

THE

BANARAS LAW JOURNAL

THE BANARAS LAW JOURNAL

Cite This Issue

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Vol. 43 No.1 *Ban.L.J.* (2014)

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Composed and Printed by Raj Kumar Jaiswal, Dee Gee Printers,
Khojwan Bazar, Varanasi-221010, U.P., (India).

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(The Founder of Banaras Hindu University)



(25.12.1861 - 12.11.1946)

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- Madan Mohan Malaviya

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**THE
BANARAS LAW JOURNAL**

Vol. 43 No. 1 ISSN 0522-0815 January- June 2014

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PUBLIC POLICY EXCEPTION IN ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN INDIA

DK Sharma*
Mayank Pratap**

Abstract

The concept of public policy has been a topic of serious debate. The narrow construction of the public policy clause with regard to foreign award was the first mandate of the Supreme Court in Renuagar. The Supreme Court had explicitly stated that the expression “public policy” with regard to a foreign award does not cover the field covered by the words “laws of India”. But the Supreme Court opened the possibility of challenge to a foreign award in India as if it was a domestic award, through Bhatia International and Venture Global, under Section 34 of the Act, making it difficult to avoid prolonged litigation while enforcing foreign awards in India. However in BALCO and subsequently through its decision in LalMahal the Supreme Court has been able to secure the sanctity of a foreign award and remove obstacles to its enforcement in India. This paper provides an interim update of the growing pro-arbitration story in India. Though a series of judicial decisions in the first decade of the new millennium showed lack of pro-arbitration approach by the Indian judiciary while interpreting arbitration laws, the trend has now changed and Indian courts are increasingly adopting a pro-arbitration approach.

Key Words: Arbitration, Public Policy, the Indian Arbitration and Conciliation Act of 1996, Foreign Arbitral Award.

I. INTRODUCTION

Arbitration¹ is one of the most successful and flexible form of dispute resolution. The history of arbitration as an informal mechanism of dispute settlement in the Asian continent including India can be traced back to ancient times². Until *the Indian Arbitration and Conciliation Act* of 1996 (“the 1996 Act”) was passed the law governing arbitration in India

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- 1 As per section 2(a) of the Act “arbitration” means any arbitration whether or not administered by permanent arbitral institution; ‘Arbitration’ means, a process of dispute resolution in which a neutral third party called arbitrator, renders a decision after a hearing at which both parties have an opportunity to be heard: Black’s Law Dictionary, 6th edn. (1990), West Publishing Co. p.105.
2. See Simon Greenberg et al., international commercial arbitration: an asia pacific perspective, (2011).

consisted mainly of three statutes: (i). The Arbitration (Protocol and Convention) Act, 1937 (“1937 Act”) (ii). The Indian Arbitration Act, 1940 (“1940 Act”) and (iii). The Foreign Awards (Recognition and Enforcement) Act, 1961 (“1961 Act”) The Arbitration Act, 1940, dealt with only domestic arbitration and during its tenure intervention of the Court was required in all the three stages of arbitrations in India, i.e. prior to the reference of the dispute to the arbitral tribunal, in the duration of the proceedings before the arbitral tribunal, and after the award was passed by the arbitral tribunal. To address these concerns and with a primary purpose to encourage arbitration as a cost-effective and time-efficient mechanism for the settlement of commercial disputes in the national and international sphere, India in 1996, adopted a new legislation modelled on the Model Law in the form of the Act. One of the reasons why arbitration has become so popular is that it allows parties to choose the location of dispute resolution, the adjudicative bodies, substantive and procedural bodies of law to apply to future potential conflicts. The International business community all across the globe has accepted international commercial arbitration³ as an effective mechanism for resolving its commercial disputes. All the major economies are now capable of emulating their western counterparts, having updated their national legislations and established world class arbitration centres. However, the credibility of an arbitral regime depends more on the attitude of the national courts. This is because arbitrations are regulated pursuant to national laws and, accordingly, have a close relationship with the national courts. In this context, especially in relation to the concept of public policy in international arbitration and enforcement of foreign awards in India the diverse approach taken by national courts which are highly debated, controversial and complex subject.

II. FOREIGN ARBITRAL AWARD

An arbitral award made in the territory of state other than the state where the recognition and enforcement of the award is sought is a foreign arbitral award. If the seat of arbitration is outside India, Part I of the Act will not be applicable. For this purpose it brings us to Part II of the Act. The Act provides for enforcement of both the New York Convention⁴ awards and the Geneva Convention awards⁵ vide Part II thereof. The definition of foreign award contained in section 44 of the Act. A foreign award under Part II is defined as (i) an Arbitral Award (ii) on differences between persons arising out of legal relationships, whether contractual or not,

3. Section 2(1) (f) of the arbitration and conciliation Act 1996 defines an international commercial arbitration (ICA) to mean one arising from a legal relationship which must be considered commercial⁵ where either of the parties is a foreign national or resident or is a foreign body corporate or is a company, association or body of individuals whose central management or control is in foreign hands. Thus, under the Indian Law, an arbitration with a seat in India but involving a foreign party, will also be regarded as an ICA and hence subject to Part I of the Act. Where an is held outside India, Part I of the Act would have no applicability to the parties but the parties would be subject to Part II of the Act.
4. The New York Convention of 1958, i.e. the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, is one of the most widely used conventions for recognition and enforcement of foreign awards. It sets forth the procedure to be used by all signatories to the Convention. This Convention was first in the series of major steps taken by the United Nations to aid the development of international commercial arbitration. The Convention became effective on June 7, 1959.
5. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Awards of 1927

(iii) considered as commercial⁶ under the law in force in India, (iv) made on or after 11th day of October, 1960 (v) in pursuance of an agreement in writing for arbitration to which the convention set forth in the first schedule applies; and (vi) in one of such territories as the central government, being satisfied that reciprocal provisions made may, by notification in the Official Gazette⁷, declare to be territories to which the said convention applies. Hence, even if a country is a signatory to the New York Convention, it does not ipso facto mean that an award passed in such country would be enforceable in India. There has to be further notification by the Central Government declaring that country to be a territory to which the New York Convention applies. The Supreme Court⁸ has expressly clarified that an arbitration award not made in a convention country will not be considered a foreign award. Section 48⁹ Conditions for enforcement of foreign awards.-

-
6. The term commercial relationship is not defined under the Act but as per explained footnote under the UNCITRAL model this word should be given a wide interpretation in terms of commercial nature. In the case of *R. M. Investment Trading Co. Pvt. Ltd. v. Boeing Co* AIR 1994 SC 11 36, the term “commercial relationship” came under consideration. The Supreme Court of India observed: ‘While construing the expression ‘commercial’ in Section 2 of the Act it has to be borne in mind that the Act is calculated and designed to subserve the cause of facilitating international trade and promotion thereof by providing speedy settlement of disputes arising in such trade through arbitration and any expression or phrase occurring therein should receive, consistent with its literal and grammatical sense, a liberal construction’.
7. About 47 countries have been notified by the Indian government so far. They are:- Australia; Austria; Belgium; Botswana; Bulgaria; Central African Republic; Chile; China (including Hong Kong and Macau) Cuba; Czechoslovak Socialist Republic; Denmark; Ecuador; Federal Republic of Germany; Finland; France; German; Democratic Republic; Ghana; Greece; Hungary; Italy; Japan; Kuwait; Malagasy Republic; Malaysia; Mexico; Morocco; Nigeria; Norway; Philippines; Poland; Republic of Korea; Romania; Russia; San Marino; Singapore; Spain; Sweden; Switzerland; Syrian Arab Republic; Thailand; The Arab Republic of Egypt; The Netherlands; Trinidad and Tobago; Tunisia; United Kingdom; United Republic of Tanzania and United States of America.
8. In the case of *Bhatia International v Bulk Trading*, AIR 2002 SC 1432
9. Conditions for enforcement of foreign awards.-
- (1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that—
- (a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration. Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or
- (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place ; or
- (e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

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- (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
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- (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place ; or
- (e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Enforcement of an arbitral award may also be refused if the court finds that-

- (a) the subject -matter of the difference is not capable of settlement by arbitration under the law of India; or
- (b) the enforcement of the award would be contrary to the public policy of India.

Explanation-Without prejudice to the generality of clause (b), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause lays down the conditions for the enforcement of foreign award made under New York Convention. In these conditions the public policy term is very much debatable and highly controversial. Public policy is one of the most popular ground commonly used by parties to international arbitration to resist enforcement of arbitral awards.

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(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause

(e) of sub-section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

III. PUBLIC POLICY-AN INTERNATIONAL LAW EVOLUTION

The principles of public policy is *ex dolomalo non oritur actio*. No court of law will lend its aid to a man who founds his cause of action upon an immoral or illegal act¹⁰. The rule has been illustrated by Russell¹¹ in the following passage-

“If there is no breach of agreed procedure, there may nevertheless arise a second and quite separate question: that is, whether as a matter of public policy, a particular award, made pursuant to that agreed procedure, ought not to be enforced, for an award entitles the beneficiary to call on the executive power of the state to enforce it, and it is the function of the court to see that the executive power is not abused. Grounds of public policy on which an award may be set aside include: (1) that its effect is to enforce a illegal contract; (2) that the arbitrator for instance manifested obvious bias too late for an application for his removal to be effective before he made his award”.

Public policy has been defined by Winfield¹² as “a principle of judicial legislation or interpretation founded on current needs of the community”. Halsbury’s Laws of England to state that the scope of public policy must be expanded to suit the needs of the modern society. Sir William Holdsworth¹³ in his “History of English Law”, has quoted saying;

“In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them.”

An English judge talked of public policy as an ‘unruly horse’. Where in once you get astride it you’ll never know where it will carry you and that it is never argued at all, but when all other points fail¹⁴. In the mid 20th century, when international arbitration was gaining prominence there was a widespread perception to limit the interference of the Court in terms of enforcement of its decisions and at the same time maintain the sovereignty concerns of the state enforcing the award. These concerns were codified in the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards also called the ‘New York Convention’. As regards public policy, Article V. 2(b) of the Convention stated;

“Recognition and enforcement of an award may also be refused if the competent authority in the Country where the recognition and enforcement is sought finds that: the recognition or enforcement of the award would be contrary to the public policy of that country.”

Later on in 1985 The Model Law incorporated Article 34 (2)(b)(ii) that stated that recourse to a court against an arbitral award may be made by an application for setting aside

10. Per lord Mansfield CJ. In *Holman v. Johnson*

11. Russell on Arbitration, 20th ed. (1982) p.409

12. See public policy in English Common Law, 42 Harvard Law Review 76

13. "History of English Law", Volume III, page 55

14. Burrough J., *Richardson v. Mellish*, 1824 All.E.R. 258.

the award if it is in conflict of the public policy of the State¹⁵. Various national systems have now adopted the UNCITRAL Model Law as national Legislations. In Canada for instance, in *Attorney General for Canada v. SD Myers Inc*¹⁶, the Court held that public policy includes fundamental notions and principles of justice and criteria such as ‘patently unreasonable’, ‘clearly irrational’ and ‘totally lacking in reality’ and thus restricting its scope. In the United States, in *Parsons and Whitmore*¹⁷ the Federal Court held that enforcement of a foreign award may be denied on public policy grounds ‘only where enforcement would violate the forum state’s most basic notions of morality and justice’. In English law¹⁸ the Court held that considerations of public policy must be approached with extreme caution and it has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to public good, or possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public.

Further on, the International Law Association’s Committee on International Commercial Arbitration¹⁹ conducted a conference on public policy and adopted the resolution that public policy refers to international public policy of the state and includes;

(i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as “lois de police” or “public policy rules”; and (iii) the duty of the State to respect its obligations towards other States or international organisations²⁰.”

IV. PUBLIC POLICY-NATIONAL LAW EVOLUTION

Before the Arbitration and Conciliation Act of 1996, Arbitration in India was covered by two statutes; the Arbitration Act of 1940 and the Foreign Awards (Recognition And Enforcement) Act, 1961. Under the Arbitration Act of 1940, an arbitral award could be set aside in the case of (a) misconduct on the part of the arbitrators, (b) issuance of the arbitral award after commencement of legal proceedings or (c) the award has been improperly procured or is otherwise invalid²¹. It can be noticed that there wasn’t a provision of annulment of the award on the ground of public policy but however there was a wider ground of the award

15. Article 34 of the UNCITRAL Model Law on International Commercial Arbitration, adopted on 21st June 1985, UN Doc. A/40/17 states, *Application for setting aside as exclusive recourse against arbitral award*. Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article; (b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or (ii) the award is in conflict with the public policy of this State.

16. *Attorney General for Canada v. SD Myers Inc.*, 2004 FC 38.

17. 508 F.2d 969 (2 Cir., 1974).

18. *D.S.T. v. Ras Al Khaimah National Oil Company*, [1987] 2 Lloyd’s Rep 246 at 254.

19. See International Law Association, “Final Report on Public Policy as a bar to Enforcement of International Arbitral Awards”, Report of the Committee on International Commercial Arbitration, adopted at New Delhi in 2002.

20. *For detail* Varunchoudhary & Adityaswarup De- Constructing Public Policy International Law and the Enforcement of Foreign Arbitral Awards in India Available at: <http://works.bepress.com/adityaswarup/9>

21. Section 30, Indian Arbitration Act, 1940.

being invalid or improperly procured²². in *Gherulal Parakh v. Mahadeodas Maiya*²³ this Court acknowledged that there could be a broad and narrow view of interpreting public policy and favoured the narrow view when it said that *'though the heads of public policy are not closed and theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is admissible in the interest of stability of society not to make any attempt to discover new heads of public policy in these days'*. After the New York Convention came into force, India, to effectively comply with its obligations as set out in the Convention passed the Foreign Awards (Recognition And Enforcement) Act that as the title suggests, government the enforcement of international arbitral awards in India. Section 7 (1)(b)(ii) of the Act stated that the foreign award may not be enforced if it is contrary to public policy²⁴. In 1996 a new Act in consonance with the UNCITRAL Model Law of 1985 came, the Indian Arbitration and Conciliation Act of 1996 that in its statement of objects and reasons put forth its main objective as "to minimizing the supervisory role of the Courts in the arbitral process" and "to provide that every final arbitral award is enforced in the same manner as if it were a decree of the Court." The Act contained Section 34²⁵ Section 34, Arbitration and Conciliation Act of India, 1996, states; Application for setting aside as exclusive recourse against arbitral award

1. Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article; (b) the court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or (ii) the award is in conflict with the public policy of this State. and 36 similar to the Model Law. However, the legislators added an explanation stating that an award would be contrary to public policy if it was induced by fraud or corruption thus further restricting its scope and bringing it in consonance with international standards. Now the Act also contained a specific Part (Part I for national arbitral awards and Part II for foreign awards) on the enforcement and recognition of foreign arbitral awards and in this sense it was a special legislation. Sections 48 (1) and (2) governed the enforcement of these awards and contained similar public policy criteria.

22. See Nadia Darwazeh, "Set-aside and Enforcement Proceedings: the 1996 Arbitration Act under threat", INT'L ARB. L. REV. 7(3), 81.

23. AIR 1959 SC 781.

24. Section 7(1)(b)(ii) of the Foreign Awards (Recognition And Enforcement) Act, 1961 states; Conditions for enforcement of foreign awards.

(1) A foreign award may not be forced under this Act—

(b) If the Court dealing with the case is satisfied that—

(i) The subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(ii) The enforcement of the award will be contrary to public policy;

25. Section 34, Arbitration and Conciliation Act of India, 1996, states; Application for setting aside as exclusive recourse against arbitral award 1. Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article; (b) the court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or (ii) the award is in conflict with the public policy of this State.

Explanation: Without prejudice to the generality of sub clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced by fraud or corruption or was otherwise in violation of Section 75 or Section 81.

V. RESISTING ENFORCEMENT OF FOREIGN AWARDS ON PUBLIC POLICY: JUDICIAL CONSTRUCTION

Perhaps, the most painful thing for a party in whose favour an arbitration award has been rendered, which may have attained finality, is the setting aside of the award by a national court where the victorious party seeks to enforce the same. This will reduce the award in one's favour to merely a pyrrhic victory. Thus, the national courts need to be vigilant particularly in cases of foreign awards, when the defeated party on different grounds stalls their enforcement. One such ground which has an element of vagueness making it difficult to define its scope, is the ground of the arbitral award being in conflict with the 'public policy of India'²⁶. The word public policy is not defined either in the Arbitration and Conciliation Act nor in any other act. Therefore the construction and interpretation of this term has been entirely the work of the Judiciary. In relation to the position of arbitration in India before the Indian Arbitration Act was introduced, Professor Paulsson²⁷ once said:

'... the courts of India have revealed an alarming propensity to exercise authority in a manner contrary to the legitimate expectations of the international community ...'

In line with the ethos of the UNCITRAL Model Law, the Indian Arbitration Act was introduced with the hope that there will be minimal judicial intervention in the arbitral process. Despite this, the Indian courts have shown a great propensity towards interfering with international arbitration. In this connection, judicial intervention at the award enforcement stage on grounds of public policy is the most controversial. In the historic ruling of *Renusagar v General Electric*²⁸ Supreme Court constructed the expression public policy in relation to foreign awards as follows:

'This would mean that public policy has been used in a narrower sense and in order to attract to bar of public policy the enforcement of the award must invoke something more than the violation of the law of India... Applying these criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.'

This decision was basically based in line with the international practice commonly accepted in most developed arbitral jurisdictions such as US and France and confirmed the position that only in exceptional circumstances, national courts should interfere with arbitral awards on ground of public policy.

The same ground is there in two provisions viz., Sections 34(2)(b)(ii) and 48(2)(b) in Parts I and II respectively. The basic question is, whether the standard of review is similar under both the provisions, as there is a literal similarity? In *ONGC v. SAW Pipes*²⁹, the Supreme

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26. Arpan Kr. Gupta, *A New Dawn for India-Reducing Court Intervention in Enforcement of Foreign Awards*, 2.2 INDIAN J. OF ARB. L. (Nov., 2013), see also Ajay Kr. Sharma, *Judicial intervention in international commercial arbitration: critiquing the Indian supreme court's interpretation of the arbitration and conciliation act*, 1996 Indian Journal of Arbitration Law V 3 issue 1 April 2014
27. J. Gaya, 'Judicial ambush of arbitration in India', (2004) *Law Quarterly Review* 571 at 571. For detail, Sameer Sattar, *enforcement of arbitral awards and public policy: same concept, different approach*
28. A.I.R. 1994 S.C. 860
29. (2003) 5 SCC 705

Court had an occasion to interpret the former provision viz., Section 34(2)(b)(ii), and it did so expansively, as per so called “broad view”. The case of *Saw Pipes* arose out of a domestic dispute concerning the payment of liquidated damages under a supply contract. The matter was referred to arbitration and an award was rendered by the tribunal which held that ONGC was not entitled to any liquidated damages since it had failed to establish any loss as a result of the late supply by Saw Pipes. ONGC applied to set aside the arbitral award before the Indian court on grounds of public policy. Supreme Court set aside the award on grounds of public policy on the basis that the arbitral tribunal had erred when it concluded that ONGC had to prove its loss in order to seek liquidated damages. The Indian Supreme Court held that, in addition to the three heads set forth in the *Renusagar* case, an arbitral award may be set aside on grounds of public policy if it is ‘patently illegal’. An award is patently illegal if it contravenes the provision of the arbitration Act or any other substantive law against the term of contract. The *Saw Pipes* case has been widely condemned for its wide interpretation of the public policy defence because this case went beyond the scope of the Indian Arbitration Act and created a new ground for setting aside arbitral awards. Supreme court decision in the case of *Mcdermott Inc. v. Burn standard*³⁰ where the court somewhat read down *Saw Pipes* it held:

“The 1996 Act makes provision for the supervisory role of courts, for the review of arbitral award only to ensure fairness, intervention of the court is envisaged in few circumstances only like, in case of fraud, bias by the arbitrators, violation of natural justice etc.

Commenting on *Saw Pipes* court said:

“We are not unmindful that the decision of this court in *ONGC* had invited considerable adverse comment but the correctness or otherwise of the decision is not the question before us it is only for a larger bench to consider the correctness or otherwise of the said decision. The said decision is binding on us. The said decision has been followed in a large number of cases.”

Moreover, in *Bhatia International v Bulk Trading*³¹, the Supreme Court held that provisions of Part 1 of the Indian Arbitration Act (which applies to domestic arbitrations only) would also apply to foreign awards under Part 2 of the Indian Arbitration Act, unless specifically excluded by the parties. The case of *Bhatia* generated much controversy, this meant that parties, relying on *Bhatia*, could use the ‘patently illegal’ ground of public policy added by *Saw Pipes* to resist enforcement of foreign arbitral awards. Again relying on *Bhatia* and extending its decision in the case of *Venture global v Satyam computer services* Supreme Court held that the losing party could bring an independent action in India to set aside a foreign arbitral award on the expanded grounds of public policy as set out in the case of *Saw Pipes*. In this case, the consequences are far reaching for it creates a new procedure and a new ground for challenge to a foreign award (not envisaged under the Act). The new procedure is that a person seeking the enforcement of a foreign award in India has not only to file an application for enforcement under Section 48 of the Act, it has to meet an application under Section 34 of the Act seeking to set aside the award. The new ground is that not only must the award pass the New York Convention grounds incorporated in Section 48, it must pass the expanded “public policy” ground created under Section 34 of the Act. Nariman³² described it as ‘*inexplicable*’ and one which ‘*cannot be defended.*’

30. (2006) 11SCC 181

31. (2002) AIR SC 1432.

Subsequently, the Supreme Court in its judgment in the matter of *Phulchand Exports Ltd. v. OOO Patriot*³³ held that “patent illegality” under the term “public policy of India”, as laid down in *Saw Pipes*, needed to be looked at while examining the enforcement of a foreign award under Section 48 (2) (b) of Act. By examining the validity of a foreign award under the laws of India, the Supreme Court has struck a heavy blow on the narrow construction that *Renusagar* had sought to propagate.

However its decision in *BALCO*³⁴ and subsequently through its decision in *LalMahal*³⁵, the Supreme Court has been able to secure the sanctity of a foreign award and remove obstacles to its enforcement in India. In *BALCO*, the Supreme Court following the principles of literal interpretation and giving regard to the legislative intention held that applicability of Part I of the Act is limited only to arbitrations held in India and omission of the word “only” from Section 2(2), as according to Court had no relevance. It further observed that the present wording of the Act does not deviate from the territoriality principle as accepted under Model Law and absence of “only” in the said provision does not change the content/intention of the legislature. The Court concluded that Part I of the Act would be applicable only in cases where the seat of arbitration was in India. The judgment by further clarifying that no annulment proceedings would lie in India against an award made outside India, has got the Indian arbitration law at par with other international jurisdictions. It has eased the difficulties the foreign investors/ players have been facing in enforcing foreign awards against Indian parties.

In *LalMahal* the Supreme Court said that, it found the application of the ‘public policy’ doctrine more limited for the purposes of Section 48(2)(b) compared to Section 34(b)(ii), dealing with domestic arbitral award and the Court did not hesitate to overrule *Phulchand Exports*. Thus, laudably, in exercising power under Section 48(2)(b) the Supreme Court refused to ‘exercise appellate jurisdiction over the foreign award’ nor it chose to ‘enquire as to whether, while rendering foreign award, some error has been committed’.

And again in, In *Associate Builders v Delhi Development Authority*³⁶, the court summarised the line of judgments on public policy. RF Nariman J held that:

“It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.”

Thus, after a series of controversial flip-flop the interpretation regarding Section 48(2)(b) got some stability for time being.

32. F Nariman, ‘India and International Arbitration’, (2010) 41 *The Geo. Wash. Int’l L. Rev.* 367 at 376.

33. (2011) 10 SCC300

34. *Bharat Aluminum Co. v. Kaiser Aluminum Technical Service, Inc.*, 2012 (9) SCC 552

35. *ShriLalMahal Ltd. v. ProgettoGrano Spa*, (2013) 8 SCALE 489

36. (2014) SCC Online SC 937

VI. CONCLUSION

The concept of public policy has been a topic of serious debate. Public policy is an important weapon in the hands of a national court wishing to interfere with the arbitral process. Despite the potentially expensive and unruly character of public policy the court in most developed jurisdiction have been very reluctant to invoke the public policy exception to deny recognition of enforcement to international arbitral award. Court has extra-ordinary dimensions and role to make the International arbitral awards challengeable on the touchstone of 'public policy'. This paper does not undermine the importance of judicial intervention, which may be vital and indispensable; it only stresses upon the need to strike a delicate balance so that the efficiency of arbitration process is not adversely affected; along-with preservation of the foundational pillars of the arbitration expressed in the principles of party autonomy and *competence-competence*. should be made aware of the adverse consequences that undue interferences in international arbitration have on the country's economy and overall growth. for a country seeking to attract foreign investment, it is crucial that its legal system provides proficient and predictable remedies to foreign investors and people seeking to enter into International transactions in India.

This is evident from the sincere efforts taken by the Government of India and the change in approach of the national courts dealing with arbitration matters especially after *BALCO* and *LalMahal* the new era for international arbitration in India is in sight the Indian courts have come a long way from a decade long of interventionist approach in international arbitrations. Although the Supreme Court in *Shri Lal Mahal* endorses a narrow construction of the term "public policy", which includes "the interests of India" within its definition, this might however be still considered quite broad. The proposed amendments to the act would make India a preferred seat for International Arbitration. Besides the aforementioned, the Courts in India in recent times have taken into consideration the judicial intervention which has hampered the arbitration proceedings in India and through several pro-arbitration rulings have removed many hurdles, which parties face while arbitrating against Indian opponents. Law Commission releases proposed amendments to the Arbitration & Conciliation Act, 1996; Large-scale amendments are designed to plug major gaps identified over time and if implemented, will work to impart confidence in Indian arbitration.

To sum up, though a series of judicial decisions in the first decade of the new millennium showed lack of pro-arbitration approach by the Indian judiciary while interpreting arbitration laws, the trend has now changed and Indian courts are increasingly adopting a pro-arbitration approach. Further, the Government too is committed to make India into an arbitration friendly country which could serve as an International Arbitration hub for the world. This is aimed to be achieved by amending the existing Act and bringing as per with international standards.



CARE AND WELFARE OF ELDERLY PEOPLE IN INDIA: EMERGING CHALLENGES

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Abstract

This article addresses the problems and issues of the grey population of the country which have not been given serious consideration. It deals with the international norms, constitutional provisions and other laws which apply to elderly people. It also deals with the policies and programmes aimed at welfare and maintenance issues, especially for indigent senior citizens, by supporting old age homes, day care centres, mobile medicare units, etc. The article concludes that the elderly are often victims of discrimination and abuse and that their unique needs are often not sufficiently met by their governments and communities. Hence, we need age-friendly societies in which all can live with dignity and support.

Key words: *Elderly People, Declaration on Social Progress and Development, 1969, Constitution of India, Hindu Personal Law, Muslim Personal Law*

I. INTRODUCTION

The phenomenon of population ageing is becoming a major concern for the policy makers all over the world, for both developed and developing countries, during last two decades. But the problems arising out of it will have varied implications for underdeveloped, developing and developed countries. Ageing of population is affected due to upward trends in fertility and downward trends in mortality i.e. due to high birth rates coupled with long life expectancies. In India the size of the elderly population, i.e. persons above the age of 60 years is fast growing although it constituted only 7.4% of total population at the turn of the new millennium.

In India with majority of its population aged less than thirty, the problems and issues of its grey population have not been given serious consideration and only a few studies on them have been attempted in our country. To reap the advantage of demographic dividend, the focus is mainly on the children and the youth and fulfilment of their basic needs for proper development. Also the traditional Indian society and the age-old joint family system have been instrumental in safeguarding the social and economic security of the elderly people in the country. However, with the rapid changes in the social scenario and the emerging prevalence of nuclear family set-ups in India in recent years the elderly people

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are likely to be exposed to emotional, physical and financial insecurity in the years to come. This has drawn the attention of the policy makers and administrators at central and state governments, voluntary organizations and civil society.

The problems and issues of elderly population are recognised globally. The International Day of Older Persons is celebrated every year on 1st October. Despite all these, the phenomenon of elder abuse is a universal social concern which affects the health and human rights of millions of older persons around the world, and an issue which deserves the attention of the international community. It indicates that the elders are vulnerable and subjected to various forms of abuses in day-to-day life in one or another way. In most countries of the world, including India, ageing population is likely to become a serious policy and programmatic issue particularly in the smart cities where the life style is very complex and individual oriented. We are sure that the discussion on ageing will help in generating a healthy debate and policy response amongst a wider cross-section of scholars, professionals, policy makers and civil society.

II. THE PROFILE OF THE ELDERLY POPULATION IN INDIA

In India the population of old citizens is growing. In 1901 it was 12.1 million, but it has been recorded in 2011 as 103.2 million.¹ The population of elderly in India (over 60 years) ranks second in the world.² The main reason for this is latest instruments, advanced medicine, world class treatment, social protection, living standard and food that is available now a days.³ If we move on the deeper side, we will observe that the number of old people would be more than the new born children.⁴

The demographic profile of the elderly population in India, as per 2001 Census, showed that in the case of the general population, the majority of the elderly (75 per cent) are living in rural areas and the rest (25 per cent) are in urban areas. While 53 per cent among elderly males are literate, the figure drops to only 20 per cent among elderly females. The data on work status of the elderly revealed that 36 per cent are still in the labour force and two-thirds (64 per cent) of them are out of the labour force.⁵ Over a quarter of elderly (26.9 per cent) are self-employed and the casual labourers among the older population are to the extent of 7.4 per cent. Only 1.5 per cent of them are in regular salaried employment. Elderly males are more economically active as compared to elderly females. The data on old age dependency ratio revealed that it was higher in rural areas than in urban areas.⁶

Due to industrialisation and urbanisation and the changing trends in society, it is the urban elderly who are more likely to face the consequences of this transition as the infrastructure often cannot meet their needs. Lack of suitable housing forces the poor to live in slums which are characterised by poor physical conditions, low income levels, high proportion of rural migrants, high rates of unemployment and underemployment, rising

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1. Registrar General and Census Commissioner, India (2011).
 2. K.L. Sharma, *Studies in Gerontology* (Rawat Publications, New Delhi, 2007), p.132.
 3. Ajay Kumar Sahoo, Gavin J. Andrews, S. Irudaya Rajan, *Sociology of Ageing* (Rawat Publications, New Delhi, 2009), p. 6.
 4. Ashish Bose, Mala Kapur Shankardass, *Growing Old in India* (B.R. Publishing Corporation, New Delhi, 2004), p. 4.
 5. National Sample Survey Organization, 2006, available at : http://mospi.gov.in/nssso_4aug2008/web/nssso/sdrd/design/design_est_62.pdf.
 6. National Sample Survey Organization, 2004, available at: http://mospi.gov.in/nssso_4aug2008/web/nssso/sdrd/design/design_est_60.pdf.

personal and social problems such as crime, alcoholism, mental illness, etc. along with total or partial lack of public and community facilities such as drinking water, sanitation, planned streets, drainage systems and access to affordable healthcare services. With the increasing prevalence of slum dwellers who come to urban areas in search of better opportunities, a significant proportion of them would be elderly. While rural India continues to provide family support in old age, the forces of globalisation have touched many a life leading to migration of children to cities or abroad.

The attitude of family members towards the elderly person changes and the elderly attitude towards their family members also changes. Attitudes towards old age, degradation of status in the community, problems of isolation, loneliness and the generation gap are the prominent thrust areas resulting in socio-psychological frustration among the elderly.⁷ In comparison to males women are more likely to depend on others, given lower literacy and higher incidence of widowhood among them.⁸ Women have a greater need for nurturance than men in old age.⁹

III. INTERNATIONAL NORMS ON ELDERLY PEOPLE

The United Nations World Assembly on Ageing, held at Vienna in 1982, formulated a package of recommendations which gives high priority to research related to developmental and humanitarian aspects of ageing. The plan of action specifically recommended that “International exchange and research cooperation as well as data collection should be promoted in all the fields having a bearing on ageing, in order to provide a rational basis for future social policies and action. Special emphasis should be placed on comparative and cross-cultural studies on ageing”.

Beginning with the Universal Declaration of Human Rights, going on to the many International Instruments—including the Covenants on Economic Social and Cultural Rights, Civil and Political Rights as well as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)—there are many references to the rights of all. The Declaration on Social Progress and Development in 1969, for the first time specifically mentions old age in the document.¹⁰ The UN adopted the 1st International Plan of Action on Ageing in Vienna in 1982, and it took until 1991 for the General Assembly to adopt the UN Principles for Older Persons and its 4 main themes independence, participation, care, self-fulfilment and dignity.¹¹ The Committee on Economic, Social and Culture Rights adopted the General comment no 6 on the Economic and Social, and Cultural Rights of Older Persons.¹²

In 1999, with the International Year of Older Persons (Document A/ 50/114), came the Conceptual Framework based on the Plan and Principles with 4 priority areas: (a) The situation of older persons, (b) individual lifelong development, (c) the relationship between generations, (d) the interrelationship of population, ageing and development. Finally, in Madrid in 2002, twenty years after, the 2nd World Assembly on Ageing (WAA) adopted

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7. S.P. Mohanty, ‘Demographic and Socio-Cultural Aspects of Ageing in India: Some Emerging Issues’, in R.N .Pati and B. Jena (eds.), *Elderly in India: Socio-Demographic Dimension* (Ashish, New Delhi, 1989), pp. 37-45.
 8. Gopal, Meena, ‘Gender, Ageing and Social Security’, *Economic and Political Weekly* (21October 2006), pp. 4477-86.
 9. J.P. Yadav, *Elderly in India, The Struggle to Survive* (Anmol Publications, New Delhi, 2004).
 10. Declaration on Social Progress and Development (1969), Article 11.
 11. U.N. General Assembly Resolution 46/91 (1991).
 12. Document E/1996/22, Annex IV (1995).

unanimously a Political Declaration and an International Strategic Plan of Action on Ageing. Both the documents include clear objectives and related actions to be taken: (i) to ensure the rights of older persons, (ii) to protect older persons from “neglect, abuse and violence” in all situations addressed by the UN as well as (iii) to recognize “their role and contribution to society”. The 2002 Madrid Plan of Action goes into great details on the situation of older persons and the Commission for Social Development was given the charge of implementation. However, it is obvious that these precedents are not enough to give older persons their rights as well as recognition of their contribution to society. Older persons are not only unrecognized but more and more excluded from their role in society, just to cite a few examples:

- Migration of younger generations from developing countries or countries in transition with little or no welfare leaves behind older persons with no social, economic and care support, thus increasing their vulnerability, isolation, poverty, discrimination and lack of health care;
- The galloping technological development increases the generation divide: in a 4 to 5 generation society, the 2-3 older generations are too often excluded and affected by the digital divide;
- In HIV/AIDS pandemic, the contribution of older generations is today vital, their right to care for their orphaned grand-children could only benefit the socio-economic development but also the human reconstruction of society through restoring an identity, transmitting higher values and life skills.

In all issues, the Right to Development takes into account the generation-specificities of development over the life span and until the end of life. To generate public attention concerning mainstreaming of older persons, the theme chosen for the International Day of Older Persons in 2003 was ‘Mainstreaming Ageing: Forging Links Between the Madrid’. Various UN programmes, specialized agencies as well as NGOs have made efforts to mainstream the concerns of older persons into their respective agendas. On the level of operative action, United Nations Population Fund (UNFPA) strives to mainstream ageing into its areas of work, namely reproductive health, gender issues and humanitarian responses to conflict situations.¹³ World Health Organisation is also working in the field of health from the very beginning of its inception. Its major mainstreaming objective is to focus on principles and methods of developing health care systems that are responsive to ageing.

IV. CONSTITUTIONAL AND LEGAL SAFEGUARDS

In Constitution of India, entry 24 in list III of schedule VII deals with the Welfare of Labour, including conditions of work, provident funds, liability for workmen’s compensation, invalidity and old age pension and maternity benefits. Further, Item No. 9 of the State List and item 20, 23 and 24 of Concurrent List relates to old age pension, social security and social insurance, and economic and social planning. Article 41 of Directive Principles of State Policy has particular relevance to Old Age Social Security. According to this Article, “the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in case of undeserved want.

The right of parents to claim maintenance from their children has been recognised by Section 20 (1&3) of the Hindu Adoption and Maintenance Act, 1956. The moral duty to

13. UNFPA—Population and Family Study Centre, *Population Ageing: Challenges for Policies and Programmes in Developed and Developing Countries* (UNFPA and Population and Family Study Centre New York and Brussels, 1999).

maintain parents is recognized by all people. However, so far as law is concerned, the position and extent of such liability varies from community to community. The statutory provision for maintenance of parents under Hindu personal law is contained in Section 20 of the Hindu Adoptions and Maintenance Act, 1956. This Act is the first personal law statute in India, which imposes an obligation on the children to maintain their parents. As is evident from the wording of the section, the obligation to maintain parents is not confined to sons only; the daughters also have an equal duty towards parents. It is important to note that only those parents who are financially unable to maintain themselves from any source, are entitled to seek maintenance under this Act.

Under the Muslim personal law, children have a duty to maintain their aged parents even under the Muslim law. According to Mulla:

- (a) Children in easy circumstances are bound to maintain their poor parents, although the latter may be able to earn something for themselves.
- (b) A son though in strained circumstances is bound to maintain his mother, if the mother is poor, though she may not be infirm.
- (c) A son, who though poor, is earning something, is bound to support his father who earns nothing.

According to Tyabji, parents and grandparents in indigent circumstances are entitled, under *Hanafi* law, to maintenance from their children and grandchildren who have the means, even if they are able to earn their livelihood. Both sons and daughters have a duty to maintain their parents under the Muslim law. The obligation, however, is dependent on their having the means to do so.

The right of parents, without any means has also been recognised by section 125 (1) (d) of the Code of Criminal Procedure 1973. Prior to 1973, there was no provision for maintenance of parents under the code. The Law Commission, however, was not in favour of making such provision. According to its report:

The Cr. P. C is not the proper place for such a provision. There will be considerably difficulty in the amount of maintenance awarded to parents apportioning amongst the children in a summary proceeding of this type. It is desirable to leave this matter for adjudication by civil courts. The provision, however, was introduced for the first time in Sec. 125 of the Code of Criminal Procedure in 1973. It is also essential that the parent establishes that the other party has sufficient means and has neglected or refused to maintain his, i.e., the parent, who is unable to maintain himself. It is important to note that Cr. P. C 1973, is a secular law and governs persons belonging to all religions and communities. Daughters, including married daughters, also have a duty to maintain their parents.

The Maintenance and Welfare of Parents and Senior Citizens Act, 2007 was enacted in December 2007, to ensure need based maintenance for parents and senior citizens and their welfare. The Act provides for:-

- a) Maintenance of Parents/ senior citizens by children/ relatives is made obligatory and justiciable through Tribunals Revocation of transfer of property by senior citizens in case of negligence by relatives;
- b) Penal provision for abandonment of senior citizens;
- c) Establishment of Old Age Homes for Indigent Senior Citizens;
- d) Adequate medical facilities and security for Senior Citizens

V. POLICIES, PROGRAMMES AND PLAN OF ACTION

The interest of social scientists and social work professionals on various issues of ageing is of recent origin. Only recently older people were identified as a priority group in implementation of social welfare policies and government interventions.¹⁴ The Ministry of Social Justice & Empowerment, which is the nodal Ministry for this purpose focuses on policies and programmes for the Senior Citizens in close collaboration with State governments, non-Governmental Organisations and civil society. The programmes aim at their welfare and maintenance, especially for indigent senior citizens, by supporting old age homes, day care centres, mobile medicare units, etc.

In view of the increasing need for intervention in area of old age welfare, Ministry of Social Justice and Empowerment, Government of India adopted 'National Policy on Older Persons' in January, 1999. The policy provides broad guidelines to State Governments for taking action for welfare of older persons in a proactive manner by devising their own policies and plans of action. The policy defines 'senior citizen' as a person who is 60 years old or above. It strives to ensure well-being of senior citizens and improve quality of their lives through providing specific facilities, concessions, relief, services etc. and helping them cope with problems associated with old age. It also proposes affirmative action on the part of Government Departments for ensuring that the existing public services for senior citizens are user friendly and sensitive to their needs. It provides a comprehensive picture of various facilities and covers many areas like financial security, health care, shelter, education, welfare, protection of life and property etc.

The aims and objectives of National Policy on Older Persons (NPOP) are to reaffirm the commitment to ensure the well-being of the older persons. The Policy envisages State support to ensure financial and food security, health care, shelter and other needs of older persons, equitable share in development, protection against abuse and exploitation, and availability of services to improve the quality of their lives. The primary objectives are:

- (a) to encourage individuals to make provision for their own as well as their spouse's old age;
- (b) to encourage families to take care of their older family members;
- (c) to enable and support voluntary and non-governmental organizations to supplement the care provided by the family;
- (d) to provide care and protection to the vulnerable elderly people;
- (e) to provide adequate healthcare facility to the elderly;
- (f) to promote research and training facilities to train geriatric care givers and organizers of services for the elderly; and
- (g) to create awareness regarding elderly persons to help them lead productive and independent live.

The Implementation Strategy adopted for operationalisation of National Policy envisages the following:

- (a) Preparation of Plan of Action for operationalisation of the National policy.
- (b) Setting up of separate Bureau for Older Persons in Ministry of Social Justice & Empowerment.
- (c) Setting up of Directorates of Older Persons in the States.

14. S.D. Gokhale, Towards a Policy for Ageing in India, in Phoebe S. Liebig and S. Irudaya Rajan (eds.), *An Ageing India: Perspectives, Prospects and Policies* (Rawat Publications, New Delhi, 2005).

- (d) Three Yearly Public Review of implementation of policy.
- (e) Setting up of a National Council for Older Persons headed by Ministry of Social Justice & Empowerment from Central Ministry, states, Non-Official members representing NGOs, Academic bodies, Media and experts as members.
- (f) Establishment of Autonomous National Association of Older persons.

The "National Policy for Senior Citizens 2011" is based on several factors. These include the demographic explosion among the elderly, the changing economy and social milieu, advancement in medical research, science and technology and high levels of destitution among the elderly rural poor (51 million elderly live below the poverty line). A higher proportion of elderly women than men experience loneliness and are dependent on children. Social deprivations and exclusion, privatization of health services and changing pattern of morbidity affect the elderly. All those of 60 years and above are senior citizens. This policy addresses issues concerning senior citizens living in urban and rural areas, special needs of the "oldest old" and older women.

The National Old Age Pension Scheme (NOAPs) is in operation all over India and the reports indicate that the most vulnerable sections of Indian society, namely, women and lower caste individuals have benefited from this scheme. Governments of all states and Union Territories have their own schemes for old age pension and the criteria for eligibility and the quantum of pension vary. The combined national budget allocation for the NOAPs comes to 0.6 per cent only as compared to 6 per cent of Central Government revenue expended on pension for its employees.¹⁵

VI. STRENGTHENING THE INSTITUTION OF FAMILY

Family is the basic institution of our society, which performs the functions of upbringing and care of all the family members. According to Prof. Goode (a great sociologist), family is a unique institution and points out that it is the only institution other than religion, which is formally developed in all societies. Family duties are the direct responsibility of everyone in society with rare exception. The most important function of family is to take care of the children, infirm, disabled and the aged family members.

The Indian culture is automatically render great reverence to the elders. But our society is in transition period in which the cherished values are being eroded. The older generation is caught between the decline in traditional values on one hand and the absence of adequate social security system on the other.¹⁶ The materialistic attitude of an individual made the ageing as social issues. The incidence of elder abuses is being observed in the family setup as well as at old age homes of paid and free kinds. Family support is found to be an important factor for socio-psychological well-being of the elderly.¹⁷

Old Age has never been a problem for India where a value based, joint family system is supposed to prevail. Indian culture is automatically respectful and supportive of elders. With that background, elder neglect and abuse has never been considered as a problem in India. But the so called joint families and extended families are disturbed due to various factors which questions the peaceful coexistence of elders with young generation. The

15. S. Rajan, Irudaya, 'Social Assistance for Poor Elderly: How Effective?' *Economic and Political Weekly*, (24 February 2001), pp. 613-17.

16. K. Gormal, *Aged in India* (Mumbai: TISS Publishers, 2003).

17. N. Prabhavathy Devi and P. Tamilarasi Murugesan, 'Institutional Care for the Elderly', *Journal of the Indian Academy of Geriatrics*, 2(1) (March 2006), pp. 15-20.

changing life styles and generation gap leads to isolation and insecurity among the grey population. The phenomenon of elder abuse and neglect is emerging in this context.

It is hereby suggested that the institution of the family needs to be protected and strengthened through professional welfare services, including financial support to low income families, and counselling services both to the elderly and to family members. The review of psychological issues shows that there were many studies conducted abroad and a dearth of studies in India particularly on determinants of happiness in old age. There is a gap in our understanding of the modes of frustration, degree of social adjustment and the need patterns of different elderly age and social groups, old age ailments, physical infirmities and mental health.¹⁸

Old age presents its special and unique problems but these have been aggravated due to the unprecedented speed of socioeconomic transformation leading to a number of changes in different aspects of living conditions. The needs and problems of the elderly vary significantly according to their age, socioeconomic status, health, living status and other such background characteristics.¹⁹ For elders living with their families—still the dominant living arrangement—their economic security and well-being largely depends on the economic capacity of the family unit.²⁰

VII. CONCLUSION

The careful study and analysis of all these, demonstrate that, the growing population of aged people is a matter of great concern for the world community. Hence various efforts appear to have been taken at international level. These efforts reflect in various documents, conventions and declarations. Not only the international community is serious with the problems and rights of the aged people, but also it appears that, certain regional efforts have been made worldwide. Hence perusal of the same reveals that, there is double protection afforded to the aged people at international level and much importance is given to the rights, protection and promotion of the interests of aged people at global level. At national level almost all civilised countries have age-friendly laws.

In spite of efforts at international, regional and national levels it is widely recognized that the elderly are often victims of discrimination and abuse and that their unique needs are often not sufficiently met by their governments and communities. Many rights of elderly persons are at stakes, like elderly persons' right to security, right to healthcare, right to an adequate standard of living, right to non-discrimination, right to participation, right to be free from torture or cruel, inhuman or degrading treatment. Now we need age-friendly societies in which all can live with dignity and support.



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18. S. Siva Raju, *Studies on Ageing in India: A Review*, Institute for Social and Economic Change, Bangalore United Nations Population Fund, New Delhi Institute of Economic Growth, Delhi (December 2011).
 19. S. Siva Raju, "Meeting the Needs of the Poor and Excluded in India", *Situation and Voices. The Older Poor and Excluded in South Africa and India*, UNFPA, Population and Development Strategies, 2 (2002), pp. 93-110.
 20. Alam, Moneer, *Ageing in India: Socio-Economic and Health Dimensions* (Academic Foundation, New Delhi, 2006).

DOWRY DEATH: CAUSATION AND LEGAL REGIME

Pradeep Singh*

Abstract

Dowry death cases are increasing and creating menacing situation for the all social institutions in India thereby it has become a matter of serious concern for legalists, jurists and academicians. Every day news papers are replete with news relating to Dowry Deaths that young women are being burnt alive or beaten to death or compelled to commit suicide. Dowry death is not only problem in illiterate and poor families, but also in highly educated, richer and socially respected families. Dowry death is most barbaric and cruel murder committed by husband and his relatives. In this murder victim is wife and assailants are husband and his family members. Protection of wife is social, moral, religious and legal responsibility of husband. Husband, the protector himself commits murder of wife, the protected. Persistent demand for dowry after solemnization of marriage results in physical and mental cruelty and ultimately it results in dowry death. Dowry death is murder and only for differentiating a common murder and murder due to the dowry demand, dowry death term is used. For tackling the problem of dowry death various provisions are incorporated in Indian Penal Code, Criminal Procedure Code, Indian Evidence Act but even after that problem is unchecked and crime rate is continuously increasing therefore it is much required that the causation of dowry death should be identified and legal regime should be analyzed to find out whether Indian Legal System provides proper measures to tackle the problem effectively.

Key Words: *Criminal Justice System; Cruelty; Dowry; Dowry death; Deemed fiction; Greed; Harassment; Presumption; Social pressure; Suicide.*

I. INTRODUCTION

Dowry and Dowry related violence are posing serious problem before the Indian society. Dowry is given and taken in India since ancient period but in last two decades it has become a menace for all the social institutions. Dowry is not only a social problem but it is mother of number of other social problems like foeticide, infanticide, corruption, bribery, demoralizing, suicide by girls and parents of girls, neglect of girl child, mismatched marriage, cruelty and domestic violence with wife and dowry death; which are declared as crime by legislature by various enactments. The most serious of these crimes is cruelty with wife and ultimately results in bride burning, murder of brides and suicide by brides which commonly known as Dowry Death. Every day news papers are replete with news relating to Dowry Deaths that young women are being burnt alive or beaten to death or compelled to

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commit suicide. Dowry death is not only problem in illiterate and poor families, but also in highly educated, richer and socially respected families creating a situation of serious concern to find out causation of dowry death and to analyse legal regime to find out whether Indian Legal System provides proper measure to tackle the problem effectively.

II. DOWRY AND DOWRY DEATH DEFINED

Dowry problem has become a menace before the society giving rise to a number of problems:

- (i) Arrangement of dowry and other expenses for marriage compel many families to take loans causing debt-net succumbing and bonded labour.
- (ii) Dowry burden develops thinking in families that the birth of girl child is burdensome. Girls are discriminated in their natal home in matter relating to health care, quality of food, education etc.
- (iii) Arrangement of dowry and other expenses of marriage cause corruption and bribery amongst public servants.
- (iv) A woman's status is also connected with dowry brought to the in-laws family. Woman's status is directly connected with kind, quality and amount of dowry.
- (v) Dowry is main cause of female foeticide and infanticide resulting in adverse sex ratio.
- (vi) Dowry demand when not satisfied results in cruelty and ultimately in dowry death.

Dowry death is most barbaric and cruel murder committed by husband and his relatives. In this murder victim is wife and assailants are husband and his family members. Protection of wife is social, moral, religious and legal responsibility of husband. Husband, the protector himself commits murder of wife, the protected. Dowry death is ultimate consequence of dowry demand. Dowry is defined by Law Commission in 91st Report:

Dowry means money, or other thing estimable in terms of money, demanded from the wife or her parents or relatives, where such demand is not properly referable to any legally recognized claim and is relatable only to the wife's having married into the husband's family.

Dowry demand made after marriage creates more sordid situation for married women and her parents. Supreme Court in case of *State of Andhra Pradesh V. Raj Kumar Asava*¹ held that the term dowry, not only restricted to agreement or demand for payment of dowry before or at the time of marriage but also include demand made subsequent to marriage when marriage institution is subsisting. Dowry Prohibition Act 1961 defines dowry as:

"Dowry means any property or valuable security given or agreed to be given either directly or indirectly by one party to a marriage to the other party to a marriage or by the parents to either party to marriage or by any other person at or before or any time after the marriage of the said parties, but does not include dower or *mahr* in the case of person to whom the Muslim Personal Law (Shariat) applies."²

Definition of dowry given in Dowry Prohibition Act 1961 is wider and it includes dowry demand made directly or indirectly either at the time of marriage or at any time after the

1. (2004) 4 SCC 470.

2. Sec. 2 Dowry Prohibition Act 1961.

marriage when demand of dowry is made in connection of marriage means either for solemnization of marriage or subsistence of marriage. Dowry Prohibition Act is a social legislation attempts to check the menace of dowry and it makes punishable giving and taking dowry, abetting dowry and demand of dowry made at the time of marriage, before or after the marriage. But if definition of dowry is read with rules relating to preparation of list of gifts given to bride and groom make clear that dowry may be divided in two categories – one which is permissible that is voluntarily given by parents or relatives of both party, and other which is punishable that is demanded and compulsive one. Thus voluntary presents given at or before or after the marriage to the bride or bridegroom out of love, affection or regard would not fall within the expression ‘dowry’ punishable under Dowry Prohibition Act. Further dowry punishable under Dowry Prohibition Act must be given or taken or demanded ‘in connection with marriage’ means either for solemnization of marriage or subsistence of marriage. When demand of money has no connection with marriage dowry related provisions would not be attracted as Supreme Court observed in the case of *Appasaheb v. State of Maharashtra*³:

A demand for money on account of some financial stringency or for meeting some urgent domestic expenses or for purchasing manure cannot be termed as a demand for dowry as the said word is normally understood.

When demand of money has nexus to marriage, then it will come under definition of dowry punishable under Dowry Prohibition Act as Supreme Court observed in case of *Bachani Devi v. State of Haryana*⁴ :

If a demand for property or valuable security, directly or indirectly, has a nexus with marriage, in our opinion such demand would constitute ‘demand for dowry’; the cause or reason for such demand being immaterial.

Persistent demand for dowry after solemnization of marriage results in physical and mental cruelty and ultimately it results in dowry death. Dowry death term is used when murder of bride is committed by husband and/or in-laws. Dowry death is murder and only for differentiating a common murder and murder due to the dowry demand, dowry death term is used and further considering the problem of lack of evidences presumption clauses are provided. Indian Penal Code defines Dowry Death as:

Where death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any other relative of her husband for or in connection with, any demand for dowry, such death shall be called “dowry death” and such husband or relative shall be deemed to cause her death.⁵

When death is caused for dowry demand within seven years of marriage, death is called as dowry death. After seven years date counted from date of solemnization of marriage if death is caused even due to dowry demand, it will be murder but not dowry death. Dowry death term is used only for such unnatural death of a married woman caused due to the dowry demand committed within seven years of marriage and cruelty for dowry demand committed before death is proved.

3. (2007) 9 SCC 721.

4. 2011 (2) SCALE 265.

5. Sec. 304-B IPC.

III. CAUSATION OF DOWRY DEATH

To analyze causation of crime is important aspect of Criminal Justice System particularly when crime is a social problem. Social problem is always needed to be properly tackled and it is possible only when causes of crime are known and in accordance of which legislature has enacted the law and such law is properly enforced by law enforcement agencies. Dowry death is caused due to dowry demand, a social problem; therefore causes of dowry death are needed to be analyzed. Some important causes of dowry death are greed; safety, security of women and social pressure:

A. Greed

Dowry problem is a social problem constituting socio-economic offence. Socio-economic offences are committed because of greed, avarice, and rapaciousness. In modern consumerist society every person has willingness to enjoy every physical amenity available in the world. Every person wants to live the life of class upper than his own class and utilize the amenities available to upper class without any effort on his own part. Easier way to get the desired amenities is to demand it from parents of wife. If wife is tortured or badly treated, her parents may be compelled to satisfy the demands of husband and his relatives. It is common phenomenon that nobody demands money or things coming within his own capacity. Dowry demanded is always for money amount or things which are not in capacity of person demanding for example when any person has capacity to purchase motorcycle, he will not make demand for it but he will demand for car. For satisfying greed cruelty is committed. Greed in reality never satisfies; therefore dowry demand and cruelty continuously take place and ultimately results in dowry death. When bride after marriage has brought either no or lesser dowry, she is not received with warm and even if she has brought some dowry, it usually not satisfies greed of her husband and in-laws. Dowry demand becomes continuous phenomenon particularly when parents of bride have satisfied some demands in the beginning, then demand increases, wife is beaten and maltreated and ultimately murdered or compelled to commit suicide. In case of *State of H.P. v. Nikku Ram*⁶ court observed:

Dowry, dowry, dowry: This is the painful repetition which confronts and at times haunts many parents of a girl child in this holy land of ours, where in old days belief was where woman is worshiped, there is abode of God. We have mentioned dowry thrice, because this demand is made on three occasions: (i) before the marriage, (ii) at the time of marriage and (iii) after the marriage. Greed being limitless; the demands become insatiable in many cases, followed by torture of girl, leading to suicide in some cases or murder in some.

B. Safety and security of daughter

Every parent wants to see his daughter happy with her husband and his family. Safety and security of daughter is very important for parents. This mentality of parents is much utilized for dowry demands. In-laws and husband commit cruelty and pressurize parents of bride to satisfy dowry demands. Dowry demand once made, becomes continuous phenomenon and cruelty becomes means to satisfy dowry demands and ultimately it results in causing dowry death. Parents have willingness that their daughters be cared properly and

6. (1995) 6 SCC 219.

live in affectionate environment with husband and in-laws. For this purpose at the time of marriage parents give dowry more than their monetary capacity and further whenever dowry is demanded during subsistence of marriage, parents for safety and security of daughters provide dowry. Daughters normally do not ask money from the parents, therefore husband and in-laws for pressurizing commit cruelty ultimately resulting in dowry death.

C. Social pressure and prestige

Social pressure and prestige play major devastating role in compelling women to remain in conjugal home with husband even after dowry demand and cruelty which ultimately result in dowry deaths. Social prestige is involved that once a girl is married, she should live with husband. If she would revolt against maltreatment due to dowry demand, it affects social prestige of parents, therefore, women endure all the cruelties and parents attempt to satisfy dowry demand, whenever it is made. Whenever dowry is demanded parents try to satisfy demand because they want that the daughter should live with the husband. Social prestige and reputation of husband and in-laws are not affected even after making dowry demand but when a women because of dowry demand and cruelty comes leaves matrimonial house or revolts, her and her parents' social prestige and reputation are completely affected. In such situations even after violence a woman remains in husband's house and ultimately due to violence woman dies.

D. Unemployment

She receives violence without any question as Unemployment is major cause of dowry death. Whenever husband is unemployed, he pressurize wife to ask money from her parents by which husband may employ himself in some business or husband may purchase some physical commodities which he otherwise cannot purchase due to his unemployment. Whenever wife does not ask or bring the dowry demanded cruelty is committed ultimately causing dowry death. Bonnie E. Carlson found in his study of domestic violence that about one third of assailants were unemployed. Out of employed only 12% were professional whereas 36% were doing unskilled work, 38% semi skilled or technical jobs and 14% were in business, sells and miscellaneous jobs.⁷

Unemployment of wife or her poor socio-economic condition is also major cause of dowry death. If the wife is economically independent then in case of cruelty due to the dowry demand she may leave the matrimonial home and dowry death may not have caused. In case of economic dependence over husband, she may remain in matrimonial home even after continuous commission of cruelty which ultimately resulting in dowry death. Bonnie E. Carlson found in domestic violence cases about 57% victims were unemployed, out of 43% victims employed only three were employed in professional positions, remainder were working in clerical, technical or unskilled jobs. In educational qualification Carlson found that one third victims had not completed high school, while another 25% completed high school but had no further formal education, 34% had some college or vocational training, only 7% had graduated from college.⁸ in Indian context the situation is more decimal, here women employment and education are much pitiable and completely neglected. Women do not know about their rights particularly legal rights and further economically dependent on husband and further traditions, religion, social pressure and social prestige create such an environment that the women can never think leave the matrimonial home therefore a woman

7. Bonnie E. Carlson, Battered women and their Assailants in Delos H. Kelly (ed.) *Deviant Behaviour*, St. Martin's Press, New York, 1979, P. 540.

8. *ibid.*

submits herself to cruelty ultimately resulting in dowry death. Indian woman right from her birth is taught to obey dictates of male whether he is father, brother or husband; and not to oppose any suffering. In such situations personality of woman becomes submissive. Carlson observed:

One trait that seemed to characterize all victims was their devastatingly low self concept. A factor contributing this was that many had never worked outside the home. The second striking characteristic was the degree of isolation that most of these women experienced – many had no close friends or relatives to whom to share the pain and fear in their lives, others had depleted such resources and had found that sisters, mothers, friends and others no longer wanted to hear about their plight.⁹

IV. LEGAL REGIME

Legal regime in democratic country play important role in tackling social problems. Law has two roles to play – one as a norm setter; generations socialized and thereby internalize standard that a particular kind of behaviour is undesirable and another role of law is to immediately check the problem by punishing offender. Punishment to offender further reinforces norm setter role of law.

A. *Declaration on Elimination of Violence against Women 1993*

International Law manifests thinking of international community and creates environment against social problems. Declaration on Elimination of Violence against Women 1993 was passed unanimously by General Assembly of United Nations. Although Declaration is not a convention therefore not binding on states, it is ground breaking instrument for protecting women by showing world community's determination to eradicate the violence against women which includes dowry related violence:

Violence against women shall be understood to encompass but not limited the following: (a) physical, sexual and psychological violence occurring in the family including battering, sexual abuse of female children in the household, *dowry related violence*, marital rape, female genital mutilation and other traditional practices harmful to women, non spousal violence and violence related to exploitation...¹⁰

Dowry and dowry related violence have roots in religion, traditions and customs. Art. 4 of DEVAW direct that the states should make effort to tackle the violence against women and states should not take the plea that violence is due to some religious and custom considerations:

State should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligation with respect to its elimination. State should pursue by all appropriate means and without delay a policy of eliminating violence against women..."

B. *Constitution of India*

Constitution is supreme law of land. The Constitution of India not only provides provisions relating to structure of government but also provides legal measures for protection of citizenry particularly whose socio-economic-political conditions are weaker and persons are in need of special protection. Dowry death is committed because of socio-economic-

9. *id* at p.543.

10. Art. 2 of DEVAW.

political weaker condition of women. Part III, IV and IV-A of Constitution provide protection to women from any kind of atrocities. These provisions provide directions to legislature and government to enact law and enforce it for elimination of violence and violence creating environment.

Art. 14 makes every person equal and in Art. 15 (1) this rule has been expanded that state shall not make discrimination amongst persons on the basis of religion, race, caste, *sex*, and place of birth. In patriarchal society men and women are not equal therefore for tackling dowry related violence special protection of women is required. Art. 15 permits legislature for enactment to protect women and it is in furtherance of equality principle:

“Nothing in this Article shall prevent the state from making special provision for women and children.”¹¹

Constitution confers equal status to women and at the same time considers socio-economic-political conditions of women. Art. 15 (3) permit legislature for enacting special law for protection of women. In exercise of this power parliament has passed law to tackle the problem of dowry and dowry death.

Directive Principle of State Policy provides directions for social welfare legislations and welfare of citizens. Economic dependence of women and unemployment are major causes of cruelty which ultimately result into dowry death. Art. 39 of Constitution manifest objectives for making available employment to women:

“(a) that the citizens, men and women, equally, have the rights to an adequate means of livelihood.”

Fundamental duties are intended to serve as constant reminder to citizen that in their activities persons should observe some morality and do not create problem to other persons. Art. 51-A (e) seeks to renounce practices derogatory to dignity of women:

“It shall be the duty of every citizen of India: ...

(e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional and sectorial diversities; *to renounce practices derogatory to derogatory to the dignity of women.*”¹²

Dowry death is most barbaric, inhuman social problem in which murder of wife is committed by protector that is husband. Art. 51-A (e) imposes duty on citizens that they should renounce such practices.

C. Indian Penal Code

Indian Penal Code is major penal statute in India. In case of dowry related violence provisions contained in Indian Penal Code provide remedies under two categories of provisions: one under general provisions dealing with assault, use of criminal force, hurt, grievous hurt, culpable homicide and murder; another under specific provisions dealing with cruelty and dowry death. When case is not coming under specific provisions, assailant is punishable under general provisions.

1. Cruelty by Husband and Relatives

For pressurizing wife to ask money from her parents, husband and his family members commit cruelty which may be either physical or mental cruelty or both. Cruelty is incipient stage of dowry death. When violence is committed but death is not caused, it is cruelty and when due to the violence death is caused, it amounts to dowry death. The provision contained

11. Art. 15(3) Constitution Of India.

12. Art. 51-A Constitution of India.

in sec.498-A of Indian Penal Code deals with cruelty and it is major provision for protecting women from dowry related violence. Legislature has added sec. 498-A and 304-B in Indian Penal Code which punish cruelty and dowry death respectively; and sec. 113-A and 113-B in Indian Evidence Act which are presumption clause, enacted to cure problem of lack of evidences in case of dowry related violence. In order to convict a person for committing cruelty against wife, it is needed to prove that the accused committed acts of harassment or cruelty as contemplated by sec. 498-A of Indian Penal Code. Term cruelty u/s 498-A of IPC includes both physical and mental cruelty. Cruelty is willful conduct which is of such nature as is likely to drive women to commit suicide or to cause grave injury or danger to life, limb, health(mental or physical) or harass or coerce her or any other person related to her to meet any unlawful demand:

“Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty, shall be punished with imprisonment for term which may extend to three years and shall also be liable to fine.

Explanation: for the purpose of this section “cruelty” means:

(a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.”¹³

Provisions contained in sec. 498-A IPC deal with violence committed against women for dowry demand but even after enactment of this provision violence committed for pressurizing women to bring more and more dowry continuing and increasing. Due to the social pressure, socialization, social prestige and economic dependence usually women do not report cases to police. Along with it after reporting the case to police, surviving of marriage comes to nugatory and creates problem of marriage tie breach up which is problematic to wife, her children and her parents. Further when case is reported to police, it usually considers matter as family dispute therefore reluctant in initiation of investigation. Violence due to dowry demand takes place within four walls therefore evidences are not available except the testimony of victim and medical report. In case of wife always there is possibility of retracted testimony. Whenever husband finds the situation that he may be convicted, he gives proposal to wife to live with him and for the sake of saving marriage and for children she changes her previous statement. Further medical opinion in evidence law is considered as expert opinion which has only persuasive value therefore very weak evidence. Considering the problem of availability of evidences in such cases presumption clauses contained in SS.113-A and 113-B Evidence Act are enacted but those are applicable only when due to the dowry demand violence dowry death is caused. When victim is surviving, no presumption clause is applicable. In case of cruelty punishable u/s 498-A IPC it is required that all the essential requirements of cruelty described therein should be proved at the time of trial which is very difficult therefore greedy persons are not fearing in committing dowry related violence.

2. Sec. 304-B of Indian Penal Code

Violence committed for dowry demands when aggravates results in death of wife and it is committed within seven years of solemnization of marriage, such death is called as

13. Sec.498-A Indian Penal Code.

dowry death which is punishable u/s 304-B IPC. Dowry death occurs within the four walls of the house and death is shown as accident specially occurring at the time of cooking food in the kitchen, therefore evidences are not available. In 1987 sec. 304-B was incorporated in Indian Penal Code, this section provides provisions for tiding over problem of lack of evidences. This section is attracted when death of women is caused by burns or bodily injury or occurs otherwise than under normal circumstances and occurrence is preceded by cruelty or harassment by the husband or in-laws in connection with a demand for dowry:

Where the death of a woman is caused by any burn or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relatives of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.¹⁴

In sec. 304-B (1) IPC dowry death is defined and rule of evidence in form of presumption clause is created that if murder comes under definition of dowry death, it shall be presumed that known as dowry death is committed by husband or his relatives. Essential ingredients necessary for dowry death are:

1. Death must have been caused by burns or bodily injury or otherwise than under normal circumstances.
2. Death must have taken place within seven years of marriage.
3. Wife must have been subjected to cruelty or harassment by her husband or in-laws.
4. Such cruelty or harassment must be for or in connection with demand of dowry.
5. Such cruelty or harassment must be shown to have been meted out to woman soon before her death.

The presumption clause is created to cure the problem of lack of evidences as dowry death is committed within four walls and shown as accident. For attracting the presumption clause it is needed that all essential requirements of this section must be proved before the court. Death must be within seven years of marriage and soon before the death cruelty or harassment for dowry demand was committed means all the requirements of sec.498-A of IPC are proved in addition to death of woman, then only death will become dowry death and presumption clause will become applicable. It is much difficult task as in dowry related offences eye witnesses and other kinds of evidences are generally not available. Requirements of proving death in suspicious circumstances and cruelty committed for dowry demand soon before death check the effective enforcement of provisions relating to dowry death.

Whenever a married woman dies within seven years of her marriage under suspicious circumstances and it is proved that she was harassed for dowry, it is presumed that the husband or in-laws have committed dowry death. It is immaterial whether she committed suicide or was murdered, both types of deaths are covered u/s 304-B IPC dealing with dowry death. In case of *Mst. Premwati v. State of MP*¹⁵ court observed:

"The framers intended and contemplated the liability of the occurrence of death of the bride to be fastened on the in-laws though they did not cause

14. Sec. 304-B IPC.

15. (1991) Cr. L. J. 268 (MP).

it, by creating a fiction. If the husband or his relations create such circumstances as would compel a person to choose death as the only way of getting out of misery, such treatment would also attract section 304-B.”

Section 304-B and 498-A of IPC are complimentary to each other to check the problem of dowry related violence. Under sec. 304-B dowry death is punishable when committed within seven years of marriage, such time period is not provided for cruelty punishable under section 498-A. Sec. 498-A deals with problem of cruelty when victim is still alive while sec. 304-B deals that stage of cruelty when cruelty resulted into death of victim. When requirements of sec. 498-A and/or 304-B are not proved then case is dealt under general provisions of Indian Penal Code penalizing use of criminal force, hurt, grievous hurt, culpable homicide and murder.

3. Criminal Procedure Code

In dowry death cases eye witnesses are generally not available therefore medical evidences are crucial. Provisions relating to investigation contained in Criminal Procedure Code direct police officers for taking necessary steps for collection of medical evidences. Further dowry problem is creating grave problem before the society, it must be tackled properly therefore besides police officers Code imposes duty on executive magistrates also for taking necessary steps for collection of evidences.

When police officer gets information about dowry death, sec. 174 Cr.P.C. imposes duty on police officer to reach at the crime scene and send the inquest report to magistrate. Police officer takes all the measures to take the dead body for medical examination which is commonly known as postmortem. Postmortem is compulsory in dowry death cases because direct evidences are not available and only by postmortem report it may be identified whether death was natural or unnatural and further whether there is any mark of physical violence indicating about cruelty. Sec. 174(3) Cr.P.C. provides that:

When-

- (i) the case involves suicide by a woman within seven years of her marriage; or
- (ii) The case relates to the death of a woman within seven years of her marriage in any circumstances raising a reasonable suspicion that some other person committed an offence in relation to such woman; or
- (iii) the case relates to the death of a woman within seven years of her marriage and any relative of the woman has made a request in his behalf.
- (iv) there is any doubt regarding the cause of death; or
- (v) the police officer for any other reason considers it expedient so to do.

he shall, subject to such rules as the state government may prescribe in this behalf forward the body, with a view to its being examined, to the nearest Civil Surgeon, or other qualified medical man appointed in this behalf by the state government, if the state of weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless.”

Section 176(1) Cr.P.C. imposes compulsive duty on executive magistrates to make inquiry into the cause of death either instead of or in addition to the investigation by the police officer:

When the case is of the nature referred to in clause (i) or clause (ii) of sub-section (3) of section 174, the nearest magistrate empowered to hold inquest shall, and in any other case mentioned in sub-section (1) sec 174, any magistrate so empowered may hold an inquiry into the cause of death either instead of, or in addition to, the investigation held by the police officer; and if does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence.”¹⁶

Section 176 Cr.P.C. ensures that in case of dowry death investigation should be proper and evidences should be collected properly. By which after trial guilty person is punished and inhuman crime of dowry death may be tackled properly. For this purpose responsibility is imposed on executive magistrate that he shall make inquiry and collect the evidences and also he shall supervise and control the investigation by police officer.

4. Indian Evidence Act

In case of dowry death problem is lack of evidences, to cure this problem presumption clauses are provided in Evidence Act. Sec. 113-B of Evidence Act provides that:

“When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person cruelty or harassment for or in connection with any demand for dowry, the court shall presume that such person had caused the dowry death.”

This presumption clause reiterates the provision contained u/s 304-B IPC in reference to presumption to presumption of commission of dowry death by husband and his family members. In dowry related violence main problem is lack evidences as the crime is committed within four walls. If even after commission of crimes criminals will not be punished, then it will create grave problem before society at large and dowry problem will create havoc. Dowry related violence may affect the life of women, children and parents therefore presumption clauses have been added in IPC and Evidence Act according to which ones it is proved before the court that death of woman was caused in suspicious circumstances within seven years of marriage and soon before death cruelty was committed, then presumption clause applies to determine that murder is dowry death and dowry death was committed by husband or/and in-laws. Normally in criminal cases burden of proof lies on prosecution to beyond all reasonable doubts that crime was committed by accused but in dowry death cases after application of presumption clause burden of proof shifts on accused to prove his innocence. Suicide committed by woman is also covered by dowry death provisions. Usually death of woman is shown by husband and in-laws as suicide or accident. This situation is needed to be tackled properly. For this purpose presumption clause is provided in Evidence Act by which husband and his relatives are presumed for abetment of suicide:

“When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her

16. Sec. 176(1) Cr.P.C.

17. Sec. 113-A Indian Evidence Act.

husband had subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.”¹⁷

Section 304-B IPC together with sec.498-A IPC, ss. 113-A and 113-B Indian Evidence Act and ss. 174 and 176 Cr.P.C. provide complete measures to tackle the problem of dowry death. These provisions mainly provide measures to cure the problem of non-reporting of dowry death cases and lack of evidences by creating presumption clauses and imposing duty on executive magistrates to supervise investigation and conduct inquiry. Even after creation of presumption clauses, problem of lack of evidences is not completely cured. Presumption clauses contained in sec. 304-B IPC and ss. 113-A, 113-B Indian Evidence Act only apply after proving certain essential requirements like death by burn, bodily injury or suspicious circumstances, death within seven years of marriage, cruelty was committed soon before death for or in connection with dowry demand. All these essential requirements for application of presumption clauses are needed to be proved by evidences and it is most difficult task because of lack of evidences in dowry related violence. Therefore requirement of proving essential ingredient of dowry death makes whole presumption clause nugatory and ineffective; making consequence of complete failure of dowry related law and dowry related violence unchecked.

(vi) JUDICIAL DIRECTIONS

Judiciary plays important role in tackling social problems. The role of judiciary becomes more crucial in case of dowry death cases because dowry death takes place within four walls and direct evidences are generally not available therefore judiciary is needed to be very careful in analyzing facts of the case, analyzing evidences and application of presumption clauses. Acquittal only on technical ground or because of lack of evidences may affect criminal justice system and ultimately the whole society. When a criminal is convicted and sentenced, it provides lesson to criminals and potential criminals that crime should not be committed and thereby problem may be tackled effectively. Law in action is depending on judicial verdicts.

In case of *Selvraj v. State*¹⁸ cruelty and harassment of wife for dowry demand was proved by evidences of independent witnesses. Death occurred between 3 pm to 4 pm but police was intimated after 9 pm. No reasonable reason was given for delayed information. Appellant simply denied accusation when questioned u/s 313 Cr.P.C. but no evidence disproving allegation was produced. Appellant could not assign any reason for committing alleged suicide by wife leaving behind a child of 1 and 1/2 years. Conviction and sentence of husband was upheld. In case of *Anand Mohan Sen v. State of W.Bengal*¹⁹ deceased was newly wedded wife, woe's unnatural death occurred in verandah in matrimonial house. In-laws fled away after locking matrimonial house. Postmortem report revealed that death was caused due to the poisoning. In-laws made no attempt to take the deceased in the hospital; therefore court did not accept the plea that death was accidental. On the basis of presumption under section 113-A Evidence Act conviction was upheld.

Dowry death cases are increasing and creating greater challenge before the criminal justice system. To tackle this problem courts are taking initiatives by applying presumption clauses by which lack of evidences in dowry death is cured. In case of *Kulwant Singh*

18. 2007Cr.L.J. 3824 (Mad).

19. 2007Cr.L.J. 2770.

20. 2007Cr.L.J. 3695 (P&H).

*v. State of Punjab*²⁰ unnatural death of wife within four years of marriage was caused due to the poisoning. Postmortem report proved death due to the poison. Demand of dowry and harassment for dowry was proved by evidences witnesses. Accused could not explain the circumstances causing death. Presumption u/s 113-B Evidence Act was applied and court opined that all the ingredients envisaged u/ss 304-B and 498-A IPC are satisfied and conviction was upheld.

In case of *Devi Lal v. State of Rajasthan*²¹ conviction was upheld. The fact of the case was that at the time of marriage father of deceased spent a lot of money but even after that in-laws family was not happy with dowry given by bride side. Deceased was harassed continuously. A few days before the incident her uncle visited her matrimonial home and found the deceased was harassed for dowry. After returning uncle informed the father about such happenings. Father went to his daughter's place, but he could not meet her and later on he was informed that his daughter had died and dead body was cremated. Court applied presumption clauses of Evidence Act and culprits were convicted for causing dowry death. Court observed that:

"It is not one of those cases, where omnibus allegations have been made against the members of the family. First information report was lodged against accused persons only. Nobody else was implicated. Hazari Ram(PW-1) has been categorical in stating that Puspa's father in-law was a gentleman. His effort to persuade his wife and son not to harass Puspa might not have ultimately succeeded but his attempt in that behalf was appreciated by him(PW-1) and other family members of his family with gratitude. It is therefore, cannot be said to be a case where Hazari Ram(PW-1) has falsely implicated anybody ...the fact that she had been assaulted even a few days prior to the incident. In our opinion, tests of section 304-B of IPC stood satisfied..."

Proof of cruelty or harassment 'soon before her death' is essential requirement in dowry death. On proving of this requirement presumption clause applies and it is presumed that death is dowry death and it was committed by husband and his relatives. In case of *Ashok Kumar v. State of Haryana*²² Supreme Court directed that 'soon before her death' should be decided on the basis of proximity principle:

"...In our view, the expression 'soon before her death' cannot be given a restricted or a narrower meaning. They must be understood in their plain language and with reference to their meaning in common parlances. These are the provisions relating to human behavior and, therefore, cannot be given such a narrower meaning, which would defeat the very purpose of the provisions of the Act. Of course, these are penal provisions and must receive strict construction. But, even the rule of strict construction requires that the provisions have to be read in conjunction with other relevant provisions and scheme of the Act...however, there must be existence of proximate link between the acts of cruelty along with the demand of dowry and the death of the victim. For want of any specific period, the concept of reasonable period would be applicable."²³

21. AIR 2008SC 332.

22. AIR 2010 SC 2839.

23. *Id* at p. 2844.

Provisions relating to dowry death are exception in criminal law as it provides deeming provision. Such provisions are provided after considering the problem of evidences in this crime. Supreme Court observed that:

“...The concept of deeming fiction is hardly applicable to the criminal jurisprudence. In contradistinction to this aspect, the legislature has applied the concept of deeming fiction to the provisions of section 304-B. where other ingredients of section 304-B are satisfied, in that event, the husband or all relatives shall be deemed to have caused her death. In other words, the offence shall be deemed to have committed by fiction of law. Once the prosecution proves its case with regard to the basic ingredients of section 304-B, the court will presume by deemed fiction of law that the husband or the relatives complained of, has caused her death. Such a presumption can be drawn by the court keeping in view the evidence produced by prosecution in support of the substantive charge under section 304-B of the Code.”²⁴

In India there is always possibility of falsely implicating a person in a case, therefore, care has been taken in enactment of legal provisions that the deemed fiction is applicable only on proving essential ingredients of section 304-B IPC and further deemed fiction creates rebuttal presumption for protection of innocent persons. Supreme Court observed in this case:

“Of course, deemed fiction would introduce a rebuttal presumption and the husband and his relatives may, by leading their defence and proving that the ingredients of section 304-B were not satisfied, rebut the same... In light of the above essential ingredients for constituting an offence under section 304-B of the Code, the court has to attach specific significance to the time of alleged cruelty and harassment to which the victim was subjected to and the time of her death, as well as whether the alleged demand of dowry was in connection with the marriage. Once these ingredients are satisfied, it would be called the 'dowry death' and then, by deemed fiction of law, the husband or the relatives would be deemed to have committed that offence.”²⁵

Indian courts are sensitive and cautious for eradication of dowry related violence and for this purpose courts interpret law and analyze facts of the dowry death cases in such manner that culprits should always be convicted and sentenced and at the same time innocent persons be protected. Courts do not care technicalities of law and do not make technical interpretation of law. Courts are functioning properly and effectively for tackling the problem of dowry related violence particularly dowry death.

24 . *Id* at p. 2845.

25. Economic activities may be divided in two categories- primary subsistence activity and secondary subsistence activity. Primary subsistence activity is production of materials for satisfying basic necessities. Secondary subsistence activity is use of materials obtained in primary subsistence activity and makes it consumable. The person who is indulge in primary subsistence is activity considered as more valuable and prevails in the societal estimation and person indulged in secondary subsistence is considered as depending on person indulged in primary subsistence activity. Generally men do primary subsistence activity for example farming and women do secondary subsistence activity for example cooking. These activities are also determinative for giving and taking dowry- dowry is given by person belonging to secondary subsistence activity and taken by person belonging to primary subsistence activity.

(VII) CONCLUDING REMARKS

Dowry and dowry death are creating graver problem before the society at large in India. The problem is becoming more and more menacing due to impact of consumerism, globalization, liberalization, electronic media and cinema as every person wants to enjoy commodities and amenities available in market without making any effort on his own part at the cost of another person and dowry system which is in existence since ancient period provides easy method to obtain the commodities and amenities. For tackling problem of dowry death it is much required that the causation and law should be analyzed. Greed, safety and security of women, social pressure, social prestige and unemployment are main causes of commission of dowry death. Due to greed and unemployment groom side pressurize bride side for giving more and more dowry and demand of dowry continues even after solemnization of marriage. Dowry demand is continuously made and for this purpose to pressurize wife to ask dowry from parents and to pressurize parents to pay dowry as and when demanded, violence is committed against wife ultimately such cruelty or harassment results into dowry death. For safety, security of daughter, social pressure and social prestige parents pay dowry. Marriage should continue, children should not be affected, economically wife is dependent on husband, and woman is socialized to not complain against any harassment or cruelty – because of these reasons even after commission of cruelty for demand complaint is not made and violence continues ultimately resulting in dowry death. Complaint in dowry related violence is not made at incipient stage but generally made after commission of dowry death. Law is enacted for tackling the problem of dowry death. Dowry death takes place within the four walls therefore direct evidences are generally not available. To cure the problem of lack of evidences presumption clauses are enacted in Evidence Act and deemed fiction is created in section 304-B IPC. Even after enactment of presumption clauses and deemed fiction crime rate is increasing continuously. The reasons behind it are: (1). Dowry and dowry deaths are social problems. Social problems can be tackled only when social institutions and social solidarity are strengthen; morality and social values are remodeled; and societal members are educated for simple living and respect for women; and proper avenues are provided to women to participate in primary subsistence activities²⁵ and social norm is developed for opposing giving and taking dowry. (2). Presumption clauses and deemed fiction of law become applicable only when there death of woman is committed. Before death presumption clauses and deemed fiction are not applicable, to tackle the problem of dowry death it is needed that these provisions should apply at the incipient stage whenever cruelty or harassment for dowry demand is committed. To apply dowry death provisions, cruelty or harassment for dowry demand is needed to be proved by evidences and these crimes are committed within four walls therefore evidences are not available; such requirement affects conviction in dowry death cases. It is needed that there should be presumption clause and deemed fiction for cruelty also. Presumption clause may be prone to be misused, therefore, it should be provided with proper safe guards.



RECONCEPTUALISING SEXUAL OFFENCES IN INDIA

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“Woman is the companion of man; gifted with equal mental capacities. She has the right to participate in the minutest details in the activities of man, and she has an equal right of freedom and liberty with him. She is entitled to a supreme place in her own sphere of activity as man is in his. This ought to be the natural condition of things and not as a result only of learning to read and write. By sheer force of a vicious custom, even the most ignorant and worthless men have been enjoying a superiority over woman which they do not deserve and ought not to have. Many of our movements stop half way because of the condition of our women.”
- Mahatma Gandhi¹

Abstract

Sexual Offences are a major problem in India, evident from trial cases in different courts; official statistics record and the reports in the media and press as well. The accused has often gone free, because the victim did not file a complaint or gathering of poor evidence as well as lacunae in the law. Though, this area of law has undergone significant changes and reforms since the 1970s. The Criminal Law (Amendment) Act, 2013 is a historic step of amending the Criminal Law of India and re-conceptualizing sexual offences. Importantly, the Act introduced several new offences under the IPC such as causing grievous hurt through acid attacks, sexual harassment, use of criminal force on a woman with intent to disrobe, voyeurism and stalking. The Act further amended the Code to criminalise the failure of a public servant to obey directions under the law. This paper presents an overview of the laws applicable to sexual offences and amendments in existing laws, specifically in terms of changes brought by the Criminal Law (Amendment) Act 2013 to bridge the gap before and after the Criminal Law (Amendment) Act of 2013 to curb the increasing instances of sexual offences against women in India.

Key Words- *The Criminal Law (Amendment) Act, 2013; Crime against Women; Rape; the Indian Penal Code, 1860; the Indian Evidence Act, 1872; the Code of Criminal Procedure, 1973.*

I. INTRODUCTION

Man and woman are two manifestations of one supreme power. They appear different in form and function but the fact remains they are equal in strength, power and disposition.

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1. M K Gandhi, *Speeches and Writings*, G. A. Natesan & Company, Madras, 1933

The one famous verse of ancient Indian scripture gives it strong approval that the ultimate reality is one and the world of beings is its manifestations². However, they are different and unique but, find their end or fulfillment in each other. The Indian philosophy always recognises this relationship of man and woman as *Shiva* and *Sakti* or *Purusa* and *Prakrti*³ and beautifully depicts this union as *ARDHANAREESWARA*—half man and half woman⁴. The first Law giver Manu says that Gods are cheerful where women are respected.⁵ This is actual realization of human philosophy. Human society has always been far away from such reality. Women are called *Bhogyā*. They are being beaten, trafficked, raped, murdered and even killed in the womb with the advancements of techniques in the field of Science and Technology. Since the dawn of human civilization, their crying voice is depicted in different ways.⁶ These abuses not only inflict great harm and suffering on half of the world—they tear at the fabric of entire societies.⁷

Sexual offences against women and children in various forms have been identified one of the major social problem since ages. Women lived in an age characterized by gender inequality. They enjoyed a few legal and social rights and were expected to remain subservient to their father or husband or son⁸. They were confined to their house and lived in obedient position in which they are pursuit for freedom and self esteem. But, with advent of progress and reform in human civilization, changes that influenced all societies not only in culture, politics, economy and social norms, transformed gradually in a global village, and thus the social upheaval in which India also witnessed a sweeping change, opened all the doors of opportunity to women with a concept of gender equality. Though, the new era of growth, development, progress and social upheaval to women unlike men arisen a sort of trouble and anxiety to women. This change in atmosphere, change in life style, living standards, disparity in economic growth due to industrialization and urbanisation and also changes in social ethos and lack of concern for moral values contributed to a violent approach and tendencies towards women, which has resulted in an increase in crime against women.

The problem of sexual delinquency in India, has failed to receive sincere attention of the State, which it deserves till date. Whereas, penal laws have been changed, amended and rectified across the globe to meet out the real problem of vulnerable groups. The more awakening of common people today made it certainly an important issue and a matter of deep concern for the government and people of Indian society both. Subsequently, the statute has been reformed and sexual offences are re-conceptualised. Though, in nineties, the Supreme Court of India in

2. *Ekam sat viprah bahudha vadati*’ i.e. there is only one reality in this world ; described in many ways, (, da l n- fo i kcgqk onk; flua ; ea ekrfj”okuekg), *Rg Veda*, 1.164.64

3. *Purusa* is the conscious principle, the force or the energy while *Prakrti* is matter, gross, but active. It is in their union the very evolution has taken place. Philosophically, the doctrine of evolution has great significance in inter relating matter, life, mind and spirit. In Indian mythology, *Siva* and *Sakti* are represented as two sides of the same divinity.

4. v/ks ok , "% vkrE% ; Ri Ruh (wife is the half of own’s self)

5. ; = uk; Lrq i ; Urs jellrs r= nork% (‘*Yartra naryastu pujoyante ramante tatra devataha*’)- Manu, *Manu-Smriti*, 3/56.

6. vcyk thou gk; rfgljh ; gh dglulj vlyy ea gs nkk vlg vllka ea ikulAA (Gupta, Maithalisharan) ; foLrr uhk dk dlb dkkj ejk u dHh viuk gkukA ifjp; bruk bfrgkI ; gh] mevH dy Flh feV vkt pyhAA -(*Verma ,Mahadevi*)

7. Foreword, Handbook for Legislation on Violence against Women, Department of Economic and Social Affairs, Division for the Advancement of Women, United Nations, New York, 2010.

8. fi rk j{kfr dkk; ; Hkrkz j{kfr ; kbuA i e-% p Lfkfojs Hkkoj L=h Lokrl=; a ukgtI AA *Manu-Smriti*, 5/151

a landmark judgment⁹ while recognizing the International Conventions and Covenants has interpreted gender equality of women, in relation to work and has held that sexual harassment of women at the workplace is against their dignity and violative of various fundamental rights of women guaranteed under the Constitution of India. The court opined that:

“Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognised basic human right. The common minimum requirement of this right has received global acceptance. The International Conventions and norms are, therefore, of great significance in the formulation of the guidelines to achieve this purpose.”¹⁰

The changed law, in changed circumstances embodies certain values and expresses the consensus of the society to adhere to some values, nevertheless, undeniably generates a process of creating social consensus and consequential conditions that are conducive to mobilize such a change¹¹. This reform in the substantive law, therefore, would certainly give a further momentum to the untiring efforts to do away with the ‘pro-male’ or ‘male-oriented’ and ‘gender bias’ sexual morals reflected in the Indian Law relating to sexual offences. This paper covers a wide range of issues relevant to sexual offences. The paper also examines restructured penal laws governing sexual offences. It has expanded substantially from the original intent while taking into account several reports and papers to which references would have been made throughout this text. This Paper deals with existing penal provisions especially in the light of *the Criminal Law (Amendment) Act 2013* to access criminal justice to vulnerable groups in India.

II. PROBLEM OF SEXUAL OFFENCES IN INDIA

Though, there is rapid change in the economic, political and social conditions of the people of Indian society, still for women, the circumstances are rare to be able to feel safe. The police system in India plays a significant role in protecting the women and preventing gender based violence. However, there have also been reports of cases of violation and discrimination by blocking investigation of the cases of sexual offences or dissuading the victim from registering a case based on the gender, class or caste inspite of task to protect the victim of sexual crime. Every time, when they stepped out of their homes, walked on the streets, or boarded public transport, they are at risk, and being harassed, groped and subjected to unwelcome sexual activities. Sometimes, they are not safe within the house too.

The Law Commission of India has remarked that during the recent years, the impact of criminal justice system on victims of rape and other sexual offences has received considerable attention, both in legal circle and amongst organizations and individual connected with the welfare of women. In the field of criminology, an increasing interest is being shown in the victim and his or her position in the criminal justice system. In consequence, greater attention is now being paid to the female victim of a sexual offence. Psychologists have for some time past, been studying the effect of rape and other sexual offences upon women or girls and their personality¹².

9. *Vishaka and others v. State of Rajasthan and others*, AIR 1997 SC 3011

10. *Ibid*,

11. *Ibid*.

12. Law Commission of India, 84th report; Introduction, p1; the Commission also observed in its 172nd report of 2000 by accepting the National Commission Reports recommending autonomy and seminal improvement in the quality of the police force, which is principal machinery for the maintenance of law and order, continue to gather dust for decades due to the apathy of all the political dispensations.

III. NATURE AND MEANING OF SEXUAL OFFENCES

Sexual offences constitute altogether different kinds of offence, which is a result of perverse mind of wrongdoer. More commonly, sexual offence is understood in terms of female only, but victims of these types of offences are children and men also. Sexual offences include rape; sodomy; incest; buggery; and other kinds of sexual assault etc¹³. It is an act of causing sexual activity or indulging another person in unwanted sexual acts either by force or threat or by inducement or deceitful means against the will or without the consent of victim, to some extent with consent too. Sexual offence is a violent and dehumanizing act, which is an unlawful intrusion of the right to privacy and sanctity of life of a vulnerable group. It is a serious blow to the supreme honour of a vulnerable group and offends her/his dignity. It degrades and humiliates the victim and leaves behind a traumatic experience. Sexual offences, when they assume the form of sexual violence may lead to murder, suicide, acute depression, etc. of victims. It entirely disturbs the social well being of the victims because of stigmatisation and the consequential loss of status in their families and the neighborhood¹⁴. Violence against women means a physical act of aggression of one individual or group against another or others. This is any act of gender-based violence which results in, physical, sexual or arbitrary deprivation of liberty in public or private life and violation of human rights of women.¹⁵

In all primitive societies, sexual offences have been condemned, proscribed and punished. *Manu- Smriti* -an oriental *Manava- Dharmashastra* describes various human activities as a part of sexual offence and prescribes severe punishments¹⁶. Sex related offences are universal phenomena that take place in every society across the. Sexual offence, when assume a form of sexual violence causes severe and irreparable physical and mental injury to the victims. In physical injury, it affects the range of sexual and reproductive health problems and in mental injury; it may lead to suicide or acute depression etc. to the victims. However, sex related offences take place in different circumstances and social settings in various forms. It happens as sexual assault (without carnal relation), forcible rape, sexual abuse of mentally or physically disabled people, sexual abuse of children including statutory rape (carnal relation with or without consent) adultery, sodomy, fornication, forced marriage and co-habitation including the marriage of children, violent acts against the sexual integrity of women including female genital mutilation and obligatory inspection for virginity and forced prostitution and trafficking of people for the purpose of sexual exploitation.

13. 'Sexual offences' was inserted into original draft of *the Indian Penal Code*, 1860 by the Act 43 of 1983 s. 3, for the heading "Of rape" (w.e.f. 25-12-21983) under "Chapter XVI- Of Offences affecting the Human Body". It encompasses ss. 375, 376 & 376A to 376E, which were amended and added vide Criminal Law Amendment Act 13 of 2013. However, the Code does not provide any definition of Sexual Offences. The preamble of *the Protection of Children from Sexual Offences Act, 2012* highlights that the Act aimed to protect children from Offences of Sexual Assault; Sexual Harassment and Pornography, so these acts may also be termed as Sexual Offences.

14. Chattoraj, Barindra N, *Sex Related Offences and Their Prevention and Control Measures: An Indian Perspective*, p82.

15. Conference on Women, Beijing, 1995 Country Report

16. *Manu-Smriti* : VIII/352-361; [vudto/ww Hkf xuh l qukj hA l quq l B dlu; k l e , pljhAA blgfg dnrV foykcdS t'kBA rkgf c/ls dNq iki u gkbAA & %kkokoh rgy l hrkl \] jkepfjrekul \] fcd' dlu/kckk.MA 8&7A% l iknd fo'oukfk feJ\] dk'khjkt l d'cj.k\] iFke l d'cj.k\] Hkkxb Hkk.k id \] oj.k.kl hA](#)

In India, sexual offences against women are mainly manifested in the form of rape, molestation, sexual harassment, kidnapping and abduction for sexual purposes and trafficking of girls for sexual exploitation. The official statistics showed a declining sex-ratio, health status, literacy rate, work participation rate and political participation among women.¹⁷ While on the other hand, the spread of social evils like dowry deaths, child marriage, domestic violence, sexual harassment, exploitation of women workers are rampant in different parts of India.

IV. HISTORICAL TRENDS IN CRIMINAL LAW REFORM

Historically, sexual offences in India have been understood through the traditional language of the 'offence of rape'. Originating in the 1860's, at a time when women had no influence over the shape or substance of legislation affecting them; the rape law remained on the statute book for a century before any attempt was made to challenge it. The need to review the law in this area has become more pressing than ever. It has been observed that there is steady increase in the statistical data of sexual offences, especially in cases of rape and molestation of women¹⁸. Though, the law reforms in India have been largely reactive in dealing with violence and sexual offences against women by the constitution of the First Law Commission established in 1834 which drafted the *India Penal Code* and other important Laws. But, in the history of penal law, the post independence era, especially the nineties has become the first decade in which certain aspects of sexual violence against women resulted in penal law reforms. The *Indian Penal Code* has hitherto been heavily skewed in favor of the accused. The verdict of the Supreme Court in *Mathura rape case*¹⁹ had generated a heated debate and forced the Government to amend the substantive law relating to sexual offences, rules of evidence and procedure and other related matters precipitately.

a) *The Criminal Law (Amendment) Act of 1983*

Taking a serious note of public criticism of the inadequacy of the law of rape; and its failure to safeguard the rights of the innocent victims against the heinous crime, the Parliament, in 1983, extensively amended the law of rape, both substantive and procedural, so as to make it more realistic. This amendment brought significant changes particularly regarding what constitute custodial rape, provision for enhanced punishment for offences under section 376 (2), and presumption of the absence of consent in cases booked under section 376(2), IPC etc. A new clause fifthly has been inserted in place of the then existing clause fifthly, which has been renumbered as clause sixthly to Section 375 IPC. This clause negatives the consent of the women for the purpose of the offence of rape if the woman is of unsound mind, or is under the influence of intoxication at the relevant time. Such consent will not be considered as valid defense and the accused will be held liable for the offence. The following changes brought forth under IPC-

1. A new category of offence i.e. Custodial Rape was introduced by inserting Section 376B to 376 D, IPC.

17. Data collected by National Crime Record Bureau (NCRB), Ministry of Home Affairs, GOI, unfolds that gender biases remain deeply in-grained in society, sustained by the institutions of patriarchy. NCRB recorded in 2011 a total of 228650 incidents of Violence Against Women (VAW) [42968 (18.79%)-Molestation, 8570 (3.75%) - Sexual- harassment, 24206 (10.58%)-Rape and remaining of Dowry Death, Kidnapping and Abduction etc.]. Appalling statistics unpack that from 1953-2011, rape rose by 87.3%, which is three times faster. Shockingly, a woman is raped every 22 minutes; and every 51minutes a woman faces harassment in the public places.

18. *Ibid*

19. *Tuka Ram v State of Maharashtra*, AIR 1979 SC 185.

2. Section 376A, IPC makes sexual intercourse with one's own wife without her consent under a decree of separation punishable.
3. The punishment for rape provided in Section 376 IPC is minimum seven years imprisonment under clause 1 and ten years under clause 2.

Section 228A, IPC prohibits the disclosure of the identity of victims in rape cases under sections 376, 376A to 376D, IPC. Other changes took place in rules of evidence and procedural laws.

4. *The Indian Evidence Act, 1872* was amended by inserting Sec. 114A drawing a conclusive presumption as to the absence of consent of the woman in case of prosecution of rape under Sec 376 (2) clauses (a) to (g), IPC shifting the burden of proof of innocence on the accused.
5. Section 327 *Cr P C* which confers the right of an open court trial has been amended making the provisions for trial of rape cases or an offence under Section 376A to 376D, IPC in camera and prohibition of publication of trial proceedings in such cases without the prior approval of the court.

Thus, in cases of custodial rape, rape of a pregnant woman, and gang rape, if it is proved that the accused had carnal knowledge with the woman who is alleged to have been raped, and the question is whether it was without the consent of the woman, and she states before the court that she did not consent, the court shall presume that she did not consent²⁰. This amendment tries to overcome the gender inequities which can exist at workplaces, police stations, jails and other such situations, in which the victim is overpowered and a forceful sexual act committed. But, these amendments were not enough to stem the rise in the number of cases of sexual violence against women.

b) *The Indian Evidence (Amendment) Act of 2003*

In 1997, in *Sakshi* case,²¹ the apex court requested the Law Commission to examine the issues raised by the petitioners and examine the feasibility of making recommendations for amendment of the *IPC* or deal with the same in any other manner so as to plug the loopholes and to look into these issues afresh. Finally, the Law Commission submitted the 142nd report reviewing the Rape Laws in 2000. However, based on the Law Commission's recommendations, Section 155(4) of the *Indian Evidence Act, 1872* was deleted and a proviso clause to the Section 146 was inserted vide Act 4 of 2003, which disallows to put questions about prosecutrix character in cross examination. Thus, a victim of rape can no longer be questioned about her past sexual conduct and her 'general immoral character'. The apex court also issued certain guidelines for preventing sexual harassment of women at workplace which is a milestone for the safety of women. There are some of the general points of the *Vishakha* judgment²² -

- Gender equality includes protection from sexual harassment and the right to work with dignity as per the Constitution of India.

20. The Act made changes in various sections of IPC - 376(2) custodial rape; 376(A) Martial rape; and section 376(B to D) sexual intercourse not amounting to rape. The amendments prohibited the disclosure of the names of the victims and perpetrators. The other changes brought about the amendment in Code of Criminal Procedure were that it provided for medical examination of the rape victim under Section 164-A and trial for rape to be conducted 'in camera' to protect the privacy of victim under Section 327(2).

21. *Sakshi v. Union Of India And Ors*, AIR 2004 SC 3566.

22. *Supra* note 9.

- Extra hazard for a working woman compared her male colleague is clear violation of the fundamental rights of Gender Equality and Right to Life and Liberty.
- Safe working environment is fundamental right of a working woman.
- In no way should working women be discriminated at the workplace against male employees.
- Working with full dignity is the fundamental right of working women.
- The right to work as an inalienable right of all working women.
- There should a Complaints Committee at all workplaces, headed by a woman employee, with not less than half of its members being women. All complaints of sexual harassment by any woman employee would be directed to this committee.

In 2012, aftermath of the Delhi gang rape, the Government appointed a three-member commission headed by Justice (retd) J S Verma having tasked with reforming and invigorating anti-rape law, Committee looked into the matter, adopted multidisciplinary approach in interpreting the existing laws and recommended to amend the penal law *inter alia* and other relevant laws²³. Major Recommendations of Justice Verma Committee are as follows:

1. Punishment for Rape: The panel has not recommended the death penalty for rapists. It suggests that the punishment for rape should be rigorous imprisonment or RI for seven years to life. It recommends that punishment for causing death or a “persistent vegetative state” should be RI for a term not be less than 20 years, but may be for life also, which shall mean the rest of the person’s life. Gang-rape, it suggests should entail punishment of not less than 20 years, which may also extend to life and gang-rape followed by death, should be punished with life imprisonment.

2. Punishment for other sexual offences: The panel recognised the need to curb all forms of sexual offences and recommended - Voyeurism be punished with upto seven years in jail; stalking or attempts to contact a person repeatedly through any means by up to three years. Acid attacks would be punished by up to seven years if imprisonment; trafficking will be punished with RI for seven to ten years.

3. Registering complaints and medical examination: Every complaint of rape must be registered by the police and civil society should perform its duty to report any case of rape coming to its knowledge. “Any officer, who fails to register a case of rape reported to him, or attempts to abort its investigation, commits an offence which shall be punishable as prescribed,” the report says. The protocols for medical examination of victims of sexual assault have also been suggested. The panel said, “Such protocol based, professional medical examination is imperative for uniform practice and implementation.”

4. Marriages to be registered: As a primary recommendation, all marriages in India (irrespective of the personal laws under which such marriages are solemnised) should mandatorily be registered in the presence of a magistrate,. The magistrate will ensure that the marriage has been solemnised without any demand for dowry having been made and that it has taken place with the full and free consent of both partners.

5. Amendments to the Code of Criminal Procedure, 1973: The panel observed, “The manner in which the rights of women can be recognised can only be manifested when they

23. On December 23, 2012, the Government of India appointed a Committee chaired by Justice Verma to inquire about the incident and propose changes to the law with a view to ensure protection of women. The Committee gave its final Report on the January 23, 2013, followed by the Government issuing an Ordinance on February 3, 2013. The Ordinance was presented as a Bill which was discussed in the Parliament and approved by both the Houses. The President gave assent to it on April 2, which brought the Act into effect retrospectively from February 3, 2013.

have full access to justice and when the rule of law can be upheld in their favour.” The proposed Criminal Law Amendment Act, 2012, should be modified, suggests the panel. “Since the possibility of sexual assault on men, as well as homosexual, transgender and transsexual rape, is a reality the provisions have to be cognizant of the same,” it says. A special procedure for protecting persons with disabilities from rape, and requisite procedures for access to justice for such persons, the panel said was an “urgent need.”

6. Bill of Rights for Women: A separate Bill of Rights for women that entitles a woman a life of dignity and security and will ensure that a woman shall have the right to have complete sexual autonomy including with respect to her relationships.

7. Review of the Armed Forces Special Powers Act: The panel has observed that the “impunity of systematic sexual violence is being legitimised by the armed forces special powers act.” It has said there is an imminent need to review the continuance of AFSPA in areas as soon as possible. It has also recommended posting special commissioners for women’s safety in conflict areas.

8. Police reforms: To inspire public confidence, the panel said, “police officers with reputations of outstanding ability and character must be placed at the higher levels of the police force.” All existing appointments need to be reviewed to ensure that the police force has the requisite moral vision. The panel strongly recommended that “law enforcement agencies do not become tools at the hands of political masters.” It said, “Every member of the police force must understand their accountability is only to the law and to none else in the discharge of their duty.”

9. Role of the judiciary: The judiciary has the primary responsibility of enforcing fundamental rights, through constitutional remedies. The judiciary can take *suo motu* cognizance of such issues being deeply concerned with them both in the Supreme Court and the High Court. An all India strategy to deal with this issue would be advisable. The Chief Justice of India could be approached to commence appropriate proceedings on the judicial side. The Chief Justice may consider making appropriate orders relating to the issue of missing children to curb the illegal trade of their trafficking etc.

10. Political Reforms: The Justice Verma committee observed that reforms are needed to deal with criminalisation of politics. The panel has suggest that, in the event cognizance has been taken by a magistrate of an criminal offence, the candidate ought to be disqualified from participating in the electoral process. Any candidate who fails to disclose a charge should be disqualified subsequently. It suggested lawmakers facing criminal charges, who have already been elected to Parliament and state legislatures, should voluntarily vacate their seats.

c) The Criminal Law (Amendment) Act of 2013

The Criminal Law (Amendment) Act, 2013 has substantially altered the normative landscape of the law of sexual offences. It not only makes changes to the rape offence, but attempts to provide a fool-proof and comprehensive list of sexual offences by criminalizing sexual harassment under Section 354A, intentional disrobing or making a woman naked under compulsion under Section 354B, voyeurism under Section 354C and stalking under Section 354D of *the Indian Penal Code*²⁴. Even well-intentioned legislations may not be

24. Section 326A (voluntarily causing grievous hurt by use of acid, etc), Section 326B (voluntarily throwing or attempting to throw acid), Section 354A (sexual harassment), Section 354B (assault or use of criminal force to woman with intent to disrobe), Section 354C (voyeurism), Section 354D (stalking) and Section 370 (trafficking of persons) are added in the Code.

enforced, or even perceived by the community in the same spirit that it was enacted. The norms asserted these new laws suffer considerable distortion, both at the level of the target population and the community, and the lack of gender sensitivity and justice perceptivity on the part of enforcement officials, viz. the police and the courts. *The Criminal Law (Amendment) Act, 2013* has re-structured and re-conceptualized the definition of rape and clarified the circumstances where consent is negated.²⁵

V. CONCLUSION

Sexual Offences are universally condemned and punished. In fact, the rape is nothing but a monstrous burial her dignity. It is a crime against the holy body and the soul of a society. The Supreme Court in the case of *State of Maharashtra v. Madhukar N. Gardikar* has held that:

“the unchastity of a woman does not make her opento violate her wishes. She is entitled to protect.....if there is an attempt to violate heragainst her wish. She is equally entitled to the protection of law. Therefore merely because she is of easy virtue, her evidence cannot be thrown overboard.²⁶”

Arijit Pasayat *J.* made this very apt observation in the case of *Tulshidas Kanolkar v State of Goa* :

“While the murderer destroys the physical frame of his victim, a rapist degrades and defiles the soul of a helpless female. When the victim is a mentally challenged person, there is not only physically violence and degradation and defilement of the soul, but also exploitation of her helplessness.²⁷”

This is also noteworthy to mention the observation made by Krishna Ayer. *J* in case of *Rafique Ahmad*:

“When a woman is ravished, what is inflicted is not mere physical injury but the deep sense of some deathless shame...A rape! A rape!..... Yes, you have ravish’d the justice. Judicial response to Human Rights cannot be blunted by legal bigotry.²⁸”

He further opined that:

“There are several ‘sacred cows’ of the criminal law in Indo-Anglian jurisprudence which are superstitious survivals and need to be re-examined. When rapists are revelling in their promiscuous pursuits and half of humankind-womankind- is protesting against its hapless lot, when no woman of honour will accuse another of rape since she sacrifices thereby what is

25. Section 375 IPC now defines “rape” where a male: (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or (d) applies his mouth to the vagina, anus, urethra of a woman or makes.

26. AIR 1991 SC 207

27. (2003) 8 SCC 590

28. *Rafique v. State of UP*, 1980 Cr. L.J. 1344

dearest to her, we cannot cling to a fossil formula and insist on corroborative testimony, even if taken as a whole, the case spoken to by the victim strikes a judicial mind as probable.²⁹

These offences are a curse to any civilized society. A happening of any kind of sexual offences in civilized society reflects the mindset of a regressive era with patriarchal dominance. The feminist approach in the 20th century has criticised these heinous activities and led a movement against the role of existing laws for preventing and controlling sexual offences and protecting dignity and safety of vulnerable groups throughout the world. Subsequently, legal principles and rules governing the sexual offences were changed and amended in Britain; Canada; Australia and US. This feminist movement has achieved significant reforms in the field of criminal jurisprudence in India also.

A new law relating to sexual offences introduced, traditional definition of the offence of rape modified; punishment increased in proportion to the gravity of; other offences incorporated in order to maintain the dignity of women and children under the criminal law of the land. Now, the question is that how far it is possible to abide by the suggestions made by the Justice Verma Committee and new prohibitions made in penal law which has been changed accordingly? This is because, what we need really to do, we can't do, it is not only a job to make amendments in pen and paper, but we have to amend the mind set and mentality of the people which is the seat of crime. Criminal justice functionaries (a sensitive judge as pointed out by Justice Krishna Ayer), non-governmental organizations, media people, political leaders, social workers and even the common man have to coordinate to create an environment in which sexual violence against women and children will not proliferate. What is most important is that the general attitude of society needs to be changed. As very aptly remarked by the apex court in *Krishna Lal v State of Haryana*:

“To forsake vital consideration and go by obsolete demands for substantial corroboration is to sacrifice commonsense in favour of an artificial concoction called ‘judicial’ probability. Human psychology and behavioural probability must be borne in mind when assessing the testimonial potency of the victim’s version. What girl would foster rape charges on a stranger unless a remarkable set of facts or cleanest motives are made out? The inherent bashfulness, the innocent naivete and the feminine tendency to conceal the outrage of masculine sexual aggression are factors which are relevant to improbabilise the hypothesis of false implication. The injury on the person of the victim has corroborative value. The court loses its credibility if it rebels against realism. The law court is not an unnatural world. Merely because the trial court has ultra-cautiously acquitted someone, the higher court must, for that reason, cannot acquit everyone. A socially sensitized judge is better statutory armour against gender outrage than long clauses of a complex section with the entire protections writ into it. Observations on probative force of circumstances are not universal laws of nature but guidelines and good counsel³⁰.”



29. *Ibid.*

30. 1980 SCR (3) 305,

AN EXAMINATION OF THE POWER OF REMOVAL OF SECRETARIES OF PRIVATE COMPANIES IN NIGERIA

Andrew Ejovwo Abuza *

Abstract

The Nigerian Companies and Allied Matters Act 2004 came into force on 2 January 1990. It provides the procedure for the removal of secretaries of public companies which said procedure accords them an opportunity to defend themselves before they can be removed. Thus, the employment of secretaries of public companies is protected by statute in Nigeria. The Act is, however, silent on the matter in relation to secretaries of private companies. In this way, the employment of secretaries of private companies is not protected by statute in Nigeria. The relevant statutory provisions have been abused. For some secretaries of private companies in Nigeria have been removed by the directors of their companies without giving them an opportunity to defend themselves. The article examines the power of removal of secretaries of private companies in Nigeria against the backdrop of relevant statutory provisions as well as case-laws. It is the view of the writer that the removal of secretaries of private companies in Nigeria without giving them an opportunity to defend themselves is unconstitutional and or unlawful. The writer suggests, amongst other things, the amendment of the Act to make the procedure for the removal of secretaries of public companies applicable to the removal of secretaries of private companies.

Key Words: *Removal, Secretaries of Private Companies, Security of Tenure*

INTRODUCTION

On 2 January 1990 the Nigerian Companies and Allied Matters Decree 1 of 1990 was promulgated into law by the military administration of General Ibrahim Badamasi Babangida (IBB). The Decree later became known as the Companies and Allied Matters Act (CAMA)¹ 1990. This enactment subsequently became CAMA² 2004. Section 296(1) of CAMA 2004 bestows on the directors of companies the power to remove a secretary of a company.

It is rather sad that since the coming into force of CAMA 2004 on the date above many secretaries of private companies have been removed by the directors of their companies for misconduct without giving them an opportunity to defend themselves contrary to the

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1. Cap 59 Laws of the Federation of Nigeria (LFN) 1990.

rules of natural justice under the common law and section 36(1) of the Constitution of the Federal Republic of Nigeria (CFRN) 1999³ which guarantees to all citizens of Nigeria the right to fair hearing.

The CAMA 2004 is blameworthy for allowing this problem to rear its ugly head, as it is silent in the procedure to be followed by the directors in the removal of secretaries of private companies. This is unlike the position of secretaries of public companies, as section 296(2) of CAMA 2004 provides the procedure to be followed by the directors in the removal of secretaries of public companies. It accords the secretaries of public companies the opportunity to defend themselves before same can be removed by the directors for misconduct. Thus, while the employment of secretaries of public companies is protected by statute in Nigeria, the employment of secretaries of private companies is not protected by statute in Nigeria. A lot of people are actually upset by the abuse of the lacuna as it poses a grave danger to the survival of private companies in Nigeria.

This article examines the power of removal of secretaries of private companies in Nigeria, analyses the relevant statutory provisions and case-laws, highlights the practice in some other countries and offers suggestions, which if implemented would enable Nigeria eradicate the menace of removal of secretaries of private companies without giving them an opportunity to defend themselves.

II. MEANING OF A COMPANY

A company is defined by the *Black's Law Dictionary* as follows:⁴ 'A corporation – or less commonly, an association, partnership, or union- that carries on a commercial or industrial enterprise.' This definition can be criticised for being too wide or elastic. It is so because any corporation such as the Nigerian Railway Corporation or union or association such as the Iloho Isoko Farmers Multi-purpose Co-operative Society would qualify as a company. The latter engages in the sale of farm produce, including palm oil, plaintain and fish produced by same to the general public at affordable prices.

A Nigerian court defined a company in *Texaco Africa Limited v. Nigerian Shipping and Trading Limited*⁵ as 'a juristic person having no physical existence of its own but recognized by law as performing its function through agents and servants who do exist physically.' This definition is also susceptible to being criticised on the ground that it is narrow in scope. Going by this definition, a duly registered trade union in Nigeria would qualify as a company since it is considered a juristic person in Nigeria.

The definition of a company by the court above is not acceptable. For an organisation to be regarded as a company properly so called it must be involved in some commercial or industrial enterprise. A duly registered trade union in Nigeria is not constituted essentially to engage in some commercial or industrial enterprise but mainly formed to engage in the regulation of terms and conditions of employment of workers,⁶ that is, collective bargaining.

2. Cap C 20 LFN 2004. This Act is an Act to establish the Corporate Affairs Commission (CAC), provide for the incorporation of companies and incidental matters, registration of business names and the incorporation of trustees of certain committees, bodies and associations. See Preamble of the Act.

3. Cap C 23 LFN 2004.

4. BA Garner, *Black's Law Dictionary* (8th edition) (St. Paul MN: West, 2004) at 298.

5. [1992] Lagos Law Reports (LLR) 78.

6. See Trade Unions Act Cap 437 LFN 1990 (now Cap T14 LFN 2004), section 1(1).

For its part, CAMA 2004 defines company thus:⁷ “‘company’ includes any body corporate incorporated in Nigeria.’ This definition is liable to be criticised for not being exhaustive or encompassing, as it implicates that there are other bodies which ought to be included in the definition of a company. Simply put, a company can be defined as a body corporate duly incorporated under the CAMA 2004 or previous Nigerian Companies enactment to carry on business in Nigeria. It is in that sense that the expression ‘company’ is used in this article.

In Nigeria, a company whether limited by shares⁸ or by guarantee⁹ or unlimited¹⁰ may be a private company or public company. The main characteristics of a private company in Nigeria are:¹¹ its name ends with the word – Limited (Ltd); it is stated in its Memorandum of Association to be a private company; it limits its total membership to 50 persons excluding persons who are ‘bonafide’ employees of the company or who remained members of the company after the determination of that employment; it is prohibited from inviting members of the public to subscribe for any shares or debentures of the company unless authorised by law; it restricts by its Articles of Association the transfer of its shares; it is restricted from inviting the members of the public to deposit money for fixed periods or payable at call whether or not bearing interest unless authorised by law; its minimum share capital is 10,000 naira (₦); it can allot its shares without external control except there is alien participation; and it is not required to hold statutory meeting within six months of incorporation and file a statutory report with the CAC.

With regard to a public company in Nigeria, its main characteristics are:¹² Its name ends with the word – Public Limited Company (Plc); it is stated in its Memorandum of Association to be a public company; there is no maximum number of members; its shares are freely transferable without restrictions; it can issue prospectus or a statement in lieu of a prospectus inviting members of the public to subscribe for its shares and debentures; it must hold statutory meeting within six months of its incorporation and file a statutory report with the CAC; and it cannot allot its shares without the prior approval of the Securities and Exchange Commission (SEC).¹³

A germane point to note here is that the main distinguishing characteristic between a private company and a public company is that whereas the latter is permitted to sell its shares and issue debentures to members of the public directly, the former is precluded from doing so. The truth of the matter is that a private company can only sell its shares to members of the public by way of private placement. Another germane point to note here is that a private company may be converted to a public company later and vice versa.¹⁴

It is glaring from the characteristics of both private and public companies above that a private company is the option available to those persons who wish to have the benefits of incorporation of a business but who desire to retain the privateness and control

7. CAMA 2004, section 292 (2)(1).

8. This is a company having the liability of its members limited by the Memorandum of Association to the amount unpaid on the shares respectively held by them.

9. This is a company having the liability of its members limited by the Memorandum of Association to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up.

10. This is a company not having any limit on the liability of its members.

11. CAMA 2004, section 22.

12. *Ibid*, sections 9, 24, 44 – 81, 211 & 650.

13. See Investments and Securities Act Cap 124 LFN 2004, section 8.

14. See CAMA 2004, sections 50 & 53.

over their businesses. This is therefore usually the best option for a family business, partnership or even sole traders. For it is a matter of procuring at least a second subscriber to the Memorandum of Association. After all, the minimum number of members to form a company in Nigeria is two persons going by the provisions of section 18 of CAMA 2004. Notable private companies in Nigeria include Chevron Nigeria Limited and Shell Petroleum Development Company of Nigeria Limited. While notable public companies in Nigeria include Dangote Cement Public Limited Company and Afribank Nigeria Public Limited Company.

III. MEANING OF SECRETARY

The meaning of a secretary is fairly well known. It is an official of a club, society and so on who deals with writing letters, keeping records, and making business arrangements.¹⁵ According to the *Black's Law Dictionary* a secretary is:¹⁶ 'a corporate officer in charge of official correspondence, minutes of board meetings, and records of stock ownership and transfer.' In India, a secretary is defined as company secretary within the meaning of section 2(1)(c) of the Indian Company Secretaries Act 1980 which means a person who is a member of the Institute of Company Secretaries of India. Also, a secretary in India includes any individual, possessing the prescribed qualifications appointed to perform the duties which may be performed by a secretary under the Act above and any other ministerial or administrative duties.¹⁷

Saharay emphasises correctly that the main function of a secretary is to perform ministerial or administrative duties of a company.¹⁸ The secretary's function does not dovetail to the exercise of any managerial powers. It is the directors of the company that have the prerogative to exercise managerial powers. Going by the provisions of section 244(1) of CAMA 2004 directors of companies are actually the persons duly appointed by the company to direct and manage the business of the company in Nigeria. This is in tune with the practice in some other countries. For example, section 60(b) of the Companies Act 1997 in Trinidad and Tobago states that the directors of a company shall direct the management of the business and affairs of the company.

The views of Pennycuik, VC in *Re Maidstone Buildings Provisions Limited*¹⁹ are very instructive here. His Lordship stated as follows:

So far as the position of a secretary as such is concerned, it is established beyond all question that a secretary, is not concerned with the management of the company. Equally I think he is not concerned in carrying on the business of the company.

APPOINTMENT OF SECRETARY OF A COMPANY IN NIGERIA

Tom argues that in Nigeria there is no statutory provision for appointment of a secretary for a private company and that in the case of a public company it is mandatory for such a company to have a secretary.²⁰ The learned writer is far from correct. The truth of the

15. Patrick Phillips et al (eds), *Oxford Advanced Learner's Dictionary – International Students Edition* (8th edition) (Oxford: Oxford University Press, 2010) at 1334.

16. Garner, *supra* note 4 at 1381.

17. Companies Act 1956 as amended by the Companies (Amendment) Act 1988, section 2 (45).

18. HK Saharay, *Company Law* (5th edition) (New Delhi: Universal Law Publishing Company Pvt. Ltd 2008) at 345.

19. [1971] 1 Weekly Law Reports (WLR) US 1092.

20. DF Tom, *Company Law in Nigeria* (Benin – City: Union Publishers, 2009) at 72.

matter is that CAMA 2004 states in its section 293(1) that: 'every company shall have a secretary.' This implicates that every company in Nigeria be it a private company or public company must have a secretary. CAMA 2004 goes further to state in its section 296(1) that: 'A secretary shall be appointed by the directors' This implicates that the directors must appoint a secretary for a company. In the case of a private company, it is the directors of same that are the competent persons to appoint its secretary. While in the case of a public company, it is the directors of same that are the competent persons to appoint its secretary.

THE POWER OF REMOVAL OF A SECRETARY OF A PRIVATE COMPANY IN NIGERIA

The power of removal of a secretary of a private company in Nigeria can be gleaned from section 296 of CAMA 2004 which deals with appointment and removal of a secretary. It states as follows:

- (1) *A secretary shall be appointed by the directors and, subject to the provisions of this section may be removed by them.*²¹
- (2) *Where it is intended to remove the secretary of a public company, the board of directors shall give him notice –*
 - (a) *stating that it is intended to remove him;*
 - (b) *setting out the grounds on which it is intended to remove him;*
 - (c) *giving him a period not less than 7 working days within which to make his defence and;*
 - (d) *giving him an option to resign his office within a period of 7 working days.*
- (3) *Where, following the notice prescribed in subsection (2) of this section, the secretary does not within the given period resign his office or make a defence, the board may remove him from office and shall make a report to the next general meeting; but where the secretary, without resigning his office makes a defence and the board does not consider it sufficient if the ground –*
 - (a) *on which it intended to remove him is that of fraud or serious misconduct, the board may remove him from office and shall report to the next general meeting and*
 - (b) *is other than of fraud or serious misconduct, the board shall not remove him without the approval of the general meeting, but may suspend him and shall report to the next general meeting.*
- (4) *Notwithstanding any rule of law, where a secretary suspended under the paragraph (b) of subsection (3) of this section is removed with the approval of the general meeting, the removal may take effect from such time as the general meeting may determine.*

The pith of the provisions of section 296 (2) above is that a secretary of a public company is accorded an opportunity to defend himself before his removal. This applies also to the removal of directors of a company under Nigerian Company Law. To be specific, section 262 of CAMA 2004 which provides the procedure for the removal of a company director requires, amongst other things, that a company on receipt of notice of an intended resolution to remove a director shall forthwith send a copy of it to the director concerned,

21. Note that it is within the jurisdiction of only the board of directors as a corporate body to remove the secretary of the company under their general or express powers in section 296 (1) of CAMA 2004. In *Ashibogun v. Aprint (Nigeria) Ltd* (1985) High Court of Nigeria Law Reports (HCNLR) 400 the Nigerian court declared ultra vires the purported removal of a secretary by the managing director.

and the director (whether or not he is a member of the company) shall be entitled to be heard on the resolution at the meeting where the issue is to be discussed.

It is important to note the provisions of section 266 of CAMA 2004 thus: 266

- (1) *Every director shall be entitled to receive notice of the directors meeting, unless he is disqualified by any reason under the Act from continuing with the office of director.*
- (2) *There shall be given 14 days notice in writing to all directors entitled to receive notice unless otherwise provided in the articles.*
- (3) *Failure to give notice in accordance with subsection (2) of this section shall invalidate the meeting.*

A critical perusal of section 296 above would reveal that CAMA 2004 is silent on the procedure for the removal of secretary of a private company. It is submitted that the omission is a deliberate act by the drafters of CAMA 2004. The secretaries of public companies seem to be more positively appreciated and given adequate regard by the Nigerian Companies Act. To be specific, the Act above provides only for the qualifications of the secretary of a public company. Under section 295 of CAMA 2004, a secretary of a public company must be:-

- (a) *a member of the Institute of Chartered Secretaries and Administrators; or*
- (b) *a legal practitioner; or*
- (c) *a member of the Institute of Chartered Accountants of Nigeria or such other bodies of accountants as established from time to time by an Act or Decree; or*
- (d) *any person who has held the office of secretary of a public company for at least 3 years of the 5 years immediately preceding his appointment in a public company; or*
- (e) *a body corporate or firm consisting of members each of whom is qualified under paragraphs (a), (b), (c) or (d) above.*

In the case of a private company, a person who appears to the directors to have requisite knowledge and experience to discharge the functions of a secretary of a company may be appointed as secretary.²²

What all these boil down to is that a secretary of a private company is perceived as a servant based on the common law principle of master and servant or in a private sector contract of employment. Evidently, there is no security of tenure of a secretary of a private company, as his appointment is not protected by statute or tainted with statutory flavour.²³ Thus, he can be dismissed or removed at any time by the directors of the company who have absolute discretion on the matter. It could be for good or bad reasons or for no reason at all and contrary to the terms and conditions of the secretary's contract of employment or the right to fair hearing guaranteed under the common law and Nigerian Constitution and all that the secretary is entitled to is damages for wrongful dismissal or removal. The damages is the

22. CAMA 2004, section 295.

23. Note that an employment is protected by statute or tainted with statutory flavour where statute makes provision for the manner of employment and discipline of the staff concerned. *Nigeria Institute of International Affairs v. Anyanfulu* (2007) 2 Nigerian Weekly Law Reports (NWLR) (part 1018) 246 251 Court of Appeal (CA). See also *Oyetoki v. Nigeria Postal Service* (2010). All Federation Weekly Law Reports (All FWLR) (part 504) 1573 1575 – 1576 (CA); *The West African Examination Council v. Muritala Oyewusi Obisidan* (2009) All FWLR (part 484) 1619 1620 – 1621 (CA); and *Attorney – General of Kwara State and Two Others v. Kike Ojulari* (2007) 1 NWLR (part 1016) 551 557 – 558 (CA).

amount of money he would have earned over the period of a proper notice to terminate the contract of employment or the amount payable in lieu of a proper notice to terminate the contract.²⁴

The approach of CAMA 2004, even though liable to be criticised for not providing for security of tenure of the secretary of a private company, is better than the approach in many countries where the Companies Act is silent on the procedure for the removal of a secretary, be it secretary of a private company or secretary of a public company. These countries include Botswana, Malaysia, Ghana, Australia, Trinidad and Tobago, Zambia, South Africa and Grenada. In this way, a secretary of a private or public company is removed at the absolute discretion of the directors of the company without the need on the part of the directors of the company to give any specific reason for the removal. The Companies Act of Ghana specifically provides for a right of the secretary to claim damages if removed by the directors of the company in breach of contract.²⁵ This is also the position in Zambia.²⁶

Somehow, the practice of subjecting the dismissal or removal of employees under a mere master and servant relationship to the whims and caprices of their employers called for a clear and definitive action against same in Nigeria. Unfortunately, the SCN could not be a saving grace on the matter when it had opportunity in one vital case that can be pinpointed with grief on the matter, that is, *Samson Babatunde Olarewaju v. Afribank Nigeria Public Limited Company*.²⁷ In that case, the appellant/plaintiff was a deputy-manager of the respondent/defendant. He was suspended from duty on some allegations of fraud, embezzlement of money and sundry allegations. He subsequently appeared before the Senior Staff Disciplinary Committee of the respondent/defendant which tried him of the allegations above. At the end, the Committee submitted its report to the respondent/defendant. By a letter, the appellant/plaintiff was summarily dismissed from office. No reason for the summary dismissal was given by the letter of dismissal. The trial court held that the summary dismissal was wrongful on the ground that the appellant/plaintiff was not first arraigned before a court of law to have his guilt on the crimes alleged against same established. It declared the summary dismissal a nullity and ordered the appellant/plaintiff's re-instatement.

On appeal to the CA by the respondent/defendant, the judgment and orders of the trial court were set aside. The appellant/plaintiff then appealed to the SCN. Honourable Justice Aloysius Iyorgyer Katsina – Alu, JSC delivering the leading judgment of the apex court to which the other four Justices of the SCN who sat in the appeal concurred dismissed the appeal of the appellant/plaintiff. His Lordship stated that the appellant/plaintiff had a mere master and servant contract of employment with the respondent/defendant. Justice Katsina – Alu declared that:

In a master and servant class of employment, the master is under no obligation to give reasons for terminating the appointment

24. In *Abalogu v. Shell Petroleum Development Company of Nigeria Ltd* (2001) Federation Weekly Law Reports (FWLR) (part 66) 662 where the contract of employment provided for not less than two month's salary in lieu of notice in order to terminate the contract of employment, the respondent/defendant terminated the employment of the appellant / plaintiff by a letter dated 3 January 1995 in line with the contract of employment, both the Nigerian CA and Supreme Court of Nigeria (SCN) affirmed the judgment of the trial court that the appellant / plaintiff's employment was lawfully and properly terminated.

25. See Companies Act 1963 (Act 179) of Ghana, section 75.

26. See Companies Act 1963 (Act 171) of Zambia as amended by the Companies (Amendment) Act 4 of 2011, section 205(4).

27. (2001) 13 NWLR (part 731) 691 695 – 9697.

of his servant. The master can terminate the contract with his servant at any time and for any reason or for no reason. In the instant case, no reason was given for the dismissal of the appellant.

His Lordship held thus:

In a pure case of master and servant, a servant's appointment can lawfully be terminated without first telling him what is alleged against him and hearing his defence or explanation. Similarly, a servant in this class of employment can lawfully be dismissed without observing the principles of natural justice. So, the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence. It depends on whether the facts emerging at the trial prove breach of contract.

It was further held by Justice Katsina – Alu that:

It is not necessary, nor is it a requirement under section 33 of the 1979 Constitution that before an employer summarily dismisses his employee from his services under the common law, the employee must be tried before a court of law where the accusation against the employee is for gross misconduct involving dishonesty bordering on criminality. Where an employee has been found guilty by a disciplinary committee to have committed a gross misconduct bordering on criminality, the master has a choice either to exercise his or its discretion in favour of prosecuting the erring servant or dismissing him summarily. In other words, prosecution before a court of law in the circumstances is not a sine qua non for summary dismissal.

Finally, His Lordship held as follows:

Where a master terminates the contract with his servant in a manner not warranted or provided by the contract, he must pay damages for breach of contract. The remedy is in damages. The court cannot compel an unwilling employer to re-instate a servant he has dismissed. The exception is in cases where the employment is especially protected by statute. In such cases, the employee who is unlawfully dismissed may be re-instated to his position.²⁸

It is pellucid going by the decision of the SCN above that it is only where an employment is protected by statute or tainted with statutory flavour that the courts in Nigeria would intervene to order re-instatement for wrongful or unlawful dismissal.²⁹

No doubt, the employments of secretaries of public companies and directors of companies in Nigeria are protected by statute or tainted with statutory flavour, as CAMA 2004 clearly provides for their appointments and discipline of same. Thus, there is security of tenure of the offices of secretary of a public company and director of a company in Nigeria.

28. For an incisive discussion on the decision of the SCN, see LO Ogiribo, 'Dismissal of an Employee on Allegation of Crime in Nigeria: A Review of Case - Law' in *Delsu Public Law Series* (DPLS) (2004) (1) pages 98 – 103.

For the persons occupying these offices cannot be removed anyhow by or at the absolute discretion of the directors of the company. The truth of the matter is that the Nigerian courts insist that there must be strict compliance with statutory provisions for their removal otherwise the removal would be declared a nullity and re-instatement of the officers concerned ordered by the court. It should be recalled here, for example, that in the Nigerian case of *Bernard Ojeifo Longe v. First Bank Nigeria Public Limited Company*³⁰ where the appellant/plaintiff was removed from the office of managing director or chief executive of the respondent/defendant bank by the board of directors without strict compliance with the provisions of CAMA 2004 on removal of directors, Honourable Justice George Adesola Oguntade, JSC delivering the leading judgment of the SCN to which the other four justices of the SCN who sat in the appeal concurred declared the removal invalid and unlawful.

His Lordship held that by virtue of the combined provisions of sections 262 and 266 of CAMA 2004 a director to be removed from office must be given notice of the meeting at which the decision to remove him would be taken and that failure to serve the notice as stated above on the appellant/plaintiff invalidated the meeting where the decision to remove same was taken. Justice Oguntade, remarkably, ordered the re-instatement of the appellant/plaintiff as his appointment as director of the respondent/defendant bank was seemingly considered to be protected by statute or tainted with statutory flavour. The decision of the SCN above is acceptable.

But the decision of the SCN in the earlier case of *Olarewaju v. Afribank Nigeria Public Limited Company* above is not acceptable. The writer actually has resentment about the judgment of the apex court in that case. Without mincing words, it is the writer's humble view that the SCN is wrong for the ensuing reasons. To begin with, in a contract of employment whether a purely master and servant relationship or employment protected by statute or tainted with statutory flavour, reasons for the summary dismissal of the employee must be given.³¹ Perhaps, it should be stressed here that summary dismissal is based on misconduct of the servant. A master cannot summarily dismiss his employee for doing no wrong. Summary dismissal carries a stigma or infamy and deprives the dismissed employee of benefits while termination of employment does not.³² Most often, an employee who is summarily dismissed from employment cannot secure an employment in the public service for the remaining part of his life. The courts, therefore, insist that reasons for the summary dismissal of the employee must be given by the employer which said reasons must be justified by the employer otherwise the summary dismissal would not be allowed to stand.³³

29. See also *Olaniyan v. University of Lagos* (1985) 2 NWLR (part 9) 599 and *Shitta - bey v. Federal Public Service Commission* (1981) 1 Supreme Court (SC) 40.

30. [2010] 6 NWLR (part 1189) 15 & 45. See also *Ibrahim Jubril v. Military Administrator, Kwara State and 4 Ors* [2007] 3 NWLR (part 1021) 357 364 (CA) and *Tunde Bamgboye v. University of Ilorin and Anor* (1999) 10 NWLR (part 622) 290 298 – 299 (SC).

31. *Abomeli v. Nigerian Railway Corporation* [1995] 1 NWLR (part 372) 451 456 (CA).

32. Note that in termination cases, the employer is not bound to give reasons for terminating the employment of his employee. But where he gives a reason or cause for terminating the appointment, the law imposes on him a duty to establish the reasons to the satisfaction of the court. See *Shell Petroleum Development Company of Nigeria Ltd v. Victor Sunday Olarewaju* (2009) All FWLR (part 458) 208 213.

33. See *Johan Nunnick v. Costain Blansevoort Dredging Ltd* (1960) Lagos Law Reports (LLR) 90 and *Ogunsanmi v. C.F Furniture (WA) Company Ltd* (1961) 1 All Nigeria Law Reports (All NLR) 862 864.

In the second place, a summary dismissal of an employee whether in a purely master and servant relationship or not without first telling the servant what is alleged against him and hearing his defence is contrary to the rules of natural justice, namely, 'audi alteram partem', meaning hear the other side of a case and 'nemo iudex in causa sua', meaning a person cannot be a judge in his own cause guaranteed under the common law a part of received English law in Nigeria and section 36(1) of the CFRN 1999 which guarantees the right to fair hearing to all citizens of Nigeria and therefore unlawful.³⁴ It is void and a nullity for being inconsistent or a contravention of the provisions of the Nigerian Constitution as stated above.

It is a general principle settled by the cases³⁵ that breach of statute or natural justice— is a nullity, is devoid of legal effect. Lord Denning summed up the position in *Mcfoyo v. United Africa Company Limited*³⁶ in these words:

If an act is void, then it is in law a nullity. It is not only bad but also incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.

Emiola, for one, argues that in the light of the constitutional provision for fair hearing and the common law rules of natural justice any determination of an employment contract without procedural fairness should be decreed invalid.³⁷

It is significant to note that in Nigeria, the provisions of the Constitution are supreme and binding on all persons and authorities, including the SCN throughout the Federal Republic of Nigeria.³⁸ A wise submission to make is that the decision of the SCN on the matter is null and void. This submission is grounded on an insightful provision in section 1(3) of the CFRN 1999 which is to the effect that any other law, including the decision of the SCN which is inconsistent with the provisions of the Constitution is void to the extent of the inconsistency.

Third, the decision of the SCN above is contrary to section 36(4) of the CFRN 1999. It states thus:

Whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing in public within a reasonable time by a court or tribunal.

The SCN had in earlier cases interpreted this provision to mean that where a citizen of Nigeria is alleged to have committed a crime he must be taken to the ordinary court for trial in order to establish his guilt and that no administrative panel can try him for the crime alleged against same.

For instance, in *Gregg Olusanya Sofekun v. Akinyemi and Three Others*³⁹ the appellant/plaintiff a registered medical practitioner and senior consultant in Ophthalmology in the public service of the Western State of Nigeria was tried by the Investigating Panel set up

34. See *R v. Chancellor, University of Cambridge* (1723) 93 English Reports (ER) 698; *Adedeji v. Police Service Commission* (1967) 1 All NLR 67; *Eperokun v. University of Lagos* (1986) 4 NWLR (part 34) 152; *Bamgboye v. University of Ilorin* (1999) 10 NWLR (part 662) 296 299; *Shitta-bey v. Federal Public Service Commission, supra* note 29; and *Olaniyan v. University of Lagos, supra* note 29.

35. See, for example, *Adeyemi Adeniyi v. Governing Council of Yaba College of Technology* (1993) 6 NWLR (part 300) 426 461 and *Governor of Oyo State and Ors v. Oba Folayan (Akesin of Ora)* (1995) 8 NWLR (part 413) 292.

36. (1962) Appeal Cases (AC) 152 160.

37. A Emiola, *Nigerian Labour Law* (4th edition) (Ogbemoso : Emiola (Publishers) Ltd 2008) at 192.

38. See CFRN 1999, section 1(1).

39. (1980) All Nigeria Law Reports (ANLR) 153 165.

by the respondents / defendants constituting the Public Service Commission of the State above for certain criminal offences, namely, attempting to have carnal knowledge of his patient – one Miss Catherine Barlow without her consent and unlawful and indecent assault on his patient above. The Panel found the appellant/plaintiff guilty of unlawful and indecent assault of his patient above. The respondents/defendants accepted the findings of the Panel whereupon they dismissed the appellant/plaintiff from the public service of the State above.

Atanda Fatai – Williams, Chief Justice of Nigeria (CJN) delivering the leading judgment of the SCN to which the other six justices of the SCN who sat in the appeal of the appellant/plaintiff concurred declared invalid the trial of the appellant/plaintiff by the Investigating Panel and his consequential dismissal from the public service by the Commission on the ground that appellant/plaintiff's right to fair hearing guaranteed in section 22(2) of the Constitution of the Federal Republic of Nigeria, 1963 (now section 36(4) of the (CFRN 1999) was violated.

His Lordship held thus:

Bearing in mind that the words “ by a court” is only used once and at the tail end of subsection (2) of section 22, the word “charged” in the first line thereof can only be synonymous with the word “accused”. No other construction is, in my view, possible. Moreover, because of the mandatory provisions of the subsection, it seems to me that once a person is accused of a criminal offence, he must be tried in a “court of law” where the complaints of his accusers can be ventilated in public and where he would be sure of getting a fair hearing as set out in subsections (4) to (10) of section 22 of the Constitution of the Federal Republic of Nigeria. No other tribunal, investigating panel, or committee will do.⁴⁰

It is submitted that the action of the SCN in bestowing on an employer or his disciplinary panel the option or right to try an employee who is a citizen of Nigeria on allegation of crime is tantamount to a usurpation of the functions of the court of law for the benefit of an employer or his disciplinary panel and depriving a Nigerian employee the protection afforded by section 36(4) above. No body in Nigeria or elsewhere must be allowed to usurp the jurisdiction and authority of the courts in Nigeria under any guise or pretext whatsoever.

Fourth, the decision of the SCN assailed here is not in consonance with its earlier decision in *Ewaremi v. African Continental Bank Limited*⁴¹ where the apex court in Nigeria ordered re-instatement for wrongful dismissal in a purely master and servant relationship. Edu, for one, contends that it is unfair and unjust for the courts in Nigeria to hold that re-instatement will not be ordered even if the employee's right to fair hearing is breached.⁴² Nigeria should emulate the practice in some other countries. To be specific, in the Indian case

40. For similar decisions of the SCN, see *Garba v. University of Maiduguri* (1986) 1 NWLR (part 18) 550; *Okonkwo v. Medical and Dental Practitioners Disciplinary Tribunal* (1990) 9 NWLR (part 617) 1 5; and *Rotimi Amaechi v. Independent National Electoral Commission* (2008) 158 Law Reports of Courts of Nigeria (LRCN) 1 107.

41. (1978) 4 SC 99.

42. OK Edu, 'Statutory Scheme for the Protection and Advancement of Workers in the Private Sector in Nigeria' in *DPLS* 2004 (1) at 62.

of *Provisional Transport Services v. State Industrial Court*⁴³ Nagpur Das Gupta, J observed as follows:

In dealing with industrial disputes ... the Supreme Court has by a series of decisions laid down the law that, even though under contract, pure and simple, an employee may be liable to dismissal, without anything more, industrial adjudication would set aside the order of dismissal and direct re-instatement of the workmen where dismissal was made without fair enquiry.

Four major reasons have been postulated for the application of the common law rule that 'the court will not impose a willing employee on an unwilling employer and vice versa in a mere master and servant relationship' since the period it was first formulated by the court⁴⁴ thus:

(i) *the court considered it to be in vain to order specific performance or re-instatement in purely master and servant relationship as the court felt that it would not be able to supervise same. It is sad that the courts are loath to grant an order of re-instatement because it would require same to constantly supervise the order so as to ensure that the employee performs his obligations.*⁴⁵ *In Edu's view, the contention that the order of re-instatement would require constant supervision by the courts to ensure that the employee performs his obligations is tenuous. This is so because, according to the learned writer, an employee who seeks re-instatement would jealously guard his job on securing the relief of re-instatement and would most likely give his best.*⁴⁶ *He maintains correctly that the fact that re-instatement is decreed in appropriate situations would not make the employer not to terminate employee's services or dismiss him when activities of same are really inimical to the interest of the employer.*⁴⁷

(ii) *it is the contention that an order of re-instatement would foist an employee on an unwilling employer and that this will not augur well for industrial harmony. Adegoroye, infact, posits that 'the imposition of an employee on an unwilling employer is an anti – thesis to the desire for industrial harmony.'*⁴⁸ *The learned writer went too far. A germane question to ask here is: would the wrongful or unlawful dismissal of employees not have an adverse impact on industrial harmony? Of course, the answer is in the affirmative. Besides, nobody is suggesting that a willing employee should be foist on an unwilling employer whether good or bad. All antagonists to the rule above are saying is that*

43. [1971] 3 All England Law Reports (All ER) 147.

44. See, for example, *De Francesco v. Barnum* (1890) 45 Chancery Division (Ch D) 430 438.

45. Edu, *supra* note 42 at 57.

46. *Id* at 61.

47. *Ibid.*

48. Adegoroye, 'The Employer's Right to Dismiss and the Doctrine of Fair Hearing' in *Lagos State University Law Journal (LASULJ)* [2002] (4) 2 at 55.

an employer who has wrongfully or unlawfully terminated the services of his employee or dismissed same from employment must be compelled to retain the employee until he learns to properly or lawfully terminate or do away with his services. The truth of the matter is that no body would complain and talk about re-instatement where the employer has in terminating the employee's employment or dismissing the employee from his services taken the right steps or followed the correct procedure in accordance with the contract of employment or the law.

(iii) it is the argument that the relationship between an employee and his employer is personal and confidential. Ipaye, in actual fact, states that in contracts of personal service, personal pride, personal feelings, personal confidence and confidentiality may be involved and all these make it undesirable to impose a willing employee on an unwilling employer.⁴⁹ This argument is not tenable with regard to employers which are large organisations such as Chevron Nigeria Limited and Shell Petroleum Development Company of Nigeria Limited. These are artificial persons in law. The point has been well made elsewhere⁵⁰ that in a large company with many shareholders and appointed directors, the employer is an impersonal juristic person. The directors and managers who exercise managerial prerogatives of dismissal and termination of appointments are as much employees as the subordinates they Lord over. Where re-instatement is ordered for wrongful termination of appointment or dismissal of such subordinates, it is the personal pride, personal feelings and personal confidence of such directors and managers that may be involved and certainly not the company – an artificial person which is the real employer.

(iv) it is the contention that re-instatement would enslave the employer who is compelled to retain an employee he does not want to see.⁵¹ This mindset is not correct. Antagonists of the rule above, as disclosed before, are not saying that an employer must continue to keep an employee in his employ whether good or bad. They would not insist on re-instatement where the employer has taken the right steps or adopted the proper procedure in doing away with a bad employee he does not want to see in his establishment.

In consideration of the difficulty associated in securing employment and the importance which employment plays in the life of a man and members of his family, it is

49. Ipaye, 'The Suspended Employee under Nigerian Law' in *Justice* (1972) (3) I & 2, pages 62 & 67, quoted in Edu, *supra* note 45 at 57.

50. *Id* at 61.

51. *De Francesco v. Barnum*, *supra* note 44, per Fry, LJ.

submitted that an employment in any organisation whether in the private or public sector, ought to be considered as a fundamental right so that where a contract of employment is breached by an employer, for instance, if he did not give the prescribed notice of termination of the employment or he did not accord the employee the right to fair hearing in dismissing the employee from his services, the appropriate remedy ought to be an order of specific performance or re-instatement. The views of Adolphus Godwin Karibi – Whyte, JSC in *Olaniyan v. University of Lagos*⁵² are very instructive here. His Lordship stated as follows:

The law has arrived at the stage where the principle should be adopted that the right to a job is analogous to a right to property. Accordingly, where a man is entitled to a particular job, I cannot conceive of any juridical or logical reason against the view that where the termination of appointment is invalid and consequently alters nothing a re-instatement of the employee barring legal obstacles intervening between the period of purported dismissal and the date of judgment is the only just remedy.

And lastly, employers would not be encouraged to abide by the terms of a contract of employment if the slavish adherence to the rule above continues unabated. It is trite law that parties are bound by the contract they freely entered into and the courts cannot make contract for the parties. The common law itself recognises and respects the sanctity of contracts. A noteworthy latin maxim is: ‘pacta sunt servanda,’ meaning parties to a contract are bound by their agreement. This is a sacred doctrine for the preservation of contracts which is entitled to the greatest respect.⁵³ Hence, where parties have reduced the terms and conditions of service into an agreement the terms and conditions must be observed.⁵⁴ It is submitted that employers in Nigeria may consider it cheaper and more convenient to breach a contract of employment and pay damages later which the Nigerian CA declared to be one month salary in lieu of notice in *Ogbaji v. Arewa Textiles Public Limited Company*.⁵⁵ Perhaps, the justices of the SCN would have come to a different conclusion if they had adverted their minds to the points above.

In order to address the concerns raised above, it might be sensible to call on the legislature in Nigeria to intervene with a view to providing for security of tenure of secretaries of private companies. In this respect, CAMA 2004 should be amended by the National Assembly (NA) of Nigeria to expunge the word ‘public’ that is before the word ‘company’ in its section 296 (2) so that the provisions of section 296 (2) would also be applicable to a secretary of a private company. Also, the word ‘fraud’ appearing in section 296(3)(b) of CAMA 2004 should be expunged by the NA of Nigeria. This is so because the word ‘fraud’ is a crime as conceived in Nigerian criminal law.⁵⁶ Any criminal act or conduct, as disclosed before, is a matter for the courts of law to determine the guilt of the perpetrator of same. It is

52. *Olaniyan v. University of Lagos*, *supra* note 29.

53. *Chukwumah v. Shell Petroleum Development Company of Nigeria Limited* (1993) 4 NWLR (part 289) 512 – 517 (SC).

54. *Ibid.*

55. [2000] 11 NWLR (part 678) 322 (CA). See also *Abomeli v. Nigerian Railway Corporation*, *supra* note 31 at 454.

56. See, for example, Penal Code Law Cap 89 Laws of the defunct Northern Nigeria, 1963, sections 174 – 176 and Criminal Code Act Cap 77 LFN 1990 (now Cap C 38 LFN 2004), sections 422, 435 & 438.

submitted that no administrative panel or tribunal or board of directors can try a citizen of Nigeria for a crime by virtue of the extant provisions of section 36(4) of the CFRN 1999. In *Attorney – General of Kwara State and Two Others v. Kike Ojulari*⁵⁷ the Nigerian CA held that:

...only a court of competent jurisdiction can determine based on the evidence led before it whether or not fraud, which is a felony, had been committed.

A sensible suggestion to make here is that where a secretary of a company is alleged to have committed fraud he must be taken to the ordinary criminal court to determine his guilt where he had denied the commission of the offence. It is after the court has pronounced him guilty of any fraudulent act that the board of directors can remove him if same really desires to remove the secretary on the ground of fraud.⁵⁸ These suggestions are informed by the ensuing reasons. First, the lacuna on the removal of secretary of a private company is being abused in Nigeria. As the law stands today, the power of removal of secretaries of private companies is like a big stick or ‘demagogic’ sword in the hands of directors of private companies in Nigeria who wield it at their whims and caprices. There might be cases where a director of a private company who wants to settle a personal score with a secretary of a private company has been instrumental to the termination of the appointment of the secretary or his dismissal. In addition, a secretary of a private company may be removed from office simply because he had resisted interference from the board of directors or managing director in the performance of his statutory duties. Gower correctly states that: ‘In the performance of his statutory duties, he is clearly entitled to resist interference from the members, board of directors or managing director.’⁵⁹

In the second instance, the failure to provide for the removal of secretary of a private company by CAMA 2004 is discriminatory against secretaries of private companies in Nigeria contrary to section 42(1) of the CFRN 1999. Many secretaries of private companies, particularly the large companies such as Chevron Nigeria Limited and Shell Petroleum Development Company of Nigeria Limited are legal practitioners, accountants and chartered secretaries and administrators like their counterparts in public companies. Why should the

57. *Attorney General of Kwara State and Two Others v. Kike Ojulari*, *supra* note 23 at 559.

58. Note that in *Sunday Okpeke v. Nigeria Security Printing and Minting Company Ltd* (1999) 12 NWLR (part 629) 160–162 the Nigerian CA held that where an employee is alleged to have committed a crime by his employer the former must be given an adequate opportunity to explain himself before a tribunal vested with criminal jurisdiction before any disciplinary action is taken against him by his employer. While in *Ibrahim Jubril v. Military Administrator, Kware State*, *supra* note 30 pages 360–361 where the appellant/plaintiff was alleged to have committed fraud an offence contrary to the Penal Code, the Nigerian CA held that where there is allegation of the commission of a criminal offence against the employee by an employer which has been denied by the accused employee, the employee may not be disciplined until he has been first tried before a regular court to establish his guilt as constitutionally required where the employer makes the accusation of the commission of a criminal offence the basis of dismissal of the employee from services. See also *Federal Civil Service Commission v. Laoye* (1989) 2 NWLR (part 106) 652 (SCN). A major criticism of the decisions reached in these cases is that an employer is compelled to keep an employee in his establishment who has really committed a crime but because he gave bribe to the Police or court he was set free. It is suggested that all corrupt Police and judicial officers in Nigeria must be made to face the full wrath of the law, as the CFRN 1999 in its section 15(5) is against corrupt practices and abuse of power.

59. LCB Gower, *Gower’s Principles of Modern Company Law: International Student Edition* (5th edition) (London: Sweet and Maxwell Ltd 1992) at 163.

CAMA 2004 accord to secretaries of public companies the right to be heard and defend themselves before they can be removed and fail to accord similar right to secretaries of private companies who may have the same qualifications with secretaries of public companies and are Nigerians as well? The writer does not think it should be so. It needs to be pointed out that section 42(1)(b) of the CFRN 1999 specifically provides that:

a citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not by reason only that he is such a person be accorded either expressly by, or in the practical application of any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.

Arguably, the secretaries of public companies are of a particular community, that is, community of public companies.

And finally, improved status of company secretary. This can be discerned from the provisions of CAMA 2004. Despite this statutory recognition of the company secretary the courts until recently have continued to treat him as a subordinate servant, without ostensible authority to commit the company by his actions apart from such matters as the engagement of clerical staff.⁶⁰ For example, in *Houghton and Company v. Northand*,⁶¹ an English court held that a company secretary was a mere administrative officer who had no right to bind the company.

It is true that CAMA 2004 has not quite expressly named the secretary as one of the organs of the company. In any event, the earlier conservative view of a secretary is now tending to be reversed.⁶² As far back as 1961, Lord Parker, indeed, declared that a company secretary is capable of being an agent of the company.⁶³ This view is fortified by extra – judicial⁶⁴ and judicial opinions that a company secretary is more than an ordinary clerk and that, for certain purposes, he might bind the company as its agent.

A relevant case that can be pinpointed here without grief on the matter is *Panorama Developments (Guildford) Limited v. Fidelis Furnishing Fabrics Limited*.⁶⁵ In that case, the English CA held the defendant company liable to a car-hire company where the secretary had fraudulently ordered self-drive cars for his own use but ostensibly for the business purposes of his employers. According to Denning, MR:

...but times have changed. A company secretary is a much more important person nowadays than he was in 1887. He is an officer of the company with extensive duties and responsibilities. This appears not only in the modern Companies Acts, but also by the role which he plays in the day - to - day business of companies. He is no longer a mere clerk. He regularly makes representations on behalf of the company and enters into contracts

60. *Id* at 163.

61. [1928] Appeal Cases (AC) 1.

62. A Emiola, Nigerian Company Law (2nd edition) (Benin-City: Amfitop Ltd 2007) at 417.

63. Quoted in *Ibid*.

64. Gower, *supra* note 59 and Report of the Reform of Nigerian Company Law, 1988 237, paras 169 & 170, quoted in Emiola, *Ibid*.

65. (1971) 2 Queens Bench (QB) 711 716 – 717 (CA). See also the decision of the Nigerian Court in *Wimpey Ltd v. Balogun* (1986) 3 NWLR (part 28) 324 (CA).

on its behalf which come within the day to-day running of the company's business. So much so that he may be regarded as held out as having authority to do such things on behalf of the company. He is certainly entitled to sign contracts connected with the administrative side of a company's affairs, such as employing staff, and ordering cars and so forth. All such matters now come within the ostensible authority of a company's secretary.

It is confirmed under section 297 of CAMA 2004 that a company secretary might be capable of 'acting as agent of the company,' and for that purpose, he owes such fiduciary duties as are owed by agents in his type of position. This implicates that he cannot make secret profits or allow his personal interest to conflict with his duties. A secretary must not use confidential information he might have obtained from the company by virtue of his office and, if he did, he is liable to account for the profits or benefits derived by so doing.⁶⁶

Also, with the authority of the board of directors a secretary of a company in Nigeria shall exercise any powers vested in the directors.⁶⁷ Moreover, there is statutory insistence in Nigeria on the company secretary's name being entered in the same register as those of the directors.⁶⁸ The register is called the Register of Directors and Secretaries which every company must keep at its registered office.⁶⁹ The approach of CAMA 2004 is in tune with the practice in many other countries. For instance, in India statute insists that every company shall keep a register of directors and key managerial personnel such as managing director, company secretary and chief financial officer.⁷⁰

Again, wide ranging duties and responsibilities which are very significant have been imposed on the company secretary in Nigeria. In the Nigerian case of *Stephen Olu Adebisin v. May and Baker Nigeria Limited*⁷¹ Adolphus Godwin Karibi – Whyte, J stated unequivocally that the secretary is an officer of the company with important duties and responsibilities. Going by section 298(1) of CAMA 2004, the duties of a secretary include: attending and rendering secretarial services at the company's meetings; advising the company on compliance with the regulations; keeping records and statutory books of the company as required by CAMA 2004; rendering returns and filing notices at the CAC; and performing other management and administrative functions as may be assigned to him from time to time by the board of directors.⁷² These duties and the complex administrative work involved appear now to make the company secretary very crucial to the success of any corporate administration.

A germane point to note at this juncture is that most of the duties imposed directly on the company are discharged administratively by the secretary and very few of such duties and those required to be discharged by the directors can be accomplished without the

66. Emiola, *supra* note 64 at 418. See also sections 279, 280 & 283 of CAMA 2004 and section 166 of Indian Companies Act 2013 (Act 18 of 2013) on duties of company directors.

67. See, for example, CAMA 2004, section 298 (2).

68. *Ibid*, section 292(1).

69. *Ibid*.

70. See Companies Act 2013 (Act 18 of 2013), sections 170 & 203. See also section 224 (1) of the Zambian Companies Act, *supra* note 26 which provides for the Register of Directors and Secretaries.

71. (1978) 4 Federal Revenue Court Law Reports (FRCLR) 232, 236.

72. The company secretary's duties are substantially the same in many countries. See for example, the functions of company secretary contained in the Indian Companies Act, *supra* note 70, section 205 (1) and South African Companies Act 71 of 2008 as amended by Companies Amendment Act 3 of 2011, section 88.

assistance of the secretary. To be specific, all the duties that can be discharged under seal can be valid only when the secretary appends his signature.⁷³

In the Nigerian case of *Adebayo and Others v. Shonowo and Others*⁷⁴ the court observed that due to the company secretary's special access and connection with the detailed machinery of control, many company secretaries, most of whom today are legal practitioners, accountants and chartered secretaries and administrators have been brought into the directorate of the companies not merely to record proceedings of the board's meetings but as full members with all the rights attaching to the office of director.

It is not a surprise, therefore, that the CAMA 2004 in its section 294 provides that a secretary of a company may also be a director of a company. The only qualification seems to be that a provision in CAMA 2004 requiring or authorising a thing to be done by a director and the secretary shall not be satisfied by its being done by the same person who is both a director and the secretary of a company.⁷⁵ CAMA 2004 approach is in consonance with the practice in some other countries, including Trinidad and Tobago,⁷⁶ Malaysia,⁷⁷ Ghana,⁷⁸ Grenada⁷⁹ and Australia⁸⁰.

Finally, Pennington draws attention to the fact that statutes creating new criminal offences often make the secretary responsible for the company's crimes to the same extent as the director⁸¹. He states further that:⁸²

In this respect, criminal law is more in accordance with reality, because the secretary is often a full-time director as well, and the may be as influential in managing the company's affairs as his fellow-directors.

IV. OBSERVATIONS

It is amply clear from the foregoing examination of the power of removal of secretaries of private companies in Nigeria that the regulatory framework is not addressing the problem of removal of secretaries of private companies without according them an opportunity to defend themselves adequately. Section 296 of CAMA 2004 which accords secretary of a public company the opportunity to defend himself before he can be removed provides the procedure to be followed in the removal of secretary of a public company. It is, however, silent on the procedure to be followed in the removal of secretary of a private company. In this way, there is no security of tenure of secretaries of private companies in Nigeria, as their appointments are not protected by statute or tainted with statutory flavour. The lacuna is being seriously abused. For many secretaries of private companies in Nigeria have been removed by the directors of their companies without according them an opportunity to defend themselves contrary to the rules of natural justice guaranteed under common law and

73. See, for example, sections 71, 75 & 77 of CAMA 2004. See also Art 11 of Part 1 and Art 15 of Part 11 of Table 'A' of schedule 1 to the CAMA 2004.

74. (1969) 1 All NLR 176 193, quoted in Emiola, *Supra* note 66 pages 421 - 422

75. See CAMA 2004, section 294.

76. See Trinidad and Tobago Companies Act 1995, section 62(2).

77. See Malaysian Companies Act 1965 (Act 125), section 139(5).

78. See Ghana's Companies Act 1963(Act 179), section 76.

79. Grenada's Companies Act 1994 (Act 35), section 60 (2).

80. Australian Companies Act 1961, section 132 (5).

81. Pennington, *Pennington's Company Law* (4th edition) (1979) at 556, quoted in Emiola, *supra* note 74 at 422.

82. *Ibid.*

the right to fair hearing guaranteed under section 36(1) of the CFRN 1999. Under Nigerian Law, secretaries of private companies are treated as servants in a mere master and servant relationship under the common law.

It is rather sad that in a plethora of cases, the Nigerian courts have held that a servant in a mere master and servant contract of employment can be dismissed from employment for good or bad reasons or for no reasons at all. The courts in Nigeria have further held that where a servant in a mere master and servant relationship is dismissed contrary to the contract of employment or any law he is not entitled to specific performance or re-instatement but only to damages which is the amount the servant is entitled to be paid as salary for the period of notice prescribed in his contract of employment for termination of same. Most often, the damages to be awarded by the Nigeria court is one month salary in lieu of notice of termination of the contract of employment.

A continuation of the problem of removal of secretaries of private companies by directors without according them an opportunity to defend themselves certainly poses a grave danger to the survival of private companies in Nigeria. It has already impacted negatively on the country's system of corporate democracy and or governance. Of course, the problem has capacity to impact negatively on economical stability. Instability in Nigerian political economy would discourage both domestic and foreign investments. This is bound to stall economic growth without which there can be no economic development in Nigeria.

Besides, lack of security of tenure of secretaries of private companies in Nigeria may discourage many competent persons such as accountants, legal practitioners and chartered secretaries and administrators from taking up the position of secretary of private company. This would surely leave open the position above to mediocres and other ill-equipped persons who may not be able to discharge the duties or responsibilities of company secretary which are both extremely broad in scope and onerous under CAMA 2004 because of lack of sufficient experience and knowledge of company law practice and administration. The resultant effect is that many private companies in Nigeria may not be able to accomplish set goals and meet the demanding standards of corporate governance now required of companies.

V. RECOMMENDATIONS

The problem of removal of secretaries of private companies without according them an opportunity to defend themselves should be seriously addressed by the government. This is imperative so as not to create the impression that the government itself is not concerned with the extermination of the problem from the Nigerian political economy.

One critical recommendation of the writer is that the tenure of secretaries of private companies in Nigeria should be made secured by the Nigerian Legislature. To this end, CAMA 2004 should be amended by the NA of Nigeria in its section 296 (2) to expunge the word 'public' that is before the word 'company' so that the provisions of section 296 (2) would also be applicable to secretary of a private company.

Another critical recommendation of the writer is that the word 'fraud' appearing in section 296(3)(b) of CAMA 2004 should be expunged by the NA of Nigeria. This is so because, as mentioned earlier, the word 'fraud' is a crime as conceived in Nigerian criminal law. In line with the provisions of section 36(4) of the CFRN 1999, where a secretary of a company in Nigeria is alleged to have committed fraud he must be taken to the court of law to determine his guilt where he had denied the commission of the offence. It is after the court has pronounced him guilty of any fraudulent act that the board of directors can remove him if same really desires to remove him on the ground of fraud.

Without doubt, the recommendations above are bound to constitute a devastating assault to the hydra – headed problem of removal of secretaries of private companies without according them an opportunity to defend themselves.

CONCLUSION

This article has examined the power of removal of secretaries of private companies in Nigeria and has also identified short-comings in the various laws. It has also discussed the effects of removal of secretaries of private companies without according them an opportunity to defend themselves on Nigeria's system of corporate governance or administration as well as the Nigerian political economy in general. It has equally highlighted the practice in some other countries and made suggestions and recommendations, which if implemented would exterminate the menace of removal of secretaries of private companies without according them an opportunity to defend themselves from Nigerian political economy as well as guarantee the security of tenure of secretaries of private companies in Nigeria since their appointments would now be protected by statute or tainted with statutory flavour.

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ISSUES AND CHALLENGES IN IMPLEMENTATION OF SUSTAINABLE DEVELOPMENT IN INDIA

B. Kumar *

Tarun Kumar**

Man has been endowed with reason, with the power to create, so that he can add to what he's been given. But up to now he hasn't been a creator, only a destroyer. Forests keep disappearing, rivers dry up, wild life's become extinct, the climate's ruined and the land grows poorer and uglier every day. - Anton Chekhov¹

Abstract

This article deals with the principle of sustainable development as enshrined in several international instruments including international conventions. It discusses the provisions of the Constitution and makes a survey domestic Laws and Acts which are related to sustainable development. This article concludes that although the law on sustainable development is gaining momentum at local, national, regional and global level, there is still a long way to go in terms of the implementations of the fundamental elements of sustainable development.

I. INTRODUCTION

In the last 10 to 14 years the environmental condition of the world has been in the news many times. Whole world is facing many problems for example the depletion of natural resources, the greenhouse impact, the diminishing biodiversity and the unprecedented rate of species extension. Pollution in overall environment is the main reason behind it. In present scenario, we can say that there are so many nations which are developing popularly termed as third world countries, development is the only option for these countries as well as developed countries. Thus, development is the main reason behind the degradation of environment. To solve the phenomena, the jurists and environmentalists worldwide have discussed a doctrine called 'Sustainable Development'. In simple words it means that there must be some balance between development and environment. To be sustainable development must possess both economic and ecological sustainability. The doctrine had brought known as early as in 1972 in the Stockholm declaration. But the concept was given a definite shape

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1. Chekhov, A., Uncle Vanya, in Hingley, R., The Oxford Chechove, Vol. 3, Oxford University Press London, 1964, p. 28.

in Brundtlands report according to which “sustainable development is to meet the needs of present without compromising the ability of future generation to meet there own needs.”²

This doctrine had been further discussed under agenda 21 of UN Conference on environment and development held in 1992 at Rio de Janeiro, Brazil. Sustainable development is essentially a policy and strategy for continued economic and social development without determining to the environment and natural resources on the quality of which continued activity and further development depends³. Sustainable development is equal to international human right law plus international environmental law plus international economic law.⁴

II. HISTORICAL DEVELOPMENT AND INTERNATIONAL CONVENTIONS

I. EPA and NEPA- In the United States of America the first establishment of a national policy for environmental sustainability came in 1969 with the name of the National Environmental Policy Act (NEPA) the object was to faster and promote the social welfare and fulfill the social, economic and other requirements of present generations and as well as future generation. On July 9, 1970, US Environmental Protection Agency (EPA) was established to improve and preserve the quality of the environment it was at both national and international level. It works to sustain human health as well as the natural resources on which all human activity depends.

II. The Stockholm Conference⁵: a new large scale event of the 1970 was the United Nations Conference on the human environment held in 1972 in Stockholm, Sweden. Developing countries expressed concern about the environmental consequence of increasing global development. On the other side states that were still developing raised their own urgent and continuing need for economic development. Thus, the concept of sustainable development was bringing out of an attempt to find a compromise between the development requirement of the states in the southern Hemisphere and the conservation demands of the developed states in the north.⁶ This conference was a big achievement as one hundred and fourteen states participated in this international conference. The world leaders agreed basically on declarations of principles and an also an action plan. The principles evolved in the conference were mainly related to the protection, management of resources of earth, proper discharge of toxic substances and lots of other similar protection.⁷

III. The Montreal Protocol (Ozone Treaty): The Montreal Protocol popularly known as Ozone Treaty came into force from Jan. 1 1989. The main aim of the Protocol was to elimination of Ozone- depleting substances such as CFC at a regular rate irrespective of the development status of a country. The pact was signed by around 48 countries, mostly developed countries. But India did not sign the pact.⁸

2. Burton Ian, our common future, the World Commission on Environment and Development, <http://www.tandfonline.com/doi/pdf/10.1080/00139157.1987.9928891#.VGxRtDSUfKM> (accessed on 12/11/2014)

3. Sustainable Development Goals, <http://sustainabledevelopment.un.org/?menu=1300> (accessed on 12/11/2014)

4. Jaswal Paramjit and Jaswal Nishtha, Environmental Law (Environment Protection, Sustainable Development and the Law), Allahabad Law Agency, at 99.

5. Swamy N. Maheshwara, Law Relating to Environmental Pollution and Protection, Asia Law House Hyderabad, Volume 2, at 1908.

6. Declaration of the United Nations Conference on Human Environment, <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503> (accessed on 13/011/2014)

7. Ibid

8. Jaswal P.S.; “Environmental Law “, Allahabad Law agency, 2009, at pp96.

IV. Brundtland Commission⁹: The term sustainable development was brought into general use by the Brundtland report, 1987. According to this report, the concept of sustainable development contains two important concepts i.e.,

a) The notion of “needs”, in particular the essential requirement of the world’s poor, to which overriding priority must be given ; and

b) The idea of limitations imposed by the state of technology and social organization on the environments ability to meet present and future needs.¹⁰

V. Earth Summit (1992): The UN Conference on Environment and Development (UNCED) popularly known as Earth Summit was held in 1992 at Rio de Janeiro. In this conference more than 150 nations participated. This was the biggest United Nation conference ever held. A few of the great achievements of earth summit lie in the form of following documents¹¹:

a) It was the Agenda 21 which recognized globally a blue prints for world government initiatives to maintain the sustainable development.

b) The second was The Forest principles, in this there was a series of principles which was evolved to provide better management to the sustainable development in the world.

c) Another important point was the two legally enforceable conventions, i.e; the convention on climate change and convention on Biodiversity. The main aim of these two conventions was to prevent global climate change and the removal of biologically diverse species.¹²

VI. Earth Summit Plus Five (1997): A separate session of the UN General Assembly was held in June, 1997 at New York. This was aim to improve the conditions of the environment. The session is also known as Earth summit plus five. It was supposed to clear “how far the committed nations had gone from Rio”. Representatives of more than 170 countries along with many of environmentalists and NGOs take part in this conference. It was realized in this conference that our oceans, planets, forests and atmosphere are in danger. It was also found that the population of poor people is growing. It was contended in this conference of environmentalists it was contended that there must be “world environment court” to solve the international environmental disputes.¹³

VII. Kyoto Protocol, 1997: all the signatories of the Kyoto Protocol were also the parties to the Convention on climate change (1992). On 11th December, 1997, representatives from 159 countries participated in this historic conference. This agreement was concluded in Kyoto, Japan. The main objects of the protocol are to protect and enhance the sinks and reservoirs Of greenhouse gases; Promote a forestation and reforestation; promotion, research, development and increased use of new and renewable forms of energy; and limit or reduce emission of GHGs¹⁴. It was agreed that the member countries have to reduce the emission of Green House Gases by at least five per cent. The time limit was fixed till 2012. It also envisages international cooperation in the field of transfer or excess to environmentally sound technology, know-how, practices and processes pertinent to climate change.¹⁵

9. Supra note 6, at 1919

10. Our Common Future: Brundtland Report Overview, <http://www.agnt.org/brundtland-summary> (accessed on 13/11/2014)

11. Supra note 6, at 1928

12. Shastri Satish C, “*Environmental law*”, Eastern Book Company Lucknow, 2015, at pp460.

13. Id.

14. Green House Gases (CO₂., CH₄, N₂O, CFCs, O₃etc)

15. Supra note 13.

VIII. Earth Summit (2002): The United Nations Organizations organize world summit on sustainable development in Johannesburg from August 26 to September 4, 2002. The earth summit started from a topic of taking steps towards coordinated international action to fight poverty as well as protect the global environment. Finally a declaration was adopted in the name as “Johannesburg Declaration on Sustainable Development”. This declaration was focused on the invisibility of human dignity. It also talks about the basic requirement such sanitation, clean water, energy, health care, food adequate shelter, security and the protection of biodiversity and many more.¹⁶

IX. United Nations Conference on Sustainable Development Rio+20, Earth Summit 2012: the main aim of this summit was to reconciling the economic as well as environmental goals of the world. This conference was organized in Rio de Janeiro (Brazil) from 13 to 22 June 2012. Around 192 UN member states take part in this conference. In this conference, member countries was advised to develop and implement science based management plans.¹⁷

III. SALIENT PRINCIPLES OF SUSTAINABLE DEVELOPMENT

Environment is a developing branch of law in India and in world. This growth is conspicuous by the remarkable activism on the part of Judiciary, legislature and the international conventions particularly in the twentieth century. In the landmark judgment, *Vishaka v State of Rajasthan*¹⁸, the Supreme Court held that in the absence of domestic law occupying the field, any international convention must be read into the provisions in Articles 14, 15, 19 (1) (g), and 21 of the Constitution. The balance between environmental protection and developmental activities could only be maintained by strictly following the principle of “sustainable development”. The principle can be discussed as under the following heads :

1) Inter-Generational Equity: according to this theory, “we the human species, hold the natural environment of our planet in common with all members of our species: past generations, the present generations, and future generations. As members of the present generations, we hold the earth interests for future generations. At the same time, we are beneficiaries entitled to use and benefits from it. Thus, the present generation being trustee, has the right to benefit from the use of the natural resources which constitutes trust property.”¹⁹

2) The Precautionary Principle: The first important object of the “precautionary principle” is to make sure that a physical substance or human activity making a threat to the environment has to be stopped from adversely affecting the environment. No matter that the activity or substance is directly harmful to environment, it must be checked. This principle plays a significant role in determining whether development process is sustainable or not. This principle underlines sustainable development which requires that the development activities must be stopped and prevented if it causes a threat to environmental damages.²⁰

In *Vellore Citizens Welfare Forum v Union of India*²¹, Justice Kuldeep Singh stated that the ‘onus of proof’ is on the actor or the developer/industrialist to show that his action is environmentally benign.

16. Supra note 6, at 1967.

17. The Tribune date 23 June 2014.

18. AIR (1997) 6 SCC 241.

19. Sing Gurdip, “Environment Law in India”, Macmillan publisher India Ltd, 2011, at pp22.

20. Ibid.

21. AIR 996 SC2715.

22. Indian council for enviro –legal action v. Union of India AIR 1996 SC1446.

23. Bhopal Gas Leak case.

3) The Polluter Pay Principle: The polluter pay principle (ppp), as construed by the Supreme Court of India, means that the absolute liability from harm to the environment extends not only to compensate the victims of pollution but also to cast of restoring the environmental degradation.²² The polluter must pay for the damage caused by him. This principle exposes the polluter to two fold liability, namely compensation to the victims of pollution²³ and ecological restoration. The principle is source of liability and compensation for the pollution. Due to its effective role, this principle has acquired a status of customary international law.

4) Public Trust Doctrine: according to Professor Jaffe²⁴ “public land dedicatee to certain uses (for example, use as a park, a recreation ground, or a forest preserve) cannot be diverted by a public authority (such as a highway commission) to other uses less environmentally worthy, unless the diversion is in consequential and does not seriously disturb the dedicated use.” In *MC Mehta v Kamal Nath*,²⁵ the Supreme Court applied this doctrine for the first time in India to an environmental problem²⁶.

IV. LEGISLATION IN INDIA INFLUENCED BY SUSTAINABLE DEVELOPMENT

In India individual is expected to play a vital role for the protection of environment. Even it is very much true in old traditions where some trees like ‘Pipal’ some animals were worshipped. But in new scenario, the problem is not easy thus; both individual as well as state must work for this. In the developing countries like Bangladesh, India all the individuals along with the initiatives of the higher judiciary are playing the role of protector of environment in true sense. Under the Indian Constitution one can find some provisions for the environment protection as well as the right of an individual to a pollution free environment. Initiatives have already been taken to promote public awareness.²⁷

This approach has helped in framing laws about the environment conservations in India. The notable ones are given below:

I. Every person enjoys the right to a wholesome environment, which is a facet of the right to life granted under Article 21 of the constitution of India.

II. Enforcement agencies are under an obligation to strictly enforce environmental law.

III. Government agencies may not plead non-availability of funds, inadequacy of staff or other insufficiencies to justify non-performance of their obligations under environmental laws.²⁸

IV. The polluter pay principle which is a part of the basic environmental law of the land requires that a polluter bear the remedial or cleanup costs as well as the amounts payable to compensate the victims of the pollution.

V. The ‘precautionary principle’ require government authorities to anticipate, prevent and attack the causes of environmental pollution.

VI. Stringent action ought to be taken against who carry on industrial or development activity for profit without regard to environmental laws.

Constitution of India through Article 48-A and 51A (g), lays down a foundation for sustainable development by outlining the blue print of social and economic development by

24. Jaffee, ‘Book Review’, 84 Harv L Rev, 1971, p 1562.

25. AIR 1997 1SCC 388.

26. Leela Krishnan “ Environment Law Case Book”, Lexis Nexis, 2014, At pp 347.

27. Tiwari Dr.H.N., Environmental Law, Allahabad Law Agency, at 74.

28. Municipal Council, Ratlam vs Shri Vardhichand & Ors, AIR 1622, 1981 SCR (1) 97

providing protection to the environment. For satisfaction of Article 48A there are a number of environmental related laws in India, enacted solely for the protection of our environment like The Forest Act, 1972, The Wildlife (Protection) Act, 1972, The Water (Prevention and Control) of pollution Act, 1974, The Forest (Conservation) Act, 1980 etc. Many rules and policies like national forest policy, 1988, Re-cycled Plastic Manufacture and Usage Rules 1999, Ozone depletion substances regulation Rules, 2000 etc. were also passed.²⁹

Some Laws and Acts which stand towards sustainable development may be summarized as -

i. The National Environmental Appellate Authority Act, 1997: this Act enabled the union government to establish the national environment appellate authority. This authority is empowered to hear appeals against orders granting environmental clearness in designated areas where industrial activity is restricted under the environment Act. It has an inclusive jurisdiction over the claims of compensation in these circumstances.

ii. Criminal Procedure Code, 1973: part eight of the Criminal Procedure Code, 1973 provides provision for public nuisance relating to environmental pollution.

iii. The Wildlife (Protection) Act, 1972: after the UN General Assembly conference on human environment in June 1972, this Act came into existence. This Act was amended in 1991 and 1992. Under this Act every state has to constitute a wildlife advisory board.

iv. The Water (Prevention and Control of Pollution) Act, 1974: this Act aims to provide for the prevention and control of water pollution and maintaining or restoring of wholesomeness of water and establishing boards for this purpose.

v. The Air (Prevention and Control of Pollution) Act, 1981: this Act came into existence with the objectives to provide for the prevention and control of air pollution.

vi. The Umbrella Legislation for Environment Protection (Environmental protection Act) 1986: this Act has the following objectives :-

- * Protection of environment,
- * Improvement of environment,
- * Prevention of hazards to human being, planets, property and other living creatures.³⁰

V. JUDICIAL ROLE

Judiciary in India, particularly the Supreme Court and the High Court's has played an important role in protecting the doctrine of sustainable development. Parliament has enacted many laws to deal with the problems of environmental degradation. In such a situation, the superior courts have played an important role in interpreting those laws to suit the doctrine of sustainable development. Most of the environmental cases have come before the court through PIL either under Article 32 or Article 226 of the Constitution.

The first case in which the Apex court had applied the doctrine of sustainable development was *Vellore Citizen Welfare Forum vs. Union of India*³¹. In this case, dispute arose over some tanneries in the state of Tamil Nadu. These tanneries were discharging effluents in the river paler, which was the main source of drinking water in the state. The Hon'ble Supreme Court held that remediation of the environment is part of the process of sustainable development and as such polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.

29. Supra note 17

30. Supra note 17

31. AIR 1996 SC

But before *Vellore Citizens case*, the Supreme Court has in many cases tried to keep the balance between ecology and development. In *Rural Litigation and Entitlement Kendra Dehradun vs. State of Uttar Pradesh*³² which was also known as *DoonVally case*, dispute arose over mining in the hilly areas. The Supreme Court after such investigation, ordered the stopping of mining work and held that:

“This would undoubtedly, cause hardship to them, but it a price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment.”³³

However in 1991, in the *Rural Litigation and Entitlement Kendra vs. State of UP*³⁴, the Supreme Court allowed a mine to operate until the expiry of lease as exceptional case on condition that land taken on lease would be subjected to afforestation by the developer but as soon as the notice was brought before the court that they have breached the conditions and mining was done in most unscientific way, the Supreme Court direct to the lessee to pay a compensation of three lacks to the fund of the monitoring committee.

Likewise, various forests have also been protected in a landmark case *Tarun Bhagat Singh vs. Union of India*³⁵, the Supreme Court issued directions that no mining work or operation could be continued within the protected area. But it is not that the court always favor environment without giving any significance to the development aspect when dispute arises between environment and development.

In *M.C.Mehta vs. Union of India*³⁶, the Supreme Court issued directions towards the closing of mechanical stone crushing activities in and around Delhi, which was declared by WHO as the third most polluted city in the world. Thus, it is quite obvious that the courts give equal importance to both ecology and development while dealing with the cases of environmental degradation.

In another case, *M.C.Mehta vs. Union of India*³⁷ (popularly known as *Taj Mahal Case*), judgment was based on the principle of sustainable development and here the court applied the “precautionary principle”. It was alleged that there is degradation of Taj Mahal, a monument of international repute. So we can say that from time to time courts have given orders in favor of the sustainable development and followed the principles to achieve this goal.

In *Ramdas J Koli v. Ministry of Environment and Forest*³⁸, The main reason for the matter to be brought before the National Green Tribunal was the project of widening and deepening of the sea for additional berth at port of Jawahrlal Nehru Port Trust(JNPT). As a result of the same, inter-tidal seawater exchanges and flow of the seawater in Nhava creek will be substantially affected. Destruction of mangroves alongside beaches, as a result of the impugned project activity would cause loss to spawning and breeding grounds of fishes. Hence, stock of grown fishery will be unavailable for earning livelihood. It was further alleged that JNPT has now further gone ahead to narrow down the mouth of the creek, which previously was of larger width, allowing free egress and ingress of traditional boats in the seawater with free tidal currents. As a result, their traditional boats are unable to navigate

32. AIR 652, 1985 SCR (3) 169

33. *ibid*

34. AIR 1991 SC

35. 1993 SCR (3) 21 1993 SCC Supl. (3) 115 JT 1993 (3) 1 1993 SCALE (2)441

36. AIR(1992) 3 SCC 256

37. AIR (1998) 5 SCC 720

38. National Green Tribunal Western Zone Bench, Pune 2015 SCC OnLine NGT 4

freely as usual within the area of seawater around proposed project. This project activity has been contested to affect the livelihood and allied human rights of the fisherman.

After hearing both the sides, NGT came to the conclusion that JNPT has failed to ensure free flow of tidal water with adequate ingress for existence of Mangroves and free movement of boats of local fishermen. The NGT observed that the economy of fishermen folk has nexus with their right to enter the seawater, collect fishes by using traditional boats, using net/mesh, as per the norms of State Government and to do business for daily earnings. They cannot be deprived of bread and butter for no fault on their part.

The NGT also emphasized on sustainable development concept, polluter pays principle and precautionary principle while adjudication upon this matter. The NGT further added that the fishermen need to be compensated in tune of Rs. Ninety Five Crores Nineteen Lakhs and Twenty Thousand, which need to be distributed equally to one thousand six hundred and thirty affected and identified fishermen's families. Further the NGT also ordered that cost for environmental restoration is upon the respondents in this case.

VI. SUGGESTIONS AND CONCLUSION

Sustainable development is the best possible way to solve conflict of interest between development and environmental conservation following are the suggestions to achieve the goals of sustainable development:

- Today, there should be more reliance on renewable sources of energy, instead of non-renewable sources of energy for supplying energy requirements.

- Emphasis should be given to preservation, utilization, restoration and enhancement before setting up any industrial venture, the principle of sustainable development should be made in integral part of planning process. We should compensate for whatever we use from nature. For example, if we fall trees for the purpose of building a factory, we should plant equal number of trees elsewhere to maintain bio-diversity and ecological balance of that areas.

- * Ground water conservation practices like construction of Khadin (popular in Maharashtra, AP, MP, TN, Karnataka and Gujarat), check dams, form ponds should be practiced.

- * Contingency crop planning can be implemented by growing various combinations of crops, fruits, trees and grasses to minimize the risk of crop failure and to provide stability to farm income.

- * Integrated development of drought-prone areas can be done by long term preventive measures like afforestation, pasture development and livestock management by growing better top feed species, which can survive annual droughts and provide rich fodder.

- * We all should plant trees, keep the surrounding clean, stop using polythene, minimize our use of petrol and kerosene and help to conserve the environment for our own good. The industries and enterprises should follow various Acts and laws framed for the protection of environment protection.

It is clear that the law on sustainable development is going momentum at local, national, regional and global level. But there is still a long way to go in terms of the implementations of the fundamental elements of sustainable development. We must learn from our experience, mistakes from the past. So that they can be rectified for a better present and future. Environment and the development are the two sides of the same coin. Anyone of these cannot be sacrificed for the other. On contrary, both are equally important for our batter future. So, all the nations should join hands for achieving the goal of sustainable development.



POSSIBILITY OF IMPOSSIBLES : GENE PATENTING

Ajai Kumar*

Abstract

Recently the Supreme Court of United States in Association for Molecular Pathology v. Myriad Genetics, 133 S. Ct. at 2115 (Myraid case) has held that isolated human genetic sequences is not patentable. The decision has the effect of invalidating thousands of gene patents in the U.S. The decision in Myraid is contrary to the decision of the same court in Diamond v. Chakravarti in 1980, in which the Supreme Court had declared that “anything under the sun made by man” is patentable. It was said that an isolated and purified DNA molecule that has the same sequence as a naturally occurring gene is eligible for a patent because: (1) An excised gene is eligible for patent as a composition of matter or as an article of manufacture because that DNA molecule does not occur in that isolated form in nature, and (2) Synthetic DNA preparations are eligible for patents because their purified state is different from the naturally occurring compound. It is in this context, the present paper examines the issue of the patentability of isolated human genetic sequences.

Key words: *Supreme Court of United States, gene patenting, isolated human genetic sequences, patent, patentability, discovery, invention, Indian Patent Act, 1970.*

Recent pronouncement of the Supreme Court of United States in *Myraid*¹ case has opened a new era of discussion in the field of human gene patenting and created a setback to business of the gene bio-technology and therapy in United States. After the decision of the same court in *Diamond v. Chakravarti*² in 1980, crores of dollars have been invested in the market by the companies working in the area. The Supreme Court had declared in the case that “anything under the sun made by man” is patentable. It was said that an isolated and purified DNA molecule that has the same sequence as a naturally occurring gene is eligible for a patent because; (1) An excised gene is eligible for patent as a composition of matter or as an article of manufacture because that DNA molecule does not occur in that isolated form in nature, and (2) Synthetic DNA preparations are eligible for patents because their purified state is different from the naturally occurring compound.

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1. *Association for Molecular Pathology v. Myriad Genetics*, 133 S. Ct. at 2115.
2. 447 U. S. at 317 (1980).

However, the recent pronouncement of the same court by granting certiorari in *Association for Molecular Pathology v. Myriad Genetics*³ on the question of whether human genes were patentable⁴ The Court held that isolated human genetic sequences have not patentable⁵ and effectively invalidating thousands of gene patents in the U.S.⁵ This recent decision represents a huge shift in the legal treatment of gene patentability. U.S. courts had allowed gene patents for decades, ever since the decision in *Chakrabarty* in 1980.⁶ The *Myriad Genetics* case, then, reversed previous U.S. policy. While the full effects of this decision are still unknown, the case has drawn international attention once again to the question of gene patent validity and may influence other countries experiencing similar pending legal challenges.

The fact of the case is that in 2009, the Association for Molecular Pathology, a U.S. non-profit scientific society of researchers and scientists, challenged Myriad's BRCA1 and BRCA2 gene patents along with their patents on diagnostic testing. Myriad held U.S. patents on the BRCA1 and BRCA2 genes as well as genetic by-products and various mutations of these genes. As a result, Myriad was the sole U.S. provider of genetic diagnostic tests for breast and ovarian cancer risk.

It is relevant to mention that the European Union (EU) patent regime in comparison to the U.S. system is more favourable towards gene patenting (Myriad) in terms of the standard of patentability⁷ as well as in what constitutes patentable subject matter.⁸ The 1998 Biotechnology Directive of the European Patent Office (EPO) explicitly discussed gene patents and urged nations to harmonize how each member state protected biotechnological inventions, including gene patents.⁹ Unlike American patents, however, European patents issued by the EPO function as a "bundle" of national patents.¹⁰ A patent is subject to judicial decisions on its validity and enforcement by different member states that are controlling only within their jurisdiction. There is currently no court to promulgate an EU-wide determination of a patent's

3. See *Myriad Genetics*, 133 S. Ct. at 2115.

4. See *id.* at 2116.

5. See *Ass'n for Molecular Pathology v. U.S. Patent & Trademark Office*, 653 F.3d 1329, 1355 (Fed. Cir. 2011) ("It is estimated that the PTO has issued 2,645 patents claiming 'isolated DNA' over the past twenty-nine years, and that by 2005, had granted 40,000 DNA-related patents covering, in non-native form, twenty percent of the genes in the human genome.") (citations omitted).

6. See *Chakrabarty*, 447 U.S. at 317 ("The grant or denial of patents on micro-organisms is not likely to put an end to genetic research or to its attendant risks. The large amount of research that has already occurred when no researcher had sure knowledge that patent protection would be available suggests that legislative or judicial fiat as to patentability will not deter the scientific mind from probing into the unknown [W]e are without competence to entertain [arguments warning against the hazards of gene patenting.. .]")

7. In order to be patentable material under European law, an invention, paralleling U.S. criteria, must: "(1) comprise patentable subject matter, (2) be new, (3) be 'susceptible of industrial application,' and (4) involve an 'inventive step.'" See *Donna M. Gitter, International Conflicts over Patenting Human DNA Sequences in the United States and the European Union: An Argument for Compulsory licensing and a Fair-Use Exemption*, 76 N.Y.U. L. REV. 1623 (2001) at 1644.

8. Like the US, the EU has been issuing gene patents since the 1990s. See Dianne Nicol & Jane Nielsen, *The Australian Medical Biotechnology Industry and Access to Intellectual Property- Issues for Patent Law Development*, 23 SYDNEY L. REV. 347 (2001) at 354.

9. See Directive 98/44/EC, of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of Biotechnological Inventions, art. 9, (noting that "exclusion from patentability of plant and animal varieties and of essentially biological process ... have created uncertainty" and that "harmoniz[ation] is necessary to clarify the ... uncertainty").

10. See Kali Murray & Esther van Zimmeren, *Dynamic Patent Governance in Europe and the United States: The Myriad Example*, 19 CARDOZOJ. INT'L & COMP. L. 287, 304 (2011).

validity once issued by the EPO.¹¹ This system can have complicated effects when the validity of a patent is in dispute between countries, with the potential for a patchwork of differing patent decisions among EU members.

Despite the EPO's explicit acceptance of gene patents, the EU has witnessed challenges over many gene patents, including Myriad's BRCA1 gene patents. In early 2002, controversy arose over the issuance of patents for the BRCA1 and BRCA2 genes and for a method of diagnosing breast and ovarian cancer to Myriad Genetics.¹² Stakeholders launched an opposition under Article 99 of the European Patent Convention (EPC).¹³ The EPO initially invalidated one of Myriad's BRCA gene patents, and it was reinstated only after the patent was amended and narrowed in scope.¹⁴ Currently, the EU continues to allow patents on isolated gene sequences when a function is identified for the sequence.¹⁵

With respect to human gene patents, Australia's official position is that "a DNA or gene sequence that has been isolated may be patentable" so long as "it follows the other statutory rules of patentability."¹⁶ This position has been challenged multiple times throughout the last decade. In 2002, the Attorney General ordered the Australian Reform Commission to "examine the laws and practices governing intellectual property rights over genetic materials and related technologies, with a particular focus on human health issues."¹⁷ In 2011, legislators in Parliament proposed the Patent Amendment (Human Genes and Biological Products) Bill in order to exclude isolated DNA segments from patentability.¹⁸ Although this bill remains under consideration by Parliament, a 2013 case was filed to challenge Myriad Genetics' gene patents.¹⁹ Despite the fact that Australian courts often use U.S. court opinions as persuasive authority,²⁰ this challenge was unsuccessful. After a subsequent second appeal, Australia's Federal Court upheld the validity of Myriad's gene patents in September 2014.²¹

11. See *id.*

12. See *id.* at 321-23.

13. See *id.* at 322.

14. See Myriad Wins European Patent Appeal on Cancer Test, REUTERS (Nov. 20, 2008, 10:20 PM), <http://in.reuters.com/article/2008/11/20/myriad-patent-idINN2041020920081120> (last visited Sept. 24, 2014).

15. However, there is an exception for "diagnostic methods practiced on the human body"; diagnostic gene sequencing does not occur within the human body and so would not be excluded from patentability. European Patent Office, Guidelines for Examination art. 53(c) (Sept. 2013), available at http://www.epo.org/law-practice/legal-texts/html/guidelines/e/g_ii_4_2.htm; see also European Patent Convention (EPC) R. 29(3), (Dec. 13, <http://www.epo.org/law-practice/legal-texts/html/epc/1973/e/r29.html> 2007), available at (allowing patents on gene sequence as long as the industrial application is disclosed in the application).

16. Kate M. Mead, *Gene Patents in Australia A Game Theory Approach*, 22 PAC. RIM L. & POL'Y J. 751 at 757 (2013) (noting "that Australian courts often use U.S. court opinions as persuasive authority for determining patent cases").

17. Austl. L. Reform Comm'n (ALRC), *Genes and Ingenuity: Gene Patenting and Human Health*, ALRC Report 99 (Aug. 2004), § 12, available at <http://www.alrc.gov.au/publications/12-patents-and-human-genetic-research/impact-gene-patents-research>.

18. See Mead, *supra* note 15, at 755.

19. See *id.*

20. See *id.*

21. See Jamelle Wells, *Court Dismisses Second Appeal to Overturn Ruling on Corporate Human Gene Patenting*, SEVEN NEWS (Sept. 6, 2014, 7:08 AM), <https://au.news.yahoo.com/nsw/a/24906725/courtdismisses-second-appeal-to-overturn-ruling-on-corporate-human-gene-patenting/> Nov. 6, 2014.

In Canada, Gene patents are available. In fact, Myriad continues to hold four gene patents in Canada for the BRCA1 and BRCA2 genes.²² Despite these patents, multiple private agencies in Canada began using “round about methods” to avoid infringing the patents” while still cutting costs, including brokering patient access to a BRCA research project.²³ Due to the cost of Myriad’s licensing agreements for genetic testing, the British Columbia Ministry of Health Services changed its official position in 2003 to permit health care facilities to use in-house BRCA testing-in violation of Myriad’s patents.²⁴ The Ontario Ministry of Health signed on to a report urging the Canadian Patent Act to exclude broad-based genetic patents and include a strong public morality clause.²⁵

Before discussing **Indian position** in area of gene patenting, it is important to explain the structure and systematic arrangement of genes.

Genes are the physical units of hereditary that the parents pass down to their children. They are made up of tightly coiled threads or polymers called as deoxyribonucleic acid (DNA). DNA is an informational molecule and is made up of four distinct nucleotides – deoxy-adenosine (A), deoxyguanosine (G), deoxythymidine (T), and deoxycytidine (C) that forms the base of each DNA molecule.

However, DNA has no functional property. Genes are considered to be fundamental as they contain the blueprint for the body to make proteins. Actually it is the proteins that do the actual work in our bodies. It is a chemical that, when placed in an appropriate environment, will direct the synthesis of particular and specific proteins, which make up the structural components of cells, tissues and enzymes (molecules that are essential for biochemical reactions). This environment is known as the cell. A DNA molecule may contain one or more genes, each of which is a specific sequence of nucleotide bases. It is the specific sequence of these bases that provides the exact genetic instructions that provides an organism with its own unique trait.

DNA (deoxyribonucleic acid):

It’s a double-stranded molecule within each cell that encodes hereditary information; also the template for RNA molecules that turn genes on and off.

RNA (ribonucleic acid):

It’s a molecule within each cell that determines protein synthesis and transmits hereditary information.

Recombinant DNA:

Artificial DNA made by splicing DNA strands from different organisms. It is used for many purposes, such as replicating DNA for research, producing important proteins, and devising gene therapies.

Expressed Sequence Tag:

An EST, or “expressed sequence tag,” is a DNA sequence of several hundred nucleotides. As the name implies, ESTs are DNAs that code for a particular protein. An EST

22. See Bryn Williams -Jones, History of a Gene Patent: Tracing the Development and Application of Commercial BRCA Testing, 10 HEALTH L.J. 123 at 141 (2002).

23. Id. at 142.

24. See id. at 142. Myriad responded by sending “cease and desist” letters to the Ontario and British Columbia governments for violating their BRCA patents. Ontario ignored Myriad’s legal claims and decided to continue financing the testing in Canadian laboratories. See Laura Eggertson, Ontario Dejies U.S. Firm’s Genetic Patent, Continues Cancer Screening, 166(4) CMAJ News, Feb. 19, 2002, available at <http://www.cmaj.ca/content/166/4/494.1.full>.

25. See Williams-Jones, supra note 21, at 143.

is a convenient means of identifying a specific gene in the context of a single chromosome, a complete genome or a collection of genes (often termed a “library”). Because the sequence information contained in an EST is enough to distinguish one gene from all others.

Genetic Testing:

A variety of tests now make it possible to examine a person’s DNA. The DNA is typically obtained from a blood sample. Genetic tests provide physicians with information about that DNA sequence and with this information, a physician can prescribe drugs, special monitoring or preventive measures to treat the disease or reduce the risk. This is the subject of a new area of medicine called pharmacogenomics.

Gene Therapy:

Gene therapy can be achieved by replacing, augmenting, or eliminating absent or defective genes, as well as by providing genes encoding therapeutic or immunogenic proteins. One method of gene therapy works by replacing a patient’s ineffective or absent gene with a therapeutic gene (e.g. a replacement gene).

Difference between human genome and gene:

A ‘genome’, on the other hand, is the complete set of genetic instructions carried within a single cell of an organism. A gene is a small subunit of the genome which in general ‘codes for’ - contains the information necessary for constructing - a single protein, or protein subunit. The human genome is estimated to comprise more than 120,000 genes. Gene patents typically issue in one of four categories: (1) genes, in whole or in part, including claims to isolated nucleotide sequences;^{25-A} (2) proteins that the genes encode and their function in organisms; (3) patents on the gene sequence itself as well as patents on the proteins encoded by those vectors used for the transfer of genes from one organism to another; and (4) genetically modified cells or organisms, processes used for the making of genetically modified products, and the uses of genetic sequences or proteins for genetic tests.²⁶ These categories are not distinct, and there are frequent overlaps. For example, a company may hold genes.²⁷ Because of the potentially broad coverage of gene patents, ownership of the rights to a single gene sequence can result in a “near monopoly on diagnostic tests and treatments for widespread and serious ailments.”²⁸ This creates the opportunity to “extract rents” from researchers and scientists who are interested in developing further diagnostic tests, resulting in both higher medical costs and decreased availability to patients.²⁹

25A. These patents are most often the cause of controversy. Consider, for example, patent 5,622,829, previously held by Myriad Genetics, which claims complementary DNA (cDNA) forms of BRCA1 alleles. See Report of the Secretary’s Advisory Committee on Genetics, Health, and .AND Society, Gene Patents and Licensing Practices and Their Impact on Patient Access to Genetic Tests, D EP’T OF HEALTH HUMAN SERVICES (April 2010), http://osp.od.nih.gov/sites/default/files/SACGHS_patents.report_2010.pdf.

26. Available at See Kristen L. Burge, Personalized Medicine, Genetic Exceptionalism, and the Rule of Law: An Analysis of the Prevailing Justification for Invalidating BRCA 1/2 Patents in Association of Molecular Pathology v. USPTO, 8 WASH.J.L. TECH. & ARTS 501, 513-14 (2013).

27. Myriad held U.S. patents on the BRCA1 and BRCA2 genes as well as genetic byproducts and various mutations of these genes. As a result, Myriad was the sole U.S. provider of genetic diagnostic tests for breast and ovarian cancer risk. See Robert Cook-Deegan et al., Impact of Gene Patents and licensing Practices on Access to Genetic Testing for Inherited Susceptibility to Cancer: Comparing Breast and Ovarian Cancers with Colon Cancers, 12(4) GENET. MED. 15, 15 (Supp. 2010).

28. Linda J. Demaine & Aaron Xavier Fellmeth, Reinventing the Double Helix: A Novel and Nonobvious Reconceptualization of the Biotechnology Patent, 55 STAN. L. REV. 303, 308 (2002).

29. See id. at 308-09.

CONCEPT OF GENE PATENTING

Besides all these benefits to the society the first question that arises in our mind is that, if all this helps the humankind then why is this concept so controversial? And to seek the answer, we must first know actually what is gene patenting?

“Gene patenting” is a broad term referring to the “patenting of either a process that involves isolation of DNA (where DNA refers to either DNA or associated materials such as RNA) as well as to a chemical substance related to DNA”. A patent is not received on just a gene. A patent is received on a gene, gene sequence, or gene fragment based inventions. DNA products usually become patentable when they have been isolated, purified, or modified to produce a unique form not found in nature. Therefore, Isolated and purified genes are patentable. Moreover gene or gene product should have real world applicability.

CONFLICT OF DISCOVERY OR INVENTION:

Regarded with the patentability of biotechnological matter, the patent law first should first distinguish between invention and discovery.

Buckley J. explained the distinction between a discovery and an invention in *Reynolds v. Herbert Smith & Co. Ltd.* in the following terms:

“Discovery adds to the amount of human knowledge, but it does so only by disclosing something. Invention also adds to human knowledge, but not merely by disclosing something. Invention necessarily involves also the suggestion of an act to be done, and it must be an act which results in a new product, or a new process, or a new combination for producing an old product or an old result”.

DOCTRINE OF PRODUCT OF NATURE:

According to the “product of nature” theory, “any kind of structure made by a human hand” is patentable, but things that exist in nature as it is (that is, not made or intervened by human hand), namely “products of nature” are not patentable.

Judge Hand’s opinion in the case of *Parke-Davis & Co. v. H.K. Mulford & Co.* illustrates that patents are not denied merely because products of nature are claimed. This suggests that “if there is sufficient reason for granting a patent, then the subject-matter requirement will be satisfied even if the subject matter claims product of nature. It has been said that the difference between a discovery and invention is a difference in degree rather than its kind”.

It was also held in the well-known case of *Diamond v. Chakrabarty* by the United States Supreme Court that genetically manipulated organisms are subject matter under section 101. In light of the “product of nature” theory, the Court’s reasoning can be accepted, as there was no corresponding organism in nature as claimed. The Court further said in this case that statutory subject matter includes “anything under the sun made by man” is patentable.

It is said that an isolated and purified DNA molecule that has the same sequence as a naturally occurring gene is eligible for a patent because;

- (1) An excised gene is eligible for patent as a composition of matter or as an article of manufacture because that DNA molecule does not occur in that isolated form in nature, and
- (2) Synthetic DNA preparations are eligible for patents because their purified state is different from the naturally occurring compound.

The position in the European Union Directive on the Legal Protection of Biotechnological Inventions, 1998 is given under Article 5 and is as follows-

1. The human body, at the various stages of its formation and development, and the simple discovery of one of its elements, including the sequence of a partial gene, cannot constitute a patentable invention.

2. An element isolated from the human body or otherwise produced by means of a technical process, including the structure or partial structure of a gene, may constitute a patentable invention, even if the structure of that element is identical to that of a natural element.

JUDICIAL OPINION

LabCorp v Metabolite³⁰

This case was fought during 2000-to-2009 and the fight was ‘Whether a patent can be allotted on co-relational relationship in a medical test result?’ In the 1980s, research scientists at University Patents (UPI), US, discovered that high levels of the amino acid homocysteine in the body are correlated with dangerously low levels of two B vitamins. UPI filed for a patent, seeking to license both the method of testing for the amino acid, and the correlation of the amino acid levels with B vitamin levels. UPI’s successor licensed Metabolite Laboratories, which in 1992 sub-licensed the patent to Laboratory Corporation of America Holdings (LabCorp). When in 1998, LabCorp started using another company’s test and stopped paying Metabolite royalties, Metabolite sued. A jury found LabCorp guilty of patent infringement and breach of contract and awarded damages to Metabolite. In an appeal to the Circuit Court of Appeals for the Federal Circuit, LabCorp argued that the patent was invalid. Natural phenomena themselves are not patentable, but new applications of them normally are. LabCorp argued that Metabolite had impermissibly patented a relationship that already existed in nature. The Federal Circuit rejected that argument, however, ruling that Metabolite could patent its discovery of the correlation and that any association of homocysteine levels with B vitamin deficiency could constitute patent infringement. LabCorp appealed its case to the Supreme Court. The Court dismissed the writ of certiorari as improvidently granted. The decision of the Federal Circuit was left in place, as if the Supreme Court had never agreed to hear the case at all.

Mayo v Prometheus³¹

This case, which was fought between 2004-to-2012, dealt with a bone of contention of ‘Whether an application of a law of nature to a known structure or process deserve patent protection?’ In the limelight were tests that measured the levels of metabolites produced by the body after a person takes thiopurine drugs, which are typically used to treat Crohn’s disease and other inflammatory bowel conditions. Knowing those levels helps doctors assess how well a patient is responding to thiopurine treatment. The drug dosage may be modified depending on whether the metabolite levels are too high or low. Prometheus Laboratories had been the exclusive licensee of these patents and sold diagnostic kits based on them. Mayo Collaborative Services bought these kits until 2004 and then decided to offer its own diagnostic tests to its clients at Mayo and worldwide. In June 2004, Prometheus sued Mayo for infringement in the Southern District Court of California, US. In March 2008, the district court held the patents invalid. In a unanimous decision on March 20, 2012, the court called

30. See more at: <http://www.biospectrumasia.com/biospectrum/analysis/190501/landmark-court-judgments-defined-gene-patenting/page/3#sthash.CrBt12td.dpuf>

31. See more at: <http://www.biospectrumasia.com/biospectrum/analysis/190501/landmark-court-judgments-defined-gene-patenting/page/1#sthash.5hq8V0oE.dpuf>

the correlation between the naturally-produced metabolites and therapeutic efficacy and toxicity to be an un-patentable 'natural law'. The court struck down Prometheus' patent claims on methods of determining metabolite levels in the body to dose thiopurine drugs for stomach disorders. The bench clarified that claims directed to a method of giving a drug to a patient, measuring metabolites of that drug, and with a known threshold for efficacy in mind, deciding whether to increase or decrease the dosage of the drug, were not patent eligible subject matter. The Supreme Court emphasized that an application of a law of nature to a known structure or process may deserve patent protection. However, in order to transform a law of nature into something worthy of a patent, the applicant must do more than simply state the law of nature while adding the words 'apply it'. Following the case several diagnostics tests were rendered non-patentable.

*Diamond v. Chakrabarty*³²

This case was fought between petitioner Ms Sidney Diamond, commissioner of Patents and Trademarks, US, vs respondents Mr Ananda Chakrabarty and others, from 1972-to-1980. The bone of contention in the case was 'Whether genetically modified organisms be patented?' In 1972, genetic engineer Mr Ananda Mohan Chakrabarty working at the University of Illinois College of Medicine, US, filed a patent on a bacterium, that was capable of breaking down crude oil. Mr Chakrabarty had proposed that the invention was novel and potentially useful in cleaning up oil spills. The US Patent and Trademark Office rejected the application claiming that living things, as products of nature and not artifice, could not be patented. Mr Chakrabarty appealed and the decision was reversed by the Court of Customs and Patent Appeals. Ms Sidney Diamond, commissioner of Patents and Trademarks, asked the US Supreme Court to consider the case. The verdict of the case was that the US Patent and Trademark Office (PTO) rejected claims to a genetically engineered bacterium on the grounds that living organisms are not patentable. The Supreme Court disagreed, deciding that a patent may be obtained on 'anything under the sun that is made by man.' The Supreme Court decision revolutionized the biotechnology industry and opened the floodgates for protection of biotechnology related inventions. Post the verdict, thousands of patents have been issued, hundreds of new companies have been formed, development of thousands of bioengineered plants and food products has taken place.

*Association for Molecular Pathology v. Myriad Genetics*³³

In 2009, the Association for Molecular Pathology, a U.S. nonprofit scientific society of researchers and scientists, challenged Myriad's BRCA1 and BRCA2 gene patents along with their patents on diagnostic testing. Following years of appeals, the Supreme Court granted certiorari on the question of whether human genes were patentable. The Court held that isolated human genetic sequences were not patentable, effectively invalidating thousands of gene patents in the U.S. This recent decision represents a huge shift in the legal treatment of gene patentability.

Indian position

Section 3(c) of the Indian Patent Act, 1970 specifies that mere discovery of a scientific principle or the formulation of abstract theory, discovery of any living thing or non-living substance occurring in nature would not be patentable. Another relevant section is 3(i) of the Act, 1970 which stipulates that plants and animals, in whole or any part thereof, other

32. 447 U. S. at 317. See more at: <http://www.biospectrumasia.com/biospectrum/analysis/190501/landmark-court-judgments-defined-gene-patenting/page/2#sthash.PVftd88S.dpuf15>.

33. 133 S. Ct. at 2107.

than micro-organisms but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals – cannot be patented.

A gene occurring in nature and therefore should not be patentable as per section 3(c) of the Act. However, it is equally true that there is considerable skill involved in identifying its function, location and isolation. Similarly, section 3 (i) of the Act prohibits patenting of plants and animals as a whole or part thereof. Now the question is whether gene be considered as a part of plant or animal and not patentable? These questions are answered with the help of the Act alone. The exclusion of the part of plant and animal from the category of patentable subject matter under the Act has to be taken seriously because the phrase used in TRIPS only exclude plants and animals and does not make specific provision for their parts.³⁴

As there is lack of decision of higher judiciary on the subject of gene patenting, therefore it is desirable to examine the Manual of Patent Office Practice and Procedure issued by Indian Patent Office and approach taken by IPO on the same.

The draft Manual, 2005 was specifically dealt in annexure to biotechnological and pharmaceutical inventions³⁵. This draft stated that any living entity of artificial origin such as transgenic animals and any part thereof are not patentable. The living entities of natural origin such as animals, plants, in whole or any parts thereof, plant varieties, seeds, species and genes³⁶ are not considered patentable. Whereas, it is stated that recombinant DNA and plasmids are patentable if there is substantial human intervention.

In subsequent draft, 2008 there was no such annexure as were seen in previous draft. The explanation under section 3(j) only describe how microorganism will be patentable, on the basis of the Dimminaco decision³⁷.

However, under the description of unity of an invention ; the manual provides the following can be claimed-

- a) Gene sequence / amino acid sequence.
- b) A method of expressing above sequence.
- c) An antibody against that protein/sequence.
- d) A kit made from the antibody/sequence.³⁸

This does give us an impression that a gene is patentable only when it is recombinant and having inventive step and industrial application.

The Manual of Patent Office Practice and Procedure,2011 does not provide any further elaboration on the subject matter. The only provisions that has been retained is pertaining to sequence listing that has to be provided by patentee along with bullet list under ‘unity of an invention’. The manual has provided following example under description of ‘unity of an invention’.

When genetically modified gene sequence/ amino acid sequence is novel, involve an inventive step and has industrial application, the following can be claimed for patent-

- a) Gene sequence / amino acid sequence.

34. Article 27.3 of TRIPS treaty – Members may also exclude patentability : (b) Plants and animals other than micro - organism, and essentially biological processes for production of plants or animals other than non-biological process and microbiological process.

35. Annexure I, Draft Manual of Patent Practice and Procedure,2005. See [www. Ipindia.nic.in](http://www.ipindia.nic.in).

36. This particular sentence has similar wording to that of section 3(i) which leads us to wonder whether the office implied that genes were actually part of plant and therefore, unpatentable.;

37. Dimminaco Ag v. Controller of Patents & Designs and others. (2001) Cal HC.

38. Draft Manual of Patent Office Practice and Procedure,2008, http://www.ipindia.nic.in/ipr/patent/DraftPatent_Manual_2008.pdf.

- b) A method of expressing above sequence.
- c) An antibody against that protein / sequence.
- d) A kit made from the antibody / sequence.

This gives an impression that a gene is patentable only when it is recombinant and having inventive step and industrial application. The requirement of substantial human intervention does not find any place in the manual.

In order to know granting practices adopted by the IPO relating to granting of patent on the matter of nucleic acid molecules, the following cases have been chosen wherein patent has been granted by IPO-

1. GENETICALLY STABLE JEV CDNA BASED ON JAPANESE ENCEPHALITIS VIRUS³⁹–

The patent has been finally granted by IPO in the name ‘ Genetically Stable JEV cDNA based on Japanese Encephalitis virus’ whereas originally the title of the invention at the time of filing application was that it relates to the ‘novel genomic RNA’ of JEV and an infectious cDNA from it.

The first examination report does not object to the title of the invention or the first claim that originally read “A genomic RNA of Korean isolate consisting of the entire genome....” Which further went on to describe the nucleotide length and the actual non-translating regions and the regions coding for a peptide.⁴⁰

This could possible lead us to conclude that there might have been an objection that led to the amendment of the claims, the title, the abstract to cover the cDNA instead of the RNA. Therefore, it is possible to claim cDNA sequence as a part of a patent in India.

When one specifically examines the patent, the claims essentially cover the entire cDNA (obtained from the genomic RNA of the virus) and the subsequent modifications made to it to obtain a vector and corresponding RNA transcript, the synthetic JEV obtained, etc.. The field of invention and the background on the other hand states that the invention discloses the full length nucleotide sequence of the JEV strain, the infectious JEV cDNA clones (which can be obtained from the genomic sequence) and the use of the vector after introducing the cDNA in a BAC vector. The creation of the cDNA is a part of the larger process of creating a vector to further create RNA transcripts that can be used to infect other microbial cells, to further produce synthetic JEVs / use as an expression vector. Nevertheless, the patent covers all the nucleotide sequences⁴¹ involved in the course of creation of the end products that are of use. This order appear to be a wide coverage given to the patentee.

The IPO has, in fact, granted protection to a cDNA sequence though it is not recombinant and a mere derivative of the existing sequence.

2. AN EXPRESSION VECTOR OR CLONING VECTOR ENCODING FILARIAL PARASITES POLIPEPTIDE⁴²

The abstract of the invention states that this is a cDNA sequence as per Sequence ID No. 1 or any functional equivalent, fragment, analogue, mutant or variant thereof. The original

39. Indian Patent no. 243799 (November 08, 2010).

40. A genomic RNA of the Korean JEV Isolate consisted of full RNA genome in 10,968 nucleotide length, in which the genomic RNA are composed of 95-nucleotide 5’ non translated region (NTR) followed by a 10,299- nucleotide single polypeptide coding region and terminated by a 574-nucleotide 3’NTR.

41. Including the ones derived directly from the natural occurring genome without any modification.

42. Indian Patent No. 246865 (March 18, 2011) (Universiti Sains Malaysia).

claim sought to cover the entire cDNA sequence under Seq. ID No, 1 or any other equivalent coding for a filarial parasite polypeptide, as mentioned in the abstract. The original claims were later narrowed down to an expression vector (i.e. a plasmid/ carrier) containing the particular nucleotide sequence for the polypeptide (essentially recombinant).

In the first examination report⁴³, the patent office had objected to several claims. The claim 1-6 and 17 (which specifically referred to a cDNA of a filarial parasite polypeptide and further delineated the sequence, the parasite, the conditions for hybridization etc.) were subject to challenge under section 3(c) of the Indian Patent Act, 1970. This is relevant that patent office had objected cDNA sequence on the ground that it was already existing in nature. Subsequent claims based on RNA and polypeptides were subject to section 3 (c) objection.

All the claims were ultimately withdrawn. The grant was only for expression vectors containing the particular sequence (Seq. ID 1) for polypeptide. This claim definitely fall outside the purview of section 3(c) of Indian Patent Act, 1970. It is unclear whether they are non-obvious or not? As the particular nucleotide sequence is put inside a vector which is known recombinant DNA technology with no enhanced utility as compared to prior art.

3. POLYPEPTIDE HAVING PHYTASE ACTIVITY AND POLYNUCLEOTIDES ENCODING THE SAME⁴³

The invention, according to the abstract, pertains to phytases derived from the organism *Citrobacter gillenii*, the wild type, the recombinant ones and their use in animal feed.

The claim originally referred to an isolated polypeptide having phytase activity with an identity close to 75% with specific sequence IDs provided and the polynucleotide sequences encoding for the same. This was objected to by the IPO where the claims were challenged on the basis that they lacked an inventive step. The office contended that altering prior art to obtain the sequence can be envisaged by a person skilled in art and that the sequence in fact was taken from different species of *citrobacter*. This might confer novelty but not non-obviousness as there are not having enhanced properties. Therefore, IPO was of opinion that they were derivative of natural sources and having no enhance effect.⁴⁴

The claims were subsequently amended to state that there was phytase activity and acid stability and having 80% identity with the subsequence IDs provided in the claim.

4. AN ISOLATED NUCLEIC ACID MOLECULE COMPRISING AN ALLELE OF A GENETIC POLYMORPHISM LINKED TO RESISTANCE TO ENTEROTOXIGENIC ESCHERICHIA COLI (ETEC)⁴⁵

This is a patent where the subject matter nucleic acid sequence pertains to resistance to a particular type of *E. coli* in pigs. The invention covers methods to identify this sequence using probes and primers crafted for this purpose. The first claim covers the particular sequence that result in the trait of resistance in pigs, and as such is naturally occurring. The patent covers both the originally sequence and the other man-made probe/primers for identifying the trait. The first examination report does not raise any objection to either the

43. Indian Patent No. 247044 (Novozymes A/s) (March 25, 2011). Takamyia M, Sjöholm C, Polypeptides having phytase activity and polynucleotides encoding same.

44. First Examiner Report 16-10-2006.in Appl 1370/CHENP/2007.

45. Indian Patent No. 244118 (University of Copenhagen) (Nov. 18, 2010). Cirera S. et al., An isolated nucleic acid (na) molecule comprising an allele of a genetic polymorphism linked to resistance to enterotoxigenic *Escherichia Coli* (ETEC).

animal source of the gene/ the fact that the first claim refers to an isolated gene sequence.⁴⁶ This may lead to the conclusion that animal genes are patentable.

5. AN ISOLATED NUCLEIC ACID MOLECULE CODING FOR HUMAN AKT3.⁴⁷

The patent relates to an isolated nucleic acid coding for human Akt3 protein (relevant in the process of cell death), the protein sequence and a method of producing it and expressing the sequence in mammalian cells. The expression of the protein prevents apoptotic cell death. The first claim specifically refers to an 'isolated nucleic acid encoding a human Akt3 protein' having a particular amino acid sequence as provided, or 'a substantially similar sequence'. Here, instead of actually providing the sequence ID for the nucleotide sequence, the sequence of the protein is used. This is vague as there are several different nucleotide sequences that can code for one amino acid and it does not specifically pin down the actual sequence encoding protein. Another important issue with this that the patent actually covers isolated naturally occurring human Akt3 protein and the coding sequences amongst the other claims that envisaged applying it, producing it etc.. The first examiner report does not object to these claims and it is indeed interesting to note that the fact that it has a human source on which the IPO has not objected. This leads an inference that it is possible to patent human genes in India.

ANALYSIS

Due to lack of any guidelines in the patent manual, the analysis of actual patents and responses given by the examiners becomes relevant. The first abovementioned patent was a situation where the claim that originally referred to genomic RNA were replaced latter on with claim covered the cDNA version. The patent in its subsequent claims describes incorporation of the sequence into a vector or a plasmid and thereby making it recombinant. The patent also cover the cDNA sequence simpliciter.

The abovementioned second patent, the claims were objected on the basis of that they were derived from nature in spite of the fact that they covered cDNA and patent was granted in first above referred patent. The final claim which was allowed covered a recombinant vector containing the cDNA having no clear indication of increased effect/ utility.

In the fourth patent (above referred), the subject matter which was claimed is natural occurring sequence (not the cDNA or recombinant version). The fifth patent happens include an isolated human gene with in its scope.

In addition to above observation in relation to subject matter of patent, it has further been found that the patent has been phrased with such vague terms that allows significant extension of the scope of patent and in long run it will interfere in further invention and development of subject matter like: 'or substantially similar sequence' or '75% similarity'.

The practice of the IPO officials showing trend that the gene that do occur in nature are not patentable whereas in respect to non- natural occurring genes they are patentable if they have delineated function or their utility have specified. It is relevant to mentioned here that the exclusion referring to plants/animals/parts of plants and animals (clause) are not applicable at the molecular / cellular level where genes are involved. It has also been seen that genes of

46. First Examination Report 16/10/06 in App 2286/DELNP/2005.

47. Indian Patent no. 226034 (Aventis Pharmaceuticals Product Inc.) (Dec.04, 2008). Pagnoni M.F. et al., An isolated nucleic acid encoding a human akt3 protein.

pigs and human beings have been subject to patenting. However, exclusion of isolated naturally occurring genes have not been shown to be consistent with the actual practice of office as isolated gene sequences are patented.

It is relevant to mention here that a new guideline for examination of biotechnological application has been issued in March, 2013 with the objective to establish uniform and consistent practices in the examination of patent applications in the field of biotechnology and allied subjects under the Patents Act, 1970. Thus the guidelines are intended to help the examiners and controllers of the Patent Office so as to achieve uniformity and consistency. However, these guidelines do not constitute rule making. In case of any conflict between these guidelines and the provisions of the Patents Act, 1970 and the Patents Rules, 2003, the said provisions of Act and Rules will prevail over these guidelines. The guidelines are subject to revision from time to time based on interpretations by a Court of Law, statutory amendments and valuable inputs from the stakeholders.

The guidelines expressly state that sequences isolated directly from nature are not patentable subject matter which is correct interpretation of section 3(c) of the Patent Act, 1970. However, now the IPO has expressly stated the same. But silent regarding the patents which have already granted that do cover isolated nucleic acid sequence. Under the guidelines there is express provision that express sequence of tags / gene probes used merely for a probe / chromosome marker, it would not be considered as an industrial application whereas if it is used as a probe to diagnose a specific disease, it would be valid 'use' for the sequence. Contrary to this, a diagnostic method using drug response markers / detection of gene signature is completely barred under section 3(i) of the Patent Act, 1970.

Finally, the question of patenting of human genes, even if they are recombinant, has not been addressed in the guidelines. The illustrative example also makes references to human protein and recombinant human nucleic acid sequences. This gives the indication that the IPO finds it acceptable to patent altered human genes. However, it is equally relevant to refer here to section 3(b) of the Patent Act, 1970 which prohibits patenting of 'inventions contrary to morality.....or which causes serious prejudice toto the environment'. It may be explained that if the subject matter involves modifying germline of human being or any process for preparing genetic materials that could cause environmental impact.

It must be noted that a lot of human illness diagnosis can be done by gene markers which are complements and based on human genes. A clear stand on patentability of human genes or diagnostic methods using those genes is important for industries that will choose to invest.



DOUBLE JEOPARDY AND THE LAW: A COMPARATIVE ANALYSIS

Arun Kumar Singh *

Abstract

This paper aims to discuss the basic concept of the double jeopardy. For this purpose the various statutory provisions as well as judicial pronouncements regarding double jeopardy has been analysed. In particular, this article analyses the provisions of the Constitution and the Criminal Procedure Code to highlight the significance of the rule of double jeopardy in the Indian legal system. To make it more clear a comparative analysis of USA, England and India has also been done.

Key Words: *Double Jeopardy, Constitution of India, Criminal Procedure Code, 1973, same offence, International Covenant on Civil and Political Rights, 1966*

I. INTRODUCTION

Most of the Common law countries including India follow the adversarial system which has the concept of presumption of innocence of accused. In Criminal trial one of the parties is State which is always in dominant position. That is why to protect the interest of accused the provision of double jeopardy was made. Doctrine of double jeopardy prevents double-counting, requires joinder of certain related charges to prohibit vexatious re-prosecution and affirms the concept of implicit acquittal. The double jeopardy rule is in place to protect people in the Court system. If a person is found innocent, he can now go on with his life. But that might not be able to happen without double jeopardy being in place. The main aim behind the double jeopardy clause is that the State should not be able to oppress individuals through abuse of the criminal process. Simultaneously, the idea involves behind this principle is, to balance the competing rights and interests of both individuals and society. This principle protects interest of accused because it bans on successive prosecutions. It also protect the interest of state by finality of litigation which is based on the Latin maxim *that; interestrepublicaut sit finish litium* (it is in the interest of state that there should be end of litigation). The basic philosophy behind the Double Jeopardy Clause is that the accused has a fundamental interest in restricting the Government to a single attempt to prove his guilt at trial. This has two main reasons. First, multiple attempts by the Government to prove guilt seriously disrupt a defendant's personal life during trial by harassment of the defendant. Second, repeated prosecutions increase the risk of an unjust conviction of an innocent defendant. the risk of an unjust conviction of an innocent defendant by wearing down the

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defendant and giving the Government new opportunities to learn from its earlier mistakes. This paper aims to discuss the basic concept of double jeopardy. For this purpose the various statutory provisions as well as judicial pronouncements regarding double jeopardy has been analysed. To make it more clear a comparative analysis of USA, England and India has been done.

II. MEANING OF DOUBLE JEOPARDY

Double jeopardy is a procedural defence that protects a defendant from being tried again on the same (or similar) charges in which either acquittal or conviction took place. It prevents the states from punishing twice or attempting a second time to punish accused for the same offences. In common law countries, principle of *autrefois acquit* and *autrefois convict* is applied. The word *autrefois* is a French word which means 'in the past'. The meaning of *autrefois acquit* or *autrefois convictis* is that the defendant has been acquitted or convicted of an offence previously. The root of the rule against double jeopardy is found in the well-established Latin maxim *nemo bis debet puniri pro uno delicto*. The meaning of this maxim is, a man must not put twice in peril for the same offence. When a person has been convicted for an offence by a competent Court, the conviction bars further criminal proceeding for the same offence.

III. PROVISION OF DOUBLE JEOPARDY IN OTHER COUNTRIES

In some countries, like United States of America herein after USA, and England guarantee against being "twice put in jeopardy". In both of the above countries the rule against double jeopardy is applied and a second trial is barred even when the accused has been acquitted at the first trial for that offence.

Position in USA

The Fifth Amendment to the U S Constitution says: "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb". The prosecution has been held to be not only from second punishment but also from second trial. In other word it can be said that the double jeopardy clause not only prevent the state from the second punishment but also from attempting a second time to punish the person. The second trial is deemed to be commenced when a man is charged before a competent Court or Tribunal. This conviction or acquittal in previous trial bar from second prosecution. However, a person is not put in double jeopardy by prosecution in a Court which has no jurisdiction to try the case. This provision is applicable to both (previous and subsequent) Courts. If a prosecution and trial was done by the Court which had no jurisdiction then second prosecution and trial regarding such issue was not barred by double jeopardy. And also, if an accused had been tried by competent Court and convicted or acquitted and again for the same offence if he was prosecuted in a court which had no jurisdiction to try the case, he shall not be deemed to be put in double jeopardy. Similarly, a person is not put in double jeopardy by a fresh trial after discharge of jury before it gives its verdict.¹ When a person appeals in a lower Court from conviction, he waives his protection and can be tried again at the direction of Appellate Court, but not for the offence of higher degree of which he was acquitted at the former trial.² In USA the Government cannot appeal from the order of acquittal even though the government

1. D D Basu, *Commentary on the Constitution of India*, (8th ed.), 2008, Vol. 3, Lexis Nexis, Butterworth Wadhwa, Nagpur, p. 2967

2. *ibid*

may have secured new evidence which was not previously available. But Government may appeal from a sentence of conviction of higher sentence and a retrial may be ordered in such appeal and this is not a double jeopardy.³ When the same act involves separate offences in the same statute or different statute then separate prosecution can lie for different offences. For example a person is tried for conspiracy to commit an offence and for commission of such crime, these two are different offences and can be tried separately. The rule of double jeopardy will not apply in this case. Similarly the protection of double jeopardy would not be available where a person commits the same offence again by repeating his in criminating act.⁴ The Court in case of *Wade v Hunter*⁵ observed that, “the double jeopardy provision does not mean that every time a defendant is put to trial before competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double jeopardy prohibition is aimed” The American Convention of Human Rights also says that an accused person acquitted by a non-bailable judgment shall not be subjected to a new trial for the same cause.⁶

Position in England

The English Common Law has also the provision regarding doctrine of ‘double jeopardy’. It is based on rule *nemodebetvisvexari* which means that a man may not be put twice peril for the same offence. In case of *Connelly v. Director of Public Prosecution*⁷ the House of Lords viewed that a man cannot be tried for a crime in respect of which he has previously been convicted or acquitted. The House of Lords ruled that a defendant could not be tried for any offence arising out of substantially the same set of facts relied upon in a previous charge of which he had been acquitted, unless there are “special circumstances” proven by the prosecution. It has been suggested that the emergence of new evidence would suffice.

This rule provides right to the accused to raise a plea not only of *autrifoisconvict* but *autrifois acquit* also. This rule applies; (i) where the charge for the offences in previous acquittal or conviction are exact in subsequent indictment; (ii) where the subsequent indictment is based on the same act or omission as those in respect of which previous acquittal or conviction or acquittal was made; and (iii) the previous trial was done before a court of competent jurisdiction.

Position in India

Article 20(2) of the Constitution of India double provides protection against jeopardy.⁸ However, principle against double jeopardy was in existence prior to the commencement of the Constitution of India. Section 71 of the Indian Penal Code, 1860,⁹ section 26 of the

3. Ibid

4. Ibid. 2969

5. (1948) 336US 684

6. Article 8(4) of the American Convention on Human Rights

7. (1964) 2 All ER

8. Article 20(2) of the Constitution of India provides; “No person shall be prosecuted and punished for the same offence more than once”

9. Section 71 says ‘where anything is an offence made up of parts, any of which part is itself an offence, the offender shall not be punished with the punishment of more than one of his offences unless it be so provided.

General Clauses Act, 1897¹⁰ and section 403(1) of the Criminal procedure Code, 1898, corresponding to section 300(1) of the Criminal Procedure Code, 1973¹¹ provide protection against double jeopardy.

(I) INDIAN CONSTITUTION AND DOUBLE JEOPARDY

The basic object of Article 20(2) of the Indian Constitution is, to protect a person from being subjected to prosecution and conviction more than once for the same offence. However, the rule of *autrifois acquit* (a person once tried and acquitted then he cannot be prosecuted for the same offence) is not applied in Article 20(2). This Article may be invoked only when there has been prosecution and punishment in the first instance. So far as the application of this clause is concerned following conditions are required to be fulfilled; (i) there must have been previous proceeding before a Court of law or a Judicial Tribunal of competent Jurisdiction; (ii) the person must have been prosecuted and punished in the previous proceeding and (iii) there must be second proceeding against such person for the same offence.

Although the words 'before a Court of Law or Judicial Tribunal' are not mentioned in Article 20(2) but the wording of whole Article showed that there must have been a prosecution and punishment before a Court of Law or a Tribunal to decide the issue judicially on evidence taken on oath.¹² The presence of word "convicted", "commission of the act charged as offence", "commission of offences" "be subjected to a penalty" in Article 20(1) of the Constitution, the words "prosecuted and punished" mentioned in Article 20(2) of the Constitution and the words "accused of any offence" indicated that the proceeding contemplated by Article 20(2) is of the nature of criminal proceeding before a Court of Law or a judicial Tribunal.¹³

Now the question is when can a person be said to be prosecuted and punished for an offence within the meaning of Article 20(2). The word 'prosecution' here means judicial proceeding before a Court of Law or Judicial Tribunal. In other words it can be said that it is an initiation or starting of a proceeding of criminal nature before a Court of Law or Judicial Tribunal in accordance with the procedure prescribed in the statute. However, according to 'SHORTER OXFORD DICTIONARY' 'prosecution' means a proceeding by way either of indictment or of information in criminal court, in order to put an offender on the exhibition of criminal charges against a person before a Court of justice¹⁴. The prosecution must be in reference to the law which relates the offence and punishment must also be in accordance with what the law prescribes. The word punishment denotes judicial penalty not the other penalties like, disciplinary action, departmental inquiry, penalty under Custom Act, 1962

10. Sec. 26 of the General Clause Act 1897 says: Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.

11. Section 300(1) provides: "A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under subsection (1) of section 221 or for which he might have been convicted under sub-section (2) thereof."

12. H.M. Seervai, *Constitutional Law of India*, Vol. 2, 1993, Universal Law publishing Co. Pvt. Ltd, Delhi, p.1052

13. *Ibid*

14. *Shorter Oxford Dictionary*, Oxford University Press, 2007

etc. An administrative act can never be converted into judicial Act even if penalty imposed by Administrative authority is much larger.¹⁵ The ambit of Article 20(2) of the Indian Constitution is, however, narrower than the English or American rule against double jeopardy.¹⁶ The Indian provision enunciates only the principle of *autrifois* convict but not of *autrifois* acquit. In order to attract Article 20(2) the accused must have been prosecuted and punished for the same offence.¹⁷ As Justice Bhagwati said in case of *Maqbool Husain v State of Bombay*¹⁸ that Article 20(2) enunciated the principle of *autrifois* convict or double jeopardy, both of which are rooted in the English law that where a person has been convicted of an offence by the Court of competent jurisdiction the conviction is bar to all further criminal proceeding for the same offence.¹⁹ So far as an offence is concerned, it means “any act or omission made punishable by any law for the time being in force.”²⁰ Both prosecution and punishment should co-exist for Article 20(2) to be operative. A prosecution without punishment would not bring the case within the ambit of Article 20(2).²¹ The prosecution and punishment should be conjunctive not disjunctive. If an accused has been prosecuted and punished for an offence but acquitted then he can be prosecuted subsequently for the same offence. So, this Article does not bar for subsequent prosecution even if the accused has been prosecuted and punished for same offence unless the previous prosecution is coupled with punishment.

When a trial has, for some reason, become abortive either because of inherent defect or illegality affecting the trial itself, the second trial is not barred by Article 20(2). In a case if a person has been prosecuted but neither acquitted nor convicted against charges in first trial, a retrial and punishment of such case does not amount to double jeopardy. Similarly, if accused of an offence is tried and acquitted and the state preferred appeal against such acquittal, the accused cannot take the plea of double jeopardy because of two grounds, firstly there is no punishment but acquittal in earlier prosecution, secondly an appeal against an acquittal is deemed to be in the continuation of such prosecution. The same was also laid down by the Supreme Court in case of *Kalawati v State of Haryana*.²²

(II) DOUBLE JEOPARDY AND THE CRIMINAL PROCEDURE CODE, 1973

Section 300(1) of the Criminal Procedure Code 1973, herein after Cr. P.C. is wider than the protection afforded by Article 20(2) of the Constitution of India. Section 300(1) says a person once convicted or acquitted not to be re-tried for same offence or even for the different offence on same fact,²³ whereas, Article 20(2) of the Constitution states that ‘no one can be prosecuted and punished for the same offence more than once’. Section 300(1) of Cr.P.C. states that no one can be again prosecuted for the same offence or even for a different offence but on the same facts. To attract the provision of section 300(1) there must be trial of the

15. *Ranchhodddas v Union of India* (1961) 3S.C.R.718

16. Professor M.P.Jain, *Indian Constitutional Law*, LexisNexis Butterworth wadhwa, Nagpur, 2010, p.1158

17. *Supra* note 12

18. (1953) SCR730

19. *ibid*

20. Section 3(38) of the General Clauses Act, 1897, Section 40 of Indian Penal Code, 1860, Section 4 of the Criminal Procedure Code, 1973

21. *Supra* note 16, p.1158

22. AIR 1953 SC131

23. *Supra* note 11

accused and hearing and determination on merits.²⁴ In summon cases the accused is said to be tried when he appears and answer the intimidation before the Court. In a case triable exclusively by the Court of Session, the trial commences after a charge is framed under section 228 of the Criminal Procedure Code. There is no trial before the charge is framed but only inquiry.²⁵ The trial must be done by the Court of competent jurisdiction. A trial by a Court having no jurisdiction, is *void ab initio* i.e. void from its inception. It does not bar retrial of such case. Another important factor of this section is that the second trial is barred when the accused is convicted or acquitted in first trial. The dismissal of complaint or the discharge of the accused is not an acquittal for the section 300(1) of the Code.²⁶ A person is said to be discharged when he is relieved from legal proceeding by the order of the Court and it does not amount to judgment. An accused who has been discharged may be again charged for the same offence if any new fact is discovered.

(III) ANALYSIS OF THE PROVISION RELATING TO DOUBLE JEOPARDY

There are two main provisions which provide against double jeopardy. One is under Article 20(2) of the Constitution and other is under section 300(1) of the Criminal Procedure Code, 1973. From the above discussion it is clear that provision of Criminal Procedure Code is wider than the provision of the Constitution. But the question is that, can it be said that provision of section 300(1) is void because it differs from Article 20(2) of the Constitution. Article 13(1) of the Constitution of India declares that all pre-Constitutional laws shall be void to the extent of their inconsistency with the Fundamental Rights. Similarly, Article 13(2) states that State shall not make any law which takes away or abridge the Fundamental Rights and a law contravening a Fundamental right is, to that extent of the contravention is void. It is not only void but *void ab initio*. If it is argued that Section 300(1) of CrPC, 1973 is corresponding to section 403(1) of Criminal Procedure Code, 1898, which was in existence prior to the Constitution and Article 20(2) cannot affect such provision. The answer of this argument is in the Article 13(1) of the Constitution which says that any pre-Constitutional law, if inconsistent with the provision of the Constitution, shall be void to the extent of their inconsistency with the Fundamental Rights. Similarly, if it is argued that Section 300(1) of CrPC is post-Constitutional Law, so, Article 13(1) will not be applicable on such provision then it can be answered that even if it is not covered under Article 13(1) but can be covered under Article 13(2) of the Constitution and therefore, it should be unconstitutional. However, in conclusion it can be said section 300(1) is not in the contravention of the provision of the Article 20(2) of the Constitution but in complementary of it.

Another debatable issue is, whether prohibition against double jeopardy is applicable only when both occasions arose after the enforcement of the Constitution or it is equally applied even if the previous prosecution and punishment took place before the Constitution. So far as operation of a statute is concerned, generally prospective operation is permitted and retrospective operation is prohibited. Our Constitution also prohibits ex-post facto law.²⁷ So, the prohibition against double jeopardy as provided under Article 20(2) should be applied if prosecution and punishment in previous case took place after the Constitution.

24. Ratanlal and Dhirajlal, The Code of Criminal Procedure, Wadhwa and Company, Nagpur, 2004, p.568

25. *ibid*

26. Explanation of Section 300 of the Criminal Procedure Code, 1973

27. Article 20(1) of the Constitution of India

Although, the provision against double jeopardy was already in existence in various statutes before Constitution but the provision of Constitution be applied prospectively. In another situation when an offence was committed by an accused before enforcement of the Constitution which was punishable under the Indian Penal Code or any other law time being enforced, and his prosecution and punishment takes place after the enforcement of the Constitution then can he be re-prosecuted for the same offence? This Article is silent about this situation. But so far as author's view is concerned he cannot be re-prosecuted for the same offence because Article 20(2) bars *autfoisconvict* and the previous conviction takes place after the enforcement of Article 20(2) of the Constitution. Thus, for the same offence he cannot be re-prosecuted.

Another question which occurs in the mind is, when a person has been prosecuted and punished but State through public prosecutor preferred appeal against such conviction on the ground of its inadequacy,²⁸ and the punishment in appeal is increased, then, will it be barred by Article 20(2) on the ground of double jeopardy or it shall be deemed in continuation of the prosecution? The answer is that if appeal against an acquittal is in substance a continuation of the prosecution then appeal against conviction should also be kept on same footing. This is because enhancement of punishment in appeal does not amount to a second punishment.

One more basic question is, what is the meaning of 'same offence' regarding double jeopardy as used in Article 26 of the General Clauses Act, 1897, Article 20(2) of the Constitution of India and section 300 (1) of the Criminal Procedure Code, 1973? Whether the fact of the case is important or the ingredients of offences in previous case and subsequent case based on the same fact are important? If we consider the former, i.e. the fact of the case is important, then in that case once a person has been prosecuted and convicted (Article 20(2) of the Constitution, Article 26 of the General Clauses Act and Section 300 of the Criminal Procedure Code) or acquitted (Section 300 of the Criminal Procedure Code) then he should not be prosecuted/tried subsequently on the same fact even if the offences based on same facts are different. While, if the latter view is considered i.e. the ingredients of previous offence and subsequent offence(s) based on the same fact, are same then the accused who has been tried and convicted or acquitted previously for one offence cannot be prosecuted for another offence if the ingredients of the previous offence and subsequent offence(s) are same. The latter view looks more relevant to ascertain the meaning of 'same offence'. So, the word 'same offence' means not the same *eo nomine* but the same criminal act or omission.²⁹ The crucial requirement of section 300 of Cr.P.C., Article 20(2) of the Constitution and Article 26 of the General Clauses Act, is that the allegations in two complaints as well as ingredients in two offences should be identical. It is necessary to compare not only allegation in two complaints but ingredients of the two offences and also to see whether they are identical or not. Same act (fact) sometimes may constitute an offence under more than one statute. If there are two distinct and separate offences with different ingredients (based on same facts), a double punishment is not barred. An act can constitute an offence under the Indian Penal Code, 1860 and at the same time constitute an offence under some other laws. For example same fact constitute offence under Section 5(2) of the Prevention of Corruption Act, 1947 and Section 161 of the Indian Penal Code. However, Courts in some cases said that the fact of the case is

28. Section 377(3) of the Criminal Procedure Code, 1973

29. *Supra* note 24 p.570

important while in other case he viewed that the ingredients of offences are important to apply the principle of double jeopardy.

Supreme Court of India in case of *State of Bombay v. S.L.Apte*³⁰ said, that to operate as bar to the second prosecution and consequential punishment thereunder must be for the 'same offence'. The crucial requirement for attracting the provision of double jeopardy is that, the offences are 'same' and also they should be identical. If, however, the two offences are distinct, then notwithstanding that the allegations of the facts in the two complaints might be substantially similar, the benefit of the ban cannot be invoked.

It is, therefore, necessary to analyse and compare not only the allegation in two complaints but the ingredients of the two offences and see whether their identity is made out.³¹ However, the Supreme Court again has different view in case *Kolla Veera Raghav Rao v. Gorantla Venkateswara Rao*³². In the instant case the appeal was filed by the appellant against an order dated 07th October 2005 passed by the High Court of Andhra Pradesh. The learned Council for the appellant submitted that the appellant was already convicted under section 138 of the Negotiable Instruments Act, 1881 and hence he could not be tried or punished on the same fact under section 420 or any other provision of the Indian Penal Code or any other statute. Supreme Court considered this submission and held that on the same fact he could not be tried or punished for the same offence under the section 420 or any other offence under the Indian Penal Code, 1860 or any other statute. The two judges bench (Justice Markandey Katju and Justice Gyan Sudha Mishra) headed by Justice Markandey Katju held that although the offences involved in that case i.e. section 138 of the Negotiable Instruments Act and section 420 of the Indian Penal Code, were different but the facts were the same and section 300(1) of the Criminal Procedure Code bar the subsequent prosecution. So, in this case the Court gave emphasis on the fact of the case rather than ingredients of previous offence tried by competent court and ingredients of subsequent offence which is going to be tried.

In a recent case i.e. *Sangeetaben Mahendrabhai Patel v State of Gujrat*³³ decided by the two judges bench of Supreme Court (B. S. Chauhan J. and Jagdish Singh Khehar J.) headed by B. S. Chauhan J, the appellant was tried and acquitted for having committed offence under section 138 of the Negotiable Instruments Act, 1881. The acquittal was challenged before the High Court. While this challenge was pending the respondent filed another complaint against appellant under section 406/420 read with section 34 of the Indian Penal Code. The appellant approached the Court for quashing the latter complaint on the ground of double jeopardy. The Court held that offences under two Acts are entirely different, therefore, doctrine of double jeopardy is not applicable. The Court in this case emphasized on necessity of ingredients for the application of double jeopardy. He said that that the ingredients of the offences in former case as well as in the latter case must be same, not different. The test to ascertain whether the two offences are the same is not the ingredients of the allegation but the ingredients of the offences. This judgment is entirely different from earlier Judgment of *Kolla Veera* case.

30. AIR 1961 SC 578

31. Supra note 16 p.1159

32. AIR 2011 SC 641

33. AIR 2012 SC 2844

IV. CONCLUSION

Undoubtedly, the double jeopardy rule ensures fairness in the criminal justice system. By applying this provision we promote efficiency and fairness, and ensure that the government cannot harass citizens through unending trials. If a person is allowed to be tried for the same offense more than once, it would be possible to abuse the legal system and keep someone tied up defending themselves perpetually. The rule of double jeopardy ends up harassing people by trying them again and again for one crime. If the provision of the double jeopardy law is done away, the police could subject an accused person to intimidation and costly legislation for the rest of their life, whether guilty or not. Double jeopardy rule puts pressure on the trial Court to make sure that they try the case correctly at the first time. But one more aspect of double jeopardy which cannot be ignored is that the double jeopardy rule sometimes allows a person to get away with serious crimes. If an accused could not be convicted because of lack of evidences and subsequently some new evidences appear which are sufficient to make him liable this rule will not allow him to be tried again for the same offence. Although, Article 14 (7) of the International Covenant on Civil and Political Right, 1966 also says that no one shall be liable to be tried or punished again for which already been finally convicted or acquitted in accordance with law an penal procedure of each country, but before applying the rule of double jeopardy we have to see the spirit of the provision. The Constitution of India is also not very lenient in favour of accused. Our Judiciary sometimes gave different opinion regarding double jeopardy. Sometimes it differ from earlier decision as done in *KollaVeera case* and *Sangeetaben's case* where both cases are decided by the Division Bench and unless a Higher Bench gives some decision regarding such issue it creates confusion that which decision should be followed.



OLD CONCEPTS, NEW CONTEXTS: PRE-EMPTIVE SELF-DEFENCE AND SELF-DEFENCE AGAINST NON-STATE ACTORS IN THE ICJ CASE LAW

Ajendra Srivastava*

Abstract

The right of self-defense on the part of states has remained one of the most contentious subjects of international law. Two areas are particularly contentious. These relate to the right of pre-emptive or anticipatory self-defence and a state's right to use force in self-defense in the face of terrorist attacks by non-state actors. The controversy surrounding these aspects has deepened in the wake of the UN response to the terrorist attacks of 2001. These issues have been considered by the International Court of Justice (ICJ) in some of its recent decisions, namely the Nicaragua, Oil Platforms, and DRC v Uganda cases; and also in the Advisory Opinions on the Legality of the Threat or Use of Nuclear Weapons and the Construction of a Wall cases. However, the ICJ's treatment of the subject has not resolved the controversy. This paper explores these issues through an examination of the recent jurisprudence of the ICJ. It shows that although the ICJ has left open the issue of preemptive self-defence and its case law in general does not support a right of preemptive self-defence, in exceptional cases a state's right to use force in anticipation of future terrorist attacks by non-state actors may be supported on the basis of the ICJ's jurisprudence. It is argued here that the Court's restrictive approach to the interpretation of Article 51 of the UN Charter has only added more uncertainty to the debate on the question of the precise scope of the individual or collective self-defence

Key Words: Self-defence in international law; International Court of Justice; Pre-emptive self-defence; Anticipatory self-defence; Right of self-defence against non-state actors; Collective security.

I. INTRODUCTION

The right of self-defense on the part of states has remained one of the most contentious subjects of international law. A slew of issues arise in this context¹ but two areas are particularly

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1. Among the most discussed issues are included those pertaining to the meaning of the expression "armed attack", the requirements of necessity and proportionality, the reporting requirement, duration of self-defence and the relationship between Article 51 of the UN Charter and the customary international law on the subject. See *Case Concerning Military and Paramilitary Activities in and against Nicaragua, Nicaragua v United States of America (USA), Merits*, ICJ Reports 1986, p. 14 at Para 176 [hereinafter the *Nicaragua* case]; and DW Greig, "Self-Defence and the Security Council: What Does Article 51 Require?" 40 *ICLQ* 366-402 (1991).

contentious. These relate to the right of pre-emptive or anticipatory self-defence² and a state's right to use force in self-defense in the face of terrorist attacks by non-state actors. The controversy surrounding these aspects has deepened in the wake of the UN response to the terrorist attacks of 2001. These issues have been considered by the International Court of Justice (ICJ) in some of its recent decisions, namely the *Nicaragua*³, *Oil Platforms*⁴, and *DRC v Uganda*⁵ cases; and also in the Advisory Opinions on the *Legality of the Threat or Use of Nuclear Weapons*⁶ and the *Construction of a Wall*⁷ cases. But the controversy surrounding the precise scope of the rights of self-defense has not resolved. The scholarly writings differ widely on the question and the state practice that has emerged quickly in the wake of the terrorist attacks is uncertain.⁸

This paper makes an attempt to examine the extent of the limits which the contemporary international law places on a state's right of self-defense in the context of an imminent danger of terrorist attacks. In this context, attempt is made to deal with two specific issues. First, whether the right of self-defence as provided for in Article 51 of the United Nations Charter also covers the case of imminent attacks by terrorist groups in addition to a conventional form of armed attacks by one state against another state that has already happened? The questions of the rights of preventive self-defence are approached here in the context of the newly emerged or emerging principles of the contemporary international law to deal with the terrorist attacks. A second issue dealt with here is— whether the right of self-defence extends to military responses by non-state actors? For this purpose, it is required to examine the contemporary state practice, scholarly writings and the judicial decisions. However, in exploring these issues this paper is limited to an examination of the ICJ jurisprudence only and the reference to juristic works, and state practice as an evidence of customary international law is taken only to support or rebut the conclusions reached by the Court. As stated above, the issue came for consideration before the ICJ in some recent cases. Although, the Court refrained from expressly deciding the issue of the validity of the preventive (or anticipatory) self-defence, its decisions are open to more than one interpretation and have been criticized as being controversial. The Court has also adopted a restrictive approach in defining the precise legal limits of the right of self-defence and the meaning of the phrase “armed attack” in Article 51 of the UN Charter. An important implication of this restrictive interpretation of Article 51 is that the legal regime as applicable to a state's right to self-defend itself in the face of an imminent danger of terrorists attacks has proved inadequate.

This article proceeds as follows. Part II of this paper provides the background for a discussion of the ICJ case law on the rights of anticipatory self-defence. It deals with the meaning of the right of self-defence under modern international law and its relevance in the

2. In contemporary international law sometimes a distinction is made between an anticipatory self-defence from a kind of self-defense which is preventive in nature. For further discussion, see below.

3. *Nicaragua* case, *supra* note 1.

4. *Case Concerning Oil Platforms, Islamic Republic of Iran v USA, Judgment*, ICJ Reports 2003, p. 161.

5. *Case Concerning Armed Activities on the Territory of the Congo, DRC v Congo, Judgment*, ICJ Reports 2005, p. 118.

6. ICJ Reports 1996 (1), p. 245.

7. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports 2004, p. 136.

8. See, in particular, Sir Robert Jennings and Arthur Watt (eds.), *Oppenheim's International Law* (Longman, 1992), pp. 421-22; A. Cassese, *International Law*, (Oxford: 2005), pp. 359-60; and Christine Gray, “A Crisis of Legitimacy for the UN Collective Security System?” 56 *ICLQ* 157-170, 160 (2007).

present day context. This Section also provides an analysis of the provision of Article 51 of the UN Charter and examines different approaches in interpreting these provisions. The purpose is to enhance our understanding of the precise scope and the nature of the right of self-defence as contained in Article 51. Part III examines the *Nicaragua*, the *Oils Platform* and *DRC v Uganda* cases in some detail and also the Advisory Opinions on the *Legality of Nuclear Weapons* and the *Wall* cases. And Part IV is conclusion.

I. REGULATORY FRAMEWORK FOR THE RIGHT OF SELF-DEFENCE: ARTICLE 51 OF THE UN CHARTER AND CUSTOMARY INTERNATIONAL LAW

A. *Collective Security and the Right of Self-Defense*

In the UN Charter era, the unilateral use of force by a state is prohibited except in self-defence. Article 2(4) of the UN Charter provides:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.⁹

However, the Charter recognizes an exception to this principle. Article 51 of the UN Charter provides that the member states have “the inherent right of individual or collective self-defence¹⁰ if an armed attack occurs against a Member of the United Nations.” But this right of self-defence has to be exercised subject to certain limits placed on it by the contemporary international law in the form of Article 51 itself. In order to understand the real significance of these limitations, it is necessary to consider the right of self-defence in the context of the principle of collective security. The principle of collective security has replaced the principle of self-help which had prevailed in the general international law in the pre-League of Nations or the UN era. As has been explained by Kelsen, there is the essential difference between self-help and self-defence.¹¹ “It [self-defence] is a special case of self help.”¹² In the case of self-defence, the right to use force is restricted. The use of force by way of self-defence is permitted if and when attacked illegally. While a system of the collective security under which the general right to use force is reserved for a central organ of a political community or organization leaves no room for the right of self-help, it does not forbid its members to resort to the limited use of force in the exercise of the right of self-defence. It may further be noted that the self-defence is a right and not merely an excuse. And in this sense, to use the words of Kunz, it has “to be distinguished from the so called “state of necessity.”¹³

A limited use of force as a measure of self-defence against an illegal attack is thus not antithetical to the principle of collective security. Under the collective security system of the UN no member state is permitted to use of force against another state; the right to use force

9. The relevant purposes of the UN set out in Article 1 of the Charter are: the maintenance of international peace and security; and to develop friendly relations among nations.

10. Hans Kelsen finds the terminology “collective self-defence” as “problematical” because the term “collective” cannot be correctly used in relation to “self-defence” For him there is no collective self-defence, rather there is only collective defence which “may be organized by treaties previously concluded for this purpose.” H. Kelsen, “Collective Security and Collective Self-Defence under the Charter of the United Nations,” 42 *AJIL* 783-96, 792 (1948). (“The term “self”-defence is correctly applied only to the state which is the victim of the armed attack. The other members of the United Nations which assist the attacked state act in the defence of the latter, but not in self-defence.) *Ibid.*

11. On the difference between the self-help and self-defence, see Hans Kelsen, *id.*, p. 784.

12. *Ibid.*

13. Joseph L. Kunz, “Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations”, 41 *AJIL* 872-79, 876 (1947).

is reserved for the Security Council. But at the same time, a right of self-defence is allowed. Although a state is prohibited to use force against another state, a state which is victim of illegal attack is not obliged to wait for the collective security to be taken by the Security Council. Thus, a restrictive right of self-defence as it is contained in Article 51 is not contrary to a system of collective security which is based on the force monopoly of the Security Council. Rather the former is a corollary to the latter. This is in contrast to the collective security system established by the League of Nations which was decentralized one. Hence, no need was felt to expressly recognize the right of self-defence. Such a right was implied in a system in which the collective security system was decentralized and war and reprisals as means of enforcing the laws were allowed.¹⁴

With this short introduction to the relationship between the collective security and the right of self-defence we will turn now to the provision of Article 51 recognizing the existence of the right of self-defence if an armed attack occurs and the contemporary developments pertaining to the scope of this right. Article 51 of the UN Charter provides as follows: Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

“Nothing ...shall impair the *inherent* right of individual or collective self-defence...,” suggests that Article 51 merely incorporates the customary law of self-defence as it stood in 1945. As this Article does not define the content of the right of self-defence recourse may be had to the customary international law on the subject in exploring the extent of the right. However, another view is also possible. According to this latter view, Article 51 is the sole source of the right of self-defence in international law and if there had been any such customary international law on the subject it stood modified by Article 51 as regards the parties to the Charter. In the *Nicaragua* case, the ICJ subscribed to the former view. In the opinion of the Court, Article 51 is only meaningful when “there is a “natural” or “inherent” right of self-defence, and it is hard to see how this can be other than of a customary nature.”¹⁵ The Court further held that Article 51 while recognizing the customary law right of self-defence, does not regulate directly all aspects of it. “For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.”¹⁶ This led the Court to conclude that Article 51 is not a provision which “subsumes and supervenes” customary international law.¹⁷ However, the view that Article 51 is not the sole repository of the right of self-defence and a right of anticipatory self-

14. *Ibid.*

15. *Nicaragua* case, *supra* note 1, Para 176. However, the position taken by the World Court may be contrasted with the position taken by Kunz on the true legal nature of the right of self-defence. Kunz has criticized the use of the expression “inherent right” in Article 51 of the UN Charter since the expression indicates that the right of self-defence is a natural right and not a right in positive law. According to him, the expression “inherent right” obscures the legal meaning. “As a legal right, granted by positive international law, it has to be defined by this positive law.” Joseph L. Kunz, *supra* note 13.

16. *Ibid.*

17. *Ibid.*

defence under general international law survives the UN Charter is controversial and is not supported by many states.¹⁸ It is, then, doubtful that any such right exists outside the context of international terrorism.

If Article 51 is taken as merely incorporating the customary international law on the subject, a further question arises— Whether there exist requirements in addition to those considered allowed under the customary law regime governing it? All these issues bear on the relationship between the Article 51 and customary international law on the subject to which we will turn to in the next part of this Article.

B. The Requirements of Necessity and Proportionality

Anyone who pleads self-defence as a justification for the use of force has to show that his action in preventing the attack is no more than necessary and is proportionate to the nature of the threatened assault.¹⁹ The municipal law requirements of necessity and proportionality also apply to inter-state relations. The *Caroline case*²⁰ is often cited an old authority evidencing the customary international law requirements of necessity and proportionality. In the correspondence between Britain and the US during 1841-1842 related to the Caroline incident the requirements of necessity and self-defence was stressed by the two states and is widely regarded as giving rise to “the modern law of self-defence.”²¹

In the *Case concerning the Military and Paramilitary Activities in and against Nicaragua*, the ICJ found these conditions as being part of the customary international law. In that case, it reached the conclusion that the response of the United States allegedly taken in self-defence was not justified as necessary measures of collective self-defence. The Court took it as settled law that “whether the response to the attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence.”²² And further, “a rule well established in customary international law” whereby “self defence would warrant only measures which are proportional to the armed attack and necessary to respond to it.”²³ The World Court reiterated the same in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*. “The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law.”²⁴

18. Gray, *supra* note 8.

19. Alan Brudner, “Constitutionalizing Self-Defence,” 61 *University of Toronto Law Journal* 867-897,871 (2011).

20. During the course of rebellion in Upper Canada (1837) , British forces seized a ship belonging to the US that was allegedly being used to supply the rebels on the Canadian side of the Niagara River. The British forces set the American ship on fire and sent it over Niagara Falls leading to the killing of two US nationals. A British subject was arrested in the US on charges of murder and arson. Britain sought the release of the British national which led to the correspondence between Britain and the US which dealt with in detail the requirements of necessity and proportionality. The US emphasized the need of showing a test of necessity and proportionality as a justification for the action taken in self-defence. And Britain agreed to the position taken by the US. On Caroline incident see RY Jennings, “The Caroline and Mcleod Cases,” 33 *AJIL* 82-99 (1938); and DJ Harris, *Cases and Materials on International Law* (London: Sweet & Maxwell, 2004) pp. 921-22.

21. Michael Byers, “Terrorism, the Use of Force and International Law after 11 September,” 51 *ICLQ* 406 (2002).

22. *Case concerning the Military and Paramilitary Activities in and against Nicaragua*, *supra* note 1, Para 194.

23. *Id.*, Para 176.

24. *The Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, *supra* note 6, Para. 41.

On the requirement of necessity, it has been suggested by Judge Roberto Ago that the action taken in self-defence is considered necessary when the state attacked... must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force.”²⁵ And on the condition of proportionality, he observes that the proportionality does not mean “perfect proportionality”.²⁶ In his language: “It would be mistaken... to think that there must be between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved the ‘defensive’ action, and not the forms, substance and strength of the action itself.”²⁷ In fact, the requirements of necessity and proportionality are probably even more pressing in the context of the anticipatory self-defence “than in they are other circumstances.”²⁸

II. JURISPRUDENCE OF THE ICJ

A. *Approaches to Interpretation of the Constitutional Instruments*

Under Article 51, the right of self-defence is conditional on the occurrence of an “armed attack.” Article 51 provides it in so many words. “...if an armed attack occurs against a Member of the United Nations.” In the opinion of many international law scholars, the language used leaves no doubt that in the terms of Article 51, a state does not have the right of anticipatory self-defence or the self-defence is not available against an imminent attack. Anticipatory self-defence refers to a kind of forcible measure which is directed to avert future attacks. To use the language of Kunz, “no *preventive* use of military force is allowed.”²⁹ According to him, if one is interested in the statement of what the law *is* it is clear that there is no right of self-defence against an imminent attack. The celebrated author goes on to suggest that the neither the phrase “inherent right” nor the drafting history of Article 51 can prevail against the clear wording of Article 51: “...if an armed attack occurs...” To quote Kunz: “Where the text is so clear and unequivocal, it is not permissible, as the two International Courts have often laid down, for the interpretation to go back to the “*travaux préparatoires*.”³⁰

25. Per Robert Ago, YbILC [1980], Vol. II, Part One, p. 69 (Cited in the dissenting opinion of Judge Schwebel, *supra* note 1, p. 360).

26. Ago, *ibid.* See also the dissenting opinion of Judge Schwebel, *id.*, p. 367.

27. Ago, *ibid.*

28. *Oppenheim's International Law*, *supra* note 8, p. 422.

29. Joseph L Kunz, “Sanctions in International Law,” 54 *AJIL* 324-47 (1960). [Emphasis is original]. Brownlie and Henkin also support the view that Article 51 does not permit the right of anticipatory self-defence. See generally, Ian Brownlie, *International Law and the Use of Force by States* (Oxford, 1963); Henkin, *How Nations Behave* (1979), pp. 141-42: Cited in DJ Harris, *Cases and Materials on International Law* (London: Sweet & Maxwell, 2004), p. 931. Bowett, however, is of the view that Article 51 does not restrict the right of self-defence. See Bowett, *Self-Defence in International Law* (1958).

30. *Ibid.* Some cases wherein the World Court held so include the *Admission of a State to the United Nations, Advisory Opinion*, ICJ Reports 1948, p. 57; and the *Competence of Assembly regarding Admission to the United Nations, Advisory Opinion*, ICJ Reports 1950, p. 4. In the former *Opinion*, while interpreting the provision of Article 4 (1) setting out the conditions for admission to the UN, the ICJ stated: “The terms “Membership in the United Nations is open to all other peace-loving States...” and... indicates that States which fulfil the conditions stated have the qualifications requisite for admission. The natural meaning of the words used leads to the conclusion that these conditions constitutive an exhaustive enumeration and are not merely stated by way of guidance or example. ...’ *Advisory Opinion on the Admission of a State to the United Nations, id.*, p. 62. Similarly, in the later *Opinion*, the World Court observed: “The Court considers it necessary to say that the first duty of a

It is a well settled rule of the statutory interpretation that “where the language is plain and admits of but one meaning the task of interpretation can hardly be said to arise.”³¹

However, much has changed since the above observations of Kunz. The change is reflected in the *Larger freedom: towards development, security and human rights for all* (2005)³², a report of the Secretary General of the United Nations prepared for the 2005 UN World Summit. In the Report, the Secretary General subscribed to the view that Article 51 covers not only the actual armed attacks but also the *imminent attacks*.³³ In the wake of 9/11 terrorist attacks, the support for the pre-emptive self-defence has grown considerably.³⁴ USA, UK and some other major powers have openly come in favour of pre-emptive self-defence. *US National Security Strategy* states:

We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and territories do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction-weapons that can easily be concealed, delivered covertly, and used without warning.³⁵

tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words.” *Advisory Opinion on the Competence of Assembly*, id., p.8. The Court quoted the following passage with approval in which the PCIJ took the similar view: “It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd.” *Polish Postal Service in Danzig*, PCIJ, Series B, No. II, p. 39.

31. P. ST. J. Langan (ed.), *Maxwell on the Interpretation of Statutes*, 12th Edition (New Delhi: LexisNexis Butterworths, 2006), p. 29.

32. Report of the Secretary General (21 March 2005), UN Doc. A/59/2005.

33. *Id.*, Para 124 (“Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this [Article 51] covers an imminent attack as well as one that has already happened.”). The Ninth Edition of Oppenheim’s *International Law*, supra note 8, adopts a middle path suggesting that while anticipatory self-defence is normally unlawful, it is not necessarily so in ‘all circumstances, the matter depending on the facts of the situation including in particular the seriousness of the threat and the degree to which preventive action is really necessary and is the only way of avoiding that serious threat...’ *Oppenheim’s International Law*, id., pp. 421-22.

34. See Christine Gray, “Self-Defence against Terrorism,” in Evans (ed.), *International Law* (2003), pp. 603-05. Gray, referring to the *Operation Enduring Freedom* launched by the US and UK on 7 October 2001 in response to the terrorist attacks of 11 September 2001 on the World Trade Centre, points out : “This use of force goes beyond the traditional model of self-defence in many ways. It seems that the massive State support for the legality of the US claim to self-defence could constitute instant customary international law and an authoritative reinterpretation of the UN charter, however radical the alteration from many States’ prior conception of the right to self-defence. First, it widens the concept of armed attack. Article 51 originally envisaged self-defence against an attack by a State and those invoking the right generally took care to attribute responsibility to a State. Now it is apparently accepted that a terrorist attack on a state’s territory by a non-State actor is an armed attack which justifies a response against the State which harboured those responsible....The right to self-defence claimed by the USA and the UK in response to the terrorist attack is also preemptive....Many States in the past rejected the legality of pre-emptive self-defence, but they have now accepted this wide right to self-defence by the USA. However, this may be only in response to terrorism, not a general acceptance of anticipatory or pre-emptive use of force.” Gray, *ibid.*

35. 41 ILM 1478 (2002).

The view – the UN Charter, being a constitutional document, should be interpreted in the light of the changed situation is supported by the rule of “flexible construction.” According to this principle, to use the language of Venkatarama Aiyar J. in the *State of Madras v. Gannon Dunkerley & Company, (Madras) Ltd.*, “...when, after the enactment of a legislation, new facts and situations arise which could not have been in its contemplation, the statutory provisions could properly be applied to them if the words thereof are in a broad sense capable of containing them. In that situation, ‘it is not’, as observed by Lord Wright in *James v. Commonwealth of Australia* [1936] AC 518, “that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning.’ The question then would be not what the framers understood by those words, but whether those words are broad enough to include the new facts.”³⁶

But, the position taken by some developed countries that Article 51 should be interpreted to include within its ambit the anticipatory self-defence is not supported by the majority of states. Although some writers have advanced the thesis that in the aftermath of the terrorist attacks, a customary international law recognizing the anticipatory self-defence has quickly grown, the right of anticipatory self-defence remains controversial. In *Oil Platforms, DRC v Uganda* and the *Nicaragua* cases, the ICJ touched upon the issue but refrained from expressing any opinion on the legality of pre-emptive (or anticipatory) self-defence. In fact, the issue of anticipatory self-defence did not directly arise in these cases. However, it is profitable to turn to certain observations of the Court to appreciate the kind of problem involved in interpreting Article 51 of the Charter.

B. Anticipatory Self-Defence

1. Nicaragua Case

In the *Nicaragua* case, the Court found that the right of individual or collective self-defence is an exception to the principle of prohibition of the use of force. The Court also reached the conclusion that the right of collective self-defence is grounded in customary international law. In reaching this conclusion the Court placed reliance on the language used in Article 51— “the inherent right of individual or collective self-defence.” It was held:

First, with regard to the existence of this right [collective self-defence], it notes that in the language of Article 51 of the United Nations Charter, the inherent right (or “droit naturel”) which any State possesses in the event of an armed attack, covers both collective and individual self-defence. Thus, the Charter itself testifies to the existence of the right of collective self-defence in customary international law. Moreover, just as the wording of certain General Assembly declarations adopted by States demonstrates their recognition of the principle of the prohibition of force as definitely a matter of customary international law, some of the wording in those declarations operates similarly in respect of the right of self-defence (both collective and individual).³⁷

36. Per TL Venkatarama Aiyar J. in the *State of Madras v. Gannon Dunkerley & Company, (Madras) Ltd.*, (1959) AIR 1958 SC 560 at p. 596. *Gannon Dunkerley* relied on the decisions in *Attorney General v. Edison telephone Company of London* [1881] LR 6 QBD 244; *Toronto Corp. v. Bell Telephone Co. of Canada, In re* (1932) AC304; *The King v. Brislan: Ex Party Williams* [1935] 54 CLR 262. However, in *Gannon Dunkerley*, which involved the issue of interpreting the expression “sale of goods” as falling in Entry 48 Schedule Seven, List Two of the Constitution of India, the Supreme Court refused to apply the principle of flexible construction for the reason that “words having known legal import should be construed in the sense which they had at the time of the enactment...” Ibid. For more fully discussion of the rule of “flexible construction”, see HM Seervai, *Constitutional Law of India: A Critical Commentary*, vol. 1, Fourth Edition, (Delhi: Universal Book Traders, 1997), pp. 176-79.

37. The *Nicaragua* case, *supra* note 1, p. 102.

The Court specifically referred to the *Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations* wherein the reference to the prohibition of the use of force is followed by the reference to “cases in which the use of force is lawful.” According to the Court, if the principle prohibiting the use of force was part of customary international law because the principle was affirmed in so many words in several declarations and other international instruments found mention in the judgment of the Court, the cases in which use of force was excused also formed part of the customary international law.

In *Nicaragua*, the question of anticipatory self-defence was not raised before the Court. Nor the facts of the case warranted the Court to discuss the issue. The case relates to the giving of assistance by the USA to rebels in Nicaragua. Nicaragua claimed, inter alia, that the United States had acted in violation of Article 2 (4) of the UN Charter and of the customary international law obligations to refrain from the threat or use of force by providing military assistance to the *contras*. The US claimed, on the issue of the admissibility of the case, that “by providing, upon request, proportionate and appropriate assistance to third States not before the Court” it actually had exercised the inherent right of collective self-defence guaranteed by article 51 of the Charter.³⁸ On the kind of assistance provided to the *contras*, the Court found that the US infringed its obligation concerning the prohibition of the use of force by arming and training the rebels in Nicaragua.³⁹ According to the Court, self-defence is available to a state even if the armed attack is carried out by irregulars or mercenaries provided that the attack is of such gravity as to amount to an actual armed attack “conducted by regular armed forces, or its substantial involvement therein.”⁴⁰ In the view of the Court, “...while the arming and training of the *contras* can certainly be said to involve the threat or use of force against Nicaragua, this is not necessarily so in respect of all the assistance given by the United States Government.”⁴¹ The Court further held: “...the mere supply of funds to the *contras* while undoubtedly an act of intervention in the internal affairs of Nicaragua...does not in itself amount to the use of force.”⁴²

In the *Nicaragua case*, Nicaragua contended, inter alia, that the US in training, arming, supporting and directing military and paramilitary actions in and against Nicaragua had violated the Charter and treaty obligations as well its obligations under the customary international law. Since the US’s acceptance of the jurisdiction of the ICJ under article 36 (2) of the Statute was subject to the reservation which excluded “disputes arising under a multilateral treaty” the Court having found that it had jurisdiction in the case went to consider the legality of the US actions under customary international law. The Court’s conclusion that the US activities in Nicaragua were in violation of the UN Charter prohibition on the use of force is based on the premise that only an armed attack against a state gives rise to the right of self-defence. “For the Court to conclude that the United States was lawfully exercising its right of collective self-defence, it must first find that Nicaragua engaged in an armed attack against El Salvador, Honduras or Costa Rica.”⁴³

In his dissenting opinion, Judge Schwebel sharply disagreed with the majority opinion that there was no armed attack by Nicaragua against El Salvador and therefore no action by

38. *Id.*, p. 22.

39. *Id.*, p. 119.

40. *Id.*, p. 103

41. *Id.*, p. 119.

42. *Ibid.*

43. *Ibid.*

Nicaragua tantamount to an armed attack upon El Salvador.⁴⁴ However, he concurred with the finding of the Court that the issue of the lawfulness of a response to the imminent threat of armed attack was not raised before the Court, and that “the Court accordingly expresses no view on that issue.” Although, no decision was needed on the issue of preventive self-defence, Judge Schwebel emphasized the need to make it clear that the right of self defence was not limited to a case of armed attack only. He went to observe: “...its Judgment may be open to the interpretation of inferring that a state may react in self-defence, and that supportive States may react in collective self-defence, *only if an armed attack occurs*. It should be observed that, if that is a correct interpretation...such an inference is *obiter dictum*.”⁴⁵ And further:

Nevertheless, I wish, *ex abundantti cautela*, to make clear that, for my part, I do not agree with a construction of the United Nations Charter which would read Article 51 as if it were worded: “nothing in the present Charter shall impair the inherent right of individual or collective self-defence if, *and only if, an armed attack occurs*...” I do not agree that the terms or intent of Article 51 eliminate the right of self-defence under customary international law, or confined its entire scope to the express terms of Article 51.⁴⁶

In support of his views, Judge Schwebel quoted a passage from Sir Humphrey Waldock’s “The Regulation of the Use of Force by Individual States in International Law”, Collected Courses, The Hague (1952-II), pp.496-97 in which Sir Waldock took the view that Article 51 did not forbid the forcible self-defence in resistance to an illegal use of force falling short of armed attack. A part of the passage quoted by Judge Schwebel is produced below: Does Article 51 cut down the customary right and make it applicable only to the case of resistance to armed attack by another State? This does not seem to be the case. ...Article 51, as is well known, was not inserted for the purpose of defining the individual right of self-defence but of clarifying the position in regard to collective understandings for mutual self-defence, particularly the Pan-American treaty known as the Act of Chapultepec. These understandings are concerned with defence against external aggression and it was natural for article 51 to be related to defence against ‘attack’. Article 51 also has to be read in the light of the fact that it is part of Chapter VII. It is concerned with defence to grave breaches of the peace which are appropriately referred to as armed attack. It would be misreading of the whole intention of Article 51 to interpret it by mere implication as forbidding forcible self-defence in resistance to an illegal use of force not constituting an armed attack.⁴⁷

2. Oil Platforms Case

Oil Platforms case does not as such bear upon the issue of the anticipatory self-defence. However, the case is important as it throws light on some prominent aspects of the right of self-defence. In the *Oil Platforms* case, the main issue was whether the attacks by the US on the Iranian oil platforms on 19 October 1987 and 18 April 1988 were the valid act of self-defence. The Court noted two specific acts which were invoked by the US in support of its claim to act in self-defence. On 16 October 1987, the Kuwaiti tanker *Sea Isle City*, reflagged to the US, was hit by a missile near Kuwait harbour. On 14 April 1988, the warship USS Samuel B. Roberts struck a mine in international waters near Bahrain while returning from an escort mission. The US justified attacks on the oil platforms as were, in the circumstances of the case, “measures...necessary to protect the essential security interests” of the US.

44. *Id.*, p. 347.

45. *Ibid.* [Emphasis added].

46. *Id.*, pp. 347-48. [Emphasis added].

47. *Id.*, pp. 348.

The Court took the view that in order to establish that the US was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, it was to be shown that the attacks 'were of such a nature as to be qualified as "armed attacks" within the meaning of that expression in Article 51 of the UN Charter and as understood in customary law on the use of force.'⁴⁸ The Court referred to the Nicaragua case, where it had stressed the necessity of making distinction between "the most grave forms of the use of force" and "the other less grave forms" for "[i]n the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack."⁴⁹ On the requirement of necessity and proportionality, the Court held: "The United States must also show that its actions were necessary and proportional to the armed attack made on it and that the platforms were a legitimate military target open to attack in the exercise of self-defence."⁵⁰

On the question whether the attack on the *Sea Isle City*, either in itself, or together with the rest of the series of ...attacks" invoked by the US as a justification for exercising the right of self-defence could be termed as an "armed attack" within the meaning of Article 51 of the UN Charter, the Court found: "Even taken cumulatively...these incidents do not seem to the Court to constitute an armed attack on the United States, of the kind that the Court, in the case concerning Military and Paramilitary Activities in and against Nicaragua, qualified as a "most grave" form of the use of force..."⁵¹

3. *DRC v Uganda*

As was the case with Nicaragua, in *DRC v Uganda*⁵² also the ICJ did not discuss the issue of anticipatory self-defence. According to the Court in *DRC v Uganda*, since the parties to the dispute did not rely on the anticipatory self-defence it was not necessary for it to dwell into the issue. Uganda categorically stated that the operation safe haven was not taken in anticipation of armed attack. The Court referred to its previous judgment in the Nicaragua case where reliance was placed by the parties only on the right of self-defence in case of an armed attack which had already occurred, and not on the anticipatory self-defence. Adopting the similar line of approach, the ICJ in *DRC v Uganda* refrained from expressing any view on the lawfulness of the use of force in the exercise of the right of self-defence in the anticipation of the threatened attacks. It may, however, be pointed out that though Ugandan claim was not formally based on the anticipatory self-defence, the Court in that case noticed that the presence of the Ugandan forces on the Congolese territory could only be explained on the basis of anticipatory self-defence.⁵³ In the language of the Court:

The Court feels constrained, however, to observe that the wording of the Ugandan High Command document in the position regarding the presence of the UPDF in the DRC made no reference whatever to armed attacks that have already occurred against Uganda at the hands of the DRC ...Rather, the position of the High Command is that it is necessary "to secure Uganda's legitimate security interests." The specified security needs are essentially preventative in character....Only one of the five listed objectives refers to a response to acts

48. *Case Concerning Oil Platforms, Judgment, supra* note 2, Para 51.

49. *Ibid.*

50. *Ibid.*

51. *Id.*, Para 64.

52. *Case Concerning Armed Activities on the Territory of the Congo, Judgment, supra* note 3.

53. Phoebe N. Okowa, "Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)" in Colin Warbrick (ed.), *Current Developments: Public International Law*, 55 *ICLQ* 742-753 (2006).

that had already taken place—the neutralization of “Uganda dissent groups which have been receiving assistance from the Government of the DRC and the Sudan.”⁵⁴

In *DRC v Uganda*, the lawfulness of the “acts of armed aggression” allegedly perpetuated by Uganda on the territory of the DRC was in issue. DRC alleged that these acts resulted in the flagrant violation of the provisions of the UN Charter as well as the Charter of the Organization of the African Unity (OAU). Uganda, on the other hand, claimed that its military activities in the DRC from the early August 1998 to July 1999 were justified as action taken in the exercise of self-defence. The Court found that the operation ‘safe haven’ undertaken by Uganda within the territory of the DRC was not an action taken in self-defence against an anticipated attack. The Court also found that the military operations of August 1998 in Beni, Bunia and Watsa, and of 1 September at Kisangani, could not be treated as the acts undertaken with the consent of the DRC. Hence, according to the Court, the legality of those acts was to be judged solely with reference to the provision of Article 51.

The Court held that since Uganda did not report to the Security Council those events which it had regarded as requiring it to act in self-defence, and that Uganda never claimed that it was subjected to an armed attack by the armed forces of the DRC the conditions giving rise to a right of self-defence were not fulfilled.⁵⁵ To quote the following passage from the judgment:

The “armed attacks’ to which reference was made came rather from the ADF...there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX) on the definition of Aggression, adopted on 14 December 1974. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.⁵⁶

Since, the ICJ did not find any evidence suggesting that the attacks from anti-Ugandan insurgents were attributable to DRC, in the opinion of the Court, “the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present.”⁵⁷ And thus, there was “no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.”⁵⁸

C. Self-Defence against Terrorist Attacks by Non-State Actors

Whether a state can exercise the right of self-defence against terrorist acts attributable to a non-state actor? The issue is controversial since the measures taken in self-defence may constitute intervention in the affairs of a state which is implicated in the terrorist attacks. *DRC v Uganda* presented the World Court an opportunity to address the issue but the Court declined to clearly rule on the issue.⁵⁹ In that case, the Court took the view since the terrorist acts carried out by the anti-Ugandan rebels, though operating from the DRC territory, were not attributable to DRC, Uganda could not claim a right of self-defence in the circumstances of the case. However, the ruling in the *DRC v Uganda* is open to more than one interpretation.

54. *Id.*, p. 222.

55. *Ibid.*

56. *Id.*, p. 223.

57. *Ibid.*

58. *Ibid.*

59. See the Separate Opinions of Judge Simma and Judge Kooijmans, *DRC v Uganda*, *supra* note 3, Para 8 and Para 25 respectively.

One may read the jurisprudence of the Court as suggesting that unless the terrorist attacks are attributable to a state from the territory of which terrorists are operating there is no right to use force in self-defence. Or one may take the position that there is nothing in the Court's jurisprudence as absolutely requiring that armed attack be launched by a state before the right of self-defence is engaged.⁶⁰ It is this second interpretation of the judgment of the ICJ in *DRC v Uganda* and the *Nicaragua* cases; and the *Wall Opinion* that is particularly contentious.

In the *Wall Opinion*, the World Court clearly reiterated the view that it is only when an armed attack is made by a state against another state that the right to use force in self-defence can be claimed. "Article 51 of the Charter, thus recognizes the existence of an inherent right of self-defence in the case of armed attack by *one State against another State*."⁶¹ Thus, unless a state is directly implicated in terrorist acts use of force as a measure of self-defence against that state is not justified. This position adopted by the majority in both cases, namely *DRC v Uganda* and the *Wall Opinion* is based on the premise that to constitute an armed attack justifying self-defence the military action in question should be of sufficient magnitude. And this could happen only if, on the basis of the reasoning adopted by the majority opinion in *Nicaragua*, the attacks are carried out by the irregulars who are sent by a state.

In the *Wall Opinion*, the issue raised was that whether construction of a security wall within the Occupied Palestinian Territories might be justified as a measure of self-defence. Israel argued that the construction of the security fence was consistent with Article 51 of the Charter.⁶² However, the majority reached the conclusion that the construction of the wall was an action not in conformity with Israel's various international obligations. Put differently, the ICJ in rejecting the argument of Israel that the construction of a security fence was a measure of self-defence relied on the *Nicaragua* case. As already stated, the Court in *Nicaragua* expressed the opinion that Article 51 recognizes the existence of an inherent right of self-defence in the case of an armed attack by one state against another state. And in *Wall Opinion* the ICJ reaffirmed this principle.

Judge Higgins, however, did not agree with the proposition advanced by the majority that only an armed attack by one state against another can give rise to the right of self-defence. Judge Higgins said: "There is, with respect, nothing in the text of article 51 that thus stipulates that self-defence is available only when an armed attack is made by a State." He went to clarify that the qualification that the right of self-defence is available only when an armed attack is made by a state "is *rather* a result of the Court so determining in Military and paramilitary activities in and against *Nicaragua*..."⁶³

Judge Kooijmans expressed the similar view. In his dissenting opinion, the existence of a right of self-defence against the terrorist acts is not conditional on the occurrence of an armed attack by one state against another. He firmly believes in the theory that self-defence

60. Kimberley N. Trapp, "Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-State Terrorist Actors" 56 *ICLQ* 141-56, 141-42 (2007).

61. *Wall Opinion*, *supra* note 7, Para 139.

62. According to Israel's Permanent Representative to the UN: "[T]he fence is a measure wholly consistent with the right of states to self-defence enshrined in article 51 of the Charter." *Wall Opinion*, *id.*, Para 138. Referring to the Security Council resolutions 1368 (2001) and 1373 (2001) he further said that those resolutions "have clearly recognized the right of States to use force in self-defence against terrorist attacks..." *Ibid.*

63. *Wall Opinion*, *id.*, para 33.

is not excluded in face of an armed attack which is not coming from a state. Disagreeing with the majority opinion according to which Article 51 recognizes the existence of the right of self-defence only in a case where a state attacks another state, he observed:

[Security Council] Resolutions 1368 (2001) and 1373 (2001) recognize the inherent right of individual or collective self-defence without making any reference to an armed attack. The Security Council called acts of international terrorism, without any further qualification, a threat to international peace and security which authorizes it to act under Chapter VII of the Charter. And it actually did so in resolution 1373 (2001) without ascribing these acts of terrorism to a particular State. This is the completely new element in these resolutions. This new element is not excluded by the terms of Article 51 since this conditions the existence of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years.⁶⁴

In the Wall Opinion, the ICJ reaffirmed the position it had taken in Nicaragua. To put it again, in Nicaragua, the Court took the view that the armed attack justifying the right of self-defence must be attributable to a state. Since, the armed attack by rebel groups were not attributable to Nicaragua, the plea of self-defence by US in supporting contras was not, in the view of the Court, was not available.

III. CONCLUSION

The debate on the legality of the anticipatory self-defence has been continuing for a long time, in particular, since the adoption of the UN Charter. However, the issue has gained prominence in the wake of threats of global terrorism. In view of the new realities, the UN Charter regime comprising Articles 2(4) and 51 has simply proved inadequate. The question which has remained unanswered is—whether a state has the right to use force in self-defence if and only if an armed attack attributable to another state has occurred?

The ICJ's jurisprudence touching on the aspects of anticipatory self-defence and the use of force in self-defence against non-state actors has left open many key issues surrounding these aspects. In *Nicaragua*, the Court while considering the conditions giving rise to the right of individual or collective self-defence did not think it proper to deal with the issue of anticipatory self-defence since the issue was not raised by the parties. In that case, reliance was placed by the parties only on the conditions giving rise to the right of self-defence in the face of an actual armed attack as distinguished from the right of self-defence in the face of imminent threat of armed attack. Similarly, in *DRC v Uganda*, since Uganda did not rely on anticipatory self-defence, the ICJ expressed no view on the legality of pre-emptive or anticipatory self-defence. In one more respect, the ICJ's decision reflects a restrictive approach to the interpretation of Article 51. Following the *Nicaragua* case, the Court in *DRC v Uganda* ruled that the right of self-defence on the part of a state can be availed only when it is exercised as a response to an armed attack by a state's regular forces or irregulars acting on the behalf of a state. In this way, the ICJ ruled out the possibility of making a claim of self-defence by a state against a non-state actor as such. In other words, according to the ICJ, the right of self defence exists only if a state is attacked by another state or by such forces acting on behalf of a state. These cases taken together, indeed, throw light on the customary international law requirements of the legitimate exercise of the right of self-defence but they

64. *Id.*, Para 35.

fall short of addressing the main issue in controversy, that is, the legal validity of the claim of a state to pre-empt an attack by using force as a measure of self-defense. Moreover, the ICJ's jurisprudence is open to more than one interpretation. Although, the ICJ's decisions in Nicaragua and DRC v Uganda apparently refrain from addressing the issue of anticipatory self-defence but at the same time these decisions are susceptible to the interpretation that supports the existence of a right of self-defence which is anticipatory or preemptive in nature. Similarly, the Court's finding in the Wall Opinion does not clearly rule out the possibility of taking measures in self-defence against an armed attack not emanating from or imputable to a state. In the extreme situations, especially in the face of the threats of terrorism it is arguable that a state can use force in self-defence in anticipation of terrorist attacks whether or not attributable to a state. The Court's restrictive approach to the interpretation of Article 51, instead of contributing meaningfully to the debate on the scope of the self-defence has added more uncertainty in this regard.

A further relevant issue relates to the difficulty in interpreting the term "armed attack" as used in Article 51. As noted above, in the opinion of the ICJ *only* a grave use of force attributable to a state fits into the description of "armed attack". This needs to be reconsidered, especially in the present day scenario when the entire world is faced with the threat of terrorist attacks. In a given case, the terrorist attacks in question may not be as grave to justify the use of force in self-defence by the attacked state.



INSURED'S DUTY OF DISCLOSURE: A NEW LOOK AT THE DOCTRINE OF *UBERRIMAE FIDEI*

Manoj Kumar Padhy*

Abstract

Insurance contracts are commonly described as contracts of utmost good faith or "uberrimae fidei". Thus, if a fact is material and within the knowledge of the assured or his agent, the assured is under an absolute duty to disclose it and in case of non-disclosure the insurer to avoid the contract ab initio, notwithstanding the absence of any fraudulent intent. This principle was first laid down by Lord Mansfield C.J. in Carter v. Boehm. It is true that no better justification for the doctrine of disclosure has been stated since Lord Mansfield C.J. delivered his classic judgment but the English and Indian courts have not been timid in expressing their unease over the rigorous of the duty of disclosure, which the judges said is unduly harass to the assured and unnecessary favour to the insurer under the existing system of formation of contract of insurance.

Key Words: *uberrimae fidei*, insurance, contract, non-disclosure, material fact, misrepresentation, fraud.

I. INTRODUCTION

In certain types of contract like that of insurance¹ one party is in a very strong position to know the material fact and the other party is in a weak position to discover them. Consequently, the general contractual duty borne by the insured not only to avoid misrepresentation but also an additional obligation to disclose all material facts that would induce the insurers to underwrite the risk. Such contracts are commonly described as contracts

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1. Many authors have made an attempt to define the term "insurance" under different perspectives. In the words of John Magee, "Insurance is a plan by which large number of people associate themselves and transfer to the shoulders, of all risks that attach to individuals"; In the words of D. S. Hansell "Insurance may be defined as a social device providing financial compensation for the effects of misfortune, the payment being made from the accumulated contributions of all parties participating in the scheme"; According to Sir William Beveridge, "The collective bearing of risk is insurance"; according to Riegel and Miller, "Insurance is a social device where by the uncertain risks of individuals may be combined in a group and thus made more certain, small periodic contributions by the individuals providing a fund, out of which, those who suffer losses may be reimbursed"; In the words of Justice Tindall, "Insurance is a contract in which a sum of money is paid to the assured as consideration of insurer's incurring the risk of paying a large sum upon a given contingency; according to Justice Channel, "Insurance is a contract where by one person, called the insurer, undertakes in return for the agreed insurer, undertakes in return for the agreed consideration called premium, to pay to another person called insured, a sum of money or its equivalent on specified event".

of utmost good faith or "*uberrimae fidei*". This principle was first laid down by Lord Mansfield C.J. in *Carter v. Boehm*². This celebrated leading case has led to formulation of the principle of utmost good faith, which is partially codified in the English Marine Insurance Act, 1906. Although, the learned lord had intended to extend the principle of good faith to all commercial transaction, its application only restricted to a limited class of transaction including insurance. It is by now well established beyond doubt that the duty of disclosure applies to all species of insurance. Thus, if a fact is material and within the knowledge of the assured or his agent, the assured is under an absolute duty to disclose it and in case of non-disclosure the insurer to avoid the contract *ab initio*, notwithstanding the absence of any fraudulent intent. There is a series of decisions including Lord Mansfield's judgment in *Carter v. Boehm*³, itself where it has been said that an insurer can avoid the insurance even in the absence of fraudulent intent on the part of the assured⁴. Meaning thereby mistake or forgetfulness affords no defense at all. Lord Cockburn C.J., in *Bates v. Hewitt*⁵ said that it is well established law that it is immaterial whether the omission to communicate a material fact arises from indifference or mistake or from it not being present to the mind of the assured that the fact was one which it was material to make known.

It is true that no better justification for the doctrine of non-disclosure has been stated since Lord Mansfield C.J. delivered his classic judgment but the economic consequences particularly on the insured, are severe and disproportionately harsh. The policy becomes valueless and the insured loses the financial safeguard that the policy was designed to provide. This also strikes the root principle of insurance i.e. social security. Still, this is not to say that the rationale underlying the doctrine of *uberrima fidei* and the remedy for its breach is in any way obscure for the reason that the insurer assesses the risk and calculates the premium depending upon the material fact. Therefore, if the material facts are known to the assured, then he must disclose it.

Doctrine of *uberrimae fidei* is a security given in the hands of the insurer to protect themselves from the fraudulent and unscrupulous insured but it has been observed that armed with this doctrine, the insurer avoids the policy on petty and flimsy grounds. For example, the failure of an insured to disclose criminal convictions⁶ and indigestion⁷ etc. in life insurance.

Indian law on the doctrine of *uberrimae fidei* is based on English Common law. This doctrine has been given a statutory recognition under the Indian Marine Insurance Act, 1963. In a series of recent cases decided over the years, the English and the Indian Courts have been steadily refining the doctrine without disturbing its objectives of this doctrine. The modern view is that insurers should not be content to play a passive role during the disclosure process but should be prepared to make necessary enquiries about the risk to be underwritten. It cannot be denied that Lord Mansfield's dictum in *Carter v. Boehm*⁸ was very much relevant when it was given, but things have been changed up to a great extent. Educational, technological and procedural advancement in the field of insurance have

2. (1766) 3 Burr. 1905.

3. *Ibid.*

4. *Macdowell v. Fraser*, (1979) 1 Doug 260.

5. (1867) L.R. 2 Q.B. 595, 607.

6. *Smt. Daya Rani and Others v. LIC*, NCDRC, decided on 15 September, 2009.

7. *LIC v. Shakuntala Bai*, AIR 1975 AP 68.

8. *Supra* note 2.

necessitated a review in the doctrine of *uberrima fidei*. With this background this article seeks to examine the doctrine of *uberrimae fidei* and the necessity to review the age old doctrine.

II. ORIGIN AND DEVELOPMENT OF DOCTRINE OF *UBERRIMAE FIDEI*

The doctrine of *uberrimae fidei* was stated by Lord Mansfield in the well known case of *Carter v. Boehm*⁹. This case is concerned with an action on a policy for the benefit of George Carter, the Governor of Fort Marlborough in the Island of Sumatra in the East Indies, against the Fort being attacked by foreign enemy. It was alleged by the underwriters that the weakness of the Fort and the likelihood of its being attacked by the French were the materials facts known to the assured which ought to have been disclosed to the underwriters. This defense in fact failed, but the learned Lord took the occasion to explain the principles necessitating a duty of disclosure in these words:

“Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation, and proceeds upon the confidence that he does not keep back any circumstances in his knowledge to mislead the underwriter into a belief that the circumstances does not exist. The keeping back such circumstance is a fraud, and therefore, the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void, because the *risqué* run is really different from the *risqué* understood and intended to be run at the time of the agreement... The policy would be equally void against the underwriter if he concealed... good faith forbids either party, by concealing what he privately knows, to draw the other on to a bargain from his ignorance of fact, and his believing the contrary.”

In this celebrated case, Lord Mansfield sought to limit the scope of the insured’s duty by stressing the need for underwriters to be proactive in ascertaining facts material to the risk. In a subsequent case in *Noble v. Kennoway*¹⁰, the learned judge observed that every underwriter was presumed to know the practices of the trade he insures and if he does not know then it is his duty to inform himself of it. Again, in *Mayne v. Walter*¹¹, the learned lord pointed out that if both parties were ignorant of the relevant fact the underwriter must run all risks and if the underwriter knew of such an edict, it was his duty to inquire. He went on to note that in order to vitiate a policy it must be a fraudulent concealment of circumstances. Lord Mansfield’s had a clear admonition that underwriters have a distinct investigative role to play in the disclosure process. Subsequently, Burrough. J. gave a new dimension to the doctrine of *uberrimae fidei* in *Friere v. Woodhouse*¹². According to him what is exclusively known to the assured ought to be communicated; but what the underwriter, by fair inquiry and due diligence, may learn from ordinary sources of information need not be disclosed. The Indian Contract Act, 1872 also recognizes this principle in exception to section 19, according to which if the consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17 of the Contract Act, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.¹³

9. Supra note 2.

10. (1780) 99 Eng. Rep. 326.

11. (1782) 99 Eng. Rep. 548.

12. (1817) 171 Eng. Rep. 345.

13. See *Shashi Mohan Paul Chowdhry v. N.K.poddar*, (1874) 5 Cal.801; *M.Hansraj & Sons v.State of MP*; AIR 1965 SC 470.

In India, the jurisprudence of doctrine of *uberrimae fidei* has developed from the English doctrine laid down in *Carter v. Boehm*¹⁴. It has given a legal recognition under sections 19, 20 and 21 of the Indian Marine Insurance Act, 1963, which is a verbatim replica of English Marine Insurance Act 1906. It is interesting to note that throughout his judgments on the issue of non-disclosure, Lord Mansfield avoided the terminology - "utmost good faith". Yet section 19 of Marine Insurance Act, 1963 states that a contract of marine insurance is a contract based upon the utmost good faith, and if the utmost good faith be not observed by either party, the contract may be avoided by the other party. Therefore, it can be said that section 19 does not precisely mirror the language of Lord Mansfield's formulation. The provision must, therefore, be seen as synthesizing not Lord Mansfield's views, but rather the dominant view emerging from the case law decided during the latter half of the nineteenth century in England to the effect that the underwriter is a passive recipient of information supplied by the insured when presenting the risk.

III. APPLICATION OF THE DOCTRINE OF *UBERRIMAE FIDEI* IN CONTRACT OF INSURANCE

Many cases have been decided both in India and England subsequent to *Carter v. Boehm*¹⁵, which simply expanded the approach Lord Mansfield with slight or no modification. Most of the Indian cases are based on the principle of English cases. One of the aspects of the doctrine is that the parties do not stand on equal footing with regard to economic aspect of the obligation created by the contract as well as knowledge about the subject matter of insurance. Scrutton LJ observed:

As the underwriter knows nothing and the man who comes to him knows everything it is the duty of the assured, the man who desires to have the policy, to make a full disclosure to the underwriter without being asked of all material circumstances, because the underwriter know nothing and the assured knows everything. This is expressed by saying that it is a contract of utmost good faith –*uberrima fides*¹⁶.

Further, in *Bates v. Hewitt*,¹⁷ the court paid little heed to Lord Mansfield's views expressed over a century earlier. Lord Cockburn, CJ. stated that a proposer of insurance is bound to communicate to the insurer all matters which will enable him to determine the extent of the risk against which he undertakes to guarantee the assured. It is worthy to note that apart from the principle of "unequal footings" another school of thought emerged which believed that the duty of disclosure is merely a duty of honesty from the insured. Thus, the insurance contract may be avoided by either of the parties on the grounds of non disclosure even without fraudulent intent.¹⁸

Another significant development of this doctrine is the disclosure of only 'material fact'. It has been established that the duty of disclosure extends only to material facts. So, a duty is cast on the insured to disclose every material fact which he knows or ought to know. This question does not depend upon what the particular insured thinks nor even what the insurers think but whether a prudent and experienced insurer would be influenced in his

14. Supra note 2.

15. Supra note 2.

16. *Rozzanes v. Bowen* (1928) 32 LL LR 98, 102(CA).

17. (1867) L.R. 2 QB 595.

18. *Life Association of Scotland v. Foster*(1873) 11 macquween Scottish Appeals, 351.

judgment if he knew it. This is called the “prudent insurer test”, propounded by Blackburn, J. in *Ionides v. Pender*¹⁹. The learned judge emphasized:

All should be disclosed which would affect the judgment of a rational underwriter governing himself by the principles and calculations on which underwriters do in practice act.

Blackburn J.’s formulation is encapsulated in sections 17 and 18(1) and (2) of the Marine Insurance Act, 1906 and sections 20(1) and 20(2) of the Indian Marine insurance Act, 1963. Section 20(1) states: subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which, is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known to him. If the assured fails to make such disclosure, the insurer may avoid the contract. Similarly, Section 20(2) states that every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

Again, in *Joel v. Law Union and Crown Insurance Company*²⁰, Fletcher Moulton L.J. expounded the “reasonable man test”. The judge explained that the insured should do it to the extent that a *reasonable man* would have done it; and, if he has fallen short of that by reason of his *bona fide* considering the matter not material, whereas the jury, as representing what a reasonable man would think, hold that it was material, he has failed in his duty, and the policy is avoided.²¹ Fletcher Moulton L.J.’s formulation is encapsulated in section 20(1) of the Indian Marine insurance Act, 1963, which states that “...and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known to him.” Thus it can be said that the insurer in order to avoid a claim must establish that the fact which was not disclosed was a material fact and it was within the knowledge of the insured as a reasonable man. Therefore, the final judgment does not lie with either parties but with the court. In *LIC v Shakuntala Bai*²² the assured did not disclose that he had suffered from indigestion for few days; the court held that it was not a material fact and non-disclosure did not affect the validity of the policy. Similarly, in *March Carbarett Clum v London Assurance Co.*,²³ non disclosure of a conviction in a criminal case of the assured was held to be a ground for invalidating the policy. However in *Smt. Daya Rani and Others v. LIC*, the National Consumer Redressal Commission held that if the deceased insured on the fateful day was innocent then merely non disclosure of the fact related to past conviction is a not a material fact and policy could not be avoided.

Further, the disclosure must be of all the material facts, not of that only which the insured realize to be material. The insured is thus under a duty to disclose material facts, irrespective of whether he or she appreciated their materiality. In other words it can be said that the ignorance of a fact is excused but the ignorance of materiality of a fact is not excused. Meaning there by, the insured cannot be relieved of a burden by proving that though he knew about the fact but he had not considered it to be material.²⁴

19. (1874) LR QB 531; see also *Pan Atlantic Insurance Co. v. Fin Top Insurance Co.* (1995) 1 AC 701, *St. Paul fire and Marine Insurance Co.(UK) v McDonnell Constructions* (1995) 2 Lloyd’s Rep. 116.

20. (1908) 2 KB 263.

21. See also *Horne v. Poland* (1922) 2 KB 364; *Becker v. Marshall*, (1922) 12 Ll. L. Rep. 413 CA.

22. AIR 1975 AP 68.

23. (1975) 1 Lloyd Report 189; see also *Woolcott v Sam Alliance and London Insurance Co.*, (1978) 1 WLR 493.

24. *Lottery Management Ltd. v Dumas*, 2002 Lloyd Report IR 237.

It is pertinent to note that the duty of disclosure extends to the authorized agents of the insured. The agent must disclose to the insurer- (a) every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him; and (b) every material circumstance which the assured is bound to disclose, unless it comes to his knowledge too late to communicate it to the agent.²⁵

IV. DOCTRINE OF *UBERRIMA FIDES*: NEED FOR A FRESH LOOK

Though the English and Indian courts have followed the doctrine of *uberrimae fidei* while disposing cases under the English Marine Insurance Act, 1906 and the Indian Marine Insurance Act, 1963, they have not been timid in expressing their unease over the rigors of the duty to disclosure. This raised a question about the retention of an eighteenth century rule of law which it is said, is unduly harass on the assured and unnecessary favorable to the insurer under current insurance conditions. It is relevant to note that the majority of American state jurisdictions have refused to apply the strict English rule of disclosure.²⁶ It is possible that an assured may display both care and complete good faith in completing a proposal form, believing he has thus purchased security, and yet find much latter that this protection in fact worthless because he omitted to mention a fact which an experienced insurer must consider material to the risk. Equipped with this protection, the insurer avoids insurance policy on petty and flimsy grounds. The question therefore, arises whether the insurer needs such a high degree of protection. In *Rohini Nandan v Ocean Accident and Gurantee Corporation*²⁷, the plaintiff insured against fire and burglary in respect of furniture, house hold goods personal effects and jewelry on his house in the first floor of the building from 1 July 1954. On 5th August 1974 there was a burglary and he claimed indemnity. The insurer refused the claim on the ground that he suppressed the fact that there was a burglary in the ground floor of the premises in 1949 in his brother's house. The court held that the earlier burglary in the ground floor of the premises was not a material fact and it has no bearing on the risk undertaken by the insurer.

Looking from another angle when a person insures he thinks that he has purchased a security. At the death of the insured when a claim is made by the representative of the deceased insured, the insurer avoids the policy on small and flimsy ground as in case of *Shakuntala Bai case*²⁸ and *Smt. Daya Rani case*²⁹. As discussed earlier in *LIC v Shakuntala Bai*³⁰ the assured did not disclose that he had suffered from indigestion for few days; the insurer pleaded to avoid the policy on the ground of non-disclosure of indigestion problem.

25. Section 21 of the Indian Marine insurance Act, 1963: Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to him; and every material circumstance which the assured is bound to disclose, unless it comes to his knowledge too late to communicate it to the agent.

26. For example, in *Anglo-African Merchants Ltd. v. Bayley* (1970) 1 QB 311, Megaw J. queried whether the insured should be bound to disclose that which he does not appreciate to be material; see also *Lambert v. Co-operative Insurance Society, Ltd* (1975) 1 Lloyd Report 485.

27. AIR 1960 Cal 696.

28. AIR 1975 AP 68.

29. Supra note 6.

30. Supra note 28.

The court held that it was not a material fact and non-disclosure did not affect the validity of the policy. In such situations how many families in India will opt to wage a war against mighty and experienced insurer who is already equipped with a panel of lawyers.

It is strange to note that the Patna High Court in *Balkrishna v. New Indian Assurance Co.*³¹, where an untrue statement is made by the insured, the insurer may avoid the contract of insurance irrespective of the fact whether the untrue statement is material or not for the insurance. This shows the harshness of this doctrine. The Court observed:

If any of the statements in the proposal form or the declaration form accompanying the proposal form made by the assured and which have been made the basis of the contract are found to be untrue, the contract of insurance would be void and unenforceable in law, irrespective of the question whether the statement, concerned is of a material nature or not.

Needless to say, when Lord Mansfield propounded the doctrine it was very much relevant but today the insurer's position has altered. He requires the assured to warrant the accuracy of his answers to a long list of detailed questions; he has an agent who inspects the property risks and medical representatives who inspects life proposed for life insurance; he can make enquiries to the assured through the instantaneous mode of communications like mobile and e-mail etc. and he has scientific data and calculating methods to assist him in evaluating the risk. In short under the current insurance condition he is in a position to know as much as the assured, and he has developed new legal weapon to protect himself. Hence, the age old doctrine of *uberrima fides* needs to be reviewed. It has to be remembered that there are two parallel regimes governing insurance contracts: one relating to commercial insurance and one relating to consumer insurance. There is no harm if the application of this rigorous doctrine is limited to commercial insurance only but not to consumer insurance.

Further, nowadays, in order to make the formation of insurance contract simpler they are concluded with a minimum of formality and so, subject only to the principle of good faith, insurers should take individual members of the relevant market as they find them. Indeed, in the current market place marketing methods are adopted which increase the risk of non-disclosure, and where intermediaries are not involved, there is no one to bring to the insured's attention the breadth of the disclosure obligation. Again, for reasons of cost and competition, proposal forms are often kept to a minimum, especially so where direct marketing of insurance products is used whereby policies are purchased by means of computer-based communications systems. The contract of insurance is a standard form of contract, where only one party (insurer) prescribes the terms and conditions. The insured has two options either to abide or to leave. In this way the insurer is already on a better footing even before the disclosure. Taken in the round, these developments increase the risk of innocent non-disclosure. A modern regime should therefore take account not only of the various subjective factors affecting insured's, but also of the diverse methods enlisted by insurers to transact with their prospective customers.

It is a well established principle of contract and torts law is that 'when there is a right there is a remedy' (*ubi jus ibi remedium*). The insurer has right to be informed about the material facts and the corresponding duty falls on the assured. The remedy available to the insurer for non-disclosure must be co-extensive with his right to be informed about the material facts. Judges of the opinion that the insurer should not be entitled to any redress which exceeds the loss which it has in fact suffered.

31. AIR 1959 Pat 102.

V. RELAXATION OF THE DOCTRINE OF *UBERRIMA FIDEI*

Efforts are made in England as well as India to mitigate the harshness of the common law doctrine of *uberrima fidei*. In 1978, the English Law Commission recommended a substantially revised duty of disclosure for both consumers and businesses, whereby an insured would be required to disclose those facts that a reasonable person in the position of the applicant would disclose. In India also efforts are being made to dilute the doctrine through legislative reform. Section 20(2) of the Marine insurance Act, 1963 says that every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk. Further, section 20(3) enumerates some circumstances which need not to be disclosed in absence of enquiry namely: - (a) any circumstance which diminishes the risk; (b) any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business as such, ought to know; (c) any circumstance as to which information is waived by the insurer; and (d) any circumstance which it is superfluous to disclose by reason of any express or implied warranty.

In 1997, the National Consumer Council of England recommended that the consumer-insured's duty of disclosure should be restricted to facts within his or her knowledge which either he or she knows to be relevant to the insurer's decision or which a reasonable person in the circumstances could be expected to know to be relevant.³² In India also this has been given a legal recognition under section 20(1) of the Marine insurance Act, 1963, which says that doctrine applies only to those material circumstances which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known to him. If the assured fails to make such disclosure, the insurer may avoid the contract.

Another safeguard given to the insured is that, in contract of insurance is that the duty applies only to negotiation preceding the formation of the contract.³³ When a relevant fact comes to knowledge of either party after the completion of the contract, there is no duty to disclose and such non disclosure of such facts does not again offend the rule of good faith. For example, the assured finds on a subsequent medical checkup after the policy is issued, that he is suffered from a serious complaint, the policy in such circumstance is not affected due to the non disclosure of a fact though material as it came to his knowledge after the policy is issued. In *Ratanlal v Metropolitan Insurance Co.*³⁴, a proposal was made on 23rd January 1946 along with the first premium. It was accepted on 26th March and communicated to the insured on 27th March and the risk was covered from 23rd March. On 27th evening the insured complained of exhaustion to his doctor which was simply ordinary disorder and the doctor came on 28th March but did not prescribe any medicine. Insured died few weeks later on 19th April. The insurer repudiated the liability on the ground of non-disclosure. The court rejected the contention on the ground that the complaint was subsequent to acceptance. To conclude, it can be said that the duty of disclosure is not a continuing duty; it must be

32. John Birds, *Insurance Law Reform: the Consumer Case for a Review of Insurance Law*, National Consumer Council, 1997.

33. Section 20(1): "...the assured must disclose to the insurer, before the contract is concluded, every material circumstance...".

34. AIR 1959 Pat. 413.

observed throughout the negotiation and continuous only until they are completed and the contract is concluded.³⁵

The rule of utmost good faith has been relaxed to some extent by the Insurance Act, 1938 and now with reference to life insurance contract on the expiry of two years if the premium has been paid regularly, the insurance policy cannot be set aside on the ground that a fact has not been disclosed unless there is a deliberate concealment, amounting to fraud on the insurance company. Section 45 of the Act states that: No policy of life insurance effected before the commencement of this Act shall after the expiry of two years from the date of commencement of this Act and no policy of life insurance effected after the coming into force of this Act shall, after the expiry of two years from the date on which it was effected be called in question by an insurer on the ground that statement made in the proposal or in any report of a medical officer, or referee, or friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false, unless the insurer shows that such statement was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made by the policy holder and that the policy holder knew at the time of making it that the statement was false or that it suppressed facts which it was material to disclose. Provided that nothing in this section shall prevent the insurer from calling for proof of age at any time if he is entitled to do so, and no policy shall be deemed to be called in question merely because the terms of the policy are adjusted on subsequent proof that the age of the life insured was incorrectly stated in the proposal. For example, in *East and West Insurance Co. v Venkayya*³⁶, one Venkayya had a policy of insurance. He failed to pay the premium and the policy had lapsed. He applied for the renewal of the policy. In the application for renewal, one of the questions was whether between the date of the lapse of the policy and the application for renewal of the policy he suffered from any illness. The insured answer "No". The renewal was granted, but subsequently the company came to know that during that period the insured underwent treatment for some skin problem. It was held that under the rule of *uberrima fides*, the insurance company was not liable under the contract.³⁷ Again, in *Srinivas Pillai v LIC*³⁸, the Madras High Court observed:

"Contracts of insurance are based on the rocky foundation of utmost good faith. Such good faith is not a matter of art but has to be really and sincerely appreciated by the insured who propose their lives for insurance with the Corporation. It is because of the heavy social responsibility involved."³⁹

35. See also *Life Insurance Corporation of India vs Bibi Padmawati*, 1967 37 CompCas 667 SC.

36. AIR 1977 Mad 381.

37. See also *Glickman v Lancashire and General Assurance Co. Ltd.*, (1925) 2 KB 593.

38. *Supra* note 36.

39. The facts of this case are: The plaintiff and his wife late Ranganayagi took out a joint life endowment assurance policy for Rs. 25,000 and paid the premium for the first quarter and obtained a receipt on 31-12-1959. Ranganayagi however died a few days later, to wit, on 17-1-1960. On information about the death, the Corporation made certain investigations and found that the policy has to be repudiated since certain material facts which the insured have to furnish were not given and certain other representations which were peculiarly within the personal knowledge of the insured were incorrectly stated. The Corporation would also take up the position that Ranganayagi who was suffering from tuberculosis suppressed the fact and that she deliberately gave the information that she had delivered a child on 18-5-1959, when on investigation it was found that the date of birth was 31-8-1959. As under the accredited policy governing the Corporation no policy of a woman would be accepted if she gave birth to a child within six months prior to the date of proposal and also for the reason that the insured were not fair in giving the requisite and material particulars.

In *A.I.G. Insurance Co v. S.P. Maheshwari*⁴⁰, a Division Bench of Madras High Court quoting *Corpus Juris Secundum* adopted the following edict therein:

An intentional or willful concealment or suppression of a material fact constitutes a fraud which will avoid the policy.

Again, on a question whether the doctrine of *caveat emptor* will apply to contract of insurance or in other words whether it is the duty of the parties to a contract of insurance to take care for their own interest and other party is not obliged to speak the truth, the Madras High Court in *L. I. C. of India v. Parvathavardhini Ammal*⁴¹, ruled out the application of *caveat emptor* to *uberrima fides* contracts and said that non-disclosure of material facts would go to the root-it being regarded as fatal to the validity of the contract.

Judiciary both at England and in India have also contributed in the relaxation of the doctrine. In *Atlantic Insurance Co v Pine Top Insurance Co.*⁴², Lord Mustill stated that those facts are to be disclosed which effect the thought processes of the insurer in weighing up the risk, quite different from words which might have been used but were not, such as 'influencing the insurer to take the risk'. The position remains that a circumstance is material and must be disclosed even though the prudent insurer, had he known of the fact would have insured the risk on the same terms. It is further necessary that a fraud or misrepresentation must be the cause of the consent, in the sense that but for misrepresentation or fraud, the consent would not have been given.⁴³ This has been given a legal recognition under the explanation to section 19 of the India Contract Act. 1872.⁴⁴ In this regard, the House of Lords unanimously held that in *Pan Atlantic Insurance Company v. Pine Top Limited*⁴⁵ that the non-disclosure of a material fact, as with misrepresentation, must induce the particular insurer to enter into the contract. Further, in *Assicurazioni Generali SpA v. Arab Ins. Group*⁴⁶, the Court of Appeal took the view that although the non-disclosed (or misrepresented) fact need not be the sole inducement operating on the insurer, it must cause the actual insurer to enter into the contract. Significantly, the majority of the court followed earlier decisions to the effect that the insurer must give evidence as to his state of mind. This, therefore, gives the insured the opportunity to cross-examine the insurer with a view to demonstrating that he was not induced by the non-disclosed fact but would have entered into the contract on the same terms had there had been full disclosure of all material facts. Clarke L.J. concluded that in order to avoid a contract of insurance it has to be proved that *firstly*, the insurer was induced to enter into the contract by a material non-disclosure or by a material misrepresentation by the insured; *secondly*, there is no presumption of law that an insurer is induced to enter in the contract by a material nondisclosure or misrepresentation; *thirdly*, the non-disclosure or misrepresentation was an effective cause of his entering into the contract on the terms on which he did. He must therefore show at least that the non-disclosed or misrepresented fact was an effective cause, although not necessarily the only cause, of their agreement to underwrite the risk.

40. AIR 1960 Mad 484.

41. AIR 1965 Mad 357.

42. [1995] AC 501.

43. See *Hims Enterprises v. Ishak Bin Subari*, (1992) 1 CLJ 132 (HC).

44. Section 19, Explanation: A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practiced, or to whom such misrepresentation was made, does not render a contract voidable.

45. [1995] 1 AC 501.

46. (BSC); CA 13 Nov. 2002.

Further, the duty of disclosure deemed to have been casted on the insured, when the insured specifically answered a question. Generally the negotiation for insurance as contract commence with a printed proposal form supplied by the insurer to the insured. The proposal form contains questions seeking answers from the insured. Whether the question asked there in logically relevant or not, it will be deemed to be material fact so either a false answer or a dubious answer to such question may amount to breach of duty of disclosure. As in the case of *Anglo Africa Merchants Ltd v Bayley*⁴⁷, the subject matter insured was the army surplus leather jerkins not used for 20 years. They were described as 'New Men's Cloth in Bales for Export'. Megaw.J held that since the underwriters were not told that the goods were government surplus and were 20 years old amount to non disclosure. If the half truth is such that it does not invoke an enquiry, the disclosure of it is no disclosure.

VI. EFFECT OF NONDISCLOSURE

As we have seen that a contract of insurance is a contract of utmost good faith. Therefore, the insurer believes what is stated by the insured in the proposal form are true as he is on a higher footing to know the truth. If the insured fails to disclose all material fact the insurer may avoid the contract. In this case the contract of insurance may be said to be induced by either misrepresentation or fraud. Section 18 of the Indian Contract Act defines "Misrepresentation" which means and includes - (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; (2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or anyone claiming under him; by misleading another to his prejudice, or to the prejudice of any one claiming under him; (3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is subject of the agreement. Similarly, fraud is defined under section 17, which means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agents, with intent to deceive another party thereto his agent, or to induce him to enter into the contract; (1) the suggestion as a fact, of that which is not true, by one who does not believe it to be true; (2) the active concealment of a fact by one having knowledge or belief of the fact; (3) a promise made without any intention of performing it; (4) any other act fitted to deceive; (5) any such act or omission as the law specially declares to be fraudulent. The explanation attached to section 17 of the Indian Contract Act, 1872 says that Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech. So when the assured knows a material fact or though he does not know ought to know this and suppress it knowing that it is material to the contract it amounts to fraud; but where he does not know about the materiality of a fact, it may have the same effect as that of misrepresentation. Therefore, merely non disclosure does not amount to fraud.

The consequence is that in case of fraud the party defrauded can not only avoid the contract but can also claim damages. In case of all non disclosures the insurer can avoid the contract and whether he would be entitled to receive damages is different question depends upon the knowledge of materiality of a fact. For example in *George P. Varghese V g Daniel*⁴⁸, where a person got his motor vehicle insured in the evening of the day on the morning of

47. (1969) 1 Loyod's eport 268.

which the vehicle had met an accident. The policy was held to be not enforceable. Similarly, in *Lambert v. Cooperative Insurance Society*⁴⁹, a lady renewed a policy of insurance on the jewelry owned partly by her and partly by her husband who had been convicted twice for two crimes involving dishonesty in the year before. She did not disclose the conviction of her husband while seeking renewal. It was held that she had a duty to disclose this though her husband was not an insured. A contract of insurance, the consent to which is caused by fraud or misrepresentation is voidable at the option of the party whose consent is so caused⁵⁰. Section 19 further goes on to provide that a party to a contract whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true. Section 64 deals with the consequences of rescission of voidable contract which says -When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit there under from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received. Further a person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfillment of the contract.⁵¹ Meaning thereby, any premium paid is returnable to the insured except in cases of fraud (unless the policy otherwise provides).

Though, in India the conditions governing the exercise of the avoidance remedy could not attract considerable judicial attention but the judiciary of England had shown its concern though of late. In *Manifest Shipping Co. Ltd. v. Uni-Polaris Shipping Co. Ltd*⁵², Lord Hobhouse said:

“The courts have consistently set their face against allowing the assured duty of good faith to be used by the insurer as an instrument for enabling the insurer himself to act in bad faith. An inevitable consequence in the post-contract situation is that the remedy of avoidance of the contract is in practical terms wholly one-sided. It is a remedy of value to the insurer and, if the defendants’ argument is accepted, of disproportionate benefit to him; it enables him to escape retrospectively the liability to indemnify which he has previously and (on this hypothesis) validly undertaken.”⁵³ In *Drake Insurance plc. v. Provident Insurance plc*⁵⁴, Rix L.J. advocated to limit the insurer’s right to avoid contract of insurance on unfair grounds.

48. AIR 1998 Ker 120; see also *LIC of India V Ajit Gangadhar Shanbagh*, AIR 1997 Kant 157, it was held that misrepresentation and concealment of material fact by the insured, insurer allowed to repudiate the policy; *LIC of India v. Narmadaa Agarwalla.*, AIR 1993 Ori. 103, it was held that the insurer would have to prove the fact of misrepresentation which he could not do in the case.

49. (1975) 1 Lloyd’s Repot 485; see also *March Cabarets Club v. London Assock* (1975) 1 Lloyd’s Repot 169, where the non disclosure of the conviction of one of the directors of the insured company of handling stolen property was held to be a non disclosure and would entitle the insurer to repudiate the policy.

50. Section 19- When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. A party to contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put on the position in which he would have been if the representations made had been true.

51. Section 75.

52. 1 All ER 743 [2001].

53. Against this, a rather more rigid view was taken towards the exercise of the remedy in *Brotherton v. Aseguradora Colseguros, SA* (No. 2).197.

54. [2003] EWCA Civ 1834.

VII. CONCLUSION

It is undeniable that Lord Mansfield's defense of the principle of non disclosure was apt for the conditions prevailing in the mid eighteenth century. Since then much water has flown in river Ganges. Under the current insurance condition discussed above the insurer is in a position to know as much as the assured, and he has developed new legal weapon to protect himself. Therefore, the eighteen century doctrine today proved to be undue and harass to the assured and unnecessary favoured to the insurer. Hence the age old doctrine of *uberrima fides* needs to be reviewed. It is humbly suggested that the rigid principle of Mansfield's *uberrima fides* doctrine should be applied to commercial insurance but not to consumer insurance. Further, the nature and extent of the insurer's redress should depend on the nature and extent of the loss which he has suffered as a result of the insured's conduct and that it should no longer be entitled to avoid a contract, and a heavy claim under that contract, merely because it has suffered a small loss as a result of non-disclosure. Insurance is an instrument of social and economic security and the purpose of insurance cannot be served unless and until the rigorous doctrine of *uberrima fides* is diluted. For this there is an urgent need to have a new look at the age old doctrine.



POLICE REFORM IN INDIA: IF ACHIVED?

J.P. Rai*

Abstract

The police in democratic society are required to maintain order and to do so under the rule of law. As functionaries charged with maintaining order, they are part of the bureaucracy. The ideology of democratic bureaucracy emphasizes initiative rather than disciplined adherence to rule and regulations. By contrast, the rule of law emphasizes the rights of individual citizens and constraints upon the initiative of legal official. This tension between the operational consequences of ideas of order, efficiency and initiative, on the one hand, and legality, on the other, constitutes the principle problem of police as a democratic legal organization.¹

Key Words: *Rule of Law, Democracy, Police Reform, Supreme Court of India*

I. INTRODUCTION

In order to develop one's personality which is a pre-requisite for the development of a country, a free, a peaceful and orderly atmosphere is required. The police are the main agency of the government which is responsible for providing such an atmosphere. Due to defects in training, organization and inadequate supervision, the police force is far from efficient functioning. It is generally regarded as corrupt and oppressive, and it has utterly failed to secure the confidence and cordial cooperation of the people.²

Police are the principal violators of the law and they get away with impunity. Some sections of the police are in league with anti-social elements. Consequently, they indulge in selective enforcement of the law. Police exhibit rude behavior, abusive language and contempt towards courts and human rights; they indulge in all forms of corruption. Depending on the socio-cultural status, economic power and political influences of people who approach them, police adopt differential attitudes, violating equality and human dignity. Given the dismal record of prevention and successful investigation of crimes, police lack accountability in protection of life and property. The police are insensitive towards victims of violent crimes.

It is essential therefore, that the police have the resources, the capability and the motivation to deal with these challenges. Unfortunately, the state police are in

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1. Jerome H. Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society* (New York: Wiley, 1966), cited in Don C. Gibbons, *Society, Crime, and Criminal Careers: An Introduction to Criminology*, New Jersey: Prentice-Hall, Inc. (1968) p. 50

2. A.H.L. Fraser, Chairman of the Second Police Commission (1902), available at <http://insightsonindia.com/2011/08/05/police-reforms-in-india-the-story-so-far/>, visited on 22 March, 2014.

shambles. They are saddled with a colonial structure³ and are completely under the thumb of the executive.

In this paper, an attempt has been made to evaluate the functioning of the police in the rapid changing society, to highlight the issues and challenges responsible for improper functioning of the police force, problems faced by them, to analyze the efforts made for reforming the police till date, consequences thereof and suggestions to improve the situation.

II. POLICE REFORM: INTERNATIONAL ASPECT

The first police force comparable to the present-day police was established in 1667 under King Louis XIV in France, although modern police usually trace their origins to the 1800 establishment of the Marine Police in London, the Glasgow Police, and the Napoleonic police of Paris.⁴ At this point, it would be pertinent to analyze existing system of policing in some leading countries of the world.

In **United Kingdom**, the Independent Police Complaints Commission (IPCC) has jurisdiction over 43 local police forces in England and Wales,⁵ enjoys institutional independence from other government departments and is separate from the police. Its decisions are binding, to be overturned only by a court. It also guarantees occupational independence.

In **United States of America** law enforcement is decentralized. Federal authorities deal with violations of federal law that fall within their specific jurisdictions. Most of the U.S. States have police at all levels - municipal, county and state level.⁶ Policing in U.S. may be divided into four categories⁷ as independent monitors, independent investigators, civilian review boards, and compulsory monitoring and reform headed by the federal government.⁸

In **Canada**, police matters are the responsibility of individual provinces. In almost all Canadian provinces, the police have internal investigations departments. There are police service boards that serve as a buffer between the political establishment and the Chief of Police and are appointed jointly by the provincial government and the relevant municipal locality.⁹

Australia does not have a centralized police system. Due to its federalist structure, police are a matter for the states and territories. In addition to internal accountability mechanisms, various states established external mechanism to oversee police action.¹⁰

3. Indian police are governed by archaic and colonial police laws of 1861.

4. A.C. German, F.D. to Day and R.R.J.Gallati, *Introduction to Law Enforcement and Criminal Justice*(Springfield, IL: Charles C. Thomas, 1978) *An Introduction to American Policing*. Chapman and Hooper: McGrawhill

5. See Police Reform Act 2002 (Ch. 30). The IPCC can have jurisdiction over other police forces by contracting with them. For a survey of police reforms over the past 40 years, see Graham Smith, *A Most Enduring Problem: Police Complaints Reform in England and Wales*, 35 *Jnl. Soc. Pol.* 121-141 (2005).

6. *Supra* Note 5.

7. Merrick Bobb, *Civilian Oversight of the Police in the United States*, Address to the Police Assessment Resource Center 3 (2003). Available at [http://www.parc.info/client_files/Articles/1%20-%20Civilian%20Oversight%20of%20the%20Police%20\(Bobb%202003\).pdf](http://www.parc.info/client_files/Articles/1%20-%20Civilian%20Oversight%20of%20the%20Police%20(Bobb%202003).pdf), visited on 10 March,14

8. *Ibid*, at p. 11

9. *Ibid*, at p. 98, 107

10. Colleen Lewis and Tim Prenzler, *Civilian Oversight of Police in Australia, Trends & Issues in Crime and Criminal Justice*(1999).

China is model of Singular Coordinated Centralized police force. The Ministry of Public Security (MPS) is a functional organization under the State Council in charge of public security work nationwide. Dispatched police stations are directly subordinate to their superior public security bureaus and sub-bureaus in counties and banners.¹¹

III. POLICE SYSTEM IN INDIA: HISTORICAL DEVELOPMENT

The existing police system¹² in India appears to be a unique and peculiar amalgam of various features of Ancient, Mughal and British police and policing systems. The present police system structurally and functionally owes its existence to the various Acts and Enactments promulgated by the colonial rulers. The Indian Police Act, 1861 is the basic foundation of the present day Indian Police.¹³

In Vedic India¹⁴, the king had the police force mainly for defence and for the collecting of taxes. *Manu Samhita* throws light on law enforcement in the contemporary society. The organization of the police was one of the prime factors of administration in ancient India because it was the duty of the state to maintain peace, law and order and protect all by deterring evil minded person from commission of crime.

In Ancient India, the smallest administrative police unit was the village and village councils were responsible to prevent and detect crime under the supervision of the headman. Kautilya mentions eighteen Tirthas in the Arthshastra. They were officers of the state. The police system during Asoka's regime underwent a change after the Kalinga conquest. The Mauryan system of administration which was previously based on rigorous police and espionage organization was now tempered and moderated by the Buddhist philosophy, piety and non violence. Asoka tried to develop both spiritual and extra national outlook in his subjects.

In Medieval India, under the Mughals, all police duties in the cities and towns were entrusted to the 'Kotwal'¹⁵. He was essentially an urban officer, being chief of the city police, nevertheless he had not only to maintain peace and order and decency in the city but he was also in charge of the entire town administration. Similarly, the Marathas also adopted the Muslim practice of maintaining the urban police by the State. During Akbar's period, the

11. Supra Note 5

12. The term "Police" broadly connotes the purposeful maintenance of public order and protection of persons and property, from the hazards of public accidents and the commission of unlawful acts. It specially applies to the body of civil officer's charges with maintaining public order and safety and enforcing the law including the prevention and detection of crime. It is the principal law enforcement agency in the state. In European parlance, the word 'police' means 'A force for the city'. In ancient India one of the titles for the chief police officer was '*Nagarpal*' or the 'protector of the city'. See Chatterji, S.K., 'The Police in Ancient India' *Indian Police Journal*, Delhi, Centenary Issue, 1961, p.11

13. Available at <http://bprd.nic.in/writereaddata/linkimages/1645442204-Volume%201.pdf>, visited on 26 April, 2014. It is, therefore, correctly said that the present day Indian Police System, in the contemporary contexts, has become old, archaic and out-dated. There is an urgent need to replace this system.

14. Aparna Srivastava, *Role of Police in a Changing Society*, New Delhi, APH Publishing Corporation, 1999 p.4

15. Sarkar, Jagdish Narayan, '*Police System in Mediaeval India in Theory and Practice*', *Indian Police Journal*, Delhi, 1961, p. 22-28

head of the provincial government was called a Subedar or Nazim, who had a number of Fauzdars under him to administer the sub-divisions.¹⁶

The police force in India, during the British period helps in explaining what they intended its role to be. Organizing a separate police force under a District Magistrate in Bengal was initiated by Lord Cornwallis in 1792 when he introduced a uniform pattern for the first time and abolished the Zamindari and Thanedari systems.¹⁷ In 1843, Sir Charles Napier realized that only under a recognized organization, the police could function properly and produce desired results and he took, as his model, the Royal Irish Constabulary.¹⁸

IV. POLICE REFORM IN INDIA : ASPIRATIONS

The Police Act of 1861¹⁹ was the first attempt to introduce a law enforcing agency with a uniform structure in the greater part of India and is functional in independent India. This Act aimed to introduce various administrative changes²⁰, organizational structure²¹, provisions with regard to the preventive of crime²², role of magistracy²³, relations between

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16. The *Mirar-i-Ahmadi* tells us about a network of *Thanas* or Outposts within a *Fauzdari*. The *Thanedars* were appointed by the *Fauzdar* and he had to urge them not to disposses people from their rightful property and not to levy forbidden *abwabs* (cess)
 17. Kasture, G.K. 'Thoughts on Police Reform', National Police Academy, Mt. Abu, November, 1966, P. 2
 18. Napier's system was based on two principals: firstly, the police must be completely separated from the military and they must be an independent body to assist the Collectors in discharging their responsibilities for law and order but under their own officers. There was an Inspector General of Police for the entire territory, with Superintendents in each district. The Superintendents was responsible to the Inspector- General as well as Collector. This experiment was successful and its broad framework was used to recognize police administration. The main principals of Napier's model were not altered even by the Police Commission of 1860, which designed the present police force for India.
 19. Available at <http://bprd.nic.in/writereaddata/linkimages/1645442204-Volume%201.pdf>, visited on 26 April, 2014
 20. This Act drew a broad line of distinction between the military and civil police and between their functions and expenditure charged with protective and repressive duties and responsibilities, the one was the Military Armed Force under the orders of a military commander while the other a civil executive department.
 21. It was perhaps for the first time that a properly constituted organizational structure of a concreted police force came into existence. It was decided that the police under each provincial government was to constitute one force under the overall control of an officer to be known as Inspector General of Police. Under him were posted District Superintendence, one for every district, for a large district where the duties developing upon the district superintendent were so heavy as to demand the services of a second officer, an assistant District Superintendent was to be appointed. The subordinate police force under the control of a district superintendent consisted of Inspectors, Head Constables, Sergeants and Constable in that order of organizational hierarchy.
 22. The Police Act was passed to take effective measures for the prevention of crime because maintenance of law and order and preservation of life and property are the primary duties of the police. These duties inevitably involve prevention, detection and suppression of crime in society.
 23. It was first time with the passage of the police Act 1861 a distinction between the judicial and police functions was made in general term. The Act provides that the administration of police throughout the local jurisdiction of the Magistrate of the district shall under the general control and direction of such magistrate, be vested in a district superintendent and such Assistant District Superintendent as the provincial government shall consider necessary. Normally, the police could not arrest any person without a warrant issued by the magistrate. (Sec. 4, Police Act)

district magistrate and superintendent of police²⁴ and recruitment and training²⁵.

Since independence there has been the tremendous change in the role and functions of police. Due to rapid industrialization, urbanization and the processes of democratization the functions of police have fundamentally changed.²⁶ Along with the functions, there have been also the changes in the behavioral pattern of police force.²⁷ But despite behavioral guidelines to police force, many a times police force has come under a severe criticism not only from the public but also from the courts in the country.

V. POLICE IN INDIA : REALITIES

Police play an important role in the maintenance of our democratic society. This role compels police officers to maintain high ethical standards of conduct. Police must protect the rights of citizens, yet are charged with restricting the rights of suspects in the furtherance of society's good. Police routinely detain, search, arrest citizens, and lawfully use physical force (including deadly force) when situations dictate. Additionally, the testimony of an officer weighs heavily in the deliberations made by jurors when determining the guilt, or innocence of a defendant in a court of law.²⁸

In spite of great aspirations, the problem of police misconduct has existed since from the beginning of law enforcement in India. Reviewing the history of police misconduct in our country affords us the opportunity to comprehend how deeply the problem is rooted. Cases of police misconduct are so pervasive and well documented that they have become the norm, rather than the exception.²⁹

Examples of police misconduct are manifold. Torture and custodial violence is a routine strategy of police control.³⁰ It has become an acceptable operational practice. Thousands of

24. The first over attempt of defining the relationship between the District Magistrate and Superintendent of Police was made.

25. Proper recruitment and training of police officers provided a sound base to the organizational structure. No administration could become stable and efficient unless its organization consisted of properly selected and well qualified officers. Police administration could not be an exception to this fundamental principle.

26. In 1981 while addressing the IV International Course of Higher Specialization of Police Officers at Messina in Italy, Mr. John Alderson, an ex top ranking British Officer focused on the sweeping changes in the role and functions of police force in worldwide. In the changed scenario, role of police are to contribute towards liberty, equality and fraternity in human affairs, to help reconcile freedom with security and uphold the rule of law, to facilitate human dignity through upholding and protecting human rights and pursuit of happiness, to provide leadership and participation in dispelling cryogenic social conditions through cooperative social action, to contribute towards the creation and reinforcement of trust in communities, to strengthen the feeling of security of persons and their property, to investigate, detect and activate the prosecution of offences within the rule of law, to facilitate the freedom of passage and movement of highways, roads and streets and on avenues open to public passage, to prevent and curb public disorder, to deal with major and minor crises and to help and advice those in distress and, where necessary, activating other agencies. Available at <http://newerajuris.com/PDF/police.pdf>, visited on 27 April, 2014

27. Available at <http://newerajuris.com/PDF/police.pdf>, visited on May 2, 2014

28. Available at <http://www.neiassociates.org/storage/HandlingPoliceMisconductEthicalWaybarrythesis.pdf>, visited on 18 April, 2014

29. See also, Feudal Forces: Democratic Nations: Police Accountability in Commonwealth South Asia, Ch. 3 (2007) available at http://www.humanrightsinitiative.org/publications/police/feudal_forces_democratic_nations_police_accountability_in_cw_south_asia.pdf, visited on 24 February, 2014

30. According to one estimate, there are 1.8 million cases of torture, ill treatment, and inhuman behavior in India every year.

people have disappeared after encountering the police. Some are later found to be dead, and some are never found. Often, the family needs to pay bribe to confirm that their relatives are detained.³¹ The level of police corruption in India is breathtaking.³² It fosters a corrupt culture, the collusion of police and criminals, individual crime, organized crime, and the exploitation of already victimized groups such as trafficked persons and refugees. The police systemically fail to observe due process norms. Many arrests and searches are made without the necessary prerequisites such as a warrant. People are detained for longer periods than permitted or without any reasonable cause. Confessions are often extrapolated through the use of forbidden means, such as violence and threats. In many cases, detainee cannot contact his relatives or friend and are not brought before a magistrate even after expiry of 24 hours.³³ Cases of non-registration of FIR are extremely common. Indeed, it is one of the most widespread grievances of citizens, particularly from the weaker sectors of society and the desire for a bribe in exchange for registration is common as well.

Amputation of male organ of Shri Jugtaram in police custody in Barmer, Rajasthan³⁴, police brutality on a lecture in Kerala³⁵, torture of Dayashankar by police in Uttar Pradesh³⁶, torture and gang rape by police officers in Tripura³⁷, false implication of the complainant and torture in Delhi³⁸, false implication of Madhukar Jetley in Uttar Pradesh³⁹, death of Salman Dinkar Padvi in police firing in Maharashtra⁴⁰, Muthanga incident⁴¹, **Nandigram incident**⁴², Machil fake encounter case⁴³, Delhi gang rape case⁴⁴, gang rape in Mumbai⁴⁵ may be cited as some of the instances of police misconduct.

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31. See Country Reports on Human Rights Practices: India, available at <http://www.state.gov/g/drl/rls/hrrpt/2008/sca/119134.htm>, visited on 28 March, 2014
 32. According to a 2005 report by “Transparency International India”, more than one tenth (12%) of all households in India have reported to have paid bribes, in that year, to the police to get service, and 87% of those who interacted with the police perceive it to be corrupt. Most people (60%) who encounter the police face an indifferent attitude, which is often a signal that they should pay a bribe. There are also cases where torture would result if the bribe isn’t paid. Available in Indian Corruption Study to Improve Governance: Volume 9, Corruption in Police Department 1(2005), at <http://ipc498a.files.wordpress.com/2008/03/ti-india-police-corruption-study-2005.pdf>, visited on 29 March, 2014
 33. Feudal Forces: *Democratic Nations: Police Accountability in Commonwealth South Asia 26 (2007)* available at http://www.humanrightsinitiative.org/publications/police/feudal_forces_democratic_nations_police_acctability_in_cw_south_asia.pdf, visited on 17 April, 2014
 34. Available at <http://nhrc.nic.in/PoliceCases.htm>, visited on May 3, 2014
 35. *Ibid*, Case 166/11/98-99
 36. *Ibid*, Case No.791/24/2000-2001
 37. *Ibid*, Case No. 5/23/2003-2004-WC
 38. *Ibid*, Case No. 3069/30/1999-2000
 39. *Ibid*, Case No.2385/24/2000-2001
 40. *Ibid*, Case No.1332/13/2000-2001/FC
 41. Available at http://en.wikipedia.org/wiki/List_of_cases_of_police_brutality_in_India, visited on 28 April, 2014
 42. Available at <http://kafila.org/2010/03/16/three-years-of-nandigram-an-appeal/>, **visited on 26 April, 2014**
 43. Available at <http://www.risingkshmir.com/news/machil-fake-encounter-case-22515.aspx>, visited on 12 April, 2014
 44. Available at <http://thepositive.com/delhi-gang-rape-is-a-wake-up-call-on-judicial-and-police-reforms/#sthash.km3wkGYM.dpuf>, visited on 15 March, 2014
 45. Available at <http://www.theguardian.com/commentisfree/2013/aug/23/violence-india-women-police-rape-mumbai>, visited on 22 March, 2014

VI. POLICE IN INDIA: AREAS OF CONCERN

Reasons, problem-areas and areas of concern of police misconduct are service related and training related.

(A) Service Related Concerns

Long Hours of Duty - Invariably most of the functionaries, especially constable to SHOs at the police stations have to put in consistently 16 to 18 hours of duty on a continuous basis. Resultant fatigue caused is reflected in their general behaviour towards public.

Sub-standard Physical Facilities - Poor physical facilities such as pucca building, toilets, drinking water, and furniture in almost all the police stations are one of the major areas of concern, which is also resulting in a variety of perpetual behavioural consequences of police personnel.

Poor Housing Facilities - Inadequate housing facilities coupled with insufficient House Rent Allowance forces them to hire houses at faraway places, which create a serious commutation problem.

Inadequate Growth Opportunities - Very low level of promotional avenue has got serious repercussion on motivation level of police personnel and works as a hindrance factor in discharge of their normal duties.

Frequent Changes in the Nature of Duties - It is a fact that most of the police personnel are expected to perform a variety of duties from maintenance of law and order to VIP security. Too frequent changes in the nature of duties, not only brings the constraint on them but also affect their normal discharge of duties at the police stations.

The Crippling Effect of Corrupt Politicians - The police-politician nexus has corrupted the force because of the sheer influence those in power exert over postings and promotions. Politicians, in power also assert their authority in the investigation of crimes and hamper free investigation.

(B) Training Related Concerns⁴⁶

Mismatch between Training and Job Responsibility - The present training approach is more militaristic in nature having less compatibility with the job responsibilities of the police personnel, particularly in the context of civil society. The use of the latest weapons in crime, computer related crime, financial crime and other white collared crimes are not adequately covered in the existing induction training programmes.

Selection of Instructors - The process of selection of Instructors does not take into account the intellectual and academic aptitude of the candidates. More often than not, Instructors are selected on the basis of availability and/or proximity to the training institute. There are no incentives worth mentioning for good police officers to opt for the training colleges.⁴⁷

Course Materials - Course materials provided to the trainees are seldom revised and updated. There is no in-built system, which takes care of revision of reading materials. The course kit does not contain relevant case studies or exercises such as role-play.

Course Content - In contemporary management training, the behavioural traits and use of scientific aids are the most important ingredients. These two aspects are, generally, referred as software and hardware, part of the training. Areas such as public relations,

46. Available at <http://bprd.nic.in/writereaddata/linkimages/4596119307-training%20Module%20for%20Sub-Inspector.pdf>, visited on 7 April, 2014

47. *Ibid.*

interpersonal effectiveness, attitudinal framework, etc are the software component, while the computer applications, forensic science, correct reflexes use of modern weapons, etc. constitute the hardware part of the training. The existing course contents run short of both software and hardware components.⁴⁸

Training Infrastructures - Many basic facilities for conducting training courses are lacking at the training colleges. The quality and setting of classrooms, number of ceiling fans, poor quality of blackboards, overhead projectors, etc. are below standard. Added to these are the poor maintenance of the hostels and the mess in many training colleges.⁴⁹

Inadequate Honorariums to Guest Faculty - As the training colleges do not pay sufficient honorarium to the Guest Faculty, not many experts do come to share their practical experience with the trainees.

Lack of Sufficient Funds - The budgetary allocations for the police training colleges are less than what it should have been. As a result, the physical and academic development of the colleges have to suffer.

In Service Courses - The most serious gap in training is found in the matter of in-service courses, promotion courses and on the job training. Rarely does a constable get a chance to attend a training course after initial training. The updating of skills, briefing on specific duties, use of available modern scientific aids, changes in the attitudes and expectations of the people, changes in the laws, new and sophisticated methods of committing crimes, changes needed in traditional methods to meet the present day challenges more professionally are not absorbed by the constables and no opportunity exists for such improvement.

VII. POLICE REFORM: COMMISSIONS AND COMMITTEES

All the above problems demand a dire need for reform in the existing police system in the country. Many attempts have been made till date through different commissions and committees.

Gore Committee, 1971-1973⁵⁰ - recommended a broad range of issues involving the need to impart necessary knowledge and skills, create the right attitudes, generate effective decision making ability and stimulate critical and innovative thinking.

National Police Commission (NPC), 1977-1981⁵¹ was the first commission to exhaustively review the Indian police system. The eight reports suggested all together 291 recommendations all related to police reforms.⁵²

48. *Ibid.*

49. *Ibid.*

50. This committee on police training was required to suggest the objectives that should govern all arrangements for training of police officers; basic shortcomings in the arrangements, and measures to be taken to bring about the desired improvement. Available at http://www.humanrightsinitiative.org/index.php?option=com_content&view=article&catid=91:shiva&id=683:police-india-gore-committee&Itemid=100, visited on 10 February, 2014.

51. Available at http://www.humanrightsinitiative.org/publications/police/npc_recommendations.pdf, visited on 12 March, 2014

52. Reports are on Complaints against the police, Appointment of the Criminal Justice Commission, to deal political interference in police work, statutory tenure of service, selection of chief of police, transfer/suspension orders, Police and the weaker sections dealing guidelines for avoidance of vexatious arrests, Registration of FIR, examination of witnesses, statement of witnesses and use of third degree methods, Recruitment to the Police including psychological tests, control of the District Magistrate, need for transparency and women police, Examinations for promotion of officers, communal riots, reservation in the force, separation of investigating staff from law and order staff, norms for Police Stations, restructuring of civil police hierarchy, establishment of a central police committee, police accountability and enactment of a Model Police Act.

Reports of the Law Commission of India

113th Report on Injuries in Police Custody(1985)⁵³ suggested insertion of a new section 114-b in the Indian Evidence Act, 1872 to provide for prosecution of police officer for any offence constituted by an act alleged to have caused bodily injury to a person. It also recommended that section 53-54 of the Code of Criminal Procedure, 1973 should be amended to provide that every person arrested taken charge of by the police must on arrest be got medically examined.

135th Report on Women in Custody(1989)⁵⁴ suggested a new draft to be added in the Code of Criminal Procedure, 1973, incorporating specific safeguards for the protection of women in custody.

152nd Report on Custodial Crimes(1994)⁵⁵ recommended several changes in the existing laws and procedures including preventive, punitive, compensatory and remedial measures to be inserted in the Indian Penal Code, 1860, Indian Evidence Act, 1872 and Indian Criminal Procedure Code, 1973.

154th Report on CrPC(1996)⁵⁶ suggested reduction of executive control over police investigation as the latter would enjoy protection of the judiciary, better investigation owing to scrutiny of courts which will lead to successful prosecutions, reduction in the possibility of unjustified and unwarranted prosecutions, speedy investigation leading to speedy disposal of cases, expertise of investigating police and increased public cooperation and confidence.

177th Report on Law relating to Arrest(2001)⁵⁷ recommended for safety and well being in custody of police and also proposed to amend the Code of Criminal Procedure, 1973.

Ribeiro Committee, 1998⁵⁸ submitted first report on establishment of the Police Performance and Accountability Commission (PPAC) to deal with transfers, tenures, promotions, rewards and punishments and the police authorities. It also recommended that all investigating officers should be specially trained in scientific methods of investigation and not utilized for law & order duties except in small rural police stations where it may not be possible to strictly demarcate the two important police functions. The investigating officers should not be shifted to law and order or other duties for five years at least.

Second Report (March,1999)⁵⁹ recommended about constitution of State Security Commission and the Central Police Committee as recommended by the NPC, replacement of the old Police Act of 1861 by a new Police Act, insulating the investigative functions of the police from its law and order work, recruitment, training and welfare of the constabulary,

53. Law Commission 113th Report Ch.4 Para5, available at lawcommissionofindia.nic.in, visited on 20 March, 2014

54. Available at <http://lawcommissionofindia.nic.in/101-169/Report135.pdf>, visited on 5 April, 2014

55. Available at <http://lawcommissionofindia.nic.in/101-169/Report152.pdf>, visited on 5 April, 2014

56. Available at <http://lawcommissionofindia.nic.in/101-169/Report154Vol1.pdf>, visited on 14 March, 2014

57. Available at <http://lawcommissionofindia.nic.in/reports/177rtp1.pdf>, visited on 5 April, 2014. The major recommendation of the report was fixation of compensations amount (Rupees twenty five thousand in case of bodily injury and Rupees One Lakh in case of death). Further suggestion was that the Government may recover any amount paid by it as compensation under this section wholly or partially as it may think proper, from the delinquent police officers.

58. Available at http://www.humanrightsinitiative.org/publications/police/recommendations_ribeiro.pdf, visited on 10 February, 2014.

59. *Ibid.*

establishment of an independent Police Recruitment Board to recruit all non-gazetted ranks and a qualitative change in the training being imparted in police training institutions.

Padmanabhaiah Committee, 2000⁶⁰ recommended norms for recruitment, training, promotion and tenure of Constables, Sub-inspectors and other police officers, weekly off and compulsory earned leave every year, holiday homes, separation of law and order work from investigation, setting up of a Police Training Advisory Council and a Police Establishment Board. Recommendations regarding control of corruption, criminalization, cyber crime and enhancement of capabilities of some police institutions, like the National Police Academy in the field of training, CBI in investigation, Intelligence Bureau in cyber surveillance and the National Crime Records Bureau in cyber technology/forensics, counter-terrorism plan, and establishment of a non statutory District Police Complaints Authority (DPCA) were also made. It also suggested a permanent National Commission for Police Standards to set standards and a need for comprehensive reforms in criminal justice administration.

Malimath Committee, 2003⁶¹ had the task of examining the fundamental principles of criminal law so as to restore confidence in the criminal justice system. This involved reviewing the Code of Criminal Procedure (CrPC), 1973, the Indian Evidence Act, 1872, and the Indian Penal Code (IPC), 1860. The committee made 158 observations and recommendations. There are 55 major recommendations of which 42 have to be implemented by the central government and 26 by the state governments.

The Report suggests that the special powers the police have under legislation such as the Prevention of Terrorism Act (POTA) should be extended into general criminal law. It recommends that the “presumption of innocence” under the present system and the need to establish the guilt of the accused “beyond reasonable doubt” be replaced with the lower standard of “the court’s conviction”. This is in accordance with the committee’s belief that proof “beyond reasonable doubt” places a very heavy burden on the prosecution.⁶²

The Report has suggested the dilution of many of the pre-trial safeguards⁶³ and to amend Section 25 of the Indian Evidence Act⁶⁴, compensation to victims, the need for a Victim Support Service Coordinator to work closely with the police and courts to ensure delivery of justice during the pendency of the case.

Soli Sorabjee Committee, 2005-2006⁶⁵, also known as Police Act Drafting Committee, drafted a new model police bill to replace the colonial 1861 Police Act. The

60. Available at http://www.humanrightsinitiative.org/programs/aj/police/india/initiatives/summary_Padmanabhaiah.pdf, visited on 20 February, 2014

61. Available at https://www.google.co.in/?gfe_rd=ctrl&ei=k8ARU6qOOenA8ge5YDYBg&gws_rd=cr#q=malimath+committee+report, visited on 24 February, 2014

62. Available at <http://www.frontline.in/static/html/fl2018/stories/20030912001708300.htm>. Rights and Criminal Justice, visited on 4 March, 2014.

63. For instance, it seeks to double the 90-day period available for filing a charge-sheet after which an accused can be released on bail. It also recommends that the permissible 15-day police remand of an accused be doubled for grave offences. It also seeks to curtail an accused person’s right to silence under Article 20(3) of the Constitution, which guarantees the right against self-incrimination, by amending Section 313 of the CrPC. The amended Section would allow the court to draw adverse inferences, which it considers proper under the circumstances, about an accused person’s silence to a question put by the court, which he or she is under no compulsion by law to answer.

64. Section 25 of the Indian Evidence Act should be amended to bring it in line with Section 32 of POTA, which makes confessions to a police officer admissible as evidence subject to the accused being informed of the right to consult a lawyer. In effect, this suggestion will enable confessions extracted under duress to be used as evidence against the accused.

65. Available at www.mha.nic.in/pdfs/n_police_act.pdf, visited on 20 March, 2014

recommendations of the committee relate to minimum of two years tenure in a particular post, promotion be based on merit, evaluated by a qualifying examination and a performance evaluation, replacement of constables by a Civil Police Officer, with a higher standard of education and training, setting up of a Police Welfare Bureau to improve the welfare of police officers by providing free insurance cover, putting in place internal grievance redressal systems and introducing eight-hour shifts.

Madhav Menon Committee, 2007⁶⁶ recommended for grant of compensation for victims of serious and dreadful crimes, instead of existing codes such as IPC and CrPC, introduction of other codes such as Social Welfare Code, Correction Offence Code to deal cases of marriage offences, prohibition offences, vagrancy and campus indiscipline, the Economic Offence Code to deal with the threat to the country's economic health, a federal agency to deal with terror threats, some alternative punishment instead of imposition of fine and imprisonment, a security cess on large industrial houses in the country and a fund for victim compensation.

Justice Verma Committee, 2013⁶⁷ to recommend amendments to the Criminal Law so as to provide for quicker trial and enhanced punishment for criminals accused of committing sexual assault against women, recommended on laws related to rape, sexual harassment, trafficking, and child sexual abuse, medical examination of victims, police, electoral and educational reforms. It also recommended establishment of State Security Commissions to ensure that state governments do not exercise influence on the state police and a Police Establishment Board should be established to decide all transfers, postings and promotions of officers with a minimum of 2 years tenure. With respect to bringing about a transformation in the interaction of the police with the public and in relation to issue of accountability, the report made recommendations to be kept in mind while drafting the new Police Act.⁶⁸

Prevention of Torture Bill, 2010⁶⁹ was an attempt to enable it to ratify the United Nation Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) but it lapsed.

The crux of the police reform is to secure professional independence for the police to function truly and efficiently as an impartial agent of law of the land and, at the same time, to enable the Government to oversee the police performance to ensure its conformity to law. A supervisory mechanism without scope for illegal, irregular or mala fide interference with police functions has to be devised. It was earnestly hoped that the Government would examine and implement the reports expeditiously so that the process for implementation of various recommendations made therein could start right away. But recommendations of none of the committees have been taken into account seriously, and that there has been no or very little change in the conditions of the police in India.

VIII. POLICE REFORM AND JUDICIARY IN INDIA

Part III of the Constitution of India dealing with Fundamental Rights, pledges that the State will safeguard human rights and will protect citizens from undue invasions on their

66. Available at www.mha.nic.in/pdfs/draft_policy_paper_Aug.pdf, visited on March 6, 2014

67. Available at <http://www.prsindia.org/parliamenttrack/report-summaries/justice-verma-committee-report-summary-2628/>, visited on May 2, 2014

68. Available at <http://nlrd.org/womens-rights-initiative/news-on-womens-rights-violence-against-women/justice-verma-committee-report-on-police-reforms>, visited on 12 February, 2014.

69. UN Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment: retrieved from www2.ohchr.org

liberty, security and privacy. The role of the police is especially significant in this respect. Unfortunately, many a time, while discharging this duty, actions of the police conflict with rights. The number of cases, in which the police personnel are accused of violation of rights, are on the rise.

While interpreting Articles 21 and 22 of the Constitution liberally, even the procedure has been required to be just and reasonable. Various instances are there in which the courts have shown their concern about increasing trend of invasion of liberty by the police and have evolved some tools and techniques to redress them.

In *Kishore Singh v. State of Rajasthan*,⁷⁰ the Supreme Court showed its deep concern regarding the police atrocities in the following words “No police life style which relies more of fists than wits and on torture more than on culture can control crime because it means boomerang on ends and re-fuel the vice which it seeks to extinguish. Secondly, the State must re-educate the constabulary out of their sadistic arts and inculcate a respect for human person - a process which must begin more by example than by precept of the lower rungs are really to emulate. Nothing is more cowardly than a person in police custody being beaten up and nothing inflicts a greater wound on our Constitutional culture than a State official running berserk regardless of human rights.”

Striking a just balance between the dehumanizing prison atmosphere and the preservation of internal order and discipline, the Supreme Court in *Sunil Batra*⁷¹ case laid down detail rights of prisoners. The Court held that convicts do not lose all their rights by being imprisoned. Conviction for a crime does not reduce a person to a non person who is subject to the whims of the prison administration. His rights are limited by his confinement but the rights left after that are all the more substantial.

Observing requirement of change in law as to the burden of proof in cases of injuries and death in police custody, the Court in *State of UP v. Ram Sagar Yadav*⁷², stressed the need to adopt a different approach in an incident that involves allegations against the police.

Expeditious investigations and Speedy trial are essential requisites of law, otherwise guarantees under Articles 14 and 21 of the Constitution will be meaningless. In order to ensure speedy investigation and trial, the Supreme Court in *Delhi Domestic Working Women's Forum*⁷³ case issued several guidelines⁷⁴ to protect rape victims from undue harassment during police and court proceedings.

Developing complete Custodial Jurisprudence, the Court, in *D.K. Basu v. State of West Bengal*⁷⁵, not only issued several guidelines⁷⁶ but also ordered them to be displayed in front of every police station.

The issues regarding the delay and disruptions in the investigations of the Central Bureau of Investigation and the Revenue Department, disclosing a nexus between several important politicians, bureaucrats and criminals was dealt by the Court in *Vineet Narayan v.*

70. 1954 CriLJ 1672

71. *Sunil Batra v Delhi Administration*, AIR 1978 SC 1675

72. AIR 1985 SC 416

73. *Delhi Domestic Working Women's Forum v Union of India*, 1995 SCC 14. See also *Delhi Commission for Women v Delhi Police*(2009), available at http://www.ncw.nic.in/PDFFILES/Delhi_High_Court_Judgement_on_guidelines_for_dealing_rape_cases_by_various_authorities.pdf, visited on Oct. 09, 2014

74. *Ibid.*

75. (1997) 1 SCC 416

76. Available at <https://ipc498a.files.wordpress.com/2007/03/sc-rights-of-detainees.pdf>, visited on Oct. 09, 2014.

*Union of India*⁷⁷. The Supreme Court noticed the urgent need for the State Governments to set up the requisite mechanism and directed the Central Government to pursue the matter of police reforms with the State.

Often innocent persons are murdered by the police in the name of encounter. These so called encounters are nothing but murder by the police. In cases where false encounter was found proved against police personnel, the Court went to the extent of observing, in *Brij Lal Verma*⁷⁸ case that they must be given death sentence.

Dismissing appeal of the Uttar Pradesh government against the high court judgment which had held that the police record was manipulated and a false story of murder was cooked up to hush up a custodial death, the Supreme Court in *State of UP v. Mundrika*⁷⁹, hoped that the departmental proceedings will be initiated and pursued to its logical end.

Expressing its distress over the alarming increase in cases of custodial violence, police torture and abuse of power, the Supreme Court in *Shakila Abdul Gafar v. Vasant Raghunath*⁸⁰ declared that “the exaggerated adherence to and insistence upon the establishment of the proof beyond every reasonable doubt by the prosecution, at times even when the prosecuting agencies are themselves fixed in the dock, ignoring the ground realities, the fact situation and the peculiar circumstances of a given case, as in the present case, often result in miscarriage of justice and makes the justice delivery system suspect and vulnerable. In ultimate analysis, society suffers and a criminal is encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of unrealistic approach at times of the courts.”⁸¹

The Supreme Court, in *Munshi Singh Gautam v. State of M.P.*⁸² regretted that the concern it had shown two decades ago regarding custodial torture and death had fallen on deaf years. The situation did not seem to be showing any noticeable change, it said. “*Custodial violence, torture and abuse of police power are not peculiar to this country, but it is widespread... If it is assuming alarming proportions nowadays all around, it is merely on account of the devilish rooftops to be the defenders of democracy and protectors of the people’s rights and yet do not hesitate to condescend behind the screen to let loose their men in uniform to settle personal scores, feigning ignorance of what happens and pretending to be peace-loving puritans and saviors of citizen’s rights.*”⁸³

The Supreme Court, in *Sahadevan v. State*⁸⁴ said, “it is a pity that some police officers have not shed such methods even in the modern age. They must adopt some scientific methods instead of resorting to physical torture. If the custodians of law themselves indulge in committing crimes, no member of society is safe. If police officers who have to provide security and protection to the citizens indulge in such methods they are creating a sense of insecurity in the minds of the citizens. It is more heinous than a game-keeper becoming a poacher.”⁸⁵

77. (1998) 1 SCC 226. Available at <http://cbi.nic.in/dop/judgements/excrpts.pdf>, visited on Oct. 14, 2014. See also Kirpal S. Dhillon, *Police and Politics in India: Colonial Concepts, Democratic Compulsions: Indian Police 1947-2002* 562 (2005).

78. *Brij Lal Verma v. CBI*, 2001 CriLJ 2546

79. 2001 CriLJ 742

80. AIR 2003 SC 4567

81. *Ibid.*

82. AIR 2005 SC 402

83. M.J. Antony, *Landmark Judgment on Illegal Custody and Police Torture*, New Delhi, Indian Social Institute, 2006, p.9

84. AIR 2003 SC 215

85. *Ibid.*

The question of liability, to compensate for infringement of fundamental rights, raised in the *Bhagalpur blinding case*⁸⁶ was answered in affirmative in *Rudul Sah*⁸⁷, *Bhim Singh*⁸⁸, *Sebastian M. Hongray*⁸⁹ and *Nilabati Behra*⁹⁰. These cases heralded new era of compensatory jurisprudence in Indian legal history. According to the court, compensation was in the nature of a palliative, in order to give a better meaning to the right of life under Article 21. The Supreme Court rejected the argument of the state government that it was immune from liability to pay compensation for the wrongs of its servants.

Reviewing the history of awarding compensation as a public law remedy, the Court held that award of compensation is a remedy after the event. But steps should be taken to prevent the evil, and therefore the Court suggested the preventive steps in *Sube Singh v. State of Hariyana*⁹¹.

Socked to note that in a grievous offence like rape, being reported to the police, the concerned officer did not register the case despite the fact that the girl had categorically stated that the accused had forcible sexual intercourse with her, the Court in *Vishnu v. State of Maharashtra*⁹² held that it would lead to losing of confidence of the public in the police establishment.

In order to initiate police reforms, the Court delivered a notable judgment in *Prakash Singh v. Union of India*⁹³, making seven directives regarding radical overhaul of the Police Act, 1861 with two fold objectives; *first*, for functional autonomy to the police through security of tenure, streamlined appointment and transfer processes, and *second*, the creation of a 'buffer body' between the police and the government and enhanced police accountability, both for organizational performance and individual misconduct.⁹⁴ A number of States have taken the initiative to put in place special committees to draft a new Police Bill.⁹⁵

On 9-4-2007, the States and the Union filed fresh affidavits to update the Court on compliance. Only around 15% have been compliant (have reported taking steps to implement all directives like Sikkim, Nagaland, Meghalaya, Arunachal Pradesh) while 63% have been partially compliant (have taken steps to comply with one or more directives, may have registered objections to some directives like Himachal Pradesh, Daman and Diu, Orissa, Jharkhand) while the rest have completely ignored them (have registered strong objections

86. *Khatri v State of Bihar*, AIR 1981 SC 928

87. *Rudal Shah v State of Bihar*, AIR 1983 SC 1086

88. *Bhim Singh v State of Jammu and Kashmir*, AIR 1986 SC 494

89. *Sebastian M. Hongray v Union of India*, AIR 1984 SC 571

90. *Nilabati Behra v State of Orissa*, AIR 1993 SC 1960. See also *Sheela Yerpude v Home Dept*, 2005 CriLJ 2224.

91. 2006 (2) Scale 161. The preventive steps are Police training should be reoriented to change the mindset of the police, and to respect human rights, The functioning of the lower officers should be monitored continuously by the superiors to prevent custodial violence, Compliance with the *D K Basu* direction should be ensured, Simple procedures should be introduced for prompt registration of FIRs, Compensation, video recording and other modern methods should be introduced to avoid manipulation of evidence at all stages, An independent agency like the CBI or the human rights commissions may be entrusted with adequate power to investigate complains of custodial violence.

92. (2006) 1 SCC 283

93. (2006) 8 SCC 1

94. Available at http://www.supremecourtcases.com/index2.php?option=com_content&itemid=135&do_pdf=1&id=21218, Visited on 10 March, 2014. In this case the Supreme Court propounded various directives to introduce the long awaited police reforms such as constitution of a State Security mechanism, Selection and Minimum Tenure of the Director General of Police, Minimum Tenure of the Inspector General of Police and Other Officers, Separation of Investigation, Police Establishment Board, Police Complaints Authority, National Security Commission.

95. *Ibid*.

to some or all directives and do not indicate any steps for implementing or have stated that new police legislation is in the process of being drafted therefore no steps have been taken to implement directives or; have sought extensions with no details on concrete steps towards compliance like West Bengal, Tamil Nadu, Uttar Pradesh)⁹⁶

Some States, however, have shown commendable progress in reforms. Meghalaya has issued notifications to comply with all the directives. Arunachal Pradesh has already consulted Superintendents of Police on their policing challenges and drafted a Strategic Policing Plan for the State with detailed performance targets, milestones and timelines for achievement. Himachal Pradesh has released a Five Year Strategic Policing Plan (2007-2011).⁹⁷

Dissatisfied with the level of compliance as well as the attempts of the states to comply only on paper, Monitoring Committee⁹⁸ of the Supreme Court prepared a report on the New Police Act legislated by some of the states, in order to review whether or not they conform to the Supreme Court guidelines.

Based on the report of the Committee the Apex Court at its hearing on 8 November 2010, took serious note of the lack of compliance and issued to the errant states, asking their chief secretaries to appear before the Court at the next hearing to clarify as to why directions given in *Prakash Singh case* have not been complied with.

Six year after ushering in police reforms, the Supreme Court, recently on April 11, 2013 took the first step for its implementation in “letter and spirit” and asked states to furnish within a week status of the Security Commission which were to be set up to insulate the police from political interference.⁹⁹

IX. CONCLUDING OBSERVATIONS

Enormous changes have occurred in this country since independence, which cast a paramount obligation and duty on the police to function according to the requirements of the Constitution, law and democratic aspirations of the people. They require the police to be professional, service-oriented, people centric, free from extraneous influences and above all be accountable to the rule of law. This has, however, not happened because those who control and run the system have abused it beyond repair and are responsible for the large number of ills that presently threaten to destroy the system.

Even after 66 years of independence from colonial absolutism, our police system has not achieved the norms and criteria enumerated in the Constitution of India. Our police system still bears the colonial mindset. It is the state’s police and not the people’s police as was expected by our founding fathers. Despite several recommendations by committees and commissions in the past, the government did not take a single step to give autonomy and establish accountability in the police system.

The directives when implemented would make the police an agent of law, accountable to law and thus an important tool in strengthening the rule of law and enriching our democratic process. This is pivotal moment in the struggle for police reforms. Therefore, it is a high time for the policy makers to take cognizance of the fact that in a dynamic world, right policies are required keeping in mind the changing conditions and the global context. However, mere policy making would hardly make any difference if it is not implemented. This is definitely not desirable, and steps are required to remedy the situation.

96. *Ibid.*

97. *Ibid.*

98. Available at <http://timesofindia.indiatimes.com/india/SC-takes-first-step-towards-implementing-police-reforms/articleshow/19503011.cms>, visited on 4 March, 2014.

99. Available at <http://timesofindia.indiatimes.com/india/SC-takes-first-step-towards-implementing-police-reforms/articleshow/19503011.cms>, visited on 4 March, 2014.

GENESIS OF THE PRESIDENT'S RULE IN THE STATES OF INDIA

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Abstract

This article traces the origin of the Constitutional provision on the President's rule. Delving into the history of the Constitutional provision on the President's rule, this article shows that the origin of the President's rule provision in the States was conceived and given a shape in India not by the Founding fathers of the present Constitution, but by the British Rulers in early thirties of this century. Beginning with 1909 when Morley-Minto reforms suggested for representation of Indian people in Governor General's Provisional Executive Councils, this article deals with those constitutional developments which led to the enactment of the President's rule provision in the Constitution.

Key Words: *President's rule, Constitution of India, Government of India Act, 1919, Government of India Act, 1935, Federal Constitution*

I. THE BACKGROUND

The Origin of the President's rule in the States was conceived and given a shape in India not by the Founding fathers of the present constitution, but by the British Rulers in early thirties of this century. At the turn of this century, the British rulers decided to delegate some power to the Indian legislature, Indian politicians and Indian people. A significant move from the British point of view was made in 1909 when Morley-Minto reforms suggested for representation of Indian people in Governor General's Provisional Executive Councils. The right of discussing question of public interest was also extended to the Council and hereby giving the members an opportunity of exercising some influence on questions of administration and finance. The concession was perhaps the most important of these changes even though the executive was at liberty to act upon such recommendations.¹ Further, the Montagu-Chelmsford Report of 1919, dealt with the question of controlling legislative bodies and governments manned by Indians.² The scheme envisaged a partial devolution of power preserving the power of the Central government to interfere.

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1. (Montagu-Chelmsford Report on Indian Constitutional Reforms, 1919)pr.8, p.2

2. Ibid,at pr.120,p.78: "Our business is one of devaluation of drawing of demarcation of cutting ling standing ties. The Government of India must give and provinces must receive: for only so can the growing organism of self-government draw air in to its lungs and live."

The Centre's basic power of interference was contained in the Government of India Act, 1919³. A proviso to Sec. 13(2) of the Act laid down:

Provided that, where, in the opinion of the Governor General a state of emergency exists which justifies such action, he may, instead of reserving such Act, signify his assent thereto and thereupon the Act shall have such force and effect as aforesaid, subject however to disallowance by His Majesty in Council. The Act under this section also had to be laid before the Parliament in the United Kingdom for eight days."

In 1920, George Lansbury, a Labour Member, introduced in the House of Commons the Commonwealth of India Bill. No specific "emergency provision" for the intervention of the Centre over the Provincial affairs⁴ was mentioned in that Bill. Clause 12 however stated that the division of powers between the Commonwealth Parliament and the provincial legislatures is more or less as at present, but all residual powers shall be vested in the Parliament.⁵

In the federal scheme envisaged by the Congress for the future India, the Provinces were visualized as autonomous political units with no power for the Centre to interfere.⁶ The policy of the Britishers was not approved of by Gandhiji, who said, "by exercising our debating skill in the legislative councils some day or the other we shall be able to impress the British Parliament with the desirability of granting us swaraj."⁷

The Nehru Report of 1928⁸ which outlined a federal setup for the country with autonomous provinces provided very little power to the Central Government to intervene in the Provincial affairs. Clause 13 gave the Central Parliament the residuary powers to legislate, inter alia, "for peace, order and good government of the commonwealth" in all residuary matters.⁹ This model was copied from the Australian and Canadian Constitution.¹⁰

II. CENTRAL RULE DURING THE BRITISH REGIME IN INDIA

The rising tempo of the nationalist demand for reform and self-government made Britain realize that she could no longer deny or delay substantial constitutional concessions to the Indian People this realization on the part of Britain resulted in the appointment in 1927 of the Indian Statutory Commission. It was this Commission, which, for the first time, recommended "emergency power" the Governor and the Governor General. The Indian Statutory Commission of 1930 took a very comprehensive look at the existing Constitutional machinery.¹¹ The Commission in its report took an account of the nature of exercise of governor's special power in legislative matters. There was only one occasion when the governor had to secure the passage of a bill by certification. The most important cases where the governor sent back bills for reconsideration were the Madras religious endowment Act and the Oudh Rent Act- the commission argued with 'useful result.'¹² The Governor interfered a little in the Provincial matters especially when he felt that the Provinces were in a state of political instability.

3. Government of India Act 1919, 9&10 Geo-V. Chapter 101

4. B. Shiva Rao(ed), The Framing of India's Constitution: Select Documents, Vol. 1, (1996), New Delhi: The Indian Institute of Public Administration, p. 43

5. Ibid, p.45

6. Ibid, p.56

7. President's Rule in the States, Rajiv Dhavan, (1979), N.M.Tripathy Pvt. Ltd., Bombay, P.17

8. Ibid, p.59

9. Ibid, p.62

10. Ibid, p. 19

11. Indian Statutory Commission(1930) Vol. 1, Also see President's Rule in the States of India by Rajiv Dhavan, (1979), N.M.Tripathy Pvt. Ltd, Bombay, p.19

12. ibid

However, the Commission betrayed its real anxieties in recommendation for 'special provisions for a state of emergency' it said, "Experience in the past has shown that, however carefully a provincial constitution may be framed, a breakdown may occur though such causes as complete inability to form or maintain in office any Ministry enjoying support from the legislature. A situation equally grave would arise if there was widespread refusal to work the normal Constitution of the Province, or general adoption of a policy which aimed at bringing government to a standstill. But, if such an emergency were to arise, it is essential that the King's government should none the less be carried on ... we therefore recommend that the Governor should be given Statutory powers to declare that a state of affairs has arisen under which the government of a Province cannot be carried on in accordance with the , provisions of the statute, and thereupon there should vest in the Governor all the powers normally possessed by the Governor and his cabinet, with the right to appoint any person to assist him and to delegate powers to them, and the right to nominate any such persons as members of the legislature."¹³

It is seen that these are the origins of the concept of President's Rule in the states. Similar provisions were not enacted with respect to the Government in Ireland act 1920. This special power appears to have been reserved for use against Indian People and Indian Legislatures with the objective that "the King's government must go on."

The Round Table Conference called by the British Government in 1930 for settling of agreed principles of a new Constitution for India; these proposals of the Commission were discussed and were accepted by the Indian participants. Without fully realizing the mischief contained in the "emergency proposals", the participants accepted it by default.¹⁴The White Paper¹⁵ published by the British government in 1933 outlining their proposals for Constitutional reforms in India recommended, besides 'special power and responsibilities' for the Governor, emergency power in the event of a breakdown in the Constitution empowering him with discretionary power if he is satisfied that a situation has arisen which makes it difficult for the Provincial government to carry on as per the provisions of the Constitution act... assume to himself such powers vested in law in provincial authority as appear to him to be necessary.¹⁶ It further stipulated that a proclamation so issued having the same force and effect as an Act of Parliament; should be communicated to the Governor General and to Secretary of State and laid before Parliament; would cease to operate at the expiration of six months unless before the expiry of that period, it has been approved by both the Houses of parliament;¹⁷ and might at any time be revoked by the Parliament.

The above proposals clearly shows that the British government, apprehending possible non-cooperation from various legislatures of the Province when vested with this powers, deliberately devised this institutional mechanism by which the British government could interfere to meet with such a situation. The Joint Committee itself admitted that the power was an unusual one, not to be used in normal circumstances; and yet it was convinced of the need for it.

The Congress in their Resolutions on 1934 ignored all the proposals made in the White Paper and the Joint Committee Report and demanded a Constituent Assembly of

13. Indian Statutory Commission, 11. 1930

14. President's Rule in the States, Rajiv Dhavan, (1979), N.M.Tripathy Pvt. Ltd., Bombay, p.22

15. White Paper, "Proposals for Constitution Reform, 1933," Reprinted in the report of the Joint Committee on Indian Constitutional Reform, 1934, p. 282

16. *ibid*

17. *ibid*

Indians and when the Constitution was created incorporated some provisions suggested by the British, even, if, as Justice Bhagvati suggests, for 'benevolent non-imperial purposes'.¹⁸

Emergency power, thus, became part and parcel of all the British proposals since 1930 in the Constitutional reforms for India. These various proposals were put together and enacted into the Government of India Act, 1935 by the British government. The relevant sections which were the fore runners of the emergency clauses in our Constitution are Section 45 and 93 of the Government of India Act, 1935.

III. THE MAKING OF THE PROVISION

The Congress leaders, who were outspoken critics of the emergency power given to the Governor under the Government of India Acts, became its strong followers when they were called upon to frame a new Constitution for free India. In the early phase of Constitution making, the general consensus among the Congress elites was for a loose federation consisting of British provinces and Princely States with only three common subject-defence, foreign affairs and communications-delegated to the Centre. The way in which the Governor-General and the Governor used their emergency powers during the second World War had convinced them that in the interests of democracy and provincial autonomy in a federal polity such¹⁹ sweeping powers should not be given either to the Governor or to the President.

However, some of the problems leading to partition and along with it the unprecedented problems, both internal and external, which threatened the very existence of the new State, probably warranted a second thought by the Congress. The partition was followed by a horrible massacre and a huge exodus of refugees from Pakistan- their problem of rehabilitation and influence on communal peace, the acute food crisis, the condition of lawlessness in some parts of the country, communist violence in Telengana, the intransigence of the Princes, perilous defence compelled into deciding in favour of a strong central government.²⁰ Their most important concern was stability and system preservation. The Union Power Committee in its final report submitted to the Constituent assembly on August 20, 1947, took a note of these momentous changes, and decided in favour of widening the scope of the jurisdiction of the Centre. The report said, "We are unanimously of the view that it would be injurious to the interest of the country to provide for a weak Central authority which would be incapable of ensuring peace, of coordinating vital matters of common concern and of speaking effectively for the whole country in the international sphere."²¹ It was precisely for this reason that the recognition of the need for a strong central government- that the consideration of the first report of the Union Powers Committee was postponed by the Constituent Assembly on 28th April 1947 on the ground that important "political Conversations" were going on.²² The movement towards a strong Centre gained momentum, especially after the announcement of the Mountbatten plan on June 1947²³, envisaging partition of the country.

18. Justice Bhagvati in the State of Rajasthan vs. Union of India, AIR 1977, S.C. 1361

19. The Impact of Partition on Constitution Making in India, ShakuntalaSrivastava. (1974), Scientific Book Agency, Calcutta, p.116

20. Dr. S.C.Dash, The Constitution of India, p.123

21. Report of the Union Power Committee, Para, 2, see generally K.M.Panikar, Note on some principles of Union Constitution in India in proceedings of Union Constitution Committee (National Archives, New Delhi), p.40

22. N.GopalSwamyAyyangar, C.A.D., Vol.III. P.381

23. The Impact of Partition on Constitution Making in India, ShakuntalaSrivastava. (1974), Scientific Book Agency, Calcutta, p.48

In their Joint Memorandum on the Union Constitution, N. Gopalswamy Ayyangar and Alladi Krishnaswamy Ayyar provided emergency powers for the President if national security is threatened by internal disturbances or external aggression authorizing the Parliament to legislate on any subject reserved for a unit. The question of the President exercising this power on his discretion or on the advice of his Cabinet was discussed on 8th June 1947 and it was decided not to allow such discretionary power to the President.²⁴

The Memorandum on Model Provincial Constitution, prepared by B.N. Rau, the Constitutional Advisor, gave the Governor special responsibility for maintaining peace and tranquility of the Province, dissolution of the legislature, protection of Minorities and maintenance of law and order. In discharge of these special responsibilities, the Constitutional Advisor thought, he was authorized to act in his discretion.²⁵ The provincial Constitution Committee considered the special responsibility of the Governor on June 1947 jointly with the Union Constitution Committee. Accordingly, the Committee decided that the Governor for the prevention of any grave menace to the peace and tranquility of the province or any part thereof, in his discretion, was to report to the President who, in turn was to take appropriate action under emergency powers conferred in the Union.²⁶ The Provincial Constitution Committee on June 11, 1947 accepted the recommendation; it was made clear that the only action that the Governor may take except on the advice is to report to the President. The Governor according to the revised decision of the Provincial Constitution Committee is bestowed with some special responsibility for prevention of grave menace to peace and tranquility in the territory. The Governor in discharge of this special responsibility would act in his discretion. As Patel explained, some members of the committee, "thought that it would be advisable under the present peculiar unsettled conditions in the country to give some limited powers to the Governor-eventually the committee came to the conclusion that it would not be workable, that it would create deadlocks and therefore the proper course would be to limit its powers."²⁷

Clause 15 which dealt with such special responsibility of the Governor read as follows:

Special Responsibility of the Governor: (1) where the Governor of a Province is satisfied in his discretion that a grave situation has arisen which threatens the peace and tranquility of the Province and that it is not possible to carry on the Government of the Province with the advice of his Ministers in accordance with the provisions of clause 9, he may, by proclamation, assume to himself all or any of the functions of the Government and all or any of the powers vested in or exercisable by any provincial body or authority; on any such Proclamation may contain such incidental and consequential provisions as may appear to him to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Act relating to any provincial body or authority:

Provided that nothing in this sub-clause shall authorize the governor to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend, either in whole or in part, the operation of any provision of this Act relating to High Courts.

(2) The Proclamation shall be forthwith communicated by the Governor to the President of the Union, who may thereupon take such action as he considers appropriate under his emergency powers.

24. Select Documents II, B. Shiva Rao, P.529

25. Ibid, 635

26.

27. Ibid, p. 610

(3) The proclamation shall cease to operate at the expiration of two weeks, unless revoked earlier by the governor himself or by the President of the Union.²⁸

While this clause came up for discussion in the Assembly, Patal, a leading member further said, "...this question of discretionary powers of the Governor is a matter which requires careful considerations. On the one hand, it encroaches upon the powers of the Ministry. Again, on the other side there is a feeling that looking to "the conditions prevailing in the country, some provision should be made for giving special responsibilities to meet with the difficult situation which has arisen in this country today."²⁹

This made it easy for members like Gupte, a member of the Constituent Assembly to move an amendment to Clause 15. Gupte's amendment sought to authorize the Governor to proclaim emergency and assume all powers of the government except those of the High Courts, and thereafter make a report to the President. While K.M.Munshi, moved an amendment that these powers should extended to such situations where "it is not possible to carry on government of the province with the advice of the ministers." He however wondered whether such enormous powers should be given to Governor or vested in the President acting on a report from the Governor. At one end of the discussion were H.N.Kunzru and G.B.Pant who felt that the Governor could not be trusted with such a wide discretion. Kunzru suggestion that this was reproducing the Government of India Act, 1935 was negated by Members like Prakasham and Maitra who hoped that Indian Governors should act differently from British Governors. The essence of the argument was that the Governor was the man on the spot and should be given discretion to deal with these situations.

There was some discussion on the President's general emergency power. At first under a draft of May, 1947, the President was simply going to have the powers to preserve peace and tranquility and prevent a grave menace to the whole of India or any part of it, safeguard THE INTEREST OF MINORITIES. The report of the union Constitution Committee and the Draft clauses prepared by the Constitutional Advisor, on May, 30, 1947, however, did not contain any provision for emergency, except a "legislative power" of the President. On July 1947, therefore, K. Santhanam and B.M.Gupte moved two amendments, which sought to confer upon the President some emergency powers, in case of his satisfaction that the normal functioning of the constitutional machinery was impossible. Santhanam's amendment sought, in such an eventuality, the President, could take adequate measure including 1. Suspension of the provincial constitution, 2. Promulgation of ordinance to be applicable to the province and 3. Issuing off orders and instructions to the Governors and other officers of the Province. Gupte's amendment sought to empower the President, under similar circumstances, in consultation with his council of ministers to issue a proclamation assuming to himself all or any of the powers vested in or exercisable by, any provincial body or authority except the High Court, including the power to confirm, modify or remove the proclamation issued by the Governor.

The draft article was redrafted on January 26, 1948 and was finally presented in the Draft constitution of February, 1948. In the draft, the emergency powers of the Governor as suggested by K.M.Munshi's amendment were embodied in draft article 188 and those of the

28. C.A.D. Vol. IV, P.579

29. II, Shiva Rao, Pp. 669-670," Principles of a Model Provincial Constitution" (as adopted by the Constituent Assembly). As quoted in the President's Rule in the States by Rajiv Dhavan, (1979), N.M.Tripathy Pvt. Ltd, Bombay, p.37

Union government in draft article 188 and those of the Union government in draft articles 275 and 280. In the case of a state emergency article 278 empowered the President, on receipt of a report from the Governor, to supersede the executive and legislative powers of the state and assume to himself all such powers exercised by the state and declare that powers and functions of the state would be exercisable by the Parliament alone. The article further enabled the President to suspend any provision of the Constitution relating to anybody or authority of the state except the High Court. This proclamation would be in force initially for a period of six months only and could be extended by Parliament subject to a maximum period of three years.

In the meanwhile, some members of the Drafting Committee as well as prominent leaders expressed their opposition to the provision of the Governor being elected either directly by the people or nominated from a panel of four persons elected by the state legislature on the ground that the co-existence of a Governor elected by the people and a Prime minister responsible to the legislature might lead to friction and consequent weakness in administration. Therefore the special committee in April 11, 1948, decided to give up the election of the Governor and to make him an appointee of the President. Ayyar while giving full support to the resolution said, "In the consideration of this question the main points to be remembered are that this assembly has accepted the introduction of responsible government in the states, that the Governor is merely a Constitutional head of the Province and that the real executive power has been vested in a Ministry responsible to the lower house in different states. The question for consideration before the house is whether under these circumstances there is any point in going through expensive and elaborate machinery of election based upon universal suffrage."³⁰

Sri Brajeshwar Prasad on 30th May 1949, moved the amendment to the effect that, "The Governor of a state shall be appointed by the president by warrant under his hand and seal." There were some discussions on the effect of all these changes on the emergency powers that the Governor had been given in the draft article 188. While H.N.Kunzru gave his limited support, he pointed out that the new situation called for the amendment of the draft articles 175 and 188, for the sake of avoidance of conflict between the Governor and popular ministers in a Parliamentary government. Instead of Article 188, he suggested, "The President of the republic can under another article be enabled to take action where the peace of the country is threatened because of anything happening in a province or where a province is found to face with a situation which if not firmly handled may lead to a conflagration."³¹

Ultimately, the Committee decided to drop Article 188 on August 3, 1949 and this called for a revision of the emergency provisions. Article 277-A was, therefore, introduced and Article 278 was substituted by new articles 278 and 278-A. While 277-A sought to declare the Union's responsibility of protecting the states as against external aggression and internal disturbances and to ensure that the government of every state is carried on in accordance with the provisions of the constitution, the new article 278 empowered the President to take over to himself all the powers and functions of the state, enabled the Parliament to take over the functions of the state legislature and could take the incidental and consequential steps if he gets a report from the Governor or otherwise satisfied that the administration of the state cannot be carried on in accordance with the provisions of the constitution.

30. C.A.D. Vol. IV, p.707

31. C.A.D., Vol.VIII, P431

Though, an extra ordinary feature in a federal constitution, these provisions which provides for the President's Rule or Central takeover of the state administration was accepted by the members of the Constituent Assembly with surprising ease.³²

Dr. Ambedkar put up a stout defence of the articles and tried to allay the fears of the critics of their possible misuse by the ruling party at the Centre for its own partisan ends. He said, "I do not altogether deny that there is a possibility of these articles being abused and being employed for political purposes. That objection applies to every part of the Constitution whenever the Centre has been given powers to override the provinces. The proper thing we ought to expect with regard to these articles is that they will never be brought into operation and they will remain as dead letter."³³

Dr. Ambedkar assured the Constituent Assembly that these articles would be used only as a last resort against a recalcitrant State. Normally, the President would first issue a warning to the State concerned and if it was not heeded, he would then order an election to allow the people of the province to settle the matter themselves. It would only be after these steps had failed that the President would be justified to intervene and resort to this article.³⁴ While piloting article 278 which later became article 356, in the Constituent assembly, Dr. Ambedkar observed that the Centre has been given powers to override the Provinces, nonetheless, ours is a federal Constitution and when we say that the Constitution is a federal constitution, it means this that the provinces are as sovereign in their field which is left to them by the Constitution as the Centre is in the field which is left to them by the Constitution as the Centre is in the field which is assigned to it.³⁵ Infact, this provision was a bulwark in favour of provincial or state autonomy, because, if there is any difficulty in any unit with regard to the proper working of the Constitution, it would be obvious duty of the Union government to intervene and set matters right. It is only when there is a failure or breakdown of the Constitutional machinery that the Union government will interfere.³⁶

This article was opposed by many critics on different grounds. There was a lot of heated debate, which lasted over five hours and over two working days. One objection to the article was that the President could act on his own without waiting for the report. The Governor is the nominee of the President and being the man on the spot should be relied upon. On replying a question put by Shri L. Krishnaswami Bharathi, he said, "It is a constitutional crime to empower the President to interfere not merely on the report of the Governor or Ruler of a State, but "otherwise" is a mischievous word. It is a diabolical word in this context and I pray to God that this will be deleted from this article. If God does not intervene today, I am sure at no distant date... the eyes of every one of us will be more awake than they are today."³⁷

However, Dr. Ambedkar emphasized the significance of the provision 'otherwise', and said in view of the fact that article 277A imposes a duty and obligation upon the Union, it would not be proper to restrict and confine the action of the President, which undoubtedly will be taken in fulfilment of his duty to the report made by the governor of the Province. It

32. Ibid.,

33. President's Rule in India, S.R. Maheswari, (1977), Mac Millan, Delhi, P.6

34. Dr. Ambedkar as quoted in M.V. Pyle, Constitutional Government in India, (1965), Asia Publishing House, Bombay, p. 643

35. C.A.D., Vol., IX, P.177

36. Ibid., p.133

37. Ibid, Shri Alladi Krishnaswamy Ayyar, p.150

may be that the Governor does not make a report. Nonetheless, the facts are such that the President feels that his intervention is necessary imminent.³⁸

Some of the members felt that the article was not needed as Article 276 and 276 give the Central executive and Parliament all powers that can reasonably be conferred on them in order to enable them to see that the law and order do not breakdown in the country or that misgovernment in any part of India is not carried to such length as to jeopardize the maintenance of law and order. But actually, "Article 275 limits the intervention of the Centre to state affairs when there is war or aggression, internal or external. Article 278 refers to the failure of the machinery by reasons other than war or aggression."³⁹Hridaynath Kunzru maintained that there could be a serious danger in the center being tempted to intervene in situations where intervention could not be justified. Instead of vesting the power in the President of India, Kunzru argued, it should be vested in the electorate who alone could ensure a responsible government. He said, "if responsible government is to be maintained, then the electors must be made to feel that the power to apply the proper remedy when misgovernment occurs rests with them."⁴⁰

Dr. Ambedkar's assurance notwithstanding, there continued to persist a good deal of confusion as to the exact meaning of the words: "Constitutional failure" (of the state machinery). During the Assembly debates, H.N. Kunzru pointedly asked Dr. Ambedkar to spell out clearly the meaning of the "failure of constitutional machinery" but Dr. Ambedkar gave a somewhat evasive reply: He said, "When we say that the Constitution must be maintained in accordance with the provisions contained in this constitution we practically mean what the American constitution means, namely that the form of the Constitution must be maintained." However, at a later date during the debates, Ambedkar said: "the expression 'failure of the machinery', I find has been used in the Government of India Act, 1935. Everybody must be quite familiar, therefore, with its de facto and de jure meaning. I do not think any further explanation is necessary."⁴¹Naziruddin Ahmad, perturbed with the lack of clarity, remarked: "This article (i.e. draft article 278) says practically nothing. It says almost everything. It enables the Centre to interfere on the slightest pretext and it may enable the Centre to refuse to interfere on the gravest occasion. So carefully guarded is its vagueness, so elusive its draftsmanship that we cannot but admire the Drafting Committee for its vagueness and evasions."⁴²

H.N.Kunzru who strongly protested against the acceptance of this article observed: "If the central government and Parliament are given the power that Article 277, 278 and 278-A read together...., there is a serious danger that whenever there is a serious danger that whenever there is dissatisfaction in a province with its Government, appeals will be made to the central government to come to its rescue. The provincial electors will be able to throw their responsibility on the shoulders of the central government. Is it right that such a tendency should be encouraged? Responsible government is the most difficult forum of government. It requires patience, and it requires the courage to take risks. If we have neither the patience

38. C.A.D., Vol., IX. P.140 (H.V.Kamath).

39. Ibid.,p. 134

40. Ibid, B.R.Ambedkar, p.175

41. The Framing of India's Constitution: A study, B.Shivarao, Indian Institute of Public administration, New Delhi, (1968), p.814(H.N.Kunzru)

42. B.R.Ambedkar, CAD, Vol.X, p.177 quoted in J.R.Siwach. "The Indian Presidency", Haryana Prakashan, Delhi, (1971), p.231

nor the courage that is needed, our constitution will virtually be stillborn. I think, therefore, Sir, that the articles that we are discussing are not needed.”⁴³

One member gave expression to his apprehension that the provision would reduce the provincial autonomy to a farce. He said, “These articles will reduce the state governments to great subservience to the Central government. They cannot have any independence whatsoever. I do not want the state to pull in one direction and the Centre in another; still there must be some autonomy for the states and I say article 277-A and 278 take away this autonomy. I feel that even if these articles are omitted, there are articles 275 and 276 and these two articles give the executive all the powers necessary to deal with an emergency. If there is an emergency, you can issue a proclamation under Article 275 and 276 you can legislate on matters relating to the provinces. So article 275 and 276 are quite sufficient. The introduction of Article 277-A and 278 is not desirable and these articles, in fact, lay us upon to the charge that we are reducing provincial autonomy to a farce.”⁴⁴

Some members felt that this was just reconstituting the approach of Section 93 of the Government of India Act, 1935. Indeed Algu Rai Shastri said: “The British have, no doubt, left the country, but their mentality of distrust is still lingering here. Whatever they gave with one hand, they have tried to snatch with the other. The British rulers used to run the Government from Delhi.”⁴⁵ But there were many others who explained that these provisions were different from Section 93 provisions. Sri Alladi Krishnaswami while speaking in the Assembly said: “There is no correspondence whatsoever between the old sections 93, the ultimate responsibility for the working of sec. 93 was the parliament of Great Britain which was not certainly representative of the people of India, whereas under the present article, the responsibility is that of the Parliament of India which is elected on the basis of universal franchise, and I have no doubt that merely the conscience of the representatives of the state concerned but also the conscience of the representatives of the other units will be quickened and they will see to it that the provision is properly worked.”⁴⁶

B.M. Gupte pointed out Sec. 93 dealt with “Constitutional failure” whereas the provisions deal with peace and tranquility. There was also the view that Sec.93 was a salutary provision. B.R.Ambedkar explained that the Drafting Committee felt some provisions should be introduced in the constitution which would be somewhat analogous to the provisions contained in Sec.93 of the Govt. of India Act 1935. Further these provisions were not intended to be used by the British Governors for British purposes without the effective control of an Indian Parliament but the present provisions by a President advised by his cabinet which in turn was responsible to Parliament. It was also said, “This provision is also against the high principles enunciated in the charter of freedom which Pandit Nehru moved in the constituent assembly on Dec. 13, 1946 while the objective resolution and preamble were described by a member of the Constituent assembly as the very life and breath of the Constitution.”⁴⁷

By giving these dictatorial powers to the President the whole constitution has been put in jeopardy. So let us not say in the preamble that we shall have a democratic republic.⁴⁸ The provision was also dubbed undemocratic because here the people are not given the chance to solve their own problems. The Union government “absolves the Ministers and the members

43. *ibid*

44. CAD, Vol.IX, Pp. 154-6

45. *Ibid.*, p.143(S.L.Saxena)

46. *Ibid.*, p.172

47. *Ibid.*, p.151.

48. Purnima Banerjee, C.A.D., Vol. X, P.451

of the local legislatures entirely from at responsibility”⁴⁹ and this article “scrapes the state legislature and the council of Ministers as well as the Governor and the President and the Parliament become the rulers of the province. “If the people are deprived of the responsibility and self-independence, their morality will be seriously undermined. So, “let people commit mistakes and learn by experience. Experience is a great tutor.”⁵⁰

Equally important was the role of the Governors. There was the fear that the Governors would be just puppets of the central government. K. Santhanam during the course of discussion said, “There are bad people in this country and it is not impossible that one such might get into the gubernatorial guddi and make havoc.”⁵¹

A.R. Shastri took the view that if Governors were going to be appointed, they might as well be given powers, otherwise be redundant. He said: “We have, provided for a Governor for each province. We are going to pay him a very high salary and provide him with all material comforts; we are going to give him a supreme status in the constitutional structure of the states, but despite all this, if we do not vest in him the emergency powers, we are in reality making him only a nominal figurehead. In that case we should not call him a Governor; rather make a little change in his designation and put it as GOBARNAR, a dummy. Bharat had installed a wooden sandal of Ram on the throne and ruled the kingdom on behalf of the sandal...but our Governors whom we are going to install in an exalted office will not be Governors in the real sense of the term; they are going to be only show-boys. What is the sense after all in having a nominal figurehead? Why then pay him a huge salary? Well, it would be better not to appoint them at all. It is better if the huge amount to be incurred on account of their salary and other allowances is saved and utilized for the benefit of the poor people.”⁵²

Another member actually stressed that, if a Governor becomes hostile, remove him and put another in his place but let him make a report before you proceed to proclaim an emergency. There was some kind of consternation regarding the kinds of emergency as provided in article 278. The words used in article 278 as has been emphasized before are “the Government of the state cannot be carried on in accordance with the provisions of the constitution.” These words are extremely wide. Santhanam put some explanation as to the sweep of this article by talking of the three kinds of emergency: “physical breakdown”, “Political breakdown” and “economic breakdown”. He explained these breakdowns as under: “There may be a physical breakdown of the Government in the State, as for instance, when there is a widespread internal disturbance or external aggression or for some reason or other, law and order cannot be maintained. In that case, it is obvious that there is no provincial authority, which can function, and the only authority, which can function, is the central government, and in that contingency these articles are not only unobjectionable but also absolutely essential and without it the whole thing would be in chaos. Then there may be political breakdown. This is a point, which requires careful analysis. A political breakdown can happen when no ministry can be formed or the ministries that can be formed are so unstable that the government actually breaks down. Normally, according to the Constitution when there is great instability of a Ministry the proper procedure will be to dissolve the lower House and reconstitute it. If after dissolution also the same factions are reproduced in the local legislatures and they

49. H.V.Kamath, CAD., Vol.IX, P.140

50. Ibid.(Naziruddin Ahmad),p.159

51. Ibid,(Naziruddin Ahmad), p.160

52.Ibid., p.153

make a ministry impossible, it will then be inevitable for the Centre to step in... Then there is the third contingency of economic breakdown. Suppose for instance in a state the Ministry is all right, but it wants to make itself popular by reducing or cancelling all taxes and running its administration on a bankrupt basis..."⁵³

Santhnam's own solution in these cases was the growth of healthy convention, if peace and democracy is allowed to grow in this country. I have no doubt whatsoever that these conventions will grow and all these articles will be utilized for the legitimate purposes for which they are intended. These three categories of emergency power did not find favour with other members. Even if the first category (physical break down) agreed upon, by some members, the second category (Political breakdown) seemed too much wide to others. H.N. Kunzru did not approve of this conceptual extension: "It is obvious that the framers of the Constitution are thinking not of the peace and tranquility of the country, of the maintenance of law and order but of good government in provinces. They will intervene not merely to protect provinces against external aggression and internal disturbance but also to ensure good government within their limits."⁵⁴

Furthermore, the prevailing chaotic situation in the country, the unequivocal support extended to these provisions by the Congress leadership and the pressure of time which prevented a detailed discussion⁵⁵ ensured its quick passage in the Constituent Assembly. Article 278 which was renumbered and became Article 356 after several subsequent amendments in it reads as follows:

Article 356 – Provisions in case of failure of Constitutional Machinery in States-

(1) If the President on receipt of a report from the Governor⁵⁶ of a State or otherwise, is satisfied that a situation has arisen in which the government of the state cannot be carried on in accordance with the provisions of the Constitution, the President may by Proclamation-

(a) Assume to himself all or any of the functions of the government of the State and all or any of the powers vested in or exercisable by the Governor or anybody or authority in the State other than the Legislature of the State;

(b) Declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;

(c) Make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to anybody or authority in the State:

Provided that nothing in this clause shall authorize the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts.

2. Any such Proclamation may be revoked or varied by a subsequent Proclamation.

3. Every Proclamation issued under this article shall be laid before each House of Parliament and shall, except where it is a Proclamation revoking a previous Proclamation, cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament:

53. Ibid., p.173

54. Ibid., p.154

55. Ibid., (H.N.Kunzru), P.155.

56. Only six days were allotted for the debate on emergency powers of the Governor and for the whole of the Union constitution and the debate was ended by a closure motion, C.A.D., Vol. IV., p.771

Provided that if any such Proclamation (not being a Proclamation revoking a previous Proclamation) is issued at a time when the House of the People is dissolved, or the dissolution of the House of the People takes place during the period of two months referred to in this clause, and if a resolution approving the Proclamation has been passed by the Council of

States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the Houses of Parliament.

Provided that if any such Proclamation (not being a Proclamation revoking a previous Proclamation) is issued at a time when the House of the People is dissolved, or the dissolution of the House of the People takes place during the period of two months referred to in this clause, and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the people first sits after its reconstitution unless before the expiration of the said period of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(4) A proclamation so approved shall, unless revoked, cease to operate on the expiration of a period of (six months from the date of issue of the Proclamation)⁵⁷

Provided that if and so often as a resolution approving the continuance in force of such a Proclamation is passed by both Houses of Parliament, the Proclamation shall, unless revoked, continue in force for a further period of (six months)⁵⁸ from the date on which under this clause it would otherwise have ceased to operate, but no such proclamation shall in any case remain in force for more than three years; provided further that if the dissolution of the House of the People takes place during any such period of (six months)⁵⁹ and a resolution approving the continuance in force of such Proclamation has been passed by the Council of States, but no resolution with respect to the continuance in force of such Proclamation has been passed by the Council of States, but no resolution with respect to the continuance in force of such Proclamation has been passed by the House of the People during the said period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the continuance in force of the Proclamation has been also passed by the House of the People.

[Provided also that in the case of Proclamation issued under clause (1) on the 11th day of May, 1987 with respect to the State of Punjab, the reference in the first proviso to this clause to “three years” shall be construed as a reference to “five years”⁶⁰

57. The words “or Rajpramukh” omitted by the Constitution (Seventh amendment) Act, 1956, S.29 and the Schedule.

58. Substituted by the Constitution (forty-fourth Amendment) act, 1978, S.38 for “one year from the date of the passing of the second of the resolutions approving the Proclamation under clause (3) (w.e.f. 20.6.1979). The words ‘one year’ were substituted for the original words ‘six months’ by the Constitution (Forty-Second Amendment) Act, 1976, S.50 (w.e.f. 3.1.77)

59. Subs. By *ibid* for ‘one year’

60. *ibid*

5. Notwithstanding anything contained in clause(4), a resolution with respect to the continuance in force of a Proclamation approved under clause(3) for any period beyond the expiration of one year from the date of issue of such Proclamation shall not be passed by either House of Parliament unless_

(a) a Proclamation of Emergency is in operation, in the whole of India or , as the case may be, in the whole or any part of the State, at the time of the passing of such resolution, and

(b) the Election Commission, certifies that the continuance in force of the Proclamation approved under clause(3) during the period specified in such resolution is necessary on account of difficulties in holding general elections to the Legislative assembly of the State concerned.⁶¹ Provided that nothing in this clause shall apply to the Proclamation issued under clause (1) on the 11th day of May, 1987 with respect to the State of Punjab.⁶²



61. Substituted by the Constitution (Sixty-eight Amendment) Act, 1991

62. Substituted by the Constitution (Forty-fourth Amendment) Act, 1978

63. Substituted by the Constitution (Fifty-ninth Amendment) Act, 1988

ADDRESSING THE FORMIDABLE CHALLENGES POSED BY THE CLIMATE CHANGE: THE RESPONSE OF THE INTERNATIONAL COMMUNITY

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Abstract

In the context of evolving climate change law and policy, this paper argues that a developing country like India having a population more than 100 crores need reorient its economic decisions more carefully and see that its climate policy is directed towards achieving the goal of saving this beautiful planet earth. It concludes that what is needed at this moment of crisis is that to reshape the economic planning and re-orient the strategies for growth and development and take appropriate socio-economic measures to face the pressure and address the challenges of sustainable development and climate change, consistent with the provisions of the United Nations Framework Convention on Climate Change.

Key words: *Climate Change, United Nations Framework Convention on Climate Change, Kyoto Protocol, IPCC, Developing Countries, India*

I. INTRODUCTION

The whole world is on the terrifying crossroads of the global environmental threat. Last few years dominated almost all the academic discourses about the serious threat climate change posed to the world. There is no denying the fact that the emissions of green house gases are responsible for such deteriorating climatic conditions. In fact as per the report of the IPCC carbon dioxide, methane, nitrous oxide and halocarbons, the four long-lived green house gases have increased significantly putting a threat to the entire world. Of course we are largely responsible for such increase in green house gases. The entire system that is responsible to make life on earth possible is affected. The poorest countries are to be hard hit by such global climate change. Actually we have started experiencing the impact of global climate change. The world is going to face the massive threat which may be dangerous and the impact will be disastrous for the mankind. Thus the crucial question before the mankind is how to address the problem and find the solution. The study requires a multi-disciplinary approach because the science of climate change is a complex issue and the impact is loud and clear.

In the recent past many deliberations have taken place throughout the world about the threat posed to the Mother Earth mainly caused by the increasing temperature of the atmosphere. This rise in temperature affects the climate to a great extent which leaves its

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impact felt globally. There is no denying the fact that the emissions of green house gases are responsible for bringing such changes. There is total consensus among the world leaders that fossil fuel emissions have been leading to a critical rise in atmospheric green house gases, which in term is causing global temperatures to rise thereby causing changes in the climate patterns of the earth.

The greenhouse gases which contribute significantly for the warming of the globe also are responsible in interfering in the global climate. Thus the concentration of green house gases namely the carbon dioxide, methane, nitrous oxide and certain other heat trapping gases contribute in a significant manner for the changes that occur in the atmospheric climate. Carbon dioxide is produced when fossil fuels are burned and with the rapid depletion of forest cover, the effect of Carbon dioxide is further intensified. Methane and Nitrous oxide are generally used in agricultural practices and the release of such gases causes certain effects on the lands and the land use and also the most important, the chlorofluorocarbons (CFCs) and other gases which have the capacity to trap the heat also account for changes in the climate.

The green house effect plays a crucial role in maintaining a life-sustaining environment on the earth. If there is no green house effect i.e. there is no green house

gases existing in our atmosphere, the situation would be something different. The temperature of the earth is determined by the amount of incoming solar radiation that reaches and heats the surface. The green house gases in the atmosphere allow the sun's ultraviolet radiation to penetrate and warm the earth, and they absorb the infrared energy that radiates back in to the atmosphere. By blocking the escape of this radiation, these gases effectively form a blanket around the earth. Green house gases makeup only about 1 percent of the atmosphere, but the act like a blanket around the earth, thereby trapping the heat and keeping the planet warmer than it would be otherwise.

According to Development Research Group of the World Bank, the climate change affects the economy condition of urban poor to a great extent making their life miserable. If this trend continues they will be the worst victims in the next few years. It is also feared that unless it is checked it will lead to affect the poor countries worst by imposing on them the disasters like severe drought, acute shortage of food, drinking water etc. The entire system that is responsible to make the life on the earth possible is affected. Thus the crucial question before the mankind is that how to address the problem and find the solution. The study requires a multi-disciplinary approach because the science of climate change is a complex issue but the impact is loud and clear. In the opinion of one of the leading experts in this field "understanding climate is like understanding the world economy; it is never solved by one new piece of information. And the answers are never in plain yes or no, but in degrees of certainty."¹ In fact, a developing country like India having a population more than 100 crores need reorient its economic decisions more carefully and see that its climate policy is directed towards achieving the goal of saving this beautiful planet earth.

1. Stephen Schneider, Professor for Interdisciplinary Environment Studies, Stanford University, quoted in the Times of India, December 15, 2009.

II. EMISSION OF CARBON DIOXIDE

Global emissions of carbon dioxide- the prime greenhouse gas added to the atmosphere as a direct result of human activity-amounted to 26.4 billion metric tons per year, of which 84 percent (22.3 billion metric tons) was from industrial activity. Emissions from industrial activity have climbed 38 percent over the past 20 years. The United States continues to be the largest source of industrial emissions of carbon dioxide, accounting for nearly 22 percent of global emissions followed by China, Russia and Japan which account for 11.9, 9.4 and 5 percents of emissions respectively. The European Union Countries account for 13 percent of the global emissions where as the developed countries of the Organisation for Economic Cooperation and Development (OECD) account for 44.7 percent².

The carbon dioxide is formed due to the burning of fossil fuels and as a direct consequence of these increased fossil fuels, global energy related carbon dioxide emissions are expected to rise between 30 and 40 percent by 2010 under moderate growth conditions. With higher economic growth rates, and therefore higher energy demand, emissions will be greater as well. The World Energy Council's *High Growth* scenario, which assumes particularly robust economic growth in the developing world; shows a 93 percent rise in carbon dioxide emission by 2020³.

This rapid increase in the emissions of carbon dioxide in the developing countries is attributed to the expansion of industrial activities in a massive scale. With the shift in stand of the economies and the opting for the industrial growth which replaced the agrarian sector saw the manufacture of certain items like refrigerators, air conditioners etc. which contribute to the emission of such gases. India which is placed with China, both of which are on the major expansion process in the industrial sector coupled with high population growth are expected to contribute significantly in the emission of carbon dioxide in the next two decades. It is also expected that by the end of this decade both the countries may account for more emissions of carbon dioxide than the OECD countries. The past record and the present day emissions of carbon dioxide confirms the position that in this century itself we are going to witness a significant change. The latest World Bank Report titled 'India's Carbon Footprint' which outlines the massive increase in carbon dioxide emissions due to fast paced development, says that emissions in the country are set to increase to 4.5 billion tons by 2031 from the current 1.1 billion tons. The report says that the bulk 53 percent would be from grid supply electricity, followed by industries 26 percent, transport 16 percent and captive power plants by 5 percent⁴.

From 1890 to 2007 rich countries contributed some 60 percent of the carbon dioxide emissions into the atmosphere with India contributing a meagre 3 percent. United States with just 5 percent of the world's population is alone responsible for some 30 percent of the carbon dioxide in the global atmosphere. Till 2007 America was the world's largest emitter, a place which was taken over by China. Even if the industrialized nations stick to their commitments, they will still be occupied around 50 percent of the global carbon budget till 2020. India which adds up to 17 percent of the world's population will contribute around 4 percent of the global carbon budget by 2020 with a self-imposed domestic target.

2. Lai's Commentary on Water, Air Pollution and Environment (Protection) Laws, 4th Edition, 2000 at p.71.

3. Ibid.

4. Indian Express, Dated December 21, 2009.

III. UN FRAMEWORK CONVENTION ON CLIMATE CHANGE

Concerned with the fact that the human activities have been substantially increasing the atmospheric concentrations of green house gases, that these increases enhance the natural greenhouse effect and that this will result on average in an additional warming of the Earth's surface and atmosphere and may adversely affect natural ecosystems and humankind, the United Nations adopted a Framework Convention on Climate Change which was opened for signature at the Rio Summit in 1992 where 155 governments signed the convention and since then over 160 governments have ratified or otherwise committed themselves to this convention. Their purpose was to stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent "dangerous" human interference with the climate system. This is reflected in the objective of the convention which says that "the ultimate objective of this Convention is to achieve in accordance with the relevant provisions of the convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."⁵ Such a level is to be achieved within a timeframe sufficient to allow eco-systems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner. The convention defines "climate change" to mean "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods"⁶ and the 'climate system' has been defined to mean "the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions"⁷.

In order to achieve the objective of the Convention and to implement its provisions, the Convention requires that the parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly the developed country parties should take the lead in combating climate change and the adverse effects thereof⁸. For the purpose the convention also requires that taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, all parties shall "develop, periodically update, publish and make available to the Conference of the Parties national inventories of emissions from sources and removals by sinks of all greenhouse gases using comparable methodologies to be agreed upon by the conference of the parties"⁹. In carrying out the commitment, the convention also speaks of conducting research and systematic observation and also carryout education, training and public awareness programmes on climate change and its effects. The convention has established a 'Conference of the Parties' which is the supreme body of the Convention, which shall keep under regular review the implementation of the convention and any related legal instruments that the conference of parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention¹⁰.

5. United Nations Framework Convention on Climate Change, 1992, Article 2.

6. Ibid; Article 1.

7. Ibid.

8. Ibid; Article 3.

9. Ibid; Article 4.

10. Ibid; Article 7 (1) & (2).

This world convention has divided the countries into two sets. One set is called the Annex - 1 countries or the industrialized countries which are responsible for most of the accumulated green house gas emissions and have been asked to reduce their emissions by 6-8% by 2012. The rest countries including India and China are called non-Annex-I countries. Eastern European countries, where it is said that economic meltdown has led to reduced emission by default, are called 'economies in transition' and are taken as a separate sub category within the Annex-I list.

The industrialized countries also committed themselves to providing new and additional financial resources to meet the agreed full costs of developing country parties in complying with communications agreed under the convention assisting vulnerable developing countries with the costs of adaptation to any adverse impacts of climate change; promoting, facilitating and financing "as appropriate" the transfer of environmentally - sound technologies and know-how to developing country Parties; and providing such financial resources, including the transfer of technology; needed by developing country parties to meet the costs of implementation of the commitments of the Convention.

Climate change is one of the most important global environmental problems. Recognising this and the threats posed by climate change, most countries joined an International Treaty, the 'United Nations Framework Convention on Climate Change', to begin to consider what can be done to reduce global warming and to cope with whatever temperature increases are inevitable. The Convention has established the 'Conference of the Parties' (COP) which is the highest decision making authority of the Convention. The Conference of the Parties meets once in a year to specify rules for implementing the provisions of the convention. So far, the Conference of the Parties has held twenty meetings, and the latest meeting was held at Lima, Peru in December 2009.

A. Kyoto Protocol

After five years of the adoption of the Framework Convention on Climate Change, the third conference of parties was held in Kyoto, Japan in December 1997 where in the progress made during the last five years was reviewed and future plans were chalked out by fixing strategies and objectives for the future. The outcome known as the "Kyoto Protocol"¹¹ succeeded in taking certain decisions. The Kyoto Protocol is an international agreement linked to the United Nations Framework Convention on Climate Change. The major feature of the Kyoto Protocol is that it sets binding targets for 37 industrialized countries and the European community for reducing greenhouse gas (GHG) emissions. This amount to an average of five percent against 1990 levels over the five-year period 2008-2012. The major distinction between the Protocol and the Convention is that while the Convention encouraged industrialized countries to stabilize GHG emissions, the Protocol commits them to do so. Recognizing that developed countries are principally responsible for the current high levels of green house gas emissions in the atmosphere as a result of more than 150 years of industrial activity, the Protocol places a heavier burden on developed nations under the principle of "common but differentiated responsibilities". The Kyoto Protocol foresaw greenhouse gas mitigation through clean development mechanisms Joint Implementation of Project and Emission Trading. On the plea of certain developing countries that their economic conditions do not permit them to accept such commitments and also the per capita emissions

11. The Kyoto Protocol was adopted in Kyoto, Japan, on 11 December 1997 and entered into force on 16 February 2005. 184 parties of the Convention have ratified this Protocol to date.

of the greenhouse gases of these countries are much less than the industrialized nations, some countries including India and China were exempted from such commitments, which the United States objected. The developed countries kept up pressure to include in the declaration to be issued at the end of the conference, some words that legally committed the developing countries to take measures to cut down greenhouse gas emissions. The Protocol's first commitment period began in 2008 to ensure that there is no gap between the end of the Kyoto Protocol's first commitment period in 2012 and the entry into force of a future regime.

B. The Delhi Declaration

In the year 2002, the eighth Conference of the Parties to the United Nations Framework Convention on Climate Change was held in New Delhi which was attended by more than 170 countries. In this ten days conference which started on 28th October 2002, the main bone of contention was whether the developing countries should take on commitment for reduction of greenhouse gas emissions beyond 2012 when the commitment period under the Kyoto Protocol comes to an end. The declaration emphasized that the United States, Russia and other developed countries which have not so far ratified the Kyoto Protocol to do so at the earliest.

The European Union and the other developed countries continued to insist that it was necessary for the developing countries to commit themselves to reduce the emissions because every country should do something to tackle the climate change problem. But the developing countries led by India maintained that it was not possible as their contribution to the problem was far less than that of the developed world i.e. a tiny fraction of what the developed countries produce. The developing countries maintained that they do not have adequate resources to meet their human resources. The Indian Prime Minister maintained that "the developing countries struggling to feed their population only produced a tiny fraction of greenhouse gases and could not afford the cost of extra emissions cuts" and also "Climate change mitigation will bring additional strain to the already fragile economies of the developing countries and will affect our efforts to achieve higher growth rates to eradicate poverty"¹².

For the first time the declaration linked climate change to sustainable development and talked more of adaptability of vulnerable communities to climate change rather than ways of reducing carbon emissions. But this was not acceptable to some. While the European Union and the other countries, which had committed to provide finances for the funds, insisted that activities that go to reduce or avoid emission of green house gases should also be included, the developing countries emphasized that the funds should be used more for improving their capacity to take care of the adverse impacts of the climate change. However, despite all the differences, the general view that emerged at the end of the ministerial plenary session was that climate change significantly impacts economic development and hence, the concern should be addressed in the context of promoting sustainable development. Many developing countries observed that adaptation to adverse effects of climate change had to be accorded priority and necessary actions taken to increase their institutional and financial capabilities to cope up with the ill-effects of climate change.

12. The Indian Express, Dated 31 October, 2002.

C. The Bali Roadmap

The thirteenth Conference of the Parties to the United Nations Framework Convention on Climate change and the third meeting of the parties to the Kyoto Protocol was held in Bali, Indonesia from 3-15 December, 2007. This conference was attended by more than 10,000 participants, including representatives of over 180 countries, together with observers from intergovernmental and non-governmental organizations and the media. The conference attracted a great deal of attention world over mainly because of two reasons. In the first place just before the conference, the fourth Assessment Report of the Intergovernmental Panel on Climate Change was released and secondly the year 2007 was the year immediately preceding the beginning of the first commitment period under the Kyoto Protocol i.e. 2008-2012.

The Conference culminated in the adoption of the Bali Roadmap, which consists of a number of forward looking decisions that represent the various tracks that are essential to reaching a secure climate future. The Bali Roadmap includes the Bali Action Plan, which charts the course for a new negotiating process designed to tackle climate change, with the aim of completing this by 2009. The Principal outcomes of the Bali Conference were, first, a process to determine the greenhouse gas reduction commitments of industrialized countries (which are referred as Annex-I countries) under the Kyoto Protocol, beyond 2012. Second, the commencement of Bali Action Plan; a comprehensive dialogue on long term co-operative action to address four major building blocks of climate change, i.e. mitigation of green house gases; adaptation to climate change impacts, technology development and co-operation; and finance. In addition to this, several other significant decisions were also taken, particularly the operationalisation of the Adaptation Fund to provide assistance to developing countries to adapt to climate Change.

The success of Bali Conference can very well be summed up by the closing remarks of the President of the Conference on the final day of the two weeks deliberation. He said “the decisions we have taken at Bali together create the world’s roadmap to a secure climate future. The governments assembled here have responded decisively in the face of new scientific evidence and significant advances in our thinking to collectively envision, and chart, a new climate secure course for humanity”. He further said that “as we begin our work for the future, we should not forget that we are only a few weeks away from the start of the first commitment period. And whilst we have made an excellent start in Bali towards a secure climate future, we must also ensure that existing commitments are fully implemented”. The road from Bali to Poznan and Copenhagen must be paved not with good intentions but concrete actions and rigorous implementation.

D. The Copenhagen Accord

To complete the journey which started with the adoption of the Kyoto Protocol, the world leaders met again at Copenhagen in December 2009 to adopt practical measures with view to resolving the problem of climate change to the best of their abilities. Before this conference, the Fourteenth Conference of the Parties (COP 14) of the United Nations Conference on Climate Change was held at Poznan, Poland from 1-12 December 2008, which was considered to be a milestone on the road to success for the processes which were launched under the Bali Roadmap. The meeting had come midway between COP 13 in Bali which saw the launch of negotiations on strengthened international action on climate change and COP 15, Copenhagen, at which the negotiations are set to conclude. The Poznan conference which has drawn more than 11,000 delegates representing government, industry, civil society and international organizations, constitutes the halfway mark in the negotiations

on an ambitious and effective international response to climate change to be agreed at Copenhagen at the end of 2009 and to take effect in 2013, the year after the first phase of the Kyoto Protocol expires.

Coming to Copenhagen again, the major thrust of the conference was to reset the goal to produce an 'operationally binding political agreement' on how and under what terms the actions needed to prevent global warming will be distributed among the 194 member countries. It was also hoped that "such an arrangements, which needs to be a major advance on the Kyoto Protocol within the parameters set by the United Nations Framework Convention on Climate Change (UNFCCC) will eventually lead to a fair, just and workable legal instrument." The settlement was expected to be guided by the UNFCCC formulation of "Common and differential responsibilities and respective capabilities." It was expected that the fifteenth Conference of the Parties (COP-15) held at Copenhagen would arrive at suitable amendments to the Kyoto Protocol for the industrialized countries to undertake new emission reduction targets beyond the first commitment period of 2008-2012. Further the conference was also expected to set the 2nd Commitment period beyond 2012 and the agreement should be far more ambitious than the Kyoto Protocol.

For Stabilizing atmospheric green house gas concentration that limits temperature rise to 2 degrees, the Annex -1 countries need to undertake deep cuts in their emissions in the post 2012 period. But on the other hand the Annex-1 countries want the emerging economies like India and China, whose emissions have grown in recent years because of their economic growth, also to accept significant legally binding cuts during this period. There is urgent need that all countries should take action and the responsibilities is more on the industrialized nations who must lead the way by committing to achieve deep cuts in their emissions of carbon dioxide and other green house gases.

The conference was held amidst the expectation by the developing nations that the rich and developed nations who contribute significantly to the warming of the world would lead with drastic emission reductions and provides financial assistance and technology transfer to them to fight the problem. They also wanted the instrument to be legally binding. But finally, the conference concluded with a disappointing note without adopting any acceptable formula. The poor countries felt that they were betrayed and the developing countries are not satisfied with the conclusion because there was no clarity on the way forward. It seems that the conclusion was dictated by the rich countries. However, the conference finally came out with document known as 'Copenhagen Accord' that promises to limit the rise in global temperatures to 2 degree centigrade.

Majority of the members could not accept this United States driven Accord and doubts were raised regarding the outcome of the conference as the Accord did not adopt and endorse the fears of the poor countries. American President Barack Obama who drafted the Accord called it and 'unprecedented breakthrough' but at the same time raises is concern also by admitting that it fail well short up combating global warming. In fact, Copenhagen provided an opportunity to the world leaders to reach a new milestone in international co-operation on climate change. But it could not strengthen the partnership and there was no unanimous voice in resolving the issue. It was said that Copenhagen session of climate change talks ended up betraying the planet, human kind and some of the poorest regions of the world with the poorest of peoples of Africa and small island nations. It was because, the rich countries instead of making any commitments, tried to shift the burden to the developing countries. As a result, 110 heads of States who attended this conference were forced to return back to their countries without reaching any agreement.

E. The Lima Climate Talks

Before the Lima Talks striking a surprise again, the world leaders at Cancun¹³ declared a breakthrough by renewing the confidence in the United Nations process negotiations and its ability to deliver a long term commitment and short term actions. Putting aside their differences, the countries reached a compromise that signaled their willingness to work together in tackling climate change. The Cancun Summit contributed to a great extent in solving the dysfunctional United Nations negotiating process from collapse.

The eighteenth Conference of the Parties was held at Qatar National Convention Centre, Doha which adopted an amendment to the Kyoto Protocol. The Doha amendment aimed to facilitate implementation of the Protocol after the first commitment period and include quantified emission limitation or reduction commitments for the second commitment period. It also approaches to address the loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change to enhance adaptive capacity. Despite these commitments the differences of the world leaders i.e. the developing and the developed countries was wide open as they could not arrive at a conclusion to address the threat of climate change to the satisfaction of all. However one positive aspect of the conference was the agreement among the nations to extend the commitment period of the Kyoto Protocol by another eight years. Thus now the deadline is now set at 2020 by which all the member countries are required to reduce the green house gas emissions.

At the 20th Conference of the Parties held at Lima, Peru in December, 2014 the difference between the developed and developing countries was clearly seen but towards the end of the conference they all reached an understanding acceptable to all and it was pledged that each will cooperate with each other in reducing the emissions. A new agreement will be signed in 2015 at the next meeting at Paris which will become operational from the year 2020. Further all the countries agreed that they will declare the targets for reducing carbon dioxide by March 31, 2015. These voluntary targets are called the Intended Nationally Determined Contributions (INDC). This consensus could be achieved after a prolonged discussion in which more than 190 countries participated. Despite the agreement certain questions also remained unanswered.

The BASIC nations and also the SAARC countries met separately and decided that they will move on the important issues relating to adaptation, technology transfer and finances to tackle the climate change. They also pledged to preserve and strengthen the unity of the developing countries and will protect their common interest. This positive attitude of the developing countries made the participating nations to arrive at a conclusion suitable to all.

IV. ASSESSMENT REPORTS BY THE IPCC

In 1988 the “Intergovernmental Panel on Climate Change” (IPCC) was established by the World Meteorological Organization (WMO) and United Nations Environment Programme (UNEP) to investigate the problem that is threatening the world. The IPCC is the leading body for the assessment of climate change to provide the world with a clear, balanced view of the present state of understanding of climate change. The IPCC carries on the exercise of international consultations on the problem which involves more than 400 scientists from

13. The Sixteenth Conference of the Parties was held at this city of Mexico from 29th Nov. to 10th Dec., 2010. The outcome of the conference was known as the ‘Cancun Agreement’ which sought to advance the Bali Roadmap.

across the world and the mandate has been given to it to assess the state of existing knowledge about the climate system and climate change; the environmental, economic and social impacts of climate change and possible response strategies. The IPCC provides at regular intervals comprehensive, rigorously documented Assessment Reports that summarize the current knowledge and future projections of climate change. The IPCC is known for the depth of its scientific work and the work is very much policy relevant. The report prepared by the IPCC played a crucial and decisive role in inducing governments to take appropriate measures, for its pioneering work and significant contribution in the field of climate change, the IPCC shared the Nobel Peace Prize, 2007.

Since its inception, the IPCC has come out with four Assessment Reports. The first report was published in 1990, the second in 1995, the third in 2001 and the fourth and the latest entitled "Climate Change, 2007" was released in November, 2007. Compared to the 2001 Report, the fourth Assessment Report pays greater attention to the integration of climate change, with sustainable development and inter-relationships between mitigation and adaptation. Specific attention is also given to regional issues, uncertainty & risk, technology, climate change and water¹⁴.

The Fourth Assessment Report (AR4) has projected a serious picture of the earth's future. The report states that the global warming may have a devastating impact on the climate of the earth. It is very likely that climate change can slow down the pace of progress towards sustainable development either directly through increased exposure to adverse impact or indirectly through erosion of the capacity to adopt. The IPCC has made it clear that the fact of global warming is unequivocal and there is enough evidence to indicate that this is due to anthropogenic reasons.

It is a fact that total stock of green house gases in the atmosphere is the cause of the global warming but when the emissions continue beyond the absorption capacity of the earth, it is sure that there will be rise in temperature. Although the developed economies are mainly responsible for this, its impact will be much greater on the developing countries and the impact on India will probably be greater. We may face the retreat of the glaciers, rising sea levels, new difficulties for the farming sector and above all the less predictable monsoon-on which the lives of so many Indians depend.

V. IMPACT AND THE HEAT OF CLIMATE CHANGE

Various studies, reports and assessments made so far on the possible impact of climate change present a very grim picture and the global climate change has become one of the most serious environmental concerns of our time. The consciousness is growing world over for understanding the possible fall out. Studies reveal that trends in the physical and biological environment and their relationship to regional climate changes has increased greatly and the recent regional changes in temperature have had discernible impacts on physical and biological systems.

As mentioned earlier projections by IPCC of future changes in climate for the next two decades, a warming of about 0.2 degree Celsius per decade is projected and if emissions are maintained at the 2000 level. A further warming of 0.1 degree Celsius per decade would be expected. Depending upon the specific emission scenario, further increase in temperature will be assessed. The report further says that continued green house gas emissions at or above current rates would cause further warming and induce many changes in the global

14. www.ipcc.ch/ar4, visited on 20.11.2008.

climate system during 21st century that would very likely be larger than those observed during the 20th century.

As per the fourth Assessment Report, more specific information is now available across a wide range of systems and sectors concerning the nature of future impacts, including some fields not covered in previous assessment. Thus, the key finding regarding the impact of climate change over the 21st century on the system and sectors like Ecosystems, Food, Coasts, Industry, settlement and society, health and water etc. are available. During this period the ecosystem is expected to undergo unprecedented changes globally and with the rise in temperature, the ecosystem structure and function will be greatly affected and there will be negative impact on the biodiversity and ecosystem goods and services. Although crop productivity is expected to rise marginally in mid to high latitudes, the lower latitude will experience low production. Coasts are projected to be exposed to increasing risks including coastal erosion and by 2080 many millions more people than today are projected to experience floods every year due to the rise in the sea level. The industries, societies and settlements which are there in coastal and river flood plains are more vulnerable because their economies are closely linked with the climate sensitive resources. Health of the millions of people is expected to be severely affected as it is projected that several diseases will affect the health status of the people. Education, health care, public health initiatives and infrastructure and economic development which are closely associated and shape the health of the population will be areas of critical concern. Similarly, water and water resources will undergo severe stress by the change in the climate¹⁵.

Besides all these, the report also projects that by 2050s, freshwater availability in Central, South, East and South-East Asia, particularly in large river basins will decrease, and coastal areas will be at greater risk due to increased flooding from the sea. Climate change is also projected to compound the pressures on natural resources and the environment associated with rapid urbanization, industrialization and economic development¹⁶. Researches also show that countries predominantly with agrarian economies will experience reducing agricultural productivity which ultimately will have a negative impact on the economic growth. This will result in lower incomes of the vulnerable populations and increase in the absolute number of people at risk of hunger.

VI. CLIMATE CHANGE AND BIO-DIVERSITY

Bio diversity includes plants animals and microorganisms found on the planet which make the life on the earth sustainable and the planet habitable for humans. Thus biodiversity has got a major role to play in helping the ecosystem which provides us a variety of services. Naturally it becomes more important for us to protect and preserve the biodiversity which faces a serious threat. Taking in to consideration the developmental needs, poverty alleviation programmes and sustainable agricultural practices, tackling climate change has become essential as climate change is closely related to the loss of biodiversity. A report of the Convention on Biological Diversity Ad Hoc Technical Expert Group on climate change and bio diversity released during the Copenhagen Summit showed that observed changes in climate have already adversely affected bio diversity at the species and eco system level,

15. www.ipcc.ch/ar4, visited on 20.11.2008.

16. Ibid.

with further changes in climate.¹⁷ Further the Third Edition of the Global Biodiversity Outlook, a State-of-the-art summary of the status of biodiversity, reveals that the five main global drivers of biodiversity loss – habitat loss, the unsustainable use and over exploitation of resources, climate change, invasive alien species and pollution have not only remained more or less constant over the last decade, but are in some cases intensifying.¹⁸ Thus there is urgent need to effectively adapt to manage the climate change and biodiversity loss by addressing the problem in a systematic manner. It has been rightly stated by the Global Biodiversity Outlook-

“Systematic proofing of policies for their impact on biodiversity and ecosystem services would ensure not only that biodiversity was better protected, but that climate change itself was more effectively addressed. Conservation of biodiversity, and, where necessary restoration of ecosystems, can be cost, effective interventions for both mitigation of and adaptation to climate change often with substantial co-benefits.”¹⁹

VII. THE FORMIDABLE CHALLENGE

National Academy of Sciences (NAS) of the United States in a recent report has also confirmed that the world temperature is rising and it is expected that the trend will continue. And now it is sure that there will be a change in the seasons we experience. In fact we have started experiencing the seasonal change particularly a little warmer climate than before which is also going to make our lives a little different. The NAS report is not sure about how much the human activity contributes to this warming but it is sure that the green house emissions are rising and we, the human being are very much responsible in causing this green house problem.

It has also been predicted by the NAS that the surface temperature will rise between 2.5 and 10 degrees in the next hundred years²⁰. We have already experienced the increase of temperature by one degree. With this increase as the NAS report says we are witnessing the retreat of the glaciers, thinning arctic ice, rising sea levels, some lengthening of the growing seasons and the earlier arrival of migratory birds²¹. If such is the situation with one degree increase what will happen if the temperature rises by 2.5 degree and it is beyond our imagination of the situation of temperature rising by 10 degrees. If the global warming will continue it will certainly have its impact felt on the social and economic characteristics of the society. Some potential effects that are associated with such a change are agriculture, water resources, coastal resources, energy and health of the people. There may be agricultural differences which will be a great burden on the developing countries, shortage of water for drinking and irrigation and other purposes, increase in certain insects, an effect on the quality of air, disruption in the weather, health-stress and the forest cover may also be severely affected as they are very susceptible to fire and other forms of damage due to change in the situation.

Recently a Washington based organization The Centre for Global Development (CGD) has claimed that China has surpassed United States of America and put India in the third

17. Secretariat of the Convention on Biological Diversity, Connecting Biodiversity and Climate Change Mitigation and Adaptation, Report of the Second Ad Hoc Technical Expert Group on Biodiversity and Climate Change (2009).

18. Secretariat of the Convention on Biological Diversity, Global Biodiversity Outlook 3 (2010).

19. Ibid.

20. Stuart Lieberman, “Environmental Justice : An Appraisal” in ‘The ICFAI Journal of Environmental Law,’ Vol.1, Nov. 2002 at p. 77.

21. Ibid.

place as the biggest emitter of carbon dioxide (CO₂) through power generation in the world²². The findings which form part of recent report by the said organization which is entitled as “China surpassing the U.S. as the world’s biggest emitter of carbon dioxide from power generation” also name Russia, Germany, Japan, U.K., Australia, South Africa, and South Korea among the World’s top ten power sector emitter in absolute terms²³. According to the report, “the State owned NTPC tops the list of companies belching out the deadly gas in India” and the data showed that emissions from power generation were racing in the wrong direction.

However, a recent study by the United Nations states that in the last 16 years i.e. the period ranging from 1990-2006, there is an 10 percent increase in the generation of greenhouse gases and the rich countries are mainly responsible for this²⁴. The United Nations Framework Convention on Climate Change, in its latest report says that “the global warming causing green house gas emissions of the rich nations have increased by 9.9 percent during the period 1990-2006.” Yet another study by an American Scientist, John Christy, a Professor of atmospheric science and director of the ‘Earth System Science Centre’ at the University of Alabama in Huntsville, United States, reveals that “a 30 - year map of the Earth’s climatic changes has indicated that the planet’s atmosphere warmed an average of about 0.4 degree Celsius²⁵. The map which is operational since December 1, 1978 shows that half of the globe has warmed at least 0.3 degree Celsius in the past 30 year, which half of that - a full quarter of the globe-warmed of least 0.6 degree Celsius. The study says that this is a pattern of warming which has not been forecast by any of the major global climate models.

A recent study carried on Antarctica by the scientists suggests that “The global warming is affecting all of Antarctica, home to the world’s mightiest store of ice. The average temperature across the White Continent has been rising for the last half century and finger of blame points at the green house effect”²⁶. The report says that ‘any significant thaw of Antarctica could drown many coastal cities and delta regions.’ Antarctica, which is bigger than Australia holds enough ice to raise global sea levels by 57 meters.

VIII. SEEKING COOPERATION OF ALL

With the passing of every year, the impact on the atmospheric climate is becoming more and more apparent. We are witnessing and experiencing the changes that are taking place in the weather conditions. The climate is warming as a result of which there are alterations in the rainfall and temperature patterns. And it is no denying the fact that the world is in the midst of climate change and the situation is not going to change in the near future. As mentioned earlier it is a long term process and it will take decades to reverse the situation. Therefore, we have to act now and take immediate measures. There was much debate in the recent past over whether human activity is influencing global climate. The Intergovernmental Panel on Climate Change (IPCC) in its Second Assessment Report (1996) which was adopted soon after the Berlin Meeting concluded that “the balance of statistical evidence, when examined in the context of our physical understanding of the climate system, now points towards a discernible human influence on global climate”²⁷.

22. The Hindu, Dated September 1, 2008.

23. Ibid.

24. The Times of India, Dated November 28, 2008.

25. Ibid; Dated December 16, 2008.

26. The Indian Express, January 22, 2009.

27. The Hindu Survey of the Environment, 1997, at p. 22.

It has already been mentioned that the IPCC projects that the earth will go warmer between 1.4 degrees Celsius to 5.8 degrees Celsius between 1990 and 2100 with most land areas warming more than the global average and there will also be a rise in the sea level. All these will result in extreme weather events such as heat waves, heavy precipitation events, floods, draughts, fires, pest outbreaks and severe cyclonic storms. Although some positive aspects could be noticed, the adverse impact would be much more. In such a situation India is going to lose severely as its economy will be shattered to a great extent if the projections come true. Then the question arises what can be done in this crucial juncture?

Scientists are regularly warning that there is urgent need to stabilize the carbon dioxide and other green house gases in the atmosphere. According to estimates, growth in global energy demand could be cut in half over the next 15 years simply by deploying existing technologies yielding a return on investment of 10 percent or more. The IPCC report lays out the very practical ways which starts from adopting tougher standards for air conditioners and refrigerators to improved efficiency in industry, building and transport. Similarly, it has been urged that there is urgent need to cut power related carbon dioxide emissions and to very rapidly bring down the price of proven, zero carbon renewable power sources, such as wind and solar²⁸. Very recently, the European Parliament has approved the European Union's ambitious climate change package aimed at reducing green house emission by 20 percent by 2020²⁹.

Taking the Indian considerations, it was felt that there should be two types of responses to address the challenge of climate change and action that needs to be taken in the future. The first relates to adaptation, i.e., measures that have to be taken given the very high likelihood that climate change will occur and will have adverse effects and the second relates to mitigation, i.e., steps to be taken that might reduce the extent of climate change³⁰. While the first one refers to actions to be taken at the national level by adapting to rapid economic growth, the second one requires to mitigate the problem through mutual co-operation and co-operative action. Among the priority areas that need attention, particularly relating to adaptation process include, "improvement of productivity potential and water use efficiency of agricultural crops, specifically in regimes of water shortage and extreme variations of temperature. Further adaptation response should include 'programmes relating to watershed management, coastal zone planning and regulation, forestry management, agricultural technologies and practices and health'³¹. The Eleventh Plan proposes to reduce the energy intensity per unit of green house gas by 20% in the next 10 years (starting from 2007-08 to 2016-17) and it also proposes to initiate action to increase our access to cleaner and renewable energy by fully exploiting existing resources (e.g., hydropower and wind power), developing nuclear power and also supporting research in newer areas such as biofuels from agro-waste, solar energy etc³².

Thus, accepting and realising the ground realities what is required is that both the developed and developing countries should work together and by co-operative action should face the challenge by creating an environment of trust and co-operation.

A recent study by the scientists raises a ray of hope which says that we can fix our troubled climate change by renewable energy and geoengineering solutions. They studied

28. The Hindu, 1.9., 2008.

29. The Times of India, Dated December 18, 2008.

30. Eleventh Five Year Plan, Planning Commission, Government of India, Vol.II at p. 205.

31. Ibid.

32. Ibid.

the effects of increasing green houses gases and sunlight on our planet's water cycle using a global climate model and their findings could have implications for the so-called "Solar Radiation Management (SRM)" geoengineering schemes³³. These schemes counter the global warming effects of anthropogenic green house gases such as carbon dioxide and methane by reducing the amount of solar radiation that is absorbed by the Earth. Placing reflecting mirrors in space, injecting aerosols into the stratosphere, enhancing the albedo of marine cloud by seeding them with cloud condensation model and painting the roof white are some examples of SRM geo-engineering schemes³⁴. To counter climate change from a doubling of carbon dioxide approximately 2 percent of the incoming solar energy needs to be reflected back.

Therefore it is said there is a need for leadership and it is the industrialized nations who should come forward and take the lead and need to do so much more effectively than has been apparent so far. But the developing countries also need to get more closely involved. Then can only be expected to do so if they can see policies and measures, technology and finance being directed towards them in ways which closely match their expectations. This means a widening of the policy and measures agenda beyond climatic adaptation and mitigation *per se*³⁵.

IX. ADDRESSING THE CHALLENGE

From the foregoing discussion, it is clear that the climate change is going to severely affect the human being and the whole world at large. It has affected the poor disproportionately and the subsistence farmers around the world have experienced an unpredictable season and social problems which are directly linked with the higher temperature. The alterations in the global climate would result in large change in the ecosystem, disastrous disruption of livelihood, living conditions, human health and above all the economic activity.

For this we have to take a sustainable approach. In the post Rio Scenario the richer countries responded unfavourably and inadequately to the concept of "common but differentiated responsibility". But now the time has changed. Both the developed and developing countries should share the 'common but differentiated responsibility'. The developed countries have to rapidly redirect their societies and economies towards clean energy, energy efficiency and more sustainable consumption patterns. The countries in the developing world must get their chance to take a direct road towards a sustainable future, avoiding the deviation of relying on unsustainable energy forms such as fossil fuels and nuclear³⁶. Thus we have to face the challenge and for the purpose "we need to open up the process leading to further commitments and timetables to combat the adverse effects of climate change, leading us into the future of climate change negotiation; a future with less greenhouse gas emissions, less risks of floods and droughts and more benefits for both developed and developing countries, hence a more sustainable future."³⁷

The IPCC projection and acceptance that 'there is a whole range of anecdotal evidence indicating change' is still under doubt by a majority of scientists which is to be proved

33. The Hindu, Dated November 5, 2009.

34. The Hindu, Dated November 5, 2009.

35. The Hindu Survey of the Environment, 1997, at p. 26.

36. Jurgen Trittin, Minister for Environment, Nature Conservation and Nuclear Safety, Germany, in The Hindu, Dated November 1, 2002.

37. Jurgen Trittin, Minister for Environment, Nature Conservation and Nuclear Safety, Germany, in The Hindu, Dated November 1, 2002.

scientifically. And also the question 'whether it is a natural climatic variation, regional change or global warming fuelled by gases from power generation, industries and transport, is yet to be conclusively determined'³⁸. Whatever may be the case and whatever may be the outcome of any scientific verification one thing is clear that the climate has certainly undergone a change. What shape it will take in the future and what will be its impact on the human community is a debatable point. But in the present scenario taking into consideration the present day happening we need to be more cautious and take necessary steps.

The year 2008 was volatile and we witnessed unprecedented changes in the weather coupled with many other problems including shortage of foods, malnutrition, impact on water resources, forests and the economic recession. The United Nations Food and Agricultural Organisation (FAO) reported that 2008 had seen the biggest increase in malnourished people in decades. Also the year 2008 has been declared as the hottest year in the last 150 years. Shortage of food, hunger, change in climatic conditions, melting of glaciers, malnutrition and low production continued to dominate the world in 2009, indicating clearly that the situation is going to be acute in the coming years. The extreme weather conditions have affected the economic growth forcing their planners to chalk out programmes to mitigate the problem.

Climate change affects everyone and must be solved by everyone. For the purpose we have to change our outlook so as to reshape the process of transformation and open the door to the age of green economics. What measures we undertake now will not affect the climate for the next two or three decades, but the sure will get the result after that, may be around 2050. It is a fact that action by industrialized countries alone is not enough. The developing countries and more particularly the emerging economies like China and India should take immediate action to mitigate the rapid growth in their emissions; otherwise they will be the ones to be hit hard by the impact of climate change.

X. CONCLUSION

The year 2014 may be declared as the hottest year because the world is witnessing the extreme weather conditions which are affecting the whole world causing a massive devastation of livelihood. The economy is also severely affected. It has been said that the world is running out of time and to cut emissions to stay below the required level is not that easy.

If we take in to consideration the outcome of all the major conferences held during the last two decades one thing is clear that despite negotiations we have achieved nothing concrete. At the global level the countries do share the concern pertaining to climate change and the potential threat to the prevailing ecosystem, but on the issue of emission reduction the developed and the developing countries greatly differ. As mentioned above we are on the terrifying crossroads of global environmental threat. We are in the 23rd year of the Rio Conference and 42nd year of the first ever conference on the human environment held at Stockholm. Despite several promises and programs what we notice that the climate situation instead of improving has declined to a great extent, which is evident from the recent dramatic changes in the climatic conditions. The negotiations to reach at a consensus are very tough. As discussed above there are many unanswered questions. One of the major issues which need immediate attention is that how much each country is going to cut taking into consideration her contributions? Whether the rich countries will agree to share the burden in case the intended target is not achieved? Whether the developing countries will be able receive the aid to meet their targets in the post 2020 period?

38. The Times of India Dated October 3, 2003.

In a surprising report³⁹ the Inter governmental Panel on Climate Change claimed that, it is very likely that the Arctic Ocean may become ice free in the summer months if the global temperature continues to rise by more than 2 degrees Celsius over the current level. The report⁴⁰ further says that there is more than 90 per cent possibility that the Arctic ice cover will continue to shrink through the 21st century with rising green house gas emissions. Really it is shocking news for the entire humanity, because the fall out of such a climate change would be devastating. There is no denying the fact that the whole world is on the terrifying crossroads of the global environmental threat. There was much debate in the recent past over whether human activity is influencing global climate. The Intergovernmental Panel on Climate Change in its Second Assessment Report⁴¹ concluded that “the balance of statistical evidence, when examined in the context of our physical understanding of the climate system, now points towards a discernible human influence on global climate.”⁴² With the passing of every year, the impact on the atmospheric climate is becoming more and more apparent. We are witnessing and experiencing the changes that are taking place in the weather conditions. The climate is warming as a result of which there are alterations in the rainfall and temperature patterns. The world is in the midst of climate change and the situation is not going to change in the near future.

President of Indonesia has rightly remarked that “we can negotiate about the climate, but we cannot negotiate with the climate”. GRo Harlem Brundtland has rightly put this “You cannot tackle hunger, disease and poverty unless you can also provide people with a healthy ecosystem in which their economies can grow”.⁴³

This year has given many surprises to the mankind so far as climate change is concerned. Hence what is needed at this moment of crisis is that to reshape the economic planning and re-orient the strategies for growth and development and take appropriate socio-economic measures to face the pressure and address the challenges of sustainable development and climate change, consistent with the provisions of the United Nations Framework Convention on Climate Change. After the Kyoto Conference it was alleged by the critics that the Kyoto Protocol was hijacked by some of the biggest polluters and now the Copenhagen has failed to raise any hope. World leaders could not arrive at any conclusion on this sensitive issue. But this should come to an end and we should work unitedly and begin to adopt practical measures to avoid the catastrophic climate change.



39. Draft copy the United Nation’s Intergovernmental Panel on Climate Change Report, Times of India, BBSR., dated 15.12. 2012.

40. Ibid.

41. The Second Assessment Report was submitted in the year 1996.

42. The Hindu Survey of the Environment, 1997 at p.22.

43. Quoted by Ahmed Djoghlaif in “Protecting Biodiversity in Relation to Climate Change and Human Welfare”, International Journal of Environmental Consumerism, New Delhi, Vol. 6, Issue 11& 12,2010 at p.5.

ONLINE SOCIAL NETWORKING WEBSITES AND THREAT TO PRIVACY

V.P. Singh*

Abstract

The internet is truly revolutionary and has created endless new opportunities for the people. The development of Information and Technology has accelerated the potentiality to publicize and communicate the information across the globe. The advancement of Information Technology not only provided facilitation of profitable e-commerce activities but also simultaneously raise the spectra of new criminal activities known as cyber crime. In the last few decades, Online Social Networking Websites have become immensely popular worldwide and has given wide opportunities to the internet users to exchange ideas, interact with likeminded people and develop healthy relationship. Unfortunately, as with most tools, not all uses of the Online Social Networking are laudatory, or even benign. There is a dark side of Online Social Networking Websites too. They became sanctuary for offenders to victimize women and other vulnerable targets and entails privacy concerns. The lack of security awareness among the user leads to privacy-intrusion prone activities and thus are susceptible to greater danger. This paper discusses the issues such as privacy threats and interpersonal victimization of women and children on Online Social Networking Websites.

Key Words: *Online Social Networking Sites, Privacy, Cyber Crime, Cyber Space, Cyber Security.*

1. INTRODUCTION

Ideate your deepest and darkest private affair or most embarrassing moment in your life which you never want to make public. Now visualize that one fine pleasant, sunny and bright morning you find this secret is suddenly broadcasted to your kinships and everyone you know. Need not to explore the aftermath. This presumption is an actuality of cyber world. Many of the people don't share deepest and darkest secrets with near and dear ones. But as a matter of fact millions of people shares their most intimate personal secrets with scores of strangers in an online chat room while seeking advice and sharing their experience. This sharing of personal secrets and befriending with strangers on an online social networking websites invites unseen and unwanted problems. A real and glaring example is of a young magazine journalist in Mumbai who was working on an article about online relationships. This article was about how people can easily find friendship and even love companion on the Online Social Networking Websites. During the period of her research, she happened to make a lot of online friends. One of these friends (ill minded, unfortunately for the young

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lady) manage to infect her computer with a Trojan. The young lady journalist lived in a small, one bedroom apartment and her computer was located in a corner of her bedroom. She had a habit of never powering off her computer. Unknown to her, the Trojan would activate her web camera and micro phone even when the internet was switched off. A year later she realized that hundreds of her private pictures were posted on pornographic sites around the world. Her fiancé broke the engagement and the young lady was thrown into suicidal depression¹.

Hundreds of people are moving towards the virtual worlds, where they interact with each other and discuss every kind of business private as well as public. The growing significance and importance of social networking in the lives of the people in the present era has ignited a vibrant dialogue about advantages and disadvantages of the use online social networking websites. The debates skirts an exceedingly wide spectrum of issues, including privacy concern, internet addiction and various other cyber crimes committed through online social networking websites for example cyber stalking, cyber defamation cyber bullying, cyber harassment etc.

II. THE CONCEPT AND BRIEF HISTORY OF ONLINE SOCIAL NETWORKING

Online Social networking websites has been around in various forms for over a decade, and existing in many avatars for various objectives. It is difficult to define online social networking in a straitjacket way, much time have been wasted and ink have been used to etch out the accurate definition of online social networking. According to Wellman online and offline social networks do not exist as such, but that they are useful analytic constructs for knowing social nature and defines social networks as relations among people who deem other network members to be significantly important and relevant to them in some or the other way.² Online social network websites are defined as websites that allow participants to construct a public or semipublic profile within the system and that formally articulate their relationship to other users in a way that is perceivable to anyone who can access their profile.³ For the purpose of this paper, the definition provided by Boyd and Ellison is most suitable and appropriate, they defined online social networking to be a network or a interlinked system where individual is allowed to (1) to create public or semi-public profile, (2) individual can articulate explicit links to other users with whom they share a connection, and (3) navigate list of connections by browsing the links and profiles of others.⁴

The world has witnessed of the remarkable changes of the last two centuries in the manner in which we socialize with other people. In a contemporary society online social networking has become as indispensable part of the people and plays a vital role in their life. It will not be hypothetical to say that people interact more with their friends and family members on social networking sites than in real world; we exhibit the most sophisticated and suave of all societal characteristics by spending as much time on the web as in the real world, exchanging favours and a person's social status is determined by his friend list in the social

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1. Nina Godbole, Sunit Belapure, *Cyber Security: Understanding Cyber Crimes, Computer Forensics and Legal Perspective*, (2011), p. 609; Rohas Nagpal, *Evolution of Cyber Crimes*, (2008), p.28.
 2. See, Wellman, B. "Are Personal Communities Local? A Dumptarian Reconsideration", *Social Networks*, 18 (4) (1996), 347-354.
 3. Patricia G. Lange, Publicly Private and Privately Public: Social Networking on You Tube, *Journal of Computer-Mediated Communication*, 13 (2008), 361.
 4. Danah m. Boyd, Nicole B. Ellison, N. B. (2007). Social Network Sites: Definition, History, and Scholarship, *Journal of Computer-Mediated Communication*, 13 (1), article 11. Retrieved on July 27, 2012 from <http://jcmc.indiana.edu/vol13/issue1/boyd,ellison.html>.

networking sites. It is so powerful and tempting that it has made everyone fall for it and believe it is their future. It also has the capacity of rendering anyone a laggard if they don't come along.⁵ Online social networking allowed people to connect and communicate with each others and thus appease the inherent urge to live in a society as man is a social animal⁶. Studies have shown that most of the social networking sites mainly support the pre-existing relationship. These networking sites are used to preserve subsisting real world relationships and thereby strengthened the relations as against the common notion that it is used to meet strangers⁷. Researchers have further found that social network users search more for those people with whom they have an offline relation than strangers, for instance, Pew research had revealed that ninety one percent of the United States teens avail the services of social networking sites to get connected with real world's friends⁸ and thus these social networking sites plays the role of bridging the gap between the relationship and make relationship more interactive as the people socialize with their near and dear ones as well as distant relatives even when they are not gathering at one place. What makes these social networking sites extraordinary is not that they permit people to meet known and unknown person, but rather they capacitate users to communicate and be visible on these sites. Online social networking websites permits individuals to (1) construct a public or semi-public profile with in a bounded system; (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system. Hence, online social networking websites profiles are equivalent to individuals in society, contacts analogous to social relationships and the ability to traverse contacts cognate to a community.

Today, there are scores of social networking websites, with different technological applications, which provide wide gamut of interests and practices. The technological applications of nearly all the online social networking websites are almost uniform, the cultures that surfaces around online social networking websites are sundry. Some people get themselves connected to these websites as per their interests, such as political views or activities while others attract because of common language, race, sex or nationality. These websites also provide platform for people to share their views with their distant friends and relatives and incorporate new information and communication tools for example mobile connectivity, blogging, photo and video sharing etc.

In recent years online social networking has moved form niche phenomenon to mass adoption and has become favorite hobby for the youths. The site Classmates.com is regarded as the first web site that allowed users to another user and one of the first recognizable online social networking websites SixDegrees.com was launched in the year 1997. SixDegrees.com was successful in attracting millions of users but services were shut down in the year 2000 after "struggling to find a purpose for [its] concept. Its founder was of the view the Six Degrees.com was simply ahead of its time. From 1997 till now, number of online social

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5. Dhiraj Kumar, *The Asocial Networking*, (2011), Wordizen books, Mumbai, p.112.
 6. Hogben, G. (ed.), "Security Issues and Recommendations for Online Social Networks", *The European Network and Information Security Agency Position Paper No. 1* (2007), <http://www.ifap.ru/library/book227.pdf> (accessed on 24.09.2012).
 7. *Ibid*; Ellison, N., Steinfield, C., & Lampe, C. The benefits of Facebook "friends": Exploring the relationship between college students' use of online social networks and social capital, *Journal of Computer-Mediated Communication*, 12(3)(2007), article 1. Accessed on August 20, 2012 from <http://jcmc.indiana.edu/vol12/issue4/ellison.html>.
 8. Lenhart, A. & Madden, M., Teens, Privacy, and online social networks. *Pew Internet and American Life Project Report*. at http://www.pewinternet.org/pdfs/PIPTeensPrivacySNS_ReportFinal.pdf. Accessed on June 24. 2012.

networking websites came into existence such as Friends, Asian Avenue, Black Planet, Live Journal, Cyworld, Lunar Strom, Myspace, Friendster, Orkut and Facebook etc. which provided services in area related to business, common interests, dating, face to face facilitation, friends, pets and photos and many more.⁹

At present there is no dearth of online social networking websites. In October 2007 Daksh Sharma published a catalogue of online links of 350 online social networking websites, since 1997 to 2010 there were some 1.5 billion users of online social networking websites. As per the Comscore, a leader in the measuring the digital world, eighty four percent of India's total internet visitors is user of online social networking websites. And India is seventh largest market worldwide for online social networking after United States of America, China, Germany, Russian Federation, Brazil and the United Kingdom¹⁰. Facebook captures the top position among online social networking websites with approximately twenty one million visitors.¹¹ As a matter of fact, Indian online social network users have increased by fourty three percent within 2009-10.¹² The result of this new world is that human being, a social animal, now have the possibility of not only to build stronger relationships with known persons but with strangers too and it would not be incorrect to state that now we lead dual existence –one in cyber world and the other in real world¹³. But it has a darker side also, though on line social networking websites have opened a wide window for socializing, they have also opened flood gate for various crimes in the cyber space. the capacity to disseminate information, easing freedom of expression to the click of a mouse poses a grievous threat to one's privacy and given way to various cyber crimes like publishing explicit materials in electronic form, video voyeurism, breach of confidentiality causing threat to the life of the people, particularly women and children, who are the victims of such the rancorous conduct of cyber criminals and other exploiters. The abusers use the online social networking websites to abuse and exploit children and women sexually for example by creating fake or false profile on facebook and other social networking websites posts defamatory and derogatory statements about the person he is personating, for example, a jilted lover can create a fake profile in the name of any women and post obscene, defamatory and derogatory message which may result in unwanted phone calls to the innocent women in the belief that she is soliciting. Perhaps in India's first case of cyber stalking the culprit Manish Kathuria was arrested by the New delhi Police. He was stalking an Indian Lady, ms Ritu Kohli by illegally chatting on the web site MIRC using her name, he used obscene and obnoxious language, and distributed her residence telephone number, inviting people to chat with her on phone. As a result of which, Ritu kept getting calls from everywhere, and people promptly talked dirty with her. The police department traced the culprit and slammed a case under section 509 of the Indian Penal Code for outraging the modesty of Ritu Kohli.¹⁴ In another incident, a

9. Danah boyd and Nicole B Ellison, "Social networking sites: Definition, history, and scholarship", *Journal of Computer-Mediated Communication*, 13(1), 2007..

10. www.oceanofweb.com/india/top-10-social-networking-sites-india.html.

11. According to recent data, facebook membership has grown down from 664 million users in first quarter of 2011 to 835.6 million in first quarter of 2012. At (<http://www.internetworldstats.com/facebook.htm>), accessed on 3rd September 2013.

12. *Facebook captures top spot among social networking sites in India*. Retrieved from <http://www.comscore.com> accessed on 25 August 2012. See also, Karnika Seth, *Computers, Internet and New Technology Laws*, (Butterworths Wadhwa, Nagpur, 2012).

13. See, Karnika Seth, *Computers, Internet and New Technology Laws*, (Butterworths Wadhwa, Nagpur, 2012).

14. Apar Gupta, *Commentary on Information Technology Act*, (Butterworths Wadhwa, Nagpur, 2nd edn., 2011)

man was arrested by the Delhi Police for assuming the identity of his ex-employer's wife in a chat channel and encouraging others to telephone. The victim who was getting obscene telephone calls at night from strangers made a complaint to the police. The accused was then located online in the chat room under the identity of the, victim and later traced through the telephone number used by him to access the internet.¹⁵ According to Jains Wolak of the Crimes against Children at the University of New Hampshire, "majority of cases involve young teenagers, mostly 13 to 15 years old who are targeted by adults on internet who are straightforward about being interested in sex".¹⁶ A report by daily Mail shows "crimes associated with the networking site have increased by as much as 7000 percent in some area – including cases of murder, rape, pedophilia, bullying, and assault. Pedophiles are using these sites to lure the innocent children and exploit them sexually."¹⁷

III. PRIVACY ISSUES IN ONLINE SOCIAL NETWORKING

Privacy influence internet and vice versa. On the one hand protection of privacy creates trust in the user and further the growth of the internet usage and on the other violation of privacy creates distrust and limits the usage of internet. Concern about privacy is crucial aspect in the internet usage. Warren and Louis Brandeis¹⁸ in 1890 explained privacy as "the right to be left alone". A more comprehensive and pragmatic view was given by Alan F. Westin in his book *Privacy and Freedom*, he defines privacy as, "the claim of the individuals, groups or institutions to determine for themselves when, how, and to what extent information about them is communicated to others"¹⁹. The term "privacy" in the information age has been explained as "the rightful claim of the individual to determine the extent to which he wishes to share of himself with others. It means the individual's right to control dissemination of information about himself..." In 1990, the Calcutt Committee in the United Kingdom defined privacy as "the right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information."

All civilized nations of the world have expressly or impliedly recognized the right to privacy. Moreover, Article 17 of the Universal Declaration of Human Rights, 1948 states: "No person shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to attack upon his honour and reputation. Every one has the right to the protection of the law against such interference or attacks." At the outset, it should be noted that since the dawn of the civilization, privacy has been acclaimed as a necessary attribute of civilized living. With emergence of the human civilization, privacy, with other

15. See, Karnika Seth, *Computers, Internet and New Technology Laws*, (Butterworths Wadhwa, Nagpur, 2012).

16. *Ibid.* See also, Steenhuysen, Julie, (2008, February 18), *Study rejects internet sex predator stereotype*. on <http://www.reuters.com/article/idUSNI560642020080218>. See also, Michele L. Ybarra and Kimberly J. Mitchell, "How Risky are Social Networking Sites? A Comparison of Places Online Where Youth Sexual Solicitation and Harassment Occurs", at <http://www.pediatrics.aappublications.org/content/121/2/e350.full.html>.

17. Dr. Biswajit Das and Jyoti Shankar Sahoo, "Social Networking Sites-A Critical Analysis of its Impact on Personal and social Life", *IJBSS Vol.2.No.14*, pp. 222-228.

18. See, Samuel D. warren and Louis D. Brandeis, "The Right to Privacy" (1890) 4 Harv L Rev 193, 197; See, Apar Gupta, "The Law of Privacy", (2011) PL May S-2; See Apar Gupta, *Commentary on Information Technology Act*, (Butterworths Wadhwa, Nagpur, 2nd edn., 2011)

19. See, Westin A.F., *Privacy and Freedom*, (Newyork, Atheneum, 1968); See, Althaf Marsoof, "Online Social Networking and the Right to Privacy: The Conflicting Rights of Privacy and Expression", Vol.19 No.2, *IJLIT*, 110, (2011).

values of life came be admired as a right. Infringement of it was/is reckoned as a wrong and a cause of action will lie for such wrong. The scope of 'privacy' under international law is very broad²⁰, all human rights instruments such as ICCPR, ECHR and ACHR contain provisions prohibiting arbitrary interference with privacy, home, family and correspondence.²¹

Much has been written to mark out the development of the right to privacy but two popular and well recognized classifications reached a level of certainty for the different forms of privacy injuries. The first classification was advanced by Prosser, and according to him four separate torts ensue from a breach of privacy: (a) intrusion upon a person's solitude or seclusion or into his affairs; (b) public disclosure of embarrassing facts of a person's private life; (c) publicity which places an individual in false light in public eyes; and (d) appropriation to a person's advantage of another's name or likeness.²² These four privacy torts has been recognized, and adopted by the First Restatement of Torts and different state legislatures and courts across the Unites States.²³

The second classification is of a more recent origin and is advanced by Daniel J. Solove²⁴, and this classification has become the most accepted yardstick to test the types of privacy wrongs in this information age. Solove classifies the privacy wrongs into four distinct kinds: (a) information collection; (b) information processing; (c) information communication, and (d) invasion.²⁵ The author further categorizes these broad classifications into sub-categories to tackle each kind of wrong which is being caused to the right to privacy. The first kind of information collection consists of surveillance and interrogation. The second category is information processing which involves collecting information and constructing it for any probable use which has been classified as aggregation, identification, insecurity, secondary use and exclusion. The third classification is related with the communication of the information and it includes breach of confidentiality, disclosure, exposure, increased and accessibility, blackmail, appropriation and distortion. And the last category pertains to invasion which is explained in relation to invasive acts that disturbs one's tranquility or solitude without concerning information.²⁶

At the onset, it should be noted that India is a signatory to the Universal Declaration of Human Rights, 1948 and the right to privacy is protected in every civilized nations of the world and in India too. In India, the Constitution of India did not expressly recognize the right to privacy but it is an implied right which springs out from the Article 21²⁷ of the Constitution of India. The Supreme Court of India in a number of cases had the occasion to interpret the various facets of right to privacy. In *Kharak Singh v State of Uttar Pradesh*²⁸ and

20. See for example, United Nations Human rights Committee. *Communication CCPR/C/82/D/903/1999*; *lacThR Tristan Donoso*. Judgement of 27 January 2009; and ECtHR application No's 35394/97 and 13710/88. As cited in United Nations Office on Drugs and Crime, *Comprehensive Study on Cyber Crime: Draft February 2013*.

21. See United Nations Office on Drugs and Crime, *Comprehensive Study on Cyber Crime: Draft February 2013*.

22. William L. Posser, "Privacy" (1960) 48 Cal L Rev 383.

23. Alexandra B. Klass, "Tort Experiments in the Laboratories of Democracy" (2009) 50 Wm & Mary L Rev 1501, 1526

24. See, Daniel, J. Solove, "A Taxonomy of Privacy" (2006) 154 U Pa L Rev 477, 482-83.

25. *Ibid*

26. See, Julie E. Cohen, "Privacy, Visibility, Transparency, and Exposure", *The University of Chicago Law Review*, Vol.75, No.1 (Winter, 2008), pp 181-201.

27. Article 21 lays down that no person shall be deprived of his life and personal liberty except according to procedure establish by law.

28. AIR 1963 SC 1295; (1964) 1 SCR 332.

Gobind v State of Madhya Pradesh²⁹, the Apex Court observed that, everyman's house is his castle which epitomizes an eternal principle which goes beyond the protection of property rights and set forth a theory of 'personal liberty which does not rest upon any element of feudalism or any theory of freedom which has ceased to exist', and thus, reintroduced the concept of right to privacy in the Indian Legal System. In case of R.Rajagopal v State of Tamil Nadu³⁰, the Supreme Court of India for the first time enunciated the twin pillars of privacy law in India, firstly in law of tort giving way to an action for damages against individual and secondly, in Constitutional law which protects a person against the arbitrary intrusion by the State machinery. The Supreme Court observed in this case:

"...the right to privacy as an independent and distinctive concept originated in the field of Tort law under which a new cause of action for damages resulting from invasion of privacy was recognized. This right has two aspects which are but two faces of same coins – (1) the general law of privacy which affords a tort action for damages resulting from an unlawful invasion of privacy and (2) the constitutional recognition given to the right to privacy which protects personal privacy against unlawful governmental invasion."

To conclude the Apex Court of India in aforesaid case recognized that, though the right to privacy originated in common law tort theories, in recent times in India it has gained Constitutional status and hence adopted the Griswold theory of 'emanating penumbra' from constitutional rights in which privacy rights could be couched.

The Supreme Court of India has now and then recognized the right to privacy in many cases; however its application vis-à-vis cyber space has yet not been touched up the court. As Right to Privacy is a fundamental right of the humans, the need is to protect one's privacy in the cyber space too. In cyber space breach and violation of privacy results from two factors: (1) interaction with information technology (the internet in this case), which needs technical knowledge and skill, and (2) a social process of communication and transaction with sometimes anonymous or little known social entities in the networked environment.

Online social network have become popular and easy means of connecting people to make contacts as creating an online social networking profile is uncomplicated and simple. All that is needed is an active email account to which a confirmation email will be automatically sent upon registration. Once registration is confirmed the profile comes into existence.³¹ The users of online social networking generally post information regarding their date of birth, gender, place of birth, residence and work, their educational qualification, details about schooling, their hobbies, interests, marital status etc. which may give rise to privacy issues.³² Online social networking websites such as Facebook, Orkut and many others provide security settings to protect the privacy of the user's personal information. These security settings enable users not to reveal personal information to anonymous strangers, but to those who know them better, as a matter of fact, there are instances which tells a different story, for example, it was reported that more than half a million images were leaked from Myspace without any consent from the users³³. No matter if one sets its security settings in the profile

29 . AIR 1975 SC 1378; (1975)2 SCC 148

30 . AIR 1995 SC 264; (1994) 6 SCC 632

31 . Miller, S.L., "The Facebook Frontier: Responding to the Changing Face of Privacy on the Internet", *Ky.L.J* 97 (2008-2009): 541 at 544.

32 . Stone, B., "Keeping a True Identity Becomes a Battle Online" !7 June (2009) <http://www.nytimes.com/2009/06/18/technology/internet/18name.html>. accessed on 25.08.2010.

33 . Kevin Poulsen, "Pillaged MySpace Phtos Show up in Massive Big Torrent Download". *Wired*. January 23, 2008.

web, he is sharing them with an unknown web administrator. Moreover, online social networking websites use click-wrap agreements and once the user has clicked 'I Agree', he has accepted all the terms and conditions of the click-wrap contract and would likely to have waived some of his privacy rights, consequently, user's personal information may be disseminated to others including to criminals.³⁴ However, there are certain online social networking websites which do not provide security settings as there are no Secure Socket Layer Logins (SSL Login); this makes it easier for strangers to hack into users account and access to the personal information of any user. Even though online social networking websites provide security settings and do not openly expose the user's identities it may reveal enough information to identify the profile owner and the information procured from these websites could be used for identity theft, to cyber stalking to physical stalking and also for blackmailing. This can be well illustrated from real incidents, Orkut, a popular networking website, faced severe criticism when the school student, a son of a rich businessman was tracked by the help of this online networking website and murdered. Similarly, Row Bowles, an online security consultant, surprised everyone in 2010 by posting personal details of hundred million Facebook users online. Bowles used a program to scan five hundred million Facebook profiles for information those were not hidden by privacy settings. And finally a collection of users passwords, names, and all the other data of their profiles were available as downloadable file in public. Facebook accepted the fact that information of users were publicly available but has not been misused.³⁵ This shows the vulnerability of privacy in online social networking websites. As a matter of fact such online social networking websites do not allows users much control on how their personal information is disseminated and used, which results in grave privacy problem³⁶, for instance, Facebook provides users with an option of deactivating an account. However, it is not possible to completely erase all personal information from the website³⁷. Moreover, a big section of users, by large, are not concern about their personal privacy while using the online social networking websites. Personal information is generously provided and limiting privacy preferences are sparingly used and thus eroded the dividing line between the public life and private life³⁸ and thus it can be stated that in cyber space there are no more secrets. Due to the availability of the personal information of the users and their public life being discussed in such online social networking websites, legal conception of privacy and security is being challenged. It is a matter of concern that online social networking websites are able to attract children and women as these vulnerable group feel more secure from danger of unknown sexual predators but this is not the real fact they are more prone to exploited online than offline and they become potential victim of online sexual assault, staling, identity theft, sexual harassment. The inevitable growth of these websites raised new issues with regard to privacy and interpersonal victimizations such as cyber

34. Aparna Viswanathan, *Cyber Law: Indian and International Perspectives*, 238 (Butterworths Wadhwa, Nagpur, 2012); See also, L, Edwards, "Privacy and Data Protection Online: The Laws Don't Work?" in L Edwards, C Waelde (ed.), *Law and the Internet* 477 (Hart Publishing, 2009).

35. Dr. Biswajit Das and Jyoti Shankar Sahoo, "Social Networking Sites-A Critical Analysis of its Impact on Personal and social Life", *IJBSS Vol.2.No.14*, pp. 222-228.

36. *Ibid.*

37. Maria Aspan, "How Sticky is Membership on Facebook? Just Try Breaking Free". *The New York Times*. February 11, 2008.

38. See, Weintraub, J., "The theory and politics of the public/private distinction", in J. Weintraub & K. Kumar (Eds.) *Public and Private in Thought and Practice* (1997), pp 1-42; See, Gelman, L., "Privacy, Free Speech, and Blurry Edged Social Networks", *B.C.L. Rev* 50 (2009), pp 1317-1318.

bullying, cyber defamation, cyber stalking etc. moreover they do not have any technology to protect the innocent users from exploiters.

The above discussion demonstrates that there would be nothing virtuous about the virtual world, unless effective protection is provided to safe guard online privacy. While there are modes of preventing such threats by the intelligible use of privacy settings in online social networking websites. This paper proceeds to analyze the Indian legal framework that safeguards privacy rights and interpersonal victimization of individuals in context of the internet and online social networking websites.

IV. PRIVACY THREATS AND LEGAL PROTECTION OF PRIVACY IN CONTEXT OF CYBERSPACE IN INDIA

In India when the Information Technology Act, 2000 was enacted, the makers of the enactment had any inkling that advent of internet will revolutionized the social structure and will be misused for criminal activities. The emergence of online social network website has increased the level of cyber offences especially against women and children such as cyber stalking, cyber harassment, cyber defamation, posting and dissemination of obscene material including pornography, indecent exposure and child pornography, etc. The misuse of the technology created the need of the legislation so as to protect the victim. Lack of privacy standards and diminishing moral etiquette on social networking sites has provided the platform of commission of crime such as murder as witnessed in the case of Adnan, son of a businessman whose profile on orkut reflected that he had gone to meet an impersonator called Angel when he was allegedly murdered by his own group of friends.³⁹

There are two kinds of laws that provide requisite safeguards to right to privacy. Statutory laws enacted by the legislature and secondly the case law evolved by the courts through the interpretation of statutory law. Many countries have a separate privacy protection law which provides punishments in case of breach of privacy of internet users⁴⁰. In India privacy issues in cyber space is regulated by the Information Technology Act, 2000. In this Act⁴¹ privacy is referred in two distinct contexts.

The right to privacy as recognized under Article 21 of the Constitution of India extends to provide protection against dissemination of personal information about one's personal detail and identification, maintaining secrecy about any fact related to one's own life. Within its spectrum, also comes the right to live with full privacy and without interference from any person. Section 72 of the Information Technology Act, 2000 envisages the breach of privacy and confidentiality as an offence⁴². Section 72 of the Information Technology Act, 2000

39 . "Did Orkut friends kidnap and kill Adnan?" 20th August, 2007, Rediff.com news, <http://www.rediff.com/news/2007/aug/20adnan1.htm>. As cited in Karnika Seth, *Computers, Internet and New Technology Laws*, (Butterworths Wadhwa, Nagpur, 2012).

40 . Electronic Communication Privacy Act, 1987 (USA); Video Privacy Protection Act, 1988, (Philippines); E-Commerce Act, 2000 (Japan), etc.

41 . Information Technology Act, 2000.

42 . Section 72 of the Information Technology Act, 2000 states that – Save as otherwise provided in this Act or any other law for the time being in force, any person who, in pursuant of any of the powers conferred under this Act, rules or regulations made there under, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information, document or other material to any other person shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or both.

confers criminal liability, is yet limited in application as under this section penalty can be imposed only against, person authorized under the Information Technology Act, 2000 to secure access to any electronic resource, while the section is silent of a situation when the breach is committed by the person not authorized under the Act.

Another section which provides protection to data is section 72A⁴³ inserted by the Information Technology (Amendment) Act, 2008. Section 72A imposes penalty on the intermediary or any other person for the disclosure of personal information acquired while providing services under the terms of lawful contracts. For penalty to become applicable under section 72A the service provider has to obtain personal information while providing services under a lawful contract, with the intention to cause and knowing it is likely to cause wrongful gain or wrongful loss. Hence, intention and knowledge is the main element which has to be taken into account. While creating profile on line social networking websites, the user does a lawful contract with the service provider and accepts all the terms and conditions and in this process would likely have waived some of his privacy rights, and the service providers by using the contract provision may disseminate the information about the user without his consent and may not be punished under section 72A of the Information Technology Act, 2000 even the elements like knowledge and intention is involved.

It is interesting to note that that today, most cell phones are in the markets which are equipped with camera facilitating the ease with which photographs of the private areas of any human being may be taken by voyeurs⁴⁴. The Information Technology Act, 2000 under section 66E provides punishment for voyeurism⁴⁵. However, all the voyeurism is not

43 . Section 72A of the Information Technology Act, 2000 provides – Save as otherwise provided in this Act or any other law for the time being in force, any person including an intermediary who, while providing service under the terms of lawful contract, has secured access to any material containing personal information about another person, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain discloses, without the consent of the person concerned, or in breach of a lawful contract, such material to any other person, shall be punished with imprisonment for a term which may extend to three years, or with fine which may extend to five lakh rupees, or with both.

44 . See Gen. Aimee Jodoi Lum, “Don’t Smile, Your Image Has Just Been Recorded on a Camera Phone: The Need for Privacy in Public Sphere”, 27 U. Hav.L.Rev.377 (2004).

45 . Section 66E provides punishment for violation of privacy. It states that – Whosoever, intentionally or knowingly captures, publishes or transmits the image of a private area of any person without his or her consent, under circumstances violating the privacy of that person, shall be punished with imprisonment which may extend to three years or with fine not exceeding two lakh rupees, or with both.

Explanation – For the purposes of this section-

(a) “transmit” means to electronically send a visual image with the internet that it be viewed by a person or persons;

(b) “capture”, with respect to an image, means to videotape, photograph, film or record by any means;

(c) “private area” means the naked or undergarment clad genitals, pubic area, buttocks or female breast;

(d) “publishes” means reproduction in the printed or electronic form and making it available for public;

(e) “under circumstances violating privacy” means circumstances in which a person can have a reasonable expectation that-

(i) he or she could disrobe in privacy, without being concerned that an image of his private area was being captured; or

(ii) any part of his or her private area would not be visible to the public regardless of whether that person is in a public or private place.

punishable under the law as the section specifically mentions that recording of the image being required to be done of a sensitive personal area. Thus, Information Technology Act, 2000 even after having certain provision relating to privacy does not skirts all the areas relating to individual privacy and contains brief and isolated provisions concerning right to privacy in cyber space.

The Information Technology Act, 2000 also have certain provisions which may be helpful in protecting the violation of privacy in online social networking websites, section 66A⁴⁶, 66C⁴⁷, and section 66D⁴⁸ of the Act aims to the growing proliferation of irresponsible electronic messages and communication which causes annoyance, danger, obstruction, injury to a person. Moreover, there was the urge that online social sites to monitor and regulate the content published on their sites which is sabotaging the entire social structure and harmful to women and children. In regard to this Information Technology Act, 2000 requires such sites to take off such illegal content within 36 hours from the actual notice or knowledge of the content if they do not monitor or edit content posted by the third party, but due to huge content posted on the sites every second such filtering and pre-censoring is quite a difficult task though not impossible as there may be difficulty in arranging a vocabulary of terms and differentiating between legal and illegal contents which may be menacing, offensive, derogatory, defamatory and harmful to minors⁴⁹ as the words like 'grossly harmful', 'harassing', 'blasphemous', 'ethnically harmful', and 'harmful to children' are subject to different subjective interpretations.

Though Information Technology Act, 2000 has some provisions protecting the privacy of the person in cyber space but the need of the day is to have a separate enactment to take care of the matter related to protection of privacy in cyber space. An attempt was made in this direction and on December 8, 2006, the Personal Data Protection Bill, 2006 was introduced in the Rajya Sabha to meet the need of providing compensation and damages to the individuals whose personal data was being used by various organizations for direct marketing and other economic benefits without the consent of the individual to whom the data belong. But the irony lies in the fact that this Bill had not the seen the light of the day and with the addition

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46. Section 66A - Punishment for sending offensive messages through communication service, etc.-Any person who sends, by means of a computer resource or a communication device,-
 - (a) any information that is grossly offensive or has menacing character, or
 - (b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; or
 - (c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such message, shall be punishable with imprisonment for a term which may extend to three years and with fine.
 47. Section 66C - Punishment for identity theft - Whoever, fraudulently or dishonestly make use of the electronic signature, password or any other unique identification feature of any other person, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to rupees one lakh.
 48. Section 66D- Punishment for cheating by personation by using computer resource - Whoever, by means of any communication device or computer resource cheats by personation, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to three and shall also be liable to fine which may extend to one lakh rupees.
 49. See Section 69A of the Information Technology Act, 2000.

of section 43A and section 72A in the Information Technology Act, 2000 this Bill is now redundant and superfluous.⁵⁰

V. CONCLUSION

While the State is enacting the legislations to protect the privacy and interpersonal victimization of women and children and, online social websites too are adopting best practices to safeguard one's privacy and protect women and children from offenders, users should also be made aware that they while using these sites be careful in using, they should not interact with strangers, they should never reveal any personal information, they should not post very personal information on their profile, they should not accept friendship with strangers and should also not interact with them, they should be cautious and careful while posting photographs, they should not post harmful and derogatory statements, abusive language and always avoid making concocted statements which is derogatory to an individual or entity and children use these sites under parent's guidance. The law alone cannot provide safety to the people but some efforts has to be done to inculcate the netiquettes among the users so that they enjoy and the let others enjoy the benefits of the new developments in the area of information technology. Otherwise it will not be wrong to say, "Once upon the time people socialized offline, then online social networking came into existence and nobody enjoyed socializing thereafter..."



50. Bajaj, K. (2009) Data Protection and Cyber Crimes under the Amended Information Technology Act, at http://www.nasscom.in/.../IT_Act_Amendments_Details.pdf.

NOTES & COMMENTS

COMPULSORY LICENSE OF PHARMACEUTICAL PATENTS IN INDIA: NATCO FINDS Safe Harbour in *Bayer v. Union of India and others*, Writ Petition No. 1323/2013 (Bom. HC)

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In *Bayer Corporation v. Union of India and others*¹ the High Court of Bombay (HC) affirmed the decision of Controller of Patents (Controller) and Intellectual property Appellate Board (IPAB) to grant Compulsory License (CL) in favour of Natco Pharma Ltd (Natco). This decision has firmly established India's first compulsory license in the post TRIPS era, since a Special Leave Petition (SLP) by Bayer Corporation (Bayer) against the final judgment and order of HC has been dismissed by the Supreme Court of India recently.²

The dispute was related to the application of the provisions of Chapter XVI and in particular Section 84 of the Patents Act, 1970 (Act).³ The petitioner, Bayer invented a drug called 'Sorafenib tosylate' (Carboxy Substituted Diphenyl Ureas) useful in the treatment of advanced stage liver and kidney cancer. In India, a patent was granted to Bayer on 2008 under the trade name Nexavar for treatment of advanced stages (stage IV) of Renal Cell Carcinoma-RCC (Kidney cancer) and Hepatocellular Carcinoma-HCC (Liver cancer).⁴ On 6 December 2010, Natco, a drug manufacturer in India, approached the petitioner for grant of voluntary license for the purpose of manufacturing and selling the patented drug in India but failed in its efforts to get license.

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1. *Bayer Corporation v. Union of India and others*, writ petition no. 1323/2013 (Bom. HC).

2. *Bayer Corporation v. Union of India and others*, special leave to appeal no. 30145/2014 (SC).

3. Section 84(1) of the Patents Act, 1970 reads as: At any time after the expiration of three years from the date of the grant of a patent, any person interested may make an application to the Controller for grant of compulsory licence on patent on any of the following grounds, namely:— (a) that the reasonable requirements of the public with respect to the patented invention have not been satisfied, or (b) that the patented invention is not available to the public at a reasonably affordable price, or (c) that the patented invention is not worked in the territory of India.

4. As a consequence of being granted a patent, the petitioner had exclusive right to make/manufacture, use and sell the patented drug either by itself or through its licensee to the exclusion of all others for a period of 20 years from the date of its application. Thus, the petitioner had exclusive right to prevent third parties from making/manufacturing, using, selling or importing the patented drug in India without the petitioner's permission/license. This license/permission is at most times voluntarily granted by a patent holder to any other party as a matter of its free will under a contract.

Armed with the provisions of Section 84(1) of the Act, read with Rule 96 of the Patent Rules 2003, an application was filed before Controller by Natco in July 2011 against Bayer for grant of Compulsory License of Nexavar claiming all three grounds mentioned in Section 84(1) of the Act.⁵ On 18 November 2011, the Bayer filed its opposition to the grant of Compulsory License to Natco before the Controller. On 9 March 2012, the Controller found Natco eligible for compulsory licensing on all the three grounds mentioned in Section 84(1) and allowed the application of Natco.⁶

Being aggrieved by the order of the Controller, Bayer preferred an appeal to the IPAB.⁷ On 4 March 2013 the IPAB after hearing the parties, upheld the order of the Controller granting the Compulsory license to Natco while increasing the royalty payable by Natco to Bayer from 6 to 7% of the sales of the patented drug.⁸ However, the IPAB did not agree with the view of the Controller that working in India in terms of Section 84(1) (c) of the Act would only be satisfied if the patented invention is manufactured in India.⁹ The IPAB viewed that the requirement of working of the patented invention in India could also be satisfied by importing the patented invention by the patent holder satisfying the authorities under the Act that the manufacture of the patented invention was not possible in India.¹⁰ Therefore, it held that manufacture in India was not necessary in every case for satisfaction of Section 84(1) (c) of the Act. It held that the working in India would have to be decided on a case to case basis and there can be no general rule that when the products are imported into India and not manufactured, it follows that patented invention is not being worked in the territory of India.¹¹ The decision of Controller which merged into the decision of IPAB was challenged by the Bayer before HC under Article 226 of the Constitution of India.¹²

REASONABLE REQUIREMENTS OF THE PUBLIC

Bayer contended that the occasion to administer the patented drug arises only during the last stages of a patient's illness.¹³ So, it is not in every case that a patient suffering from HCC or RCC Cancer is required to be administered the patented drug.¹⁴ Bayer further contended that even in the last stages of a patient's illness, the Doctor may opt for a line of treatment requiring measures other than the administration of the patented drug.¹⁵ Bayer submitted that Controller and IPAB have not made efforts to determine the exact quantum of the patented

5. Rule 96 (Application for compulsory licence etc.) of the Patents Rules, 2003 reads as: An application to the Controller for an order under section 84, section 85, section 91 or section 92 or section 92A shall be in Form 17, or Form 19, as the case may be. Except in the case of an application made by the Central Government, the application shall set out the nature of the applicant's interest and terms and conditions of the licence the applicant is willing to accept.

6. In the matter of Natco Pharma Ltd. and Bayer Corporation, Compulsory License Application No. 1 of 2011.

7. Section 116(1) of the Patents Act, 1970 reads as: Subject to the provisions of this Act, the Appellate Board established under section 83 of the Trade Marks Act, 1999 shall be the Appellate Board for the purposes of this Act and the said Appellate Board shall exercise the jurisdiction, power and authority conferred on it by or under this Act.

8. Bayer Corporation v. Union of India and others, OA/35/2012/PT/MUM, Order No. 45 of 2013 at 45.

9. *Id.* at 43.

10. *Id.*

11. *Id.* at 44.

12. *Supra* note 1.

13. *Id.* at 15.

14. *Id.* at 34.

15. *Id.*

drug required by the patients suffering from last stage of HCC or RCC Cancer and therefore, it is not possible to conclude that reasonable requirement of the patients is not met by the patented drug.¹⁶ However, HC opined that the exercise suggested by Bayer can never be carried out on a mathematical basis and it has to be on a broad basis.¹⁷ HC found that this broad exercise has been done on the basis of the evidence produced by the parties, and Controller as well as IPAB has considered the rival statistics of the patients before it and on that basis they determined the reasonable requirement of the public.¹⁸

HC pointed out that Section 84(7) (a) of the Act deems that reasonable requirement of the public is not satisfied, if the demand for patented article is not met to an adequate extent.¹⁹ The aspect of adequate extent would vary from article to article. HC made distinction between luxury articles and essential articles regarding meeting of adequate extent test.²⁰ In respect of the essential articles (*viz.* Medicine) adequate extent test has to be 100% *i.e.* to the fullest extent.²¹ Essential articles have to be made available to every person in need and this cannot be deprived at the altar of rights of patent holder.²² HC opined that it in accord with Doha Declaration 2001 which *inter alia* reiterates flexibility to member countries so as to ensure access to medicines for all.²³ HC found that the requirements of all the patients in India were not being met by the patented drug and concluded that there was no merit in the petitioner's submission that it had met the reasonable requirement of the public in respect of the patented drug under Section 84(1(a) of the Act.²⁴ The decision of HC on this aspect is in conformity with the general principles of the Act.

REASONABLY AFFORDABLE PRICE

The petitioner submitted that before deciding whether the patented drug was available to the public at reasonably affordable price it was necessary for the authorities to first determine what is the reasonably affordable price in respect of the patented drug.²⁵ HC

16. *Id.*

17. *Id.*

18. The Controller has examined the issue of reasonable requirement of the public for the patented drug being satisfied on the basis of figures given by the petitioner in affidavits of its Country Medical Director one Dr. Manish Garg dated 8 February 2012. The above affidavit of Dr. Garg states that about 4004 RCC patients would require the patented drug while total number of HCC patients who would require the patented drug would be another 4838 thus making it an aggregate of 8842 patients. As against the above requirement the petitioner has sold only 593 number of boxes *i.e.* supplied patented drug to about 200 patients in 2011. The Controller in his order has found that if one adds the patented drug supplied by Cipla *i.e.* 4686 packets the total availability would be only for 5279 packets which even according to the figures of petitioner would not anywhere meet the annual requirements of the patients. Thus, the reasonable requirement of the public with regard to the patented drug has not been satisfied. For the purposes of the above exercise we have, just as the Controller, proceeded on the basis that even if patented drug supplied by the infringers namely Cipla is taken into account. Reasonable requirement of public is not being met/satisfied. Thus the reasonable requirement of the public under Section 84(1)(a) of the Act is not satisfied even if one accepts the figures of the petitioner.

19. *Supra note 1*, at 38.

20. *Id.* at 39.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. Petitioner placed reliance on Section 84(1)(b) read with Section 90(1)(iii) of the Act. It is mandated by Section 90(1)(iii) of the Act that the Controller should ensure that the patented drug is available at reasonably affordable price.

viewed that the Act itself does not bestow any power of investigation to the authorities with regard to the reasonably affordable price.²⁶ Section 90(1) (iii) of the Act on which reliance is being placed by the Bayer does not direct the Controller to fix the reasonably affordable price but only directs the Controller to endeavor to ensure that the patented article is available at reasonably affordable prices.²⁷ HC further viewed that the reasonably affordable price has to be determined on the basis of the relative price being offered by the patent holder and the applicant.²⁸ The price at which the petitioner was selling the patented drug was at about Rs.2,84,000/per month of therapy and the applicant was offering the same at Rs.8,800/per month of therapy.²⁹ HC concluded that in such a case the reasonably affordable price has to necessarily be the price of the applicant.³⁰

HC further viewed that it would be impossible for the authorities, in the absence of balance sheet and other figures being made available by the patent holder, to independently determine the reasonably affordable price of the patented drug.³¹ These figures were known to the petitioner and yet not produced by it. Therefore, it found no fault with the impugned order of Controller holding that the patented drug is not available to the public at a reasonably affordable price and concluded that there is no reason to interfere with the impugned order of authorities to the extent it holds that the patented drug is not available to the public at reasonably affordable price.³²

Indian Patents regime does not mandate to reveal true accounts of R&D costs. Without this data one can never know that price of drug is reasonable or exorbitant. Even before HC, Bayer's refusal to submit its R&D costs indicates that bayer has been charging exorbitant price. In this situation, it seems correct that HC relies to protect public health and provide affordable medicine to patients in India.

WORKING IN THE TERRITORY OF INDIA

The petitioner submitted that the patented drug had been worked in the territory of India by importation of the same.³³ In particular, petitioner placed reliance to Article 27 of the TRIPS which *inter alia* provides that there would be no discrimination in respect of patented product whether products are imported or locally produced.³⁴ The requirement of patented drug has been worked in India by virtue of importation by the Bayer.³⁵ The petitioner submitted

26. *Supra note 1*, at 40.

27. *Id.*

28. *Id.* at 41.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 45.

33. *Id.* at 46.

34. Article 27 (1) of the TRIPS Agreement reads as: Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and *whether products are imported or locally produced*.

35. This is also apparent from Form 27 prescribed under the said Act and the Patent Rules. Patent holder has to file a statement in Form 27 with the Controller regarding the working of the patent in India. In the aforesaid form the patent holder while giving details of patented drug in India, has to make declaration of working in India of the patented product under two classifications namely manufacture in India and secondly imported from other countries.

that there is no requirement for the purpose of patented invention being worked in India; that it should necessarily be manufactured in India, as provided prior to 2002 in the Act.³⁶ It was submitted by Bayer that the Tribunal has specifically held that the working in India could be done even by import.³⁷ However, the Union of India contended before HC that for the purposes of working in India, patented drug has to be manufactured in India.³⁸

HC viewed that Section 83 of the Act contains the legislative guidelines to govern the meaning of the words 'worked in the territory of India'.³⁹ Section 83(b) of the Act in particular states that the patent is not granted so as to enable the patent holder to enjoy a monopoly with respect to the importation of the patented article.⁴⁰ Thus, it would presuppose that some efforts to manufacture in India should also be made by the patent holder.⁴¹ This is further supported by other considerations set out in Section 83 of the Act to be applied in construing 'worked in territory of India'. Section 83(c) of the Act provides that there must be transfer of technological knowledge to the mutual advantage of the producers and users of the patented article. Section 83(f) of the Act provides that patent holder should not abuse his patent so as to *inter alia* adversely affect international trade. As against the above, Form 27 as prescribed also gives an indication that importation could also be a part of working in India.⁴²

HC agreed with the view of the IPAB that it would need to be decided on case to case basis. HC opined that manufacture in all cases may not be necessary to establish working in India as held by the Tribunal.⁴³ However, the patent holder would nevertheless have to satisfy the authorities under the Act as to why the patented invention was not being manufactured in India keeping in view Section 83 of the Act.⁴⁴ This could be for diverse reasons but it would be for the patent holder to establish those reasons which makes it

36. This according to the petitioner is evident from erstwhile Section 90 of the Act prior to 2002 using the word 'manufactured in India' as a part of Chapter XVI of the Act. This itself is a further indication that the importation of patented products within the territory would amount to working of patent in India.

37. *Supra* note 1, at 17.

38. *Id.* at 22.

39. *Id.* at 47.

40. Section 83 of the Patents Act, 1970 reads as: General principles applicable to working of patented inventions.—Without prejudice to the other provisions contained in this Act, in exercising the powers conferred by this Chapter, regard shall be had to the following general considerations, namely;— (a) that patents are granted to encourage inventions and to secure that the inventions are worked in India on a commercial scale and to the fullest extent that is reasonably practicable without undue delay; (b) *that they are not granted merely to enable patentees to enjoy a monopoly for the importation of the patented article*; (c) that the protection and enforcement of patent rights contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations; (d) that patents granted do not impede protection of public health and nutrition and should act as instrument to promote public interest specially in sectors of vital importance for socio-economic and technological development of India; (e) that patents granted do not in any way prohibit Central Government in taking measures to protect public health; (f) that the patent right is not abused by the patentee or person deriving title or interest on patent from the patentee, and the patentee or a person deriving title or interest on patent from the patentee does not resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology; and (g) that patents are granted to make the benefit of the patented invention available at reasonably affordable prices to the public.

41. *Supra* note 1, at 48.

42. *Id.*

43. *Id.*

44. *Id.*

impossible/ prohibitive for it to manufacture the patented drug in India. However, where a patent holder satisfies the authorities, the reason why the patented invention could not be manufactured in India then the patented invention can be considered as having been worked in the territory in India even by import. This satisfaction of the authorities is necessary particularly when the petitioner admittedly has manufacturing facilities in India.⁴⁵ HC concluded that the contention of Union of India that 'worked in India' must in all cases mean only manufactured in India is not acceptable.⁴⁶

HC clearly failed to appraise objectives of the patent system; *i.e.*, transfer and dissemination of technology to the patent granting country. Simply granting IPRs in the hope of eventual technology transfer can hardly make any transfer or diffusion of technology. In this context, local working requirement is desirable because it contributes to technology transfer resulting in industrial and technological capacity building. The decision of HC obviously dilutes the local working requirement and facilitates foreign patentees to situate production facilities outside India and import finished products in India. Since we do not find definition of 'work' in any international agreement related to intellectual Property, it must be interpreted as 'to manufacture', to manufacture sufficiently patented products, or to use the patented methods in India. The effort of HC to relate 'work' with availability and affordability of the product is not appreciable because non-working alone constitute ground to grant compulsory licensing as mentioned in section 84(1) (c). Moreover, the context in which the word "work" is used in different sections of the Act makes it clear that it means actual manufacture of the patented products in India. In future litigations, courts should make it unambiguous that the mere importation of a patented product does not amount to its working in India. The working of a patented invention should mean: where the patent has been granted in respect of a product, the making of the product; where the patent has been granted in respect of a process, the use of the process.



45. *Id.*

46. *Id.* at 49

INTERNATIONAL COMMERCIAL ARBITRATION UNDER NATIONAL LAW OF INDIA: AN AVANT-GARDE VIEW FROM CONSTITUTIONAL PERSPECTIVE

Debasis Poddar*

I. INTRODUCTION

On its ascent out of advent of international commercial transaction in post-war world, international commercial arbitration as a subset of private international law emerges as a subject in itself. In a way or other, private international law seems a misnomer since conflict of (national) laws constitute core corpus of the same though principles of UNIDROIT¹ regime also substitute development of the subject. Besides, however, there is implicit public law dynamics- both international and national- in the subject where lies fulcrum of this effort. In particular, Indian constitutional law perspective of international commercial arbitration and the juridical discourse involved therein attracts core focus of this effort. Last directive principle of state policy- Article 51(d)- is the axis on which arguments are posited to this end.

By and large, with occasional overwhelming syndrome, there are three operative parts of this paper. First is jurisprudence perspective which deals with conceptual construct behind. Second is constitutional perspective which deals with grand normative order underlying in Indian legal system. Third is (international) rule of law perspective which binds India alike others as a stakeholder of international community (of states). Together these offer a rudimentary trajectory of its national law toward international arbitration in general and international commercial arbitration in particular. Besides there are socio-legal arguments in specific context of globalized economic order and international trade regime under the auspices of World Trade Organization (WTO) to which India has acceded way back since 1995. A review of constitutional provision seems imperative to this end.

A public law perspective seems also imperative for an altogether different reason as the Constitution of India was drafted before emergence of private international law the way the same is understood and appreciated in contemporary sense of the term. A national law perspective of international commercial arbitration may and does carry forward jurisprudential underpinnings of the subject concerned which is least explored in six decades of constitutional experiment in India.

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1. For details, refer to UNIDROIT instruments (conventions, model laws, principles and the like) under auspices of International Institute for the Unification of Private Law, Rome. Available at: <http://www.unidroit.org/dynasite.cfm> retrieved on January 23, 2012.

II. INTERNATIONAL COMMERCIAL ARBITRATION: JURISPRUDENCE PERSPECTIVE

At the threshold of this effort, a premise is required to be put forth that international commercial arbitration is a modern phenomenon in its essence. In ancient India, as Derrett demonstrated, no authoritative text mentioned about operation of alternative dispute resolution mechanism as an institution.² This is perhaps because of *dharma- a sui generis* paradigm of transcendental justice- being operative in ancient India, no alternative institution was required for settlement of disputes. Also there was vacuum in terms of transnational understanding amidst overseas sovereigns which seems yet to be done away with to offer effective judicial process under regular administration of justice. Thus, as happened in ancient Europe as well, concerned royal institution operated as exclusive repository of justice delivery system in India.

Indeed there were popular courts since time immemorial, mostly within local limits, these were tributaries of the then local self-governance to complement and supplement mainstream institutions rather than parallel institutions to offer an ADR mechanism.³ By and large these courts were engaged in amicable settlement of local dispute. No such court entertained commercial dispute and that also transnational in its essence. While depicting 'the wonder that was India', Basham mentioned about sea trade and overseas contract sans ADR mechanism vis-à-vis international commercial transaction or institutionalized infrastructure to resolve offshore commercial disputes anyway.⁴ With the passage of time, however, parallel infrastructure has become instrumental for better governance of such transaction in post-war world. No wonder that a set of specialized non-state ADR institutions, e.g. Indian Council of Arbitration (ICA), American Arbitral Association (AAA), London Court of International Arbitration (LCIA), International Council of Commercial Arbitration (ICCA) etc. are operative to minimize anarchy in the world of commercial transaction.

Since the beginning of international commercial arbitration, non-state institutions emerged out of its historical perspective. Few factors might have accelerated toward growth of these ADR institutions: (1) state governmentality vis-à-vis international trade and commerce is so often than not driven by international relations along with diplomacy while commercial entrepreneurship is driven by profit and loss statement rather than political consideration; (2) state-run ADR institutions ought to be bound by state governmentality while non-state ADR institutions are free from prejudice; (3) under the guise of justice, state tribunal is devoid of flexibility while non-state one are pragmatic to balance commercial interests underlying in the competing claims of its parties. Thus, on

2. Whether *raja-sasana* means edict or judgment, it is always merely an expression of the royal policies, which could not be inspired by considerations of convenience, opportunism, or equity, of which the king is and must remain the sole judge.
Robert Lingat (tr. by J. Duncan M. Derrett), *The Classical Law of India*, Oxford University Press, New Delhi, 1973, p. 256.

3. More important than the state courts were the popular courts, which were numerous in strength and varied in kind. A major portion of the juridical work in those days was done by these people's courts. The history of these courts can be carried back to the Rig Vedic period. In those days they were known as the Sabhas. That the Sabhas of Rig Vedic period exercised judicial functions is proved by numerous references in the Rig Veda.
K. Srikantan (ed. by V. Ramachandran), *Administration of Justice in Ancient India*, Bharatiya Vidya Bhavan, Mumbai, 2007, p. 78.

4. *Vide* A. L. Basham, *The Wonder That was India*, Rupa & Co, New Delhi, 1981, Chapter VI.

the premise of existing principles, these non-state institutions are engaged in developing jurisprudence of their own and thereby offering final and conclusive decisions like those of state-run institutions.

Place of national law is crucial in international commercial arbitration in a sense that the same is instrumental to offer respect for such decisions as part of ADR mechanism arrived at by quasi-judicial process under the auspices of these non-state institutions. Here lies conundrum of Article 51(d) of the Constitution of India to include decision of a non-state institution in its language which is silent over international disputes which are commercial in its essence.⁵ Forthcoming paragraphs are meant to decipher the jurisprudence underlying in Article 51 in general and Article 51(d) in particular. Since this directive principle is not a well explored one so far, a resort may be taken to pages of Constituent Assembly Debates (CAD).

III. INTERNATIONAL COMMERCIAL ARBITRATION: CONSTITUTIONAL PERSPECTIVE

As a matter of convenience, now onward, the Constitution of India shall be referred to as 'the Constitution' for territory specific study of its constitutional perspective. As cited earlier, since its beginning, the Constitution has had an arbitration clause. Introduced through amendment by Ayyangar on 25th November 1948, with argument against war, he pleaded arbitration as sole means of settling international disputes.⁶ Indeed dissident voice was raised by Tyagi against Ayyangar, with counterargument of his own.⁷ The same did not sound jurisprudential enough to the House with a result that clause (d) was inserted to Article 40 of the then draft Constitution which became Article 51 of the final draft Constitution as the same stood on 26th November 1950. This being a historical context of the text in Article 51(d), international arbitration was conceived to be a means for peaceful settlement of (public) disputes between and among states rather than (private) commercial disputes.

On another side of the coin, however, the term 'international disputes' seems general and the same does not *ipso facto* exclude a(ny) class of disputes from its purview.

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5. **Article 51. Promotion of international peace and security.**- The State shall endeavour to-
-
- (d) encourage settlement of international disputes by arbitration. The Constitution of India, 1950.
6. I would like very much that we should have some such clause that it shall be the duty and the constant endeavour of the Government of India to see that all people in the world are released from the domination of other people, that each people big or small, each nation or state big or small, get freedom to manage their own affairs within the territory which God has given to them. Situated as we are, we cannot do it. For this purpose, arbitration is the sole means of settling international disputes.
Shri M. Ananthasayanam Ayyangar, on 25th November, 1948. For details, refer to Constituent Assembly Debates: Official Report, Vol. VII (Book 2), Fourth Reprint, Lok Sabha Secretariat, 2003, p. 603-605.
7. You talk of arbitration of international disputes. But where are the arbitrators? We have seen the arbitrators who came here and have seen the way they have been functioning. It is very difficult to get honest arbitrators. How can anybody arbitrate in such matters? I prefer war in such cases. ... So, I want to reserve one privilege as a man of war, that in case we fail to achieve these objects peacefully, we shall war and accomplish these objects. With these words of reservation, I support whatever you have said, because it is all a pious wish.
Shri Mahavir Tyagi, *ibid*.

Therefore, object or purpose of this provision being international peace and security, exclusion of commercial disputes at random may not appear jurisprudential to this end- so far as reading of its headlines is concerned. Contemporary history of international disputes in post-war world, history of post-soviet world in particular, corroborates this conclusion. Thus, though commercial dispute may not have been squarely fitting into this provision, the same may be derived from creative construction of clause (d). This seems more so out of recent developments in the world of international relations and diplomacy which are driven by trade-related and/or commercial considerations. In particular, emergence of WTO and operation of its dispute settlement mechanism accelerated transition in litigation landscape of international disputes to such extent that there is hardly any international dispute left out which is in no way hyperlinked to trade and commerce.

In view of UNCITRAL Model Law on International Commercial Arbitration of 1985, and pursuant to its obligation under Article 51(c) read with 51(d) of the Constitution,⁸ archaic law of arbitration- the Arbitration Act, 1940- is replaced by new legislation- the Arbitration and Conciliation Act, 1996- through which India updated its position in terms of ADR jurisprudence and thereby internationalized its arbitration discourse to include international commercial arbitration as well.⁹ With its newer definition, along with the Preamble to the legislation, the Parliament of India has demonstrated its concern for those international disputes which are commercial in their essence.¹⁰ At the threshold of economic epiphany, so far as official version is concerned, India is left with no other option but to globalize its state governance.

IV. INTERNATIONAL COMMERCIAL ARBITRATION AND RULE OF LAW PERSPECTIVE

Adherence to global wisdom, as reflected in a(ny) series of international instruments, is the *mantra* of civilized states to gain legitimacy before international community and India seems no exception to this end. Like that of internal system of governance within liberal democratic state(s), there is international rule of law in terms of global governance to which states are stakeholders and subject to docility before public international law. In particular, there is reasonable expectation that General Assembly resolutions ought to be observed as guidelines for civilized state practice on

8. *Vide* A. M. Ahmadi, International Arbitration: Position in India and the U.K., in P. C. Rao and William Sheffield (ed.), *Alternative Dispute Resolution: what it is and how it works*, Universal Law Publishing Co. Pvt. Ltd., Delhi, 1997, p. 1.

9. **2. Definitions.** (1) In this part, unless the context otherwise requires-
 (f) "international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India where at least one of the parties is-
 (i) an individual who is national of, or habitually resident in, any country other than India;
 or
 (ii) a body corporate which is incorporated in any country other than India; or
 (iii) a company or an association or a body of individuals whose central management is and control is exercised in any country other than India; or
 (iv) the Government of a foreign country.
 The Arbitration and Conciliation Act, 1996.

10. For details, refer to paragraph no. 4 and 5, Preamble to the Arbitration and Conciliation Act, 1996.

the part of parties to the United Nations system. Pursuant to the wisdom of such a resolution,¹¹ read with Article 51(c) of its Constitution, India preferred the new legislation of 1996 to accommodate globalized law of international commercial arbitration in its system. Thus India has internalized New York Convention and Geneva Convention awards through Part II of its legislation. Consequently, therefore, India seems in tandem with the wisdom under Article 51(d) of its Constitution and thereby attains a requirement of international rule of law since conflict of (national) laws may henceforth be taken care of under internationalized national law of India to address commercial disputes which are international in terms of their given statutory definition.¹²

Thus, unlike earlier era, the hitherto conundrum of private international law vis-à-vis applicable law, choice of forum and enforcement of foreign judgment seems no longer a serious headache for Indian legal system. Also there are UNIDROIT Principles of transnational Civil Procedure of 2004 to facilitate uniform conduct of its national judicial process in compliance of rest of the world- wherever these standardized principles are operative for adjudication of international commercial arbitration. Also there are specialized ADR institutions like ICA, AAA, LCIA, ICCA, etc. to this end. So far as these institutions are concerned, their operation is governed by concerned arbitration agreement and no other legal instrument. A(ny) judicious decision arrived at by such institutions through quasi-judicial process, therefore, is subject to further judicial review in India. A decade back, on a question whether the Court would have jurisdiction under section 34 of the Act to set aside award passed by Arbitral Tribunal which is patently illegal or in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract, the Apex Court decided that under certain circumstances an arbitral award under Section 34(2) of the Act may be set aside. While deciding this case, the Court set aside an impugned arbitral award and thereby set a precedent to this end.¹³ Subsequently, the judgment has become subject to criticism with an argument that the Court thereby defeated object and purpose of arbitration as part of alternative dispute resolution mechanism. Indeed the Court was specific enough to delineate how far impugned arbitral awards may be set aside by the Court, bitter polemics seems on its rise on a contentious issue over jurisdiction of court over an arbitral award under the Act as the judgment seems to have driven ADR jurisprudence towards untoward direction.

Here there is a subtle underpinning of rule of law dynamics in this judgment since the same allowed the judiciary to reopen an(y) arbitral award arrived at through quasi-judicial process of ADR mechanism which is meant to minimize unmanageable arrear of pending cases in mainstream court. While the judiciary seems yet to get rid of existing burden of its arrear, reopening arbitral awards may and does resemble reopening

11. *The General Assembly*,

...
...
...
2. *Recommends* that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice.
General Assembly Resolution no. 40/72; adopted in 112th plenary meeting on December 11, 1985. Available at: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/477/79/IMG/NR047779.pdf?OpenElement> retrieved on January 22, 2012.

12. *Supra*, n. 9.

13. *Oil and Natural Gas Commission Ltd. v. Saw Pipes Ltd.* (MANU/SC/0314/2003).

Pandora's Box which was somehow managed by emerging jurisprudence of ADR mechanism. One way of looking at its judgment is alleged authoritarianism of the Court to usurp undue position above law (of alternative dispute resolution). A counterargument may be offered under Article 142(1) of the Constitution in defence though the same stands otiose to fortify its Victorian castle.¹⁴ This seems more so since recent trend of judicial policymaking corroborates this allegation and similar aggression is perpetrated against other institutions. In the specific context of recent worldwide trend- that of Liberalization, Globalization, Privatization (LPG)- the law of a(ny) land is required to walk hand-in-hand with rest of the world.

V. CONCLUSION

In view of such development in the sphere of international commercial arbitration, a conclusion may reasonably be drawn that the Apex Court seems yet to be judicious enough to accommodate quasi-judicial process of arbitration as ADR mechanism which may and does run parallel to mainstream judicial process either to complement or supplement administration of justice in India. Thus two divergent institutions- court and tribunal- lack mutual faith and trust between one another with a result that court is averse to output of quasi-judicial process as part of ADR mechanism while tribunal is averse to judicial review of its decision. Such blank space within the legal system leaves ADR mechanism defunct as all these matters are anyway bound to be burden of the judiciary and the ADR mechanism is thereby reduced to a juridical grandeur under (dis)guise of justice delivery system which is meant for multiplication of forum to add value [sic] on existing institutional mechanism.

The judiciary, being keeper of the Constitution, offers complete jeopardy to the same and that also in the name of complete justice under Article 142(1) of the Constitution. On one side, the judiciary undermines juridical wisdom of Article 51(c); on the other, Article 51(d) remains dormant to the detriment of settlement of international disputes while these directive principles are fundamental in the governance of the country.¹⁵ In its effect, therefore, agenda posited in paragraphs in the Preamble to the Arbitration and Conciliation Act, 1996 appears to be filled in with all words of hollow substance. In court practice, there is no practice of what legislature does preach in the Act. So, introspection seems imperative to bridge widespread gap between the cup and the lip. Intellectual hypocrisy in terms of policymaking process cannot take away the State too far to get rid of liability of its governance failure and bitter aftermath through caustic criticism from global community which is likely to damage credibility of India before rest of the world as a civilized state.

14. **142. Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.-** (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice [sic] in any cause or matter pending before it. **The Constitution of India, 1950.**

15. **Article 37. Application of the principles contained in this Part.** The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. **The Constitution of India, 1950.**

Even in terms of international rule of law, a willy-nilly position vis-à-vis arbitration seems anathema to public international law since war is condemned in post-war world. Peaceful settlement of international disputes, therefore, is law and order of the day. A question may be raised over accommodation of international commercial disputes and the same may be addressed in perspective of globalization which is bound to put forth commercial colour on any sundry matter including disputes of international character. In perspective of globalization of international trade under the auspices of WTO, none under the Sun may and does act sans commercial consideration in favour of the person concerned- natural or artificial is a point apart. Being bound by chain of nationality, despite governed by private international law, private dispute ought to be hyperlinked to public discourse of the state concerned. No state, as a stakeholder in its society, may therefore afford not to adhere to international rule of law set under the auspices of UN General Assembly being a replica of world legislature through global presence. So also is the case in case of Republic of India as the same poses a classic illustration of contemporary liberal democratic governance.



BOOK & REVIEW

Text Book on Indian Penal Code (5th ed., 2014), By K D Gaur, Universal Law Publishing Co. Pvt. Ltd., Delhi. Pp. cxxii+973, Price Rs 550/=

The *Indian Penal Code*, enacted in 1860, is the longest serving one of the most influential criminal codes in the common law world. The *Indian Penal Code*, 1860 (hereinafter referred to as 'the Code') is a classical work and a model piece of legislation of Lord Thomas Babington Macaulay-the principal drafter of the Code. This is a standing tribute to the genius and learning of Macaulay. This Code is the first code of modern criminal law in the common law jurisdiction and largely envisioned with the principles of uniformity and certainty to enhance the rule of law. The people of common law world has commemorated one hundred and fiftieth anniversary of the *Indian Penal Code* in the year 2010 and honoured the law reform legacy of Macaulay in the field of criminal jurisprudence.

The '*Textbook on the Indian Penal Code*' authored by Prof K D Gaur is a latest commentary on the Code in comparison to other commentaries available so far. In fact, this is a testimony of its author's long experience. The present edition in hand has been brought forth by the author who has affixed his indelible imprint in the field of academics. He has tried to remove ignominy of this legal literature.

Running into 955 pages, the current edition is a voluminous commentary of the Code. The review of the current edition is done on several planks i.e.- style; comparative study; descriptive presentation of case laws along with legal provisions; its critical analysis; incorporation of updated cases and affordability. The book provides a short insight into the evolution and development of criminal law. Comments are provided after every section which are augmented by a comparative analysis with other statutes. Readers can obtain a comprehensive output in clear, lucid and logical manner through this book. Typical examples are very useful for readers. Copious and generous amount of case laws are analytically and descriptively discussed in this edition so that the principles of criminal jurisprudence get stamped to the memory of readers. So the book is enriched with up to date case laws.

The notable feature of this edition is tabular presentation of guidelines laid down by the courts in multitude of cases. Book contains comments which are made on those cases with the purpose to initiate an academic debate on legal issues. The cases in which the Apex Court has expanded the scope of criminal liability on the basis of constitutional mandate have also been discussed at length. Comparative analysis of cases of different countries is one the core feature of this book where author has discussed important cases on relevant topics decided by the judiciary of

Perhaps, one of the paramount thoughts behind bringing forth this edition, after an interval of five years, was to highlight the drastic changes brought into the Code in the light of growing incidents of offences in India specially increasing crimes against women. Therefore, author has focused on offences affecting Human Body especially of Culpable Homicide, Murder and Rape etc. A thorough documentation of all provisions inserted by virtue of the *Criminal Law Amendment Act, 2013* is exemplary. The exegesis of these provisions has enriched the book. Author has to be credited for accommodating case laws which have assumed contemporary relevance for debatable issues. For example- a) the curb on appropriate

government's power to grant remissions ; b) commutation of death sentence on account of delay in execution; c) acceptance of passive euthanasia under exceptional circumstances under strict monitoring of the Court ; d) upholding the constitutional validity of s. 377 IPC and criminalising unnatural offences (LGBT); e) imposition of death sentence for a rapist and so on .

This book has also parted with the conventional style incorporating 'Interpretation Clause' which is a valuable aid for lawyers, judges and law students. Structurally, the commentary part of the book is linear. Thus, looked from this perspective, absence of 'interpretation clause' is a blemish on this magnificent work. This book also sets a benchmark for affordability at Rs. 550/= INR (paperback). This book is easily within the reach of the entire spectrum of legal community and exhorts others to follow its path. To conclude, this book is a sumptuous symphony of a rich sonata of updated case laws and legal provisions. Legal commentary includes incisive analysis, descriptive tabular representation which is uniformly presented, precisely worded and comprehensive discussions.

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Science, Technology and Law Reform (2014), edited by B.C. Nirmal and Ajendra Srivastava, Satyam Law International, New Delhi, India, Pp. 408, Price: Rs. 990.00

Science and Law are two different discipline of knowledge. The science is all concerned with the study of matter or nature and its behaviour while law is, as a part of social science, concerned with the study of the legal norms, concepts, institutions etc to control and regulate the behaviour of human beings in the society. The nature of the science is mechanical and value free on other hand the law is idealistic, nontechnical and humanistic. The law of science do not change according to the time, place but law is always subject to change according to the time, place, culture and need etc. Contrary to the natural science, law is a normative science and is concerned with the *sollen*, not the *sein*. Both science and law seeks to find true facts but their goals are different. Science seeks to find truth and truth only whereas the goal of the law is to provide justice. Both law and science are deeply and noticeably marked by formal rationality – that is, systematic ordering through general rules and logical derivations that Max Weber identified as the central characteristics of modern consciousness. Importantly, although law and science have achieved unprecedented hegemony, both claim to recognize and rely for their legitimacy on limits to their own fields of action. In science, the limits are co-extensive with the scientific method of inquiry; in law, the limits reside in procedural technicalities. In both cases, these methodological limits distinguish law and science from faith or metaphysical speculation.

The book under review titled “Science, Technology and Law Reform” is edited by Professor BC Nirmal and Professor Ajendra Srivastava. The Hon’ble Judge of the Supreme Court of India coded in the introductory remark as ‘foreword’ that “*perhaps the most praiseworthy aspect of this book is the underlying theme of all the articles that the law and science are complementary to each other and scientific advances can be immensely helpful in realizing the goals of equality and justice*”. The book makes an original as well as unique contribution to the science, technology and law reforms. It seems a commendable and sincere effort to give readers as much as possible the conceptual and judicial exposition of the law. With respect to a systematic study of the book, it is divided in the six parts which deals with the different aspect of science and the law.

The introduction part is the back bone of this edited manuscript which not only describes the nature, concept and characteristic of the science and law but discusses the whole summary of the book under review. It explores the developments in the field of the science and technology and the role of law to balance the concern raised by the widespread use of the science and technology.

The first part of this book is entitled as ‘Interrelation of Law and Science: Jurisprudential Perspectives’ which comprises two chapters ‘Science and Law: Some Observations’ contributed by Swatanter Kumar, Hon’ble Justice Supreme Court of India and ‘Law and Science: Bridging the Gap’ contributed by Subhash Chandra Singh. Justice Swatanter Kumar raises the issue of impact of modern technology on the society and emphasized the need to

regulate the widespread use of technology. The eminent author illustrates that what is really needed for law is to adapt itself to technologically induced social changes. Justice Swatanter Kumar's precious contribution presents a brief overview of some specific fields- DNA evidence, cyber crimes, expert testimony, where law and science closely interact with each other. Emphasizing the utility of science in administration of justice, he concludes that a level of science literacy is required for proper functioning of legal system. Author Subhas Singh explores the general things of the impact of the science on the law society in his contributions entitled "Law and Science: Bridging the Gap". In his analytical study, the author explains the nature of scientific knowledge and then goes to inquire about the meaning of scientific meaning. He discussed the importance of the scientific evidence in criminal justice system. His excellent contribution ends with the observation that allowing scientifically flawed evidence to influence any of the law's processes under mines law's moral authorities.

The second part of the book is entitled "Implication of the Advances in the Medical Science for Law". It begins with the scholarly contribution of Hon'ble Justice B.S. Chauhan, Judge Supreme Court of India as "Law and Morality with Special Reference to Assisted Reproductive Technology". It examines the ethical, moral and legal issues that arise in the context of assistive reproductive technology. The author discusses the legal and moral issues that arise from the increasing use of ART, such as IVF, artificial insemination and surrogate mother hood. The issue of artificial insemination is dealt by R.N. Sharma in his contribution entitled "Artificial Insemination Social and Legal Perspectives". He describes the three types of artificial inseminations and the issues in these artificial inseminations. He also suggested for the need of the enactment on artificial insemination with other suggestions with respect to it.

The thought provoking contribution of author Dinesh Kumar Srivastava deals with "Surrogate Motherhood: An Analysis of the Legal and Moral Issues under the Present and Proposed Laws. His studied devoted to various legal and ethical issues involved in surrogate motherhood in India. He points out that the proposed legislation in India prohibits the partial surrogacy but not same is not prohibited in England and many other countries.

Organ transplantation has become the most emerging sector in medical field and it has faced a lot of challenges. The contribution of Jyoti J. Mozika examines the different perspective in his work. Jyoti J. Mozika presents an account of the evolution of the organ transplantation law of the country focusing on the Transplantation Of Human Organs Act 1994. Bibha Tripathi's contribution "Sex Selection: Text and Context" provides some very valuable insights into the issue of continuous decline in the Child Sex Ratio. Her contribution examines the causes of the decline in CSR and attempts to provide some viable solution in Indian perspectives. In the context of declining child Sex Ratio, J.P.Rai's contributions "is remarkable entitled Technology and Female Foeticide in India: Issues and Challenges" This is excellent work focuses on the social evil of female foeticide in the country. The author also has examined the issues surrounding the problems from a 'rights' perspectives.

Part III of the book deals with the "International Legal Regulation of Space" which consist three contributions. The contribution of Salig Ram Bhatt entitled "The Future of Air Law discusses the inter relation of air Law and technology focusing on civil aviation and assesses the future direction of space law. The chapter " Aviation Technology and Law: The Changing Regulatory Role of The ICAO" contributed by V. Balakista Reddy considers the role of law in particular the role of International Civil Aviation Organization (ICAO) the specialized agency of United Nation. The contribution of eminent scholar B.C. Nirmal on

“Protection on Space Environment: Need for International Legal Framework” attempts to understand the nature of space environment and explains the concept of protection of space environment with specific reference to planetary protection etc.

Part IV of the book deals with the contributions under topic “Implications of Advances in Genetic for Law. The contribution of David W. Tushaus with topic “Science, Technology and the need for Reforms in the Criminal Justice System” explains that how the use of DNA has helped expose injustice or even gross injustice in the United States’ legal system. Kshitij Kumar Singh’s contribution “Human Therapeutic Cloning and Stem Cell Research: Ethical, Legal and Policy implication” reviews these underlying issues. The author undertakes the analysis of the law and policies relating to it. Ajendera Srivastava’s contribution “Bio Safety Challenges and Over view of Liability and Redress Regime for Trans boundary Moment of Living Modify Organism: A Missed Opportunity?” is aimed mainly to presenting a brief overview of the liability and redress regime for transboundary moment of living modified organism(LMOs) as stabilised by 2010 Nagoya- Kuala Lumpur supplementary protocol.

The issues of the intellectual properties laws with respect to technology have been discussed in part V entitled “Implication of Advances in Technology for Intellectual Property Laws”. Justice Dilip Gupta’s contribution “Technological Innovation in the Add of Law” discusses some recent changes effected by technological development of law specially impact on intellectual property laws and space Law. J. K. Das’s contribution “Impact of Science and Technology on Copyright Law: A Plea for Reform In India” discuss a range of legal issues that Aries in the context of strengthening the legal protection of newly emerge Technology specially computer programmes.

In their contribution “Objectives and Principles, Technology Transfers and the TRIPs Agreements: Flexibilities and options for Developing Countries” B. N. Pandey and Prabhat Kumar Saha raise the issues of one sided interpretation of TRIPs Agreement which favours developed countries and ignores the concern of developing countries. In his contribution “Linkage between Biological Resources and Intellectual Property Rights: Implications for Developing Nations author V. K. Pathak explores the relationship between the intellectual property rights and biological resources and point out the likely conflict between the two regimes of Convention on Biological Diversity and the TRIPs agreements. The contribution of Anand N. Raut, Swatee Yogesh & Sujata Tikande, “Regulating Cyber Crime Investigation in India: Need of Hour” analyses the provisions of the Information Technology Act, 2000 which relate to investigation of cyber crime. Golak Prasa Sahoo’s contribution, “Privacy Protection in Cyber Space: An Overview” examines in particular issues relative to privacy protection that arise in the context of increasing dependence on computer. His contribution also contains certain valuable suggestions in this regards. The last part of the book under reviews deals with “Nanotechnology and Right to Food. It starts with the contribution of Vinod Shankar Mishra entitled “Nanotechnology with Special Reference to Nano medicine and Regulatory Measures: Indian Perspective”. His work addresses many ethical and legal issues that relate to nanotechnology, in particular, nano-medicine. The Chapter “Food Security and Human Rights: A Study of the Role of Judiciary in Evolving a Legal Regime in India” contributed by Manik Chakraborty examines the concept of Food Securities and its legal recognition as a human rights in India.

The editors of the book have done a remarkable job in arranging the contributions in a very systematic and synchronized manner. The book is highly informative and fills the gap in the existing legal System. All the authors who contributed the chapters deserves

appreciation that they have chosen a very relevant to pick which are not only challenging but illustrate serious question to the law due to advancement of science and technology. Contributions to this volume may not be comprehensive enough to touch every aspect of the subject but it provides new insight into the complex relationship of law and science which pose new questions. The book elaborates changing role of law in responding the contemporary challenges posed by scientific and technological advances. The language of the book is digestible and convenient. The cover page of the book is attractive and price is moderate as a reference book.

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