9 Ibid.

10 Jonathan Berger, 'Litigating for Social Justice in Post-Apartheid South Africa: Focus on Health and Education', in Varun Gauri and Daniel M. Brinks (eds), *Counting Social Justice: Judicial Enforcement of Social and Economic Rights in The Developing World, (Cambrige University Press, 2010), at p.54*

11 *Soobramoney v. Minister of Health* [KwaZulu-Natal], 1997 (12) BCLR 1696 (CC) (S. Afr.).

12 Constitution of the Republic of South Africa, Sec.s 27(1) & 27(3).

The Court held that it could not interfere and tell the government how to stock its medical supplies. Rather, the Court said that it could only interfere in situations where there was an unconstitutional violation of equality; for example, if the priority list prepared by the doctors gave preference to individuals of a particular race. Unfortunately, national television stations took their cameras to Soobramoney's home the day the opinion came down rejecting the claim for dialysis treatment. He was sitting with his wife and three children, and they asked him how he felt about the decision of denying him the dialysis treatment. Before he could even begin to answer, however, he had a stroke and died within an hour. The Court was criticized by much of the media for effectively sentencing Soobramoney to death.

Perhaps the most dramatic case in the Constitutional Court's history thus far has been *Minister of Health v. Treatment Action Campaign.*[13] This particular case involved the supply of a drug called Nevirapine to pregnant women. The drug has been very successful in stopping the transmission of the HIV virus from HIV-positive mothers to their newborn children. It is inexpensive and easily dispensed; the mother has to have one small dose during labour and the child a very small dose at birth. But the South African government has an ambivalent and in some ways irrational approach to HIV/AIDS. Some senior ministers, and even President Thabo Mbeki at one stage, denied that the HIV virus is the cause of AIDS. As such, only two test stations in two medical facilities were set up within the country, effectively denying Nevirapine to 90 percent of South Africa's pregnant women.

The government argued that the use of Nevirapine would require mothers to understand that they could not breast-feed to prevent the transfer of the HIV virus to their children. The government contended that there was no use in taking a drug and possibly building up resistance to it if a mother was then going to breast-feed her child. The Court responded, however, that individuals could be trained to educate expectant mothers about these risks. Finally, the government objected on the grounds that women who did not breast-feed would need clean water for formula, which was not available in some areas. The Court held that this was not a sufficient ground to deny the drug, but rather a reason to supply clean water. If no clean water was available, the mother would not be advised to take the drug.

As a result, the government was ordered to supply the drug to every hospital in South Africa. In its decision, the Court relied not only on the right to medical treatment but also equality: Nevirapine could not be supplied to some mothers and not others. The government, to its great credit in this and other cases where the Court had ruled against it, had quickly implemented the orders of the Constitutional Court.

Since 1994 there have been several court cases which have served to add to the normative content of the right to health care. These have thrown light on the

13 *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) (S.Afr.).

concepts of "available resources" and "reasonable measures" in terms of Section 27 (1) (b) of the Constitution. In the *Soobramoney case*[14] the Constitutional Court opined that the scarcity of resources available to the State was a constraint to the enjoyment of the right by the appellants, given the socio-historical context of South Africa. In the *Grootboom case*,[15] the Constitutional Court defined the parameters of what constitutes "reasonable measures". In addition to these, it concluded that measures that do not include meeting the needs of the most vulnerable groups in society, were unreasonable. Furthermore, it was stated that implementation plans that failed to be "reasonable" would not meet the State's obligations in term of Section 7(2) of the Constitution.

LEGISLATIVE MEASURES IN SOUTH AFRICA

Certain sections of the National Health Laboratory Services Act, Act 37 of 2000 came into operation in 2001. The Act provides for the establishment of a juristic person to be known as the National Health Laboratory Service. The Act has introduced a significant change to the way laboratory services are provided in the public sector. It creates a new service, as an autonomous body, bringing together the staff and assets of the South African Institute for Medical Research (SAIMR), the National Institute for Virology, the National Centre for Occupational Health, the forensic chemistry laboratories owned by the State (with the exception of those operated by the police and military) and all provincial health laboratories. A national laboratory service regulates and standardizes services.[16]

Since March 2000 two draft bills were tabled before Parliament for discussion providing a broad framework of the government's strategy on health- The National Health Act (2003) and the Mental Health Act (2002).

The National Health Act (2003)

The National Health Act is national framework legislation for the delivery of health care by creating closer cooperation between the three spheres of government. It is designed to improve access to health care facilities, improve quality of care by building capacity of health professionals. In the preamble, it is stated that the proposed law is pursuant to Section 27(1) of the Constitution, which provides for everyone to have access to health care services, including reproductive rights. The objective of the national framework legislation is to establish a national health system which encompasses public, private and non-governmental providers of health services; provides the population of the Republic with the best possible health services that available resources can afford and to set out the rights and duties of both health care providers and users.

14 *Supra* note .6

15 *Government of the Republic of South Africa and Others v. Grootboom and Others* 2000 (11) BCLR 1169 (CC).

16 *South African Year Book 2001/02.* Pretoria, Government Communication and Information System, 2001, p. 329.

Section 7 of the Act provides that the Minister or the relevant Member of Executive Council responsible for health may prescribe that a private or public health establishment shall not deny any person seeking emergency medical treatment if such an establishment is open and able to provide such services. "Emergency treatment" is defined in the Act as "treatment which is needed to treat a life-threatening but reversible deterioration in person's health status and it continues to be emergency treatment until the condition of the person has stabilized or has been reversed to a particular extent."

The Mental Health Care Act 2002

The main purpose of the Act is to regulate, integrate, co-ordinate access to mental health care, treatment and rehabilitation services on a non-discriminatory basis. It also proposes to integrate mental health into Primary Health Care. Other areas of focus are the development of community, district and regional mental health services; de-institutionalization from psychiatric hospitals through the development of community support services (group homes; day programmes; rehabilitation groups and home based care).

The Act entitles mental health care users to legal representation and to be informed of his/her rights. It further provides, that a prisoner, who after an investigation by prison authorities, is considered mentally unfit may be transferred to a mental health institution on recommendation of a health practitioner. He or she may be released after the expiry of the term of imprisonment.

INDIAN CONSTITUTIONAL PERSPECTIVE

Right to health is not included directly as a fundamental right in the Indian Constitution. The preamble to the Constitution of India, inter alia, seeks to secure for all its citizens justice-social and economic. The Constitution makers imposed the duty on the state to ensure social and economic justice specifically through Part IV of the Indian Constitution which enshrines Directive Principles of State Policy. If we see those provisions, then we find that some provisions are either directly or indirectly related with public health.

Articles 42 and 47 are the most significant provisions to be discussed here.

Article 42

Provision for just and humane conditions of work and maternity relief- The State shall make provision for securing just and humane conditions of work and for maternity relief.

Article 47

Duty of the State to raise the level of nutrition and the standard of living and to improve public health- The State shall regard the raising the level of nutrition and the standard of living of its people and the improvement of public health as among

its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption, except for medicinal purposes, of intoxicating drinks and of drugs which are injurious to health.[17]

The above articles act as guidelines that the State must pursue towards achieving certain standards of living for its citizens. Thus it also show clearly the understanding that nutrition, conditions of work and maternity benefit are integral to health.

Although the Directive Principles of State Policy quoted above are a compelling argument for the right to health, this alone is not a guarantee. There must be a clearly defined right to health so that individuals can have this right enforced and violations can be redressed.

The Indian judiciary has interpreted the right to health in many ways. Most significantly, through public interest litigations as well as litigations arising out of claims that individuals have made against the State with respect to health services. As a result, there are substantial case laws in India, which show the gamut of issues that are related to health.

The fundamental right to life, as stated in Article 21 of the Indian Constitution, guarantees to the individual her/his life and personal liberty. Such right to life is only permitted to be taken away if it is done so in accordance with a procedure established by law. The Supreme Court has widely interpreted this fundamental right and has included in Article 21, the right to live with dignity and "all the necessities of life such as adequate nutrition, clothing…." It has also held that act which affects the dignity of an individual will also violate her/his right to life.[18]

In India, the theory of the inter-relatedness between rights was famously articulated in the *Maneka Gandhi*[19] decision. This became the basis for the subsequent expansion of the understanding of the 'protection of life and liberty' under Article 21 of the Constitution of India. The Supreme Court of India further went on to adopt an approach of harmonization between fundamental rights and directive principles in several cases.

With regard to health, a prominent decision was delivered in *Parmanand Katara v. Union of India.*[20] In this case, the Court was confronted with a situation where hospitals were refusing to admit accident victims and were directing them to specific hospitals designated to admit 'medico-legal cases'. The Court ruled that while the medical authorities were free to draw up administrative rules to tackle cases based on practical considerations, no medical authority could refuse immediate medical attention to a patient in need.

17 Part IV, Constitution of India was adopted on 26 November 1949.
18 Francis Coralie Mullin v. The Administrator, Union Territory of Delhi 1981 (1) SCC 608.
19 AIR 1978 SC 597.
20 AIR 1989 SC 2039.

The Court relied on various medical sources to conclude that such a refusal amounted to a violation of universally accepted notions of medical ethics. It observed that such measures violated the 'protection of life and liberty' guaranteed under Article 21 and hence created a right to emergency medical treatment. [21]

Another significant decision which strengthened the recognition of the 'right to health' is *Indian Medical Association v. V.P. Shantha.*[22] In this case, it was ruled that the provision of a medical service (whether diagnosis or treatment) in return for monetary consideration amounted to a 'service' for the purpose of the Consumer Protection Act, 1986. The consequence of the same was that medical practitioners could be held liable under the Act for deficiency in service in addition to negligence. This ruling has gone a long way towards protecting the interests of patients. However, medical services offered free of cost were considered to be beyond the purview of the said Act.

With regard to the access and availability of medical facilities, the leading decision of the Supreme Court is *Paschim Banga Khet Mazdoor Samiti v. State of West Bengal.*[23] The facts that led to the case were that a train accident victim was turned away from a number of government-run hospitals in Calcutta, on the ground that they did not have adequate facilities to treat him. The said accident victim was ultimately treated in a private hospital but the delay in treatment had aggravated his injuries. The Court realized that such situations routinely occurred all over the country on account of inadequate primary health facilities.

The Court issued notices to all State governments and directed them to undertake measures to ensure the provision of minimal primary health facilities. When confronted with the argument that the same was not possible on account of financial constraints and limited personnel, the Court declared that lack of resources could not be cited as an excuse for non-performance of a constitutionally mandated obligation. The Court set up an expert committee to investigate the matter and endorsed the final report of the said committee.

This report contained a seven-point agenda addressing several issues such as the upgrading of facilities all over the country and the establishment of a centralized communications system amongst hospitals to ensure the adequacy and prompt availability of ambulance equipment and personnel. Some commentators have argued that by recognizing a governmental obligation to provide medical facilities, the Court has created a justifiable 'right to health'.

In India the concept of Right to health is dynamic in nature. It is not restricted to the pragmatic concept of right to health and emergency medical treatment only

21 Arun Thiruvengadam, 'The global dialogue among Courts: Social rights jurisprudence of the Supreme Court of India from a comparative perspective' in C. Raj Kumar & K. Chockalingam (eds.), *Human Rights, Justice and Constitutional Empowerment* (New Delhi: Oxford University Press, 2007) p. 283.

22 AIR 1996 SC 550.

23 AIR 1996 SC 2426.

but has a broader meaning. In fact, right to health also includes other related rights like in *CECS* v. *Subhash Chandra Bose and other*[24], the minority judges were of the view that the term health includes "...more than an absence of sickness. Medical care and health facilities not only protect against sickness but also ensure stable manpower for economic development." [25] In V*incent Panikurlangara v. Union of India*[26] it had been said that the healthy body is the foundation of all human activities. Again in *Consumer Education and Research Centre v. Union of India*,[27] it was enumerated by the Court that it is the obligation of the state not only to provide emergency medical services but also to ensure the creation of conditions necessary for good health, including provisions for basic curative and preventive health services and the assurance of healthy living and working conditions. The facts of the case were relating to the work-related health hazards faced by workers in the asbestos industry. The Court in its judgment emphasized on the fact that right to life under Article 21 includes right to health and medical care, and therefore, they are essential for the life of worker to become meaningful and purposeful with dignity of person. The Court went on to hold that the state here includes an industry, both Private and Public,[28] and it has a duty to promote health, strength, and vigour of a worker during the course of his employment and to provide him adequate facility of leisure after the course of employment. Health of the worker helps him to enjoy the fruits of his labour. Providing medical facilities to worker will protect his right to health making his life meaningful and purposeful. In order to complement this decision, the Court has laid down some guidelines, which are mandatory for all the industries[29] and private persons to follow. Along with the guidelines the Court also added that the Central and the state Governments, shall review the position after every 10 years. The Court also directed the authorities in this regard to consider the inclusion of other small scale industries who are engaged in the production of asbestos and its subsidiary products to protect those workmen working in these industries from health hazards.[30]

Municipal Council Ratlam v. Vardhichand[31] is a case which basically dealt with the issue regarding the failure of duty of the state and municipality to provide a pollution free environment which is a part of public health. The applicant, who was a resident of Ratlam, filed a complaint that the municipality had failed to prevent the discharge of malodorous fluids from the nearby Alcohol plant into the drains and to provide sanitary facilities on the roads. The Supreme Court directed the municipality to follow the statutory duties as provided in Article 47 of the Constitution and to stop the effluents from the alcohol plants to be discharged into the drain, and to provide sanitary facilities on the roads. It further stressed,

24 1992 AIR 573, 1991 SCR Supl. (2) 267.
25 Ibid.
26 AIR 1987 SC 990.
27 (1995) 3 SCC 42.
28 Constitution of India,. Art. 12.
29 That time there were 74 asbestos industries.
30 (1995) 3 SCC 42.
31 1980 AIR 1622, 1981 SCR (1) 97.

that Article 47, makes it the paramount duty of the state or municipality to take steps to promote pollution free environment and to improve the public health. The Court observed that: "where directive Principles have found statutory expression in do's and don'ts, the court will not sit idle to let the municipality to become statutory mockery".

CONCLUSION

To conclude it can be said that Right to health is one of the indispensable human rights and should not be compromised with on any ground. Although right to health is one of the socio-economic rights, it cannot be subjected to secondary importance. For the enjoyment of the first generation rights[32], ensuring right to health is imperative. As it is rightly observed by the Supreme Court in Vincent Panikurlangara case, 'healthy body is the very foundation of all human activity'[33]. Therefore, this right should not be restricted in any situation.

In this paper, I have discussed the situation of two different countries, India and South Africa, and the attitude of the judiciary towards the protection of right to health of their citizens. Whereas in South Africa Constitutional right to health is an enforceable right, in India it is expressively unenforceable. But judiciary while enforcing this right in South Africa has been somewhat reluctant and has imposed reasonable restriction on the same regarding the availability of the resources, but in India, the judiciary has adopted a totally different approach as has been evident in many leading cases. The judicial verdicts in India advocate the principle that "The law will relentlessly be enforced and plea of poor finance will not be alibi when people in the misery cry for justice". This shows that the protection of right to health in India is much stronger than in South Africa. Apart from this, a recent development in the right to health jurisprudence in India is the draft National Health Policy, 2015 prepared by the Union Ministry of Health and Family Welfare. This draft has suggested making health a fundamental right, similar to education, and the key proposal suggests making denial of health an offence.[34] So to sum up, it can be said that right to health should not stay in the pages of socio-economic right and given secondary importance but should be given fundamental practical significance as tried in the Indian Context.

****

32 Karel Vasak, "Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights", UNESCO Courier 30:11, Paris: United Nations Educational, Scientific, and Cultural Organization, November 1977.

33 Vincent Panikurlangara v. Union of India AIR 1987 SC 990.

34 The Hindu, 'Centre moots health as a fundamental right, 2015', available at *<http://www.thehindu.com/news/national/centre-moots-health-as-a-fundamental-right/article6742882.ece> Last visited, 2 April 2015.*

COMPULSORY REGISTRATION OF MARRIAGES IN INDIA: A CRITICAL ANALYSIS IN THE CONTEXT OF PERSONAL LAWS

Ms. Ambily P*

ABSTRACT

The different claims related to matrimonial rights and remedies are dependent upon the fundamental question of validity of marriage. The courts employ different means to ascertain the validity of marriages such as factum of marriage, presumption of marriages and so on. This preliminary enquiry on the claim of matrimonial rights and remedies is a tedious task for the parties as well as the courts. The purpose for which the case is filed may be a matter of dire necessity and the courts are bound to ascertain these matters by employing different laws relating to the personal law of the parties. In India, the uniform civil code on these aspects is not a matter that can be attained in near future. Thus the need of compulsory registration of marriages is looked into as a means by which many issues may be resolved by this simpler procedure at the time of solemnization of marriages. This can also serve as an effective way by which instances of fraud upon marriages and the related exploitation of women may be addressed. The research mainly looks into the different issues which can be resolved by the implementation of the rules relating to compulsory registration of marriages.

INTRODUCTION

Concept of Marriage

Marriage is an eternal relationship between male and female[1]. Marriage was never an unknown concept in India[2]. Marriage has been mentioned in many of the scriptures too. From the very commencement of the Rig Vedic age, marriage was a well- established institution, and the Aryans ideal of marriage was very high.[3] In Hinduism it is believed that marriage is a necessary samaskar, and that every Hindu must marry if he wants to achieve moksha. The Christians consider it as a sacrament that one must take during his lifetime. Among the Muslim community marriage has also been considered to be a contract; however such

* Assistant Professor, School of Law, Christ University; available at ambily.p@christuniversity.in & at 080-401219587

1 Westermarck, Edward. The History Of The Human Marriage. London: MacMillan & Co., 1903, Page 22.

2 Muir, Original Sanskrit Texts, Vol. 2, P. 327.

3 *Smt Seema v. Ashwani Kumar,* A.I.R. 2006 S.C. 1158.

Muslim marriages are solemnized with the recitation of verses from the Koran, clearly showing that there is still a touch of purity to the so called civil contract. Parsi marriages are also regarded to be a contract however the religious ceremony called *ashirvad* is essential for its validity and the Parsi marriage is solemnized by the priest. Thus marriage is a significant institution amongst all religions in India.

With advancement of ages, various anomalies started creeping into the pure institution of marriage and the whole idea and reasoning behind the existence of marriage started to fall apart. People started using the loophole in the law to get away with various duties in a marriage and exploiting the very institution of marriage, children born out of the wedlock had no were to go to and over the time were pushed towards child labour and evils like trafficking. Women were exploited, looked down upon, child marriage started to become a common practice and so on. It is therefore a major concern that the law makers must address in order to strike uniformity in removing such anomalies.

Significance of Registration of Marriages

India is a country with a varied population with different beliefs, customs and practices. This is inbuilt within the fundamental freedoms guaranteed by the constitution. Thus law allows different individuals to be governed by their personal laws. According to the existing legal framework of different personal laws in India, registration of marriages is not made mandatory. There are various benefits that are not expressly mentioned under any statutes as such but are known according to practice. Fraud upon marriage is one area where exploitation of parties entering into the institution of marriage usually takes place. Where there had to be clarity of law, the law makers have failed to provide it. There are many benefits of registration of marriages if there can be a legal requirement.

1. Ease in legal proceedings in cases of succession of property.

2. After dissolution of the first marriage, a person is able to enter the matrimonial alliance for the second time through legal measures.

3. Transfer of property or the custody of kids in case of legal separation, the court requires a certificate of marriage to be produced in the family court.

4. The fact that a Registration of Marriage Certificate serves as a legal evidence of the marriage having taken place, is of undeniable relevance for the couple. The Certificate acts as check on some unscrupulous people who deny the existence of marriage taking advantage of there being no official record of the marriage.

5. Marriage registration is benefits women the most. It has high evidentiary value in the matters of custody of children, rights of children born from the wedlock, and the age of the parties to the marriage or many other legal scenarios. In cases of unforeseen events, the husband cannot deny being married to avoid his duty to alimony or maintenance.

6. It acts as a check to illegal bigamy/ polygamy and restricts men from deserting women after marriage.

7. It enables widows to claim their inheritance rights and other privileges which they are entitled to after the death of their husband.

In view of the importance of marriage registration to women, the Supreme Court has directed all states and union territories to enact laws to make registration of marriages compulsory irrespective of religion.[4] Marriage registration procedure is laid down by the respective State Governments and there is no uniform central law applicable to registration of all marriages in India. It has been pointed out that compulsory registration of marriages would be a step in the right direction for the prevention of child marriages and exploitation of women. In the Constitution of India, 1950, List III of the Seventh Schedule provides in Entries 5 and 30 as follows:

Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.[5]

States have framed rules regarding registration of marriages however they have not made it compulsory in several States. If the record keeping of marriage is made compulsory, to a large extent, the dispute concerning solemnization of marriages between two persons can be avoided. Marriage records provide documentation for the establishment of the civil status of individuals for such purposes as receipt of alimony allowances, claims for tax benefits, provision and allocation of housing or other benefits related to the marital status of a couple, and changing nationality on the basis of marriage. In addition, records of marriage and divorce are important for establishing the right of an individual to remarry and to be released from financial and other obligations incurred by the other party.

According to the Report on the National Consultation on Prevention of Child Marriage the mean age for marriage of girls in the country has improved from

4 *Supra* no.293
5 The Constitution of India, 1950.

19.3 years in 1990 to 21.0 years in 2010, as per the National Family Health Survey 2005-06, 47.3% of all young women aged 20-24 were married by age 18, while 16% of men of age 20-49 were married by age 18, and 28% by age 20. The incidence of child marriage in rural areas is alarming as it stands at 52% when compared to urban average of 28%. These numbers are shown to be particularly high in states such as West Bengal, Bihar, UP, MP, Rajasthan, Chhattisgarh and Jharkhand. At all India level, in 2004, the mean age at effective marriage for those females who married under 18 years of age is 16.3 yrs.[6] This happens to be a really low figure which shows the degree to which child marriage is prevalent in India. As per Census 2001, the share of Widowed/Divorced/Separated female population in the all India female population constitutes 7.38%.A total of 3,09,546 cases of crime against women (both under various sections of IPC and SLL)were reported in the country during the year 2013[7] as compared to2,44,270 in the year 2012, thus showing an increase of 26.7% during the year 2013 .As the statistics show, one of the major problems that India faces today is child marriage and the only way to put a curb on such crimes is to make registration of marriages compulsory throughout India. It must be noted that registration per se would not wipe out any crimes as such but holds a high potential to prevent such crimes from happening.

The law regulating registration of marriages is not uniform and is neither executed well. The increasing crime rates and the increasing violation of the institution of marriage is a proof of how inefficient the law on the given subject matter. The administrative machinery for registration of marriages is not regulated by one and the same law. In different parts of the country it is regulated by either of the three central laws – the Births, Deaths and Marriages Registration Act, 1886, the Registration Act, 1908 and Registration of Births and Deaths Act, 1969 – or by a State law, or a combination of both hence creating a lot of confusion with registration among the officials as well as people. In order to explore the drawback of the existing system, the different personal laws are critically analyzed to emphasize upon the need for a uniform law.

Hindu Marriage Act, 1955

As part of Hindu Code Bill, the Hindu Marriage Act was enacted by the Parliament in 1955 to amend and to codify marriage laws between Hindus and to regulate the institution of marriage.

6 Ministry of women and child Development of India, A Handbook of Statistical Indicators on Indian Women 2007, Page 21

7 Ministry of Home Affairs, Crimes in India 2013 Compendium, National Crime Records Bureau, Page 79.

The Act applies to all forms of Hinduism and recognizes the branches of the Hindu religion. It must be noted that these include Jains and Buddhists. The Act however does not apply to any Muslims, Jews, Christians, or Parsis.

There is no provision for compulsory registration of marriages under the Hindu Marriage Act, 1955 but few states have amended the making registration of marriage compulsory. Section 8(5) exclusively states that the validity of any marriage is not affected by failure to register the marriage. By virtue of Section 8(1) and Section 8(2) of Hindu Marriage Act, 1955 the State government is given the responsibility to make any provisions for compulsory registration of marriage if the State Government deems fit to do so. Here lies a major loophole in the law because the law becomes very subjective. The idea that the State Government may or may not make registration of marriage compulsory is the conflicting point at hand. Section 8 of the Hindu Marriage Act allows the State government to make rules for the registration of Hindu marriages particular to that state, particularly with respect to recording the particulars of marriage as may be prescribed. The main idea behind registration of marriage is that the Hindu Marriage Register should be open for inspection at all reasonable times therefore allowing anyone to obtain proof of marriage and hence be admissible as evidence in a court of law.[8] Here comes the problem because when the very idea of registration of marriage is to remove any anomalies in the institution of marriages, record keeping becomes important. Now such record keeping becomes subject to the State Government's nod hence complicating the whole procedure. This complication is very clearly seen as only a few states have made registration of marriages compulsory; Bombay, Karnataka, Andhra Pradesh and Himachal Pradesh being those states which have made registration of marriages compulsory.

Section 8(5) lays down that registration of marriage does not affect the validity of any marriage and the marriage stays valid. Non-registered marriages only attract a fine which happens to be a meager amount of Rs 25. A wrongdoer may find more utility in not getting the marriage registered and may exploit the law in his favour, doing much of harm to the institution of marriage and the society as a whole.

Section 8(5) creates another problem and creates a disparity between what the law says and what it does. The sections lays down that registration of marriage does not affect the validity of any marriage and the marriage stays valid. Non-registered marriages only attract a fine which happens to be a meagre amount. A wrongdoer may find more utility in not getting the marriage registered and may exploit the law in his favour, doing much of harm to the institution of marriage and the society as a whole. The reasoning behind the Act in not making registration of

8 Section 8(4), Hindu Marriage Act, 1955.

marriage compulsory is that marriages in India take place with a lot of publicity and public.[9]

The Madras High Court was of the view that because of non-registration of marriage, women, who give themselves physically, emotionally and otherwise, gains nothing but stands to lose everything when the marriage is denied by the man. The other compelling factor to make registration compulsory is the trauma that a child may face going through his formative years with his paternity in doubt. This has a negative effect on a child's sensibilities and this can be easily avoided if there is a certificate of registration of marriage between his mother and father which though may not validate the marriage if otherwise void but will at the least bear some testimony to the identity of his biological parents.[10]

The court had taken a similar view in *Vikram Aditya Singh v. Union Of India* ;[11] it was said that to overcome the various problems that Hindu brides faced when the husbands denied the marriage, then court in its landmark decision changed the scenario in 2006. The Supreme Court directed the State and Central Government to take concrete steps towards this direction of making registration of marriages compulsory irrespective of the religion and all of this was supposed to be done within a period of three months.[12] It was clearly noted that the judiciary had realized that how registration and it not being compulsory had affected the Hindu women in an adverse way and therefore expressed concern that in a large number of cases, some unscrupulous persons are denying their marriages by taking advantage of the fact that there is no official record of their marriage since most states in India didn't provide for registration of marriages. The court also commented in the same case that, there must be a central law to protect the rights of women and children, to protect the inheritance rights and other benefits which women where entitled to after the death of their husband, deter the men from deserting their wife after marriage, deter parents/guardians from selling away their child to any person under the garb of marriage; and registration stands as a check over the same. Presumption of marriage can be the only resort available women who have been deserted by their husbands. Now where there is prolonged and continual cohabitation between a man and a woman particularly where the alleged marriage took place a long time ago about which it may be impossible to produce any testimony then presumption of marriage arises. However good the idea behind the concept may be, it is subject to the conduct of the parties. If the conduct of the parties is not similar to that of marriage then such a presumption does not hold true, therefore there still remains a possibility that exploitation in

9 Diwan, Paras, Shailendra Jain, and PeeyushiDiwan. Law Of Marriage & Divorce. Delhi: Universal Law Pub. Co., 2008. Print, Page 560.

10 Kanagavalli v.Saroja, A.I.R. 2002 Mad 73.

11 AIR 2007 Delhi 101.

12 *Supra* no.293

marriage prevails. However Section 16 of the Hindu Marriage Act, 1955 comes to the rescue of children born out of relationships which may expressly not come under the ambit of marriage per se.

Presumption of marriage can be the only resort available women who have been deserted by their husbands. Now where there is prolonged and continual cohabitation between a man and a woman particularly where the alleged marriage took place a long time ago about which it may be impossible to produce any testimony then presumption of marriage arises. However good the idea behind the concept may be, it is subject to the conduct of the parties. If the conduct of the parties is not similar to that of marriage then such a presumption does not hold true, therefore there still remains a possibility that exploitation happen. However Section 16 of the Hindu Marriage Act, 1955 comes to the rescue of children born out of relationships which may expressly not come under the ambit of marriage per se.

One of the major drawback that exist in The Hindu Marriage Act was that it does not apply to the Scheduled Tribes which meant that tribal marriages remained outside the scope of Section 8 of the Act and any Rules framed there under by the State Governments with respect to registration of marriages. The Supreme Court has affirmed a Delhi High Court judgment that in the absence of a notification in terms of sub- section (2) of Section 2 of the Hindu Marriage Act 1955, no case for prosecution of a husband - a tribal (Santhal) - for bigamy under Section 494 of the Indian Penal Code was made out by the appellant-wife, also a tribal (Oraon), because ``the second marriage solemnised by him cannot be termed void either under the 1955 Act or any alleged custom having the force of law.[13] Keeping tribal marriages outside the scope of Section 8 was a major error and loophole. Given that the tribal population is not well educated due to various reasons, the major chances of major anomalies arising in the institution of marriage would be in such communities. Where the law could have made a body which would have regulated such marriages, the law completely swiped out the idea of tribal marriages even being there in the picture. It is submitted that such a law is erroneous and needs rectification.

Secondly,Section 8 is subject to Section 7 of the mentioned Act. The principle is well settled that the ceremony is essential for a valid marriage prevailing in the community, must be performed and if there was no valid marriage in that event there could not be any valid registration under the provisions of Section 8 of the Hindu Marriage Act. A marriage not duly solemnised by performing the essential ceremonies is no marriage at all.[14] The Supreme Court has also taken

13 T. PadmanabhaRao,Tribal can't be prosecuted for bigamy under IPC: SC,(Friday, February 16, 2001), *http://www.thehindu.com/2001/02/16/stories/0216000g.ht.*

14 Mousumi Chakraborty v.SubrataGuha Roy, 95 C.W.N. 380.

a similar view while stating that though, the registration itself cannot be a proof of valid marriage per se, and would not be the determinative factor regarding validity of a marriage, still it has great evidentiary value in the matters of custody of children, right of children born from the wedlock of the two persons whose marriage is registered.[15] It is therefore submitted that the process of registration of marriage must be laid down clearly and a central laws for the same must exist, not infringing any sentiments of personal laws and or in violation of any customs as such. Personal laws and the people being governed by such laws must be open to something like registration of marriage because it is a step forward towards dealing with the evils of our society.

Thirdly, it must also be noted that the abovementioned act does not given adequate amount of powers to the panchayats to deal such registration of marriages and not do most of the State law satisfy the same. It is submitted that the Centre and the State must look into giving more powers to the panchayats to register marriages because it is proved that the rural population is not very educated and hence they whole process of registration may become complicated for them; however if the panchayat can register marriages and can propagate the importance of registration of marriage and the panchayat be made accountable for such registration maintained by them as prescribed; then it becomes convenient for the rural population to understand the importance of the same and the whole process becomes easy and not cumbersome given that most people do not even know what a valid marriage is and how to solemnize one.

Fourthly, the priests in the temples should also be given some amount of power to register marriages. Such power shall be checked upon by the State Government to whom the priest may submit such register of marriage in which he must maintain a record of the marriage that are registered. Such submission maybe made from time to time as prescribed by the State Government.

Fifthly, all Hindu Marriages which have been registered must be published in the Official Gazette of the State Government.

Sixthly, registration of Hindu marriages should be made compulsory and all revenue officers upto the level of patwari, all local self-government bodies such as corporations, town area committees, magistrates of any rank may it be executive or judicial should be authorized to keep a register marriage and should be given the power to register marriages too.

Muslim Law

15 *Supra* no.293

A marriage under Muslim laws is contractual by nature and includes all the elements of a contract such as proposal, acceptance, consideration etc. It is only logical to have a proof for a contract, and given that a Muslim marriage is contractual in nature, there must be a written proof for the same.

Muslim law as such does not require registration of a marriage as an essential for a valid marriage. On the other hand, Muslim Law never prohibits registration either. A Muslim marriage can be proved by direct evidence; be established by presumption of marriage; by acknowledgement of the man for the paternity of the child; or an acknowledgement that the woman is his wife of the man. Muslims in an area may device a process by which proof of marriage becomes easy and this process is called Jamath. Once it is established that the Muslims in the area had developed it as a custom to have marriages registered then it is assumes the character of customary right and not contractual right.[16]

The whole system of certification of marriage in Muslim law is a system of private registration. Certification is done by a Kazi and this practise has been prevalent among the Indian Muslims. The whole process of Nikha begins with formally obtaining consent of the parties and ends with the recitation from the Holy Quran followed prayers. After the ceremony the Kazi prepares a Nikha-Nama which mentions all the details of the parties and is signed by two witnesses. The Kazi authenticates the Nikha- Nama by putting his signatature on it. The Kazi maintains a record of such Nikha-Nama and issues a copy of the same to both the parties. It must be noted that under Indian laws, a Nikha-Nama is an admissible evidence.

Presumption of marriage plays an important role in safeguarding the Muslim women governed under the Muslims laws. It was held by the Supreme Court in *Mohamad Amin v. Vakil Ahmed*[17] that presumption of marriage arose from the Mohomeddan Law in the absence of any direct proof from the continual cohabitation and this would be sufficient to assume marriage between a man and a wife. If a couple is living together for a very long time as a husband and a wife there would be a presumption in favour of a wedlock; however this presumption is rebuttable but a heavy burden of proof lies upon the party proving the contrary.

There exists a central law called the Kazis Act, 1880 which empowers the State Government to appoint Kazis for the purpose of helping local Muslims solemnize marriages By virtue of Section 4 of this act it is laid down that State appointed Kazis will not be mandatory for any marriage. . The central Kazis act does not apply to private Kazis and contains no provisions relating to Kazis

16 M. Jainoon v. M. Ammanullah Khan &ors., (2000) 2 M.L.J. 714.
17 A.I.R. 1952 SC 358.

and preparation of records of marriages. In the State of Maharashtra the very Act was amended in 1980 and private kazisalso came into the purview of the abovementioned legislation. Various other states namely, West Bengal, Bihar, Jharkhand, Assam, Orissa, Meghalaya have legislations on voluntary registration of marriages. The parent law among these States and their legislature is the old Bengal Mohammendan Marriage and Divorce Registration Act, 1876. By virtue of these legislations the local Government is empowered to appoint authorized persons to various areas for the purposes of registration of marriages. Theses persons are called Mohammedan Marriage Registrar. It is to be noted that non-registration of such marriages would not invalidate the marriage and the status of the marriage remains as it is.

In some States where such Acts are in force the Rules made thereunder have been made applicable also to the Kazis functioning under the central Kazis Act 1880 (detailed above). These Rules are, however, not being followed in practice for fear of resentment by the clerics who do have a strong hold upon the society.[18] Under the Kazi's Act, 1880 it must be noted that the Kazi maintains the Nikha-Nama and issues a copy to both the parties. This become cumbersome while dealing with issues related to marriage in the court of law. The State Government must also have proof of such marriages and the Kazi's maintenance of such records must be State-Government regulated or at the least it must be that the Kazi is answerable to the State-Government. The Kazi's Act, 1880 and various other acts namely,Assam Moslem Marriage and Divorce Registration Act, Orissa Mohammedan Marriage and Divorce Registration Act 1949 which have been derived from the parent act i.e. Bengal Mohammedan Marriage and Divorce Registration Act 1876 must be implemented in a better way and all other State must also have similar regulatory authorities for the same purpose.

None of the above mentioned steps shall be in deterrence to the Muslim law as such. As seen in the after effects of the *Seema v. Ashwani Kumar* [19] case, the Muslim Personal Law Board expressed its discomfort with the ruling in the given case and said that it felt that the Muslim community already had clear cut procedures for registration of marriages. Therefor it is submitted that the Government both at the centre and the state must recognize the practise prevailing among the Muslims and must evolve a system for automatic registration of marriages performedby the officiating cleric, with the government authority. There will have to be a subtle way in which the Muslim personal law is not effected by homogenizing the process of registration of marriage.

18 LAW COMMISSION OF INDIA, Laws on Registration of Marriage and Divorce – A Proposal for Consolidation and Reform, Report 211, (2008).

19 Seema, 2006.

The Indian Christian Marriage Act, 1872

The registration of marriage is compulsory under the Indian Christian Marriage Act, 1872. Under the said Act, entries are made in the marriage register of the concerned Church soon after the marriage ceremony along with the signatures of bride and bridegroom, the officiating priest and the witnesses.[20] The interpretation clause of the very act states the various Churches which are covered under the Act. It is clear from the text that the Act differentiates between the various Churches and makes separate provisions for the followers of various Churches. Various churches recognized under the act are, the Church of England, Church of Scotland, Church of Rome. The act provides separate rules for the solemnization of marriages and it registration of the people who are governed by the act.

The above mentioned act because of such distinction becomes complicated in its application part and the registration of marriages under the mentioned act specifically becomes complicated. Marriages may be solemnized by various people, namely, Minister of Church who received episcopal ordination; Clergymen of the Church of Scotland, Ministers of Religion licensed under the Act; Marriage Registrar appointed under the Act; Persons licensed under the Act to grant certificate of marriage between "Indian Christians".

Ss. 27- 37 contains provisions for registration of marriages solemnized by Ministers and Clergymen. In this very Part IV of the Act, there are separate provisions for General Christians and Native Christians. Every marriage solemnized by the Minister of Religion will be registered in a register of marriages kept by the Clergyman of the Church of England in accordance with the form laid down in the Third Schedule. Part V deals with rules for solemnization and registration of marriages directly by Marriage Registrar appointed under the Act. Part VI deals with marriages of Indian Christians and this part also provide rules for certification of the abovementioned marriages. It is noted that the Act is overly complicated because of the distinctions and recognitions it makes and it is submitted that the act is lacks uniformity in terms of subject matter and application of the provisions. The take away from the act however is that registration of marriage is compulsory under the act and registration of marriage is done just after the ceremonies in the marriage are completed.

Drawback of the entire of system of registration under the act is that however is that a copy of the records maintained in the church must be submitted to the State-Government. Another problems in the act is that there must be total uniformity in the act with respect to registration of marriages which is rather lacking under the act. There are too many complications in the act which for given reasons arise

20 Id.

because of the distinction among Christians made under the act.

CONCLUSION

Marriage comes under the Concurrent list of the Constitution of India and it hence becomes a common concern of both the State and the Central Government to look into the institution of marriage. Both the Central Government and the State Government have powers to make laws with respect to subject matters mentioned the concurrent list. It is therefore submitted that in the Centre must make a uniform law for registration of marriage and must make it compulsory. Keeping in mind the various personal laws and not infringing into the practices of such personal laws, the centre as well as the state must come up with legislations to prevent all the anomalies which have crept into the institution of marriage. The Muslim Personal Law Board had expressed its criticism to the Supreme Court judgement which made registration of marriage compulsory in India. In the light of such issues, it is submitted that the law made by either the State or the Central Government must not in any way hurt the sentiments of the personal laws and the followers of the same. In the given context what the Government could do is that the Nikha-Nama which is held by the Kazi must be brought under regulation of the State-Government and a copy of the Nikha-Nama must be submitted to the government too, and a copy of the register of marriages must be submitted to the State-Government too.

India is a secular country, having diverse cultures & religions and respects the views of all communities based on religion, language and geographical locations. The Constitution of India[21] imposes an obligation on the State to secure for its citizens a uniform civil code. The Supreme Court, in more than one judgement has observed the need for adopting a uniform civil code so that the discriminatory provisions both for inter-religious and intra-religious groups could be eliminated. [22]It is therefore submitted that it is the need of the hour to achieve the abovementioned goal and a good point for a start would be registration of marriages. A uniform law for the purposes of registration removes the entire problem in the society which Indian is facing. Evils like child marriage, property disputes, polygamy and bigamy, child trauma and so on can be curbed upon by a single procedure of law. Personal laws must be open to such laws. No religion would like to see such evils propagate and therefore it is a need which must be addressed; the most effective answer to it being a uniform law for the purpose of marriage. Special Marriages Act, 1954 in no way is a solution to the given problems. Imposing of a law which benefits everyone without hurting the ideologies of personal laws shall suffice.

21 Article 44.
22 M. P. Dubey, Role of Supreme Court in Indian Constitution (1987), Page 31.

Convention to Eliminate All Forms of Discrimination against Women is the very first International Law Instrument focusing entirely on elimination of all forms of discrimination against women. It was adopted by the United Nations on 18 December 1979 and came into force on 3rd of September, 1981. In 1993, India ratified the Convention.This stands as another reason as to why the Government both at the Centre and the State must not give declaratory statements in the U.N. alone, but it must act on ground of removing the problems from the root level itself. The Government may have tried to make registration of marriages compulsory ever since it was guided by the Supreme Court to do so after the Seema case, however it is submitted that better steps needs to be taken for the same. There is no doubt upon the fact that this attempt of the Government for registration of marriages has uplifted the position of women and has worked towards their well being but there is more which needs to be done.

There are no Central legislations on compulsory registration of marriages, few States are enforcing compulsory registration through State laws or executive orders. India has different personal laws dealing with both civil and matrimonial rights and as such does not have a uniform law regarding registration of marriages. However, some of the personal laws do provide for registration of marriage. The Special Marriage Act, 1956 provides for compulsory registration of marriages where irrespective of religion, marriages have to be registered. The Indian Christian Marriage Act, 1936 requires registration of marriage that is done in the Church. The Parsees Marriage and Divorce Act, 1936 also provides for registration of marriage. As far as Mohammedans are concerned the marriage is a contract and is usually reduced into a 'Nikha-nama'. The Hindu Marriage Act, 1955 also provides for registration of marriage but the same is not compulsory.

The law commission report, on the subject matter of marriage and registration of marriages deals with in depth analysis of all the personal laws with respect to marriages, moreover the report makes recommendations to the existing laws in question. The report clearly points out the fact that very few States all marriages irrespective of the law under which these may have been solemnized have to be compulsorilyregistered.[23] The majority of States have not enacted any generallaw on marriage registration applicable to all communities. The report also mentions that the existing laws on registration are ineffective and people do not adhere to it due to its ineffectiveness.

In Goa, the family laws provide for compulsory registration of marriage. It has a provision of penalising the Civil Registrar if any marriage is registered in contravention of the provisions of the civil code, thus making the concerned

23 Law Commission of India, Laws on Registration of Marriage and Divorce – A Proposal for Consolidation and Reform, Report 211, (2008).

officers more responsible. In addition, some of the State Governments have enacted laws for registration of marriages, such as, Andhra Pradesh, Maharashtra, Karnataka and Himachal Pradesh. Uttar Pradesh, in its Population Policy, 2002 has adopted the policy of compulsory registration of marriages and has involved the Panchayats to enforce the same. The Parliamentary Committee on Empowerment of Women in its 5th Report submitted to the Parliament on 3rd December 2001 recommended that the Government make registration of marriages compulsory in order to prevent bigamy. The Government has also accepted this recommendation to amend the Hindu Marriage Act and makemarriage registration compulsory. The Government in its National Policy onEmpowerment of Women, 2001 commits to making the registration of marriagescompulsory with a view to eliminating child marriages by 2010. The NationalCommission for Women is in the process of drafting an Act on compulsory registrationof marriages.

Despite low literacy levels, Muslim and Christian marriages do get registered. Christian marriages are registered in Church and Muslim marriages by the Kazi who also records the terms of the marriage in a nikhanama. The Hindu marriages however, only require the performance of a ceremony recognized by law, or customary practice and the officiating priest maintains no register of the same. No document containing signature or thumb impression of the parties is obtained to secure their consent to the marriage. Hence the Hindu women are most adversely affected by the lack of registration of marriages.

It is necessary for the State to plan and initiate measures to eliminate discrimination. It is recommended that the government make a plan to decentralize and simplify the registration of marriages to make it available in a phased and gradual manner at all levels and for all contexts.[24] The manner of registration and its simplification should be designed to cope up with corresponding context, rather than adopting the present position which assumes low literacy, and multiplicity of religions is inherently incompatible with registration. There must be time frame within which the Government plans achieve compulsory registration, particularly for Hindus and also promote literacy and awareness around the need for registration at all levels in the urban as well as rural areas. Further, the National Commission on Women, the statutory body assigned with the task of examining and making recommendations on women's rights, has strongly recommended registration of marriages in its annual reports.

*****

24 Anne Hellum& Henriette Sinding Aasen, *Women's Human Rights* (Cambridge Univ. Press 2013), Page 234.

REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016 SCRUTINIZING IT AS BUYER'S FRIENDLY OR A DOUBLE EDGED SWORD WALK FOR PROMOTERS?

Mr. Hitendra V.Hiremath*

ABSTRACT

In this article the provisions under the Real Estate (Regulation and Development) Act, 2016 are analyzed as passed by Rajya Sabha on 10th of March, 2016, which received assent of the President of India on 25th of March, 2016 and published on 26th of March, 2016. This Act is regarded as buyers friendly, protecting them from the problems arising while purchasing of properties like homes/flats/apartments from builders, however few problems that causes delay in completion of projects which are beyond the control of builders could have been taken into consideration while drafting the bill, however the real worry is that this 'Act' should not become like other 'Acts', which limit themselves from creating authority. Authority must have to work for the betterment of Real Estate sector. 100 % Foreign Direct Investment is permitted in Real Estate sector, thus this Act should not cause any adverse effect on flow of Foreign Direct Investment. The Purpose of this article is to analyze the provisions of Real Estate (Regulation and Development) Act, 2016 and to find the real problems/ambiguities, and to provide effective suggestions.

INTRODUCTION

Market evidenced increase in the share price of real estate companies[1] when Real Estate (Regulation and Development) Bill, 2016[2] passed[3] in the Rajya Sabha, which received the assent of the President of India on 25th of March, 2016 and published in gazette on 26th March, 2016[4] the Act as mentions shall leads to

* In–House Counsel, Shriram Properties Private Limited, Bengaluru, Karnataka, India; LL.M. Corporate Law at National Law University, Jodhpur, Rajasthan, India and can be reached <*hitendrahiremath@gmail.com*>

1 Business Standard, Realty Shares gain as Rajya Sabha passes Real Estate Bill, March 11, 2016, Available at *http://www.business-standard.com/article/markets/realty-shares-gain-as-rajya-sabha-passes-real-estate-bill-116031100152_1.html,* last visited on 11th March, 2016 at 11:55pm

2 Hereinafter 'Act'

3 Rajya Sabha passed the long awaited bill on 10th of March, 2016

4 The Real Estate (Regulation and Development) Act, 2016 as published in the gazette, Available at *http://egazette.nic.in/WriteReadData/2016/168720.pdf,* last visited on 07th April, 2016 at 11:10am

the creation of a regulator specifically to the real estate sector in order to protect the allottees[5] by having a dedicated and single regulatory to look after all the problems. The main aim of the Act is:

"to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Authority and for matters connected there with or incidental thereto" [6].

The Act intends to ensure accountability and transparency amongst the Promoters[7] , it's to be duly noted that the vast benefit is given to allottees, thus making it buyers friendly and has over looked the problems faced by the Promoters in this sector.

Rajya Sabha passed the bill after making amendments on the recommendations of the standing committee[8], it is regarded that said Act shall regulate the sector and also shall bring the clarity amongst promoters and allottees[9].

This Act will govern all the promoters to adhere to the provisions, failing which penalty shall be levied upon them. The major concern of the purchasers is that they have been harassed and put into great difficulty by the promoters, by neither giving timely possessions nor adequate compensation for delay in project approvals or structural defects. It is to be noted that it is essential that Real Estate sector needed a regulator and this will enable the sector to have an authority to address the concerns of promoters/developers/builders and allottees/buyers.

However there are certain concerns/ambiguities that still exist which pertain to corruption in the system delaying the approvals[10], this may hamper the flow of Foreign Direct Investments, genuine delay caused due to false filing of cases, not getting timely approvals, problems faced by contractors and suppliers due to non-

5 Sec. 2(d) mentions allottees as the persons to whom a plot, apartment or building is sold, transferred by the Promoter.

6 Aim of the Act as mentioned.

7 Sec. 2(zk) of Act states and includes persons who construct the independent building, apartments, develops land into project or converts the existing building to apartment for the purpose to sell. Persons like authority, State Co-operative societies, developer, contractor, builder, and estate developer, colonisers who are involved in this development and construction and selling of apartments.

8 Earlier the Real Estate (Regulation and Development Bill), 2013 was introduced in Rajya Sabha by Ministry of Housing and Urban Poverty Alleviation on August 14th, 2013, further Standing Committee on Urban Development submitted its report on 13th February, 2013.

9 Real Estate Regulator Bill : 10 things you should know about, March 10, 2016, Available at *http://economictimes.indiatimes.com/wealth/real-estate/real-estate-regulator-bill-10-things-you-should-know-about-it/articleshow/51344872.cms, last visited on 14th March, 2016 at 11:25am*

10 *Infra* No. 38

availability of materials and other concerning matters must also be addressed.

OVERVIEW OF REAL ESTATE (REGULATION & DEVELOPMENT) ACT, 2016]

Analyzing the Provisions of the Act, it binds the promoters and agents to conform with it and it shall be mandatory for every Real Estate project[11] and Real Estate agent[12] now to be registered with the Real Estate Regulatory Authority and without registering promoter not to book, sell or invite any persons to purchase the project. Application to be filed[13] with the necessary approvals from the local authorities, along with the development plan, proforma of all agreements that are signed by the company, details pertaining to real estate agents, contractors, structural engineers, architects and other concerned people relating to project, number and total carpet area of each apartments that are for sale in the project and declaration signed with affidavit stating that its free from all encumbrances, no other person/s has/have any interest or title in the property and 70% of amount realized by the allottees is now to be deposited with a scheduled bank[14].

However registration is not required in the following circumstances -[15]

(a) Proposed land for development is 500 sq.mts or 08 apartments out of the said extent of land[16].

(b) Completion certificate has secured prior to commencement of this act.

(c) For renovation, repair or re-development or marketing of the real estate project.

(d) If the real estate project is to be developed in different phases, then each phase under the real estate project must be approved differently on standalone phases.

So the necessary approvals from the concerned local authorities must be obtained

11 Section 3 of Act, 2016 makes it's mandatory for every builders/developers to register their project with Real Estate Regulatory Authority, however the Act also lays certain exemptions as when the registration is not necessary.

12 Section 9 of the Act makes its mandatory now to register the real agents to register with the Real Estate Regulatory Authority, Real estate agents now have to register separately for different projects, and authority can revoke the registration if registration is secured by any fraud or misrepresentation.

13 Section 4 of Act.

14 Section 4(2) (i) (D) of Act.

15 Section 3 (2) of Act.

16 However this threshold can be reduced by the appropriate Government as mentioned in Sec. 3(2) (a) of Act.

prior to filing an application before the Real Estate Authority for project approval.

Site and layout plans as approved by the competent authority and display must be made at the site or such other space as mentioned by the authority and stage wise time schedule of completion of project including the provisions pertaining to sanitary, water and electricity must be provided[17]

Promoter now on his own[18] have to secure the completion certificate and must be made available to all allottees individually or to the association of allottees and have to provide all the services as specified in the terms of agreement and maintenance must be made until the association of owners overtake it, even association of owners and co-operative society must be formed for the benefit of allottees,

True and correct information should be made in prospectus and advertisements, if in case of false information due to which any damage is caused to the allottee then he must be given entire amount with the interest as specified[19].

Promoter can accept not more than 10 % of the total cost of apartment, flat as application fee or booking amount without first entering into an agreement of sale[20], so this provision now addresses allegations leveled against the builders/ developers for overcharging the allottees/buyers/purchasers.

The details relating to development of project, construction of buildings and apartments, specifications relating to external developmental works, dates and manner on which the apartment shall be delivered to the allottees and likely date as when the possession shall be given, are to be mentioned in the said Agreement of Sale.[21]

Proposed project must be developed/built according to the plans and structural designs, in case of any structural defect, if such defects are bought to the notice of the promoter within five years from the date of handing over of the possession, the same must be rectified within thirty days or else compensation must be provided to allottees[22].

17 Section 11 (3) of Act.

18 Sec.11(4) of Act.

19 Section 12 of Act states Where any person makes an advance or a deposit on the basis of the information contained in the notice advertisement or prospectus, or on the basis of any model apartment, plot or building, as the case may be, and sustains any loss or damage by reason of any incorrect, false statement included therein, he shall be compensated by the promoter in the manner as provided under this Act:

20 Section 13 (1) of Act states that A promoter shall not accept a sum more than ten per cent. of the cost of the apartment, plot, or building, as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.

21 Section 13(2) of Act, lays down the necessary terms which must be included in the Agreement.

22 Section 14(3) of Act, states In case any structural defect in such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over

In case of transfer of the real estate project to a third party, developer has to take written consent of two third allottees[23], developer have to take all related insurances for land, buildings and for construction and pay premium prior to transferring the documents to the association of owners[24].

In case of failure to give possession of apartment on time or due to discontinuance of business or in case of suspension or revocation of registration, if demanded by the allottees to return the amount received with interest and necessary compensation, and in case of delay to hand over possession the developer shall be liable to pay interest for every month of delay[25].

Allottee is entitled to all necessary documents after handing over of the possession[26] , Allottee has to make the necessary payments as mentioned in the time schedule and also have to pay the proportionate share in registration charges, municipal, water and electricity charges, maintenance charges, ground rent and other charges as mentioned in the agreement[27] and delay in payment if any shall amounts to pay the interest[28]

Real estate regulatory authority shall be established within one year from the date after this act comes into force[29] and it must have a chairperson and a minimum of two whole time persons as members[30], authorities have to promote the real estate sector[31]

Further Central Government can establish a Central Advisory Committee comprising representatives of various ministries for advising Central Government on various matters[32].

Real Estate Appellate Tribunals will be established for settling the disputes, decisions of the authority can be challenged before the tribunal within 60 days[33]; any appeal from the tribunal shall lie before High Court and to be filed within

possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under this Act.

23 Section of 15 of Act, now makes it mandatory that developer has to take a written consent from two third of allottees

24 Sec.16 of Act.

25 Sec.18 of Act

26 Sec.19 (5) of Act

27 Sec.19(6) of Act

28 Sec. 19(7) of Act

29 Sec. 20 of Act dealing with Establishment and Incorporation of Real Estate Regulatory Authority

30 Sec.21 of Act

31 Sec.32 of Act mentions Functions of Authority for promotion of real estate sector

32 Sec.41 and 42 of Act dealing with establishment and functions of Central Advisory Committee

33 Section 43 and 44 of Act; Establishing Real Estate Appellate Tribunal and filing application for settlement of disputes and appeal to the Appellate Tribunal

60 days of communication of decision[34]. Consumer case pending before the consumer tribunal can be withdrawn and can be filed before the adjudicating officer, however the matters must be relating to damage caused due to false advertisement, not adhering to the approved plans and project specifications, failure to give possession on specified date[35]. However the Ministry gave an opinion to Standing Committee on Urban Development stating that this provision will not take away the jurisdiction of the Consumer Courts[36].

So after looking into the provisions it can be inferred that[37], provisions bar the promoters not to sell the flats without registering, penalties are imposed if in case the promoter fail to comply with the provisions, real estate regulatory authority has been established to look after the projects, real estate appellate tribunal to look after the disputes.

AMBIGUITIES AND SUGGESTIONS

As argued earlier, there are certain ambiguities in the Act, and those are:

1. Delay in Completion of Projects

   (a) Approvals: Local authorities that are supposed to approve the projects and grant the occupancy/completion certificates may delay in granting, and such delays may be due to technical defects or errors committed by the Promoters.

   (b) Environmental Issues: instances wherein projects are stopped after initiating the works due to environmental issues, time delay that are caused again due to false filing of the cases and getting injunctions through tribunals as in National Green Tribunals shall again have effect on completion of projects which is again not in the hands of developer.

34 Section 58 of Act; Appeal to High Court

35 Section 71of Act states that *For the purpose of adjudging compensation under sections 12, 14, 18 and section 19, the Authority shall appoint in consultation with the appropriate Government one or more judicial officer as deemed necessary, who is or has been a District Judge to be an adjudicating officer for holding an inquiry in the prescribed manner, after giving any person concerned a reasonable opportunity of being heard: Provided that any person whose complaint in respect of matters covered under section 12, 14, 18 and section 19 is pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, established under section 9 of the Consumer Protection Act, 1986, on or before the commencement of this Act he may, with the permission of such Forum or Commission, as the case may be, withdraw the complaint pending before it and file an application before the adjudicating officer under this Act.*

36 Clause 8.13, Standing Committee on Urban Development, Real Estate (Regulation and Development) Bill, 2013 presented to Lok Sabha on 17/02/2014 and laid in Rajya Sabha on 13.02.2014, Available at http://www.prsindia.org/uploads/media/Real%20Estate/SCR-Real%20Estate%20Bill.pdf, last visited on 16th March, 2016 at 10:45am

37 This inference is drawn after looking into the Act, the main objectives which the Act want to achieve are pointed under the Real Estate (Regulation and Development) Act, 2016

(c) Contractors: Project comprises of contractors and few times there are instances where labour shortages are caused which delays the completion of work.

(d) Suppliers: Failure in delivering the construction materials on specified time and date shall again delay the work; even supplier may not be in appropriate position to supply due to delay in manufacture. The problem caused due to contractors and suppliers is like a chain reaction which causes an effect to the promoter, which is an ultimate effect causing the delay.

(e) False Cases: Even after due care and diligence before the commencement of project, suits are filed and injunctions are granted halting the Project to a standstill, which will lead to delay in completion of project. This can be curtailed by imposing heavy penalty on the Applicant, for filing false cases.

(f) Corruption in getting approvals is the major problem that is faced by the developers in India[38], According to report of World Economic Forum on real estate and infrastructure ventures, Real estate firms in India pay 50 percent on average basis as bribes to speed up clearances for the real estate and infrastructure ventures[39].

(g) Lowering flow of Foreign Direct Investment due to corruption, the report as given by World Economic Forum on Indian Real Estate sector and Infrastructure ventures states, *"High levels of corruption impede foreign direct investment and market entry for global enterprises that assess the risks of damaged reputation and potential consequences under legislation such as the U.S. Foreign Corrupt Practices Act (FCPA) or the U.K. Bribery Act. Even if strong internal compliance programmes are in place, risks remain along the supply chain via subcontractors and intermediaries[40]"*. Act would have dealt with this problem and a mechanism must be made in order to abolish the bribe and transparency must be bought in getting approvals, which will increase the flow of Foreign Direct Investments as Investors expect to get high profit in less time and without any legal complications.

So the acts does not address all these concerns and makes liable only the Promoters as liable in completion of project, these genuine ambiguities as such could have

38 Vikas Dhoot, Firms pay 50% cost as bribes, The Hindu, March 22, 2016, Available at http://www.thehindu.com/business/Industry/firms-pay-50-of-cost-as-bribes/article8386124.ece, last visited on 23rd March, 2016 at 10:21am

39 *Ibid*.,

40 *Ibid*.,

been considered, it can be regarded that the Act is like a incomplete sentence with commas, and not a complete sentence with a full stop.

2. Depositing 70% of the amount realised from the allotees to cover the cost of construction is on higher node further an exemption must be given by giving a right to route money generated from earnings made from other projects[41]. The provision is as such confusing and question arises whether investments raised through Foreign Direct Investment, Loans borrowed for the project has to be utilized separately.

3. Occupancy Certificate are granted by the concerned local authorities, if in case due to any legal glitches delay is caused in getting the Occupancy Certificate then at certain minimal exemption should be given to the Promoter as it may delay in handing over of the possession.

4. The types of disputes that will be tried by the Real Estate Appellate Tribunal is not clear as earlier Consumer Courts used to try the matters relating to allottees and nowhere now the Act bars the jurisdiction of Consumer Courts and even the ministry has given the clarification to the Standing Committee that establishing the Real Estate Tribunals shall not take away the jurisdiction of Consumer Courts[42] . The important reason of establishing a tribunal under the Act is to overlook the matters of dispute in the sector between the promoters and allottees, the very purpose shall be defeated of establishing the tribunals. Even the confusion pertaining to type of cases that shall be handled has to be cleared.

5. The functioning of start-ups and relaxation, if any in the real estate sector could be dealt.

6. In coming days the Real Estate sector shall evidence the investments through Real Estate Investment Trust, Act not deals anything in relation to it[43].

All these above mentioned acts shall automatically halt or affect the delay in completion of the projects, which will have impact on delivery of possession so during all these instances the allottees duty and liability is yet to be answered. Further few times, even after due care and diligence over the property after the project starts/begins cases are filed and injunction are bought halting the project, again this has to be also answered as here the promoters are not under any

41 Section. 4(2) (i) (D) of Act, states *that seventy per cent., or such lesser per cent. as notified by the appropriate Government, of the amounts realised for the real estate project from the allottees, from time to time, shall be deposited in a separate account to be maintained in a scheduled bank within a period of fifteen days of its realisation to cover the cost of construction and shall be used only for that purpose. Explanation.— For the purpose of this clause, the term "scheduled bank" means a bank included in the Second Schedule to the Reserve Bank of India Act, 1934;*

42 *Supra* No. 36

43 SEBI notified regulations relating to Real Estate Investment Trust on 26th September, 2014, Available at *http://www.sebi.gov.in/cms/sebi_data/attachdocs/1411722678653.pdf,* Last Visited on 15th March, 2016 at 12:11pm

presumption of any future cases that will arise.

Hope once the Act gets notified and such problems arise the tribunals and Courts have to deal with these questions, however this would have been avoided if bill is drafted keeping all these problems in mind. Balance of rights while addressing the grievances should have to be maintained between promoters and allottees.

CONCLUSION

Act as discussed earlier have considered the vide aspects and problems of the purchasers/buyers. Act being the buyers friendly was very much essential for the Real Estate sector as this sector lacked a supervising authority to overlook the matters/problems of sector, now tribunals will be established to look after the matters of the sector, however, appropriate Governments have to establish the authority in their states within one year after the act comes into force[44]. Real Estate Appellate Tribunal will be established in the States by the appropriate Governments of State to settle the disputes relating to real estate sector, this shall reduce the burden on other tribunals where still cases are pending, however it is interesting to note that the jurisdiction of consumer courts are not barred to try the matters[45], when a distinct and separate tribunals are established then the Act could have mandated to file and transfer the relevant cases to the tribunal and as well the adjudicating authority[46], further even there is a bar on civil court jurisdiction to entertain any suit or proceeding with respect to any matter which can be tried by tribunal or adjudicating authority but ambiguity persists as what type of suits or cases can be tried by tribunal, Central Advisory Committee after established will provide advice to the Central Government on policy and others matters. Over all looking into the Act, it could have been even more balancing by addressing concerns relating to delay in completion of projects due to ongoing cases even after taking necessary approvals and clarity regarding the functioning and utilization of amounts made through Foreign Direct Investments and Real Estate Investment Trust. A sole authority could have been established to deal all matters of Real Estate concerning grant of various approvals and other matters under one head.

*****

44 Section.20 of Real Estate (Development and Regulation) Act makes its mandatory to all appropriate Governments to establish the Real Estate Regulatory Authority within one year after the acts come into effect, however two or more states can have one regulatory authority. Even States can establish more than one regulatory authority.

45 Supra No. 351

46 Section 79 states that No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

THE IMPACT OF FOREIGN DIRECT INVESTMENT ECONOMY WITH SPECIAL REFERENCE TO AGRICULTURE

Mr. Pradip Kumar Kashyap* & Ms. Pooja**

ABSTRACT

Now it is established facts that capital and investment are the essential pillars of economic development of every country. Saving capital and investment along with human resources is the essential hub of development. But the short supplies of domestic capital limit the growth of developing country. Low GDP keeps the savings and investment rates low which in turn, limit growth. Poor technological base of production is another factor impinging upon growth of the developing countries. Foreign direct investment mitigates these constraints to growth of the developing countries. FDI has an important contribution in the growth of a developing country. FDI and foreign technology also brings with modern managerial practices. Keeping in view the pivotal role played by FDI inflows the government of India opened the Indian economics for foreign players in 1991 when the economic reforms process was initiated. The last 15 years have seen a marked increase in foreign capital inflows into India both in foreign direct investment and portfolio form. This paper covers various aspect of FDI in context of agriculture. The study is based on Secondary sources, which includes books, journals, reports, news papers, internet websites, government publications and records.

INTRODUCTION

India is the second fastest growing economy in the world. It is third largest economy in the world in terms of GDP and fourth largest economy in terms of Purchasing Power Parity. India presents a huge opportunity to the world at age, to use as a hub. Standing on the threshold of a retail revolution and witnessing a fast changing retail landscape, India is all set to experience the phenomenon of global village. India is the "promised land" for global brands and Indian retailers A "Vibrant economy". India tops in the list of emerging market for global retailer and India's retail sector is expanding and modernizing rapidly in line with India's economic growth.[1]

* Assistant Professor, Modern College of law, Ghaziabad – 201007; Available at +91 8802437640 and *at pradiprgnul@gmail.com.*

** Head of Department, Modern College of Law, Ghaziabad – 201007; available *at poojabhadauria@gmail.com*

1 Ms. Vidushi Handa and Mr. Navneet Grover, "Retail Sector in India: Issues & Challenges",

Foreign Direct Investment (FDI) is fund flow between the countries in the form of inflow or outflow by which one can able to gain some benefit from their investment whereas another can exploit the opportunity to enhance the productivity and find out better position through performance. The effectiveness and efficiency depends upon the investors perception, if investment with the purpose of long term then it is contributes positively towards economy on the other hand if it is for short term for the purpose of making profit then it may be less significant. Depending on the industry sector and type of business, a foreign direct investment may be an attractive and viable option. Any decision on investing is thus a combination of an assessment of internal resources, competitiveness, and market analysis and market expectations.[2]

The growth of FDI gives opportunities to Indian industry for technological up gradation, gaining access to global managerial skills and practices, optimizing utilization of human and natural resources and competing internationally with higher efficiency.[3]

MEANING OF FDI

Foreign direct investment (FDI) is an investment involving in a long term relationship and reflecting a lasting interest and control of a resident entity in one economics in an enterprise resident in an economics other than that of the foregoing direct investor.[4]

Foreign direct investment involves the ownership and control of a foreign company in a foreign country. In exchange for this ownership the investing country usually transfer some of its financial, technical, managerial, trademark and other resources to the recipient country. The government of India in March 2003 revised the foreign direct investment definition in line with international practices. The revised foreign direct investment data now includes "equity capital" including that of unincorporated entities, non-cash acquisition against technology transfer, plant and machinery, goodwill, business development, control premium, and non-competition fees. It also includes re-invested earnings including that of incorporated entities, unincorporated entities and reinvested earnings of indirectly held direct investment enterprises.[5]

Foreign Direct Investment is the process whereby resident of one country acquire

---

International Journal of Multidisciplinary Research Vol.2 Issue 5, May 2012, ISSN 2231 5780, p. 244.

2 Mahanta Devajit, "Impact of Foreign Direct Investment on Indian economy", *Research Journal of Management Sciences* Vol. 1(2), 29-31, September (2012), p. 29.

3 Ministry of Finance, Report of the Economic Survey, Government of India, New Delhi (2003-04).

4 Usha Bhati, *Foreign Direct Investment Contemporary Issues*, Deep and Deep Publication, New Delhi, 2006, p. 1.

5 Ibid at p. 2.

the ownership of asset for the purpose of controlling the production, distribution& other activities of the firm in another country.[6]

ECONOMY OF INDIA: AN OVERVIEW

Professor .John P Lewis[7] has pointed out that almost every developed country of the world in its initial stages of development has made use of foreign capital to make up the deficiency of domestic savings.[8]

The economy of India is the tenth-largest in the world by nominal GDP and the third-largest by purchasing power parity (PPP).[9] The country is one of the G-20 major economies and a member of BRICS. On a per-capita-income basis, India ranked 141st by nominal GDP and 130th by GDP (PPP) in 2012, according to the IMF.[10] India is the 19th-largest exporter and the 10th-largest importer in the world. Economic growth rate slowed to around 5.0% for the 2012–13 fiscal year compared with 6.2% in the previous fiscal.[11] It is to be noted that India's GDP grew by an astounding 9.3% in 2010–11. Thus, the growth rate has nearly halved in just three years.

We have already seen that in 1950-51, India's per capita income was Rs. 255 only, which increased to about Rs.16500 in 2000-01. However, India's per capita income is one of the lowest in the world. The per capita income of U.S.A. and Japan is 74 times the per capita income of India. The economic activities of the government are carried out through a planning process. Our government prepares a plan for every five years and involves all the public sector enterprises, and its administrative machinery, to allocate all the income and resources it possesses to different segments and sectors of Indian economy. So far, Indian government has carried out nine Five Year Plans, and very recently, it has finalized the Tenth Five Year Plan. The government outlay during the First .Five Year Plan (1951-56) was Rs. 24000 million and this has increased to Rs. 859000 million during the Ninth Five Year Plan (1997-2002).[12]

Foreign capital is needed for overall economic development of India due to following reasons:-

6 Savita Bapurao Balip, "FDI –In Indian Retail Industry", ASM'S International E- Journal of Ongoing Research in Management and IT E-ISSAN-2320-0065, p. 1.

7 John. P. Lewis, Quiet Crisis in India, Bombay, Reprint, 1970 p. 251.

8 Gupta .K. L, and Kour Harbinger Ner, Indian Economy and Reforms, Deep and Deep Publications New Delhi, p. 115.

9 International Monetary Fund, Retrieved from *http://www.imf.org, Last visited on 18.04.2015, at 4:55 IST.*

10 Country and Lending Groups, World Bank, Retrieved from *http://data.worldbank.org, Last visited on 18.04.2015, at 4:55 IST.*

11 International Monetary Fund, Retrieved from *http://www.imf.org,* Last visited on 18.04.2013, at 4:55 IST

12 S.P Jain, "Indian Economics", Business Today, June, 2008.

i. Exploitation of natural resources

ii. Technological gap

iii. Shortage of foreign exchange

iv. Balance of payment support

v. Undertaking the initial risks[13]

Agriculture

Agriculture in India has a significant history. Today, India ranks second worldwide in farm output. Agriculture and allied sectors like forestry and fisheries accounted for 16.6% of the GDP in 2009, about 50% of the total workforce. The economic contribution of agriculture to India's GDP is steadily declining with the country's broad-based economic growth. Still, agriculture is demographically the broadest economic sector and plays a significant role in the overall socio-economic fabric of India.[14]

Characteristics of Indian Agriculture

1. The average size of agricultural holdings is still very small and uneconomical to cultivate the national average being around 1.69 hectares. Because of these uneconomic holdings, there is a great hindrance to the developmental programme of agriculture.

2. India has the largest irrigated area of the cultivated land. Still the facilities of irrigation are available only on 30 percent area of our cultivated land 60 to 65 percent of the cropped area being rainfed.

3. Indian farmers grow a wide variety of crops both food crops and commercial or cash crops. Yet a very large portion of our crops consist of food grains.

4. Agriculture in India depends on the monsoon rains, which are uncertain, irregular and inequitably distributed. Artificial irrigation is very essential for growing various crops.

5. There are mainly two crop-seasons in India Rabi (November to April) and Kharif (June to October). An extra-crop known as "Zayad" is also grown after the kharif crop in the months of April May and June.

6. The average productivity of crops is very low in comparison to several

13 Gupta K L and Kour Harbinger Ner Indian Economy and reforms, Deep and Deep Publications New Delhi, page 116-117.

14 Ratna Chatterjee, An Introduction to Economics, Central Law Publication, Allahabad, p. 189.

other agriculturally well developed countries of the world.

7. Indian agriculture is predominantly of the subsistence type. About 72.3 percent of the total cultivated area is devoted to food crops and yet the country is just self-sufficient in its food requirements.[15]

Feature of Indian Economics

Indian economy is basically an agricultural economy. More than 60% of the population is engaged in agriculture and allied activities.

1. Low per capita income is the second feature of Indian economy. It is one of the lowest in the world.

2. The occupational structure has not been changed during the last 100 years. In 1950-51 about 73% of the workers were engaged in primary activities, 11% in secondary and 16% in tertiary activities. In 1999-2000 the share of different sectors in employment amounted to 60%, 17% and 23% respectively.

3. Inequality of income and wealth is other important feature of Indian economy. In India the main resources are concentrated in the hands of the few people. 40% of the total assets is concentrated in the hands of top 20 percent people.

4. There has been remarkable improvement in social sectors such as education, health, housing, water supply, civic amenities etc.

5. Planning process is also an important feature. As the government has adopted planned developmental economy. Five years plans are framed for economic development.[16]

Foreign Direct Investment and Indian economics

Foreign Direct Investment as defined in Dictionary[17] of Economics is investment in a foreign country through the acquisition of a local company or the establishment there of an operation on a new (Greenfield) site. To put in simple words, FDI refers to capital inflows from abroad that is invested in or to enhance the production capacity of the economy. Foreign Investment in India is governed by the FDI policy announced by the Government of India and the provision of *the Foreign Exchange Management Act (FEMA) 1999.* The Reserve Bank of India (RBI) in this regard had issued a notification, which contains *the Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000.* This notification has been amended from time to time. The

15 Surbhi Arora, *Economics for Law Student,* Centre Law Publication, New Delhi, p. 215.
16 M. B. Shukla, *Indian Economy,* Taxman Allied Services Pvt. Ltd, New Delhi.
17 Graham Bannock et.al.

Ministry of Commerce and Industry, Government of India is the nodal agency for motoring and reviewing the FDI policy on continued basis and changes in sectoral policy/ sect oral equity cap. The FDI policy is notified through Press Notes by the Secretariat for Industrial Assistance (SIA), Department of Industrial Policy and Promotion (DIPP). The foreign investors are free to invest in India, except few sectors/activities, where prior approval from the RBI or Foreign Investment Promotion Board ('FIPB') would be required.[18]

Effect of Foreign Direct Investment on Economic Growth

One school of thought argued that FDI has a negative impact on the growth of India because FDI flows mainly towards the primary sector which basically promoted the less market value.[19] However another school of thought argued that FDI inflow into the core sectors is assumed to play a vital role as a source of capital, management and technology in countries transaction economies.[20]

Much has been written about the relationship between FDI and development (UNCTAD, 1999). We review the main impact areas and suggest there have been major changes within these, with an emphasis on how FDI relates to economic growth. There are several areas though which FDI affects development

(i) employment and incomes

(ii) capital formation, market access,

(iii) structure of markets,

(iv) technology and skills,

(v) fiscal revenues, and

(vi) Political cultural and social issues.

FDI affects economic growth through all of the above channels. FDI can raise economic growth by increasing the amounts of factors or production (by increasing capital or employment, directly, or indirectly in local suppliers and competitors), in the traditional growth accounting context, or increasing the efficiency by which these factors are used (by using superior technology, or locating in high productivity areas, or through productivity spillovers), as expressed in the literature in endogenous growth (e.g. Aghion and Howitt, 1998) where FDI

18 Dr. R. Renuka, Dr. M. Ganesan, and Dr. M. K. Durgamani, "Impact of FDI in Indian Economy with Special Reference to Retail Sector in India," Global Research Analysis Volume 2 Issue 1 Jan2013 ISSN NO2277-8160, p. 22.

19 Weisskof T.E., "The impact of Foreign Capital Inflow on Domestic Savings in Underdeveloped Countries", *Journal of International Economics*, p. 25-38 (1972).

20 Sahoo D. Mathiyazhagan M.K. and Parida P., "Is Foreign Direct Investment an Engine of Growth? Evidence from the Chinese Economy", *Savings and Development,* p. 419-439 (2002).

represents the port through which new ideas are gained. In the long-run, FDI induced productivity change is important for long-lasting economic growth (e.g. through spillover to local capabilities), while FDI induced build up of factors may only raise growth temporarily (e.g. by establishing a garment assembly factory).[21]

FDI brings in investible financial resources to host countries. FDI inflows are more stable and easier to service than commercial debt or portfolio investment. In distinction to other sources of capital. TNCs can bring modern technologies, some of them not available in the absence of FDI, and they can raise the efficiency with which existing technologies are used. They can adapt technologies to local conditions, drawing upon their experience in other developing countries. They may, in some cases, set up local R&D facilities. They can upgrade technologies as innovations emerge and consumption patterns change. They can stimulate technical efficiency and technical change in local firms, suppliers, clients and competitors, by providing assistance, by acting as role models and by intensifying competition.[22]

Trends and Patterns of Foreign Direct Investment Inflow in India

The new economic policy FDI came into being in mid-1991, for the development of country.[23] With the arrival of new brands, new flavors will be added to Indian Luxury market which will give customers a better choice.[24] Johns Hopkins University professor Ravi Aron, who is a senior fellow at Wharton's William and Phyllis Mack Center for Technological Innovation, argues that opening up FDI will not only lead to a greater variety of products for sale and increased consumer choice, but also penetrate deep into the hinterland of Indian economic activity and do much to improve the country's shunned sectors: infrastructure and logistics.[25]Direct investment tends to involve a lasting relationship, although it may be a short-term relationship in some cases with decisions by enterprises may be made for the group as a whole.[26]

21 *Foreign Direct Investment and Development An Historical Perspective, Background paper for* 'World Economic and Social Survey for 2006', Retrieved from www.odi.org.uk/resources/docs/850.pdf, Last visited on 12.04.2015, at 4:55 IST.

22 World Investment Report 1999: Foreign Direct Investment and the Challenge of Development, Retrieved *fromunctad.org/en/Docs/wir1999_en.pdf,* Last visited on 12.04.2015, at 4:55 IST.

23 K.S. Challapti Rao and Biswajit Dhar, India's FDI Inflow: Trends & Concepts, ISID, February 2011, Retrieved from *http:// isidev.nic.in/pdf/WP1101.pdf,* Last visited on 12.04.2015, at 4:55 IST.

24 Anand Sharma, FDI will help add new Flavors to Indian Luxury Market, DNA India, Retrieved from *www. dnaindia.com/money/report_fdi-will-help-add-newflavours-to-indian-luxury-market-anand-sharma_1761626,* Last visited on 4.04.2015, at 5:55 IST.

25 India Knowledge Wharton, FDI in Indian Retail: The Big Benefits Will Come Tomorrow, Not Today, September 2012, Retrieved from *http://knowledge.wharton.upenn.edu/india/article.cfm?articleid=4702*,Last visited on 4.04.2015, at 5:55 IST.

26 Prerna and Dr. Seema Dhawan, "Trends and Patterns of FDI Inflow in India", International Journal of Management and Business Studies, Vol.3, Issue1, Jan - March 2013, p. 110.

Foreign Direct Investment Equity Inflows from 2000-2012[27]

S.NO.	Financial Year (April -March)	In Rs, crores	In US$ million	%age growth over previous year (in terms of US $)
1	2000-01	10733	2463	-
2	2001-02	18654	4065	(+) 65 %
3	2002-03	12871	2705	(-) 33 %
4	2003-04	10064	2188	(-) 19 %
5	2004-05	14653	3219	(+) 47 %
6	2005-06	24584	5540	(+)72%
7	2006-07	56390	12492	(+)125 %
8	2007-08	98642	24575	(+) 97 %
9	2008-09	142829	31396	(+) 28 %
10	2009-10	123120	25834	(-) 18 %
11	2010-11	88520	19427	(-) 25 %
12	2011-12	122307	26192	-
	Cumulative Total (from April 2000 to January 2012)	723367	160096	

FDI inflows into India was very low during 1970 to 1979 which ranges from 18 millions of US Dollars to 85 millions of US $. The average value of FDI inflows and annual growth rate in this decade works out to 45 millions of US $ and 0.99% per year respectively. During the period from 1980 to 1989, the FDI inflows into India had grown considerably. FDI inflows into India had grown sizably during the period from 2000 to 2007.The value of FDI inflows has rose from 3.9 billion of US$ in 2000 and touched the highest level of 23 billions of US$ in 2007. The average value of FDI inflows and annual growth in this period works out to 9.4 billion of US$ and 77.17% per year respectively. Currently, it is being discussed to deregulate FDI restrictions further, e.g. by allowing FDI in retail trade. Policymakers in India as well as external observers attach high expectations to FDI.[28]

The Foreign Direct Investment boom in India

27 Rajesh Goyal, FDI in India, Retrieved from http://www.allbankingsolutions.com, Last visited on 10.04.2015, at 4:55 IST.

28 Dr. S.A. Saiyed, "Effect of Foreign Direct Investment on Economic Growth in India: an Empirical Investigation", *Indian Journal of Research* Volume: 1 Issue: 11 November 2012, p. 27.

India is now the third most favored destination for Foreign Direct Investment (FDI), behind China and the USA, according to an AT Kearney survey that tracked investor confidence among global executives to decide their order of preferences.

1. India's share of global FDI flows rose from 1.8 per cent in 1996 to 2.2 percent in 1997.

2. FDI in India in 1997-98 was lower at U.S.$ 5,025 million compared to U.S.$ 6,008 million in 1996-97 because of a decline in portfolio investment. Although foreign direct investment (FDI) increased by 18.6 per cent from U.S.$ 2,696 million in 1996-97 to U.S.$ 3,197 million in 1997- 98

3. International developments continue to attract capital flows into India in 1998-99 as well.

4. Mauritius, as in the previous two years, was the dominant source of FDI inflows in 1997- 98. U.S.A. and S. Korea were, respectively, the second and third largest sources of FDI.

5. S. Korea increased its flow of investment in India from a meager U.S.$ 6.3 million in 1996-97 (0.2 per cent of total FDI) to U.S.$ 333.1 million in 1997-98 (10.4 per cent share).

6. There has been a sharp rise in the number of FDIs approved in 2004.

7. During the first seven months of 2004, between January and July, Rs. 5,220 crore worth of FDI was approved.

8. Almost a third share of the investment in India is by NRI. According to the latest Reserve Bank of India figures, outflows through various NRI deposits schemes amounted to $903 million since May 2004, as against net inflows of $1.2 billion in the corresponding period last year.[29]

The Impact of Foreign Direct Investment on Indian Agriculture

FDI has been shown to play an important role in promoting economic growth, raising a country's technological level, and creating new employment in developing countries It has also been shown that FDI works as a means of integrating developing countries into the global market place and increasing the capital available for investment, thus leading to increased economic growth needed to reduce poverty and raise living standards.

Organized retail will offer the small Indian farmer more competing venues to sell his or her products, and increase income from less spoilage and waste. A Food

29 Dr. Vemuri Lakshmi Narayana and Mr. S. Dhinesh Babu, India's Economic Growth and the Role of Foreign Direct Investment, Retrieved from *http://www.indianmba.com/Faculty_Column/FC819/fc819.html,* Last visited on 03.04.2015, at 3:06 IST.

and Agricultural Organization report claims that currently, in India, the small farmer faces significant losses post harvest at the farm and because of poor roads, inadequate storage technologies, inefficient supply chains and farmer's inability to bring the produce into retail markets dominated by small shopkeepers. These experts claim India's post-harvest losses to exceed 25%, on average, every year for each farmer.[30]

Over 1.1 billion people were subsisting on less than US$1 a day and around 2.1 billion people on less than US$2 a day of who between two thirds to three-quarters live in rural areas.[31] In. Sub- Saharan Africa (SSA), where about 43 percent of its population is living below the international poverty line, the incidence of poverty is the highest among smallholder farmers residing in rural areas. Thus, if the war on poverty is to be won, developing countries need to place more emphasis on the agricultural sector.

In India, agriculture is an important sector of the Indian economy and accounts for almost 19% of Indian gross domestic products (GDP). Agriculture is the main stay of the Indian economy as it forms the backbone of rural India which inhabitants more than 70% of total Indian population.

The Ministry of Agriculture, the Ministry of Rural Infrastructure, and the Planning Commission of India are the main governing bodies that define the future role of agriculture in India and it aims at developing agricultural sector of India. No FDI / NRI / OCB are allowed in the Indian Agriculture sector. Only in Tea sector 100% FDI is allowed, including plantations of tea.[32]

Foreign Direct Investment in Indian Agriculture Sector and the Latest Developments are as Follows

1. 100% foreign direct investment (FDI) allowed through the automatic route covering horticulture, floriculture, development of seeds, animal husbandry, pisciculture, aqua culture, cultivation of vegetables, mushroom and services related to agro and allied sectors.[33]

2. Farm credit target of 225,000 crore for 2007-08 has been set with an addition of 50 lakhs new farmers to the banking system.

3. 35 projects have been completed in 2006-07 and additional irrigation

30 Shah and Venkatesh (2009). Opportunities for Food Industry in India, Indian Institute of Technology Bombay.

31 According to the World Banks World Development Report, in 2000.

32 Department of Industrial Policy and Promotion Ministry of Commerce and Industry Government of India Consolidated FDI Policy, D/o IPP F. No. 5(1)/2013-FC.I Dated the 05.04.2013, Para 6.2.2.1.

33 Department of Industrial Policy and Promotion Ministry of Commerce and Industry Government of India Consolidated FDI Policy, D/o IPP F. No. 5(1)/2013-FC.I Dated the 05.04.2013, Para 6.2.1.

potential of 900,000 hectares to be created and training of farmers arranged.

4. A pilot programme for delivering subsidy directly to farmers has been arranged.

5. Loan facilitation through Agricultural Insurance and NABARD has also been facilitated

6. Corpus of Rural Infrastructure Development Fund to be raised.[34]

7. Animal husbandry, pisciculture, aqua culture, cultivation of vegetables, mushroom and services related to agriculture and sectors associated with it.[35]

Foreign Direct Investment Inflows to Fertilizers Industry in India

The government of India has allowed foreign direct investment in the fertilizers industry of the country. Foreign Direct Investment (FDI) in fertilizers in India is allowed up to 100% under the automatic route in India. The total amount of FDI Inflows to Fertilizers industry in India was US$ 78.22 million between August 1991 and December 2005. The total percentage of FDI Inflows to Fertilizers industry in India stood at 0.26% out of the total foreign direct investment in the country during August 1991 to December2005.Bayer Crop of Germany was given the approval in 2003, to invest 74 crores in Aventis Crop Science in India involved in the production of fertilizers and pesticides. Through this investment Bayer Crop increased its stake in Aventis Crop from 67.08 % to 100%. This made Aventis Crop a fully owned subsidiary of Bayer Crop.[36]

Advantages of Foreign Direct Investment Inflows to Fertilizers Industry in India

The various advantages of FDI Inflows to Fertilizers industry in India are

(i) Growth and expansion of fertilizer industry in India.

(ii) Use of improved technology.

(iii) Better quality fertilizers that are more effective for agriculture.[37]

34 Dr. Sushama Deshmukh, "The Impact of Foreign Direct Investment on Agriculture Economy" *International Referred Research Journal*, February, 2012. ISSN- 0974-2832, RNI-RAJBIL 2009/29954; VoL.III ISSUE-37.p.7.

35 Department of Industrial Policy and Promotion Ministry of Commerce and Industry Government of India Consolidated FDI Policy, D/o IPP F. No. 5(1)/2013-FC.I Dated the 05.04.2013, Para 6.2.1.

36 *Id*.

37 Dr. Sushama Deshmukh, "The Impact of Foreign Direct Investment on Agriculture Economy" *International Referred Research Journal*, February, 2012. ISSN- 0974-2832, RNI-RAJBIL

Foreign Direct Investment Foreign Direct Investment Inflows to Agriculture Services has Effected Development of Rural Infrastructure, like

i. To connect 66,800 habitations with population over 1000 with all weather roads

ii. To construct 1,46,000Km of new rural roads

iii. To upgrade and modernize 1,94,000Km of existing rural roads

iv. Total investment of ` 1,74,000 crore envisaged under "Bharat Nirman", investment on rural roads estimated to be at ` 48,000 crore

v. To provide corpus of ` 8000 crore to Rural Infrastructure Development Fund (RIDF)[38]

FDI Inflows to Agriculture Services also facilitated Growth of other Allied Areas like the Following

i. Irrigation

ii. Roads

iii. Housing

iv. Water Supply

v. Electrification

vi. Telecommunication Connectivity[39]

CONCLUSION

In India, agriculture is an important sector of the Indian economy and accounts for almost 19% of Indian gross domestic products (GDP). Agriculture is the main stay of the Indian economy as it forms the backbone of rural India which inhabitants more than 70% of total Indian population.

The Ministry of Agriculture, the Ministry of Rural Infrastructure, and the Planning Commission of India are the main governing bodies that define the future role of agriculture in India and it aims at developing agricultural sector of India. No FDI /

2009/29954; VoL.III ISSUE-37.p. 7.

38 *FDI inflow to Fertilizer,* Retrieved from http://business.mapsofindia.com, Last visited on 19.04.2015, at 4:55 IST.

39 *Id*.

NRI / OCB are allowed in the Indian Agriculture sector. Only in Tea sector 100% FDI is allowed, including plantations of tea.

Foreign Direct Investment (FDI) is an important driver of growth. It is an important source of economic development for country whereas some people see threat of FDI to sovereignty of host and domestic business houses. Policy makers need to ensure transparency and consistency in policy making along with comprehensive long term development strategy.

*****

DAMAGES FOR PSYCHIATRIC INJURIES

Mr. Ramesh Kumar*

ABSTRACT

As a normal course the law takes into account only physical injuries caused to the plaintiff and not the mental injuries or shocks caused to him as a result of the defendant wrongful act. The issue of compensation and damages in cases of psychiatric or nervous shock injuries is complicated and generates a lot of controversy among the legal experts. The legal position in this area is still not very clear and not much development has been made in this regard. The author focuses on the concept of psychiatric injury also known as nervous shock and the extent to which the damages are recoverable in such injuries.

INTRODUCTION

Nervous shock is a term used in English law to denote psychiatric illness or injury inflicted upon a person by intentional or negligent actions or omission of others. It is often applied to psychiatric disorders triggered by witnessing an accident, for e.g. an injury caused to one's near relatives. The psychiatric damages suffered by a claimant extending beyond grief or emotional distress to a recognized medical illness, such as anxiety, neurosis or reactive depression are covered under nervous shock. The condition relates to the shock to the nerve and brain structures on the human body. The possibility of recovering damages for nervous shock, particularly caused by negligence, is strongly limited in English law.[1]

DUTY OF CARE

It is well established in English law that a person who has intentionally and without good reason caused another emotional distress will be liable for any psychiatric injury that follows. An example of this is a bad practical joke played on someone which triggered serious depression in that person. The joker intended to cause the other person emotional distress and will be liable for the medical consequences. Before a claimant can recover damages for the nervous shock which he suffered as a result of the defendant's negligence, he must prove all of the following elements of the tort of negligence:

* Assistant Professor, CPJCHS & School of Law, Narela, Delhi; Available at *rkumaredv67@gmail.com & at +91 8826784520*

1 *http.//en.wikipedia.org/Nervous shock accessed on 3rd Feb, 2011.*

1. The existence of a duty of care, i.e. the duty on the part of the defendant not to inflict nervous shock upon the claimant;

2. A breach of duty i.e. the defendant's actions or omissions in the circumstances fell below what would be expected from a reasonable in the circumstances.

3. A causal link between the breach and the psychiatric illness, i.e. the nervous shock was the direct consequence of the defendant's breach of duty;

4. The nervous shock was not too remote a consequence of the breach.

For fear of spurious actions and unlimited liability of the defendant to all those who may suffer nervous shock in one form or other, the English courts have developed a number of "control mechanisms" or limitations of liability for nervous shock. These control mechanisms usually aim at limiting the scope of the defendant's duty of care not to cause nervous shock, as well as at causation and remoteness.

ORIGIN AND DEVELOPMENT OF THE CONCEPT OF NERVOUS SHOCK

This branch of law is of recent origin and provides relief to a person who is injured, not by physical impact, but by what he saw or heard from his own senses.[2] Prior to 1896, only physical injury to the plaintiff was taken into account for claiming damages. The mental injuries remained uncompensated till late 19th century. In an early decision of the Judicial Committee of the Privy Council in *Victorian Railway Commissioners v Coultas,*[3] the damages for nervous shock were held irrecoverable. In this case, the appellant's gate-keeper negligently invited the plaintiff and his wife, who were driving in a buggy, to enter the gate at a crossing when the train was approaching, and, though there was no actual collision with the train, the escape was so narrow and the danger so alarming, that the lady fainted and suffered a severe nervous shock, which produced illness and miscarriage. The damage caused to the lady was held to be too remote a consequence to be recovered as there was no physical harm. The Privy Council refused to allow damages arising from mere sudden terror unaccompanied by any physical injury.

An important development took place in 1896 when in *Pugh v London Brighton & Sought Coastory Co.*[4] where it was held that nervous shock accompanied by definite illness is as much a physical injury as a broken bone or a torn flesh wound. But damages cannot be given for the mere sensation of fear or mental distress, for, there will be fraudulent claims.

2 S. P. Singh, Law of Tort, p.166 (5th edition, 2010).
3 Victoria Railway Commissioner v Coultas (1888) 13 App.Cas 222.
4 (1896) 2 QB 248.

The above view was expressly confirmed in 1901 in *Dulieu v Whit*.[5] which is regarded as the most important case in the development of law on nervous shock. In this case, the plaintiff, a pregnant woman, was not physically injured, but she suffered shock which resulted in serious illness and premature birth of her child. Holding the defendants liable Kennedy J stated that a claim for damages for physical injuries naturally and directly resulting from nervous shock which is due to the negligence of another in causing fear of immediate bodily hurt is in principle not too remote to be recoverable in law." [6]

This decision rejected the earlier view that damage due to nervous shock is a remote consequence for recovery on the ground that denial of meritorious claims on the grounds of public policy and fear of the possibility of fraudulent claims, would result in injustice in genuine cases. It established that defendant's negligence would make him liable if the natural and direct consequence is nervous shock followed by illness, subject to the condition that the shock must have been due to the reasonable fear of one's own personal safety. Though the above decision was a definite improvement on the previous law but still it imposed a restriction on the scope of liability because the fear of injury must be that of one's own safety and not anyone else.

The restriction on the scope of defendant's liability imposed by the *Dulieu case* i.e. the shock must have been due to fear of one's own personal safety, was rejected in 1925 in *Hambrook v Stokes Bros*[7]. In this case, a motor lorry with the engine running was left unattended at the top of a steep street by the defendant's servant. The lorry started by itself and ran violently down the incline. Mrs. Hambrook, the plaintiff's wife who was walking up the street with her children had just parted with them a little below a point where the street made a bend. On seeing the lorry rushing round the bend, she became frightened for the safety of her children, who by that time were out of her sight round the bend and at a distance of about 300 yards away from her. On being told by a by-stander that a child of the same description as one of her's had been injured, she suffered a nervous shock which eventually caused her death. The trial court based its decision on the limitation introduced in Dulieu case and decided in favour of the defendant. But on appeal, Bankes and Atkin rejected the limitation proposed by Justice Kennedy and held that the defendant ought to have anticipated that if his lorry ran away down this narrow street, it might terrify some woman to such an extent, through fear of some immediate bodily injury to herself, that she would receive such a mental shock as would injure her health." The dictum of Kennedy was held to be in quite general terms and that it cannot be accepted as good law applicable in every case."[8]

Thus while rejecting the principle laid down by Kennedy J, the Court of appeal

5 (1901) 2 KB 669, 2QB 248.
6 *Supra* note 404.
7 (1925) 1 KB 141.
8 (1925) 1 KB 141. (1901) 2 KB 669, 2QB 248.

enlarged the area of tortuous liability for nervous shock by laying down that defendant's liability also extends for shock to persons in the general vicinity of the accident. However a limitation was imposed on this principle by Justice Bankes that for liability in case of shock due to fear of injury to others, the defendant would be liable only if the injured either saw or realised by her own unaided senses and not from something which someone told her. This means that defendant will be liable only if the plaintiff who was in the vicinity of the accident himself saw it happen and did not hear about it from others.

It can be argued that the shock resulting from the report of an accident is not always unforeseeable. But the important fact was that in the above case the fear of injury was to self or someone closely related. This decision is unclear as regards a person who suffers nervous shock on witnessing an accident of someone not related to him ?

This issue came up before the House of Lords in *Bourhil v Young*[9] expressed the view that damages cannot be recovered from nervous shock where the defendant owed no duty of care to the plaintiff.

In this case, the appellant while alighting from a tramcar did not see the accident which occurred about 50 feet away as her view was obstructed by the tram car but she heard the collision. Later, she reached the spot of accident and saw the blood that was left on the road after the body was removed. She suffered nervous shock and gave birth to a premature child in the eighth month of her pregnancy. The House of Lords held that the defendant was not liable. It was explained that the test of proximity or remoteness is to be applied, I am of the opinion that such a test involves that the injury must be within that which the cyclist ought to have reasonably contemplated as the area of potential danger which would arise as the result of his negligence…." [10]

Distinguished the present case with that of Hambrook's case it was held that although, admittedly going at an excessive speed, the cyclist had his machine under his control and it has not been left standing unoccupied and insufficiently braked. It was also noted that the victim was not within the area of potential danger which the cyclist should reasonably have had in view."[11] Lord Macmillan stated that she was not so placed that there was any reasonable likelihood of her being affected by the cyclist's careless driving. In these circumstances, it was held that the late John Young was under no duty to the appellant to foresee that his negligence in driving at excessive speed and consequently colliding with a motor car might result in injury to her, for such a result could not reasonably and probably be anticipated. He was, therefore, not guilty of negligence in a question. [12]

9 *Ibid* p.168.
10 1943 AC 92.
11 *Ibid*., Also see S. P. Singh, Law of Tort, p.170-171 (5th edition, 2010)..
12 *Supra* note 13. p. 99.

However, on the basis of this decision, it can be said with some certainty that a plaintiff can recover for nervous shock only if he was so placed that a physical injury to him could have been reasonably foreseen. In other words, the plaintiff can recover damages for nervous shock caused by the injury to another due to defendant's negligence provided he is within the area of potential danger and that if it was reasonably foreseeable that a normal healthy person placed in the plaintiff's position would have got such a shock.[13] The decision does not answer the question of damages to those persons who are normal healthy persons but suffer nervous shock, although they were not within the area of potential danger. This possibility was explored in *King v Phillips*[14] by the Court of Appeal in 1953.

In King v *Phillips*, a taxicab driver negligently backed his taxicab into the small boy on a tricycle. The injury to the boy and his tricycle was slight. The child's mother, who was in her house seventy or eighty yards away, heard him scream, and, looking out of a window, saw the tricycle under the taxicab, but she could not see the child who eventually ran home. She suffered nervous shock followed by illness and for which she claimed damages. The lower court awarded damages to the boy amounting to £ 10, but dismissed the claim of the mother. On appeal, the Court of Appeal, affirmed the judgment of the lower court and held that the defendant owed a duty of care to the boy and not to the mother. Though the judges of the Court of Appeal reached the same conclusion but differed in the theoretical basis of the conclusion. Denning L.J. stated that the true principle is that every driver can and should foresee that if he drives negligently, he may injure somebody in the vicinity in some way or other; and he must be responsible for all the injuries which he does or in fact cause by his negligence to anyone in the vicinity, whether they are wounds or shocks, unless they are too remote in law to be recovered. If he does by his negligence and infact causes injury by shock, then he should be liable for it unless he is exempted on the ground of remoteness. Thus Singleton L.J. took the view that there was no duty of care on the part of the driver to anticipate emotional shock to the mother who was away from the road. Denning L.J., on the other hand, stated that there was a breach of duty, but the damage was too remote because it was not reasonably foreseeable.

The issue of the plaintiff's presence in the vicinity at the time of accident came up for discussion before the House of Lords in *McLaughlin v O'Brian*.[15] In this case, a road accident was caused by the defendant's negligence, the plaintiff's daughter was killed and her husband and two children were severely injured. At the time of the accident, the plaintiff was at home, which was two miles away. An hour later, the accident was reported to her by a friend, who drove her to the hospital where she saw the injured husband and children and heard about the death of her daughter. The plaintiff suffered severe nervous shock and illness. The House of Lords held that the defendant liable for the injury by nervous shock and laid down that the test of liability for damages for nervous shock was reasonable foresee

13 *Ibid* p. 111.
14 S. P. Singh, Law of Tort, 5th edition, 2010, p.172.
15 *Ibid*, p.175.

ability and the plaintiff was entitled to recover even though she was not at or near the place of the accident at the time or shortly afterwards as the nervous shock suffered by her was a reasonably foreseeable consequence of the negligence of the defendant.

The House of Lords, in its previous decision of *Bourhill v. Young* laid down the test of 'area of potential danger'. But in *McLaughlin case* it was held the defendant liable on the ground of reasonable foresight despite the fact that the plaintiff was far away from the place of accident and was told about it one hour later. The plaintiff though not present at the accident was present at the aftermath in the hospital and suffered nervous shock on seeing her severely injured husband and children in the hospital. Close ties of love and affection were presumed as the plaintiff was wife and mother of the injured.[16]

The claimant in *Page v. Smith*[17] was involved in a collision in a motor accident caused by the defendant's negligence. Though he remained physically unhurt, he suffered a recurrence of 'Myalgic encephalomyelitis', a psychiatric illness, with which he had suffered earlier but which was in remission at the time of the accident. However as a result of the accident, the illness became chronic and permanent. The injury actually suffered by the plaintiff was not foreseeable in a person of 'normal health' but physical harm to the plaintiff (which did not occur) was foreseeable.

The House of Lords held the defendant liable and laid down the following propositions :

1. In cases involving nervous shock, it is essential to distinguish between the primary victims and secondary victims.

2. In cases of secondary victims, the law, as a matter of policy, insists on a control mechanism so as to limit the number if potential claimants. If the psychiatric injury is not foreseeable in a person of normal health, then the defendant is not liable. Such a control mechanism does not apply in case of primary victim.

3. In claims by secondary victim, it may be legitimate to use hindsight in order to be able to apply the test of reasonable foreseeability at all. Hindsight however, has no part to play where the plaintiff is the primary victim.

4. Subject to above qualifications, the approach in all cases should be that whether the defendant can reasonably foresee that his conduct will expose the plaintiff to the risk of personal injury, whether physical injury or injury by nervous shock ? If the answer to this question is 'yes', then duty of care is established even though physical injury does not infact occur. It is not

16 (1982) 2 All ER (HL) (298).
17 Rattanlal Dhirajlal, The Law of Torts, p.209 (25th edition, 2006).

justified to regard physical injury and psychiatric injury as two different kinds of damages.

5. A defendant who is under a duty of care to the plaintiff whether as a primary or a secondary victim is not liable for damage for nervous shock unless the shock results in some kind of recognised psychiatric illness.

6. The defendant cannot take the defence that the plaintiff was predisposed to psychiatric illness or that the illness has taken a rare form or is of unusual severity. The defendant must take his victim as he finds him (Egg skull rule).

In an important case, *Alcock v. Chief Constable of South Yorkshire Police*,[18] 16 persons who did not receive any physical injury but suffered psychiatric injury claimed damages against the chief constable. The plaintiffs were friends and relatives of the persons killed or injured in the disaster. Some of the plaintiffs were in the stadium at the time of the disaster but not in the area where the disaster occurred. They alleged to have suffered nervous shock caused by seeing or hearing news of the disaster.

One of the plaintiff, Mr. 'H' who was present elsewhere in the stadium and whose two brothers died failed to satisfy the condition of close ties of love and affection with the main victim. The Court refused to presume the existence of close ties of love and affection between brothers and no evidence was led to prove that such close ties existed in this case. Two of the plaintiffs, Mr. and Mrs. 'C' failed to satisfy the condition of presence at the place of accident or its immediate aftermath because they were not present in the stadium and saw the scene on television. One of the plaintiff, Mr. 'A', who identified his brother-in-law in the mortuary at mid-night failed to recover as he was not in time for the immediate aftermath of the tragedy. All the claims were thus dismissed.

Another case *White v. Chief Constable of South Yorkshire*[19], arose out of the same football disaster. In this case, the claimants were a number of police officers who were on duty at that time at the stadium and who suffered post-traumatic stress disorder, a recognised psychiatric illness, while engaged in the rescue work in the aftermath of the disaster. The plaintiff were not within the range of foreseeable physical injury but they claimed that they should be treated as primary victims merely because they were employees of the tortfeasors and the nervous shock was suffered in the course of employment. They also claimed special treatment as primary victim on the ground that they were rescuers. The claims of the plaintiffs were rejected on the ground that they did not satisfy the test of being a primary victim as they were not in the range of foreseeable personal injury and the fact that they were employees of the tortfeasors or the fact that they were rescuers did not enable to claim as primary victims.

18 (1995) 2 All ER 736 (HL).
19 (1992) 1 AC 310.

LAW POSITION AFTER WHITE'S CASE[20]

The House of Lords reviewed the Common Law position in case of nervous shock or psychiatric illness in the White's case. While considering all the earlier authorities, the Court noticed that 'this law is a patchwork quilt of distinctions which are difficult to justify.' The Court however declined to reform the law leaving this task to Parliament.

After White's case, mental suffering has to be divided into different categories.

1. Mental suffering which follows from foreseeable physical injury is routinely compensated under the head ' pain & suffering' while awarding compensation for personal injury.

2. Mental suffering which is not a concomitant of physical injury is further subdivided into two groups – recognisable and unrecognisable psychiatric illness.

3. Mental suffering not following physical injury, amounting to unrecognisable psychiatric illness, is not redressible under the common law.

4. Mental suffering amounting to recognisable psychiatric illness when not following physical injury, is redressible in limited cases and for this purpose the victims are divided into two categories – primary victim (those who are in the actual area of danger of receiving personal foreseeable injury but suffer only a recognisable psychiatric illness) and secondary victims (those who are not in the area of danger of receiving foreseeable personal injury but yet suffer recognisable psychiatric illness).

5. Primary victims are entitled to receive compensation for mental suffering which amounts a recognisable psychiatric illness even if psychiatric illness was not foreseeable.

6. Secondary victims can be allowed damage if the following condition known as 'control mechanism' are satisfied. The plaintiff must have close ties of love and affection with the main victim. The plaintiff must have been present at the accident or its immediate aftermath. The psychiatric injury must have been caused by direct perception of the accident or its immediate aftermath and not upon hearing about it from someone else.

Thus a plaintiff who was an employee of the tortfeasor and suffered psychiatric injury in the course of his employment (rescue operations, etc.) but was not within the range of foreseeable physical injury has to prove the conditions mentioned above like other secondary victims, for claiming damages. Mere fact of the employer-employee relationship with the tortfeasor cannot enable him to claim

20 (1999) 1 All ER (HL).

as a primary victim. Effect of decision in *White's case*[21] is to finally replace the test of foreseeability of psychiatric injury to a person of normal fortitude which started from *Bourhill v Young* by the following :

1. Test of foreseeablity of personal injury in case of primary victims and

2. 'Control mechanisms' mentioned above in case of secondary victims.

POSITION IN INDIA

Indian law is not yet clear on the test of reasonable foreseeability in cases of nervous shock. This is not because of the conflicting opinion of the judges, but because of the fact that such cases are yet to come before the courts. However, this much is clear from the decided cases in this area viz. *Dipchand v. Manak Chand*[22] that mere mental shock unaccompanied by illness is not actionable.

The shock accompanied by illness which is directly attributable to negligence will be actionable as was held in *Halligue v Mohansundaram*[23] where it has been observed that the trend of English case law having exploded the old view that damages cannot be claimed on the basis of nervous shock directly attributable to negligence, Indian case law based on old English decisions should in this domain of law have a similar orientation.

In view of this it appears that the test of reasonable foresight is far better than the test of potential area of danger.

CONCLUSION AND SUGGESTIONS

Though the test of reasonable foresight is quite a vague concept but the decisions in *Alcock case, White's case and Page v Smith* have laid down some qualifications to the concept of reasonable foresight, especially in case of secondary victims. It is important to recognise nervous shock as an 'injury' whether or not there is 'physical damage' as such. This is because our body is controlled by the nervous system and if its activities are impaired by a shock to the nervous system, the body is incapacitated from functioning normally. Thus, such cases can be brought under cases of 'bodily injury' even if there is no apparent physical injury. Lack of legislation in this area also adds to the problem. Parliament needs to bring about reforms in this area. The views of the medical experts needs to be taken at the time of disposal not only to avoid fraudulent claims but also to ensure that justice is not denied in genuine claims.

******

21 Rattanlal Dhirajlal, The Law of Torts, 25th edition, 2006, p.207.
22 AIR 1994 SC 787, p 799,800; (1994) 1 SCC 243.
23 AIR 1939 Nag 154.

SURROGACY IN INDIA: ISSUES AND PERSPECTIVES

Dr Savita Nayyar* & Ms Rekha Sharma**

ABSTRACT

Today India is known in the world as hub of surrogacy. Women, both, who cannot conceive and the one who acts as surrogate, are the main actors in this process. The word 'Surrogate' has been derived from the Latin word 'surrogatus' meaning a 'substitute' and the term 'surrogate mother' means a woman who bears the child on behalf of another woman. As there is no strong legislation in the field it has lead to exploitation of women as many a times they are forced to practice surrogacy by their spouses in lieu of the 'huge' amount which they get from commissioning parents. This commercialisation of surrogacy has raised various social, legal, ethical and moral issues. Though there exist guidelines of Indian Council of Medical Research but they are often flouted because of lack of sanctions. The Central Government has come up with Assisted Reproductive Technologies (Regulation) Bill, 2014, which is the fourth version of the same Bill first introduced in 2008 but it focuses more on registration of clinics and less on rights of surrogate mother and the child born out of surrogacy. The paper, therefore, deals with the issues relating to practice of surrogacy in India and presents some perspectives on it.

INTRODUCTION

Motherhood is regarded as the most precious gift of nature as it gives a fulfilling experience. But because of certain medical conditions it is not possible for some couples to conceive. However, the advancement of science and technology has opened new vistas for such couples. In-Vitro Fertilization (IVF) is one such method by which a childless couple can have a child. Today, surrogacy which is further improved application of IVF technology, is a subject matter of debate among feminists, civil society, legal professionals, medical professionals and persons dealing with administration. The issues raised under this debate are the commercialization of surrogacy and its indiscriminate practice by medical practitioners without having any regard to the health risks and the rights of surrogate mother, exploitation, in the garb of empowerment, of the impoverished section of women in society and the rights of the child born out of surrogacy. As the area is largely unregulated these issues remain unsettled.

* Sr. Asstt Professor, Department of Law, University of Jammu; available at *nayyar.savita@rediffmail.com & at +91 9419112372.*

** Research Scholar, Department of Law, University of Jammu, Jammu; available at …..Matter pending……

MEANING OF SURROGACY

The word "surrogate" has its origin in Latin "surrogates" past participle of "surrogare", meaning a substitute, that is, person appointed to act in the place of another.[1] Thus the surrogate mother is a woman who bears the child for another woman. Black's Law Dictionary defines surrogacy as a process of carrying and delivering a child for another person.[2] Generally, surrogacy is classified in two types – (i) Traditional Surrogacy and (ii) Gestational Surrogacy.

1. Traditional Surrogacy - In traditional surrogacy the surrogate acts as egg donor and as the actual surrogate for the embryo. Therefore, in this type of surrogacy the surrogate is also the biological mother of the child.

2. Gestational Surrogacy- In gestational surrogacy one mother provides the eggs which is fertilized and another woman carries the fetus and gives birth to the child. The mother which provides the eggs is called the genetic mother and the one which carries and gives birth is called surrogate. Therefore, there is no biological relation between the child and the surrogate mother.

Today, gestational surrogacy is given preference over traditional surrogacy which has lead to commercialization of surrogacy.

COMMERCIALIZATION OF SURROGACY VIS.-A-VIS. RIGHTS OF WOMEN

In its early days, the surrogacy was practiced altruistically, that is, it was confined to close relatives and friends who used to bear child for the childless couple. But, now, the network has been extended. It has become commercial wherein the surrogate is paid money for bearing and delivering the child. Today, surrogacy has become a transnational phenomenon and India is known in the world as 'hub of surrogacy'. A small town in Gujarat, Anand, has become the surrogacy capital of the world. With growing medical tourism, the smaller cities have not only become more accessible, but also have become a steady source of gamete donors and surrogates.[3]

India's medical tourism industry is flourishing and surrogacy has a big share in it. Commercial surrogacy involves a contract wherein surrogate mother agrees to deliver and hand over the child to the commissioning parents on payment of money. The usual fee is around $25,000 to $30,000 which is around one – third of that in developed countries like USA.[4] In Indian context factors such as lack of regulation, comparatively lower cost than many developed countries, less

1 Law Commission of India, 228th Report on Need for Legislation to Regulate ART clinics as well as Rights and Obligations of Parties to a Surrogacy (August, 2009).

2 Id.

3 Sayantani Das Gupta and Shamita Das Gupta, *Globalisation and Transnational Surrogacy: Outsourcing Life 2* dc (Lexington Books, Maryland, UK, 2014).

4 Supra note 1.

waiting time, possibility of close monitoring of the surrogates by the intended parents, availability of large pool of women willing to be surrogates, developed infrastructure and medical expertise comparable to international standards hence created a conducive environment for the expansion of the industry.[5]

At a glance, surrogacy seems like an attractive alternative as a poor surrogate mother gets very much needed money, an infertile couple gets long desired biologically related baby and country earns foreign currency, but the real picture reveals the bitter truth.[6] Contrary to what surrogacy agencies, infertility doctors and some intended parents declared, commercial surrogacy was not a "win-win" exchange where both parties received equal rewards. Instead the intended parties gained considerably more, but they had nothing in their possession that could fundamentally alter the surrogate mother's world in contrast to what the mothers had given them.[7]

There are three parties involved in surrogacy contract – the contracting parents, the commissioning agents and the surrogate mother. The only party who is at loss is the surrogate mother. Because of her poor socio-economic background she is forced to enter into such contract. Her illiteracy and ignorance further degrades her position. Most of the women become surrogates to fulfil basic needs of their family, like food, clothing, shelter, education of children etc. Behind the flourishing 'baby market' lies the poverty-ridden socio-economic structure which any nation should be ashamed of. In spite of various poverty alleviation and other social sector reform programmes, the condition of poor lot remains grim. The reason of their failure is poor implementation on the part of administration and, the women, being the most vulnerable section of the society are the victims of such apathy.

The most contentious and intricate issue of commercial surrogacy is lack of free choice and decision making. In a patriarchal society like ours women have no say even in matters exclusively related to them. Sometimes they are even forced to undergo surrogacy to meet the financial needs of the family. The US Supreme Court in *Jack T. Skinner v. State of Oklahoma*[8] characterized the 'right to reproduce' as one of the basic civil rights of the man. The Supreme Court of India in *B. K. Parthasarthi v. Govt. of A. P.*[9] held that 'right of reproductive autonomy' is a facet of 'right to privacy'. But, surrogacy has altered the nature of pregnancy from a private affair to a public one thereby making it a work rather than virtue. As a surrogate becomes a medium to have a child typically, her autonomy gets (re)defined and (re)constructed within the framework of control

5 Sayantani Das Gupta, Op. cit.

6 Pikee Saxena, Archana Mishra, et. al., "Surrogacy: Ethical and Legal Issues" 37 IJCM (2012). Available at http://www.ncbi.nlm.gov/pmi/articles/PMC3331011 (Visited on: 7th February, 2016).

7 Sharmila Rudrappa, Discounted Life: The Price of Global Surrogacy in India 148 (New York University Press, New York, 2015).

8 316 US 355 (1941).

9 A. I. R. 2000 AP 156

and negotiations.[10]

Even though the commercial surrogacy industry is flourishing but, still, it is stigmatized in the society. It raises moral and ethical issues and is socially disapproved. The business is thriving but 'under cover'. Most of the women who undergo the process either do not reveal that their pregnancy is because of surrogacy or are shifted to medical hostels on the pretext of ante-natal care. The stay in such hostels means separation from their own family and kids who ought to be their first priority. The surrogacy is also criticized on the ground that it leads to commoditization of child, breaks the bond between the mother and the child, interferes with nature and leads to exploitation of poor women in underdeveloped countries who sell their bodies for money.[11] Thus, it psychologically affects the women and their families especially children.

In India, surrogacy is governed by the Indian Contract Act, 1872. Like all other contracts it also requires all the essentials of contract to be fulfilled. Free consent is an important pre-requisite to the validity of the contract and, therefore, the parties to the surrogacy agreement must enter into the agreement in exercise of their free will.[12] Given her poor socio-economic background, the contract that a surrogate woman signs leaves limited or no scope for her to exercise autonomy.[13]The surrogacy contracts ideally created to protect the rights of all parties are undoubtedly skewed towards protecting the interests and rights of the intended parents, the legal support available to the surrogate is at best uncertain, while both the clinic and intended parents are better placed to take action against the surrogate in a similar situation.[14]

According to a study on surrogacy, submissiveness is observed to be the hidden criterion adopted by medical practitioners/surrogate agencies for selection of surrogate mothers. The surrogacy contract ensures that the decisions related to pregnancy are made by the intended parties or physicians. The well being of baby takes precedence over her health and pregnant woman becomes the property of medical practitioners and the intended parents and subject to their monitoring and control.[15] The lack of independent say in contract makes it inequitable in nature. As they are at lower bargaining position and, therefore, are unable to negotiate the terms of the contract.

In the commercialization of surrogacy the commoditification of body is clear: the child becomes a product of arrangement while the woman's body, specifically her

10 Sayantani Das Gupta, Op. cit.
11 Supra note 1.
12 Diksha Munjal Shankar, "Medical Tourism, Surrogacy and the Legal Overtones- The Indian Tale" 56 JILI 69 (2014).
13 Sayantani Das Gupta, Op. cit.
14 Ibid
15 Sheela Saravanam, "Transnational Surrogacy and Objectification of Gestational Mother" 45 EPW 27 (2010)

reproductive labour or organs, become a resource.[16]

HEALTH HAZARDS IN SURROGACY

India recognized surrogacy in 2002 and since then it is a flourishing industry. There is a spurt in ART clinics which are offering their services at discriminate costs and standards. As the area is largely unregulated the only guidelines available are that of Indian Council for Medical Research (ICMR) which were issued in 2005. These guidelines deal with accreditation, supervision and regulation of surrogacy clinics. But lack of effective implementation has given a free hand to the ART clinics to practice surrogacy. The guidelines are flouted day in and day out thereby further deteriorating the condition of surrogate mothers.

In such a scenario, two concerns have been raised, first as to the misuse of technology causing serious problems such as declining sex ratio, rising caesarean sections and over diagnosis leading to unnecessary medical procedures and second is the commoditization of the body parts such as in the clandestine trade in kidneys, placentas and aborted fetuses.[17] The ICMR guidelines prohibit sex selection but are conspicuously silent on rest of the matters.

Surrogacy is a complex issue as it affects the woman in number of ways, socially, psychologically, emotionally and physically. Socially it is abhorred, psychologically and emotionally it is distressing and its implications on physical health of the surrogate mother many and varied. In the United States surrogates are given no more than two embryos for their safety whereas in India, surrogates are implanted with up to three embryos in order to increase the chances of pregnancy.[18] Sometimes it leads to multiple births which, further, increases the health risks for woman. Moreover, it has legal implications as no additional payment is made to the surrogate in case of multiple births.

In such cases of pregnancy, birth and post-partem period includes complications such as pre-eclampsia and eclampsia, haemorrhoids, gestational diabetes, life threatening hemorrhage and pulmonary embolism.[19] The surrogate mother is put on high doses of medicines and bloated with injections. They are kept in hostels for ante-natal care and are not allowed to move out. Long separation from her family disturbs her emotionally which, consequently, affects her physical health as well.

16 Vrinda Marwah, "Commercial Surrogacy in India" GeneWatch Available at *http://www.concilforresponsiblegenetics.org/genewatch/ (Visited on: 15th February, 2016).*

17 Imrana Qadeer, "Social and ethical basis of legislation on Surrogacy: Need for Debate" 6 IJME (2009).

18 Annu, Pawan kumar, et. al., "Surrogacy and Woman's Right to Health in India: Issues and Perspectives" 57 IJPH (2013) Available at *http://www.ijph.in* (Visited on: 10 February, 2016).

19 Id.

The process of surrogacy dehumanizes woman. It expects that a woman should be pregnant without being conscious about it.[20] In other words she is likened to a 'human incubator' for someone else's child which is believed to destruct the relationship between expecting mother and her pregnancy.[21] Child bearing is not like any other activity as there is strong possibility that the expectant mother can develop emotions that make giving the child away extremely difficult.[22] Also, the contract demands that the surrogate mother should immediately part with the child. In such a situation surrogate woman undergoes severe emotional upheavals which impact both her, physical and psychological health.

Though, the ICMR guidelines provide that there should be counselling of both parties regarding the risks involved with the surrogacy but, in practice, no such counselling takes place. Potential surrogates are not informed of the potential risks related to the harmones they are required to take in connection with their womb to receive the fertilised embryo nor are they informed of the potential risks associated with the pregnancy.[23] The whole system operates in dark for poor surrogate woman. Private sector is given full freedom to expand ART clinics to promote medical tourism and surrogacy. This can physically harm surrogates leading to various complications due to techniques, for example, low birth weights and malformed babies, which are not publically disclosed.[24] In absence of government control, private ART clinics are mushrooming keeping on stake surrogate's health.

India is a country where medical facilities are available at lower rates as compared to first world countries and most of the times these are further reduced by skipping necessary tests for the safety of surrogate mother and child. The lower cost of surrogacy and lack of proper laws may attract the people from world over but ignoring health hazards adversely affecting the women is likely to have far reaching implications for the country.

RIGHTS OF THE CHILD

Though the child is born in India, but, India does not confer citizenship on that child. The child is considered to be of the nationality of the commissioning parents. But sometimes situation arises in which the country of commissioning parents do not accept the child because surrogacy is not allowed in that country.

20 N. D. Gowda, "Surrogate Motherhood – Ethical or Commercial in Indian Perspective" 5 IJAR 464 (2015).

21 Ibid.

22 Vinita Lavaria, "Commercial Surrogacy in India: Exploitation or Mutual Assistance" (2014). Available at *http://www.iaac.ca/en/* (Visited on 15th February, 2016).

23 William J. McCabe, "Ethical Problems of Gestational Surrogacy in India" (2014) Available at *http://www.voicesinbioethics.org*/2014/09/09/ (Visited on: 15th February, 2016).

24 Annu, Op. cit.

Such a problem arose in the case of ***Baby Manji v. Union of India***[25] in which before the birth of child a matrimonial dispute arose between the commissioning parents which resulted in divorce. In this case the biological parents, Dr. Yuki Yamada and Ifukumi Yamada came to India in 2007 and had chosen a surrogate mother in Anand, Gujarat and a surrogacy agreement was entered into between biological father and biological mother on one side and the surrogate mother on the other side. The child was born on 25th July, 2008 but before that a dispute arose between biological parents. The biological father had to return home due to expiration of visa. The Anand Municipality gave the birth certificate indicating the name of genetic father. Now, the Japanese Civil Code recognised the woman who gives girth as the sole mother and does not recognize either the surrogate mother or the surrogate child. The father of the child, Dr. Ifukumi Yamada, wanted to take back the child but the Guardian and Wards Act, 1890 does not permit a single man to adopt the baby girls. This was a strange situation where the baby Manji had three mothers – the intending mother who entered into contract, the egg donor and the surrogate, yet, there was no one to accept her. Moreover, she was caught in two legal systems and no one to accept her as its citizen. The Apex Court directed that the National Commission for Protection Child Rights was the apt body to deal with the issue. The father, being the genetic father of the child, was given the custodial rights of the child. Later on Japanese Embassy granted her passport on humanitarian grounds. This case was first of its kind which brought forward the flaws in the legal system and the inadequacy of the present guidelines to deal with the issue.

In another case of *Jan Balaz v. Anand Municipality*[26] the Gujarat High Court observed:

"... babies conceived through surrogacy encounter a lot of legal complications or parentage issues. Legitimacy of the baby is therefore a live issue. Can we brand them as illegitimate babies disowned by the world..."

In this case a German couple entered into surrogacy agreement and twin children were born to them. The parent State of couple, Germany, did not recognize surrogacy and their citizenship issue was litigated in courts. In its landmark judgement Gujarat High Court directed to grant them Indian citizenship as the egg donor mother was Indian. But later on it was challenged in Supreme Court. The Supreme Court denied them Indian Passport but granted them exit permits.

It is a strange situation emerging wherein commercial surrogacy is on boom and there is no law to regulate the subject matter. Therefore, complex and unprecedented disputes are coming up before the courts and, in absence of law, courts are giving judgements keeping in view the rights of surrogate woman, the child and the contours of the Contract Act, 1870 as the surrogacy agreements are covered by the same.

25 (2008) 13 SCC 518
26 AIR 2010 Guj 21.

Though the ICMR guidelines provide that the commissioning parents must accept the child irrespective of any physical defect in them, but, there are many instances where parents refuse to accept such child. The surrogate mother being poor cannot afford the child and the ART clinic's job is over as soon as child is born. Such child has to spend his/her life in an orphanage adding more agony to the life of child. In a recent case in Thailand an Australian couple refused to accept the child with Down's syndrome born to a Thai surrogate mother.[27] Another question which has come up in surrogacy is what if twins are born and the intending parent wants only one child? Such a situation arose in India where again an Australian couple refused to accept the child of a particular sex as they already had one child of the same sex.

All these things make it clear beyond doubt that the surrogacy agreements are against the interest of both the surrogate mother and the child born out of such surrogacy agreement.

PROPOSED ASSISTED REPRODUCTIVE TECHNOLOGIES (REGULATION) BILL, 2014: THE LIMITATIONS

The need of a legislation in the field of surrogacy has been highlighted many times by all the sections of society. The Supreme court in various cases before it also laid emphasis on the need of a legislation. In *K. Kalaiselvi v. Chennai Port Trust*[28] court observed that apart from legal, other issues such as moral, ethical, psychological and religious are involved in surrogacy procedure. Hence, in India a comprehensive legislation is very much need of the hour to address the complex legal issues related to surrogacy.

The ART (Regulation) Bill, 2014 mainly addresses the issue of streamlining and regulating the ART clinics. There are very few provisions which deal with the rights of woman. It, therefore, invariably gives importance to the commercial activity than the woman who is centre of surrogate activity. It is inadequate in protecting and safeguarding the rights and health of women going for IVF techniques, recruited as surrogates and children born through commercial surrogacy.[29]

The Bill does not lay down the amount of compensation to be paid to the surrogate which leaves the matter unresolved and gives a leeway to the middleman and the clinics to decide the same for the surrogate. The Bill provides that woman should be involved in deciding the amount of compensation[30] but these women are not in a position to bargain because of their low socio-economic position and illiteracy.

27 Australian couple abandon surrogate twin with Down's syndrome-but keeps his sister, the Telegraph (August, 1, 2014) Available at *http://www.telegraph.co.uk*

28 Decided on 4-3-2013 Available at *http://www.indiankanoon.org*

29 Aarti Dhar, "Gaps in Surrogacy Bill" The Hindu, Oct. 8, 2013.

30 The Assisted Reproductive Techniques (Regulation) Bill, 2014, Section 34(1).

Even though the Bill does mandate the number of times a woman may undergo live births and embryo transfers[31] it does not mention any other provisions for her welfare or safeguarding her from any health hazards.[32] There is always a risk, although small, of death of surrogate. Even in this case the Bill leaves the matter to be decided by the parties beforehand.

Section 26(8) of the Bill permits a woman to donate her eggs six times in her life, at intervals of three months which is hazardous to her health as the time period of three months is too early for a woman to start with hormonal injections for the creation of eggs and it can affect the reproductive system of the woman adversely. In absence of any medical and legal counselling they are left with no means to assert their right of compensation.

Like surrogate mother, the child also does not get any protection under the Bill. The framers of the legislation, perhaps, forgot that the result of this contract is a life which needs adequate protection. The Bill proposes to restrict the surrogacy to Indian nationals and bars the foreigners from entering into surrogacy contracts in India. It is argued by many quarters that rather than banning the foreigners it is better that surrogacy is regulated.

CONCLUSION AND SUGGESTIONS

The business of surrogacy is flourishing because of poor socio-economic conditions of people, illiteracy, availability of surrogates and most importantly the unregulated ART clinics. The technique was developed to help those needy couples who wanted their own child but because of medical reasons were not able to do so. But in India it has become a fashion for high profile families to go for surrogacy. The poor women agree to be surrogates to earn two square meals a day for family. Most of the times they are not properly paid and being unaware of legal provisions cannot fight for their rights. The surrogacy agreement for them, therefore, is a paper beyond their comprehension. The health hazards involved in surrogacy have far reaching effects on women. The whole process involved in assisted reproductive technique drains the women physically , emotionally and psychologically. Women may have to undergo the whole process of hormonal treatment a number of times for conceiving and finally delivering the child. This aspect should be taken into consideration by the State while framing law. Multiple pregnancies is another issue. Another issue is that of the rights of the child born out of surrogacy. His rights are also jeopardised when he is not accepted by certain countries and the parents. Therefore, the need of the hour is to regulate surrogacy keeping in view the rights of surrogate mother and the child.

Following workable suggestions are made which can improve the status of women

31 Id., Section 34(9)

32 Priyatama Bhanj, "The Assisted Reproductive Technologies (Regulation) Bill, 2010: A Case of Misplaced Priorities?" (2014) Available at *http://www.jilsblognujs.wordpress.com* (Visited on 16th February, 2016).

undergoing surrogacy and the child who is born out of that surrogacy.

1. Adoption should be encouraged.
2. Only those couples who cannot conceive because of medical reasons be allowed to go for surrogacy.
3. There must be independent legal help for surrogate mother who puts forward her case while negotiating contract.
4. An amount should be fixed for compensation or minimum or maximum limits must be set to avoid injustice.
5. Child's right must be protected so that he is not branded as illegitimate and stateless.
6. Countries which do not grant citizenship to children born out of surrogacy in other countries, their citizens should not be allowed to enter into surrogacy contracts in India.
7. Proper regulation of surrogacy contracts keeping in view the right to health of women and children.
8. State should enact the law on priority basis considering this as the human rights issue.

*****

ACID ATTACK: A MODERN WEAPON OF REVENGE

Ms. Anjali Sankhwar*

ABSTRACT

The present research article discusses the definition and the history of acid attack. This article deals with the atrocities done to the women by throwing acid on them and the suffering through which they go, and also the effect on them by the behavior of the society. This article deals with the reasons behind the acid attack and also the consequences of acid attack like physical, psychological, social and economic. It also covers the judicial pronouncements on aid attack. It also deals with the ratio of this crime in other Asian counties like Bangladesh, Pakistan and Combodia.

INTRODUCTION

Acid throwing, also called an acid attack, a vitriol attack or vitriol age, is a form of violent assault defined as the act of throwing acid or a similarly corrosive substance onto the body of another "with the intention to disfigure, maim, torture, or kill." Perpetrators of these attacks throw acid at their victims, usually at their faces, burning them, and damaging skin tissue, often exposing and sometimes dissolving the bones. The most common types of acid used in these attacks are sulfuric and nitric acid. Hydrochloric acid is sometimes used, but is much less damaging. The long term consequences of these attacks may include blindness, as well as permanent scarring of the face and body, along with far-reaching social, psychological, and economic difficulties.[1]

Perpetrators of acid attacks intend to disfigure and cause extreme physical and mental suffering to victims. Perpetrators usually attack victims with hydrochloric, sulfuric, or nitric acid, which quickly burns through flesh and bone. Acid attacks occur in private and public spaces. Attackers throw acid through open home windows at night or from moving motorcycles in markets in broad daylight. Acid violence has devastating health consequences for victims. Short-term effects include immense physical pain, while long-term effects can include blindness, loss of facial features, and severe mental suffering. As a result of their physical deformities and accompanying disabilities, acid violence survivors are often

* Assistant Professor, School of Law, ChanderPrabhu Jain College of Higher Studies; Available at *advocateanjali@gmail.com* & at +91 9810529055

1 *http://en.wikipedia.org/wiki/Acid_throwing, visited on 07.02.2016*

marginalized in society.[2]

The Acid Survivors Trust International (ASTI) estimates there are approximately 1,500 acid attacks a year globally. However, experts say that this is not an accurate figure and is grossly underreported as most victims do not report assaults for fear of reprisal. It is a cruel form of violence primarily targeted at women. Experts point out that 80% of victims are female and the perpetrators are almost always male. Acid attacks are a form of gender-based violence aimed at intimidating and controlling women. They are often intended as a retaliatory or punitive measure for the woman's alleged transgressive behaviour or her assertion of autonomy. Their use as a weapon against women who refuse sexual advances or marriage proposals is on the rise in India. This can be attributed to the easy availability of acid, its low cost, and its effectiveness as a mode of attack. Acid is sold openly, over the counter, in neighborhood markets and hardware stores for as cheap as Rs.30 for a liter. Since it is used as a low-cost cleaning agent, buying acid hardly ever raises suspicion. This deadly liquid often turns into a handy and potent weapon for spurned suitors, obsessive stalkers and estranged husband's. Such is the corrosive effect of the acid that it takes just seconds to cause grievous damage. [3]

HISTORY

Acid has been used in metallurgy since prehistoric times and also for etching since the Middle Ages and antiquity. The rhetorical and theatrical term "La Vitrioleuse" was coined in France after a "wave of vitriolage" occurred according to the popular press, where in 1879, 16 cases of vitriol attacks were widely reported as crimes of passion, perpetrated predominantly by women against other women. Much was made of the idea that women, no matter how few, had employed violence as means to an end. On October 17, 1915 acid was fatally thrown on Prince Leopold Clement of Saxe-Coburg and Gotha, heir to the House of Koháry, by his distraught mistress,Camilla Rybicka, who then killed herself. Sensationalizing such incidents made for lucrative newspaper sales.

The use of acid as a weapon began to rise in many developing nations, specifically those in South Asia. The first recorded acid attacks in South Asia occurred in Bangladesh in 1967,India in 1982, and Cambodia in 1993. Since then, research has witnessed an increase in the amount and severity of acid attacks in the region. However, this can be traced back to significant underreporting in the 1980s and 1990s, along with a general lack of research for this phenomenon during that time period. Currently, research shows acid attacks increasing in many developing nations, with the exception of Bangladesh which has observed a decrease in

2 "Combating Acid Violence in Bangladesh, India, and Cambodia" Avon Global Center for Women and Justice at Cornell Law School and the New York City Bar Association, 2011, Pg. 2.

3 Sonali Aggarwal, "Acid Attacks on Women in India", Associate Professor, Department of English, Indraprastha College, Delhi University, Pg. 1.

incidence in the past few years.[4]

REASONS FOR ACID ATTACKS

The most common and obvious reason for such attacks can be referred to as "lover rejection", in which the proposer of the marriage, love or sex is rejected by the victim. A study of Indian news reports, from January 2002 to October 2010 uncovered that victim's rejected love or marriage proposals motivated attacks in 35% of the 110 news stories, providing a motive for the attack.[5] Additionally, a report written by a leading organisation in India working on acid violence, 'the Campaign and Struggle against Acid Attacks on Women (CSAAAW)', found that sexual harassment or assault in response to a woman or girl refusing such advances or demanding that the violence stop often precede such attacks.[6] This reflects the traditional orthodox mindset of masculine gender to regard women as "possession". Victims in India report that, immediately prior to their attacks, the attacker said that "if he could not possess her, then no one else could"[7]. This view could be said to be based on a patriarchal system of culture which is the heart and soul of the Indian society where the man takes all the decisions. When a woman refuses a man, it is seen as hampering his reputation and honour and he seeks to restore it by means of acid attacks. Men throw acid on women's faces as a mark of their masculinity and superiority, to keep women in their place.[8] By deforming a woman's face, man derives a sadistic pleasure and his male ego is satisfied.

Another prominent reason for such attacks may be related to dowry and other marital disputes. Dowry is the system of giving money to the husband and his family at the time of marriage by the bride's family. Even though receiving dowry has been classified as an offence and invites imprisonment if practiced; still it is a widely practiced custom in India. This custom proliferate the idea of women being economic encumbrance. It is considered as a duty on the part of bride's family to give dowry and inflicts social stigma if not complied with it. Generally, refusal to pay Dowry or additional money instigates the husband to resort to acid attack on his wife as a form of punishment to the wife's family. In India several women have claimed that their husbands have attacked them with acid due to this reason.[9] Land or property disputes may also be said to constitute one of the key reasons for the commission of this inhuman crime. The study of newspaper reports in India,

4 *http://en.wikipedia.org/wiki/Acid_throwing#History*, visited on 07.02.2016

5 Avon Global Centre for Women and Justice at Cornell Law School, the Committee on International Human Rights of the New York City Bar Association, The Cornell Law School International Human Rights Clinic, The Virtue foundation.(2011). Combating Acid Violence in Bangladesh, India and Cambodia.website: *www.ohchr.org/Documents/HRBodies/CEDAW/HarmfulPractices/AvonGlobalCentreforWomenandJustice.pdf.,* visited on 10/02/2016

6 Campaign and Struggle against Acid attacks on women (CSAAAW), Burnt not defeated 21-22(2007).

7 Supra note 6 at 10

8 AfrozaAnwary ,Acid Violence and Medical Care in Bangladesh: Women's Activism as Carework, Gender and Society, (2003),Pg. 17, 305

9 Supra note 6 at 21

exhibits that nearly 20% of the attacks occurred between unrelated people, due to business disputes, sales disputes, land disputes, or revenge between families[10]. In a case before the Supreme Court of India[11], the accused was the husband of the deceased, Sushila and wanted to kill her and their daughters, Bindu and Nalini to grab the property as he was the immediate beneficiary to her estate. He poured acid over her, in order to kill her. He was convicted under Section 302/ 34 of the Indian Penal Code, 1860. Furthermore, in cases of land disputes, a family member often attacks a woman or girl family member of an opponent‘s family as she is the most vulnerable to such attacks and will most likely become a burden on her family, subsequent to the attack. The case of ChennammaDeveGowda, wife of former Indian Prime Minister H.D DeveGowda has created sustained and widespread interest on the issue. On 21 February 2001, H.D Lokesh, nephew of the former Prime Minister of India, brutally attacked his aunt with acid in a temple over a family feud. Newspapers reported that it was an act of vengeance between the two families. One reached the top-most position in the country while the other family was facing grinding poverty with six children, including two physically challenged ones[12]. Thus it can be said that men resort to acid attacks as a means to intimidate women and to impose their authority on her. Such kind of attacks nurtures his male ego and makes him feel that he is living up to the image of man‘created by the patriarchal society.

CONSEQUENCES OF ACID ATTACK

Physical Consequences

Unlike other wounds and injuries, acid burns are amongst the worst injuries that a human being can suffer, solely because of the nature and magnitude of the injuries are wide spread, and mostly require extensive medical treatment. Acid burns through skin and flesh, layer by layer, causing great pain and injury. It eats through the two layers of the skin, into the fat and muscle underneath, and sometimes down to the bone. It may dissolve the bone. The deepness of injury depends on the strength of the acid and the duration of the contact with the skin - the burning continues until the acid is thoroughly washed off with water. Further, if thrown on a person’s face, acid rapidly eats into, eyes, ears, nose and mouth. The pain is excruciating, as an intense burning heat cuts through the victims flesh like a hot knife. Eyelids and lips may burn off completely. The nose may melt, closing the nostrils and ears shrivel up. Acid can quickly destroy the eye, blinding the victim. Skin and bone on the skull, forehead, cheeks, and chin may dissolve. The acid usually splashes or drips over the neck, chest, back, arms or legs, burning anywhere it touches. One study found that on average, patient suffered burns to 14% of their body surface area, with areas most commonly affected including the face (87% of the victims), head and neck (67%), upper limbs (60%) and chest

10 Supra note 5 at 12

11 Ram Charitter and Anr.v. State of Uttar Pradesh Cri. App. 766 of 2006 (S.C.)

12 Jane Welsh.(2009). “It was like burning in hell”: A Comparative exploration of acid attack violence, Carolina Papers on International Health, Pg.1-15.

(54%). Around a third of victims (31%) suffered complete or partial blindness.[13]

Psychological Consequences

Psychological consequences of acid violence are even direr as compared to physical consequences. This impacts not only the victim, but family, friends and society too. It creates fear amongst others and has a deep rooted impact on the minds of the masses. Psychological trauma is caused by the terror which the victims suffer during the attack, as they feel their skin burning away, and after the attack by the disfigurement and the disabilities that they have to live with for the rest of their lives. Victims suffer psychological symptoms such as, depression, insomnia, nightmares, fear of other acid attacks and/or fear about facing the outside world, headaches, weakness and tiredness, difficulty in concentrating and remembering things etc. They further feel perpetually depressed, ashamed, worried and lonely as they are boycotted by the society, which is another sociological issue of the society. This will be subsequently discussed. It has adverse impacts on women's empowerment and mobility. The victim's life gets derailed as every time she looks in the mirror she is reminded of her present insecurity as well as the hopelessness of the future.[14]

Social and Economic Consequences

The orthodox and traditional Indian approach believes more in physical beauty rather than inner beauty. Not only this, but the society looks at the victim as an 'alien'. Thus the life of the victim is ghettoized. Victims who are not married are likely not to get married and those who suffer any disabilities like blindness, as the repercussion of attack, do not find any jobs, irrespective of their qualification. The so called "Personality" for the job is absent in such victims. The approach of the society is 360 degree opposite to what it ought to be. Instead of helping and rehabilitating such victims, we, look at them with sympathy, and cannot bear to look at their faces for long. However this approach needs to be changed and reformed. Their pain and suffering needs to be felt as they are one amongst us. So far as economic consequences are concerned, such victims face a high degree of discrimination in employment prospects and have to live a depended life full of economic hardships. Therefore, it can be said that victims of vitriolage go through hell in this ordeal and their life becomes worse than death after they become subject to such attacks. Their physical scars remind them persistently about the atrocities which have been committed against them and the feeling of loneliness and worthlessness never really leave them.[15]

13 ParvathiMenon and Sanjay Vashishtha, "Vitriolage& India - The Modern Weapon of Revenge", International Journal of Humanities and Social Science Invention, Faculty of Law, JamiaMilliaIslamia, New Delhi, 2013, Pg. 2.

14 Ibid, Pg. 3.

15 Ibid.

ROLE OF JUDICIARY IN PROSECUTING THE PERPETRATORS OF ACID ATTACK

Initially the perpetrators of acid attacks were not effectively prosecuted. They were generally charged under the offence of causing hurt which invited punishment of merely 3 years. Besides perpetrators of this crime were easily let out on bail. Compensation was hardly ever awarded to the victims of vitriolage and even if given was grossly inadequate. In *Ravinder Singh v State of Haryana*[16] acid was poured on a woman by her husband for refusing to give him divorce. The husband was involved in an extra-marital affair. Due to the attack, the victim suffered multiple acid burns on her face and other parts of her body, leading to her death. The accused was charged and convicted under Section 302 of the IPC. However, life imprisonment was not imposed even though the victim had died. In *State(Delhi Administration) v. Mewa Singh*[17] the accused threw acid on the victims face. The liquid splashed or her face produced some redness (erythema) on the skin over a part of her face involving her upper eye-lids. There was no corrosion, of the skin or other deformity. The accused was convicted for causing hurt under Section 323 of the IPC and a meagre fine of Rs. 300 along with 15 days imprisonment was awarded. This sort of punishment for acid attack is in itself a mockery of sorts and does not take into consideration the gravity of the crime and its after effects like trauma which affects the victim throughout her life. In *Syed Shafique Ahmed Vs. State of Maharashtra*[18] personal enmity with his wife was the reason behind a gruesome acid attack by the husband on his wife as well as another person . This caused disfiguration of the face of both the wife as well as that of the other person and loss of vision of right eye of wife. The accused was charged under Section 326 and 324 of the IPC and was awarded Rs5000 as fine and 3 years imprisonment. This case again shows that the punishment that is often awarded does not take into account the deliberate and gruesome nature of the attack and rests on technicalities of injuries. In a case of *Awadhesh Roy Vs. State of Jharkhand(2006),* the victim was standing with her friend at a Bus Stop in Dhanbad. The Appellant came and poured acid over her head and face. The appellant had a photograph of the victim and was blackmailing her but she refused to accede to his demands. The victim suffered burn injuries over the left side of her eye, neck and chest and had to be hospitalized. A case was registered under Sections 324, 326, 307 IPC. The police investigated the case and finally submitted a chargesheet against the appellant under the aforesaid sections. The learned 2nd Additional Sessions Judge, Dhanbad held the appellant guilty under Section 324 IPC and convicted and sentenced him to undergo rigorous imprisonment for three years. The appellant‘s conviction was upheld by the Hon‘ble High Court. No compensation whatsoever was awarded to the victim. In this case the court seems to have been guided by the nature of injuries which in its opinion did not amount to grievous hurt. At one instance the judge even asked the acid attack

16 AIR 1975 SC 856
17 5(1969) DLT 506
18 2002 CriLJ1403

victim to cover her face in the court[19]. This shows the callous and insensitive attitude of the judiciary who are supposed to be the guardian of Fundamental Rights, in the beginning, towards the victims of acid attack.

Now the role of judiciary in combating the threat of vitriolage has taken a completely round about turn. In one of the most famous cases[20] involving acid attack the accused threw acid on a girl, Hasina, for refusing his job offer. This deeply scarred her physical appearance, changed the colour and appearance of her face and left her blind. The accused was convicted under Section 307 of IPC and sentenced to imprisonment for life. A compensation of Rs. 2,00,000/- in addition to the Trial Court fine of Rs 3,00,000 was to be paid by the accused to Hasina's parents. This was a landmark case as it was the first time that a compensation which was quite a large sum was given to the victim to meet the medical expenses including that of plastic surgeries. Recently in 2013, the Additional Sessions Court on pronounced life sentence on the accused in the heinous acid attack case that snuffed out the life of 23-year old Vinodhini.

The acid attack took place in November 2012 and the victim died in February 2013. Thirty-three-year-old Suresh Kumar alias Appu was sentenced to life under Section 302 (murder) or under Section 326 (causing grievous hurt by dangerous weapons). The accused would also undergo a concurrent sentence of two years rigorous imprisonment each under Section 324 (voluntarily causing hurt). In addition, the court slapped a fine of Rs.1 lakh, of which Rs.50,000 would be given as compensation to Vinodhini's family[21]. The relevance of this case lies in the fact that it was decided merely in 4 months which is a huge task for the Indian Courts as it takes years to dispose of the cases. The case of *Laxmiv Union of India & others* (2006)[22], is the testimony to the fact that Supreme Court has taken note of increasing trend in commission of vitriolage and the necessity to curb the same. The Court gave the following guidelines in the instant case-

1. Over the counter sale of acid is completely prohibited unless the seller maintains a log/register recording the sale of acid which will contain the details of the person(s) to whom acid(s) is/are sold and the quantity sold. The log/register shall contain the address of the person to whom it is sold.

2. All sellers shall sell acid only after the buyer has shown: a) a photo ID issued by the Government which also has the address of the person: b) specifies the reason/purpose for procuring acid.

3. All stocks of acid must be declared by the seller with the concerned Sub-Divisional Magistrate (SDM) within 15 days.

19 Supra note 6 at 22-23

20 2005(5) AIR Kar.R 724. (DB)

21 P.V.Srividya,(2013, August 20). Life term for accused in Vindodhini acid attack case.The Hindu. retrieved from http://www.thehindu.com/news/national/tamil-nadu/life-term-for-accused-in-vinodhini-acid-attack-case/article5041675.ece, visited on 20/02/2016

22 Writ Petition Cri. No. 129 of 2006

4. No acid shall be sold to any person who is below 18 years of age.

5. In case of undeclared stock of acid, it will be open to the concerned SDM to confiscate the stock and suitably impose fine on such seller up to Rs. 50,000/-

6. The concerned SDM may impose fine up to Rs. 50,000/- on any person who commits breach of any of the above directions.

7. The acid attack victims shall be paid compensation of at least Rs. 3 lakhs by the concerned State Government/Union Territory as the after care and rehabilitation cost. Of this amount, a sum of Rs 1 lakh shall be paid to such victim within 15 days of occurrence of such incident (or being brought to the notice of the State Government/Union Territory) to facilitate immediate medical attention and expenses in this regard. The balance sum of Rs. 2 lakhs shall be paid as expeditiously as may be possible and positively within two months thereafter.

The role of judges in ensuring that the perpetrators of this crime are effectively penalized and brought to justice and effectively redressing the plight of the victims of such attack and to hamper others from resorting to the same is undeniable. Indian Judiciary has come a long way while dealing with acid attack cases. But some problems still persist. One of the problems that affect the prosecution of the acid attack cases is the lack of judges in the Country. An estimate puts the judge to person ratio in India at 12.5 judges per one million people[23]. The problem with such low ratio of judges is that it takes inordinate delay to dispose of the cases and 'justice delayed is justice denied'. It takes years for courts to dispose of the cases thereby totally exhausting the purpose of the prosecution. Gender insensitivity at lower levels of judiciary also poses a major challenge while dealing with the acid attack cases.

ACID ATTACK IN OTHER COUNTRIES

Acid attacks have been witnessed in various parts of the world. These attacks have been witnessed in various countries such as U.K, U.S, Sri Lanka, Malaysia, Italy, China but it has been found to be more rampant in Bangladesh, Cambodia, Pakistan, Uganda and in India. Bangladesh records the highest number of acid attack cases. This paper would now seek to analyse the legal position of acid violence in Bangladesh, Cambodia, Uganda and Pakistan.

Bangladesh

23 Center for Policy Research. PRS Legislative Research, Vital Stats: Pendency of Cases in Indian Courts 2 (2009). retrieved from *http://www.prsindia.org/administrator/uploads/general/1251796330~~Vital%20Stats%20%20Pendency%20of%20Cases%20in%20Indian%20Courts%2026Aug2009%20v10.pdf.,* visited on 20/02/2016

According to Acid Survivor Foundation Bangladesh, there have been 3115 reported acid attack victims in the country since 1999[24]. In the year 2013 itself, so far 50 incidents of acid violence have occurred in Bangladesh[25]. The experience in Bangladesh was that, acid violence cases took up to 10 years to be prosecuted in courts, and as many as 1 in 10 did not go for trial[26]. However Bangladesh has enacted specific legislation to combat acid violence. In 2002, Bangladesh enacted two comprehensive laws – the Acid Crime Control Act (ACCA) and the Acid Control Act (ACA).The ACCA heightens penalties and creates special court procedures for acid attack cases. Key provisions of the ACCA were already in effect prior to its adoption. Few provisions which are pertinent to be highlighted include:

1. Penalties: The ACA allows courts to impose the death penalty for acid attacks. The level of punishment is tied to the parts of the body effected. If the victim dies or loses sight or hearing, or if the victim's face, breasts, or sexual organs are damaged, the attacker faces the death penalty or life imprisonment, as well as a fine up to TK. 50,000 ($700 USD)[27].

2. Attempted Attacks: Throwing acid or attempting to throw acid without causing either physical or mental suffering is also punishable, and a sentence of 3 and 7 years and a fine upto a TK. 50,000 can be imposed[28].

3. Investigation Procedures: Police must investigate acid attacks within 30 days, but can be given up to 60 days extension. If the investigation has not been completed within the designated timeframe, courts may request that the police department designate another investigating officer to complete the investigation within the prescribed time period and may also take measures against investigating officer[29].

4. Acid Regulation: The Act punishes the unlicensed production, import, transport, storage, sale, and use of acid by a prison term of 3 to 10 years and fine of up to Tk.50,000($700 USD) . However, implementation of these stringent provisions is another challenge faced by the Bangladeshi Government. For example in Bogra, of the estimated 2500 to 2800 acid users, only 31 have licenses, while it appears that very few of these people obtain such licenses. In addition to the implementation challenged under the ACA, criminal provisions of the ACCA are not adequately implemented to bring perpetrators of acid violence to justice.

24 Acid Survivors Foundation (ASF), Statistics, http://www.acidsurvivors.org/statistics.html., visited on 26/03/2016

25 Ibid.

26 Law Commission of India.(2009). The Inclusion of Acid Attacks as Specific Offences in the Indian Penal Code and a law for Compensation for victims of crime.(226). available at *http://lawcommissionofIndia.nic.in/reports/report226.pdf.,*visited on 26/03/2016

27 S.5(b) of the ACCA.

28 S.6 of the ACCA.

29 S.11 of the ACCA.

Pakistan

According to New York Times reporter Nicholas D. Kristof, acid attacks are at an all time high in Pakistan and increasing every year. The Pakistani attacks he describes are typically the work of husbands against their wives who have "dishonored them". Statistics compiled by the Human Rights commission of Pakistan show that 46 acid attacks occurred in Pakistan during 2004 and decreased with only 33 acid assaults reported for 2007[30]. According to a New York Times article in 2012 there has been 150 acid attacks in Pakistan, up from 65 in 2010. However, other estimates by the Human Rights watch and the HRCP cite the number of acid attack victims to be as high as 400 to 750 per year[31]. In Pakistan, the Parliament in 2011 made amendments to existing laws that criminalized such attacks, stipulating a minimum sentence of 14 years in prison, a maximum sentences of life imprisonment and fines up to 1 million Pakistani rupees ($10,200). After the suicide of an acid attack victim in Pakistan last year, pressure was put on the government to introduce even stronger laws. A bill titled "Acid throwing and burn crime bill 2012" was introduced in the Parliament in Pakistan. The case of NailaFarhat is landmark decision dealing with acid attacks in Pakistan. This case received enormous publicity. In this case the perpetrator was sentenced to 12 years imprisonment and was ordered to pay 1.2 million Rupees in damages. This decision was an exception in the landscape of acid attacks in Pakistan; in most cases the measures taken, if any, are not proportionate to the sufferings inflicted by the attacks[32].

Cambodia

According to data gathered by the Cambodian Acid Survivors Charity (CASC) on people treated in hospital for acid burns, there have been 271 acid violence victims between 1985 and June 2010 in Cambodia. The Cambodian statistics may also under represent the true of magnitude of the problem since many victims never seek treatment for their burns[33]. A newspaper report states that from October 1999 to December 2006 there have been 111 acid attacks with a total of 181 victims[34]. In 2012, CASC recorded 7 acid attacks and 17 in 2011. The Royal Government of Cambodia began taking positive steps to combat this horrific phenomenon. since 2010, a Special Committee was working on a new law, and it was passed on 4 November 2011, and came into force on December, 2011. Under the new acid law stringent penalties of imprisonment or life imprisonment for acid offences

30 Jane Welsh.(2009). "It was like burning in hell": A Comparative exploration of acid attack violence, Carolina Papers on International Health, 1-115.

31 Ibid.

32 Asian Human Rights Commission.(2010). Acid attack a serious concern in Pakistan.Ethics in action, 4(1). retrieved from *www.humanrights.asia/resources/journals-magazines/eia/eiav4a1/3-acid-attacks-a-serious-concern-in-pakistan.*, visited on 26/03/2016

33 Cambodian Acid Survivors Charity (CASC), April-June 2010, Quarterly Report 4(2010).

34 The Cambodia Daily, 5 Dec 06, retrieved from www.cambodiadaily.com/date/2006/12/, visited on 05/03/2016

that disable a victim for life have been incorporated. In case the attack causes death, life imprisonment is imposed on the perpetrator. Acid law provides that unless a person or legal entity has a licence or letter issued by the concerned ministry or responsible authority of the RGC, they shall not be allowed to import, transport, distribute, buy, sell, store or use acid[35]. The acid law in Article 14 includes penalties of fines and confiscation for those operating without a licence. The Acid Law includes an obligation on the part of the responsible or the relevant authority to immediately bring the victim to the closest medical health centre, state owned hospitals or other state owned health institution, which must provide support and treatment to the victim free of charge[36]. But the problem in Cambodia also lies in the implementation of the existing laws. Another trend which has been seen in Cambodia is that this law has rarely been used in the courts. In early 2013, the Pnom Penh Municipal Court for the first time sentenced a perpetrator of acid violence under the new law[37]. Therefore, it is pertinent to observe that, although the South Asian Countries are making laws, but they bear no fruits without any effective implementation machinery. For an effective law, all the organs of the state needs to work effectively and efficiently, otherwise the pain and sufferings of the victims will continue.

CONCLUSION

Acid attack is one of the henious crimes that could happen to mankind. The perpetrators of acid attacks throw acid at their victims, usually at their faces, burning them, damaging skin tissue etc. After reading the definition and history of acid attack, it is found that usually the victims of acid attack are women. The reason behind the acid attack is usually taking revenge from the victim and the consequences of acid attack like physical, psychological, social and economic. The perpetrators should not get bail easily. The government should offer various programms for rehablitaion of the victims and also provide free of cost surgeries to the victims. The NGOs can play a vital role in rehablitating the victims. There should be strict rules for the sale of acid and related material.

*****

35 Article 5 and 8 of Acid Law.

36 Articles 10 and 11 of the Acid Law

37 LiengSarith.(2013, January 29). First Case prosecuted under new Acid Law. The Phnom Penh Post.retrieved from http://www.phnompenhpost.com/national/first-case-prosecuted-under-new-acid-law, visited on 03/03/2016

R.T.I. REVOLUTION IN REAL SENSE: AN ANALYSIS

Dr. Jitender Singh Dhull*

ABSTRACT

In the democratic set up, it is people's participation in making the Government. In democracy the governing power originate from the people. In our democracy, people of the country are the authors of the main law i.e. constitution. It is the dharma of the government to work for the welfare of the people, which constitute the rule of the law of country……

INTRODUCTION

In the democratic set up, it is people's participation in making the Government. In democracy the governing power originate from the people. In our democracy, people of the country are the authors of the main law i.e. constitution. It is the dharma of the government to work for the welfare of the people, which constitute the rule of the law of country. In democracy there are certain basic human rights and it is one of the basic human right that people should know what government is doing and why government is doing it. Though there are certain exceptions also as no right is absolute right, but for bringing transparency, efficient working and to check the corruption in the government, right to know is the important tool in the hands of the people of the country. Gone the days worldwide when there was recognition to the divine rights of the King or communism was recognized. In the whole world the democratic phenomena is emerging. Some of the states adopted it two century back and the process of adopting the democratic setup is continuing till then. In the era of modern times the democracy has reach its height's, now the democratic governments in the states are more accountable and answerable to the people, the healthy democracy lies in well informed citizen and the transparency at the government level. It is the natural right flowing from the very concept of the democracy.

Transparency at the government level whether it be in legislature, executive and to some extent judiciary it is sure technique to minimize the abuse and misuse of discretionary powers, a knowledge is guarantee against ignorance so at government level openness a guarantee against misconduct.

* Assistant Professor, Department of Law, M.D.University, Rohtak, Haryana; Avialable at jitendersinghdhull@gmail.com & at +91 9416149377.

J.V.R.Krishna Iyar rightly said, "A government which reveals in secrecy in the field of people's liberty not only acts against democratic decency but busies itself with its own burial[1]".

PRESENCE OF THE RIGHT IN ANCIENT TIMES

In the ancient times right to know or hearing and discovering the truth was man's zeal and the philosophy that inspires the Indian people's hunger for freedom of information is best expressed in our Vedas and Upnishad's

'Asato ma sadgamay'

Oh, lord! Lead me from ignorance lead me to truth i.e. from fiction to reality.

' Tamso ma Jyotirgamay[2]'

Oh, lord! Lead me from darkness lead me to light i.e. from ignorance to knowledge.

Though at the time of rule of Kings, to provide basic rights to the people depends on the morality of the king.

During the British period some important legislations were passed by the Britishers benefitting the people of the country but during this time the Britishers were mainly confined to maintaining the law and order and to rule the country. It is during this period Official Secrets Act, 1923 was passed and in this act Section 5 makes almost every official information a secret, beside this act there is another act which was passed i.e. Indian Evidence Act, 1872 in which section 123 and section 124 restrict of giving information of official documents and powers to withhold the documents.

DEVELOPMENTS IN 20TH CENTAURY

The phenomena of Right to know emerged as a basic right worldwide. In 1948, the United Nation proclaimed a universal declaration of Human Rights which was followed by the International Covenant of civil and political rights. The right to know in form of legislation has been brought in many countries, in some countries right to know or access to information is reflected into there constitution itself as in case of Sweden, the freedom to information Act was enacted in Australia in 1982 and in Canada in 1986. In USA there was enactment of the Information Act 1966, Electronic Freedom of Information Act 1996. Denmark, Netherland and France have also legislations which provide access to Information. Beside this there are countries such as Russia where people are voicing for transparency and freedom of expression.

1 Maneka Gandhi vs. Union of India, AIR1978 SC597.
2 Brhadaranyaka Upanishad, 1.iii.28

CONSTITUTIONAL PROVISIONS

Our constitution came to be reality on 26 January 1950. The preamble of our constitution reflect this right in declaration "to secure to all citizen Liberty of thought and Expression" and in pursuance of this objective right to know or right to information is implicit in the Right to Freedom of Speech and Expression u/Art. 19(i)(a). People should have mean to know the truth and collect the information so that they may not speak or express there opinion in the air. The people have right to know the reality and basis of govt. actions and by knowing the real facts they may be able to form there opinion in regard to govt. activities before casting there votes. Now by wide interpretation of Article-21 (i.e. protection of Right to Life and Personal Liberty) by the Supreme Court, the right to know is directly linked with this right. Right to life means living a life with human dignity. There is strong link between Art. 21 and Right to know, particularly where Govt. decisions may effect the health, life and occupation of the people.

THE INTERVENTION OF THE COURT'S AND COMING OUT OF THE R.T.I ACT INTO REALITY

Despite India became independent and the constitution came into force in 1951, the Act RTI took about 54 years to coming into reality, the journey started with State of Punjab vs Sodhi Sukhdev Singh[3], in this case the Hon'ble Supreme Court was of the opinion that in view of the privileged legislation i.e. Section 123 of Evidence Act 1872, under no circumstances the court can inspect a document or permit giving of secondary evidence. After 14 years another important case came i.e. State of UP vs Raj Narayan[4], in this case the Hon'ble Supreme Court upheld the decision of the Allahabad High Court in which the High Court disallowed the privilege of Section 123 of the Evidence Act. Thereafter another important case came before the Hon'ble Supreme Court i.e. S.P. Gupta vs Union of India[5] also known as (Judges Transfer Case), in this case the Hon'ble court observed that 'Right to know' is implicit in 'the Right to Free Speech and Expression' which is guaranteed under our constitution in Article 19(1)(a) and in this case the Supreme court recommended to change the provisions of Sec 123 Evidence Act 1872, as it has no relevancy in present time. After this decision of the Hon'ble Supreme Court 'Right to Know' has reached new dimensions. Though thereafter some important decisions of the Supreme Court also came in this regard as Reliance Petro Ltd.vs Indian Express[6], Secretary, Ministry of Information and Broadcasting vs Cricket Association Bengal[7] and Right to Know now started reflecting as a basic right of the citizens of the country. The scope of Right to know has very much widened in present times as now it is linked with Right to Life which is guaranteed under Article 21 of the Constitution. In case Essar Oil Limited vs Halar Utkarsh Samiti

3 . AIR 1961 SC 493
4 . AIR 1975 SC 865
5 . AIR1982 SC 182
6 . AIR 1989 SC190
7 . AIR 1995 SC1236

[8]Court held that right to know has a strong link between Article 21 particularly where the government decisions may effect the health, life and occupation of people. The citizens of India has right to know about the affairs of the government. Thus the right to get information in democracy is recognized all throughout and it is natural right flowing from the concept of democracy and in 2005 the RTI came into be reality.

Normally the work of judiciary is to adjudicate the matter, in our constitution we have provided the independent status to the Higher Judiciary and has assigned another very important role i.e. final interpreter and guardian of the constitution. The judiciary has played a very constructive role in bringing out the right to information Act a reality. Despite the important judgments discussed above the court has also issued directions to election commissioner for calling information on affidavit by issuing a necessary order for the candidates seeking elections to the parliament and the state legislature in exercise of election commission's power u/ article 324 of the constitution, as a necessary part of candidate nomination papers furnishing there in his or her candidature. After such directions, the Representation of People's Act 1951 has been amended by amendment of 2002.

THE MAIN PROVISIONS OF THE R.T.I ACT, 2005

The term "information" has been defined under Sec 2(f) which means "any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force".

As per Section 7 the information is to be given by the P.I.Officers in 30 days of the receipt of the request and can reject the request for any reason specified in section 8 and Section 9, further if the information is related to the life or liberty of a person, the same shall be provided within forty-eight hours of the receipt of the request.

Sec 8 bar's giving information to the citizen which effects the sovereignty and integrity of India, the security, strategic, scientific, or economics interests of the state, relation with foreign state or lead to incitement of an offence. Sec 8(j) bar's giving personal information.

If in stipulated time the PIO don't give the information provisions of appeal and second appeal u/s 19 (1) and (3) are there. As per Sec 19(1) the person aggrieved of the decision of PIO can file first appeal before the 1st Appellate authority with in 30 days from the expiry of such period or from the receipt of such a decision. A second appeal against the decision under sub-section (3) shall lie before Central Information Commission or the State Information Commission as the case may

8 . AIR 2004 SC 1834

be within ninety days from the date on which the decision should have been made or was actually received. The Central Information Commission or the State Information Commission can also relax the time period of Appeal if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

Sec 20 (1) deals with provisions of penalty of Rs 250 till the information is received not exceeding 25,000/-.

Sec 24 of this act provide's exceptions where this act doesn't apply. It shall not apply to intelligence and security organizations specified in second schedule.

CONCLUSION AND SUGGESTIONS

Passing of RTI Act 2005 is a revolutionary step towards maintaining transparency in the state functions, it benefits and serves the society three folds, first it brings the efficiency in the working of the govt., second it brings the transparency and third it checks and minimize the corruption in govt. functioning. The court has done a tremendous work and made this Right to know such a important right that the scope of right to know is much more wider then what is there in the Act. To make the RTI more meaningful certain suggestions are as under:

That for good governance, the transparency is foremost required and Legislature, Executive and Judiciary stand on the same footing. Though the concept of right to know and right to information has come to reality by the contribution of judiciary, then how judiciary can itself deny to recognize this right. The ruling of the Delhi High Court in case Secretary General, Supreme Court of India vs Subhash Chandra Agarwal[9] that C.J.I. is public authority under R.T.I Act, will enable the people to seek even sensitive information from C.J.I.'s office. Though one of our Chief Justice of India Sh. K.G.Balakrishan made certain objections to furnish huge sensitive information's. If R.T.I Act permits to furnish any specific information then no question of denial in the name of sensitivity. The judiciary also requires transparency in their administrative functioning which include appointment of the judges, transfer of the judges or declaring the assets. It is sensitive because the people has more faith in judiciary then to executive and legislature. It is welcoming step from higher judiciary in declaring there assets.

1. That recently Sexual Harassment of Women[10] Act,2013 has been passed, which came into force on 9th December 2013. Section 16 of this Act specifically bars RTI and complaints under this act are kept outside the preview of RTI Act. Consequently the details of false/fabricated cases will not be available.

2. That the office of the P.I.O, who gives the information is a important seat and it is matter of concern that all the persons who act as PIO's are

9 . LPA No 501 of 2009 Decided on 12 January 2010

10 . Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act,2013

performing there additional duties as PIO's and the junior persons are normally appointed as PIO's. Rather it is foremost required that PIO's to be appointed as a whole time officers to provide the information and where there is delinquency the officer be held responsible and liability of the person can be fixed. Further the PIO's be given training courses/ orientation courses to deal with the RTI's, so that they can deal the RTI's in better way.

3. That under sec 20 of the Act there is specific provision of imposing penalties on the PIO's for not giving the information in time, but rarely the PIO's are penalized. There is also inordinate delay by the appellate authority in hearing the matter and long dates are given, the main reason behind this is the Appellate authorities are holding additional charge of first appellate authority and they don't have enough time to deal with the matters relating to the RTI.

4. That in the RTI Act the Appellate Authority has not more powers to implement there order's, they can only recommend the disciplinary actions against the erring PIO's to there respective departments. There should be powers with the Appellate authority, so that they can effectively implement there orders in providing information to the persons.

5. That the highest authority under the Act is the Information Commission and normally a retd. senior executive is appointed as information commission and it is seen that the working of this office is not up to the mark and the pendency of the cases is very high. As the working of the office is of judicial nature, hence the persons of that background be appointed. It is further suggested to create the permanent benches of the Commission. It is also seen that the commission gives the VIP treatment to the PIO's and the govt. officials instead of the common people.

6. That under section 25 of the Act the Information Commission has to prepare a report on the implementation of the provisions of this act after the end of each year and to forward a copy thereof to the appropriate govt. but this practice is not done by the commission at any where. Moreover the office of the Information Commission should work as a facilitating centers rather as courts.

No doubt, the RTI Act is a wonderful Act which is given by the government to the people of the country to seek and access the information from the organs of the government. It is also there that people are misusing it by seeking the vague information or huge information, these problems are minor problems. This act is for providing the information which the government has with it and the system is not used to give the information hence at some level it is thought that by seeking information the persons are creating problem and it should not be looked like this. It is to bear in mind not to create the information but to give the information what the govt. is having. The Govt. is lacking in fulfilling the requirement u/s Section

4(1)(a)(b) which deals with Pro active disclosers by preparing the computerized records and making them available on the internet. The foremost requirement of today's time is to educate the public in order to have more potential of RTI, the provisions i.e. Sec 26 (1)(a)(b)(c) reflects about preparing programmes by the govt. to making people aware about the Act for its effective implementation. We have experience of about 10 years in witnessing this Act and has seen the changes at the govt. level in keeping the record intact, but lot more is required to be done. Further by removing the shortcomings and making aware the public about the Act the maximum use can be done of this act and it will be a wonderful experience to see the out come of Act in future.

*****

MAINTENANCE AVAILABLE TO WIVES AND OTHER DEPENDANTS UNDER DIFFERENT INDIAN LAWS: OPTION OR OBLIGATION

Ms. Nidhi Sharma*

ABSTRACT

Maintenance can be claimed under the respective personal laws of people following different faiths and proceedings under such personal laws are civil in nature. Proceedings initiated under Section 125 however, are criminal proceedings and, unlike the personal laws, are of a summary nature and apply to everyone regardless of caste, creed or religion. The object of such proceedings however, is not to punish a person for his past neglect. The said provision has been enacted to prevent vagrancy by compelling those who can provide support to those who are unable to support themselves and have a moral claim to support. Maintenance can be claimed either at the interim stage, i.e. during the pendency of proceedings, or the final stage.[1]

INTRODUCTION

Here the topic of discussion is whether the salaried wife has a right to be maintained or not which is controversy from last few years and various judgment also penned down "in favour" a n d "in against " of the same. In my opinion, as an researcher on legal remedies for domestic violence in India as well as layman salaried wife or we can say an earning wife also entitled to maintenance. The reason behind that society is becoming more challenging now. Besides oneself own duty, woman have to manage family members too and have to carry out other responsibilities. Now if we go with the legal definition of maintenance, it is clearly mention under section 125 of Cr.P.C. to be read with section 24,25,26 and 27 of Hindu Marriage Act that it is an obligation of a male Hindu to maintain his wife, children and old aged parents. Further in a case, where a person refused to maintain his wife on a ground that he is unable to earn.

Justice Chandrachud observes in a case that either begs, borrow or steal but you have to maintain your wife from a very day you entered into wedlock. Yes, it is true and mention in the Hindu scripts that the Hindu woman have to left her

* Research Scholar, Mewar University, Rajasthan, India; Available at *nidhisharma1910@gmail.com & at +91 08586008348.*

1 Kamini Ahuja; Vasundhra Ravi;The concept of maintenance under Indian law,international bar association, assessed from *http://www.ibanet.org/Article/Detail.aspx?ArticleUid=5be1285c-2dfc-4513-88c2-acc7e2a0c04e* dated 20 may '2016 @ 2:30 P.M.

father home and to adjust in her husband home with the new traditions, rules and regulations by forgetting he old life and have to adapt in a new environment.

In an old era, it is clearly mention that male has to run house by earning and women has to settle a house by performing household works. But in today's changing era, woman is equally running by joining shoulder to shoulder with man. Now she is no more confined to household works nor she has to suffer a domestic violence, nor she has to burn in a fury of intolerance, illiteracy, violent life, domination of male members. Now she is well-versed in every sphere. Yes, she is earning, but male too is bound by the rituals that he has to earn and maintain his wife and here excuses like 'he cannot earn' or 'she is earning' 'so why she is claiming maintenance' doesn't matter. On daily basis in various courts, these types of issues arise from last few days, news are prevailing regarding divorced couple and the main facts of the case were that if husband has a salaried person then, divorced wife will be entitled to husband's salary and also she will be owner of 50% of husband's father and grandfather's property.

Further in calculating the maintenance, the court will see into

1. Total monthly income of both husband and wife.
2. Number of children.
3. Number of years of marriage.

The last decade witnesses a rapid growth in cases of divorce and separation. Indian law contains provisions for maintenance under different laws like Section 125 of Code of Criminal Procedure, 1973, Section 24 of Hindu Adaption and Maintenance Act, 1956 and other personal laws like shariat law, etc. These laws provide that the benefit can be claimed by woman even prior to divorce during separation.

Initially a misconception existed that a working woman is not entitled to claim maintenance as she is earning and is thus able to maintain herself. Now, based on various judgments in cases like Bhagwan VS. Kamla Devi[2] & Chaturbhuj Vs Sita Bai[3], it is evident that she can claim maintenance even though she is earning.

The Delhi High Court has further clarified few more matters like husband, being jobless does not work as an excuse for not paying maintenance[4].

Indian law also makes provision under Section 19 of Hindu Adoption & Maintenance Act, 1956 for claiming interim maintenance expenses for

2 Bhagwan Dutt Vs. Kamla Devi (1975) 2 SCC 386.
3 Chaturbhuj Vs. Sita Bai, 2008
4 Being jobless no ground to deny maintenance to wife. Court (2008, Dec.9) Zee news.com, India Edition.

proceedings even during pendency of proceedings[5]. The word 'maintenance' is related with the term 'alimony' which has its origin in the latin word 'Alimania', meaning sustenance. It means an allowance or amount which a court orders the husband to pay to the wife for her sustenance.

Therefore, from the above discussion, it is clear that gone that era, in which woman only regarded as a 'domestic commodity'. Now, she has successfully created herself as a independent woman. It was only in past era, that she was unaware of her rights like, right to work, equal property, maintenance etc. and only because of this rapid growth in her advancement, the topic of maintenance touched its heights. Therefore, in today's society in various cases of divorce, while claiming maintenance, it doesn't matter, whether she is earning or not. She has a right to claim maintenance from her husband and neither of the excuses can debarred her from her rights.

[Obligation of a husband to maintain his wife arises out of the status of the marriage. Right to maintenance forms a part of the personal law. Under the Code of Criminal Procedure, 1973[6] (2 of 1974), right of maintenance extends not only

5 Mohini Bharat alias Seema Vs. V.K. Bharat, 2004 (2) Civil Court Cases, 476.

6 Section 125. Order for maintenance of wives, children and parents.

(1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct: Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means. Explanation.- For the purposes of this Chapter,-

(a) " minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875); is deemed not to have attained his majority;

(b) " wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

(2) Such allowance shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month' s allowances remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made: Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due: Provided further that if such person

to the wife and dependent children, but also to indigent parents and divorced wives. Claim of the wife, etc., however, depends on the husband having sufficient means. Claim of maintenance for all dependent persons is limited to Rs 500 per month. Inclusion of the right of maintenance under the Code of Criminal Procedure has the great advantage of making the remedy both speedy and cheap. However, divorced wives who have received money payable under the customary personal law are not entitled to maintenance claims under the Code of Criminal Proceedings

Under Hindu Law, the wife has an absolute right to claim maintenance from her husband. But she loses her right if she deviates from the path of chastity. Her right to maintenance is codified in the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956). In assessing the amount of maintenance, the court takes into account various factors like position and liabilities of the husband. It also judges whether the wife is justified in living apart from husband. justifiable reasons are spelt out in the Act. Maintenance pendante lite (pending the suit) and even expenses of a matrimonial suit will be borne by either, husband or wife, if the either spouse has no independent income for his or her support. The same principle will govern payment of permanent maintenance. Under the Muslim Law, the Muslim Women (Protection of Rights on Divorce) Act, 1986 protects rights of Muslim women who have been divorced by or have obtained divorce from their husbands and provides for matters connected therewith or incidental thereto.

This Act inter alia provides that a divorced Muslim woman shall be entitled to:

(a) reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband;

(b) where she herself maintains children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children;

---

offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing. Explanation.- If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife' s refusal to live with him.

(4) No Wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

(c) an amount equal to the sum of mehr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to the Muslim Law and

(d) all property given to her before or at the time of marriage or after her marriage by her relatives or friends or by husband or any relatives of the husband or his friends. In addition, the Act also provides that where a divorced Muslim woman is unable to maintain herself after the period of iddat the magistrate shall order directing such of her relatives as would be entitled to inherit her property on her death according to the Muslim Law, and to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, standard of life enjoyed by her during her marriage and means of such relatives, and such maintenance shall be payable by such relatives in proportion to the size of their inheritance of her property and at such periods as he may specify in his order.

Where such divorced woman has children, the Magistrate shall order only such children to pay maintenance to her, and in the event of any such children being unable to pay such maintenance, the magistrate shall order parents of such divorced woman to pay maintenance to her. In the absence of such relatives or where such relatives are not in a position to maintain her, the magistrate may direct State Waqf Board established under Section 13 of the Waqf Act, 1995 functioning in the area in which the woman resides, to pay such maintenance as determined by him.

The Parsi Marriage and Divorce Act, 1936 recognizes the right of wife to maintenance-both alimony pendente lite and permanent alimony. The maximum amount that can be decreed by court as alimony during the time a matrimonial suit is pending in court is one-fifth of the husband's net income. In fixing the quantum as permanent maintenance, the court will determine what is just, bearing in mind the ability of husband to pay, wives own assets and conduct of the parties. The order will remain in force as long as wife remains chaste and unmarried.

The Indian Divorce Act, 1869 inter alia governs maintenance rights of a Christian wife. The provisions are the same as those under the Parsi law and the same considerations are applied in granting maintenance, both alimony pendente lite and permanent maintenance.

MAINTENANCE UNDER HINDU LAW

Maintenance is a right to get necessities which are reasonable from another. it has been held in various cases that maintenance includes not only food, clothes and residence, but also the things necessary for the comfort and status in which the person entitled is reasonably expected to live. Right to maintenance is not a transferable right.

Maintenance without divorce

The Hindu Adoptions and Maintenance Act, 1956.Maintenance, in other words, is right to livelihood when one is incapable of sustaining oneself. Hindu law, one of the most ancient systems of law, recognizes right of any dependent person including wife, children, aged parents and widowed daughter or daughter in law to maintenance. The Hindu Adoptions and Maintenance Act, 1956, provides for this right.

Maintenance as main relief for wife

The relief of maintenance is considered an ancillary relief and is available only upon filing for the main relief like divorce, restitution of conjugal rights or judicial separation etc. Further, under matrimonial laws if the husband is ready to cohabit with the wife, generally, the claim of wife is defeated. However, the right of a married woman to reside separately and claim maintenance, even if she is not seeking divorce or any other major matrimonial relief has been recognized in Hindu law alone. A Hindu wife is entitled to reside separately from her husband without forfeiting her right of maintenance under the Hindu Adoptions and Maintenance Act, 1956. The Act envisages certain situations in which it may become impossible for a wife to continue to reside and cohabit with the husband but she may not want to break the matrimonial tie for various reasons ranging from growing children to social stigma. Thus, in order to realize her claim, the Hindu wife must prove that one of the situations (in legal parlance 'grounds') as stated in the Act, exists.

Grounds for award of maintenance

Only upon proving that at least one of the grounds mentioned under the Act, exists in the favor of the wife, maintenance is granted. These grounds are as follows:

(a) The husband has deserted her or has willfully neglected her;

(b) The husband has treated her with cruelty;

(c) The husband is suffering from virulent form of leprosy/venereal diseases or any other infectious disease;

(d) The husband has any other wife living;

(e) The husband keeps the concubine in the same house as the wife resides or he habitually resides with the concubine elsewhere;

(f) The husband has ceased to a Hindu by conversion to any other religion;

(g) Any other cause justifying her separate living;

Other dependents who can claim maintenance

Apart from the relationship of husband and wife other relations in which there is economic dependency are also considered to be entitled to maintenance by the Hindu Adoptions and Maintenance Act, 1956. Accordingly a widowed daughter-in-law is entitled maintenance from her father-in-law to the extent of the share of her diseased husband in the said property. The minor children of a Hindu, whether legitimate or illegitimate, are entitled to claim maintenance from their parents. Similarly, the aged and infirm parents of a Hindu are entitled to claim maintenance from their children. The term parent here also includes an issueless stepmother.

MAINTENANCE UNDER MUSLIM LAW

Under the "Women (Protection of Rights on Divorce) Act, 1986" spells out objective of the Act as "the protection of the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands." The Act makes provision for matters connected therewith or incidental thereto. It is apparent that the Act nowhere stipulates that any of the rights available to the Muslim women at the time of the enactment of the Act, has been abrogated, taken away or abridged. The Act lays down under various sections that distinctively lay out the criterion for women to be granted maintenance. Section (a) of the said Act says that divorced woman is entitled to have a reasonable and fair provision and maintenance from her former husband, and the husband must do so within the period of iddat and his obligation is not confined to the period of iddat.

It further provides that a woman , if not granted maintenance can approach the Waqf board for grant as under section (b)which states that If she fails to get maintenance from her husband, she can claim it from relatives failing which, from the Waqf Board.

An application of divorced wife under Section 3(2) can be disposed of under the provisions of Sections 125 to 128, Cr. P.c. if the parties so desire. There is no provision in the Act which nullifies orders passed under section 125, Cr. P.c. The Act also does not take away any vested right of the Muslim woman.

All obligations of maintenance however end with her remarriage and no claims for maintenance can be entertained afterwards. The Act thus secures to a divorced Muslim woman sufficient means of livelihood so that she is not thrown on the street without a roof over her head and without any means of sustaining herself.

Protection to Divorced Women Sub-section (1) of Section 3 lays down that a divorced Muslim woman is entitled to:

(a) a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband;

(b) where she herself maintains the children born to her before or after the divorce.

MAINTENANCE UNDER CHRISTIAN LAW

A Christian woman can claim maintenance from her spouse through criminal proceeding or/and civil proceeding. Interested parties may pursue both criminal and civil proceedings, simultaneously, as there is no legal bar to it. In criminal proceedings, the religion of the parties does not matter at all, unlike in civil proceedings.

If a divorced Christian wife cannot support her in the post divorce period she need not worry as a remedy is in store for her in law. Under S.37 of the Indian Divorce Act, 1869, she can apply for alimony/ maintenance in a civil court or High Court and, husband will be liable to pay her alimony such sum, as the court may order, till her lifetime. The Indian Divorce Act, 1869 which is only applicable to those persons who practice the Christianity religion inter alia governs maintenance rights of a Christian wife. The provisions are the same as those under the Parsi law and the same considerations are applied in granting maintenance, both alimony pendente lite and permanent maintenance. The Indian Divorce Act under part IX s.36-s.38 deals with the provisions of alimony.[7]

---

7 S.36. Alimony pendente lite. -In any suit under this Act, whether it be instituted by a husband or a wife, and whether or not she has obtained an order of protection the wife may present a petition for alimony pending the suit.

Such petition shall be served on the husband; and the Court, on being satisfied of the truth of the statements therein contained, may make such order on the husband for payment to the wife of alimony pending the suit as it may deem just:

Provided that alimony pending the suit shall in no case exceed one fifth of the husband's average net income for the three years next preceding the date of the order, and shall continue, in case of a decree for dissolution of marriage or of nullity of marriage, until the decree is made absolute or is confirmed, as the case may be.

37. Power to order permanent alimony -The High Court may, if it thinks fit, on any decree absolute declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife, and the District judge may, if he thinks fit, on the confirmation of any decree of his declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife,

Order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it thinks reasonable; and for that purpose may cause a proper instrument to be executed by all necessary parties.

Power to order monthly or weekly payments. -In every such case, the Court may make an order on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the Court may think reasonable:

Provided that if the husband afterwards from any cause becomes unable to make such payments, it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order wholly or in part as to the Court seems fit.

38. Court may direct payment of alimony to wife or to her trustee. -In all cases in which the Court makes any decree or order for alimony, it may direct the same to be paid either to the wife herself, or to any trustee on her behalf to be approved by the Court, and may impose any terms or

Alternatively, as previously mentioned S.125 of Cr.P.C., 1973 is always there in the secular realm. Under the Code of Criminal Procedure, 1973 (2 of 1974), right of maintenance extends not only to the wife and dependent children, but also to indigent parents and divorced wives. Claim of the wife, etc., however, depends on the husband having sufficient means. Claim of maintenance for all dependent persons was limited to Rs 500 per month but now it has been increased and the magistrate can exercise his discretion in adjudging a reasonable amount. Inclusion of the right of maintenance under the Code of Criminal Procedure has the great advantage of making the remedy both speedy and cheap.

Proceedings under S.125 are not civil, but criminal proceedings of a summary nature. But these criminal proceedings are of a civil nature. Thus, clause (3) of S.126 which empowers that Court to make such orders may be just. It should be kept in view that the provision relating to maintenance under any personal law is distinct and separate. There is no conflict between the two provisions. A person may sue for maintenance under s.125 of Cr.P.C. If a person has already obtained maintenance order under his or her personal law, the magistrate while fixing the amount of maintenance may take that into consideration while fixing the quantum of maintenance under the Code. But he cannot be ousted of his jurisdiction. The basis of the relief, under the concerned section is the refusal or neglect to maintain his wife, children, father or mother by a person who has sufficient means to maintain them. The criterion is not whether a person is actually having means, but if he is capable of earning he will be considered to have sufficient means. The burden of proof is on him to show that he has no sufficient means to maintain and to provide maintenance.

MAINTENANCE UNDER PARSI LAW

Parsi can claim maintenance from the spouse through criminal proceedings or/ and civil proceedings. Interested parties may pursue both criminal and civil proceedings, simultaneously as there is no legal bar to it. In the criminal proceedings the religion of the parties doesn't matter at all unlike the civil proceedings.

If the Husband refuses to pay maintenance, wife can inform the court that the Husband is refusing to pay maintenance even after the order of the court. The court can then sentence the Husband to imprisonment unless he agrees to pay. The Husband can be detained in the jail so long as he does not pay. The Parsi Marriage and Divorce Act, 1936 recognizes the right of wife to maintenance-both alimony pendente lite and permanent alimony. The maximum amount that can be decreed by court as alimony during the time a matrimonial suit is pending in court is one-fifth of the husband's net income. In fixing the quantum as permanent

restrictions which to the Court seem expedient, and may from time to time appoint a new trustee, if it appears to the Court expedient so to do.

maintenance, the court will determine what is just, bearing in mind the ability of husband to pay, wives own assets and conduct of the parties. The order will remain in force as long as wife remains chaste and unmarried[8].][9]

CONCLUSION

Thus from the above discussions and various views expressed by different persons, mentioned under various personal laws, it is clear that the maintenance is not an option but it is an obligation to be fulfilled or you can say it is a duty to be performed by husbands after entering into a wedlock. Further it has been elaborated that not only wife but other dependants too can claim maintenance. Under this article main focus lies on 'maintenance of salaried wife 'which is very much in issue now a days and receives a positive attitude in various judgments also. It is clear that under each and every personal law women can claim maintenance from her husband and in case of refusal she can knock the door of the court anytime Moreover, a Hindu wife is entitled to reside separately from her husband without forfeiting her right of maintenance under the Hindu Adoptions and Maintenance Act, 1956.

*****

8 S.40. Permanent alimony and maintenance

(1) Any Court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on an application made to it for the purpose by either the wife or the husband, order that the defendant shall pay to the plaintiff for her or his maintenance and support, such gross sum or such monthly or periodical sum, for a term not exceeding the life of the plaintiff as having regard to the defendant's own income and other property, if any, the income and other property of the plaintiff, the conduct of the parties and other circumstances of the case, it may seem to the Court to be just, and any such payment may be secured, if necessary, by a charge on the movable or immovable property of the defendant.

(2) The Court if it is satisfied that there is change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the Court may deem just.

(3) The Court if it is satisfied that the partly in whose favour, an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he had sexual intercourse with any woman outside wedlock, it may, at the instance of the other party, vary, modify or rescind any such order in such manner as the Court may deem just.

9 Romit aggarwal, maintenance : under hindu,muslim,partian and Christian laws; information assessed from *http://www.legalserviceindia.com/articles/hmcp.htm on 20 may'2016* at 2:45 p.m.

EXPORT CARTELS: NEED FOR REGULATION

Ms. Ritika Chauhan*

ABSTRACT

The article focuses on the impact of exports cartels on domestic market, importing country and the world trade. The harmful effects of the exports cartels urges the need for regulation of the same as the export cartels are exempted from the purview of Competition Laws of most of the countries. The article attempts to provide a solution to the menace of export cartels.

INTRODUCTION

Cartels are universally established as being the most pernicious form of agreement for competition regulators. The OECD refers to them as "the most egregious violations of competition law,"[1] and has repeatedly found that one of the most important goals of Competition Policy must be to root out cartels.[2] The European Union has repeatedly stated the harms caused by them in terms of reducing consumer welfare and distorting allocative efficiency.[3] Certain cartels being anti competitive practices transgress borders and their effect is no longer restricted to national territory but is disseminated beyond the boundaries of the particular state. This indeed is the peculiarity of export cartels which is a specie of the genus, international cartels.[4]

An agreement or arrangement between firms to charge a specified export price and/or to divide export markets is known as export cartels.[5] Many competition

* Assistant Professor, Chanderprabhu Jain College of Higher Studies and School of Law affiliated to GGSIPU; available at +91 8588829814 and at *rits.chauhan1988@gmail.com*

1 OECD Council, "Recommendation of the Council Concerning Effective Action Against Hard Core Cartels (1998)," *http://www.oecd.org/dataoecd/39/4/2350130.pdf* (last visited on 17 February . 2016).

2 OECD Council, "Report on the Nature and Impact of Hard Core Cartels and Sanctions against Cartels under National Competition Laws, 2002", www.oecd.org/dataoecd/16/20/2081831.pdf; OECD "Report on Hard Core Cartels: Recent Progress and Challenges Ahead, 2003," *www.oecd.org/publications /ebook/ 240311E.pdf; OECD* "Report on the Implementation of the 1998 Recommendation, 2005," *www.oecd.org/dataoecd/58/1/3 5863307.pdf*.(last visited on 25 February, 2016).

3 XXXII EU Report on Competition Policy, *http://ec.europa.eu/competition/publications/annual_report /2002/en.pdf.* (last visited on 1 March, 2016).

4 The difference between export cartels and international cartels is that international cartels involve exporters'from different countries, while export cartels involve exporters from the same country.

5 Availaible at *http://www.oecd.org/regreform/sectors/2376087.pdf* (last visited at 14 March, 2016).

law statutes exempt such agreements from the conspiracy provisions provided that the cartel does not lead to injurious effects on competition in the domestic market, e.g., give rise to price fixing agreements or result in reduction in exports. The rationale for permitting export cartels is that it may facilitate cooperative penetration of foreign markets, transfer income from foreign consumers to domestic producers and result in a favourable balance of trade.[6]

MEANING OF EXPORT CARTELS

Export cartels are cartels that allow companies to fix prices and coordinate conduct that, if firms pursued such conduct domestically, would lead to antitrust scrutiny. An export cartel exemption allows exporters within a given country immunity to antitrust laws so long as the conduct in question affects international markets only. Because these activities are conducted for export markets only, they do not necessarily harm competition in the domestic market.[7]

Approximately 51 countries, including India, allow for export cartels either explicitly or implicitly in their antitrust regimes; this is approximately half of all countries with antitrust regimes.[8] In 2002, India introduced the Competition Act wherein there is a special exemption to the agreement for export of goods.[9]

TYPES OF EXPORT CARTELS

Export cartels may sometimes take the form of hard core cartels[10]. Hard core export cartels across the jurisdictions are commonly identified by four categories

6 Organisation for economic co-operation and development, "Glossary of industrial organisation economics and competition law", p. 84 available at *http://www.oecd.org/regreform/sectors/2376087.pdf* (last visited at 15 March, 2016).

7 D. Daniel Sokol, "What Do We Really Know About Export Cartels and What is the Appropriate Solution?", 4 J. Comp. L. & Econ. 967 (2008), available at *http://scholarship.law.ufl.edu/cgi/viewcontent.cgi?articl e=1177&context=facultypub* (last visited at 27 March 2016)

8 Preliminary Information Report Submitted by CUTS to CCI available at *http://www.cuts-ccier.org/pdf/CUTS_Preliminary_Information_Report_Submitted_to_CCI.pdf* (last visited at 17 March 2016).

9 Section 3(5)(ii) provides nothing contained in this section shall restrict
(b) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

10 Hard core cartels can be described as the anti competitive agreements by competitiors to fix prices, restrict output, submit collusive tenders or divide or share markets cited in OECD reports on Hard core cartels 2000 available at http://www.oecd.org/competition/cartels/2752129.pdf (last visited at 14 March, 2016)

of conduct,[11] i.e. price fixing,[12] output restrictions,[13] market allocation[14] and bid rigging.[15] But export cartels are not always hard core cartels.

Export cartels can be divided into two groups. 'Pure' export cartels which direct their efforts exclusively at foreign markets. 'Mixed' export cartels which restrain competition in the exporting country's home market as well as in foreign markets.

Pure export cartels are treated as being outside the scope of most countries' competition laws for two reasons. One is that these cartels are considered to be beyond the jurisdiction of domestic competition laws, and the other is that they are explicitly exempted from the application of the laws. Mixed export cartels are generally subject to essentially the same requirements or outright prohibitions as cartels that affect the domestic market alone, although some countries provide special exemptions for such cartels where the domestic restraint or effect is ancillary to the restraint on export trade.[16]

REASON FOR EXEMPTION

Exporting countries permit domestic export cartels due to the expectation accorded in them to increase exports by enabling domestic enterprises to grab the foreign market and to compete more successfully in foreign markets. They expect to achieve this by reducing export costs and enhancing bargaining power against foreign buyers and competitors. The other reason can be jurisdictional, i.e., unless there is an anti competitive effect on the domestic market, the basic jurisdictional requirement for the application of law is lacking.[17]

11 These categories are recognized by OECD Recommendation and soft law institutions like the International Competition Network.

12 Price Fixing can be determined as an agreement between sellers to raise or fix prices in order to restrict inter firm competition and earn higher profits cited in Organisation for economic co-operation and development, "Glossary of industrial organisation economics and competition law", p. 69 available at *http://www.oecd.org/regreform/sectors/2376087.pdf* (last visited at 15 April 2016).

13 Output restrictions can involve agreements on production volumes, sales volumes or percentages of market growth.

14 Market allocation or division schemes are agreements in which competitors divide markets among themselves, i.e., competing firms allocate specific customers, types of customers, products or .territories.

15 There are two common forms of bid rigging. In the first, firms agree to submit common bids, thus eliminating price competition. In the second, firms agree on which firm will be the lowest bidder and rotate in such a way that each firm wins an agreed upon number or value of contracts cited in Organisation for economic co-operation and development, "Glossary of industrial organisation economics and competition law", p. 16 available at *http://www.oecd.org/regreform/sectors/2376087.pdf* (last visited at 18 March, 2016).

16 Ulrich Immenga, "Export Cartels and Voluntary Export Restraints between Trade and Competition Policy", 4 Pac. Rim L. &,Pol'y J. (1995), p.125.

17 Christian Schultz, "Export Cartels and Domestic Markets" 2(3) *Journal of Industry, Competition and Trade* (2002), p. 233.

IMPACT OF EXPORT CARTELS

The impact of the export cartels was discussed the WTO member states During the existence of the Working Group on the Interaction between Trade and Competition Policy (WGTCP). The question whether export cartels affect or not international trade was a crucial one. If this business practice had an adverse effect on trade, then the call for multilateral action was justified. If, on contrary, this type of collusion did not restrict international trade, then the rationale for a multilateral agreement was missing.[18] The main question being: are export cartels welfare enhancing or reducing. Export cartels can also influence domestic production and pricing if the export quantity influences utilisation of capacity especially if members of the export cartel have a substantial share of the domestic production, as their export decisions will spill over and influence domestic suppliers and prices. Operating such cartels in the home country can also create a potential situation of "conscious parallelism" when sensitive price information is shared to set prices for foreign markets. Another domestic effect is the exclusion of competition between export traders.[19]

(a) Impact on domestic markets

Apart from the beneficial effects which appear infrequently, export cartels can cause various problems for domestic competition and other objectives of the exporting country. They frequently have repercussions on domestic competition, even if there is an explicit clause in the cartel contract that no internal effects are intended. Comparable to "side effects" of joint ventures, the exchange of information on prices, costs, capacities and sales policies may influence the domestic competitive conduct of the cartel members and lead to conscious parallelism. Every export cartel whose members account for a substantial share of domestic production can influence domestic supplies and prices through its export decisions. Such spillovers occur if the export quantity influences utilization of capacity and therefore, uno actu, the total output and the domestic sales. Sometimes dumping abroad might be made possible by monopoly profits earned in domestic markets. An additional domestic effect is the exclusion of competition between export traders. Furthermore, the typical long term problems of price and sales quota cartels must be regarded. Such problems include the delay of technical progress, increasing costs, and a tendency for over-capacity. For the exporting country, export cartels are, therefore, not necessarily beneficial. However, contrary to increasing export revenues, those disadvantages are difficult to evaluate and are not immediately apparent.[20]

(b) Impact on Importing Country

18 Cristina Gonta,"Export Cartels – A century of fumble attitudes?",Law, nr. 11 (2010), p. 337.

19 Pradeep S. Mehta, Aradhna Aggarwal, Natasha Nayak worked with CUTS International, Jaipur, India.p. 7 *http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD(2012)17&doclan guage=en*(last visited at 12 March 2016)

20 *Supra note* 16 at p.126

For the importing country, foreign export cartels may be beneficial if they are formed by small and medium-sized firms which are thereby enabled to export. Export co-operation may also lead to higher quality and lower prices by reduced export costs. On the other hand, export cartels may maintain or create barriers to trade by forcing customers to pay high, non competitive prices or by limiting the quantity of imports. In these ways, their effects are similar to import cartels or domestic cartels. The opportunity for an export cartel to exercise market power abroad is greater if it faces less domestic competition. In this case, countries with less developed industries are more likely to get hurt than highly industrialized countries with competitive domestic industries.[21]

(c) Impact on World Trade

It is clear that the exports cartels may have positive/ beneficial results in one country and negative/ harmful effects in another. The importing country may also benefit by enabled or quality-improved exports, or by lower prices. The losses for the importing country caused by quantitative restrictions and price increases could be outweighed by the benefits for the exporting country.[22] The importing countries' losses caused by aggressive export cartels may outweigh the benefits in the exporting country because of "dead weight losses[23]" In these situations, export cartels adversely effect the world trade.

NEED FOR REGULATION

The debate on export cartels had its peak hour after the creation of the WTO within the Working Group on the Interaction between Trade and Competition Policy (WGTCP) and raised not only issues regarding the effects of the anticompetitive behaviour on trade, but also issues regarding the developing countries and the role of the WTO as such.[24]

The issue of export cartels was heavily debated within the WGTCP. The positions expressed reflect in fact the divide between the export cartels-friendly countries and the export cartels-unfriendly countries. The US is the primary example of an export cartel-friendly country. From all the communications submitted by the US to the WGTCP between 1996-2004 only one mentioned the issue of export cartels and this occurred at a rather late stage of negotiations. On that occasion, the US pointed out that the issue of export cartels requires "further and more focused discussion among WTO Members" The European Community (EC), on the other hand, condemned the export cartels since its first communication to the WGTCP44) and constantly touched upon this issue during the following years. One unexpected export cartels-unfriendly country was Japan. Japan enacted legislation that exempted export cartels from the application of antitrust rules and made heavy use of this exemption to promote its industries. However, during the

21 *Ibid*.
22 *Supra note* 16 at p.128
23 *Supra note* 16 at p. 129
24 *Supra note* 18 at p. 336

life of the WGTCP, Japan expressed constant calls for an international prohibition of export cartels.[25]

Because of the fact that the Member States of the WTO expressed their positions on export cartels in the context of the wider interface between trade and competition, interesting linkages and conclusion were made. Two main types of concerns were raised by the Member States in relation to the subject-matter of this paper. First, Governments addressed substantive legal questions in relation to export cartels. Second, important procedural concerns were expressed.[26]

A number of policy makers too, accorded their view to abondon the export cartels exemptions and to replace them with cooperative, international antitrust enforcement.[27] The rationale behind these arguments can be associated with the problematic behaviour of the export cartels. Export cartel exemptions are especially problematic because they prevent those with the most information about the activities of export cartels from helping those who might be harmed by them.[28]

Also the intended beneficiaries are not those using these exemptions. It has frequently been argued that large international companies, not small and medium-sized ones, are taking advantage of export cartel exemptions, thus defeating the purpose of the exemptions.[29] At a 2003 meeting of the World Trade Organization ("WTO") Working Group on the Interaction Between Trade and Competition Policy, the Thai representative acknowledged that export cartels "could sometimes be pro-competitive or have efficiency-enhancing effects,". but argued that these associations "should not benefit from a blanket exemption from competition laws, which would exclude them even from scrutiny under a rule of reason (case-by-case) approach."[30] A vast number of studies had shown that most such cartels involved large companies and that there was little or no efficiency justification for their practices"[31] The developing countries which are importing machinery and consumer products are more likely to be the victim of export cartels. It can also be suggested that these types of cartels have deleterious effects on international

25 *Ibid*

26 *Ibid*.

27 See World Trade Org., Rep. of the Working Group on the InteractionBetween Trade and Competition Policy - Communication from the EuropeanCommunity and its Member States: A WTO Competition Agreement's Contributionto International Cooperation and Technical Assistance for Capacity Building, WTO Doc. WT/WGTCP/W/184, 4 (May 8, 2003)

28 See Towards an International Framework of Competition Rules, Communication, Submitted by Sir Leon Brittan & Karel Van Miert to the Council, COM(96)284 § 1(b), Annex § (b) (1996) cited in Valerie Y. Suslow, "The Changing International Status of Export Cartel Exemptions", American University International Law Review, Volume 20 no.4 (2005), p.794

29 World Trade Org., Rep. of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WTO Doc. WT/WGTCP/7, 14 (July 17, 2003).

30 Valerie Y. Suslow, "The Changing International Status of Export Cartel Exemptions", *American University International Law Review*, Volume 20 no.4 (2005), P.794-795.

31 Claimed by Thai Representative and reported in World Trade Org., Rep. on the Meeting of 26-27 Sept. 2002, WTO Doc. WT/WGTCP/MI19, 6 (Nov. 15, 2002.)

trade and development. Thus, Export exemptions undermine international trade policies that promote greater market integration and freer international trade.[32]

SUGGESTIONS

The regulation of export cartels requires approach distinct from either existing hard-law or soft-law solutions. Hard-law agreements can be enforced through binding adjudications. In the case of antitrust, hard law among existing institutions means an export cartel ban through the WTO.[33] A "soft-law" solution includes the establishment of soft-law international antitrust organizations which will use norm creation and implementation to achieve compliance. OECD and ICN[34] work as a soft- law antitrust organisations. The regulation of export cartels is a mandate for this day and for regulation following suggestions are placed:

1. The most appropriate judge of the anti-competitive nature of an export cartel is in fact the importing state[35] A State that fights the incoming effects of an export cartel within its jurisdiction can act unilaterally – that is, take action based on its sole will. A State might take unilateral action based on hard-law measures or unilateral action based on soft-law measures.[36]

2. The cooperative action on export cartels is the action based on the will of two or more states. Depending on the number of the wills involved, the cooperative action can be bilateral, regional, plurilateral or multilateral.[37]

3. A multilateral agreement along the lines of a "reverse" anti-dumping agreement. Where the export prices would exceed some "normal value" – that is, the reverse of normal dumping – the importing state would be entitled to impose a sanction on the colluding foreign firms.[38]

4. There should also be a WTO export cartel body will also prevent breaching the multilateral agreement.

5. The WTO prohibition would also provide a policy lever to push for increased domestic policy change in export cartels and provide arguments for competition advocacy to limit any negative effects of such cartels.[39]

---

32 *Supra note* 27 at p.797

33 *Supra note* 7 at p. 975

34 International competition network (ICN) Cartel Working Group (CWG) is mandated "to address the challenges of anti-cartel enforcement, both domestically and internationally, across the entire range of ICN members and amongst agencies with differing levels of experience"

35 Brendan Sweeney, "Export Cartels: Is There a Need for Global Rules", 10 Journal Of International And Economic Law 1 (2007), p. 106

36 *Supra note* 18 at p. 349.

37 Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis, *The World Trade Organization: Law, Practice and Policy*, Oxford: Oxford University Press, 2006, p. 886.

38 Aditya Bhattacharjea, "Export Cartels – A Developing Country Perspective," 38 Journal Of World Trade 2(2004), p. 353

39 *Supra note* 7 at p. 982

6. To create a more effective policy to combat this potential problem requires a solution that reduces the information costs associated with understanding export cartels.[40]

CONCLUSION

The actual harm of the export cartels still remains unknown and there is a need of empirical research on the working of export cartels and its economic effects. Time and again the world has faced the evil effects of export cartels like Webb-Pomerene carteisation, soda ash export cartel, Potash cartel. The regulation of exports cartels is not possible in isolation. The entire member states of WTO shall work in collaboration to safeguard the interest of the importing countries especially developing countries and interest of the consumers.

*****

40 *Ibid.*

STANDARD OF PROOF: AN INSIGHT WITH REFERENCE TO CRIMINAL CASES

Ms. Aditi Malhotra*

ABSTRACT

The lead Prosecutor in the O J Simpson case[1] opined that the jury pronounced the verdict 'not guilty' only because they did not want to believe that there existed 'proof beyond reasonable doubt' in order to convict Simpson. However the definition of this term stands as ambiguous today as in 1880 when Woods, J attempted to give it clarity. It may be stated that the concept of 'reasonable doubt' entails the theory that whilst it is not possible to achieve absolute certainty, the highest level of certainty may be acceptable.

In the light of the above, the researcher would like to delve into the meaning of the term 'reasonable doubt', whether it is really possible to define it and to understand the burden of proof in case of reverse onus clauses.

INTRODUCTION

"[I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the fact finder cannot acquire unassailably accurate knowledge of what happened. Instead, all the fact finder can acquire is a belief of what probably happened. The intensity of this belief-the degree to which a fact finder is convinced that a given act actually occurred, can, of course, vary. In this regard, a standard of proof represents an attempt to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. Although the phrases 'preponderance of the evidence' and 'proof beyond a reasonable doubt' are quantitatively imprecise, they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions."[2]

A standard of proof is a question of law, considered to be an abstract norm, but the evaluation of this standard is a question of fact, that is, how the evidence produced by parties to a dispute applies to this abstract norm.[3] With respect to the

* Assistant Professor, Chanderprabhu Jain College of Higher Studies & School of Law; available at aditi5481@gmail.com & at 9999319570.

1 The People v. O. J. Simpson, 1995 WL 704381.

2 In Re Winship, 397 U.S. 358 (1970).

3 Christian Diesen, "Beyond Reasonable Doubt: Standard of Proof and Evaluation of Evidence in Criminal Cases", available at: *http://www.scandinavianlaw.se/pdf/40-7.pdf* (Last visited on

standard of proof, the legislature has omitted from framing a precise definition leaving this arduous task of the formulation of rules and principles for evidence appreciation and evaluation in the hands of the courts.[4] In the context of criminal cases, these guidelines that are present today have been developed from the numerous decisions undertaken by the judiciary over several years.[5]

BURDEN OF PROOF

Any law suits whether civil or criminal is decided on the basis of the principal of 'burden of proof', viz., the duty to persuade or as otherwise stated as the risk of non persuasion.[6] It may also be defined as the assertion of certain 'facts'[7] that determine the force of a contention.[8] According to Walton, "the burden of proof only makes sense in relation to a concept of argument as reasoned dialogue when there are two sides of an argument. As more weight is placed upon one side, the other side becomes relatively lighter. And as more weight is removed from one side, the other side may be viewed as having relatively more weight. The corresponding shift is indicated by the raising of the balance on one side and the lowering of the balance on the other."[9] The Apex Court in *Sher Singh v. State of Haryana,*[10] referred to a comprehensive definition of this term as elucidated in the Concise Dictionary as:

"The duty of a party to litigation to prove a fact or facts in issue. Generally the burden of proof falls upon the party who substantially asserts the truth of a particular fact (the prosecution or the Plaintiff). A distinction is drawn between the persuasive (or legal) burden, which is carried by the party who as a matter of law will lose the case if he fails to prove the fact in issue; and the evidential burden (burden of adducing evidence or burden of going forward), which is the duty of

---

14th April, 2016).

4 The Indian Evidence Act, Section 3 states that:
A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

5 *Ibid*.

6 J. P. Mc Baine, "Burden of Proof: Degrees of Belief", California Law Review, Vol 32 No. 3 (September 1944), 242-268.

7 Supra note 5, Section 3 states that 'the term Fact' means and includes:
(1) anything, state of things, or relation of things, capable of being perceived by the sense;
(2) any mental condition of which any person is conscious.

8 Supra note 5, Section 101 states that "whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that he burden of proof lies on that person."

9 Douglas N. Walton, Burden of Proof, available at, https://pdfs.semanticscholar.org/e7e9/e902e7fe7a1a0cfd0871a69e17078a1d52c9.pdf (Last Visited on 28th March, 2016).

10 AIR 2015 SC 980.

showing that there is sufficient evidence to raise an issue fit for the consideration of fact as to the existence or non-existence of a fact in issue."

In criminal cases, it is the prosecutor upon whom the burden of proof lies.[11] He must establish the guilt of the accused beyond reasonable doubt to triumph the case. All that the defence requires to prove is any weakness in the prosecution's premise.[12]

Usually, the duty of the prosecution is to prove the case by establishing a concurrence between the actus reus and mens rea. The State must discharge the evidential burden to substantiate the allegations contended. If this burden is not satisfies, the judge must acquit the accused. On the other hand, if the prosecution has convinced the judge that there exists a prima facie case, it must thereafter continue to satisfy the persuasive burden by proving its case beyond reasonable doubt.[13]

Thus, the norm defines the margin of error that has to be observed by the courts while evaluating the evidence presented to it based upon whether or not evidence verifying the guilt of the accused is strong enough to express his guilt in positive terms.[14] Personal, subjective and emotional skepticism shall not be sufficient to upset the prosecutor's thesis.[15] However, where the doubt is 'reasonable', the accused must be declared innocent. A reasonable doubt thus shall encompass certain characteristics that shall make it rational, concrete and relative according to the circumstances in every distinct case.[16]

The reason for such disparity in the standard of proof is often accorded to the presumption of innocence in favour of the accused that an innocent person must be not convicted even when that suggests allowing guilty persons to be at liberty.[17] However is this standard of proof beyond reasonable doubt truly an

11 Supra note 5, Section 102 states that, "the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."
Section 103 states that, "the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

12 In *T.N. Lakshmaiah v. State of Karnataka,* AIR 2001 SC 3828, it was held that under the Evidence Act, the onus of proving any of the exception lies on the accused though the requisite standard of proof is not the same as expected form the prosecution. It is sufficient if an accused is able to bring his case within the ambit of any of the general exceptions by the standard of preponderance of probabilities, as a result of which he may succeed not because that he proves his case to the hilt but because of the version given by him cases a doubt on the prosecution case.

13 *Sher Singh v. State of Haryana*, AIR 2015 SC 980.

14 Christian Diesen, Beyond Reasonable Doubt: Standard of Proof and Evaluation of Evidence in Criminal Cases, available at: *http://www.scandinavianlaw.se/pdf/40-7.pdf* (Last visited on 14th April, 2016).

15 *Ibid*.

16 Ibid.

17 Douglas N. Walton, Burden of Proof, available at, https://pdfs.semanticscholar.org/e7e9/e902e7fe7a1a0cfd0871a69e17078a1d52c9.pdf (Last Visited

ideal our criminal justice system so cherishes? Solan believes that the term 'proof beyond reasonable doubt' developed in the early nineteenth century to express the opinion that conviction by the jury shall be made when they were absolutely certain of the guilt of the accused.[18] Years later, this standard of proof rule is still followed for the very same reason.[19] Substantiating the same in *Brinegar v. United States,* it was held that:[20]

"[g]uilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common law tradition, to some extent embodied in the Constitution, has crystalized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property."

On the same lines, in *Davis v. United States,*[21] a conviction for the crime of murder was reversed because of reasonable doubt as to the capability of the accused. Justifying its stance, the court held that, "reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence- that bedrock 'axiomatic and elementary' principle whose enforcement lies at the foundation of the administration of our criminal law." Basing his judgment on the above mentioned verdicts, Brennan, J in In Re Winship, submitted that:[22]

"It is quite true that proof beyond a reasonable doubt has long been required in federal criminal trials. It is also true that this requirement is almost universally found in the governing laws of the States. And as long as a particular jurisdiction requires proof beyond a reasonable doubt, then the Due Process Clause commands that every trial in that jurisdiction must adhere to that standard."

However, Brennan, J further elucidated that while proof beyond reasonable doubt was a requirement of Due Process in terms of a fair trial, where the State legally adopted a different approach in tandem with the law of the land, the same could not be invalidated.

---

on 28th March, 2016). See also William Blackstone, Commentaries on the Laws of England.
Article 14(2) of the International Covenant on Civil and Political Rights that came into effect in 1976 states that:Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
Article 11(1) of the Universal Declaration of Human Rights, 1948 states that:
Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

18 Lawrence Solan, "Refocusing the Burden of Proof in Criminal Cases", 78 Texas Law Review 105 (1999).
19 Ibid.
20 338 U. S. 174.
21 160 U. S. 488.
22 397 U.S. 358 (1970).

PROOF BEYOND REASONABLE DOUBT

The required standard of proof is the same in all criminal cases but what is different is the requirement of evidence necessary for the court to be satisfied beyond reasonable doubt.[23] Proof beyond a reasonable doubt is often understood well but is not easily defined. It does not encompass proof beyond all possible doubt since everything related to lives of human being is not free from a possibility of doubt.[24] Thus, a charge is proved beyond reasonable doubt when there subsists, a highest degree of certainty as to the truth of such charge.

In *Victor v. Nebraska,*[25] O Connor, J., equated proof beyond reasonable doubt to a moral certainty. He also defined the term 'reasonable doubt' to mean a "doubt that would cause a reasonable person to hesitate to act."[26] Similarly, according to the United States (US) Supreme Court (SC) in *Cage v. Louisiana,*[27] it was upheld that:

"[A reasonable doubt] is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty."[28]

Therefore, reasonable doubt is not a mere possibility of a doubt or imaginary doubt but, it is the position taken after appreciation of the entire evidence that satisfies human reason and judgment. If upon consideration it is found that a reasonable doubt survives, the accused is entitled to the benefit of acquittal.[29]

However, the US Court of Appeals, Seventh Circuit in *US v. Charles W. Blackburn*[30], validated that to define the phrase was an impossible task since the phrase itself was self explanatory and could not be equated to any other. Any endeavor to identify a definition would be misleading and ambiguous. Moreover another significant issue pertains to the fact that the entire focus of the adjudicating party is upon 'reasonable doubt' and there is failure to focus upon 'proof' before 'doubts' crop up.[31]

23 Supra note 15.
24 Proof Beyond a Reasonable Doubt, available at: *http://www.mass.gov/courts/docs/courts-and-judges/courts/district-court/jury-instructions-criminal/2180-reasonable-doubt.pdf.*
25 511 U.S. 1 (1994).
26 Ibid.
27 498 U.S. 39 (111 S.Ct. 328, 112 L.Ed.2d 339).
28 Ibid.
29 Commonwealth v. Webster, 59 Mass. 295, 320 (1850).
30 992 F.2d 666.
31 Supra note 19.

The term 'proof' depends upon the admissibility of evidence. A fact is proved when the court believes it to exist or considers its existence so feasible that a prudent person shall act upon such supposition. Proof of the fact depends upon the degree of probability of its existence,[32] and a presumption is an inference of fact concluded from other proved facts. It only becomes a final conclusion when it remains undisturbed.[33]

It is often argued that this burden upon the prosecution is extremely high and indirectly helps the defence to escape liability. It has been acknowledged that the primary principle of criminal jurisprudence relates to the presumption of innocence of the accused unless rebutted by the prosecution by production of evidence and proving existence of certain facts so as to record a finding of the guilt of the accused. Once the same is established, it is upon the accused may be reasonably consistent to rebut such presumption. However, the onus on the accused is not as heavy and any material that is even slightly consistent with the innocence of the accused is enough to entitle him to an acquittal.[34] In the light of the above Krishna Iyer, J. in *Shivaji Sahabrao Bobade v. State of Maharashtra,* has observed that:[35]

"The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand special emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community."

V. R. Krishna Iyer, J. pronounced that the depravity in acquitting guilty personnel goes way beyond the fact that one guilty person has been let off without penalty. Unmerited acquittals portray a callous disregard to the law and results in a demand for stricter presumptions against the indicted persons. He goes further to declare that frequent unmerited acquittals shall lead to brutal punitive laws destroying the protection given to the faultless. A balance has to be struck between chasing enhanced possibilities as good enough to set the delinquent free and hacking the logic of preponderant probability to punish marginal innocents.[36] The US SC in *Patterson v. New York,*[37] has also held that they decline to adopt that, "a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative

32 M. Narsinga Rao v. State of Andhra Pradesh, AIR 2001 SC 318.
33 Ibid.
34 Kali Ram v. State of Himachal Pradesh, AIR 1973 SC 2773.
35 1973 SCC (Cri) 1033.
36 Ibid.
37 432 U.S. 197 (1977).

defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here."

Numerous authors have discussed the different perspectives on whether the term 'reasonable doubt' can be quantified or not and the manner in which such quantification shall be presented to a jury deliberating on the guilt of the accused. According to Judge Weinstein, proof beyond reasonable doubt would require a probability of guilt not less than ninety five percent.[38] Professor Tillers and Gottfried refer to its quantification in terms of odds, probabilities and chances. However, Jon O. Newman feels that there still exists ambiguity regarding the same. He believes that words such as 'odds, 'probabilities' and 'chances' are not clear to an average juror. Analyzing the opinion of Judge Weinstein, Newman avers that for some persons 'probability' may refer to a likelihood of a future event.[39] He gives the example of a coin toss, there is a fifty percent probability that heads may turn up. Substituting the term 'future event' for verdict or the sentence of the judge, he states that there are only two possible outcomes, viz., guilty or not guilty but the risk of understanding what 'probability' means in the context of a jury is much higher. He furthers his argument on the ground that few jurors may even think that if the accused was tried a hundred times, he would be found guilty ninety five times out of a hundred or if the evidence was presented to hundred jurors, ninety five of them find the accused guilty.[40] A similar situation exists with the terms 'odds' and 'chances'. Therefore he laments that the one cannot foresee how a juror would contemplate when faced with such instructions.[41]

Further, there are certain situations where in the burden of proof rests upon the defence per se. They are when the defence admits to the elements of the crime but claims special defence, the evidential burden lies upon him to prove his innocence, or when the defence asserts any of the general exceptions (as under IPC) and lastly where the statute itself places a persuasive burden on the defence.[42] The validity of such reverse onus clauses has been upheld by the courts in various cases such as in *State of West Bengal v. Mir Mohammad Omar,*[43] wherein the Supreme Court held that the doctrine of the burden of proof upon the prosecution shall not be taken to be a fossilized doctrine. If allowed to be wrapped in pedantic coverage, the offenders of serious crimes (Prevention of Corruption Act, 1988, Negotiable Instruments Act and Narcotic Drugs and Psychotropic Substances

38 Jon O. Newman, "Quantifying the Standard of Proof Beyond a Reasonable Doubt: A comment on Three Comments", available at: http://lpr.oxfordjournals.org/content/5/3-4/267.full.pdf (Last visited on 14th April, 2015).

39 Ibid.

40 Ibid.

41 Ibid.

42 Sher Singh v. State of Haryana, AIR 2015 SC 980.

43 2000 (8) SCC 382.

Act, 1985, 1881 etc.) would be at an undue advantage.

While dealing with the question of standard of proof upon the accused person with respect to reverse onus clauses, specifically under section 4(1) of the Prevention of Corruption Act, *V. Ramaswami, J. in V. D. Jhangan v. State of Uttar Pradesh,*[44] pronounced that:

"It is well-established that where the burden of an issue lies upon the accused, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt. That is, of course, the test prescribed in deciding whether the prosecution has discharged its onus to prove the guilt of accused; but the same test cannot be applied to an accused person who seeks to discharge the burden placed upon him under s. 4(1) of the Prevention of Corruption Act. It is sufficient if the accused person succeeds in proving a preponderance of probability in favour of his case. It is not necessary for the accused person to prove his case beyond a reasonable doubt or in default to incur a verdict of guilty. The onus of proof lying upon the accused person is to prove his case by a preponderance of probability. As soon as he succeeds in doing so, the burden is shifted to prosecution which still has to discharge its original onus that never shifts i.e., that of establishing on the whole case the guilt of the accused beyond a reasonable doubt."[45]

Supporting their decision, the three judge bench elaborated upon their verdict given in *Harbhajan Singh v. State of Punjab*,[46] wherein it was held that when the onus lay upon the accused to disprove a presumption that existed against him by virtue of statutory law, it may be compared to the onus on a party in civil proceedings, and just as in civil proceedings the Court trying an issue makes its decision by adopting the test of probability, so must a criminal court hold that the plea made by the accused is proved if a preponderance of probability is established by the evidence led by him.[47] The Supreme Court also in the above mentioned decision cited the famous remarks as observed in *Woolmington v. Director of Public Prosecutions*[48], that the principle that the State must establish guilt beyond all reasonable doubt was an imperative part of common law and any attempt to sabotage the same would be struck down.

Therefore, it may rightly be inferred that in a criminal trial, there is no absolute or fixed standard of proof and the examination as to whether the charges against the accused have been proved beyond reasonable doubt depend upon the facts, circumstances and the quality of evidence produced in every case.[49]

44 AIR 1966 SC 1762.
45 Ibid.
46 1966 Cri. L.J. 82 (SC).
47 Ibid.
48 (1935) A.C. 462.
49 State of West Bengal v. Orilal Jaiswal, AIR1994SC1418.
See also Sankar Sen, Proof beyond Reasonable Doubt, available at: *http://www.arsipso.com/PROOF-BEYOND-REASONABLE.asp* (Last visited on 14th April, 2015).

CONCLUSION

The Committee on the Reforms of Criminal Justice in its report has outlined that in actual practice, proof beyond reasonable doubt is relegated to proof beyond doubt in most cases. Ahmadi, J has observed that in most cases attention is focused on 'doubts' and their reasonableness instead of discovering the truth. When a large percentage of the criminal population is acquitted, the crime rate in the society tends to rise resulting in harm to the innocent citizens and anarchy everywhere. Proof beyond reasonable doubt clearly imposes an onerous task on the prosecution to anticipate every possible defence of the accused and to establish that each such defence could not be made out.[50] Proof beyond reasonable doubt puts an extremely high burden on the prosecution. Glanville Williams in this light observes that it is insufficient to place the burden upon the prosecution without specifying the degree or quantum of proof required to prove a conviction.[51] To this the Malimath Committee recommended a midway called 'clear and convincing' standard of proof, greater in weight than preponderance of probability and lesser than 'proof beyond reasonable doubt'.

Newman believes that if a jury is to be told that the standard of proof beyond a reasonable doubt has a numerical component, judges should eschew words like 'probability', 'odds', and 'chances', and simply explain that jurors may not convict unless they are convinced of guilt to a degree of certainty that exceeds some selected number on a scale of zero to hundred.[52]

*****

50 *Supra* note 2.

51 Ministry of Home Affairs, Government of India, Committee on Reforms of Criminal Justice System, March 2003, available at *http://www.mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/criminal_justice_system.pdf* (Last visited on 22nd April, 2016).

52 Supra note 39.

RIGHT TO GOOD ENVIRONMENT & SUSTAINABLE DEVELOPMENT: IN THE LIGHT OF COMPARATIVE STUDY IN INDIA AND NEPAL

Prof. Dinesh Babu* Mrs. Manju Kaur**

ABSTRACT

The right to good Environment is a fundamental right .and the protection of environment is a global issue and it is not an isolated problem of any area or nation. The problem of environment pollution in an increasingly small world concerns all countries irrespective of their size, level of development or ideology.

I. INTRODUCTION

Environment is the sum total of all conditions and circumstances affecting people's life and encompasses both the features and products of the natural world and those of human civilization. According to Justice P.N. Bhagwati[1], the term *'environment'* refers to the conditions within and around and organism, which affect the behavior, growth and development, or life processes, directly or indirectly. It includes the conditions with which the organism interacts.

Section 2(a) of the environment (Protection) Act, 1986 gives inclusive definition of the term *'environment'* which includes water, air and land and the inter-relationship which exists among and between water, air and land and human beings, other living creatures, plants, micro-organism and property.

Thus, environment refers to every thing around us whether biotic or a biotic. It not only includes the land, air and water; natural conditions, natural resources and all natural forces which while existing on this earth affect human life but also our built environment and the condition of our local amenity and neighborhood.

On the other hand, development is a complex issue containing economic growth as one of the elements wherein human being is both the subject and the beneficiary of the development process. Development is fulfillment of human needs including physical, security, status, autonomy, self actualization etc. It pertains to quality and

* Prof. Dinesh Babu, Vice Principal, Chanderprabhu Jain College of Higher Studies & School of Law, Narela, Delhi

** Mrs. Manju Kaur, Assistant Professor, BJR Institute of Law, B.U. Jhansi

1 B.C. Nirmal and P.C. Shukla, 'Sustainable Development, Human Rights and Good Governance', in J.L. Kaul et al (eds) Human Rights and Good Governance: International and National Perspectives, Satyam International, New Delhi, 2008,

is multidimensional and covers personal life, social relations, politics, economics and culture of the countries and regions concerned.

The capital-energy intensive, industrialization-oriented and high technology centered process of development led to the serious environmental and ecological degradation. In this way development process became direct threat to environment protection but 'human development' requires both the things 'development' and 'environment'. Therefore, the world community came out with a compromise which gives due respect to both the third generation human rights: right to development and right to environment in the form of "Sustainable development" and developed several international and regional instruments conferring legal validity to the concept.

India and Nepal which are the pioneers in environment protection have adopted the concept of 'sustainable development' in its municipal law by giving implicit or explicit recognition to the efforts made by United Nations and other organizations at international level.

In this backdrop, this paper aims to discuss the development of the principle of 'sustainable development' at international, regional, municipal levels and its recognition and application in India and Nepal. It also aims to make a comparative study of the approaches of both the nations towards the concept of sustainable development.

II. Sustainable Development under International and Regional Human rights Standards:

The term "Sustainable Development" is not easy to define. It has taken on whatever meaning speakers have needed to promote their cause. Indeed, it is the ambiguity of the term which has made it so widely acceptable in environmental diplomacy. In the beginning the term stood for sustained economic growth or growing the moving business. It then slowly moved into a combination of environmental conservation and economic growth 'Caring for the Earth: A Strategy for Sustainable Living' stated that sustainable development depends upon accepting a duty to seek harmony with other people and with nature.

The expression 'sustainable development' is now used to refer to an integrated approach to policy and decision making in which environmental protection and long term economic growth are seen not as incompatible but as complementary, indeed mutually reinforcing. In other words, it is the negation of traditional concept that development and ecology are diametrically opposite to each other.

As far as the UN concerns with sustainable development are concerned, they may traced to the UNGA resolution 1831 (1962) which urged governments to undertake natural resource preservation and G.A. resolution of 1968 in which Assembly pledged to find solutions/to problems related to the environment but it

gained foothold in international law[2] when the Brundtland Report (1987) coined a new term ***sustainable development'*** to describe it. The Report titled "Our Common Future', which is considered to be the Bible for sustainable development proposed a definition of sustainable development that became a general starting point for building a worldwide consensus on its meaning.

It states that sustainable development that ***'meets the needs of the present without compromising the ability of future generations to meet their own needs.'*** The Rio Conference reaffirmed the Brundtland Report's central message: socio-economic development and the environmental protection are intimately connected and effective policy must tackle them together.

The Rio Declaration[3] states the principle as the merger of environmental and economic concerns and 'places environmental concerns firmly within the context of growth'. In order to achieve sustainable development, environmental protection shall constitute integral part of the development process and cannot be considered in isolation from it'.

The salient features of sustainable development, according to the Rio-Declaration are: inter-generational equity, use and conservation of natural resources, environmental protection, the ***'precautionary principle'[4], polluter pays principle,*** obligation to assist and cooperate in the eradication of poverty, financial assistance and technology transfer on concessional rates to developing countries[5].

The complex agenda of sustainable development has gained wide acceptance in the year since Rio, although, the progress in achieving it is very slow. There are in fact a host issues related to sustainable development which need imaginative and innovative policy initiatives, plans, programmes and strategies at the national, regional and international levels trade and environment. These are patterns of production and consumption, poverty reduction, current demographic dynamics, financial resources and mechanisms, education, transfer of environmentally sound technologies, environmental capacity building, decision making and activities of the private and public sectors, civil society, groups and participation of the stockholders in the design, formulation and implementation of sustainable

2 ILM, 31 (1992), 874. The role of international law in sustainable development is recognized in a number of international instruments:18th UNGA Special Session on International Economic Cooperation (1990); The Vienna Declaration and Programme of Action (1993);….. see also Dorfman and Dorfman (eds) **Economics of the Environment: Selected Readings,** Norton and Co, New York, 1993; Lele Sharach Chandra M, 'Sustainable Development: A Critical Review, 'World Development, vol 19, no. 6, pp 607-621;

3 See generally, B.C. Nirmal, 'From Vellore to Nyadu: the Customary Law Status of the Precautionary Principle', the Banaras Law Journal, (2001), 58-59

4 See generally, B.C. Nirmal, 'From Vellore to Nyadu: The Customary Law Status of the Precautionary Principle', The Banaras Law Journal, (2001) 58-99

5 For details of the Rio Principles see B.C. Nirmal, 'Regulating Transboundary Movement of Hazardous Wastes', in S. Bhatt and A. Mazid (eds.) Environmental Management and Federalism (2002) 135-180, esp., 152-156.

development policies[6].

The Johanesburg Summit[7] expanded the concept of sustainable development by underscoring the necessity of a better integration of three pillars of sustainable development namely, economic development, social development and environmental protection. It reaffirmed sustainable development as a central element of the international agenda and gave new impetus to global action to fight poverty and protect the environment.

The Summit recognized that 'poverty eradication', changing consumption and production patterns and protecting and managing the natural resources base for economic and social development are overarching objectives of are essential requirements for sustainable development'[8]. The Summit also identified the following challenges to sustainable development; chronic hunger, malnutrition, foreign occupation, armed conflicts, illicit drug problem, organized crime; corruption, natural disasters, illicit arms, trafficking in persons, terrorism, intolerance and incitement to social, ethnic, religious and other hatreds; xenophobia, and endemic, communicable and chronic diseases, in particular HIV/AIDS, malaria and tuberculosis[9]. These issues are to receive priority attention of the international community. The Summit also resolved through decision on targets, time-tables and partnerships to 'speedily increase access to basic requirements such as clean water, sanitation, adequate shelter, energy, health-care, food security and the protection of bio-diversity'[10].

In Johannesburg Governments agreed to and reaffirmed a wide range of concrete commitments and targets for action to achieve more effective implementation of sustainable development objectives. Although the outcome of the Summit has not at all been impressive, it has undeniably created a better understanding of the concept of sustainable development and there is now an increased awareness that if the planet Earth has to survive, vital survival issued must be tackled sooner than latter.

The concept of sustainable development was further defined in Article 3(1)(a) of the Convention for Co-operation in the Protection and Sustainable Development of the Marine and Coastal Environment of the North Pacific[11].

6 B.C. Nirmal and P.C. Shukla, supra 2, p 4

7 See Johanesburg Declaration on Sustainable Development, the Report of the World Summit on Sustainable Development, Johanesburg, South Africa 26 Aug. -4 Sept. 2002 A/CONF. 199/20 New York, United Nation, 2002, See also Johanesburg Plans of Implementation, Report of the World Summit on Sustainable Development. Johanesburg, South Africa, 4 Sept., 2000, UN Doc./Al Conf./199/20. For results of this World Summit see, Segger and Khalfan, n. 2, Ch. 2.

8 The Johanesburg Declaration, para 11.

9 ID., para 19.

10 Id., para 18

11 As quoted in IUCN, Draft International Covenant on Environmental Development (2004). The concept of 'environmental services' is linked with sustainable development. According to the Antigua Convention, 2002 it means the services provided by the function of nature itself, such as the protection of soil by trees, the natural filtration and purification of water, and the protection

'For the purpose of this Convention sustainable development means the process of progressive change in the quality of human beings, which places it as the centre and the primordial subject of development, by means of economic growth with social equity and the….. without prejudice to and ensuring the quality of life of future generations.'

In recent years the idea of sustainable development has found recognition in a number of treaties like the UN Framework Convention on Climate Change, UN Convention on Biological Diversity, Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa and the regional sustainable development treaties such as the 2002 Antigua Convention for Cooperation in the Protection and Sustainable Development of the Marine and the Coastal Environment of the North East Pacific[12].

In addition to the above, international courts and tribunals have also recognized sustainable development goals and instruments. For instance, the International Court of Justice in the *Gaickovo-Nagyamaros* case[13] invoked the concept of sustainable development in order to reconcile environmental protection and the need for economic development. In this case the Court observed:

"Throughout the ages, mankind has for economic and other reasons, consistently interfered with nature……. In particular, they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side arms on both sides of the river". The WTO Appellate Body also has opined that the concept of sustainable development has generally been accepted as one integrating economic and social development and environmental protection[14]. The concept has also been invoked before national courts and tribunals around the world[15]. As a result of legal developments in the field of sustainable development in the last few years, a substantive body of legal norms has emerged. The emerging law of sustainable development is also found in a series of 'soft law instruments'[16] such as the Rio Declaration, The Stockholm Declaration, the Forest Principles adopted at UNCED, 1989 UNEP London Guidelines for the Exchange of Information on Chemicals in International Trade or the 1985 FAO International Code of Conduct on the distribution and use of Pesticides and the 1990 FAO guidelines on the operation of prior informed consent. Though not legally binding

of habitat for bio-diversity (Art. 31C).

12 Treaties related to or having a bearing on the environment and sustainable development include inter alia Charter of the United Nations, 1945.

13 The Gaibcikovo – Nagyamaros Case ICJ Reports : 1997, at p. 78)

14 United States: Import Prohibition of certain Shrimp and Shrimp products (20 Sept. 1999) WT/DS/58/AB/R (Appellate Body Report), WT/DS58/R (Panel Report), at para 129 and note 107

15 For judicial decisions of foreign courts see Bulankulama v. The Secretary, M9inistry of Industrial Development (2000), Sri Lanka Supreme Court; Shebla Zia and Others v. WAPDA (1997l, Pakistan Supreme Court and LCB v. United Kingdom (199) 27 ECHR cited in Segger & Khalfan, n. 2 at 96.

16 Stockholm Declaration, 1972.; ILO Declaration on Fundamental Principles and Rights at Work, 1998. UN Millennium Development Goals, 2000; Doha Ministerial Declaration (the Doha Development agenda), 2001;

these soft law instruments are persuasive and influence the behavior of states.

Efforts have also been made by the International Law Association, IUCN and other bodies to identify general substantive and procedural principles of international law for sustainable development[17]. The ILA Declaration of Principles of International Law relating to Sustainable Development (2002), New Delhi for example provides a useful starting point.

The Declaration has identified the following principles of international law relating to sustainable development. (i) the duty of states to ensure sustainable use of natural resources (ii) principle of equity and the eradication of poverty, (iii) the principle of common but differential responsibility, (iv) the principle of the precautionary approach to human health, natural resources and ecosystems (v) the principle of public participation and access to information and justice, (vi) the principle of good governance and (vii) the principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives. Notwithstanding the existence of a substantive body of international norms relating to sustainable development, the question of the legal status of the concept of sustainable development is a hotly debated issue.

According to first view, sustainable development has not become a customary norm of international law. Gunther Handl, for instance argues: *'(n)ormative uncertainty, coupled with the absence of justiciable standardsfor review, strongly suggest that there is as yet no international legal obligation that development must be sustainable'*[18] . For the same reasons he rejects the suggestion that sustainable development constitutes *jus cognes*[19]. According to another view, there is 'wide and general acceptance by the global community of sustainable development and emerging global consensus on the need to strengthen international law on sustainable development'[20].

The third view sees *'sustainable development as an emerging area of international law in its own right'* or as a different types of norms which *'facilitates and requires a balance and reconciliation between conflicting legal norms relating to environmental protection, social justice and economic growth'*[21].

In the first sense sustainable development law could be described as a corpus of international principles and treaties that address the areas of intersection

17 See ILA Report, of the Seventieth Conferences New Delhi. (London, ILA, 2002), Available online, http://www.ila.hq.org.

18 G. Handl, "Environmental Security and Global Change: The Challenge to International Law". YBIEL(1990) cited in Segger & Khalfan 2 at p. 46.

19 Handl, 'The Legal Mandate of Multilateral Development Banks as Agents for Change towards Sustainable Development', AJIL, 92 (1998), 641. See also Vaughan Lowe, 'Sustainable Development and Unsustainable Agreements', in A. Boyle and D. Freestone (eds.), **International Law and Sustainable Development: Past Achievements and Future Developments** (Oxford, 1999), p. 16.

20 *Gavcikovo-Nagyamaros Case*, ICJ, Rep. 1997, 78.

21 Segger & Khalfan, n. 2 at 47.

between international economic law, international social law and international environmental law[22]. On the other hand, sustainable development as a different type of norms may be described as a meta principle – a legal concept of 'interstitial normatively which provides the basis for effecting reconciliation' between the conflicting norms of the aforesaid three branches of international law in the interest of present and future generations so that development can be sustainable[23].

Although there is doubt regarding the existence of a legally binding 'principle of sustainable development', yet there is no doubt about the growing body of international law in the field of sustainable development[24]. This law derives 'a significant amount of normative power for its negotiated, incremental acceptance among states, as well as a wide variety of other actors and interest groups'[25].

While some progress toward sustainable development has been made, for example, in curbing pollution and slowing the rate of resource degradation in a number of countries, overall trends tend toward continued deterioration[26]. The planet's health is generally worse than ever and 'the spirit of Rio is in serious jeopardy'. The global environment continues to suffer. Loss of biodiversity continues, fish stocks continue to be depleted, desertification claims more and more fertile land, the effects of adverse climate change are already evidence, natural disasters are more frequent and more devastating developing countries are more vulnerable and air, water and marine pollution continues to rob millions of a decent life.

Global sustainable development requires a fair and equitable new international economic order. But the processes of economic globalization which began since early 1990's continue to present new challenge to the developing countries in the area of funds, trade and debts, which in turn seriously hamper their capabilities for sustainable development[27]. As aptly stated by Mr. Yashwant Sinha (the then) Indian Foreign Minister, 'it is difficult to pursue enlightened approaches of development in a world where ODA levels are falling, protectionism is on the rise, terms of trade are stacked in favour of the rich, debt burdens have spiraled, corporate governance need urgent redefinition, and the volatility of international capital transfers has affected productive investment flows to the South[28].

The obduracy of the US administration on the issue of the ratification of the Kyoto Protocol and the continuous efforts of the leading nations to dilute and sideline their historical and current responsibility in the deterioration of the environment

22 Ibid
23 B.C. Nirmal and P.C. Shukla, supra 2, at 11
24 Segger and Khalfan, n. 2 at 50.
25 Ibid
26 See Programme for the Further Implementation of Agenda 21, U.N.G.A. Res. S-19/2, Annex (June 28, 1997), I.L.M. 36 (1997).
27 The Johanesburg Declaration, 2002, para 13.
28 Statement of the then Finance Minister Mr. Yashwant Sinha quoted in M. Hussain, K.S., World Summit on, Sustainable Development, Johanesburg, 'An Appraisal', IJIL, 42 (2002) 348 at 357, no. 28. See B.C. Nirmal and P.C. Shukla, supra 2, at 11

and also the core principle of the Rio Declaration constitute serious impediments on the path of sustainable development.

It is important to note here that sustainable development is not only about protection, conservation and preservation of the environment and sustainable use or sustained economic growth, it is in fact, a much wider concept than environmental protection and is situated at the intersection of three fields of international law namely, international human rights law (including humanitarian law and international social development agreements) and international economic law (including international trade law, international competition law, international investment law, law of international economic integration)[29]. The concept of sustainable development thus integrates economic environmental and social priorities. Since not all rules of international law in these areas need to be integrated, the concept of sustainable development refers to a specific, narrower set of legal instruments and provision where environmental, social and economic consideration are integrated of varying degrees in different circumstances. Thus the principle of integration is the essence of the concept of sustainable development.

As can be seen from the above, the concept of sustainable development embraces a wide range of issues, such as poverty eradication, sustained use of natural and other resources and equitable sharing of benefits. It aims at empowering human beings and their communities to improve their quality of life. It must also be recognized that peace, development, environmental conservation and respect for human rights and fundamental freedoms are interdependent. Further, both environmental protection and development can be achieved only when human rights are respected. Likewise, sustainable development depends on respect for human rights.

III. Sustainable Development in India:

India is one of the countries which not only recognized but applied the internationally recognized principle of 'sustainable development' in its municipal spheres. Although there is no specific provision in law of the land i.e. the Constitution of India providing protection to the 'environment' and reinforcing 'sustainable development' yet there are constellation of provisions taking together are sufficient enough in ensuring protection such as Articles 48A, 51(A)g, 48, 14, 19, 32, 226, 21, entries 17, 17A, 17B of List III of Schedule 7.

Out of these constitutional provisions Article 21 is remarkable which includes all the finer graces of human civilization and thus embraces environment also and thus the credit goes to Indian judiciary to incorporate the internationally recognized 'right to environment' under domestic domain by following principle of 'incorporation'. Further, the Indian judiciary recognized the principle of

29 Segger and Khalfan, n. 2, p.103. See also McGoldrick 'Sustainable Development and Human Rights: An integrated Conception', ICLQ, 45 (1996), 796.

sustainable development as a part and parcel of Indian law in a series of cases and also elevated it to the status of a Fundamental Right implicit in Article 21 (right to life and personal liability) of the Indian Constitution[30]. In ***M.C. Mehta vs. Union of India***[31], the court stated in following words:

Development and protection of environment are not enemies…….. In case of doubt, however, protection of environment would have precedence over the economic interest.

Similarly, in ***N.D. Jayal vs. Union of India***[32], the court emphasized on the symbiotic relationship between right to environment and right to development and held:

The adherence to sustainable development is sine qua non for the maintenance of the symbiotic balance between the rights to environment and development. The right to environment is a fundamental right. ….. The weighty concepts like intergenerational equity, public trust doctrine and precautionary principle which have been declared as inseparable ingredients of our environmental jurisprudence could only be nurtured by ensuring sustainable development.

Thus in India, sustainable development has become part of environmental law along with certain other principles such as public trust doctrine, polluter pay principle, precautionary principle, which are interrelated to each other.

Subhash Kuamr vs State of Bihar (AIR 1991 SC 420) The Hon'ble Court held that public interest litigation is maintainable for ensuring enjoyment of pollution free water and air which is included in the "right to live".

Rural Litigation and Entitlement Kendra v. Stat of U.P. (1985 2 SCC 431) the Court ordered the closure of certain lime stone quarries on the ground that there were serious deficiencies regarding safety and hazards in them and Protection of Ecology and Environmental Pollution. *Shiram Food and Fertilizer case (M.C. Mehta v. Union of India, (1986) 2 SCC 176* the Supreme Court directed the company manufacturing hazardous and lethal chemicals and gazes posing danger to health and life of workmen and people living in its neighborhood, to take all necessary safety measures before reopening the plant.

IV. Sustainable development in Nepal:

Nepal is the landlocked country bordering between the most populous countries India to the east, south and west and Chine to the north. Ecologically the country is divided in three geographic regions viz. the northern range which comprised

30 Gotham Construction Co. v. Amulya Krishna Ghose AIR 1968 cal. 91; Om goving Singh v. Shanti Swarup AIR 1979 SC 143;RLEK v. State of U.P. AIR 1988 Sc 2187; M.C. Mehta v. U.O.I, AIR 1987 SC 985;

31 (2004) 12 SCC 118

32 (2004) 9 SCC 362

of the high Himalayas including Mount Everest, middle range is captured by gorgeous mountains, high peaks, hills, valleys and lakes, the southern range (Terai) is captured by gigantic plain of alluvial soul and dense forest area, national parks, wild life reserve and conservation. Nepal is the paradise for its climatic diversity and water resources with a perennial source at different mountains, hills and Himalayan regions in the north[33].

In Nepal natural resource has been the main means of livelihood for majority of poor, disadvantaged, landless and marginalized rural people like other developing countries[34]. As per being the developing countries the developmental activities also started in Nepal in order to have economic independence but these activities confronted with the natural bounties of Nepal.

Environmental right and justice cannot be separated from civil rights although environmental right along with other social, economical and cultural rights were not included in fundamental constitutional rights in Constitution of Nepal but courts and judicial bodies have established a trend to ensure the right to live in safe and healthy environment while solving many issues related to degrading environment limiting the right of life[35].

The Supreme Court recognized environmental problem under public interest litigation and delivered many environmentally friendly decisions and principles. One of the most important cases on this aspect is the case of *Surya* ***P Sharma Dhungel vs Godavari Marble Industries Pvt Ltd (1994).*** In this case petitioner alleged that the respondent is destroying the ecology of Godavari hill and thereby threatening the biodiversity of the valley by its marble mining operation. The SC of Nepal issued a verdict to the respondent to apply necessary mechanism for effective environment protection[36] and emphasized upon the favorable treatment of sustainable development in Nepal. The court held that[37]:

'...since a clean and healthy environment is an essential element for our survival,

33 Kanak Bikram Thapa, 'A Brief Survey of Nepalese Legal System', Soochow Law Journal, vol. III, 2006, pp 202-226 at 202; For natural resources and economic development in Nepal, see D Pearce, Edward B Barbier, Anil Markandaya, **Sustainable Development, Economics and Environment in the Third World**, Earthscan Publication, Great Britain, pp 168-188

34 S. Ghimire, 'Concept of environmental justice in Nepal; Environmentalism of poor for sustainable livelihood,' Himalayan Journal of Sciences, I(I), 2003, pp 47-50 at 47; see also Madan K. Dahal et al **Environment and Sustainable development: issues in Nepalese Perspective,** Kathmandu, Nepal, 1993

35 Ibid; see also K. Shrestha, 'Fundamental right for clean environment and environmental justice,' in N. Belbase and C. Bhattarai (eds) Environmental Law and Justice, IUCN, Nepal, 1998. In 1993 Nepal legislated National Environmental Impact Assessment Guidelines, see V.S. Mani, 'Environmental Law in South-Asia: An Overview, The Banaras Law Journal,vol. 30, 2001, pp 15-38 at 29-30

36 ibid

37 Surya P. Subedi, 'Incorporation of the Principle of Sustainable Development into the Development Policies of the Asian countries,' Environmental Policy and Law, vol. 32/2, 20023, pp 85-89 at 88

the right to life encompasses the right to a clean and healthy environment. Article 26(4) of the Constitution of the Kingdom of Nepal serves as a confirmation of the fact that the constitutional circumstances under which the application was made have been substantially changed.....It seems to be quite essential to have environmental laws enacted and implemented to protect the environment in an effective manner'.

The court then concluded that:

'...both the country and the society need development, but at the same time it is necessary to maintain a sound environment along with the industries. It is necessary to maintain a fine balance between the priority for environment protection and the need to give continuous momentum to developmental activities……. ..., it is in keeping this fact in view that measures have to be adopted to prevent harm to the environment[38]'.

The second case of environmental significance decided by the SC is the case concerning the Arun III hydroelectric power project (***Gopal Siwakoti vs Ministry of Finance, 1993).*** The Nepalese Government had plans to build a huge hydroelectric power plan in a remote hilly district of Nepal to harness water from river Arun. It was going to be a biggest project in Nepal. Some NGOs alleged that it would have long term environment impacts and demanded information regarding project. The matter reached to the Supreme Court. The court held that the séance the question concerning Arun III were matter of public concern the applicants had a right to seek the intervention of the court. Accordingly, the court found that the demand about the information relating to Arun III form Governmental Department was in accordance with the provision of the Constitution relating to the right to information[39].

Another case of wide significance is *Prakash Mani Sharma and Others vs His His Majesty's government, Cabinet Secretariat and Others[40],* in which while, arguing that the right to live in a healthy environment is protected under the Constitution of the Kingdom of Nepal of 1990, the Environment Protection Act of 1997, and the Traffic and Transportation Management Act of 1992, petitioner demands the court to quash a government decision allowing unfettered import of diesel taxies from India and to issue a mandamus for protecting the environment by relying upon the reasoning that a government decision allowing the import of diesel vehicles, unscientific registration and operation systems of vehicles, and unrestricted importation of leaded petrol are resulting in negative impact upon human health and ultimately jeopardize the existence of the historical, cultural, and archaeological significance of the Katmandu Valley.

Disputing the petitioner's demand, the respondent Cabinet Secretariat et al. argue in their written statements that His Majesty's Government has already decided on

38 ibid
39 Id at 89
40 WP 2237/1990 (2003.3.11)

13 May 1996 to direct the concerned ministry to make proper arrangements to disallow the operation of diesel vehicles; what type of vehicles should or should not imported is a policy matter to be decided by the government; His Majesty's Government is actively formulating and implementing policies, programs, laws and regulations concerning population and environment; considering the environmental seriousness of Katmandu; all the relevant government agencies are working hand in-hand to mitigate vehicular pollution; that is why the writ petition must be quashed.

Thus responding to three main issues (i) Is the court entitled to ask the government to adopt particular measures for reducing pollution? (ii) Can environmental protection be ignored in the name of development? (iii) Does the enjoyment of personal liberty under Art 12(I) require a pollution-free environment?

The Court held that a healthy environment is a prerequisite for the protection of the right to personal freedoms under the Constitution: that is why the state has a primary obligation to protect the right to personal liberty by reducing environmental pollution as much as possible. Relying on the concept of sustainable development, the court went on to say that environment and development should proceed harmoniously and environmental protection cannot be ignored for the sake of development. Finally, taking into account the lack of implementation of its previous judgments, the court issued a directive of enforce essential measures within a maximum of two years in order to reduce vehicular pollution in Kathmandu Valley.

Thus judiciary recognized the principle of sustainable development principle and incorporated it in its municipal law. Later on when interim constitution came in 2007 after coup in Nepal, environmental related provisions got explicit recognition.

Interim Constitution of Nepal

Article 16(1) of the Fundamental rights chapter reads: Every person shall have the right to live in clean environment Article 33(g) of Part IV of the Constitution obligates State to follow a policy of protecting and promoting national industries and resources. Similarly, Article 33(o) directs State to use existing natural resources for the interest of nation and Article 35(5) enjoins upon state to make necessary arrangements to maintain clean environment. The State shall give priority to the protection of the environment, and also to the prevention to its further damage due to physical development activities by increasing the awareness of the general public about environmental cleanliness, and the State shall also make arrangements for the special protection of the environment and the rare wildlife. Provision shall be made for the protection of the forest vegetation and biodiversity, its sustainable use and for equitable, distribution of the benefit derived from it.

V. Concluding Observation

The general tendency of the human kind is to protect and secure present as well as future generations by saving valuable things either in cash or in kind for coming generations but it is not so with regard to earth or environment because of lack of similar sensitivity towards nature. The over exploitation of natural resources due to unbridled use of scientific and technological advancements resulted into eco-imbalances and environmental degradation and ultimately all these changes cumulatively started affecting adversely nature, animals and human beings equally. Hence a notion build up that development and ecology are opposite to each other or development is inversely proportional to ecology/environment.

The concept of sustainable development negates the above notion and tries to establish an integral relation between environment and development so that both can go together but it goes beyond environmental conservation and consists of economic development, social development and environmental protection. Situated at the intersection of international environmental law, international social law including human rights and international economic law, this concept of sustainable development calls for integration of social, economic and environmental concerns and aims to bring out a progressive change in the quality of life of the majority of the human race, which presently lives in bitter poverty and inhuman conditions. While as an objective or goal to be achieved by humankind sustainable development means economically and ecologically sustainable development, it also involves a continuous process for the progressive change in the quality of life of human beings by jointly addressing economic, environmental and social issues whilst avoiding the over consumption of key natural resources[41].

Sustainable Development has been recognized by both India and Nepal in there respective municipal laws firstly by the efforts of judiciary but interim constitution of Nepal is more advance in giving protection to environment than India and it has made right to live in clean environment and thus given a constitutional base to Sustainable development whereas in India sustainable development is a part and parcel of Indian Law but only because of the wider interpretation of Article 21 which talks about right to life and personal liberty.

No doubt judiciary is playing vital role in resolving environmental issues but the nature of the problem calls for better solution. In this context legislative bodies should come with better framework and most important thing is people's awareness towards environmental issues and their participation[42] in the events of environmental conflicts in a systematic and non-violent manner.

41 B.C. Nirmal and P.C. Shukla, 'Sustainable Development, Human Rights and Good Governance', in J.L. Kaul et al (eds) **Human Rights and Good Governance: International and National Perspectives,** Satyam International, New Delhi, 2008, pp 1-31 at 30

42 For detail study see B.C. Nirmal and Prakash C. Shukla, 'Public Participation in Decision Making: International Standards and Indian State Practice, *'Fifth International Conference Papers,* vol. II, Indian Society of International Law, 2007, pp 693-702.

Suggestions:

i. More emphasis on public participation should be given in developmental projects;

ii. Right to information can be an effective weapon in this context;

iii. Environmental education and awareness is essential for sustainable development;

iv. The Civil society groups should take up the issue seriously and not for populism only;

v. Careful and sustainable use of natural resources;

vi. Use of resources having less impact on environment should be encouraged.

*****

➢ Guidelines for Submission of Articles in CPJ Law Journal [Vol. VI]

The *CPJ Law Journal* requests the contributors to comply with the following guidelines:

Submissions

The Journal is accepting contributions for Articles, Essays, Notes and Comments (Case Comments, Book Comments, Legislative Comments, Policy Comments and Scholarship Comments). Contributions should be sent by post along with CD (RW) of the same in MS word and also by E-mail id.

Covering Letter

All submissions must be accompanied by a covering letter stating the title, author's full name, designation, institute they belong and postal address and the author's contact details. Only the covering letter should contain the above mentioned details and not the manuscript.

Manuscript

- **Main Text** – Times New Roman, font size 10, 1.15 spacing, justified, with a margin left 1.5 inch and right 1.0 inch, top 1.0 inch and bottom 1.0 inch.
- **Foot Notes** – Times New Roman, font size 8. Substantive foot notes are accepted.
- **Citation** – The standard ISI method of reference would be maintained.

Plagiarism

All the contributions should be the original work of the contributors and should not have been submitted for consideration in any other Journal. The author would be liable for any Legal issue arising out of plagiarism.

Copyright

The contributions presented to and accepted for publication and the copyrights therein shall be the intellectual property of the Chanderprabhu Jain College of Higher Studies & School of Law. Every article/comments/notes etc. received for publication will be edited for general suitability of publication byEditorial Board.

Paper finding place in the Journal will be duly communicated to their authors.

Contact: For any clarifications, please mail us at:

Editor: cpj.lawjournal@gmail.com

।। विद्या परमं तपः।।

CPJ

Group of Institutions

GATEWAY TO KNOWLEDGE

(Affiliated to Guru Gobind Singh Indraprastha University, Delhi)

Plot No. OCF, Sector A-8, Narela , Delhi- 110040

Ph: +91-11-27284333 / 34 Fax: +91-11-27284335

Toll Free No.: 1800117677

Website: www.cpj.edu.in Email: cpj.chs@gmail.com

For suggestions mail at: cpj.lawjournal@gmail.com