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Editorial

Future empires are empires of mind. A prosperous country is one which has more intellectual property than material property; number of patents are more meaningful than number of missiles. Innovation, excellence and inclusion are prime concerns of every society and in particular for any profession.

Legal profession in particular demands new ideas, interpretation and great intellect. Law changes with the change in the society. Law is not an antique to be taken down, dusted, admired and put back on the shelf. It is a dynamic instrument for bringing about development; the development which is not confined to economic growth, but reaches out to every human being in the country. The focus of law must be human beings. Law is not abstract; it is not a set of mechanical rules. It has a social purpose and an economic mission. Therefore, in a developing country like India, law must be dynamic and not static. Law must not be inhibited by the past; it must look out into the future, and satisfy the hopes, aspirations of the people. As observed by Cardozo: "The inn that shelters for the night is not the journey's end, law like the travelers must be ready for tomorrow."

The intellectuals of the society owe a moral duty to review and redesign the law as per the demands of the society. Researchers are true parents of modern legislation. One idea, one innovation and one new interpretation can change the lives of millions. Justice for all is justice for me.

Through Bharati Law Review every effort has been taken by us to inspire the young researchers to pen down their thoughts of innovations to promote quality in the content of law. Laws are not dead letters; they must breathe for the society.

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PROTECTION OF HUMAN RIGHTS BY INVOKING COMPENSATORY JURISDICTION BY COURTS

Mr. M.S. Deshpande*

Introduction

The concept of human rights has its origin in humanism, which recognizes the value and dignity of man, and makes him the measure of all things or somehow takes human nature, its limits or its interests as its theme. Humanism is a basic aspect of renaissance. It refers to absence of threat, pressure or undeserved wants. The concept of human rights is developed according to development in law. The judiciary, parliament and the government of India are committed to bring development in concept of human rights. The judiciary has strengthened the concept by providing timely protective remedies as per law and also by invoking compensatory jurisdiction. Victims of crime, either direct or indirect, are human beings. They have every right to be getting compensated. It has its roots in the concept of protection of human rights. The Supreme Court has developed the concept through right to life, and also by interpreting various provisions of the Constitution of India, 1950 (hereinafter the Constitution) has given directions to the state regarding fulfillment of legislative intendment for protection of human rights.

On basis of this analogous ideology this paper aims to state the role of judiciary in protection of human rights, especially, granting compensation to the victim of crime. It aims to prove that during last half century the judicial attitude is changing and becoming more favourable in awarding compensation to the victims; also there is a need to recognize victims' right to speak and to consider the nation's responsibility to listen seriously. It is an obligation of the courts to award compensation in appropriate cases.

Human Rights

Generally, human rights are those rights which are inherent in every human being. In absence thereof human beings are not in position to live as human beings. They are entitled for their enjoyment, protection and enforcement. Human rights are universal equally and also inalienable. Generally, human rights mostly dishonored by the

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barbarous acts at the hands of individuals, groups or the sovereign powers. It is the need of the day to recognize and respect human rights in social, cultural, economic and political spheres. By nature, the human rights are indivisible, interrelated and interdependent. They are natural rights come by birth as human beings. Separate efforts are not required to get them. However, their protection requires efforts and their violation requires to be compensated.

Section 2(1)(d) of the Protection of Human Rights Act, 1993 defines "human rights" as follows:

> ""Human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India."

The Universal Declaration of Human Rights, 1948 (UDHR) declares: "All human beings are born free and equal in rights and dignity". Human rights can be considered from two angles. Firstly, the rights necessary for dignified human existence, viz., basic human needs of food, clothing, shelter and medical care. Secondly, the rights which are necessary for adequate development of human personality such as right to education, freedom of culture, speech and expression, free movement, satisfaction of undeserved wants etc.

Human rights are evolved through a long process from Vedic period to recent past. They are again classified into liberty oriented, security oriented and internationally agreed. Liberty oriented human rights are mainly connected with civil and political rights whereas, rights related to social, economic and cultural security are termed as security oriented rights. The rights which are related to group of people concerning environmental, cultural and developmental aspects and which come into existence through international agreements consist in the third category. Unless, equilibrium of political and civil rights with economic, social and cultural rights is properly evolved, a sizeable section of the society will be deprived of such rights. Efforts are being made by the courts to achieve that equilibrium.

Constitution of India and Human Rights

We have accepted and recognized the principles of UDHR as an integral part of constitutional obligations. They speak for civil, political, economic and social rights. The traditional civil and political rights form part of fundamental rights, whereas, social and economic rights are set forth as directive principles. Though the directive principles are not enforceable by courts, they are none the less fundamental in governance of the state. Thus, the state has enacted

appropriate laws including the Protection of Human Rights Act, 1993, for respecting and promoting human rights. In absence of specific provisions of law, the Supreme Court invokes its original jurisdiction for protecting human rights and by compensating for their disregard.

Victims of crime, either direct or indirect, are human beings. They have every right to get compensated. In recent years, compensation to victims of crime has been introduced in several countries, which has its roots in the concept of protection of human rights. The compensation may be awarded against wrongs committed by individual, groups or agencies of the state. The idea is not alien to Indian social and legal context. Article 41 of the Constitution provides that:

> "The State shall, within the limits of its economic capacity and development, make effective provisions for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement and any other cases of undeserved want."

No doubt, the victims of crime in number of cases are exposed to disablement, undeserved want and even privation. To bring reformation in criminals is an object of modern law. However, victims, their problems and violation of their human rights are not so much looked into. The courts are much slow, rather restrained by inadequate provisions of law to grant compensation to the victims. The Committee under the chairmanship of Dr. Justice V.S. Malimath in 2003 has made various recommendations to overcome the problem.[1] Accordingly, the provisions of Section 357A of the Code of Criminal Procedure, 1973 are introduced. However, those provisions are not full-fledged to cope with all needs of victims and to cover all kinds of victims, direct and indirect. The definition of "victim" given in Section 2(wa) of the Code of Criminal Procedure (Amendment) Act, 2008 is not exhaustive. To become entitled for compensation under Section 357A, the victim is dependent upon the recommendation made by the trial court to the Legal Service Authority. Moreover, except few states like Tamilnadu, other states have not prepared schemes and sanctioned requisite funds for the compensation of victims. Thus, the provisions of Section 357A are either inadequate or rendered inoperative by the passive attitude of the state. Moreover, the provisions of Section 372 of the Code of Criminal Procedure (Amendment) Act, 2008 are silent on the point when the compensation is not at all granted by the trial court, as there is no

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[1] GOVERNMENT OF INDIA, MINISTRY OF HOME AFFAIRS, COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM (Mar. 2003).

provision for appeal when compensation is denied or recommendation is not made to the Legal Service Authority.

Role of Courts in Protection of Human Rights

The Supreme Court and various High Courts have taken lead to overcome these problems. The judiciary has taken a lead role in protection of human rights of victims, especially by granting compensation and also by laying down various guiding principles for subordinate judiciary for dealing with such cases. The judicial attitude is changing on this point in good direction and becoming more favourable for granting compensation to victims. Even in few cases an interim compensation is also granted. Provisions of Articles 14, 21, 32 and 226 of the Constitution are considered by the Supreme Court for invoking its compensatory jurisdiction for translating UDHR into reality. In post independence era the judiciary, being custodian of rights of people, has shown deep concern about protection of human rights of victims.

Article 9(5) of the International Covenant on Civil and Political Rights, 1966 (ICCPR) indicates that an enforceable right to compensation is not alien to the concept of guaranteed rights, as it provides for award of compensation to the victims who have been unlawfully arrested or detained and to get such compensation is their enforceable right. Probably, on that basis the Supreme Court and High Courts in India are leading to recognize and protect the victims by awarding compensation.

Prior to introduction of Section 545 of the Code of Criminal Procedure, 1898 (corresponding Section 357 of the Code of Criminal Procedure, 1973) the dependents of victims might institute suit for damages under the Fatal Accidents Act, 1855. A decree for compensation Rs. 1,500/- granted in such suit was set aside by the first appellate court. However, by restoring the decree of High Court of Lahore, in *Sardara Singh v. Charan Singh*[2] it was observed that it is sufficient under the Fatal Accident Act, 1855 if a person by his wrongful act, neglect or default shall have caused the death of another person. Under similar circumstances, the High Court of Allahabad in *Jagannath Singh v. Pragi Kunwar*[3] has held that a suit for compensation under the Fatal Accident Act, 1855 was maintainable. It awarded compensation Rs. 2,000/-. A person could sue for damages in a civil court, if crime is at the same time a tort. However, the Fatal Accident Act, 1855 was leading to multiplicity of proceedings and expenses to the victims, as they had to approach

[2] A.I.R. 1933 Lah. 770.
[3] A.I.R. 1949 Allah. 448.

criminal as well as civil courts for redress of their grievance. Thus, concept of compensation to victims was introduced in the Code of Criminal Procedure, 1898.

The general principle behind payment of compensation in criminal case is a simple and cheap way of giving a victim a civil remedy to which the victim is already entitled. It is not a punishment or an additional punishment to an offender. By principle, an excessive fine or compensation should not accompany with a substantial sentence. The High Court of Bombay, in *State v. Pandurang Shinde*[4] has observed that when the accused was sentenced to life for an offence of murder, a sentence of fine could not be imposed, as it was wholly opposite. Thus, the order of payment of fine Rs. 500/- was set aside.

The Supreme Court also expressed similar view in *Palaniappa Gounder v. State of Tamilnadu*[5]. The accused was convicted for murder and sentenced to death. The High Court of Madras upheld the conviction, but reduced the sentence to imprisonment for life, by imposing fine Rs. 20,000/- and directing to pay compensation Rs. 15,000/- out of fine. The Supreme Court held the fine to be unduly excessive and reduced it to Rs. 3,000/- and directed to pay it to the dependants of victim. In both the cases, it was the view that when there is a statutory provision for granting compensation, there is no scope for invoking inherent powers under Section 482 of the Code of Criminal Procedure, 1973. The Supreme Court expressed need to consider the propriety and adequacy of fine on the basis of the facts of the case.

During that era the Supreme Court started recognizing the rights of prisoners to ask for observance of human rights and penological innovations. That can be seen in *Prabhakar Pandurang Sanzgiri*[6], *Charles Shobraj*[7], *Sunil Batra*[8] and *Krishan Lal*[9].

The Supreme Court also showed serious concern for speedy trials in *Ramamurthy*[10] and prohibiting the putting of under trial prisoners in leg irons in *Prem Shankar Shukla*[11].

In furtherance of introducing more and more principles for protection of human rights, the Supreme Court in *Guruswami v. State*

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4 A.I.R. 1956 Bom. 711.
5 A.I.R. 1977 S.C. 1323.
6 State of Maharashtra v. Prabhakar Pandurang Sangzgiri, A.I.R. 1966 S.C. 424.
7 Charles Sobraj v. The Suptd., Central Jail, Tihar, New Delhi, A.I.R. 1978 S.C. 1514.
8 Sunil Batra v. Delhi Administration, A.I.R. 1978 S.C. 1675; A.I.R. 1980 S.C. 1579.
9 Krishan Lal v. State of Delhi, A.I.R. 1976 S.C. 1139.
10 Ramamurthy v. State of Karnataka, A.I.R. 1997 S.C. 1739.
11 Prem Shankar Shukla v. Delhi Administration, A.I.R. 1980 S.C. 1535.

of Tamilnadu[12] expressed the need to provide proper compensation for dependants of victims in cases of murder. In case of murder of father and brother the sentence of death was confirmed by the High Court of Madras. The Supreme Court while reducing the sentence to life imposed fine Rs. 10,000/-. Thus, a new principle was introduced for protection of human rights of victims that whenever there is reduction in substantive sentence, the amount of fine or compensation should be increased. Similar view was taken in *Nand Ballabh Pant v. Union Territory of Delhi*[13] while reducing the sentence from 2 months to 1 month for conviction under Section 304A of Indian Penal Code, 1860, the sentence of fine was enhanced from Rs. 500/- to Rs. 1,000/- with a direction to pay the same for compensation to the wife of victim.

In *Prabhu Prasad Shah v. State of Bihar*[14] the accused was sentenced to life for murder. The High Court convicted the accused under Section 304 (Para I) of Indian Penal Code, 1860 and imposed rigorous imprisonment for 10 years. However, compensation was not granted to the victim. The Supreme Court by confirming conviction reduced the sentence to the period of 2 years period which was already undergone and imposed fine Rs. 3,000/- with a direction to pay the same to the dependents of victim by observing that the requirement of social justice demand that a heavy fine should be imposed, in lieu of reduction of sentence so that children of deceased may be compensated.

In *Rudul Shah v. State of Bihar*[15] the Supreme Court, for patent violation of rights to life, liberty and other basic human rights of the victim incorporated idea of imposition of exemplary costs as remedial measure in addition to the victim's entitlement to claim damages.

In case of abetment of suicide the accused husband was sentenced for rigorous imprisonment for 4 years and a fine Rs. 500/-. The High Court acquitted the accused for want of evidence. The Supreme Court restored the conviction in *Brijlal v. Premchand*[16] by observing that the ends of justice will be met if the sentence awarded to accused is substituted with the period of imprisonment already undergone by him. The Supreme Court enhanced the sentence of fine from Rs. 500/- to Rs. 20,000/- with a direction to pay compensation Rs. 18,000/- out of fine to the father of deceased for bringing up her minor son.

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12 A.I.R. 1979 S.C. 1177.
13 A.I.R. 1977 S.C. 892.
14 A.I.R. 1977 S.C. 704.
15 A.I.R. 1983 S.C. 1086.
16 A.I.R. 1989 S.C. 1661.

In *Nilabati Behera v. State of Orissa*[17] the Supreme Court held that for contravention of human rights and fundamental rights by the state and its agencies, the court must award compulsory compensation. It rejected the defense of sovereign immunity. It was held that custodial death amounts to violation of fundamental right to life.

In *Venkatesh v. State of Tamilnadu*[18] the accused was sentenced to life imprisonment for murder. The High Court altered the conviction and convicted the accused under Section 304 (Para II) of Indian Penal Code, 1860 and inflicted rigorous imprisonment for 5 years and imposed fine Rs. 3,000/- with a direction to pay the same to dependants of victim for compensation. The Supreme Court observed that if a steep sentence of fine is imposed and fine is made payable to widow and unmarried daughter of deceased, it will serve ends of justice. It reduced the sentence of imprisonment to one already undergone and enhanced fine to Rs. 1,00,000/- with a direction to pay compensation Rs. 75,000/- to widow and Rs. 25,000/- to unmarried daughter. Thus, it was laid down that in sentencing process compensation is one of mitigating factors for reducing the substantive sentence.

In *Madhukar Chandar v. State of Maharashtra*[19] the accused, a young farmer murdered his brother in law. The sentence of life imprisonment was reduced to rigorous imprisonment for 7 years by the High Court of Bombay by holding that true justice will be achieved if the old mother and 3 children will receive some sustenance which the deceased would have otherwise provided. The High Court put an option before the accused to pay a fine Rs. 40,000/- and in default to undergo rigorous imprisonment for 7 years. It was also directed that if fine is paid within 12 weeks the jail sentence shall stand reduced to 3 years. The amount of fine Rs. 40,000/- was directed to be paid to the dependants of victim. Here the court equated the substantive sentence with compensation.

In *Bodhisttwa Gautam v. Subhra Chakraborthy*[20] the Supreme Court has held that rape is a crime against the basic human right. It violates right to life enshrined in Article 21 of the Constitution. The Supreme Court provided certain guidelines for awarding compensation to the prosecutrix in such a case. It has also given various guide lines for protection of basic human rights and compensation of women in *Delhi Domestic Working Women's Forum v.*

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17 A.I.R. 1993 S.C. 1960.
18 1993 Cri. L.J. 61.
19 1993 Cri. L.J. 3281.
20 A.I.R. 1996 S.C. 922.

Union of India[21]. The state has been directed to constitute Criminal Injuries Compensation Board for payment of compensation to rape victims and protecting their basic human rights.

However, the state has not fulfilled its obligation in all respects even after lapse of about 18 years. Earlier, in case of *P. Rathinan v. State of Gujrat*[22] a victim of custodial rape, who was a tribal woman, was also awarded interim compensation Rs. 50,000/-.

Thus, the courts in India are promoting human rights by protecting them. In cases of violation of rights of masses by state agencies the Supreme Court has shown deep concern by giving various reliefs. Recently, the Supreme Court has stressed upon the role of trial courts to be played for protection of human rights by granting compensation. It is observed in case of *Manish Jalan v. State of Karnataka*[23] that the victims need to be compensated sufficiently by using provisions of Sections 357 and 357A of the Code of Criminal Procedure, 1973. The Supreme Court has gone to the extent by holding that power of courts to grant compensation is coupled with duty. It is held in the case of *Ankush Shiwaji Gaikwad v. State of Maharashtra*[24] that the courts are bound to consider issue of award of compensation by recording reasons for awarding or refusing compensation. The court can hold enquiry as to capacity of accused to pay. According to the Supreme Court the word "may" used in Section 357 of the Code of Criminal Procedure, 1973 should be read as "shall". Thus, the courts are put under an obligation to decide question of compensation at the trial level. Thus, the apex court is harping much on protection of human rights by granting compensation.

Conclusion

Human rights need to be respected, protected and in case of violation they are required to be compensated. To reduce violation of human rights, element of humanization must be present everywhere. The legislature and judiciary in India have shown deep concern for promotion and protection of human rights. However, execution part lapse in that aspect. Considering the aforesaid judicial trend, it can be concluded that the superior courts in India, especially the Supreme Court, in appropriate cases have reduced the substantive sentence and granted/enhanced the compensation to the victims. The Supreme Court has also made the state and its agencies liable for

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21 (1995)1 S.C.C. 14.
22 (1994) S.C.C. (Cri.) 1163.
23 A.I.R. 2008 S.C. 3074.
24 A.I.R. 2013 S.C. 2454.

violation of human rights and required them to pay compensation to the victims of illegal detention, custodial death, rape, mass disasters. The courts are committed to protect human rights of victims by granting compensation and creating obligation on their part to consider issue of compensation at trial level only.

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NEW PATTERN OF DEMOCRACY THROUGH ELECTORAL REFORMS

Ms. Kavitha Balakrishnan*

A New Approach to Democracy

Over 60 years have elapsed after the British have left, and India was proclaimed independent. If one is able to traverse across the length and breadth of this great country today (the chances are that he may not return in one piece), it will be well nigh impossible to find a single Indian. No, you can't find an Indian, not even a human being for that matter. You may find Malayalees, Tamilians, Kannadigas, Maharashtrians, Kashmerees, Congress, Communists, Muslim Leaguers, Shiv Senites, Hindus, Muslims, Christians, Sikhs, *Dalits* and so on, and all of them quarreling among themselves. Every right thinking Indian shall introspect, and may wonder as to what is wrong with our people, or shall I say peoples! It is ridiculous to claim that our democracy is 63 years old, when we don't show the maturity of a 6 year old child. One wonders as to what has happened to our patriotic fervor, which was so vehement during the struggle for independence. Patriots may still be seen but they are largely disillusioned, unorganized and unable to stand up and assert themselves to fight against the evils prevailing in the society. I reckon that this type may not number more than 10% or 20% of the entire population. Another 10% or 20% are the ruling and opposition elites, who are blinded by the power they wield over the hapless masses, and who consider themselves as licensed to act according to their own whims and fancies, without giving much consideration for the future of this great country.

We proudly proclaim that India i.e., Bharath is the largest democracy of the world, with a vast population of over a 113 *crores* of people, and almost equal number of political parties on the scene, willing to grab the power with no holds barred. However, it is a sad thing to note that most of these parties do not share the vision that national interests should prevail over all parochial, sectarian considerations. The politics has degenerated into a mere profession with no consideration of patriotic feelings. People are reduced to the

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status of voting instruments, and any political party which is capable of garnering around 40% of votes is automatically catapulted into controlling positions. They are able to hold sway over the vast resources of this great country with impunity and without any questions of accountability. Whatever promises were made to the electorate during the elections are conveniently forgotten. People are unable to see any difference between the ruling or opposition parties. They are just two sides of the same coin.

We may speak of lofty ideals such as *Panchayathi Raj*, planning at grass roots level, decentralization of power and so on; but in effect, these local bodies are coerced into following the dictates of the state governments. Many of the state governments act as if they are sovereign governments without paying any heed to national policies, and whereas some of the state governments are over turned by the centre to suit the interests of the ruling parties.

Until recently we were led to believe that our judiciary is above all temptations. The recent incidents point out that this belief is slowly being eroded to a point of no return, and some drastic initiatives are necessary to restore the ventilating status of the judicial system. No! It is not democracy. It is nothing but a rule by of the organized minority. We are therefore left with no alternative but to appeal to, and call upon the patriotic public including those working in the areas of arts, literary, and cultural avocations to rise to the occasion and come forward to provide the necessary leadership to usher in a new era of peace and harmony between the various sections of society.

Avoidable Expenditure

If we ever venture to work out the expenditure that is forced upon the nation for the sake of implementing the so called democracy, we would be wonder-struck to realize an unbelievable truth. The huge sums that we have already spent would have been sufficient to convert the whole of India into a shining example for the world community. We are witnessing a scenario where scores of ministers, hundreds of parliamentarians, tens of thousands of Members of Legislative Assembly (MLAs), hundreds of thousands of state and district political leaders, and *crores* of high officials are engaged in a never ending race to exploit and plunder the wealth of our mother land. The ruling class, in collusion with hundreds of thousands of contractors and businessmen are amassing wealth with hardly any hindrance from the accounting authorities. For the majority of the downtrodden, helpless and hapless poor people who even today find it difficult to make their both ends meet, the so called development that we have achieved is nothing but superficial. The governments are

spending large sums of money, but it doesn't reach its beneficiaries. That is the fault of the system of implementation. Had they bothered to deposit the amount ear-marked for the benefit of the *adivasis* alone in a bank, each *adivasi* living in India would have become a rich individual, and entitled to a respectable amount of interest every month.

Let us consider the expenditure involved in the working procedures of our great (funny) democracy, right from preparation of voters' lists, elections, counting of votes, and declaration of results, constitution of various houses such as panchayaths, municipalities, corporations, district councils, state assemblies, parliament etc., and right up to the formation and installation of ministries. Let us not forget that separate electoral rolls are often necessary for elections at different levels. Any right thinking person will feel exasperated when he realizes that *crores* and *crores* of rupees-our taxpayers' precious money–are spent on such preliminary exercises, and this has to be repeated every 5 years or at the whims of those who are in power when interim elections are conducted to perpetuate their sectarian interests. Leave alone the expenditure incurred by the administration by way of allowances to officials, transportation expenses etc., the total expenditure incurred by the contestants, well wishers, and their parties are beyond any one's imagination. To top it all, the general public is not left alone; they are pressurized, intimidated, and fleeced in to giving donations to the parties involved. Besides all these dramatic acts, the actual headache to the public and to the administration lies in the tension generated on the rallies, street fights, and the loss of precious lives of innocent citizens by way of avoidable violence. After the declaration of results we normally witness intense lobbying, blackmailing, threats and counter threats to complete the formation of ministries.

Thus new governments are formed at various levels right from panchayath to the parliament, to start a reign of corruption, malpractices, favouritism, nepotism, and pure wasteful expenditure of precious revenue funds, which should otherwise be useful for developmental processes. Billions of rupees are spent on the maintenance of ministers, Members of Parliament (MPs), MLAs, and officials at various levels are left to any one's imagination. Shri. Varkala Radhakrishnan, a former MP is quoted to have said that the expenditure involved in the working of parliament works out to Rs. 3,60,00,000/- per day. Now we may imagine the total expenditure involved in the working of all legislatures, panchayaths, municipalities etc.

Once a person is elected and declared to be a people's representative, and after completion of a minimum term in the house,

he is entitled for pension for life, no matter how young he is. Those with huge income from other professions/sources are also entitled for pension if they once become a people's representative. However, those officials who are the real back bone of the administration have to wait for the attainment of superannuation to earn their pension.

Can we call it democracy which was once defined as "rule of the people, by the people, for the people"? We can't really term it as the rule by the majority. We are really in a vicious circle, where our society is intimidated by unscrupulous people (hoodlums) aided and abetted by politicians (both ruling as well as opposition) and senior officials alike. In a nutshell we may sum up that the milk produced by our democratic cow-if we may term it so–is virtually consumed by its keepers or those who control the institutions at panchayath, block panchayath, municipality, municipal corporation, district panchayath, state legislature, and parliament levels. The common people at large are left high and dry to fend for themselves.

The point is that our democracy has failed to provide succor to the toiling masses. Is it then necessary to continue with this sort of democracy, or is it possible for us to device a system in which the exploitation is completely avoided? Let us appeal to all good people who have not surrendered their own brain and spine to the controlling centers of political parties, and are willing to stand up bravely, to ponder over the subject, to organize, prepare for a final fight to establish a new democracy where the will of the vast majority of the people shall prevail over the might of the organized, pressuring, and intimidating sections of society.

A New Constitution

At this juncture, let us put in a suggestion to usher in a new and equitable form of democracy where the will of the common masses shall be respected. Let us also hope that it will be possible to usher in a new India where public life is clean, and corruption is completely eradicated.

Salient Features of the New Constitution

We must begin with a fundamental change. The Constitution recognizes only one religion, i.e., human religion, and only 2 castes, i.e., males and females. All other man-made divisions may exist and people may or may not follow their respective faiths, but the constitution shall not recognize or give any consideration to such divisions. Government, offices, university, college or school records shall not indicate or differentiate between any divisions on the basis of religion or caste. Neither will there be any division on the basis of

political affiliations. No political party will be recognized. The entire population of the country should be encouraged to live like members of a single family, i.e., children of mother India.

Ward sabha, grama panchayath sabha, special grade (municipal) panchayath sabha, super grade (corporation) panchayath sabha, jila panchayath sabha, prantheeya panchayath sabha, and deseeya panchayath sabha shall be the new constitutional establishments. These houses shall have powers to enact and implement laws according to their respective jurisdictions, and in conformity with national policies. The block panchayath, and rajya sabha will be abolished as these do not serve any useful purpose other than increasing the burden on the exchequer. The basic constitutional establishment will henceforth be the ward sabha. Instead of the prevailing inactive wards, we will have hundreds of thousands of lively wards where laws are enacted and implemented without fear or favour.

Procedure of Elections

Elections to the new panchayaths shall be held well in time to facilitate a smooth change over on the very next day after completion of the 5 year term of the outgoing sabhas. In any case the 5 year term shall not be reduced to suit the convenience of a few self serving leaders. All the adult voters who have attained the minimum age of 18 gathers at a hall, school, open ground or such other places as convenient, bringing with them the necessary identification documents as stipulated in advance. Without a customary voters' list, spirited campaigns based on political parties, huge processions, and without the usual displays of flags, cut outs and various forms of advertisement, the elections would be conducted in a peaceful manner in all the five hundred thousand wards on the same day. All those who are able to walk without the help of others will be eligible to caste cast their votes. On arrival at the appointed place, every voter affixes his/her signature in a ledger kept for the purpose. One senior official assisted by 2 senior citizens of the ward shall over see the procedure. Since the procedure is in an agreed format, it will not be necessary to seek assistance from the police force. If it is however felt necessary, the police assistance may be sought.

Ten members shall be elected from each ward. The name of each candidate shall be proposed and seconded by different voters present. If there are more than 10 candidates, the election is conducted immediately by raising of hands by the voters present or by any other agreed procedure. Votes received by each candidate are counted and written down in the ledger. The 10 candidates who have secured maximum number of votes are declared elected. Once the ledger is

signed by the senior official who over saw the election, the election procedure is concluded. A candidate should be less than 75 years of age as on the date of election. The government employees shall not be permitted to contest, whereas those employed in private sector may be permitted. No member shall be permitted to continue in office for more than 4 consecutive terms. Those who fail to cast their votes shall be fined a sum as decided at the first meeting of the ward sabha. However the sabha may exercise their discretion and wave the fine if there is sufficient and convincing reason for the absence.

Soon after the ward level election is completed, the 10 elected members sit down together, and elect 2 members to represent the ward in the grama panchatyath sabha. The most deserved out of the remaining 8 members shall be elected president and another as vice president of the ward. The remaining 6 members shall constitute the ward ministry, which shall handle the affairs of the ward governance for the next 5 years.

The ward sabha is empowered to enact and implement laws affecting subjects indicated in the ward list. Only the elected members are permitted to present any bill for the consideration of the sabha. It shall be mandatory to obtain a two-third majority out of those present and voting to get any bill as declared passed by the sabha. A minimum presence of 75% of the total voters is also mandatory for the ward sabha to conduct any business. If it is considered necessary to remove the president or the vice president from office, such proposal should receive the assent of at least two third majority of the total number of voters. The new incumbent should be selected from the remaining elected members, and fresh election can be held only on completion of the 5 year term.

It is the constitutional responsibility of the ward ministry to work for the solution of any problems faced by the people of the ward. Whenever the ward sabha is convened, the decisions and actions taken by the ministry are reviewed, approved, altered, or cancelled, as is decided by the collective wisdom of the house. Though the approval is carried by a simple majority, alterations or cancellations should receive the assent of at least two third of the members present and voting. The ward sabha has to ensure that the cleanliness of the ward–every square inch of it–and daily removal of waste materials, including solid, liquid, or air pollutants, is enforced on priority basis, and the process should be continuously monitored and reviewed. It is also to be ensured that any damages to the roads are to be rectified within 24 hours.

In case of natural calamities, the ward ministry should play the leading role to ensure timely assistance to the affected families. It is

also necessary to prevent thefts within the ward premises. In case of thefts, action should be taken immediately to provide justice to the aggrieved.

Voluntary Service

In order to ensure smooth implementation of the aforesaid responsibilities, citizens' committees may be set up to assist the administration on a voluntary basis. Each elected member is required to identify at least 10 citizens for such voluntary service. Thus the total number of volunteers would work out to be 80.

If the task at hand is beyond the capacity of the voluntary force, the matter should be brought to the notice of the ward sabha, and assistance from sources outside the ward can be arranged. This ensures proper security for the entire population of the country. When such a system is enforced in all the wards in the country, the whole of India will be acknowledged as the most beautiful and healthy place to live in.

If there is waste land available within the ward, this voluntary force can be used to cultivate such land with the consent of the owner. Income derived from such cultivation shall be divided on 50:50 basis between the voluntary force and the land owner. The owner is then required to contribute two-fifth of his share to the ward development fund. This arrangement ensures huge revenue to the exchequer.

Complaint/Suggestion Book

This is a register which is required to be maintained in every ward. Any citizen of the ward may write down his complaint/suggestion indicating the date. It should be mandatory to find a solution to such complaint within 7 days. If it is not possible to solve the problem, the ward president should enter the same in the complaint register at the concerned panchayath office, and the panchayath president is hence required to find a solution to the problem within the next 7 days.

Financial Sources

The ward sabha is entitled for the entertainment tax which is to be collected from the ward. Cinema houses, theatres, television sets or such other entertainment sources may be taxed as necessary. Agriculture or land tax at a minimum rate may be collected from the land owners. Those who own land holdings up to 25% may be exempted from the land tax. Other revenue sources have to be identified within the ward itself. Sand deposits available in the river bed may be auctioned by the ward sabha. Private chit funds may be

banned, and the ward sabha may run chit funds on its own. Small scale industries or other suitable business ventures may be started by the ward sabha for the purpose of augmenting its income. The services of the voluntary force can be utilized for operating such ventures. Besides the above, each ward will receive allocation of funds from the concerned panchayath sabha, and the state government.

The income received should be deposited in the treasury and the same may be withdrawn as and when required. It is to be stipulated that a minimum balance of 2% of the revenues is to be ear marked as contingency fund to meet any unforeseen eventualities. This ensures that no deficit budget will ever be introduced in the ward sabha.

Ward Relief Fund

Each ward should institute a relief fund. Without giving undue hardship to the people and with the help of the voluntary force, this relief fund has to be built up and maintained so as to enable the sabha to meet challenges that may be thrown up by unforeseen natural calamities etc.

Arts and Sports Club and Reading Room and Library

It shall be a constitutional requirement to institute a single, common club and library for the use of the entire ward population. Even if there are many clubs already in existence, these should be combined into one single club, so that the entire population can take part in all the sports and cultural programmes organized by the ward sabha, without giving any consideration for the different socio–religious or caste equations. Inter–ward competitions may be held periodically to encourage healthy and creative interactions between different ward sabhas. There shall be no room for terrorism, thefts, looting or deceit, and every member of the ward is duty-bound to work for the progress of the entire nation. With the abolition of sectarian politicking, this can be accomplished easily.

Educational and Employment Concessions

Since there is no consideration on the basis of religion or caste, it is necessary to identify those families who are really in need of concessions in the local area. The most suitable institution to identify such needy families is obviously the ward sabha. The ward sabha meets, discusses the various aspects of backwardness, economic status and any other aspect that requires consideration and identifies the needy families and makes a report to the president of the concerned grama panchayath. The panchayath president is

empowered to issue the necessary certificate after conducting necessary evaluations. This procedure ensures the most efficient method of solving all socio-religious or financial backwardness among various sections of people within the entire country.

Grama Panchayath Sabha

This sabha is composed of the members elected from various wards within the panchayath. E.g., if there are 10 wards in a panchayath, the total numbers of members elected to the panchayath are 20 (10+2). All the members so elected, sit down together the very next day or as soon as the sabha is constituted, and elects a leader, to represent the grama panchayath in the jila (district) panchayath sabha. Out of the remaining members, the president, the vice president, members of various standing committees etc., are elected. The ward presidents are required to attend the grama panchayath sabha whenever it is convened. In order to pass any legislation, it is mandatory to obtain a two-thirds majority of the total members of the grama panchayath plus the ward presidents. In the example, it is 19+10=29. In case it is felt necessary to remove an incumbent president or vice president, it is mandatory that at least 50% of the total members should be present, and 80% should support the resolution. This sabha is empowered to enact laws applicable within the panchayath, but it is mandatory that the laws made should conform to the national policies, and guide lines.

The professional tax and building tax, along with allocations from the state government form the main source of revenue for the grama panchayath sabha. Grama panchayath sabha may take suitable actions to augment the panchayath revenues. In order to augment the revenue sources, the pacnhayath sabha may go in for setting up of small scale industries or any suitable business. However, it is necessary to ensure that no loss is incurred from such ventures. In cases where the loss is reported, the loss has to be recovered from the persons who are responsible for the job or from the members of the panchayath ministry. This should be a constitutional requirement, and will serve as a severe deterrent against squandering away of the resources. The pachayath sabha may avail the services of the voluntary forces functioning within the wards. The funds received should be deposited in the treasury and a minimum balance of 2% is required to be maintained. A complaint book is another requirement in the pachayath sabha, and the complaints are registered by the ward presidents. These complaints are to be sorted out and solutions found within 7 days.

Grama Relief Fund

Grama relief fund is to be maintained at the grama panchayath level. All official documents are to be transparent and any information as required must be made available to the citizens as and when it is requested for. Activities both developmental and administrative in the wards are required to be constantly monitored by the grama panchayath sabha, and if required, suitable actions may be initiated at the grama panchayath level. Only those matters which cannot be sorted out at the level of the grama panchayath sabha may be reported to the jila panchayath sabha, police or courts.

Jila Panchayath Sabha

This sabha is constituted at each district level, and the membership is composed of one leader elected from each grama panchayath within the district. For example if there are 80 pachayaths in the district, the jila panchayath sabha will be composed of 80 members. As soon as the sabha is constituted, the members sit down together, and elect 12 members from the sabha, and these 12 leaders shall represent the district in the state legislature. The election may be conducted by raising of hands or such other simple procedure, and the voting pattern has to be recorded by the district collector or any other official designated for the purpose. The remaining members shall form the jila panchayath sabha. The president and members of the jila cabinet be elected from the members of the sabha. All the grama panchayath presidents from the district shall also attend and take part in all the business conducted in the sabha, and take part in voting.

The jila panchayath sabha has jurisdiction over matters pertaining to subjects indicated in the district list. A minimum presence of 50% of the total members should be present to transact any business in the house, and if a bill is to be passed by the sabha, it should receive the assent of at least two-third of the members present and voting. A complaint register is to be maintained and any complaints registered by the pachayath presidents, shall be resolved within 1 week. The state government shall allocate certain funds to meet administrative expenditure to be incurred by the jila sabha. However the sabha has to find means of augmenting the funds. The most ideal method is to start a suitable, profitable industrial unit sponsored by the sabha which should be run efficiently. This provides employment to the people of the state and further it will generate funds for the business of the jila sabha. In case of losses, such loss should be recovered from the persons responsible for the loss. This stipulation should serve as a deterrent for the members against shirking away their responsibilities.

Prantheeya Panchayath Sabha

This is the state legislature, and it is composed of the members elected from the district panchayath sabha. Two members per each district in the state shall be elected to represent the state in the deseeya panchayath sabha. (E.g., in Kerala state there are 14 districts, and the total number of members works out to be 168. Out of the 168 members, 28 members are elected to represent the state in the deseeya panchayath sabha.) The election may be conducted by raising of hands or such other simple procedure, and the voting pattern has to be recorded by the chief secretary in the ledger provided for the purpose. The remaining members (140 in the case of Kerala) shall form the The prantheeya panchayath sabha. The speaker, the chief minister and ministers shall be elected from the members of the sabha. The strength of the ministry shall be pegged at 10% of the strength of the sabha. The jila panchayath presidents shall also attend and take part in all the businesses conducted in the sabha including voting. (In the case of Kerala, this arrangement raises the strength of the sabha to 154 or 140+14).

The prantheeya panchayath sabha has jurisdiction over matters pertaining to subjects indicated in the state list. Legislation over the subjects indicated in the state list and levy of taxes as authorized by the law are the responsibility of the state administration. A minimum number of 50% of the total strength should be present to transact any business in the sabha, and if a bill is to be passed by the sabha, it should receive the assent of at least two-third of the members present and voting.

A complaint register is to be maintained and any complaints registered by any jila pachayath president, shall be resolved within one week. If there are serious allegations and it is deemed necessary to make changes in the composition of the ministry or an incumbent minister may be removed or changed, such a resolution should receive the assent of a majority of 80% of the total strength of the sabha.

To augment the funds allocated by the central government, the state government has to generate sufficient funds to run the state administration. It is to be ensured that the funds allocated by the centre should be properly utilized. In case the fund is unutilized or lapsed, the minister concerned should be asked to resign. At least 1% of the funds generated by the state government shall be deposited in a contingency fund to meet any unforeseen eventualities. A prantheeya relief fund is to be maintained at the state level to meet any emergencies due to natural calamities etc. In order to augment the fund, donations may be accepted from people and voluntary

organizations even outside the state. All official documents are required to be transparent and any information as required must be made available to the citizens as and when it is requested for. Activities both developmental and administrative in the state jurisdiction are required to be constantly monitored by the prantheeya panchayath sabha, and if required, suitable actions may be initiated to streamline the same.

Deseeya Panchayath Sabha/Parliament

Deseeya panchayath sabha replaces the present lok sabha. The rajya sabha is abolished as it is considered a back door entry to the highest policy making body of the country. The deseeya sabha is composed of members elected (2 members representing each district) from all prantheeya panchayath sabhas across the country. These members along with all chief ministers of states form the total strength of the sabha that is empowered to transact business to govern the Republic of the Union of Bharatha Desam that is India. The president, the vice president, the prime minister, the speaker, the deputy speaker, and ministers are elected from the members of the house. The new incumbents shall wield powers for a full 5 year term. The president shall not abrogate the Constitution or dissolve any of the elected sabhas before the completion of the 5 year term. The deseeya panchayath sabha, presided over by the speaker or the deputy speaker of the house shall exercise powers to remove the president, the vice president, the prime minister or any of the incumbents of the house, provided that the resolution proposing such action receives assent from a minimum of 80% members of the total strength of the house.

A complaint register shall be placed in the sabha, and suggestions or complaints are recorded by the chief ministers of states. Any complaints recorded shall be resolved within a time frame of 30 days. A national relief fund is instituted under the control of the president to meet national emergencies or natural calamities. Donations to this fund may be received from all people and institutions across the globe.

Recalling of Elected Representatives

In case of serious allegations of any nature, it may become necessary to consider the recalling of an elected member of any of the sabhas before the completion of the full 5 year term. In such cases, the following procedure shall be adopted. If a member is required to be recalled, the grama panchayath in which his/her parent ward is situated is required to act. All the ward sabhas in the particular grama panchayath meets separately. In each meeting, at least 95% of

the total voters should be present, and 80% of those present should endorse the recalling resolution. If this stipulation is fulfilled, any elected member shall be recalled and a new member elected in his/her place.

Amendment to the Constitution

In cases when changes are required to be made in the constitution, it is necessary to obtain the assent of a minimum of 75% members present and voting out of a minimum attendance of 80% of the total strength of the sabha. If the proposed changes are on the fundamental features of the Constitution, such resolutions are to be further ratified by at least 50% of the prantheeya panchayath sabhas.

The post of governor shall be abolished. The chief secretaries of states, appointed by the president, shall shoulder all responsibilities currently discharged by the governor.

Judges

Appointments of judges up to the jila level shall be entrusted to the Public Service Commission. Applications for apointments of judges to High Courts and Supreme Court are scrutinized by the president's secretariat, and submitted to the deseeya panchayath sabha for consideration. When the matter is considered, at least 75% of the total strength of the sabha, is required to be present, and the resolution has to be approved by a three-fourth majority of the sabha. Appointment is made by the president, after the names are duly approved by the sabha. The judges shall retire from service on completion of 70 years of age. The judges of Supreme Court or High Courts may be ousted after they are impeached by the deseeya panchayath sabha with the assent of 80% of the total strength of the sabha.

Union Public Service Commission

A high power committee consisting of the president, the vice president, the chief justice of India, the prime minister and the speaker of deseeya panchayath shall be constituted to decide appointments to the Union Public Service commission. Senior officers who are highly qualified and accomplished in different subjects and aged between 50 to 65 years are appointed. The members retire on completion of 70 years of age.

Prantheeya Public Service Commission

A high power committee consisting of the chief secretary, chief minister, speaker of prantheeya panchayath sabha, and chief justice of the concerned High Court shall be constituted to decide appointments to the prantheeya Public Service Commission. Senior officers who are highly qualified and accomplished in different subjects and aged between 50 to 65 years are appointed. The members retire on completion of 70 years of age.

Action against President, Vice President, Chief Justice of India etc.

Any high ranking functionary of the union or state governments can be removed and if necessary punished in the light of sufficient evidence of corruption, malpractice, favouritism, nepotism etc. Such an action is taken on the basis of a clear complaint submitted to the ward president, and forwarded through proper channel to the speaker of the deseeya sabha, with due endorsement of concerned sabhas from ward level. If the complaint is upheld by 80% of the total strength of the deseeya panchayath sabha; then the motion is considered passed, and the concerned functionary is punished accordingly.

Supreme Court judges, chief justices of High Courts, judges, senior civil service officials etc., can also be punished on similar grounds. In this case the action is to be taken by the central high power committee. Complaint in this case is to be submitted to the president by any elected representative at any level, but it should be supported by concrete evidence.

Remunerations and Perquisites for the People's Representatives at All Levels

Ward members and panchayath members are required to produce itemized expenditure vouchers to claim refund of the expenditure that they have incurred in connection with public service. A member will be compensated with the amount that is actually spent plus an additional sum as approved per month. Similarly, the panchayath president and vice-president shall also be given an additional sum as approved per month. In addition to the above, these members shall be entitled for free passage in buses plying through the panchayath area. Any citizen of the panchayath has the right to verify the vouchers submitted by the members. In case of disputes the matter may be brought up for discussion in the concerned sabha.

In addition to the actual expenditure, the additional sums payable to the jila panchayath president, the vice-president, and the members shall be as per the guide lines duly approved or in accordance with the national policy. In addition, these members are entitled for free passage in buses plying in the district. A common vehicle shall also be provided for the official use of the members. The vouchers submitted by the members shall be available for verification by any citizen of the district.

In addition to the actual expenditure, the additional sums payable per month in the case of prantheeya panchayath members, ministers, and chief minister shall be as per the guide lines duly approved or in accordance with the national policy.

Minister's Privileges and Perquisites

The members and ministers of prantheeya panchayath shall enjoy free hostel accommodation as long as they remain in office. There shall be a common canteen facility to provide food as per individual's choice. Each minister may not be provided separate cars. They shall be provided with a common *A* class vehicle and a few number of cars, which may be used in turn and as per requirement. In case of emergency requirements, hired vehicles may also be provided. When vouchers are produced for re-imbursement, the purpose of travel should also be indicated. The information regarding ministerial travels shall be available to any citizen of the state on demand. Free travel facility may be provided by buses or by trains within the state or outside as per the requirement. Chief ministers may be given the facility of free air travel as per requirement. Expenditure incurred on maintenance of ministers' hostel should be pegged to a bare minimum amount which should be stipulated on yearly basis. There shall be no additional payments to the ministers as TA/DA etc. Security and police escorts are either avoided or kept to the barest minimum.

Central Ministers and Deseeya Panchayath Members

In addition to the actual expenditure, the additional sums payable per month in the case of deseeya panchayath members, and ministers shall be as per the guide lines duly approved or in accordance with the national policy.

Members and ministers may travel freely by train anywhere in India. Ministers may be allowed air travel as well. A minimum number of *A* class vehicles may be made available for common use of ministers. Those who prefer to use private personal vehicles may be refunded the actual cost of fuel consumed. All these vouchers are to be audited

according to rules laid down. Members and ministers from ward sabha to deseeya sabha, are duty bound to write diaries detailing the tour schedule on a daily basis, and these diaries may be verified by the auditors if required.

Pensionary Benefits

Political activity cannot be considered as a profession, and therefore the idea of giving pension to members of prantheya panchayaths/deseeya panchayaths cannot be accepted as a matter of right. However a person who had been a people's representative for a full term of 5 years, and if he or she is not entitled for any other benefits from state funds, such needy members may be granted a suitable sum as pension after he/she has attained the age of 60 years. The idea is to give them a chance to lead a decent life, and not to pamper them by utilizing state funds.

In case it is felt necessary to revise the payment rates to the members of legislatures, the proposal should be submitted for consideration by the central cabinet. After the proposal is approved by the central legislature, the same has to be ratified by at least 75% of the total number of ward sabhas by a margin of 75% of the total membership of the respective sabha. If the proposal has to become law, the entire process has to be completed in 3 months.

Meetings of Various Sabhas

A strict time frame has to be worked out and put in operation to convene meetings of various legislative sabhas. This is necessary to enable the presidents of lower formation sabhas to participate in the upper formation sabhas as and when these are in session.

The new government shall start on a clean slate after effecting necessary changes in the constitution. As per the present Constitution, we are aware that it is virtually an impossible task to conduct free and fair elections even to a co-operative body or a legislature. If we are to achieve the possibility of free and fair elections, and that too with the bare minimum expenditure, then we may say that we are approaching our goal. The above mentioned changes may become possible if the present members of parliament are willing to forget their sectarian or party-based ideologies for the sake of ushering in a new and equitable form of democracy which we feel is the most suited one for our impoverished masses to attain greater heights of equality through equal opportunities. This message and expectations for a mutually beneficial transformation of minds of our masses to pave the way for a prosperous future for our great nation should be brought to the notice of the common man through various seminars and media publicity throughout the length and

breadth of India. Let us wait for that unenviable occasion when our efforts become fruitful and a new and equitable social order is realized in our great country.

Special Features at a Glance

1. The Constitution recognizes only one religion, i.e., the human religion, and just two castes, i.e., males and females. However unofficially every citizen shall be free to carry on with the faith of his/her choice.
2. Party-less elections will be held in all the wards (total number being approximately 500,000) throughout the country, on the basis of adult franchise. There is no need to have a voters' list. Every voter will have to produce a suitable document as proof of age and residence, such as ration card, school certificate, bank pass book, or birth certificate as stipulated.
3. Ten members shall be elected from each ward. Out of these 10, 2 members shall be elected to the grama panchayath sabha, and from each grama panchayath, 1 member shall be elected to the jila panchayath sabha. From each of the jila panchayath sabha, 10 members are elected to the state legislative assembly or prantheeya panchayath sabha, and additionally 2 members are elected to the parliament or deseeya panchayath sabha.
4. There shall be a council of ministers at the ward, village panchayath, district panchayath, state legislature, and parliament. The block panchayath and rajya sabha shall be abolished. Municipality may be re-christened as special grade panchayath, municipal corporation as super grade panchayath, state legislature as prantheeya panchayath, and parliament as national or deseeya panchayath.
5. Each house shall have powers to enact laws (pertaining to subjects allocated to it) within its jurisdiction, and implement the same. This applies to developmental projects as well.
6. Sources of income shall be clearly demarcated. Each ward, grama panchayath, jila panchayath, prantheeya panchayath, and deseeya panchayath shall collect taxes allocated to each of these, and funds shall be distributed as per suitable formula to be worked out and implemented. Tendency to spend more than the resources available shall be discouraged.
7. The state shall institute a mechanism to assess the losses suffered due to natural calamities, diseases and prompt and proper compensation to the victims shall be ensured without waiting for a public outcry on the subject.
8. Constitution shall guarantee free education and suitable employment to all those who are below the poverty line.
9. There shall be provision to recall the people's representatives irrespective of their position.

10. There shall be a suitable mechanism to ensure dismissal or punishment of an employee if he/she is found incompetent or guilty.

11. Constitutional guarantees are to be ensured for a continuous process of activities to ensure road safety, health care, and clean surroundings.

12. In order to ensure the proper and efficient functioning of various activities, it is necessary to set up an 80 strong voluntary force in each of the five hundred thousand wards.

13. There shall be constitutional guarantees for setting up of clubs in each ward to oversee arts, sports, and cultural activities.

14. If it is felt necessary to increase the salaries, perquisites, or other amenities to the people's representatives at all levels, such proposals should be approved by at least 75% of the ward councils. Pensions should be granted to people's representatives only after attaining the age of 60 years.

15. Complaint books shall be kept in all wards, panchayaths, state legislatures, and parliament. There shall be a mechanism to probe the complaints received from people in a time bound manner and find solutions within a matter of days, i.e., an ideal time frame being 7 days to 1 month.

16. Whenever meetings are held at the panchayath level, all presidents of wards within the panchayath shall attend and take part in confabulations in the house. Similarly the panchayath presidents shall attend district panchayath meetings, district presidents shall attend state legislatures, and state chief ministers shall attend parliament meetings. They shall also be permitted to introduce bills and take part in voting.

17. The uncultivated or unutilized land in each ward shall be identified and the same shall be used (with the consent of the owner) for cultivation by a land army set up for the purpose or by voluntary organizations. The ward sabha shall arrange funds for cultivation, and the same can be recovered from the harvested produces. One half of the income so earned may be distributed within the voluntary organization, and remaining half given to owner of the land after deducting a fixed portion (say two-fifth) for developmental work within the ward.

18. Let us see what will be the expenditure involved for conducting the entire election process which in effect is finalized at each ward level. If a paltry sum of say Rs. 500/- is spend at ward level, this process can be completed. It works out to approximately (500*500,000) Rs. 25,00,00,000/- (Rs. 25 *crores* only).

19. With the implementation of the foregoing points, it is envisaged that all problems relating to unnecessary expenditure, disruptive activities such as strikes, terrorism etc., shall become irrelevant, and peace and harmony shall prevail in the society. The billions

of rupees saved by avoiding unnecessary expenditure can be utilized for constructive nation building purposes.

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PERMANENT LOK ADALATS: AN EMERGING MECHANISM FOR SPEEDY JUSTICE

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"To no one will we sell, to no one will we deny, or delay right or justice."[1]

- *The Magna Carta*

Introduction

State in a democratic setup has a duty to ensure equal and speedy justice to all its citizens. India is striving to become superpower in the coming decade. It means that country will soon be witnessing more changes in economic scenario where insurance, communication, transport, infrastructure and other services are thrown open to corporate giants, and therefore, it is all the more necessary to provide for cost-effective and delay-free tools for resolution of disputes to meet the present and approaching challenges. All have equal rights, but, unfortunately, all cannot enjoy the rights equally. Enforcement of the rights has to be through courts; but the judicial procedure is very complex, costly and dilatory, putting the poor persons at a distance, and hence, needs immediate attention. To meet the needs of the people at large and to fulfill the constitutional mandate, in the year 2002 a pioneering institution of Permanent Lok Adalat was introduced under Chapter VI-A of the Legal Services Authority Act, 1987. This institution is a hybrid or admixture of mediation, negotiation, arbitration and participation. It is a participative, promising and potential Alternative Dispute Resolution mechanism. It revolves round the principle of creating awareness amongst the disputants to the effect that their welfare and interest, really, lies in arriving at amicable, immediate, consensual and peaceful settlement of the disputes. It is a machinery to settle or decide disputes relating to public utility services and is an indigenous grievances redressal forum for providing inexpensive and prompt relief to the satisfaction of parties to the dispute. The present paper explores as to what extent

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1 MAGNA CARTA 1215, § 40, *available at* http://www.rightsandwrong.com.au/challenge/ (last visited Sept. 5, 2013).

this medium of participative justice has humanized and expedited the process of justice in the 21st century India.

In the globalized world there is rampant increase in the developmental work by the government agencies and that of corporate agencies. This also leads to an implication that there will certainly be more litigation against or by these bodies and thereby adding to "litigation explosion". Our judiciary is already overburdened with the pending cases, lack of courts and judges etc. India has one of the largest judicial systems in the world–with over 3 *crores* of pending cases and sanctioned strength of some 16,000 judges. The system has expanded rapidly in the last 3 decades, reflecting India's social, economic and political development in this period. It is estimated that the number of judges/courts expanded 6 fold while the number of cases expanded by double that number–12 fold. The judicial system is set to continue to expand significantly over the next 3 decades, rising, by the most conservative estimate, to at least about 15 *crores* of cases requiring at least some 75,000 courts/judges.[2] Therefore to meet the demand of the ever increasing litigants, a mechanism has to be formulated, which will not only lessen the burden of the court, but at the same time will provide cost efficient and speedy justice to the aggrieved. Since government is the biggest litigant so an effective judicious mechanism is a need of an hour which will deal with the matters specifically relating to the public utility services.

India still holds the baggage of having the poorest population of the world, where 21.92% of people are still below poverty line.[3] These people cannot afford to go to regular courts. Therefore duty is caste upon the state to ensure that poor will get free legal aid,[4] and an inexpensive redressal mechanism which will ensure that their grievances will be addressed expediously and at their doorsteps.

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2 SUPREME COURT OF INDIA, NATIONAL COURT MANAGEMENT SYSTEMS (NCMS) POLICY AND ACTION PLAN (2012) *available at* supremecourtofindia.nic.in/ncms27092012.pdf.

3 Data is for the year 2011-2012 *available at* http://planningcommission.nic.in/news/pre_pov2307.pdf.
The survey is based upon the formula being formulated by the Suresh Tendulkar Committee for estimating poverty to draw a poverty line. The actual figure of poor could be more alarming as government has begun moving to a broader and more realistic de facto definition that will include roughly 65% of the population as poor. *See Beyond the Debate, Government Accepts 65% Indians are Poor*, THE HINDU, July 25, 2013.

4 INDIA CONST. pt. IV, Directive Principles of State Policy.
Art. 39A of the Constitution of India provides for equal justice and free legal aid. The state shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Access to speedy justice is regarded as a human right which is deeply rooted in the foundational concept of democracy and such a right is not only the creation of law but also a natural right.[5] The foundation of justice, apart from other things, rests on the speedy delineation of the *lis pendens* in courts.[6] It is almost a universal truth that the poor encounter numerous barriers to access basic legal services within the justice system. These barriers include a lack of legal information about dispute resolution options and effective mechanisms to protect individual human and social rights.[7]

The non-participatory British model of administration of justice has certainly alienated the people from the system, because of its foreign origin, technically, extreme formalism and rigid rules of procedure. The effect of the Anglo-Saxon jurisprudence was the rule and procedure oriented adversarial administration of justice. The adversarial system fails to provide justice quickly and effectively.[8] Thus, the Alternative Dispute Resolution (hereinafter ADR) mechanism emerges not only because the adversarial dispute resolution mechanisms fails to provide justice to a large number of masses but also because the adversarial system is not proper mechanism for certain classes of cases, for which the ADR is the best mode for dispute.[9] We have adopted ADR from America but our traditional Lok Adalats are also another very effective means of redressing grievances and delivering justice, which is indeed very much Indian.

In 1980, a committee[10] at the national level was constituted by the judiciary to oversee and supervise legal aid programmes throughout the country. This committee came to be known as CILAS (Committee for Implementing Legal Aid Schemes) and started monitoring legal aid activities throughout the country. The introduction of Lok Adalats added a new chapter to the justice dispensation system of this country and succeeded in providing a supplementary forum to the litigants for conciliatory settlement of their disputes and access to justice was made less formal and easy.[11] The object of the free Legal Aid Scheme was to render legal aid services free of cost, and at the same time to hold Lok Adalat for resolution of disputes. Since the Scheme has no statutory recommendation, in 1987 the Legal

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5 Noor Mohammed v. Jethanand and Another, 2013 (2) S.C.J. 164.

6 *Id.*

7 JUSTICE FOR THE POOR: PERSPECTIVES ON ACCELERATING ACCESS xvi (Ayesha Dias & Gita Honwana Welch eds.,Oxford University Press, N.Y. 2009).

8 SARFARAZ AHMED KHAN, LOK ADALAT: AN EFFECTIVE ALTERNATIVE DISPUTE RESOLUTION MECHANISM 13 (APH Publishing Corp., New Delhi 2006).

9 *Id.* at 15.

10 GOVERNMENT OF INDIA, MINISTRY OF HOME AFFAIRS, COMMITTEE FOR IMPLEMENTING LEGAL AID SCHEMES (CILAS) (1980).

11 *Supra* note 8.

Services Act, 1987 (hereinafter the LSA Act, 1987) was enacted by the Parliament. Subsequently, amendment was brought to the said Act in 1994. Chapter VI of the LSA Act, 1987 enshrines about the manner of holding Lok Adalats.[12] Further amendment to the LSA Act, 1987 was made in the year 2002 introducing Permanent Lok Adalats under Chapter VI-A which provides mechanism for pre-litigation, conciliation and settlement.

International Scenario Relating to Access to Justice

The right to access to justice is more important in a democratic set-up based on rule of law where safeguarding human rights and assuring dignity of individual is the responsibility of the state. Even the United Nations (U.N.) has recognized that "access to justice" is one of the most celebrated human rights thus needs to be protected. The settlement of the disputes of the poor, needy and downtrodden who live in the lower socio-economic bracket of the society is an imperative need in a democratic state which aims at an egalitarian social order. Some of the obstacles faced by persons living in poverty, such as the cost of legal advice, administrative fees and other collateral costs, relate directly to their lack of financial resources. Other obstacles, however including lack of access to information and lack of legal recognition are harder to identify and arise out of discrimination against the poorest and most marginalized. The limited ability of people living in poverty to access legal and adjudicatory processes and mechanisms is not only a violation of human rights in itself (ICCPR[13] Article 14), but is also the consequence of numerous other rights violations.[14] In the similar context, one of the goals of the SAARC Development Goals[15] (hereinafter SDGs) is to "ensure access to affordable justice".

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12 *Supra* note 8, at 126.

13 The International Covenant on Civil and Political Rights (ICCPR) is a multilateral treaty adopted by the United Nations General Assembly on Dec. 16, 1966, and in force from March 23, 1976. It commits its parties to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and a fair trial. *Available at* http://en.wikipedia.org/wiki/International_Covenant_on_Civil_and_Political_Right (last visited Oct. 27, 2013).

14 *United Nations Human Rights: Access to Justice by People Living in Poverty* (2012), *available at* http://www.ohchr.org/EN/Issues/Poverty/Pages/Accesstojustice.aspx (last visited Oct. 1, 2013).

15 *SAARC Development Goals-India Country Report* (2013), *available at* http://mospi.nic.in/Mospi_New/upload/SAARC_Development_Goals_%20India_Country_Report_29aug13.pdf.
SAARC Development Goals are regionalized form of Millennium Development Goals with some additional targets and indicators, for the period of 5 years, 2007-12. The 3rd SAARC Ministerial Meeting on Poverty Alleviation, held in Kathmandu on April 5, 2013, has extended the terminal year of SDGs from 2012 to 2015 to coincide with the Millennium Development Goals. This report is in pursuance of the decision

SDGs indicators are as follows:

1. Average time required in disposal of legal disputes.
2. Access to alternate disputes resolution.
3. Access to free legal aid for the poor (marginalized group).

Here[16], the government of India in its report has emphasized on the role played by the Lok Adalats in access to justice, equal opportunity and speedy justice.[17] Being an important member of SAARC and United Nation Organization, it is an imperative of the government of India to take measures for the attainment of these goals. In this context non-adversarial institution of Permanent Lok Adalat can help in providing access to justice to the poor litigants in time.

What is Permanent Lok Adalat?

To understand the concept of the Permanent Lok Adalats, firstly we have to look into the meaning of the Lok Adalat, as Permanent Lok Adalat is an advanced version of the Lok Adalat. The "Lok Adalat" is an old form of adjudicating system prevailed in ancient India and it's validity has not been taken away even in the modern days too. The word "Lok Adalat" means "People's Court". This system is based on the Gandhian principles. It is one of the components of ADR system, therefore provides alternative resolution or devise for expeditious and inexpensive justice.[18] It is that temple of justice where people get and achieve timely justice. It is a para-judicial institution. The sanction of people is the essence of Lok Adalat. Lok Adalat is an alternative forum for resolution of disputes, which is very popular among the rural people.[19] These are organized at regular intervals by National Legal Services Authority, State Legal Services Authority, District Legal Services Authority, Supreme Court Legal Services Committee, High Court legal Services Committee, Taluka Legal Services Committee.[20]

The LSA Act, 1987 was enacted to constitute legal services authorities for providing and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice were not denied to any citizen by reason of economic or other

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taken in the 5th Meeting of SAARC Secretaries on Poverty Alleviation, held in Kathmandu on April 4, 2013. India is the member of South Asian Association for Regional Cooperation (SAARC).

16 *Id.*

17 *Id.*

18 P.T. Thomas v. Thomas Job, A.I.R. 2005 S.C. 3575.

19 Executive Engineer Electrical (NESCO) v. Chairperson, P.L. Adalat, A.I.R. 2013 Ori. 125.

20 S.K. CHAWLA, LAW OF ARBITRATION AND CONCILITATION INCLUDING OTHER ADRS 835 (3rd ed., Eastern Law House Pvt. Ltd., Calcutta 2012).

disabilities and to organize Lok Adalats to ensure that the operation of the legal system promoted justice on a basis of equal opportunity.[21]

The major defect of the mechanism of Lok Adalat is that it cannot take a decision, if one of the parties, is not willing for a settlement, though the case involves an element of settlement. The adamant attitude shown by one among the parties will render the entire process futile. Even if all the members of the Lok Adalat are of the opinion that the case is a fit one for settlement, under the present set-up, they cannot take a decision unless all the parties consent.[22] To overcome these impediments, in 2002, Parliament brought about certain amendments to the LSA Act, 1987. The said amendment introduced Chapter VI-A with the caption: Pre-Litigation Conciliation and Settlement.

Section 22B envisages establishment of "Permanent Lok Adalats" at different places for considering the cases in respect of public utility services.[23] One of the important features of this court is that this court may invoke its jurisdiction by deciding the case on merits,[24] making it more powerful than ordinary Lok Adalats. If there is a dispute with respect to public utility service, as per Section 22C(1), any party to such a dispute can, before bringing it to a court of law for adjudication, make an application to Permanent Lok Adalat for the settlement of that dispute. The party making such application need not be a party who raises a claim against a public utility service. If a claim is made by one against a public utility service, the establishment carrying out the public utility service can also raise that dispute before Permanent Lok Adalat to resolve it. The only limitation is that Permanent Lok Adalat shall not have jurisdiction to consider a dispute relating to an offence not compoundable under any law or any matter where the value of the property in dispute exceeds Rs. 10 *lakhs*. But the central government can, by an appropriate notification, increase this limit. Once an application has been made to Permanent Lok Adalat by one party, no party to that application shall invoke the jurisdiction of any court in the same dispute. Any party to a dispute involving public utility services may approach the Lok Adalat for public utility services by moving a petition, without affixing any court fee, where, under the procedure, the other party would be called and the dispute would be resolved. The Permanent Lok Adalat for public utility services is governed by

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21 Object of the Legal Services Authority Act, 1987.

22 *Permanent Lok Adalat for Utility Service*, *available at* http://delhicourts.nic.in/PLAPUS%20Broucher%202008.pdf.

23 V. Karthyaeni & Vidhi, *Lok Adalats and Permanent Lok Adalats: A Scope for Judicial Review? A Critical Study*, *available at* http://www.legalserviceindia.com/articles/lok_a.htm (last visited May 5, 2013).

24 *See* the Legal Services Authority Act, 1987, Acts of Parliament, 1987 (India) § 22E.

the principal of natural justice, objectivity, fair play, equity and other principles of justice without being bound by the Code of Civil Procedure, 1908 (hereinafter CPC) and the Indian Evidence Act, 1872.[25] Further, in 2003, a set of rules was formed for the better functioning of the Permanent Lok Adalats.[26]

The philosophy of equality and justice embodied in Part III and Part IV of the Constitution of India is the basis of the Permanent Lok Adalat. It is a unique redressal forum which provides equal opportunity and speedy justice to the poor litigants, and at the same time ensures that justice is accessible to every strata of the society.[27] The alternative modes of settlement of disputes have been given impetus by the recent amendments to CPC. Under Section 89 of the CPC, courts have been empowered to explore the possibilities of settlement of disputes through Lok Adalats, arbitration and conciliation.[28]

What is a Public Utility Service?

A "public utility service", as defined by Section 22A(b) of LSA Act, 1987, "means any-

(i) Transport service for the carriage of passengers or goods by air, road or water; or
(ii) Postal, telegraph or telephone service; or
(iii) Supply of power, light or water to the public by any establishment; or
(iv) System of public conservancy or sanitation; or
(v) Service in hospital or dispensary; or
(vi) Insurance service

and includes any service which the Central Government or the State Government, as the case may be, in the public interest, by notification, declare to be a public utility service for the purpose of this Chapter."[29]

Public utility services are indispensable part of an individual's life in a civilized society. Complaints relating to these services require a specific court which deals only these specific matters. In 21st century

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25 *See* the Legal Services Authority Act, 1987, Acts of Parliament, 1987 (India) § 22D.
26 The Permanent Lok Adalat (Other Terms and Conditions of Appointment of Chairman and Other Persons) Rules, 2003.
27 LAW COMMISSION OF INDIA, 222ND REPORT ON NEED FOR JUSTICE-DISPENSATION THROUGH ADR ETC. (April 2009).
28 K.A. Abdul Gafoor, J., *The Concept of Permanent Lok Adalat and the Legal Services Authorites Amendment Act, 2002*, (2003) 5 S.C.C. (Jour.) 33.
29 *Id.*

more and more matters will fall under this definition, therefore Permanent Lok Adalat has come out as a very significant redressal mechanism in dispensing speedy and equal justice in matters relating to the public utility services.

Constitutional Directives for Permanent Lok Adalats

It is important to note that Constitution of India, 1950 emphasizes, to ensure justice to all even to the poorest of the poor through effective justice delivery mechanism. The architects of the Constitution prescribed the mandate for justice–social, economic and political, in its Preamble. The various provisions of the Constitution such as Articles 14, 21, 38, 39A and 40 also lay down stress upon the right to equal and effective justice. In order to achieve the goal of justice, Article 39A has been enshrined in the Constitution with the purpose to provide free legal aid and to strengthen the justice delivery system. The apex court has also played a vital role through its series of judgments for the advancement of administration of justice. The court declared in these cases[30] that the right of free legal services and speedy trial as the fundamental rights which are included within the broad matrix of the principle of right to life and personal liberty in Article 21 and right to equality under Article 14.

Working of Permanent Lok Adalat in the Union Territory of Chandigarh

Section 22A of the LSA Act, 1987 provides for setting up of Permanent Lok Adalat for public utility services. The State Legal Services Authority, Union Territory, Chandigarh constituted under the LSA Act, 1987 came into force with effect from January 19, 1998. In order to achieve aims and objectives of the Act and to settle the disputes between the parties amicably and expeditiously, a Permanent Lok Adalat was established in the District Court, Chandigarh on August 7, 1998, which happened to be the first Permanent Lok Adalat in the Country and it is functioning in the District Courts Complex on all working days. From 1998 to the year 2012 it has settled 38,753 cases a sum of Rs. 3.36 *crores* has been awarded in 327 MACT[31] cases and a sum of Rs. 9.50 *lacs* has been recovered in 24,636 summary cases.[32] An amount of Rs. 9.66 *crores*

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30 Hussainara Khatoon and Ors. v. Home Secretary, State of Bihar, Patna, A.I.R. 1979S.C. 1369; L. Babu Ram v. Raghunathji Maharaj and Ors., A.I.R. 1976 S.C. 1734; State of Maharashtra v. Manubhai Pragaji Vashi and Ors., A.I.R. 1996 S.C. 1; Suk Das v. Union Territory of Arunachal Pradesh, A.I.R. 1986 S.C. 991; Khatri and Ors. v. State of Bihar and Ors., A.I.R. 1981 S.C. 928.

31 Motor Accident Claims Tribunal.

32 Data from Aug. 1998 to Dec. 2012, *available at* http://chandigarh.gov.in/rti/r2i_slsa.pdf.

was awarded as compensation in Special Lok Adalat at Pre-Litigative Stage. The State Legal Service Authority, Union Territory, Chandigarh has organized 61 special Lok Adalats in the district courts, Chandigarh and settled 3,22,088 cases. A sum of Rs. 35.37 *crores* was awarded as compensation in 1,703 Motor Accident Claims cases.[33] Another Permanent Lok Adalat constituted under Chapter VI-A of the LSA Act, 1987, relating to public utility services has been established by the authority on November 9, 2003 in Sector 17, Chandigarh. The Permanent Lok Adalat for public utility services has disposed of 10,959 out of 11290 cases taken up by it from its inception till July, 2013 and a sum of Rs. 3.30 *crores* has been awarded as compensation. Permanent Lok Adalat for public utility services is the first to be established in the country.[34] In 2007, it has been decided that let the banking and financial institution cases may be added to the existing list of public utility services.

Number of cases disposed of by the Permanent Lok Adalats shows that people are satisfied with the working of these courts as it has expedited the process of justice. Now people need not to get entangled in the lengthy process of availing their rights, they can just have to file complaint relating to public utility services on a plain piece of papers in this court.

Importance of Permanent Lok Adalats

The Supreme Court of India through R.M. Lodha and Anil R. Dave, JJ., highlighted the significance of the Permanent Lok Adalats in the recent benchmark case, *Bar Council of India v. Union of India*[35] inwhere the petitioner challenged Sections 22A, 22B, 22C, 22D and 22E, principally on the ground that they are arbitrary per se, violative of Article 14 of the Constitution of India and are contrary to the rule of law as they deny fair, unbiased and even-handed justice to all. The court while unanimously dismissing the writ petition held that the Permanent Lok Adalats under the LSA Act, 1987 (*amended by* 2002 Amendment Act) are in addition to and not in derogation of Fora provided under various specialized statutes, viz., the Consumer Protection Act, 1986, The Telecom Regulatory Authority of India Act, 1997 and the Insurance Act, 1938. The court has emphasized upon the importance of the Permanent Lok Adalat, which are as following:

1. The alternative institutional mechanism in Chapter VI-A with regard to the disputes concerning public utility service is intended

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33 *Id.*

34 Data *available at* http://chdslsa.gov.in/index.php?trs=statistical_information#casessettledplapus (last visited Sept. 19, 2013).

35 Bar Council of India v. Union of India, A.I.R. 2012 S.C. 3246.

to provide an affordable, speedy and efficient mechanism to secure justice.

2. By not making applicable the CPC and the statutory provisions of the Indian Evidence Act, 1872 there is no compromise on the quality of determination of dispute since the Permanent Lok Adalat has to be objective, decide the dispute with fairness and follow the principles of natural justice.[36]
3. Sense of justice and equity continue to guide the Permanent Lok Adalat while conducting conciliation proceedings or when the conciliation proceedings fail, in deciding a dispute on merit.[37]
4. It is not unusual to have the tribunals comprising of judicial as well as non-judicial members. The whole idea of having non-judicial members in a tribunal like Permanent Lok Adalat is to make sure that the legal technicalities do not get paramountcy in conciliation or adjudicatory proceedings.
5. The fact that a Permanent Lok Adalat established under Section 22B comprises of 1 judicial officer and 2 other persons having adequate experience in public utility service does not show any abhorrence to the rule of law nor such composition becomes violative of principles of fairness and justice or is contrary to Articles 14 and 21 of the Constitution of India.
6. Section 22E(1) makes every award of the Permanent Lok Adalat under the LSA Act, 1987 either on merit or in terms of a settlement final and binding on all the parties thereto and on persons claiming under them. No appeal is provided from the award passed by the Permanent Lok Adalat but that does not render the impugned provisions unconstitutional. Reasons given to this finding are as following:
    - In the first place, having regard to the nature of dispute upto a specific pecuniary limit relating to public utility service and resolution of such dispute by the procedure provided in Section 22C(1) to 22C(8), it is important that such dispute is brought to an end at the earliest and is not prolonged unnecessarily.
    - Secondly, and more importantly, if at all a party to the dispute has a grievance against the award of Permanent Lok Adalat he can always approach the High Court under its supervisory and extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India. There is no merit in the submission of the learned counsel for the petitioner that in that situation the burden of litigation would be brought back on the High Courts after the award is passed by the Permanent Lok Adalat on merits.

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[36] *Also see* the Legal Services Authority Act, 1987, Acts of Parliament, 1987 (India) § 22D.

[37] *Id.*

There are some other benefits of the Permanent Lok Adalats, which are mentioned as following:

- Increases participation by the disputing parties.
- Cutting down court backlog of cases and also costs savings to courts and litigants.
- Informal atmosphere where there is full involvement of parties, mostly without lawyers.
- Capacity for compromise–give and take also provision for apology. A compromise where none loses or wins, but everyone walks out as winner.
- Cases are dealt with quicker than via court proceedings.
- Outcome is mostly "owned" by the parties therefore likely to cause less resentment than if imposed by the Consumer Forum.
- Non adversarial and non threatening.[38]

Suggestions

Clearing the huge case backlog and ensuring faster justice is the most vital administrative and social obligation of the centre and the states as it is directly linked with peace, tranquility and maintaining the rule of law in society.[39] Therefore considering the importance of Permanent Lok Adalats in speedy disposal of cases pertaining to public utility services and to make it more effective, following suggestions are made:

1. There should be more awareness amongst masses regarding Permanent Lok Adalats and its usefulness.
2. The ambit pecuniary jurisdiction of Permanent Lok Adalats should be raised timely.
3. In most of the matters Permanent Lok Adalat resolve disputes by adjudication instead of conciliation. There should be made slightest change here as the heading of Chapter VI-A itself clearly refers to Pre-Litigation Conciliation and Settlement therefore, if parties do not reach a settlement after conciliation then only Permanent Lok Adalat should exercise their power to decide the dispute without parties' agreement.
4. Endeavour should be made to increase the number of Permanent Lok Adalats in states/Union Territories.

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[38] Haryana State Legal Services Authority, *available at* http://hslsa.nic.in/Publications%20PDF/PLA.pdf.

[39] Editorial, *Our Overburdened, Ill-equipped and Clogged Up Courts*, THE TRIBUNE, Nov. 10, 2002.

5. The matters falling under the definition of "public utility services" should be increased by the appropriate authorities, helping people in speedy disposal of their grievances.
6. Judges, Lawyers, academicians, students and para-legal volunteers should be motivated to encourage people, to bring their matters before Permanent Lok Adalats.
7. Working of Permanent Lok Adalats should be made more dynamic.

Conclusion

The cumbersome legal process haunts not only litigants but also daunts the justice delivery system which assures fair, equal, effective and speedy justice and is a constitutional mandate. To meet the challenges of ever growing litigations especially relating to public utility services, an effective grievances redressal mechanism of Permanent Lok Adalats has emerged with the objective of "equal access to justice" to all. There is no technical inhibition imposed by any strict procedural law. In this system, justice is done by the concerted effort of people, parties and witnesses. Majorly outcome is justice by consensus.[40] The amendment made to the LSA Act, 1987 was significant because it filled the lacuna of Lok Adalat. Disputes relating to public utility services need urgent attention because prolonged delay may result in irretrievable damage to either party. Since the subject matter of the Permanent Lok Adalat relates only to public utility services this makes Permanent Lok Adalat a specific court for specific matter.[41] It is an indigenous grievances redressal forum for providing inexpensive and prompt relief to the satisfaction of parties to the dispute and thus, humanized and expedited the process of justice in the present scenario. This medium of participative justice will certainly be useful in meeting the future contingencies, as more and more matters in 21st century will be covered within the definition of "public utility services".

[40] D.M. DHARMADHIKARI, J., LOK ADALAT 44 (Nyaya Path-Souvenir 2000).
[41] Akriti Shashni, *Critical Analysis of Permanent Lok Adalats*, *available at* (last visited Aug. 23, 2013).

AN OVERVIEW OF INTERCOUNTRY ADOPTION WITH SPECIAL FOCUS ON INDIA

Dr. Achina Kundu *
Ms. Ayushi Kundu **

Concept of Intercountry Adoption

According to *Black's Law Dictionary*, adoption is the act of one who takes another's child into his own family, treating him/her as his own, and giving him/her all the rights and duties of his own child. It is a juridical act creating between two persons certain relations, purely civil, of paternity and filiations. Intercountry adoption (hereinafter ICA) can be defined as adoption of a child by a person of another country.

The meaning of adoption as provided by the Central Adoption Resource Authority (CARA), reads as follows:

> ""Adoption" means the process through which the adopted child is permanently separated from his biological parents and becomes the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship."[1]

ICA, involving the transfer of children for parenting purposes from one nation to another, presents an extreme form of what is often known as "stranger" adoption, by contrast to "relative" adoption. Relative adoption refers to situations in which a stepparent adopts the child of his or her spouse, or a member of a child's extended biological family adopts the child whose parents have died or become unable or unwilling to parent. Such adoptions are largely uncontroversial; children stay within the traditional biological family network, and the adoptive parents are generally thought of as acting in a generous, caring manner by taking on the responsibility for these children.

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1 CARA, Ministry of Women and Child Development, Government of India, *available at* http://adoptionindia.nic.in/index.htm.

International adoption is largely a phenomenon of the last half of the 20th century. The numbers and patterns of international adoption has changed over the years in response to the changing political attitudes of both sending and receiving countries, and the international community as a whole, and not simply to the objective needs of children for homes or the desire for prospective parents for the children. The poor countries of the world had long had an access of children for whom they cannot adequately care; children doomed to grow up in grossly inadequate orphanages or on the streets. The rich countries had always had an access of infertile adults who want to parent and relatively limited number of homeless children. Yet there was virtually no matching of these children with these adults until after the Second World War. That war left the predictable deaths and devastation, and left the plight of parentless children in the vanquished countries visible to the world at a time when adoption was beginning to seem like a more viable option to childless adults in more privileged countries who were interested in parenting.

In successive years different countries have decided whether or not to make their children available for adoption abroad based on some combination of perceived needs of homeless children, often precipitated by war, poverty or other forms of social crisis, and political attitudes, which can make international adoption unacceptable as a method of addressing children's needs regardless of the extent of those needs and the extent of social crisis.[2]

By contrast, in ICA adoptive parents and children meet across lines of difference involving not just biology, but also socio-economic class, race, ethnic and cultural heritage, and nationality. Typically the adoptive parents are relatively privileged white people from one of the richer countries of the world, and typically they will be adopting a child born to a desperately poor birth mother belonging to one of the less privileged racial and ethnic groups in one of the poorer countries of the world. ICA is characterized by controversy. [3]

International Provisions for ICA

The United Nations Convention on Rights of Child, 1989, provides in Article 20 that a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. In such situations,

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[2] Elizabeth Bartholet, *International Adoption: Thoughts on Human Rights Issues*, 13 BHRLR, *available at* http://www.law.harvard.edu/faculty/bartholet/PUB_BUF_IA_2007.pdf.

[3] *International Adoption in* CHILDREN AND YOUTH IN ADOPTION, ORPHANAGES, AND FOSTER CARE (Lori Askeland ed., Greenwood Publishing Group Inc. 2005).

States Parties shall in accordance with their national laws ensure alternative care for such a child. Such care could include, inter alia, foster placement, *Kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background. Article 21 further states that States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counseling as may be necessary; recognize that ICA may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin; ensure that the child concerned by ICA enjoys safeguards and standards equivalent to those existing in the case of national adoption; take all appropriate measures to ensure that, in ICA, the placement does not result in improper financial gain for those involved in it; promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

The Hague Convention of May 29, 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Adoption Convention) (hereinafter the Convention) protects children and their families against the risks of illegal, irregular, premature or ill-prepared adoptions abroad. The Convention, which operates through a system of national Central Authorities, reinforces the United Nations Convention on the Rights of the Child (Article 21), and seeks to ensure that ICAs are made in the best interests of the child and with respect for his/her fundamental rights.

Provisions for ICA in India

In India, adoption has been an age old practice and performs a very important function in the society. In the *Smritis* literature, the law of adoption was parent based and not child based. The *Smrtikaras* suggested that only one son could be adopted for the continuation of the family line and to offer oblations to the deceased ancestors. The *Dharmasastras* deals in detail with the qualifications of the male

child to be taken in adoption. The adopted son is uprooted from his natural family and transplanted in to adoptive family like a natural son. But at present, the law of adoption among Hindus is completely regulated by the Hindu Adoption and Maintenance Act of 1956.

However, ICA is a novice concept in India and is yet to gain much ground. The Supreme Court of India, while supporting ICA, in the case of *Laxmikant Pandey v. Union of India*[4] laid down certain guiding principles which were to be followed in the cases of ICA. It was held necessary to bear in mind that the primary object of giving the child in adoption being the welfare of the people, great care has to be exercised in permitting the child to be given in adoption to foreign parents, lest the child may be neglected or abandoned by the adoptive parents in the foreign country or the adoptive parents may not be able to provide the child a life of moral and material security, or the child may be subjected to moral and sexual abuse or forced labour or experimentation for medical or other research, and may be placed in worse situation than that in his own country. The apex court further went on to lay down certain prerequisites for foreign adoption. In the first place, every application from a foreigner desiring to adopt a child must be sponsored by social or child welfare agency recognized or licensed by the government of the country in which the foreigner is a resident. No application by a foreigner for taking a child in adoption should be entertained directly by any social welfare agency in India working in the area of ICA or by any institution or centre or home to which children are committed by the juvenile court.

The Supreme Court also insisted upon the age within which a child should be adopted in case of ICA, and held that if a child is to be given in ICA, it would be desirable that it is given in such adoption before it completes the age of 3 years. Such a ruling was delivered by the Supreme Court because it felt if a child is adopted by a foreign parent before he or she attains the age of 3, he or she has more chances of assimilating to the new environment and culture. Another important rule framed by the Court during the course of judgement was:

> "Since there is no statutory enactment in our country providing for adoption of a child by foreign parents or laying down the procedures which must be followed in such a case, resort had to be taken to the provisions of the Guardian and Wards Act, 1890 for the purpose of felicitating such adoption."

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4 A.I.R. 1984 S.C. 469.

The Bombay High Court *In re Jay Kevin Salerno*[5] iterated that:

> "[W]here the custody of a child is with an institution, the child is kept in a private nursing home or with a private party for better individual care of the child, it does not mean that the institution ceases to have the custody of the child."

Therefore it may be submitted that in the absence of any explicit legislation on the subject, the Supreme Court has played a pivotal role in regulating the adoption of tendered aged children to foreign parents.

However, at the international level, India has signed the Hague Convention on Intercountry Adoption, 1993 on January 9, 2003 and ratified the same on June 6, 2003 with a view to strengthening international cooperation and protection of Indian children placed in ICA. ICA processing in Hague countries is done in accordance with the requirements of the Convention; the United States of America (U.S./U.S.A.) implementing legislation, the Intercountry Adoption Act of 2000 (IAA); and the IAA's implementing regulations, as well as the implementing legislation and regulations of India. For the purpose of implementation of the Convention in India, Ministry of Social Justice and Empowerment is functioning as the administrative ministry and Central Adoption Resource Authority (CARA) as the central authority, which functions as an autonomous body under the Ministry of Women and Child Development. It functions as the nodal body for adoption of Indian children and is mandated to monitor and regulate in-country and ICA. CARA primarily deals with adoption of orphan, abandoned and surrendered children through its associated /recognized adoption agencies.[6]

At national level, India has prepared a National Policy for children in 1974 under which Ministry of Social Justice and Empowerment (now known as Ministry of Women and Child Development) and has got the mandate to enact laws regarding welfare of children. The Juvenile Justice (Care and Protection of Children) Act, 2000 is a landmark in this regard. This Act has incorporated the provision of adoption of child as an alternative to institutional care.

The Supreme Court of India has laid down that every application from a foreigner or NRI (non-resident Indian) or PIO (person of Indian origin) (as applicable) desiring to adopt a child must be sponsored by a social or child welfare agency recognized or licensed by the government or a department of the foreign government to sponsor

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5 A.I.R. 1988 Bom. 139.

6 *Supra* note 4.

such cases in the country in which the foreigner is resident. The foreign agency should also be an agency "authorized" by CARA, Ministry of Social Justice and Empowerment, Government of India. No application by a foreigner or NRI or PIO for taking a child in adoption should be entertained directly by any social or child welfare agency in India.

Criteria for Foreign Prospective Adoptive Parent/s (FPAP)

- Married couple with 5 years of a stable relationship, age, financial and health status with reasonable income to support the child should be evident in the Home Study Report.
- Prospective adoptive parents having composite age of 90 years or less can adopt infants and young children. These provisions may be suitably relaxed in exceptional cases, such as older children and children with special needs, for reasons clearly stated in the Home Study Report. However, in no case should the age of any one of the prospective adoptive parents exceed 55 years.
- Single persons (never married, widowed, divorced) up to 45 years can also adopt.
- Age difference of the single adoptive parent and child should be 21 years or more.
- A FPAP in no case should be less than 30 years and more than 55 years.
- A second adoption from India will be considered only when the legal adoption of the first child is completed.
- Same sex couples are not eligible to adopt.

In the case of *In re Rasiklal Chhaganlal Mehta v. Unknown*[7], the Supreme Court of India held that when a court is dealing with intercountry adoptions, it must bear in mind the principles incorporated in the report of the European Expert Group on ICA organized jointly by the European Office of the Technical Assistant Administration, United Nations and International Social Service, before making an order in such a case. The Court must ensure in such proceedings that the adoption is legally valid as per the laws of both the countries, that the adoptive parents fulfill the requirement of the law of adoption of their country, that they have the requisite permission to adopt, if required, from the appropriate authorities in their country, that the child will be able to immigrate to the country of the adoptive parents and that he will be able to obtain the nationality of the parents. If these facts are not established, what will result is either an "abortive adoption" having no validity in either

[7] A.I.R. 1982 Guj. 193.

country or a "limping adoption", that is to say an adoption recognized in one country but having no validity in another, leaving the adopted child in a helpless condition. Such an unfortunate situation must, in any event, be avoided.

In January 2011, India implemented new procedures to provide more centralized processing of ICAs. In addition to the new guidelines, prospective adoptive parents should be aware of all Indian laws that apply to ICA. A child can be legally placed with the prospective adoptive parents under the Hindu Adoption and Maintenance Act of 1956, the Guardians and Wards Act of 1890, or the Juvenile Justice (Care and Protection of Children) Act of 2000.

Post Adoption/Post Placement Reporting

Some courts in India require regular follow-up visits and post-adoption counseling by a licensed social worker until the child has adjusted to his/her new environment. The follow-up visits are generally for a period of 1 year or as directed by the court. Copies of the follow-up reports should be sent to the District Social Welfare Officer or other concerned state government department, Voluntary Scrutinizing Agency, and the court where the adoption or guardianship order was obtained. CARA also requires adoptive parents to submit post-placement reports on the child through their adoption service provider to CARA and the Recognized Indian Placement Agencies (RIPA).

Problems Relating to ICA

It has been widely contended that in the absence of any concrete legislation, ICAs should be disallowed. In a certain public interest litigation (PIL), which was filed by a Thane based NGO, *Advait* Foundation, and Pune based NGO, *Sakhee*, in which CARA was made to appear as the respondent party, the Supreme Court Bench headed by Justice Aftab Alam issued a notice to the centre government seeking direction to the government to ban ICAs in the absence of any law regulating it. The apex court also sought response from the government on holding a comprehensive probe on the alleged ongoing adoption racket in the country. The PIL claimed that the country lacks proper law for protection of the rights of children up for adoption and, hence, Parliament of India be directed to enact proper laws and amend the Juvenile Justice Act, 1986.[8]

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[8] Press Trust of India, *Supreme Court Issues Notice to Centre on Banning Intercountry Adoption*, NDTV, May 4, 2012, *available at* http://www.ndtv.com/article/india/supreme-court-issues-notice-to-centre-on-banning-inter-country-adoption-206511.

International adoptions have an illustrious facade, conjuring images of couples saving a hungry, orphaned child and living happily ever. While imagining international adoptions as a corrupt business is abhorrent, connections to child trafficking have recently arisen. Accordingly, the state department reports that though Americans adopted 22,991 international children in 2004, the implementation of the Convention brought about a precipitous drop to 9,319 adoptions in 2011.[9]

The term "child laundering" expresses the claim that the current ICA system frequently takes children illegally from birthparents, and then uses the official processes of the adoption and legal systems to "launder" them as "legally" adopted children. Thus, the adoption system treats children in a manner analogous to a criminal organization engaged in money laundering, which obtains funds illegally but then "launders" them through a legitimate business.[10]

Due to both faulty bookkeeping and deliberate manipulation, there is no reliable source on how much adoption corruption takes place. Therefore, it is impossible to concretely determine whether actions reduce corruption, as the only available statistic is the number of children adopted abroad. According to Michael Thorner, the Hague Conference's Director of the International Centre for Judicial Studies and Technical Assistance, with international adoption, most of the problem is that people often view the decrease in international adoptions as a negative effect of the ICA convention. There's actually a drop in adoptions because more proper procedures with more safeguards are actually being added.[11]

The persistence of tracking problems, profit motives, and demand for children ensures that corruption in ICA will remain. This does not mean however that international authorities should give up fighting adoption corruption. Michael Thorner has further said that there have been real successes and looking to the areas where there has been success, where there has developed effective transnational partnership, an attempt should be made to model along the lines of where there has been achievement.[12]

Further, adopting a child from a country faced with serious conflict or an emergency situation presents many challenges that can

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9 Gina Kim, *International Adoptions' Trafficking Problem*, HPR (June 20, 2012).

10 David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping, and Stealing Children* (ExpressO Preprint Series, Working Paper No. 749, 2005).

11 *Supra* note 9.

12 *Id.*

threaten the well-being of the child. UNICEF's position on cases of children separated from their parents and communities during war or natural disasters is that such children should not be considered for ICA, and family tracing should be the priority.

During or following a natural disaster or civil unrest, children are particularly vulnerable to separation from their family, exploitation and the possibility of trafficking. In these extreme cases, children can be abducted or illegally taken from their parents or sold to agencies that handle ICA for personal financial gain.

Situations involving corruption, political unrest or severe destruction caused by an emergency situation can make children more vulnerable and may result in ICA placements that do not ensure the best interests of the child. Thus, people considering ICA from a country where there is corruption concerns or a recent emergency situation should be very cautious.

Moreover, as more nations prohibit ICA or raise costs and regulatory hurdles, the cost of adoption soars upward, making it even more likely that there will be corruption in an ever smaller number of nations that do permit ICA.[13]

Human rights activists in the ICA arena have spoken with a relatively singular voice-a voice that is generally critical of international adoption, calling either for its abolition, or for restrictions that curtail its incidences in ways that are often seen as harmful to children, limiting their chances of being placed in nurturing homes with true families and condemning even those who are placed eventually to unnecessary months and years in damaging institutions. Also, opposition to ICA that purports to be grounded in children's human rights tends to be more politically palatable and thus persuasive, than arguments grounded in a country's nationalist claims of ownership rights over its children, or nationalist pride in not appearing unable to care for its children.[14]

Critics of the ICA system say that it promotes the illegal buying and selling of children. The claim is that the high demand in the developed world for children in the developing world creates a "black market in kidnapped babies".[15] While at first ICA was a type of humanitarian response to the needs of "the child", now the focus has

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[13] Richard Carlson, *Seeking the Better Interests of Children with a New International Law of Adoption*, 55 N.Y.L. SCH. L. REV. 733 (2010-11).

[14] *Supra* note 2.

[15] John Triseliotis, *Intercountry Adoption: In Whose Best Interest? in* INTERCOUNTRY ADOPTION: PRACTICAL EXPERIENCES 123 (Michael Humphrey & Heather Humphrey eds., New York: Routledge 1993).

shifted to potential parents unable to have children. In other words, the right to be a parent–not the right of a child to have a family–is the primary motivating force behind ICA in "receiving" countries. While there is no necessary connection between this shift and a decrease in benefits for the child, it does, unfortunately, have the capability of leading to practices that promote the good of the potential parents to the detriment of the adopted child and his biological parents.

In a certain crude sense, the developing world has become a provider of healthy infants for developed nations. For developing countries feeling at the economic mercy of the developed world, ICA may seem like being taken advantage of–this time for their children–yet further. The line between receiving and sending countries is the same line that is between rich and poor, developed and developing. By "exporting" children–clearly an unappealing designation of ICA–some feel that the developing world is allowing itself to be stripped of yet another natural resource.

Another claim that ICA is focused on parents in the developed world is based on the fact that placing a child in a foreign country strips her of her culture and heritage. Despite any attempts by the adoptive parents to incorporate their child's native culture into the home, removing a child from his country of origin makes inaccessible to him an integral part of who he/she is. The international community acknowledges that cultural identity is very important, and international standards always favour placing adoptable children–whenever possible–within those children's home countries for that reason. But the question then becomes: when a home in the child's country of origin is impossible, is it more valuable to have culture, or a family? The international community–as represented by United Nations decisions–certainly seems to favour the latter.[16]

The Hague Convention is also not devoid of shortcomings. If the Hague Convention is recalled, it is seen that it is simply a tool that allows states to better manage relations amongst themselves. It is about putting in place a system of cooperation, just as the title of the Convention suggests. The Hague Convention does not in itself seek to replace a state's internal laws, nor cover all the loops that a child must theoretically go through to be considered in need of ICA. When we look more closely at it, adoption misconduct clearly takes place well before the steps in the adoption covered by the Convention have even commenced. To give a simple example: If one falsifies the civil status of a child by erasing its birth family and thereby has it declared abandoned, a review of its file will not raise any doubts

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[16] Lara Kislinger, *Intercountry Adoption: A Brief Background and Case Study, available at* www.adoptionpolicy.org/pdf/backgroundCS.pdf.

about the child's adoptability. Clearly it is not the Hague Convention that deals with how official documents must be kept, or with the consequences of their misuse. Nevertheless, if misconduct is not identified, a Convention adoption can still be duly conducted, despite the circumstances of the case being a lie from the very beginning.[17]

Conclusion and Suggestions

It is therefore to be noted that many malpractices are prevalent in the system of ICA. Also, the law relating to international adoption is overwhelmingly negative in the sense that it focuses almost entirely on the bad things that can happen when a child is transferred for adoption from one country to another, as opposed to the good things. It reflects the general negativity of all adoption laws regarding the transfer of a child to adoptive parents, but adds a layer of additional negativity related to the particular issues involved in international adoption. Thus, often the law prohibits ICA altogether.

By contrast, there are almost no laws or policies that focus on the devastating damage to children's life prospects that come from spending months and years on streets or in the kinds of institutional conditions that typify the world's orphanages. There are millions and millions of homeless children worldwide living and dying in these situations, and there are limited prospects in the near term for doing better by them in their home countries. Yet, there are almost no laws or policies requiring that children in need, without parents or with absent parents, be identified and be freed up for adoption if there is no reasonable likelihood that they will soon be able to live with their parents.

Accordingly, the general legal picture is one in which the law places multiple barriers between children who need homes and parents who might provide them. Recent developments indicate moves in certain divergent directions, some making international adoptions more difficult to accomplish, and others making it somewhat less difficult. There is no move, however, to transform international adoption regulation to focus more significantly on the positive, so that for children who need adoptive homes, as many as possible are placed, as promptly available.

While providing shelter to orphans, deprived and destitute children and giving a child to childless couples, it also succumbs to many evils

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17 Hague Conference on Private International Law, The Netherlands, *The Grey Zones of Intercountry Adoption International Social Service*, Adoption Information Document No. 6 (June 17, 2010),
available at http://www.hcch.net/upload/wop/adop2010_info6e.pdf.

such as corruption, ill-treatment of the child by ways such as child trafficking, child exploitation, misuse of the dignity and innocence of the child, and also strips the child of his native culture and values. However, ICA is a practice that has gained popularity over the years, and there is every reason to believe this trend will continue. For couples (or individuals) whose country of residence has few healthy babies available for adoption, going outside the country for a child is a desirable option. It is also desirable from the perspective of the child, who usually comes from a country with more available children than potential adoptive parents.

The future of ICA will be determined by the perceptions of its success held by officials and the public in the children's countries of origin. Safeguards contained in the Hague Convention on ICA, a multilateral treaty of cooperation and controls now being considered for ratification by countries around the world (including U.S.), will help reassure all parties that the rights of the children and birth parents in an ICA are respected. The Convention should put to rest some of the fears (e.g., the children are being used as organ donors) that make the process unstable and deny the love of a permanent family to children who could benefit from adoption.

Policy makers in both sending and receiving countries need to facilitate the adoption process so that it better serves the needs of the prospective adopters. The primary reason to do this is not because it will promote their interest in parenting, although that interest should be recognized as perfectly legitimate, but it will maximize the numbers of parents for the children in need. Bureaucratic barriers serve to drive prospective parents away, either away from parenting altogether, or in the world of reproductive technology, where they are seen as having rights to become parents by pretty much whatever means they choose, including the purchase of eggs, sperms, pregnancy and childbirth services, and where they will be producing new children, rather than giving homes to existing children in need.

Policy makers must also address the baby buying and kidnapping issues that exist in the international adoption world. The opponents of international adoption have grossly exaggerated the scope of these problems, using them deliberately to promote restrictive adoption rules to suit their larger anti adoption agenda.

Policy makers also need to link their new adoption reform moves with efforts to improve conditions for the children who will not be adopted, and for their birth parents. Opponents of international adoption are correct in arguing that it can never provide homes for all the children in need, and that we must address the issues of poverty and injustice that result in children being abandoned in large numbers in the poor countries of the world.

Keeping in mind the large scaled child trafficking in the world, the Rights of the Child, 1989 convention requires that ICA will receive only the last priority while searching for the foster home. Like any other types of adoption, ICA can be expensive, time consuming and uncertain. Hence, not only statutory, but also moral upliftment should be instilled among the people of the international village, with special importance on the value of children. If the challenges involved in ICA can be taken care of, then ICA will give thousands of families' joy and satisfaction, as it has already fulfilled dreams of many.

EMPOWERING THE RURAL CONSUMERISM

Dr. S.C. Roy*

Introduction

India lives in villages. It is an old statement, but it is true even after 65 years of independence. Around 70% of our population lives in rural area depending upon consumer goods manufactured in the industries. Although they are the producers of grain, but they are bound to purchase processed goods of brand companies without questioning about their quality, quantity, purity and impact factors. People are not aware of "Maximum Retail Price (MRP)" and "Inclusive of All Taxes". More so the rural population lacks adequate market expansion even in 21st century. Thus whatever the commodity is available in the local market, they have to purchase at the term and condition of the vender. The venders have their own union whereas the purchasers (consumers) are disorganized. Venders charge standard price for substandard goods. More over the rural folks are so innocent that they fall prey very easily to the venders. Even spurious and expiry drugs are sold to them without fear. Adulterated food materials are common in sale without fearing the enforcement agencies. They are also victim of low weights and measurement. Even the vegetable sellers cheat them very easily. The supplies of essential commodities are always in scarcity causing black marketing and high price. Even fertilizer, packaged seed, pesticides are inferior with high price. Thus from consumer to agricultural commodities, the rural consumers are very easily deceived by the clever dealers.

In this context, this paper seeks to study the problems of rural consumers. Whether the rural folks know the remedies available? How can they get relief? Should they fight for small purchase of daily commodities, and waste their time, money and energy? Who can provide them protection? Whether the state machinery is not responsible to provide adequate safety to the innocent rural consumers? The answer of all such questions requires to be studied under the concept of consumer empowerment.

Where there is life, there is consumption of goods and services. Life without consumption cannot be imagined. Even the beggars consume the goods and the services without which they have no physical

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existence of which the Constitution guarantees[1] to all citizens of this country. Consumerism seems to be different in meaning from the ordinary meaning of consumer. It seems that one who spends much on goods and services i.e., the elite class or high income group spending money on consumption. In other words, consumerism is associated with criticism of consumption. But in positive sense consumerism is social and economic order that encourages the sale and purchase of goods and services in great amounts. The term "consumerism" also refers to the "consumerist movement", "consumer protection" or "consumer activism" which seems to protect and inform the various consumers by various modes of advertisements, consumer education, consumer awareness and protection through legal provisions and machineries. It is the movement to regulate the products, services, methods and standard of manufacturers, sellers and advertisement in the interest of buyers. It is the public concern over quality of consumer goods and honesty of advertising agencies.

This ideology came into full focus in 1962 after then President John F. Kennedy introduced the bill-Consumer Bill of Rights which provided that consumers have right to be safe, to be informed, choose and to be heard. This was shift from theory of *caveat emptor*[2] to *caveat vendator*[3]. This movement brought a shift in American culture from "producer oriented society" to "consumerists". It was a check on the monopoly for better goods and services to conscious consumer. This movement affected all the countries and entered into the Indian system also. Although, India had various legal provisions to protect interests of the consumers under Indian Penal Code 1860, and viz., the Dangerous Drug Act 1930, the Sales of Goods Act 1930, the Drugs and Cosmetics Act 1940, the Banking Regulation Act 1949, the Industrial Development and Regulation Act 1951, the Prevention of Food Adulteration Act 1954, the Essential Commodities Act 1955, the Indian Standard Institution (Certificate of Marks) Act 1952, the Monopolies and Restrictive Trade Practices Act 1969, the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act 1980, the Provisions of Maintenance of Internal Security Act 1971 which has been replaced by the National Securities Act 1980.

The United Nation (U.N.) General Assembly also adopted guidelines for protection of consumers[4] after extensive negotiation and discussion among the governments on the scope and content of

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1 INDIA CONST. art. 21. Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.

2 "Let the buyer beware".

3 "Let the seller beware".

4 G.A. Res. 39/248.

guidelines. Since the consumers often face imbalances in economic, educational, and bargaining term, they must be protected from defective goods or deficiency in services, spurious drugs, adulterated food items, deceit in weights and measures, arbitrary price fixation, black marketing, artificial scarcity of essential commodity in the market so that the consumers may enjoy their lives with decency, check the drain of money for future consumption in their lives. The U.N. General Assembly is concerned with global peace, security, and prosperity along with socio-economic justice.

Thus influenced by the General Assembly Resolution, 1977 a high powered expert committee was constituted under the chairmanship of Justice Rajender Nath Sachar to study the social responsibility of business concern to the community so that the corporate sector should function as being responsible to the society like any other individual. The corporate accountability is not limited to the shareholders alone but to the best of the community at large. With the recommendation of the report the concept of unfair trade practices was brought in year 1984 in Monopolies and Restrictive Trade Practices Act, 1969 (M.R.T.P. Act) and for the protection of Indian consumer the Companies Act, 1956 was amended in 1988. But it was not enough to protect the interest of the consumer. So, in 1986, the Government of India enacted the Consumer Protection Act in order to provide easy remedy to consumer and check on the business and service providers.

The Act[5] defined the term "consumer"[6]. Consumer means a person who buys goods or is a user of such goods on price paid or promised; but it does not include the person who obtains such goods for resale or any commercial purpose. However, the person who buys such goods exclusively for the purpose of earning livelihood by means of self-employment is put under the heading consumer. Consumer also includes a person who hires or avails of any services for consideration, and includes beneficiary of such services excluding services for any commercial purpose. But the term "consumer" does not classify either rural or urban. The definition treats all the consumers equally; therefore the question arises, here, why should there be specific talk on rural consumerism? Since, India is a country of villages and around 70% of population resides in rural area, therefore, the concern of rural consumerism is obvious. The corporate sectors have very good market in the rural areas too, though the per-capita income of rural people is less in comparison to urban consumer. Secondly, the urban consumers are mostly educated and aware of their rights whereas the rural consumers are generally naive

5 The Consumer Protection Act, 1986, No. 68, Acts of Parliament, 1986 (India).

6 *Id.* § 2(1)(d).

persons believing the sellers, service providers, etc., in good faith. The rural consumers do not know the meaning of MRP, service tax, Value Added Tax (VAT) etc. They do not know how to examine the spurious drugs. They also do not know about food adulterations, weights and measures, food safety. They do also not know about the quality of seeds and fertilizers. The rural people are easily cheated by grocers and cloth merchants. They are not in a bargaining capacity. This is why in spite of consumer redressal mechanism, the rural folk are far away from the protection of profit mongers, unfair traders, and gullible service providers. Thus here is the requirement of empowerment of the rural consumers urgently. In this developmental concept, the paper seeks to study the various ways and means to empower for socio-economic justice in India.

Rural Marketing and Rural Consumers

Rural areas are the areas of the country that are not urbanized. The consumers residing in rural areas depend for goods of consumption in rural market where industrial as well as local goods are sold. In the rural marketing, the dominant participants are from the rural area that are naive and lack bargaining capacity. The rural market is different from urban market. The urban people are powerful in word of mouth and bargaining. Rural consumers easily fall prey to the sweet alluring words of the traders who are trained in salesmanship malpractices. Rural consumers are slow to collect any brand commodity because of high price, lack of selection intelligence, and the economic status. Thus, the rural sellers do not keep goods of high brands but duplicate goods in the same brand name are easily sold. The purchasers do not know about the trademark or brand name. Every consumer has to spend year long whereas income in rural area is seasonal. Hence, purchasing is high in income season in rural markets where as surplus goods/rejected goods/goods of very low qualities are sold in rural market at the same price. More so, rural market was completely an organized even in 21st century. It is agriculture based marketing. With advent of green revolution in 1960-90, the agriculture production increased and purchasing capacity of people boosted up. Since 1990, Indian industrial sector has gained strength and maturity. Not only fertilizers and seed companies entered the rural market, but consumer companies also entered with their brands for the vast rural market.

At the same time, the development in education and employment has poured cash into totally agriculture based economy improving the purchasing capacity of the people. The communication facilities and transportation also connected the rural people to urban market and the desire to purchase and consume the commodities increased. Thus the rural market started to cater to the demand of the people,

realizing the potential of rural consumers. But along with this the expansion cum development saga started and there started exploitation of rural consumers. The reasons are various, i.e., the low rate of literacy, the problem of ignorance of English language, lack of road and rail connectivity, lack of media (television and radio), lack of electricity, lack of adequate and scientific storage facilities, awareness of goods and services, competitive pricing, bargaining technique, redressal mechanism etc. Rural consumer does not know how to examine the quality of goods and services even for medical services; they are ignorant of their rights with doctors and knowledge of purchasing medicine, where they easily purchase even spurious drugs. Rural market is also ignorant of banking and insurance utility. Thus, in all cases, there is waste of income without proper advantages.

Firstly, number of markets in rural area in comparison to urban area is also minimum. The rural market is held, generally, weekly. There is lack of permanent shops with adequate number of variety so that the consumers can select out of many. Thus neither the variety nor the sufficient number of shopping centres is available. Hence the shopkeepers monopolize. The right of consumer to choose is defeated. Secondly, the rural consumers are unaware of the quality and price of particular commodity. Sometimes they feel obliged by paying high price for the goods, generally clothing. They cannot bargain with the sellers because they lack confidence. Most of the time they are fooled by the sellers in the name of "known-man/near relative" also. Sometimes they attract the consumers by offering eatables during transactions. Now a days rural consumers are being cheated by the telecommunication companies. They do not know the tariff rates and various rules and regulations of Telephone Regulatory Authority of India (T.R.A.I.). More so, India is a country of festivities which are connected with customary and religious ceremonies. The purchases on such occasions are in great numbers. All come out of their houses for necessaries and ceremonial items without knowing the quality of the commodities, brand, prices, selection techniques, bargaining skill etc. The rural consumers are easily exploited in the name of price rising, transportation cost, tax rates, VAT and other taxes.

Rural Consumer Behaviour and Consumer Rights

"Consumer behavior" refers to the "buying behavior of the individual household for personal consumption". Thus, all the individuals and households living in the rural area are rural consumers. Their consumer behaviour helps in the formation of the rural market. There are more than 600,000 villages in India. As against 300 cities and 5000 towns the rural consumers have different taste in comparison to urban consumers in terms of products, colour, and sizes of the

commodities. Their purchasing behaviour is guided by their motive and reason regarding orientation, purchase, use, maintenance, and disposal of goods. The environment and geographical influences affect the purchasing behaviour of the consumer. The influence of the occupation, place of purchase, durable and creative use of product, all influence the rural consumer's behaviour. The rural consumers do not choose the best option, but the satisfying option,[7] whereas they have to pay for the best. At same time they are unknown about their right if their goods and services are of low quality and deficient or the MRP is inclusive of all taxes, levies, charges, fees, duties, etc. But there is no minimum cost price which can be understood for MRP There is no cost of production written on package. What is the percentage of profit charged by the trader is not known. The quality of the product is not known to the consumers. They are victim of adulteration and weights too. The rural consumers are not aware of these facts. They also don't know where to go for remedies. It is their daily fate. Along with other consumable goods, medical and health care are the basic needs like shelter, food and education. The rural consumer under this sector is also cheated from medical shop to doctor's clinic. They become the victim of doctor's negligence. Generally they avail the services of the doctor on the propaganda of touts. Though the rights are available to the consumers under Consumer Protection Act, 1986, yet, what are the rights and how they can be availed, are quite absent. No mechanism is available in the market for immediate education, information, suggestion and confidence build up for the purchase of the commodity. Thus the psychological behaviour of the consumer is also responsible for the deception in the market. Consumer confidence is key to a competitive and flourishing market in European Union (EU).[8] The EU has evolved 10 basic principles of consumer protection:[9]

1. Buy what you want; where you want.
2. If it does not work, send it back.
3. High safety standards for food and consumer goods.
4. Know what you are eating.
5. Contract should be fair to consumers.
6. Sometimes consumers can change their mind.
7. Make it easier to compare price.
8. Consumer should not be misleading.
9. Protection while you are in holidays.
10. Effective redress for cross-border dispute.

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7 CONSUMER BEHAVIOR: EFFECTIVE MEASUREMENT TOOLS (G. Radha Krishna ed., ICFAI Books, ICFAI University Press 2005).

8 SABA NAZMI, CONSUMER RIGHTS: YOUR RIGHT AS A CONSUMER 162 (ICFAI Books, ICFAI University Press).

9 *Id.* 162.

The consumer rights under EU seem more comprehensive in comparison to Indian counterpart. The Consumer Protection Act 1986, ensures the right to be protected against the marketing of hazardous goods, against unfair trade practices, to be assured to access to variety of goods at competitive prices, the right to be heard and to be assured that their interests will receive due consideration at appropriate forum, and right to consumer education. The Act provides 3 tier facilities in order to redress the complaints in District Consumer Forum, State Consumer Redressal Commission and at National Consumer Dispute Redressal Commission. No doubt, the Consumer Protection Act, 1986 has brought revolution and awareness among the consumers for their rights, yet the maximum rural consumers are far away from the reach of redressal mechanism. The reason is obvious, the lack of knowledge of their rights, lack of confidence to fight against the organized business guilds, delay in the redressal from the forum, expenditure of money etc. One of the most important reasons is that one does not want to spend money and time in litigation for small purchase whereas everyone is being cheated every time for the small purchase of utmost need. Due to these reasons the empowerment is an urgent need of the rural consumer. There is a provision of Consumer Council in the Consumer Protection Act, 1986; but it is almost neglected.

Empowerment Mechanism

Generally empowerment is understood in terms of rights conferred for the redressal if there is no violation by any one. But the term is not providing the power legally rather mentally and psychologically with confidence. Many of us are being cheated because of naive character without utilizing the cognitive faculty of mind. Therefore, in spite of Consumer Protection Act, 1986 and different types of legislations for different goods and services, the actual benefit is out of the reach of the people. Though the rights conferred under Consumer Protection Act, 1986 are nothing but to empower the consumers in general, i.e., either rural or urban, yet the consumers are unable to decide the quality, brand, local made or industry made; nor there is any agency to guide for their selection according to their means. There is no mechanism or organization to keep watch on artificial scarcity and overcharge in the market. Therefore, market functions entirely on the behaviour of consumer and alluring tactics of the sellers. The rural consumers completely depend upon the fate and luck. Voluntary organizations are not working in this area.

In case of insurance sector, the rural consumers are easily cheated by the insurance agents in misguiding in the selection of the plan,

premium amount, and deposit of the same in the insurance office and discharge of the maturity amount. The insurance agents do receive commission on the premium amount of their client but they do not provide services. If they receive money to deposit in the company, they do not do so. Thus their claim is forfeited. Likewise, banking services are far away from the rural folk; *grameen* banks are not working properly nor available in the rural areas. Therefore, every market requires a "consumer watch" as a governmental institution or Non Governmental Organization (NGO) to educate the consumer immediately, protect them from gullible traders, and provide immediate local protection. If the matter is related to the durable goods, the dispute can be referred to the consumer forum through the consumer watch. Therefore, empowerment programs are urgent need to be started from the *gram panchayat* level. The *panchayat* level consumer redressal forum and consumer watch is required. In this movement, the empowerment of the women needs first, because most of the rural purchases are made by the rural women. Another requirement for the support of empowerment is expansion of rural market. Population is increasing but market expansion is not keeping pace with such increase. Therefore, the number of business entities is not in adequate number where competition among the sellers may develop and the consumer may be ultimately benefited. Therefore, market expansion and encouragement for entrepreneurship is also required. The seasonal character of market has to be changed. It has to be converted into perennial and all the markets are required to be watched by the specific agency as a free aid to consumer awareness. Traders are also required to be motivated for their social responsibility through making the appropriate goods and services available to the potential consumers on reasonable price. Thus, the Consumer Protection Act, 1986 can work sufficiently and efficiently, and protect the interest of rural consumers.

Role of Mass Media in Empowerment

Media, i.e., print, audio or visual, disseminate information about the various goods and services through advertisement but they do not explain the quality, quantity, price, durability, safety, comfort etc. However, the goods are purchased on the basis of trademarks and the advertisement which is the silent salesman. More so, the trademarks are only suggestive not descriptive; but its impression is vital. The visual advertisers are concerned with increase in sale by dazzling attraction. The media-audio, visual or print-is not only to provide political, or social events or sports news, rather consumer friendly problems in the nature of frequently asked questions (F.A.Q.) requires to be made available to the consumer. Since media has a greater reach for 24 hours, it can be a great help in consumer empowerment. Along with, the voluntary organization can be a great aid to help fight

manipulation. As to certain channels, i.e., *AWAZ* deals with stock market, financial institutions analysis, likewise media has to establish rural markets channels for their empowerment. With the help of the analysis, the stock market consumers are benefitted. Likewise, the rural market analysis will help the rural consumers, rural salesman, entrepreneurs, rural management graduates, transporters etc.

It is a great surprise that even today the rural area has no media access. The print media has no reach, nor the electronic media. The villages have no library where newspapers can be subscribed and the rural people can be empowered. Even the village schools do not subscribe newspaper. Despite *panchayat raj* system, even the *panchayat bhawan* committee does not subscribe newspaper. Thus the rural consumers neither are quite unknown about the market activities nor are they trained to understand the bargaining tactic of the businessman. They also do not know about the trademarks. Thus the media is not only to get various information from the rural area, rather it requires to make it possible to disseminate the same by initiating "consumer sponsorship awareness program" through newspaper. The free circulation of at least 1 newspaper will empower the rural consumers. The electronic media has also greater role to day in this consumer age. But there is another problem related to electricity. It can be removed by solar energy, and the same can be sponsored by the media for continuous access to the market information. The media has to take its corporate social responsibility for rural consumers. The *panchayat* does not play any role in the regulation of market, either for agriculture goods or for consumer goods. If there is a market at far off places, there is lack of ware house/store house for storage purposes. The media has responsibility to unearth the problem and aware the people from monopolistic exploitation.

Conclusion

With about ¾th of the country population living in the villages, and their ever increasing consumption power, their empowerment is a primary concern to avail them goods and services at reasonable price and save them from exploitation. Since, in the era of globalization, many business houses, big companies and even multinational corporations (MNCs) have placed special emphasis on rural areas to promote their products as well as services. They have designed special communication messages to draw their attention and thereby their purchasing power. But judging from the consumer point of view, no special care is taken to address the issues arising out of the differentiation between urban consumers and rural consumers. The product usage guidelines, manufacturing date, date of expiry of

medicine and foils, MRP, description of the content on the packages, weights and price variation etc., are printed on international standard which is out of the common understanding of the rural consumer. More so, they lack bargaining capacity. The information on any package/carton is not in local language. They are not able to examine the trademarks or trade names and the quality of the goods underneath. Therefore, in spite of various consumer friendly legislations and the Consumer Protection Act, 1986 some guidelines/training of marketing is required. In this context, the role of NGO's and establishment of an institution as consumer watch in each market is urgent need to protect the rural consumer's interest. The easy access to consumer watch in the existing market is first before working on any major plan to educate them. Therefore, in order to build up confidence seminars, workshops in rural areas closely linked to the market is essential for practical training on the spot with expert advisers. This will generate employment too.

The Indian concept of consumer rights and education requires simplification and expansion in terms of EU and China. EU model of consumer protection principles can build up confidence among the rural folk. At the sometime, right to information has to be applied towards the private business entities/sellers also as practiced in China.

The Product Liability Law[10] of China has stipulated obligation upon the business operators to present true product information, any "flaw" in the product, i.e., "does not possess good quality or standard of services", it is punishable. Here under the Consumer Protection Act, 1986 the term "flaw" requires to be added in order to widen the scope of the Act. More so, the efficiency of the consumer redressal forums also requires to be enhanced by addition of more members and benches to *panchayat* level for speedy disposal of consumer problems. The network of consumer forums along with the consumer watch can reduce the exploitation of the rural consumer. Confidence building is a long term strategy and ongoing process. Consumer's laws and redressal mechanism are the secondary part of the problem. Primary concern for rural empowerment is to make the people aware about the market trends and commodities available in the market, their pricing and quality. China has also amended product quality law[11] to protect the consumers from any deviation from quality. The *panchayat* needs to take proactive role for rural consumer awareness and consumer justice. As there is mass education program,

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10 Chapter V, The Tort Law of the People's Republic of China (2010) P.R.C. Laws & REGS (China).

11 Product Quality Law of the People's Republic of China (amended at the 16th Meeting of the Standing Committee of the 9th National People's Congress on July 8, 2000).

consumer awareness program needs to be started. The village wise consumer *manch* and consumer watch in each market can be a great help to the rural consumers.

Thus, in the age of global market the rural market in India is still in the pre-liberalization stage, and the rural consumers are struggler in between the traders and manufacturers for quality goods, fair price, fair services and immediate redressal. The rural consumers who are guided by their psychology and emotions attached to particular trading house, business men, requires to be rationalized through another consumer movement, i.e., "empowering rural consumerism". It is possible through the establishment of consumer watch in the market, organizing the rural consumers under consumer *manch* or consumer cooperative society to combat the business guild. At the same time, various consumer laws require to be unified or consolidated. The empowerment and enlargement of the consumer forum at *panchayat* level is also a need. Through seminars, workshops in rural areas, confidence building and purchasing skill can be developed for the fair access to market, consumption and socio-economic justice.

ENHANCING THE STANDARDS OF LEGAL EDUCATION

Dr. Nitesh D. Chaudhari*

Introduction

An educated person has the ability to differentiate between right and wrong. Man becomes "man" through education only. He is what education makes him. Education is now a part of the "human rights dialogue". Majority of the nations of the world have also accepted their obligation to provide at least free elementary education to their citizens. Each type of education has its own values. Legal education is not an exception to it. Spiritually, it is believed that the life on the earth is regulated by the laws of God or the divinity. It is "rule of law", that draws the essential difference between human society and animal world. It is the legal education that plays an important role in promoting social justice.[1]

Encyclopedia of Education defines legal education as a skill for human knowledge which is universally relevant to the lawyer's art and which deserves special attention in educational institutions.[2] Abraham Lincoln once wrote that: "'[t]he best mode of obtaining a thorough knowledge of the law' . . . is very simple, though laborious, and tedious. It is only to get the books, read, and study them carefully . . . . Work, work, work, is the main thing".[3]

Section 76 of the Indian Penal Code, 1860 provides that ignorance of law is not excused. It means it is expected from every person living in India, that he must possess the knowledge of law. It is duty of state to provide education to all, but state is bound to provide only elementary education and we can't compel the state for providing legal education to all. Legal education is now has become integral part of nation's development. Today legal education is provided by law colleges and law universities. Some law colleges and law universities are government-aided while majority are self financed. The standard

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1 Ahmad Tabrez, *Legal Education in Indian Perspective* (2009) *available at* www.site.technolexindia.com; http://iplexindia.blogspot.com.

2 5 THE ENCYCLOPEDIA OF EDUCATION, INDO. AND LIBR. 355 (1971).

3 Abraham Lincoln, *Letter to John M. Brockman*, *in* COLLECTED WORKS OF ABRAHAM LINCOLN (Roy P. Basler ed., 1953), *reprinted in* OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 283 (Fred R. Shapiro ed., Oxford Univ. Press 1993).

of legal education is a debatable issue. Major changes required in legal education.

Legal Education in India

During the Mughal legal system, the advocates were called as "*vakils*". While in British India legal profession was started which provided base to today's legal system. After independence the Advocate Act, 1961 was passed which provides for standard of legal education registration, and professional misconduct by advocates by establishing the Bar Council of India. The Bar Council of India prescribes the minimum curriculum required to be taught in order for an institution to be eligible for the grant of a law degree. The Bar Council also carries on a period supervision of the institutions conferring the degree and evaluates their teaching methodology and curriculum, and having determined that the institution meets the required standards, recognizes the institution and the degree conferred by it.[4]

Legal education is offered as 3 year degree course and 5 year course. Earlier 5 year course was known as B.S.L. LL.B; now it is available as B.A./B.Com/B.Sc./B.B.A./LL.B. Post graduate course i.e., LL.M. is a 2 year degree while recently it has become 1 year programme also. M.Phil. and Ph.D. are the research oriented programmes. NET/SLET/SET examinations are conducted for the eligibility of lectureship in law colleges and legal institutions.

Objects and Scope of Legal Education

The aim of the legal education is-to train the students for the legal profession; to impart the knowledge of law from historical, political, social, economical point of view; how the concept of "law" took birth and how it developed?; what will be the future requirements in the field of law?; what are the roles of judiciary, executive and legislatures?; what are the substantial and procedural laws? etc. Legal education also has to extract the principles underlying the existing legal rules, and provide the students with adequate experience to apply these rules.

Legal education generally has a number of theoretical and practical aims, not all of which are pursued simultaneously. The emphasis placed on various objectives differs from period to period, place to place, and even teacher to teacher. One aim is to make the student familiar with legal concepts and institutions, and with characteristic modes of legal reasoning. Students also become acquainted with the

[4] *Legal Education in India*, WIKIPEDIA, THE FREE ENCYCLOPEDIA.

processes of making law, settling disputes, and regulating the legal profession, and they must study the structure of government and the organization of courts of law, including the system of appeals and other adjudicating bodies.[5]

The Committee of Legal Education of the Harvard Law School lays emphasis on double purpose of a law school:

1. To train men for the legal profession; and
2. To provide a centre where scholars might contribute to an understanding of law and government, and participate creatively in their growth and improvement.

Mr. Dean Wright of the University of Toronto suggested 3 objectives of a law school:

1. Education in the qualities that should be found in a legal practitioners;
2. Education which would train a man not merely in the work of solving problems of individual clients, but of the society in which he lives; and
3. To act as a centre of research, criticism and contribution to the better understanding of the laws by which societies are held together.

Lord Denning in his address to the Society of Public Teachers of Law expressed 3 purposes of legal education:

1. To show how legal rules have developed, the reasons underlying them, and the nexus between legal and social history;
2. To extract the principles underlying the existing legal rules; and
3. To point the right road for future development.[6]

Legal study promotes accuracy of the expression, facility in arguments and skill in interpreting the written words, as well as some understanding of social values. Law acts as the cementing material of society and an essential medium of social change. A well administered and socially relevant legal education is a sine qua non for a proper dispensation of justice. Giving legal education a human

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[5] *The Aims of Legal Education, available at* http://www.britannica.com/EBchecked/topic/334873/legal-profession.

[6] Priya Ravi, *Legal Education and Its Aims, available at* www.legalservicesindia.com.

face would create cultured law abiding citizens who are able to serve as professionals and not merely as business men.[7]

The most important object of the legal education institutions now a day is, to provide legal aid facilities to poor and needy. Legal institutes specially law colleges, are in much better place to carry out such activities. Such institutes can literally go door to door to spread the legal awareness. The working force they have is well acquainted with the legal language as well as local dialects. They can very effectively communicate with the needy people, and can convince them. Organizing legal aid camps in remote areas is difficult job due to lack of interest of common man in the subject. People need motivation to attend such camps. This job requires a high level of spirit, which can be achieved if the work force is itself a part of the population served. Hence, law colleges with local work force can very effectively deliver this function.

Never since independence has legal education received the attention it receives today from society, government and the private corporate sector. This has resulted in better infrastructure, greater private participation and increased investment, though yet inadequate for quality legal education. While attempting to meet the challenges of the marketplace and globalization, the focus of the curriculum at the National Law Schools is reportedly geared to the private corporate sector, supplying trained graduates for corporate jobs, legal and managerial. The original objectives of setting up National Law Schools were to supply well-trained lawyers to the trial and appellate bar as well as for judicial service so that access to justice is enlarged, and the quality of justice for the common man is improved and strengthened.[8]

An era has dawned where specialization, computerization, electronic media, internet, consumerism, foreign investments, mergers and take-over, insurances etc., are becoming the order of the day. There is, therefore, need for experts in legal drafting as well as lawyers and judges having deep knowledge of the specialized fields of electronics, computers, information technology, banking, taxation, investment, environment, and others.[9]

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7 *See supra* note 1.

8 N.R. Madhava Menon, *The Transformation of Indian Legal Education A Blue Paper*, HARVARD LAW SCHOOL PROGRAM ON THE LEGAL PROFESSION (2012).

9 S.P. Mehrotra, J., *Re-Inventing Legal Education: Challenges and Opportunities.*

Conclusion and Suggestions

Enhancement scope of legal education is crucial for better future of the legal profession, and ultimately of the nation. Following are some suggestions to improve the quality of legal education:

The job of the legal education is not only to create lawyers but also to produce good social leaders. The leaders, who can understand the socio-legal challenges of the society, will have the ability to solve them. It is the fundamental duty of every citizen to be abided by the Constitution of India, 1950. Hence legal education must encourage the students to uphold the values of the Constitution of India.

Legal education institutions must compulsorily have a free legal aid centre in the premises where poor and needy can obtain free legal aid or advice. This will inculcate among the student value of free legal aid.

Compulsory attendance of the students in the legal aid programme organized by the college, legal services authorities or by any non government organizations (NGOs). They should also be bound to attend the *Lok Adalats*, so that they can understand the importance of settlement of dispute by compromise.

Mahatma Gandhi, "the Father of the Nation", quoted: "Justice that love gives is a surrender; justice that law gives is a punishment". He has given great thoughts regarding better legal system. His thoughts should be a compulsory subject in both the stream of law courses.

Majority legal educational institutions are self-financed. Government is providing grant-in-aid to medical, engineering, art, science and commerce etc., colleges, but not all to law colleges. In Maharashtra, from the year 1996 government has started to providing grants to law colleges as per the direction of the Supreme Court of India. Suddenly in the year 1999, it changed its policy and introduced the concept of "permanent non-grant basis". This should be avoided, and regular grants should be given to legal education institutions.

The conventional class room teaching should not be the sole method of teaching. Now a day the case reports are available online on various websites. Soft copies of all back volumes of different reporters are provided. Hence, the legal educational institutions have to adopt new technologies while providing legal education. Internet facilities to all law students, as well online subscriptions of various reports and websites should be provided.

Advocate needs better skill of communication. Hence law students shall be required to do case studies; attend chamber of a lawyer; visit the court regularly; do client interviewing and counseling sessions; and participate in debate, mock trial and moot court competitions. Senior practicing lawyers should be called for teaching of procedural laws. Like National Law School, Bangalore in each state National Law School should be established. Law faculty should be encouraged to undertake research activities for better outcomes in the field of law. Regular discussions on the latest development of law, amendments, socio-legal issues have to be made.

DEVELOPMENT-INDUCED DISPLACEMENT: LEGAL AND HUMAN RIGHTS PERSPECTIVES

Dr. Kaumudhi Challa*

"Most large forced dislocations of people do not occur in conditions of armed conflict or genocide but in routine, everyday evictions to make way for development projects. This "development cleansing" may well constitute ethnic cleansing in disguise, as the people dislocated so often turn out to be from minority ethnic and racial communities."[1]

Introduction

Right to development is a fundamental human right. The developmental projects in different fields are vital for the progress of the nation. At the same time these projects have tremendous impact on the environment as well as the common people. The most significant impact of developmental project is the displacement of population whose land is acquired for the projects. The people are uprooted from their present habitat and have to start their life elsewhere. Each year, millions of persons are forcibly displaced by development projects, whether dams, roads, reservoirs or oil, gas and mining projects. While such projects can bring enormous benefits to society, they also impose costs, which are often borne by its poorest and most marginalized members.[2] The suffering of those displaced by developmental projects can be very severe and has several dimensions to it. E.g., the displaced people suffer from financial and social insecurity because of their shifting to new set up and face many problems in adjusting to the new environment. More importantly, they have deep emotional attachment to their ancestral land, tradition, culture and way of life and hence the displacement also affects them mentally and psychologically. Development-induced displacement has become a common feature in all countries particularly developing countries.

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1 *See* Balakrishnan Rajagopal, *The Violence of Development*, WASHINGTON POST, Aug. 9, 2002.

2 W. Courtland Robinson, *Risks and Rights: The Causes, Consequences, and Challenges of Development-Induced Displacement* (Feb. 2, 2013), http://www.internal- displacement.org/8025708F004CFA06/may03.pdf.

In India massive developmental projects have been undertaken since independence in order to achieve socio–economic progress. India has invested in numerous industrial projects, dams, roads, mines, power plants and new cities. These projects have been made possible through large scale acquisition of land. As a result around 50 million people have been displaced due to development projects in over 50 years.[3] The rehabilitation of these displaced people is one of the most complex and sensitive issue and needs to be viewed from socio-economic as well as human rights perspectives.

This paper seeks to examine the meaning and concept of the development induced displacement and impacts on common people. Further this paper examines the human rights violations involved in development-induced displacement and attempts to strike a balance between the development and the rights of displaced persons.

Development-Induced Displacement: The Concept

Development-induced displacement (hereinafter DID) occurs when people are forced to abandon lands or relocate because of development.[4] It can be defined as the forcing of communities and individuals out of their homes, often also their homelands, for the purposes of economic development. Use of coercion or force of any nature by the state is central to the idea of DID. At the international level, it is viewed as a violation of human rights.[5] It is a subset of forced migration. DID has occurred throughout history and is commonly associated with the construction of large dams for hydroelectric power and irrigation purposes, mining, and industrial projects. So also DID may occur due to military installations, airports, weapon testing grounds, railways and road developments, urbanization, conservation projects, forestry, etc. DID is a social problem affecting multiple levels of human organization, from tribal and village communities to well-developed urban areas.[6]

DID may be divided into two categories–direct and indirect. Direct displacement refers to those cases, where due to the initiation and construction of developmental projects there is a direct displacement of people who have inhabited these sites for generation together. E.g., displacement due to projects such as mines dams and industries,

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3 Nalin Singh Negi & Sujata Ganguly, *Development Projects v. Internally Displaced Populations in India: A Literature Based Appraisal* (Feb. 2, 2013), http://www.uni-bielefeld.de/tdrc/ag_comcad/downloads/working paper _103_negi_ganguly.pdf.

4 Jay Drydyk, *Unequal Benefits: The Ethics of Development-Induced Displacement*, 8 GEO. J. INT'L AFF. 105 (2007).

5 Kelly A. Dhru, *Acquisition of Land for "Development" Projects in India: The Road Ahead* (Feb. 2, 2013), http://www.rfgindia.org/publications/LandAcquisition.pdf.

6 *See* www.wikipedia.org. (last visited Feb. 20, 2013).

wildlife and other projects. Indirect displacement occurs when the people are forced to leave the area due to the functioning of those developmental projects. This is because the functioning of the projects consumes the natural and environmental resources in the surrounding and deprives their traditional means of livelihood. It is to be noted that these types of displacements affects mostly indigenous people who depend on their natural surrounding for their livelihood.[7]

DID can again be classified as physical, economic, or both depending on the impacts of such displacement on people. Thus the actual relocation of individuals, families or communities from one place to another is termed as physical displacement, and when people lose access to vital natural resources that they need to sustain their livelihoods such as forests, grazing lands, and fresh water, it is termed as economic displacement. The causes or categories of DID may include water supply (dams, reservoirs, irrigation), urban infrastructure, transportation (roads, highways, canals), energy (mining, power plants, oil exploration and extraction, pipelines), agricultural expansion, parks and forest reserves, and population redistribution schemes.[8] The vast majority of DID is involuntary, with government authorities, security forces, or private militias forcing people from their homes and lands.[9]

Impacts of Development-Induced Displacement

The impacts of DID are of varied nature and can range from loss of livelihood to mental and psychological impacts. According to a research conducted by Michael Cernea, a sociologist based at the World Bank, the forcible displacement from one's land and habitat carries with it the risk of becoming poorer than before the displacement. Those displaced "[a]re supposed to receive compensation of their lost assets, and effective assistance to re-establish them productively; yet this does not happen for a large portion of oustees". The research points out that: "[t]he onset of impoverishment can be represented through a model of 8 interlinked potential risks which are intrinsic to displacement".

They are, landlessness, joblessness, homelessness, food insecurity, marginalization,[10] increased morbidity and mortality,[11] loss of access

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7 *See supra* note 3, at 8.

8 ASHIRBANI DUTTA, DEVELOPMENT-INDUCED DISPLACEMENT AND HUMAN RIGHTS 19 (2007).

9 Kate Hoshour & Jennifer Kalafut, *A Growing Global Crisis: Development-Induced Displacement and Resettlement* (Feb. 2, 2013), http://www.accountabilityproject.org/downloads/IAP%208.10%20Briefer.pdf.

10 Marginalization occurs when families lose economic power due to loss of their land and job. Many individuals cannot use their earlier acquired skills at the new

to common property, and social disintegration. In addition to these impacts, there are some other risks of DID such as loss of access to schooling for school-age children, and the loss of civil rights or abuse of human rights.[12]

Displacement from one's habitual residence and the loss of property without fair compensation can, in itself, constitute a violation of human rights. In addition to violating economic and social rights, listed above, arbitrary displacement can also lead to violations of civil and political rights, including arbitrary arrest, degrading treatment or punishment, temporary or permanent disenfranchisement and the loss of one's political voice. Finally, displacement carries not only the risk of human rights violations at the hands of state authorities and security forces but also the risk of communal violence when new settlers move in amongst existing populations.[13] Most importantly these impacts are very severe in case of indigenous people.

Development-Induced Displacement in India

DID is not new in India. It has existed since the colonial era. The most common reasons for DID are water resource development projects, mining, industrial and rail and road transport. The available data on some of the notable developmental projects in India reveals the plight of displaced people and the utter violation of their human rights. E.g., it took more than 25 years to resettle the people due to the construction of Bhakra Nangal Dam, and that to only 730 out of 2108 families. Most of oustees of big projects, like the Hirakud Dam in Orissa or the Rihand Dam in Utter Pradesh, Narmada Dam in the 3 states of Gujarat, Maharashtra and Madhya Pradesh, etc., have not been officially resettled till now. So also the situation of the oustees of the Pong Dam in Himachal Pradesh, who were displaced in the late 1960s, is very poignant. Out of the 30,000 families, only 16,000 were found eligible for compensation and in the end only 3756 were moved hundreds of miles to a completely different cultural, linguistic and ecological zone in Rajasthan. Some of the land meant for their occupation had already been occupied, while remaining land was uncultivable. As it was not enough, the host villagers were not prepared for their arrival and finally over 75% returned to Himachal

location and face difficulties in adjusting. Economic marginalization is often accompanied by social and psychological marginalization, loss of confidence in society and in themselves, a feeling of injustice, and deepened vulnerability.

11 Massive population displacement threatens to cause serious decline in health levels. Displacement-induced social stress and psychological trauma are sometimes accompanied by the outbreak of relocation related diseases. Unsafe water supply and unhygienic living conditions in new location systems increase vulnerability to epidemics.

12 *See supra* note 2.

13 *Id.*

only to find little support for their re-establishment. Thus, the displaced people face lot of problems due to improper rehabilitation and resettlement and suffer severe violations of basic human rights.[14]

Development-Induced Displacement and Indian Laws

The most important feature which is common to all developmental projects is the acquisition of land including private land by the state. The Indian state has the power to compulsorily acquire private land for such developmental projects without the consent of the owner of such land. The only law applicable all over the country with respect to the issue of induced displacement is the colonial Land Acquisition Act, 1894 (hereinafter LAA). The most important principle underlying LAA is the "doctrine of eminent domain", according to which the state enjoys ultimate power over all land within its territory. It follows that the state has the right to invoke this right for the "public good", and the consequent compulsory acquisition of land cannot be legally challenged or resisted by any person or community. In India, the only national law regarding displacement is LAA, which places no legal obligation on either the project authorities or the state, beyond a limited conception of adequate "compensation".

Thus the displaced were only granted compensation under LAA for the land acquired and the notion of rehabilitation was not known under LAA. However, after the independence, more and more developmental projects were implemented by the Indian government and as a result large scale displacement occurred. The deplorable conditions of these displaced people (hereinafter DPs) compelled the government to think about rehabilitation programmes.

In 1985, a committee of the Ministry of Welfare prepared a policy for tribal DPs and suggested that a national policy be prepared for all the DPs. It suggested that rehabilitation should be integral part of the plan of every project above a certain size in the public as well as the private sectors and that the policy should be binding on the government and the implementing authority.

However, it took 8 years for the Ministry of Rural Development to formulate a policy draft in 1993[15] and it was further revised and re-revised without any success. The discussion of a draft internally displaced people (hereinafter IDPs) policy continued and it was only

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[14] Parshuram Ray, *Development-Induced Displacement in India*, 2(1) SARWATCH (July 2000).

[15] Walter Fernandes, *Development Displaced and the Right to Life: Implications for the Northeast, in* PROBLEMS OF INTERNALLY DISPLACED PERSONS IN ASSAM WITH SPECIAL REFERENCE TO BARAK VALLEY 3-27 (Tanmoy Bhattacharjee ed., Silchar: Department of Political Sciences, Assam University, Mar. 2003).

in 2004 that a National Policy for Resettlement and Rehabilitation of Project Affected Families (hereinafter NPRR-2003) was passed with minimal debate. NPRR-2003 only applies to those displaced due to development projects and is primarily meant to safeguard the interests of resource-poor landless agricultural labourers, forest dwellers, artisans and *adivasi* groups. This draft policy was again revised in the year 2006 and was notified on October 31, 2007 with the title "National Rehabilitation and Resettlement Policy" (hereinafter NRRP-2007). This policy is the currently applicable in the country for rehabilitation and resettlement of displaced persons. However, it suffers from various drawbacks and is severely criticized.

Firstly, though the main aim of the policy is to minimize displacement, it is silent about the measures to be followed for minimizing displacement and thus does not provide clear guidance to the authorities. Secondly, NRRP-2007 provides for land-for-land compensation and declares that it is subject to the availability of government land in resettlement areas. Also, preference for employment in the project for at least one member in the nuclear family is subject to the "availability of vacancies and suitability of affected person". Such qualifying words only favour the project developers so that they can evade responsibility on the pretext that, the land is not available or the person is not suitable for employment. Further, even though the Preamble of NRRP-2007 states that it will apply to all cases of involuntary displacement, Clause 6.1 proclaims that the appropriate government has the authority to declare which regions are affected depending on the number of people being displaced, such that a particular locality will not be declared affected if the number of families being displaced is below 400 in plain areas and below 200 in hilly areas. This implies that NRRP-2007 will not be applicable even if the number of families is just below the mark specified. Thus the policy suffers from various drawbacks.

In addition to the measures taken by the Central Government of India, the government of different states has also taken legislative measures. E.g., Maharashtra Project Affected Persons Rehabilitation Act, 1999, Law of Resettlement of Project Displaced Persons in Madhya Pradesh, 1985, Karnataka Rehabilitation Act, 1987, Rehabilitation and Resettlement (R&R) Policy for Government of Andhra Pradesh, 2005, Orissa Resettlement and Rehabilitation of Project Affected Persons Policy, 1994, Orissa Resettlement and Rehabilitation Policy, 2006 etc.

Recently, the Central Government has prepared, the Land Acquisition, Rehabilitation and Resettlement Bill, 2011 (LARR Bill, 2011). LARR Bill, 2011 has 107 clauses and is currently in public domain and India's Parliament for review. LARR Bill, 2011 seeks to

repeal and replace India's Land Acquisition Act, 1894. LARR Bill, 2011 seeks to enact a law that will apply when, government acquires land for its own use, hold and control; and government acquires land with the ultimate purpose to transfer it for the use of private companies for stated public purpose. The purpose of LARR Bill, 2011 includes public-private-partnership projects, but excludes land acquired for state or national highway projects. It aims to establish the law on land acquisition, as well as the rehabilitation and resettlement of those directly affected by the land acquisition in India.

Response of Indian Judiciary in the Protection of DID

In the absence of any specific law on rehabilitation, the Indian judiciary has taken a dynamic stand and interpreted Article 21 of the Constitution of India, 1950 to provide relief to people affected by DID. The apex court has interpreted the term life in Article 21 to include the right to live with dignity[16] and a life more than a mere animal existence[17]. In the context of DID, the judiciary have interpreted that, right to live with dignity includes the right to rehabilitation and resettlement. In *B.D. Sharma v. Union of India*[18], the court held that: "[T]he overarching projected benefits from the dam should not be counted as an alibi to deprive the fundamental rights of oustees. They should be rehabilitated as soon as they are uprooted". Further, the court provided a time frame by which the rehabilitation must be complete: before 6 months of submergence. Such a time limit fixed by the court was reiterated in the Narmada's case[19].

In *Narmada Bachao Andolan v. Union of India*[20], the court went a step forward and emphasized that: "[R]ehabilitation is not only about providing just food, clothes or shelter. It is also about extending support to rebuild livelihood by ensuring necessary amenities of life. Rehabilitation of the oustees is hence a logical corollary of Article 21". Further, in *N.D. Jayal and another v. Union of India*[21], the court held that: "[T]he right to development encompasses in its definition the guarantee of fundamental human rights". Thus, the courts have recognized the rights of the oustees to be resettled and right to rehabilitation has been read into Article 21.[22]

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16 *See* Francis C. Mullin v. The Administrator, Union Territory of Delhi and Others, A.I.R. 1981 S.C. 746; Olga Tellis and Others v. Bombay Municipal Corporations, [1985] 2 Supp. S.C.R. 51 etc.

17 *Id.*

18 1992 Supp. (3) S.C.C. 93.

19 Bulbul Khaitan & Nitya Priya, *Rehabilitation of the Displaced Persons in India*, 2 NUJS L. REV. 111(2009).

20 A.I.R. 2000 S.C. 3751.

21 (2004) 9 S.C.C. 362.

22 See *supra* note 19.

Application of International Law for Protection of DID

The people affected by DID do not cross the borders of the country and may migrate from one state to another state within the county itself and are thus internally displaced. These IDP's posses all rights that have been guaranteed by the Constitution of India. Though, normally the people affected by the DID do not cross the boundaries of the country, the United Nations (U.N.) has expressed its concern for protection of the rights of internally displaced persons. These guidelines can be made applicable for the protection of people affected by DID.

The IDP definition in the Guiding Principles does not specifically mention development projects as a possible cause of displacement, the words "in particular" introducing the listed examples of causes indicate that this list is not exhaustive. It can be argued that development projects, such as the construction of hydroelectric dams, leaving communities without adequate resettlement and compensation, could be considered a "human-made disaster" and a human rights violation, and therefore that those development induced displaced people all within the definition in the Guiding Principles.

Furthermore, Guiding Principle 6 explicitly covers DID by restating the prohibition of displacement in cases of large-scale development projects "which are not justified by compelling and overriding interests". So also, the Guiding Principles ensure that: "[D]evelopment cannot be used as an argument to disguise discrimination or any other human rights violation by stressing that development-related displacement is permissible only when compelling and overriding public interests justify this measure". The words "compelling" indicate the notion of proportionality whereas the word "overriding" demands the balancing of public and private interests. Principle 6 does not mean that persons displaced by justifiable and lawful projects are not internally displaced. In fact, the Guiding Principles describe anyone as an IDP who is coerced to leave his or her habitual residence, regardless of whether the displacement was illegal or not.[23]

Though the Guiding Principles do not address all specific issues of DID, they are nonetheless relevant and applicable to situations of displacement caused by development projects. E.g., Principle 7 mentions about proper treatment of IDPs by the authorities when displacement does occur, in particular in situations other than armed conflicts. It also states that, efforts should be made to avoid, and

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[23] Walter Kalin, *Guiding Principles on Internal Displacement* (Feb. 2, 2013), http://www.asil.org/pdfs/stlp.pdf.

minimize displacement and its adverse effects[24]; minimum conditions to be met: proper accommodation, satisfactory conditions of safety, nutrition, health and hygiene, and protection from family break-up.[25] Further, Principle 9 states that, authorities must take special care to protect against the displacement of indigenous people, minorities, peasants, pastoralists and others with special attachment to their lands. Further the guidelines provides that, IDPs have a right to an adequate standard of living[26]; authorities are responsible for facilitating the durable resettlement and integration of IDPs[27]; and upon resettlement, IDPs shall not be discriminated against, in particular with regard to access to public services and participation in public affairs; the authorities are responsible for ensuring that IDPs receive appropriate compensation for lost properties[28]. Thus these guidelines can also be considered by the authorities while formulating plans for dealing with DID.

Conclusion and Suggestions

The developmental projects are very essential for achieving economic growth of the country as well as for providing and enhancing basic amenities of people. At the same time, the adverse impacts of developmental projects on the displaced people and their human rights cannot be ignored. The basic rights like right to life, live with dignity and right to livelihood are often violated due to major developmental projects. Therefore it is very essential to include specifically, rehabilitation and resettlement policy in the plans of developmental projects. There is a need to strike a balance between the developmental concerns and the human rights of displaced peoples. The following suggestions are put forward for protecting the rights of peoples affected by DID:

1. A specific legislation should be enacted laying down clearly, the basic obligations of the government towards the rehabilitation of displaced persons.

2. The Principles of Sustainable Development, Polluter Pays Principle and Precautionary Principle should be applied while implementing the developmental projects.

3. Compulsory environmental impact assessment (EIA) including social impact assessment (SIA), should be carried out for fixing the compensation to be given to the displaced people. So also

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24 *See* princ. 7.1.
25 *See* princ. 7.2-3.
26 *See* princ. 18.
27 *See* princ. 28.
28 *See* princ. 29.

EIA and SIA should be carried out even at later stages for assessing rehabilitation and resettlement.

4. Consultation with affected people should be made mandatory while adopting any rehabilitation provisions. All the important segments of displaced community including woman, indigenous people should be properly represented and their interests should be considered.

5. Any developmental projects which involve displacement should be initiated only after properly rehabilitating each and every one affected. It should include identification of the problems of displaced people, the measures required for helping the displaced people to settle in the new area, the measures to be adopted for reducing conflicts between communities by convening consultations between internally displaced persons and populations residing in areas of resettlement, considering the needs of the resident as well as relocated populations in program design and taking steps to prevent stigmatization or resentment.

6. Disseminate information about the rights of displaced persons during displacement to displaced persons and to relevant authorities. The authorities should mandatorily disclose to the public regarding various measures adopted for ensuring the rights of displaced people.

7. Any rehabilitation and resettlement policy should give due importance to provide economic opportunities to the displaced people. It should also include provisions for community services.

Development is a right but it also carries risks to human life, livelihood, and dignity and these impacts of developmental projects must be avoided so that these projects are beneficial to everyone.

THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012: A GREAT LEAP TOWARDS SECURITY OF CHILDREN'S RIGHTS

Dr. S.R. Katari*

Introduction

Children are most important asset of any nation. They are the crucial element for the prosperous of a nation. But it depends on the holistic development of children, and care and protection given to them.[1] When they are neglected or abused, their ethical, moral and intellectual growth is curtailed. It poses a challenge to the security of their rights.

Sexual abuse[2] is the worst form of child abuse. Though the offence knows no gender discrimination, pathetic victim is the girl child. The changing scenario of nature of sexual offences is making children more vulnerable to sexual assaults. The major dimensions of the multifaceted menace are molestation, child rape, fondling, child prostitution, incest, stalking and pedophilia. With the aid of technological development the menace is taking different shapes[3] and gaining momentum in the country[4]. The traditional practices like *devadasi* and child marriages are also invariably associated with child sexual abuse.

According to a study[5], 25% of the children are victims of sexual abuse in the country. The study reveals that among them, 30% of the children are sexually abused by family members, relatives, or well

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1 NUZHAT PAREEN KHAN, CHILD RIGHTS AND THE LAW XIII (2012).

2 According to the World Health Organization (WHO), child sexual abuse is: "The involvement of a child in sexual activity that he/she does not fully comprehend, is unable to give informed consent to, or that violates the laws or social taboos of society".

3 E.g., child pornography, "live" online sexual abuse, child sex tourism, cyber stalking and bullying.

4 In the year 2010-5, 484 child sexual abuse cases were reported in India. In Utter Pradesh the number of cases reported in the year was 1,182.

5 Conducted by PRAYAS, a Delhi based Non-governmental Organization (NGO) for the Ministry of Women and Child Development in collaboration with the United Nations Children's Fund (UNICEF) and Save the Child Fund, interviewed over 13,000 minor children and 800 stakeholders across 13 states. *See* THE HINDU (Mumbai ed.), March 21, 2007 at 9. However, according to the study by the NGO-'the Child Sweden', in 2006 in Chennai out of the total reported cases of 2,211, 42% children faced child sexual abuse. *See supra* note 1, at 41.

known persons like teachers, neighbours, family friends, staff and management of protective homes, with whom the victim has close relation and trust.[6] There are incidents of sexual abuse even by fathers and brothers. In such cases, the victims' faith and trustworthiness of relationship is damaged, their character is debased and they are demoralized. The chilling scenario of sexual abuse and statistics reveals the large scale suffering and exploitation of children in the country. Therefore, there is no safety for children even in their home. Such sexual abuse violates right to privacy, dignity, chastity and physical security of children.

In the absence of appropriate and comprehensive law[7], particularly for preventing non-commercial forms of sexual exploitations, the Government of India enacted[8], "the Protection of Children from Sexual Offences Act, 2012"[9] (hereinafter the Act). The Act is made under the authority of Article 15(3) of the Constitution of India, 1950, in order to make international obligations under the United Nations (U.N.) Convention on Rights of Child[10], legally enforceable in India.

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6 In most of the rape cases reported in Delhi in the year 2012 the offenders are closely related to the victims. The figures compiled by the Delhi police show that out of the 662 rape cases reported in Delhi in 2012, 202 have involved neighbors and 189 have involved friends and relatives, 15 fathers, 7 stepfathers, 2 ex husbands, 17 brothers-in-law, 4 uncles, 3 cousins, 16 colleagues, 1 stepson, 2 father-in-law. Among them victim's doctors, principal, a priest are also there. Out of 662 victims 396 are below the age of 18 years (under 2 years' age groups 5 victims, between 2-12 years age group 105 victims, between 12-18 years age group 286 victims). In Mumbai, according to NCRB, in 2012-93% of rape cases reported are committed by known to the victim.

7 PEN. CODE §§ 354, 375, 376, 509. They provide protection from such sexual abuse. But these provisions are insufficient and inappropriate to govern all forms of sexual abuse like oral sex, other than penile-vaginal penetrations or incest. And also no distinction is made in these provisions for offences against minors as opposed to adults. However, all these provisions are amended by the Criminal Law (Amendment) Act, 2013 to define the offences according to the present trends and to provide more stringent form of punishments. The Immoral Traffic (Protection) Act, 1986 provides protection to children below 16 years age and confines to commercial sexual exploitation. It does not deal with cases of individual child sexual abuse. The Information Technology Act, 2000 (the IT Act, 2000) prohibits only publishing or transmission of child pornographic material in Section 67(B). The Juvenile Justice Act, 2000 aims on rehabilitation rather than prevention of child sexual abuse.

8 Goa is the first state in India to pass a law on protection of children from sexual abuse, titled-The Goa Children's Act, 2003. But it targets mainly on sex tourism.

9 Act No. 32 of 2012. It was passed in May, 2012 which came into force along with Rules, co-incidentally, on children's day of the year.

10 Article 34 provides that: State Parties undertake to protect the child from all form of sexual exploitation and sexual abuse. For these purposes, State Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:
(a) The inducement or coercion of a child to engage in any unlawful sexual activity;
(b) The exploitative use of children in prostitution or other unlawful sexual practices;
(c) The exploitative use of children in pornographic performances and materials.

The Act specifically addresses child sexual abuse. The objective of the Act is protection of children from sexual assaults, sexual harassment and pornography, and also to establish special courts for trial of such offences. The state consciously enacted the Act to ensure safety of 40% of its population, who are the youngest citizens of the country; without their safety the nation will not be prosperous.

Offences under the Act: The Changing Dimension of Sex Crimes in India

The offences defined in the Act are gender neutral and against a child below the age of 18 years. The offences govern both the consensual and non-consensual commissions. The Act extensively defines various kinds of penetrative and non-penetrative sexual offences.

"Penetrative sexual assault" is defined in Section 3 of the Act as:

1. Penetrating penis into any body part of the child or making the child to penetrate his penis into the body parts of the offender or any other person; or
2. Insertion of any material object or body part into the body parts of the child or making the child to do so with the offender or any other person; or
3. Manipulating any body part of the child so as to cause penetration into the body parts of child or offender or any other person; or
4. Oral sex involving either party or making the child to do it with third party.

The definition is wide enough to govern all types of penetrations. It also covers much wider range of sexual acts including all forms of unusual and unnatural practices of sex. The section makes, not only commission of the act but also encouraging or influencing the child to do so is an offence. Making the child to do the acts with third person is also governed by the offence. Both conceptually and literally, the definition has gone beyond the scope of traditional concept of "rape", which is limited to penile-vaginal penetration. However, the new definition of "rape" under the Criminal Law (Amendment) Act, 2013 has been drafted on the same lines.

When penetrative sexual assault is committed by any police officer, member of armed forces or security forces, public servant, management or staff of jail or remand home or protective home or hospital including private hospital or educational institution or religious institutions or service providing institutions is known as an offence of "aggravated penetrative sexual assault", under Section 5 of the Act. These persons may take the advantage of authority to easily

influence the child. Therefore, to arrest their undue influence the acts are recognized as aggravated forms. When the penetrative sexual assault is committed by a group, or by using force, or causes physical disability or mental ill, or committed repeatedly, or against a child below 12 years of age, or by any relative, or during communal or sectarian violence, or by a habitual offenders, or on a pregnant girl or against disabled child is also known as an aggravated form of offence under the section. All these incidents make the child more vulnerable and the child is put under serious threat. The corresponding offence in penal law is "custodial rape" under Section 376(2). But the instant definition governs a wide range of offenders and a variety of assaults. For the purpose of the Act, the section broadened the scope of relatives and relations, which includes domestic relation and relation of shared household.

Physically touching any private part of the child with sexual intention or making the child to touch him/her or any other person is termed as "sexual assault".[11] Physical intimacy other than penetration constitutes the offence.[12] If the "sexual assault" is committed by any person or in any manner specified in Section 5 of the Act, is known as the offence of "aggravated sexual assault". Infliction of child with the human immunodeficiency virus (HIV) or any other life threatening disease is also brought within the ambit of the offence.

If anyone, with sexual intention, tries to draw attention of the child by words, any sound, gesture, by showing any object or body part is known as "sexual harassment". It is an attempt to draw the attention of the child either by verbal or visual means without physical contact. Such acts not only interfere with the privacy of the child but also insult the modesty of the child. Making the child to exhibit any body part, attracting a child for pornographic purposes, threatening by use of indecent photographs of child, the act of repeatedly following or watching or contacting a child by any manner and means are also governed by the offence.

Using a child in any form of media for the sexual gratification is known as the offence of "use of child for pornographic purposes". It includes all types of advertisements or programmes in any form. Storage of child pornographic material "for commercial purposes" is also governed by the Act. However, the Act ignores "users" of child pornographic material.

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11 The Criminal Law (Amendment) Act, No. 13 of 2013, INDIA CODE (2013) § 7.

12 Sexual assaults other than rape fall under Section 354 of Indian Penal Code, 1860 (hereinafter IPC). *See* S.N. MISRA, INDIAN PENAL CODE 583 (2008).

To protect the best interest of the child, the Act prohibits a wide variety of sexual offences against children. It governs visual, verbal, physical and ethical forms of sexual abuses as well. Perhaps, the Act is the first Indian legislation, which specifically governs all forms of sexual abuses. The Act provides clear definitions and descriptions of offences. It noticeably draws distinction between the offences. But it failed to address certain categories of abuses like *devadasi* system, sex tourism and child marriage, where sexual abuse of child is largely associated with.

Punishments under the Act: More Deterrent

The Act provides higher and deterrent form of punishments. Perhaps, the Act is the first legislation in India, which provides higher degree of punishments for sexual offences. For commission of "penetrative sexual assaults" punishment prescribed in Section 4 is imprisonment for a term not less than 7 years but extended to life and fine. The amended provision of Section 376 of IPC also provides the same term of punishment for bodily penetration. But for penetration of penis with other than vagina, punishment provided in Section 377 of IPC is imprisonment for a term of 10 years and also fine. For the similar nature of offence the Goa Children's Act, 2003 provides punishment of imprisonment for a maximum period of 10 years and fine of 2 *lakh* rupees. Therefore, comparatively the instant Act provides heavier punishment for the offence.

Punishment for aggravated penetrative sexual assault, which includes incest, is imprisonment for not less than 10 years but extended to life and fine. For custodial rape, IPC provides the same quantum of punishment in Section 376(2). However, the original text of IPC does not provide any specific provision for incest. For incestuous offence the punishment prescribed in the Goa Children's Act, 2003 is imprisonment for a term of 1 year and fine of 1 *lakh* rupees only. Perhaps, these laws have not taken incest as a serious form of offence.

For sexual assaults' punishment prescribed in Section 8 is imprisonment for not less than 3 years which may be extended to 5 years and fine. For the corresponding offence, IPC in Section 354 provides imprisonment for a term not less than 1 year but extended to 5 years and fine. However, the Goa Children's Act, 2003 makes the offence punishable with 3 years imprisonment and fine of 1 *lakh* rupees. Aggravated sexual assault is punished with imprisonment for a term not less than 5 years but which may be extended to 7 years and fine. Sexual harassment of the child is punished with imprisonment extending up to 3 years and fine. For the corresponding offence in penal law the punishment prescribed in

Section 509 is simple imprisonment for a term which may be extended to 3 years and fine. Though the punishments under IPC appear same and similar to that of the Act, they got seeds of high punishments, for 2013 Amendment Act, only from the Act.

The "abettor" of the offence is punished with same quantum of punishment provided for such abetted offence. For "attempts" punishment is half of the punishment provided in the original offence. When the offence is punishable under this Act and also under various provisions of IPC, the offender shall be punished under either law, which provides higher degree of punishment. This alternative punishment provision is a special feature of the Act. The provisions of the Act are in addition to and not in derogation of the provisions of any other law. However the Act has overriding effect. But, when the offender is a minor, he shall be punished under the Juvenile Justice (Care and Protection of Children) Act, 2000 but not under the instant Act. Therefore, in case of minor offender the deterrence and significance of the Act are diluted. In order to uphold the integrity of the Act and to do meaningful justice to the child victims, as it is desired by the Act, juvenile offenders should also be governed by the Act. This change is desirable as there are growing incidents of involvement of minors in sexual offences.[13]

The perusal of penal provisions of the Act indicates that the Act provides higher degree of punishments than the existing laws. And also punishments under the Act are stringent and commensurate with the gravity of the offence. However, surgical or chemical castration is also desirable for sexual offences against children, at least in case of the aggravated forms of offences, like in Poland and Moldova.

Special Features of the Act: Child Friendly Procedures and Provisions

- The statement of the victim shall be recorded at the residence of the child or at any place according to the victim's choice.
- The statement shall be recorded preferably by a women police officer, not below the rank of sub-inspector.
- While recording the statement of the child the police officer shall not be in uniform.
- Victim shall not be detained in the police station for any reason in the night.

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13 The Delhi Gang Rape Incidence, Dec. 2012.

- Statement of the victim shall be recorded as spoken by the victim and in the presence of parents. If it is required, assistance can be taken from interpreter or expert.
- Medical examination shall be conducted in the presence of parents. In case of girl victim it should be conducted by a lady doctor.
- During trial of the victim frequent breaks should be given and he/she should not be called repeatedly.
- The court shall create a child friendly atmosphere. Aggressive questions should not be asked.
- The evidence shall be recorded within 30 days of the cognizance.
- The child is not exposed to the accused at the time of recording evidence.
- The trials to be conducted "in-camera" and in the presence of the parents.
- Disclosing the identity of the victim in media is made a punishable offence.
- In case of offences under Sections 3, 5, 7 and 9 of the Act the burden of proof lies on the accused.
- For rendering speedy justice to victims, the Act provides for constitution of special courts for each district.
- Time limit for completion of trial is fixed as 1 year.
- The Act makes reporting of offences under the Act mandatory.
- Misuse of the Act is made punishable offence for adults.
- The complaint receiving agency is required to make immediate arrangement to give the child adequate care and protection by admitting the child into a shelter home or hospital within 24 hours of the report.
- In case of emergency treatment, no documentation or magisterial requisition would be necessary before the treatment.
- The state is under obligation to pay compensation to victims within 30 days. According to the Rules made under the Act, the criteria for awarding compensation includes loss of education and employ-mental opportunity along with disability, disease, pregnancy suffered by the victim because of the abuse. The Act also provides for interim payment of compensation.
- The Act imposes obligation on central and state governments to give wide publicity to the provisions of the Act.
- The obligation to enforce the Act is on state governments.
- The National Commission for Protection of Child Rights and State Commission for the Protection of Child Rights are responsible to monitor the implementation of the Act.

All these provisions are adopted with a view to minimize discomfort for the child. Throughout the Act, a strong desire of the state to protect interest of the child is evident.

Conclusion

A perusal of the above discussion reveals that the Protection of Children from Sexual Offences Act, 2012 is a comprehensive law on child sexual abuse. The specific features of the Act are, a wide variety of offences, clear definitions, deterrent punishments, speedy justice, child friendly trial procedures, mandatory reporting provision, effective compensation, exemption from legal formalities for treatment, protection from misuse and alternative punishment provisions etc. It is not only thorough but tough law on child sexual abuse. The Act, throughout the text emphasized protection of privacy and confidentiality of children for their all round development. But the important task is effective implementation of the Act. For achieving this objective wide and intensive spreading of awareness of the features and provisions of the Act is necessary. Parents, teachers and more importantly children must be educated. Sensitizing the police, judiciary, authorities and public is necessary for effective implementation of the Act. Media and NGOs play a crucial role in spreading awareness among masses. States also must take prompt and positive initiative to implement the Act by constituting special courts, child protection units, providing appropriate compensation and giving a wide publicity to the provisions of the Act. It is also necessary that all agencies involved in ensuring the welfare of the children to act in a coordinated manner to protect physical security, dignity of life and healthy development of the children guaranteed under Articles 39(e) and (f) of the Constitution of India, 1950. However, on September 11, 2013 the Maharashtra cabinet approved a scheme known as *Manodhairya Yojana*, which would be launched on October 2, aiming at providing financial assistance up to Rs. 3 *lakhs*, medical benefit, legal aid, rehabilitation and counseling to victims of child sexual abuse. It reflects the progressive attitude of the state towards protection of the child rights.

RIGHT TO HEALTH IN CONSTITUTIONAL PERSPECTIVE: A COMPARATIVE OVERVIEW

Dr. K.I. Jayasankar*

Introduction

In 2020 the health and health care of our citizens could look quite different. We find ourselves today on the threshold of a new era with many opportunities for radical improvements in the way we manage and receive health care. In order to ensure the sustainability of our health care systems, there is a need to tackle considerable challenges.

Health is vitally important for every human being in the world. Whatever our differences may be, health is our most important commodity. A person in bad health cannot really live life to the fullest. The right to health care is primarily a claim to an entitlement, a positive right, not a protective fence. In the 18th century rights were interpreted as fences or protection for the individual from the unfettered authoritarian governments that were considered the greatest threat to human welfare. Today democratic governments do not pose the same kind of problems and there are many new kinds of threats to the right to life and well being. Hence in today's environment reliance on mechanisms that provide for collective rights is a more appropriate and workable option. Social democrats all over Europe, Canada and Australia have adequately demonstrated this in the domain of health care.[1] The researcher in this paper has made an attempt to analyze the right to health and health care from the international perspective.

Right to Health in International Human Rights Law

Under international law, there is a right not merely to health care, but to the much broader concept of health. Because rights must be realized inherently within the social sphere, this formulation immediately suggests that determinants of health and ill health are

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1 AUDREY CHAPMAN, EXPLORING A HUMAN RIGHTS APPROACH TO HEALTH CARE REFORM, AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE, WASH. D.C. (1993).

not purely biological or "natural" but are also factors of societal relations.[2]

In the human rights discourse and practice the right to health has been and continues to be a contentious arena. Primarily located within legal frameworks that focus on civil and political rights, the right to health is more frequently being used to challenge abuses of health by invoking social and economic rights, even though this places the right to health on slippery terrain that is not as internationally accepted as civil and political rights. The right of everyone to the enjoyment of the highest attainable standard of physical and mental health has been recognized in different international and regional human rights systems and in the domestic laws of many countries as a fundamental right. The majority of countries have acquired an international obligation to respect, protect and ensure the right to health to everyone under their jurisdiction. It is also recognized as fundamental right in numerous international instruments, including the Universal Declaration of Human Rights (UDHR).

UDHR states that: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care."[3] Subsequently, many nations adopted the International Covenant on Economic, Social and Cultural Rights (ICESCR), one of the implementing treaties of the UDHR.[4] Article 12 of ICESCR provides that states parties "recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health".[5] ICESCR also provides enforcement provisions for states parties.[6] Since ICESCR, the United Nations (U.N.) has adopted other treaties that recognize the international human right to health and related health questions.[7] In addition, the treaty bodies that monitor the ICESCR,

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2 U.N. Committee on Economic, Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health,* U.N. Doc. E/C.12/2000/4, *available at* http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En?OpenDocument (last visited Dec. 26, 2012).

3 Universal Declaration of Human Rights art. 25.

4 G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966).

5 *Id.* at 51.

6 *See* MATTHEW C.R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS 106–51 (1995) (discussing states' obligations in implementing ICESCR); Matthew C.R. Craven, *The Domestic Application of the International Covenant on Economic, Social and Cultural Rights*, 40 NETH. INT'L L. REV. 367 (1993) (discussing problems and possible solutions for enforcing ICESCR, including direct applicability).

7 *See e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106, U.N. GAOR, 20th Sess., Supp. No. 14, at 49, U.N.

the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child have adopted general comments or general recommendations on the right to health and health-related issues. Numerous conferences and declarations, such as the International Conference on Primary Health Care (resulting in the Declaration of Alma-Ata[8]), the United Nations Millennium Declaration and Millennium Development Goals,[9] and the Declaration of Commitment on HIV/AIDS,[10] have also helped clarify various aspects of public health relevant to the right to health and have reaffirmed commitments to its realization.

The right to health is also recognized in numerous national constitutions,[11] either directly, as in South Africa, or indirectly, as in India. Despite significant improvements, access to health care services-and, in particular, equitable access-remains a major challenge facing developing countries; the desire to achieve universal coverage and the pursuit of the right to health can conflict with resource constraints.

Right to Health: Development as a Concept

Traditionally health was seen as falling within the private, rather than public, realm. Health was also understood as the "absence of disease". The first laws containing health-related provisions go back to the era of industrialization. The Moral Apprentices Act (1802) and Public Health Act (1848) were adopted in the United Kingdom (U.K.)

Doc. A/6014 (1966) (entered into force Jan. 4, 1969) (providing in art. 5(e)(iv) for the right to "public health, medical care, social security and social services); Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 196, U.N. Doc. A/RES/34/180 (1980) (entered into force Sept. 3, 1981); Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 169, U.N. Doc. A/44/49 (1989) (entered into force Sept. 2, 1990).

See Susan Kilbourne, *U.S. Failure to Ratify the U.N. Convention on the Rights of the Child: Playing Politics with Children's Rights*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 437 (1996) (supporting adoption of the Convention and highlighting arguments of its opponents in the U.S.); Alison Dundes Renteln, *Who's Afraid of the CRC: Objections to the Convention on the Rights of the Child*, 3 ILSA J. INT'L & COMP. L. 629 (1997) (providing historical overview on the Convention's adoption process in the U.S. and political controversy surrounding it); Egon Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 INT'L & COMP. L.Q. 996 (1966) (discussing origins of the Convention and providing detailed comparative analysis of its provisions).

8 Declaration of Alma-Ata, International Conference on Primary Health Care, Alma-Ata, U.S.S.R., Sept. 1978.

9 *See* http://www.un.org/millenniumgoals/.

10 G.A. Res. S-26/2 (July 27, 2001).

11 Cf. E. Kinney & B. Clark, *Provisions for Health and Health Care in the Constitutions of the Countries of the World*, 37 CORNELL INTERNATIONAL LAW JOURNAL 285 (2004).

as a means of containing social pressure arising from poor labour conditions. The 1843 Mexican Constitution included references to the state's responsibility for preserving public health.[12] Besides these there are some specific issues and provisions related to the right to health of specific sectors as follows:

- **Prisoners:** Rules 22-26 of the Standard Minimum Rules for the Treatment of Prisoners refer to health services in prison, minimum health entitlements of prisoners and the general duties of doctors assigned to penitentiary establishments.[13]
- **Disabled persons:** The U.N. Declaration on the Rights of Disabled Persons addresses their rights to health care and rehabilitation services.[14] In addition, ICESCR General Comment 5 is devoted to disabled persons, and establishes the obligation to adopt positive measures in order to reduce the structural disadvantages that affect them.[15]
- **Victims of violence:** The U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[16] lays out the health and social services provisions that should be available for victims of violence, including psychological assistance.
- **Mental health:** The U.N. Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care establish a series of standards to safeguard the human rights of mentally ill persons, guarantee adequate treatment, care and rehabilitation, and ensure humanitarian and non-discriminatory conditions. The U.N. Declaration on the Rights of Mentally Retarded Persons sets out the rights of such persons to health care, therapy and education.[17]

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12 The first nation to formally incorporate guarantees for economic, social and cultural (ESC) rights was Mexico (1917 Constitution), though no specific mention is made of the right to health.

13 Standard Minimum Rules for the Treatment of Prisoners, *adopted on* Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, ESC Res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended ESC Res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977).

14 Declaration on the Rights of Disabled Persons, G.A. Res. 3447 (XXX), 30 U.N. GAOR Supp. (No. 34) at 88, UN Doc. A/10034 (1975).

15 CESCR, General Comment 5, *Persons with Disabilities* (11th session, 1994), U.N. Doc E/C.12/1994/13 (1994).

16 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. 40/34, annex, 40 U.N. GAOR Supp. (No. 53) at 214, U.N. Doc. A/40/53 (1985).

17 Principles for the Protection of Persons with Mental Illnesses and the Improvement of Mental Health Care, G.A. Res. 46/119, 46 U.N. GAOR Supp. (No. 49) at 189, U.N. Doc. A/46/49 (1991); Declaration on the Rights of Mentally Retarded Persons, G.A. Res. 2856 (XXVI), 26 U.N. GAOR Supp. (No. 29) at 93, U.N. Doc. A/8429 (1971).

Constitutional Provisions for Health

The extent to which health rights are neglected or promoted is a major factor in the promotion of health equity in a civilized country. Right to health as a constitutional right provides a bench mark for government, private sector and society to respect, protect, fulfill and promote it. Two thirds of the constitutions in the world have a provision addressing the right to health or to health care.

The right to health is also recognized in numerous national constitutions,[18] either directly, as in South Africa, or indirectly, as in India. Such indirect protection can be effected by judicial pronouncements, incorporating the right to health aspects in other human rights, explicitly guaranteed at the national level.[19] In some countries, where the constitution does not provide specifically for the right to health, elementary health care issues can be deduced from a more generic human rights provision, such as the human dignity provision read in conjunction with a "social state" or solidarity principle, as under the German Basic Law in Articles 1[20] and 20a[21]. These chapeau provisions serve as an umbrella of human rights protection, albeit restricted to guaranteeing the survival kit, the existential minimum, without which a life in dignity cannot be led.[22]

Health Care Rights under Constitution of United States of America

More than 70% of national constitutions around the world now provide a right to health care. But the United States (U.S.) Constitution is not among them. It is generally accepted that no right

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[18] Cf. E. Kinney & B. Clark, *Provisions for Health and Health Care in the Constitutions of the Countries of the World*, 37 CORNELL INTERNATIONAL LAW JOURNAL 2004, at 285.

[19] *See* H. Potts, *Accountability and the Right to the Highest Attainable Standard of Health*, Open Society Institute, Public Health Programme, University of Essex, Human Rights Centre, 2008, app. I, case studies 3 and 4–India, at 33–35.

[20] **Art. 1.** Human dignity–human rights–legally binding force of basic rights.-
1. Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
2. The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
3. The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

[21] **Art. 20a.** Protection of the natural foundations of life and animals.-Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.

[22] Eibe Riedel, *International Law Shaping Constitutional Law in* CONSTITUTIONALISM: OLD CONCEPTS, NEW WORLDS 105-121, at 115 (Eibe Riedel ed., Berlin: Berliner Wissenschafts-Verlag, 2005).

to health or health care exists in the U.S. Constitution.[23] The U.S. Constitution does not explicitly address the question of a right to health care. The words "health" or "medical care" do not mentioned anywhere in the text of the Constitution. The provisions in the Constitution indicate that the framers were somewhat more concerned with guaranteeing freedom from government, rather than with providing for specific rights to governmental services such as for health care. The right to a jury trial, the writ of habeas corpus, protection for contracts, and protection against ex post facto laws were among the few individual rights explicitly set forth in the original Constitution.[24] Even though the U.S. Constitution does not explicitly set forth a right to health care, the Supreme Court's decisions in the areas of the right to privacy and bodily integrity suggest the constitution implicitly provides an individual the right to access health care services at one's own expense from willing medical providers.[25] But some argue that even if a right to health or health care existed, it would not be justiciable because enforcement via the courts would be impossible without exceeding judicial competence, stretching separation of powers, and undermining democratic accountability.[26]

Health Care Jurisprudence in U.S.

In U.S. the health care reform debate raises many complex issues including those of coverage, accessibility, cost, accountability, and quality of health care. Underlying these policy considerations are issues regarding the status of health or health care as a moral, legal, or constitutional right, it may be useful to distinguish between a right to health and a right to health care.[27] An often cited definition of "health" from the World Health Organization (WHO) describes health

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[23] Although Shapiro v. Thompson, 394 U.S. 618 (1969), suggests that advocates could use a theory of economic discrimination under the 14th Amendment to require the government to provide welfare benefits, this approach has been undermined by subsequent cases.

[24] W. Kent Davis, *Answering Justice Ginsburg's Charge that the Constitution is 'Skimpy' in Comparison to our International Neighbours: A Comparison of Fundamental Rights in American and Foreign Law*, 39 S. TEX. L. REV. 951, 958 (1998).

[25] *See* Roe v. Wade, 410 U.S. 113 (1973) (constitutionally protected right to choose whether or not to terminate a pregnancy), and Cruzan v. Missouri Department of Health, 497 U.S. 261 (1990) (constitutional right to refuse medical treatment that sustains life), both of which involve a right to bodily integrity that may logically be extended to a person seeking health care services at his or her own expense.

[26] *See* CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR's UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 175-176 (2004).

[27] *See* Lawrence O. Gostin, *Securing Health or Just Health Care? The Effect of the Health Care System on the Health of America*, 39 ST. LOUIS U.L.J. 7 (1994), and Lawrence O. Gostin, *The Right to Health: A Right to the Highest Attainable Standard of Health*, 31 HASTINGS CENTER REPORT 29-10 (2001).

as "a state of complete physical, mental and social wellbeing, and not merely the absence of disease or infirmity".[28] "Health care" connotes the means for the achievement of health, as in the "care, services or supplies related to the health of an individual".[29] For purposes of this paper, discussion will be limited to constitutional and legal issues pertaining to a right to health care. Numerous questions arise concerning the parameters of a "right to health care". If each individual has a right to health care, how much care does a person have a right to and from whom? Would equality of access be a component of such a right? Do federal or state governments have a duty to provide health care services to the large numbers of medically uninsured persons? What kind of health care system would fulfill a duty to provide health care? How should this duty be enforced? The debate on these and other questions may be informed by a summary of the scope of the right to health care, particularly the right to access health care paid for by the government, under the U.S. Constitution, and under interpretations of the U.S. Supreme Court.[30]

Health Care Rights in South Africa

Pre-1994, South Africa had a highly fragmented and bureaucratic health care system. Administration of health care was fragmented, with 14 separate departments to look after the health of the different racial groups, the 4 homelands, and 6 "self governing" territories. At an organizational level, there were multiple ministries and departments based on race (the tricameral system) and ethnicity (the homeland governments). Vertical fragmentation was through service differentiation (preventive and curative services) amongst the federal government, the provinces and local authorities. Public health services for whites were better than those for blacks and those in the rural areas were significantly worse off in terms of access to services compared to their urban counterparts. Expenditure on tertiary health services was prioritized above primary health care services.

Subsequently South Africa has been commended by many for giving direction to and recognizing health rights such as the right of access

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28 WHO CONST. (2006), *available at* http://www.who.int/governance/eb/who_constitution_en.pdf.

29 Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule, 45 C.F.R. § 160.10.

30 *See e.g.,* JOHN TOBIN, THE RIGHT TO HEALTH IN INTERNATIONAL LAW (Oxford University Press 2012); Puneet K. Sandhu, *A Legal Right to Health Care: What Can the United States Learn From Foreign Models of Health Rights Jurisprudence?* 95 CAL. L. REV. 1151 (2007); and, Marcela X. Berdion, *The Right to Health Care in the United States: Local Answers to Global Responsibilities,* 60 S.M.U. L. REV. 1633 (2007).

to health care services.[31] When apartheid ended in South Africa, a new populist government, headed by Nelson Mandela, aimed to create a more just and equal society which would seek to address the economic and social rights of its citizens. Article 27 of the Constitution of South Africa includes the right to health care, food, water and social security. It sets forth "the right to have access to" health services, including reproductive health care, and prohibit the denial of emergency assistance to it.[32] The adoption of this Constitution for the Republic of South Africa marked the enactment of one of the world's most liberal constitutions. Besides this the National Health Act, 61 of 2003, provides a framework for a single health system for South Africa. The Act provides for a number of basic health care rights, including the right to emergency treatment and the right to participate in decisions regarding one's health. The implementation of the Act was initiated in 2006, and some provinces are engaged in aligning their provincial legislation with the national Act. Other legislation relating to health care, some recently passed, include laws which aim to:

- Ensure all health establishments comply with minimum standards through an independent entity (the National Health Amendment Bill, 2010);
- Make drugs more affordable and provide for transparency in the pricing of medicines (the Medicines and Related Substances Amendment Act, 59 of 2002);
- Regulate the medical schemes industry to prevent it from discriminating against "high risk" individuals like the aged and sick (the Medical Schemes Act, 1998);
- Legalize abortion and allow for safe access to it in both public and private health facilities (the Choice on Termination of Pregnancy Act, 92 of 1996);
- Limit smoking in public places, create public awareness of the health risks of tobacco by requiring certain information on packaging, and prohibit the sale of tobacco products to

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[31] A. Snellman, *The Development of a Socio-Economic Rights Jurisprudence in South Africa: A Minor Field Study* (Orebro University (Online) 2002), http://www/afrikagruppema.se/usrd/agm488.pdf.

[32] **§ 27.** Health care, food, water and social security.-
1. Everyone has the right to have access to
a. health care services, including reproductive health care;
b. sufficient food and water; and
c. social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.
3. No one may be refused emergency medical treatment.

anyone younger than 18 (the Tobacco Products Control Amendment Act, 23 of 2007);

- Provide for the introduction of mandatory community service for nurses (the Nursing Act, 2005);
- Introduce a process to develop and redesign mental health services so as to grant basic rights to people with mental illnesses (the Mental Health Care Act, 2002);
- Allow non-pharmacists to own pharmacies, with the aim of improving access to medicines (the Pharmacy Amendment Act, 2000). This came into effect during May 2003.

Other important developments in health care policy and legislation include the Health Professions Amendment Act.[33]

Health Care Rights in European Countries

European governments face a growing number of major health challenges, which are putting unprecedented pressures on public health systems. As main actors responsible for the delivery and financing of health care, generally based on the principle of social solidarity, they need to identify policy solutions in this and relevant non-health sectors to best address these challenges. Despite its limited competences with regard to health, the European Union (EU) also has an impact, particularly by encouraging cooperation between member states, funding health programmes and reinforcing internal market rules. The Charter of Fundamental Rights of the European Union has caused much debate and controversy since it was proclaimed in December 2000.[34] Section 2 of this Charter explores the relationship between human rights and the regulation of health and health care. It considers various human rights principles with relevance in health contexts, as developed at the international and Council of Europe level. By reference to selected examples, it explores some of the ways in which human rights have affected health and health care at the member state level. Diverse national approaches to controversial ethical questions may give rise to particular challenges for the EU in attempting to construct health and health care law and policy in the light of human rights principles in the future. The 3rd section of the Charter focuses upon the impact of human rights principles upon the EU itself. That is, in the formulation of health law and health policy in the light of the EU Charter and the recent

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[33] http://www.southafrica.info/about/health/health.htm#ixzz2Gho4PoAi.

[34] *See* ECONOMIC AND SOCIAL RIGHTS UNDER THE EU CHARTER OF FUNDAMENTAL RIGHTS: A LEGAL PERSPECTIVE (T. Hervey & J. Kenner eds., Oxford: Hart 2003); S. PEERS & A. WARD, THE EU CHARTER OF FUNDAMENTAL RIGHTS: POLITICS, LAW AND POLICY (Oxford: Hart 2004). The Treaty of Lisbon changes the position of the Charter from that of soft law to being legally enforceable.

creation of the European Union Agency for Fundamental Rights. The Charter considers how such fundamental rights principles may be utilized in developing law and policy in this area in the future. It explores whether the EU Charter will really provide radical change or whether, ultimately, the EU Charter is likely to operate more at a rhetorical level, with limited practical effects.

England is one of four countries, along with Scotland, Wales and Northern Ireland that make up the United Kingdom of Great Britain (U.K.) and Northern Ireland. Health care in England is mainly provided by England's public health service, the National Health Service, that provides health care to all permanent residents of the U.K. which is free at the point of use, and paid for from general taxation. Since health is a devolved matter, there are differences with the provisions for health care elsewhere in the U.K.[35] The National Health Services Act in U.K along with the Health and Social Security Act, and the National Health Service and Community Care Act, 1990 are largely concerned with the constitution of services.[36]

Health Care Rights in South East Asia Region

Article 32 of the Constitution of the People's Republic of Bangladesh states that no person shall be deprived of life or personal liberty saves in accordance with law. The Constitution of Bangladesh mandates that: "[It] shall be a fundamental responsibility of the state to attain, through planned economic growth, a constant increase of productive forces and a steady improvement in the material and cultural standard of living of the people with a view to serving its citizens the provisioning of basic necessities of life, including food, clothing, shelter, education and medicine". The government of Bangladesh, since independence, has been investing substantially in the strengthening of health and family planning services in the country, giving special allocation to the population that resides in the rural areas. The main thrust of the health programmes has been the provision of primary health care (PHC) services which has been recognized as a key approach to attain "Health for All by the year 2000". Bangladesh has accepted the goal and reiterated her political and social commitment to achieve it based on the Primary Health Care Strategy declared in Alma-Ata in 1978.[37]

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35 http://news.bbc.co.uk/2/hi/health/7149423.stm.

36 BRAZIER MARGARET, MEDICINE, PATIENTS AND THE LAW 20-22 (Harmondsworth: Penguin Books 1992).

37 Omar Haider Chowdhury & S.R. Osmani, *Towards Achieving the Right to Health: The Case of Bangladesh*, XXXIII THE BANGLADESH DEVELOPMENT STUDIES, Mar.-June 2010, Nos. 1 & 2.

The right to health is not an unfamiliar concept in the other member states of the South-East Asia region. This right is enshrined in the constitutions of Democratic People's Republic of Korea, Indonesia, Maldives, Nepal (interim constitution), Thailand and Timor-Leste. All these constitutions employ the local equivalent of the English language word "right" in describing people's entitlement to health care, and in some cases also to underlying determinants of health. The Constitution of Timor-Leste is the only constitution where the word "right to health" is included. The constitutions of Bhutan, Bangladesh, India, Myanmar and Sri Lanka do not recognize the right to health as a fundamental right but, nevertheless, compel the state to provide health services or in some cases, more indirectly to improve public health. It should be noted that although the right to health has not been included as a positive right in some constitutions of the region, other national legislation guaranteeing this right might be in place, or access to health could be treated de facto as a right. The distinction between the "right to health" or the "right to health care", and the obligation of the state to provide health care may not appear significant as far as the observable outcomes on the ground are concerned, but from the human rights perspective the difference is important. The rights-based approach to health signals a paradigm shift to using human rights as a pervasive human value enshrined in global convention, and not merely constitutional declarations on state policy, as a direction for health development.[38] The assumption is that once people are made aware of human rights as a pervasive value of a democratic society, and assume their role as rights holders, they will take actions to hold the states accountable to improve health service delivery.[39] The right to health may be incorporated in the constitution as a constitutional right (positive right), which can be enforced in a court of law. In contrast, when it is incorporated as a directive principle of the government, the right cannot be enforced by the courts and constitutes rather a socio-economic objective to guide the government's actions.[40]

Health Care Rights in India: Constitutional Provisions

The preamble to the Constitution of India coupled with the Directive Principles of State Policy strives to provide a welfare state with

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38 WHO, *25 Questions and Answers on Health and Human Rights*, 1 HEALTH AND HUMAN RIGHTS PUBLICATIONS, GENEVA, July 2002, at 16.

39 Sofia Gruskin & Daniel Tarantola, *Health and Human Rights in* PERSPECTIVES ON HEALTH AND HUMAN RIGHT 49 (Gruskin et al. eds., New York: Routledge 2005).

40 M. Mulumba, D. Kabanda & V. Nassuna, *Constitutional Provisions for the Right to Health in East and Southern Africa,* Centre for Health, Human Rights and Development, CEHURD, *in* Regional Network for Equity in Health in East and Southern Africa EQUINET, Discussion Paper No. 81, April 2010, *available at* http://www.equinetafrica.org/bibl/docs/Diss81%20ESAconstitution.pdf 3 (last visited Jan. 10, 2013).

socialist patterns of society. It enjoins the state to make the "improvement of public health" a primary responsibility. Furthermore, Articles 38, 42, 43 and 47 of the Constitution provide for promotion of health of individuals as well as health care.[41] The Constitution of India also enumerates the separate and shared legislative powers of parliament and state legislatures in 3 separate lists: the Union List, the State List and the Concurrent List. The parliament and state legislatures share authority over matters on the Concurrent List, which include criminal law and procedure; marriage, divorce and all other personal law matters; economic and social planning; population control and family planning; social security and social insurance; employment; education; legal and medical professions; and prevention of transmission of infectious or contagious diseases. Laws passed by parliament with respect to matters on the Concurrent List supersede laws passed by state legislatures. The parliament generally has no power to legislate on items from the State List, including public health, hospitals and sanitation. However, two-thirds of the rajya sabha may vote to make parliament possible to pass binding legislation on any state issue of "necessary or expedient in the national interest". In addition, 2 or more states may ask parliament to legislate on an issue that is otherwise reserved for the state. Other states may them choose to adopt the resulting legislation.

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[41] **Art. 38.** State to secure a social order for the promotion of welfare of the people.-
1. The state shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.
2. The state shall, in particular, strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

Art. 42. Provision for just and humane conditions of work and maternity relief.-The state shall make provision for securing just and humane conditions of work and for maternity relief.

Art. 43. Living wage, etc., for workers.-The state shall endeavour to secure, by suitable legislation or economic organization or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the state shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

Art. 47. Duty of the state to raise the level of nutrition and the standard of living and to improve public health.-The state shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the state shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

Concluding Remarks

The most appropriate feasible measures to implement the right to health will vary significantly from one state to another. Every state has a margin of discretion in assessing which measures are most suitable to meet its specific circumstances. ICESCR, however, clearly imposes a duty on each state to take whatever steps are necessary to ensure that everyone has access to health facilities, goods and services so that they can enjoy, as soon as possible, the highest attainable standard of physical and mental health. This requires the adoption of a national strategy to ensure to all the enjoyment of the right to health, based on human rights principles which define the objectives of that strategy and the formulation of policies and corresponding right to health indicators and benchmarks. The national health strategy should also identify the resources available to attain defined objectives, as well as the most cost-effective way of using those resources.

The formulation and implementation of national health strategies and plans of action should respect, inter alia, the principles of non-discrimination and people's participation. In particular, the right of individuals and groups to participate in decision-making processes, which may affect their development, must be an integral component of any policy, programme or strategy developed to discharge governmental obligations under Article 12. Promoting health must involve effective community action in setting priorities, making decisions, planning, implementing and evaluating strategies to achieve better health. Effective provision of health services can only be assured if people's participation is secured by states.

The national health strategy and plan of action should also be based on the principles of accountability, transparency and independence of the judiciary, since good governance is essential to the effective implementation of all human rights, including the realization of the right to health. In order to create a favourable climate for the realization of the right, states parties should take appropriate steps to ensure that the private business sector and civil society are aware of, and consider the importance of, the right to health in pursuing their activities.

States should consider adopting a framework law to operationalize their right to health national strategy. The framework law should establish national mechanisms for monitoring the implementation of national health strategies and plans of action. It should include provisions on the targets to be achieved and the time-frame for their achievement; the means by which right to health benchmarks could be achieved; the intended collaboration with civil society, including

health experts, the private sector and international organizations; institutional responsibility for the implementation of the right to health national strategy and plan of action; and possible recourse procedures. In monitoring progress towards the realization of the right to health, states parties should identify the factors and difficulties affecting implementation of their obligations.

National health strategies should identify appropriate right to health indicators and benchmarks. The indicators should be designed to monitor, at the national and international levels, the state party's obligations under Article 12. States may obtain guidance on appropriate right to health indicators, which should address different aspects of the right to health, from the ongoing work of WHO and the United Nations Children's Fund (UNICEF) in this field. Right to health indicators require disaggregation on the prohibited grounds of discrimination.

Any person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels. All victims of such violations should be entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition. National ombudsmen, human rights commissions, consumer forums, patients' rights associations or similar institutions should be strengthened to address violations of the right to health.

The incorporation in the domestic legal order of international instruments recognizing the right to health can significantly enhance the scope and effectiveness of remedial measures and should be promoted in all cases. Incorporation enables courts to adjudicate violations of the right to health, or at least its core obligations, by direct reference to ICESCR.

To sum up it is felt that judges and members of the legal profession should be encouraged by states parties to pay greater attention to violations of the right to health in the exercise of their functions. States parties should respect, protect, facilitate and promote the work of human rights advocates and other members of civil society with a view to assisting vulnerable or marginalized groups in the realization of their right to health.

MENACE OF ECOTOURISM AND THE ROLE OF LEGISLATIONS IN INDIA

Ms. Archana K.*

Introduction

Ecotourism is more than a catch phrase for nature loving travel and recreation. Ecotourism is consecrated for preserving and sustaining the diversity of the world's natural and cultural environments. It accommodates and entertains visitors in a way that is minimally intrusive or destructive to the environment; it sustains and supports the native cultures in the locations it is operating in. Ecotourism focuses on local cultures, wilderness adventures, volunteering personal growth and learning new ways to live on our vulnerable planet. It is typically defined as travel to destinations where the flora, fauna and cultural heritage are the primary attractions.

As India is a land of diverse geography and culture and its topography boasts a varied range of flora and fauna and home to numerous rare and endangered species, it is believed that ecotourism will earn good amount of revenue by causing least damage to the environment. There are currently about 80 national parks and 441 sanctuaries in India. Numerous botanical and zoological gardens are working towards the enhancement of the ecosystem. The revenue produced from tourism by using these biodiversity rich areas, helps and encourages governments to fund conservation projects and training programs.

With the object of earning revenue while retaining the nature as it is, newer biodiversity rich areas, under "protected area" status or otherwise, are being rapidly opened for ecotourism in India. But in the absence of coherent policy, regulation and guidelines in India, ecotourism has impacted biodiversity, lives and governance systems of communities. This has resulted in loss of rights and benefits arising from use of biological resources to communities. Women are particularly affected as they confront increasing problems of social evils, finding wherewithal from even distant locations. With this background this paper analyzes the growth of ecotourism and the steps taken by the government of India in promoting ecotourism. It

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throws light on the dark areas of ecotourism along with the status of the policies and legislations governing ecotourism in India.

What is Ecotourism?

Fundamentally, "ecotourism" means making as little environmental impact as possible and helping to sustain the indigenous populace, thereby encouraging the preservation of wildlife and habitats when visiting a place. This is responsible form of tourism and tourism development, which encourages going back to natural products in every aspect of life. It is also the key to sustainable ecological development. Ecotourism is derived from two words: "ecosystem" and "tourism". Ecotourism is the best option for the people who love nature and its beauty.

The official definition of "ecotourism" by the World Conservation Union (IUCN) is:

> "[E]nvironmentally responsible travel and visitation to relatively undisturbed natural areas, in order to enjoy and appreciate nature (and any accompanying cultural features-both past and present) that promotes conservation, has low negative visitor impact, and provides for beneficially active socio-economic involvement of local populations."[1]

The Travel Industry defines "ecotourism" as:

> "[P]urposeful travel that creates an understanding of cultural and natural history, while safeguarding the integrity of the ecosystem and producing economic benefits that encourage conservation . . . The long-term survival of this special type of travel is inextricably linked to the existence of the natural resources that support it."[2]

This means that those who implement and participate in ecotourism activities should follow the following principles:

- Minimize impact;
- Build environmental and cultural awareness and respect;
- Provide positive experiences for both visitors and hosts;
- Provide direct financial benefits for conservation;
- Provide financial benefits and empowerment for local people;
- Raise sensitivity to host countries' political, environmental, and social climate; and

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1 *Definitions of Ecotourism*, http://www.piedrablanca.org/ecotourism-definition.htm (last visited Aug. 15, 2013).

2 *Id.*

- Support international human rights and labour agreements.

Ecotourism and Conservation Mechanism

Ecotourism is a big business across the world. When the United Nations Environment Programme with blessings of the World Tourism Organization (UNWTO) designated year 2002 as the International Year of Ecotourism, it received vociferous support and sponsorship from the tourism industry and travel associations. The reason for such support was the magic *mantra* that enabled the tourism industry to pacify critics by using the language of conservation while attempting to manage the adverse environmental footprints of tourism while not compromising on profits.

Biodiversity of an ecosystem is a vital issue of an economy. Soil, water, climatic condition, forest cover and biodiversity are crucial in determining the renewable resource flow of an economy. As the uncontrolled economic activities resulted in the raise in global temperature, increased natural calamities etc., need for biodiversity conservation was felt all over the world. At this juncture ecotourism emerged as a tool for sustainable development of the economy, as it is believed that economic development of the country can be done with the adoption of ecotourism, without disturbing the ecosystem in a large scale.

Though the concept gained momentum and most of the developing countries adopted this type of tourism, there was a voice against such activity by the minority, as uncontrolled ecotourism can also be a good cause to ruin the rich biodiversity. With this regard, first initiation was taken at the 5th Conference of the Parties (COP) of the Convention on Biological Diversity (CBD) in Nairobi May 15-26, 2000 to discuss the negative and positive impacts of ecotourism on biodiversity. Though COP noted the drawback of ecotourism as "self regulation of the tourism industry for sustainable use of biological resources has only rarely been successful", decision of COP states that:

> "[T]ourism does present a significant potential for realizing benefits in terms of the conservation of biological diversity and the sustainable use of its components."

Despite this acknowledgement of the inherent imitations of voluntary approaches, the parties to the CBD subsequently embarked on a process to elaborate voluntary Guidelines for Biodiversity and Tourism Development, which were adopted in the 7th meeting of the Conference of the Parties to the Convention on Biological Diversity at Kuala Lumpur, Malaysia, in February 9-20, 2004. The need to involve indigenous people and local communities in tourism

development is mentioned in these guidelines, but only as a voluntary measure. The CBD recognized the difficulty of the communities to compete in a market that is "fiercely competitive" and "controlled by financial interests located away from tourist destinations".

Need for Ecotourism in India

India is a country of continental dimensions consisting of 4 distinct regions, viz., the great mountain zone, plains of the Ganga and the Indus rivers, the desert region and the southern peninsula. India is thus endowed with every land form-mountains, plains, sea coasts and desert. With the idea of reserving the wholesome environment to the next generation, government of India encouraged the use of these biodiversity rich areas for ecotourism. Number of travel related organizations started exploring the beauty of nature to the nature loving tourists by offering different ecotourism packages like bamboo rafting, wild adventure, tribal heritage, jungle inn etc. There is a silent boom in ecotourism with number of travelers on the rise every year. But due to lack of legislations in the area and efficient supervision of the implementation of the policies made by the government, there are certain basic problems of pollution, destruction and disturbance to the wholesome environment.

To avoid the adverse impacts on the environment, India has consistently included environmental and ecological safeguards in ecotourism by adopting various policies. The government of India has also recognized 3 key players in the ecotourism business, viz., local authorities, the developers and the operators. Without a cordial relation among them it is not possible to mitigate the existing problems. Besides this the visitors and the local community are also responsible for protection or degradation of the earth.

In India, only after careful assessment of carrying capacity, ecological areas for tourism will be opened to ensure that nature's bounty is not destroyed. India tried to ensure that tourism does not impinge on the culture and heritage. In general, a sound and sensitive environmental approach is adapted to tourism development planning and is integrated with other activities to ensure the following:

- Levels of development are to be compatible with the general capacity of the physical environment and resources.
- Sufficient facilities and services need to be provided to serve tourists and the local population.
- Hotel rooms must be distributed in such a manner that the natural characteristics and qualities of the area are enhanced.

- The three dimensional manifestation of tourism development should be designed carefully and with a sensitivity that merges with the surroundings and enhances the natural beauty.
- Architectural heritage sites and other areas of historic value are to be adequately protected.

Legal Framework for Ecotourism in India

To achieve all these goals, many policies were made, depending on the needs of that area. The objective of a tourism policy is to provide tools for growth of tourism beyond viable, acceptable and sustainable natural, social and economic thresholds. Tourism policy also tries to enable identification and mitigation of impacts and caters to all aspects of the tourism production function, intermediate inputs and the final output, i.e., experiences.

But, as far as ecotourism is concerned, clear planning and control of the sector is a globally identified need. General tourism policies are not congenial for ecotourism and as of now legislations in ecotourism are rare. In the past environmental laws of India were passed with the motto of preventing and regulating pollution and protection of untouched ecologies and sensitive ecosystems. Provisions of these laws were made applicable to ecotourism. Some of such laws are the following:

1. **The Wild Life (Protection) Act, 1972:**
   This Act permits tourism in protected areas along with scientific research and wildlife photography. The character and volume of tourism in protected areas has changed considerably since this law was framed. There are no specific provisions to regulate tourism and tourist activity in and around the protected areas. Hence, there is an urgent need to amend the Act.

2. **The Forest (Conservation) Act, 1980**:
   The law prohibits conversion of forest land for "non-forest" activities[3]. However, ecotourism is being propagated on the notion that it supports conservation and hence is being allowed in forest areas. Although this Act has the potential to regulate ecotourism, the belief of conservation through ecotourism, has become a stumbling block in the implementation of the Act.

[3] Any activity that does not support protection and conservation of forests.

3. The Environment (Protection) Act, 1986:

Under this Act, there are 2 very important notifications that are closely linked to the development of ecotourism, viz.:

- **Coastal Regulation Zone Notification, 1991**: This is an important piece of legislation guiding anthropogenic activities along the coast. However, 20 amendments have been made to the notification over the years which have diluted and rendered many of the protective clauses meaningless.
- **Environmental Impact Assessment Notification, 2006**: The notification has totally omitted Environmental Impact Assessments for tourism projects as against its predecessor, the Notification of 1991, which required Environmental Impact Assessments of tourism projects.

4. Other Provisions:

Besides these legislations, there are no specific legislations or regulations made by the central government to protect ecosystem in India. The only document available with regard to ecotourism policy at national level is the Ecotourism Policy and Guidelines, 1998 which identifies key players in ecotourism as: government, developers/operators and suppliers, visitors, host community, non-governmental organizations (NGOs) and research institutions. It also prescribes operational guidelines for these key players. The policy defines and hence approaches ecotourism with a clear conservation bias. It lays out cardinal principles suggesting the importance of involvement of local communities, minimizing the conflicts between livelihoods and tourism, environmental and socio-cultural carrying capacities.

National Biodiversity Strategy and Action Plan (NBSAP) were made to assess gross impacts of tourism activities in major ecosystems and also to focus on principles in relation to tourism and biodiversity that need to be adopted for the sake of conserving biodiversity. The Ministry of Environment and Forests, Government of India has rejected NBSAP on grounds of it being unscientific. The preparation of NBSAP was one the most participatory processes in Indian history.

Due to lack of adequate provisions and policies, the authorities are making use of the policies enforced by the government of India to protect the environment, to regulate ecotourism. Few among the other policies are:

- **The National Environment Policy, 2006:**

  The policy promotes ecotourism in many fragile ecosystems and overlooks tourism as an impacting agent.

- **The Ecotourism Policy and Guidelines, 1998:**
  Drawing from international guidelines prepared by tourism industry associations and organizations, the Ecotourism Policy and Guidelines, 1998 issued by the Ministry of Tourism, Government of India represent interests of global industry players. The policy approach is environmental protection for the sake of profits. The policy outlines all ecosystems of India as ecotourism resources and states that these have been well protected and preserved. Where the policy enlists its principles and elaborates operational aspects for key players in the ecotourism business, the role of communities is considerably reduced to protecting environmental resources and providing services to tourism in the role of "hosts". An environment protected by communities is a resource for ecotourism when tourists experience the natural beauty. Indigenous and local communities become important "stakeholders" thereby becoming subservient to a process where environmental protection is vested from their control and is being pursued for the sake of supporting economic enterprise. What the policy fails to realize is the cross linkages between ecotourism and the social, cultural, economic and institutional processes of indigenous and local communities. Their lives are very closely linked to the environment they live in, and their customs and traditions bear strong linkages to it.

- **Andaman and Nicobar Islands Tourism Policy:**
  This is a rather simplistic document serving very little of its purpose of providing guidelines and principles for implementation. Chhattisgarh does not have an ecotourism policy. Information on ecotourism sites is provided on the official website which states that one of the major objectives of the policy is to promote economically, culturally and ecologically sustainable tourism in the state; with ecotourism in the 3 national parks and 11 wildlife sanctuaries.

- **Madhya Pradesh Ecotourism Policy, 2007:**
  Salient features include development of infrastructure, promotion of lesser known areas, diversification of tourism activities, building awareness and securing local community and private sector participation. Ecotourism activities will include nature camps, eco friendly accommodation, trekking and nature walks, wildlife viewing and river cruises, adventure sports, angling, herbal ecotourism, urban ecotourism through eco parks, visitor interpretation centers, and conservation education.

Role of Indian Judiciary in Preserving the Wholesome Environment

The Indian judiciary has also contributed in protecting and preserving wholesome environment by giving landmark judgments in various cases.

In *Niyamavedi v. State of Kerala*[4], the Kerala High Court found that a project for such a park was designed after consulting many experts who gave full support to watching wildlife at close quarters, without interfering with the sanctity of flora and fauna. In the court's eyes the government's decision to establish a park after consultation was a policy decision, which could not to be interfered with.

In *Nagarahole Budakattu Hakku Sthapana Samithi v. State of Karnataka*[5], the establishment of a restaurant with board and lodging, in the midst of a national park was the main issue. On the basis of an 18 year lease from the government, the lessee, a private company, renovated old building for the establishment of the facility. The Karnataka High Court held that once an area was declared a national park no one has any right on or over the land, unless it is specifically granted. Further, subsequent to the Forest (Conservation) Act, 1980 (FCA), no forestland or portion could be assigned by way of a lease or "otherwise" to anybody. The court noted that the expression "otherwise" denotes that a lease or even an easement is incapable of being assigned. The lease being contrary to laws relating to, wildlife and forest conservation, the court ordered to hand over the possession of the building to state government**.**

An artificial deviation of the flow of a river in forestland, for the purpose of augmenting facilities of a motel, was challenged in *M.C. Mehta v. Kamalnath*[6]. Quashing prior approval for the lease, the apex court referred to the evolution of public interest doctrine under which the state as a trustee has to protect the natural resources for the benefit of the general public. On the facts of the case, the court found that the bank of the river, which was part of protected forest, had been leased out for commercial purpose. The state government committed a patent breach of public trust by leasing out the ecologically fragile land for a hotel. The formulation and application of the public trust doctrine, in the context of protection of forests and preservation of natural resources, is a landmark in the growth of Indian environmental law.

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4 A.I.R. 1993 Ker. 262.
5 A.I.R. 1997 Kar. 288.
6 A.I.R. 2000 S.C. 1997.

In *Union of India v. Kamath Holiday Resorts Pvt. Ltd.*[7], the Supreme Court disagreed with the argument that the lease for a snack bar and restaurant was necessary for visiting tourists in the reserved forest. The court observed:

> "All current streams of thought lead towards protection of environment and preservation of forest wealth. On the other hand there are demands in justification of other use telling on the forests. A balance would have to be struck in a cool and dispassionate manner."

In this case, an officer of the central government leased out the site in forest for the snack bar. The apex court was categorical that even if the central government agency grants the lease, prior approval is imperative.

The question to what extent tourist traffic may be permitted into the parks was examined in *Forest Friendly Camps Pvt. Ltd. v. State of Rajasthan*[8]. The Government of Rajasthan has established a tiger project in the vicinity of Ranthambore National Park with a view to attracting tourists. Both the state government and the central government encouraged tourism and helped setting up of various hotels and resorts around the park area. Though there were hardly any restrictions in the beginning, the government regulated the tourism business in the park by controlling entry of private vehicles. The appellants challenged the roster system' and the restrictions on the ground that they would hamper tourism, and consequences would result in affecting the foreign exchange earnings. The writ petition was dismissed with an emphasis on the following aspects of ecotourism:

- It would be just and fair to maintain a careful balance between the preservation of wild life in forest and sustainable development, in order to ensure the long-term health of both the ecosystem and the tourism economy.
- The policy should be developed to ensure that the tourism activities, which need the nature and biological diversity conservation, include mobilizing funds from tourism.
- The tourism should be based on environmental friendly concept.
- Tourism activities which directly or indirectly contribute to the conservation of nature and biological diversity and which benefit local communities should be promoted.

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7 A.I.R. 1996 S.C. 1100.
8 A.I.R. 2002 Raj. 2001.

- It should be seen that tourism activities should be environmentally, economically, socially and culturally sustainable.
- The tourism should be developed in a way so that it benefits the local communities, strengthens the local economy, employs local work force.
- To ensure all these aspects the policy of tourism should be such where the tourists are not put to inconvenience.

Although tourism helps in mobilizing funds for development of the national economy, however, one is compelled to warn that tourist activities should never go beyond the boundaries of being environment friendly. The court laid emphasis on sustainable development, which has to be accepted as a viable concept for eradicating poverty, helping the local people and improving the quality of human life, while maintaining the equilibrium of the ecotourism. In other words, society has to prosper, but not at the cost of the environment. This concept will have to be accepted in the field of ecotourism.

Conclusion

To be with nature and enjoy its creations in the most natural way without endangering it is known as ecotourism. Ecotourism in the Indian context has significant implications for nature and culture conservation, rural livelihoods and conservation education. Every visitor and the citizen of India are responsible for the protection of biodiversity rich ecosystem of India. As, each one has to be sensitive to the environment and local traditions, there should be a set of guidelines for the successful development of ecotourism. In addition, NGOs and scientific and research institutions also have to play a key role in the development of ecotourism. Along with that, a management plan for each ecotourism area should be prepared by professional landscape architects and urban planners, in consultation with the local community as well as others directly concerned. Integrated planning should be adopted to avoid intersectoral and cross-sectoral conflict. Moreover, involvement of the local tribes by giving preference, in such activities is must in conserving our ecosystem.

THE PREVENTION OF TORTURE BILL, 2010: A CRITICAL ANALYSIS

Mr. Vijay V. Muradande*

Intoduction

Human rights can generally be defined as those rights which are inherent in our nature without which we cannot live as human beings.[1] The concept of "human rights" is the mother's milk of the international community. Human rights are the rights of a human being, and without these basic, inalienable and sacrosanct human values there is no meaning to human life.[2] According to Nagendra Singh implementation of human rights is achieved best through the agency of municipal or national law.[3] Basic need for human rights protection is not at the international level, but in each state where oppression must be curbed.[4]

Torture is the most heinous practice that ought to be prohibited in any country.[5] It has been the concern of international community because the problem is universal, and the challenge is almost global. Custodial torture is a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality.[6]

The prohibition of torture and other forms of ill-treatment has a special status in international protection of human rights. At present the United Nations (U.N.) human rights treaty regime is grounded in the 9 core human rights treaties, which apparently prohibits all forms of torture. Perhaps the most notable international agreement prohibiting torture is the U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1984 (CAT) which requires signatory parties to take legislative, administrative, judicial and other measures to prohibit torture within their territorial jurisdiction and to criminalize all acts of torture.

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1 N.S. Kamboj, *Human Rights and Judicial Activism*, 41(1) J.I.L.I. 110 (1999).

2 D.S. Prakasa Rao, *Human Rights-Ideology and Practice: Indian Perspective*, 1(62) Journal of Indian Legal Thought 62 (2003).

3 NAGENDRA SINGH, ENFORCEMENT OF HUMAN RIGHTS 81 (1st ed., Eastern Law House Pvt. Ltd., Calcutta 1986).

4 S.L. BHALLA, HUMAN RIGHTS 171 (1st ed., Docta Shelf Publications, Delhi 1991).

5 J.B. Bhushan, *Custodial Violence-A Gruesome Practice,* XXVIII(1) IBR 99 (2001).

6 Surender S. Jaswal, *Custodial Crimes-An Affront to Human Dignity*, XXX (2 & 3) IBR 255 (2003).

On October 14, 1997, the Government of India signed CAT making the following statement:

> "The Convention corresponds to the ethos of Indian democracy, rule of law, individual freedom, personal liberty and security enshrined in Indian polity."

Signing to CAT by India is an important milestone in the process of India's continued commitment to fundamental and human rights of all persons and directive principles of national policy.[7]

In India, torture remains an entrenched and often routine law enforcement strategy, despite India's status as the world's largest democracy. The Lok Sabha passed the Prevention of Torture Bill, 2010 (hereinafter the Bill), on May 6, 2010 and it is now pending before the Rajya Sabha. The ostensible rationale for its formulation is the fulfillment of the requirement of an enabling legislation, necessary if India is to ratify CAT. Accordingly, the Bill defines torture; prescribes necessary punishment; and provides certain procedural safeguards relating to the process of investigation.

This paper examines these aspects in the Bill and attracts considerable criticism. It also falls short of meeting India's international law obligations, while at the same time it contains several clauses which are theoretically unsound and may create several undesirable ramifications in practice. The Bill in its current form does not bring India's domestic law in conformity with CAT. The Bill fails to establish a strong and credible legal framework for the prevention of torture. On the basis of this analysis, appropriate amendments to the clauses are desired which will secure necessary compliance with international law obligations under CAT as well as to ensure that interpretive difficulties under domestic law are smoothened to make the provisions in the Bill justifiable in theory and efficacious in practice.

Prohibition of Torture and Other Forms of Ill-Treatment in International Treaties

The following are international instruments that absolutely prohibit torture and ill-treatment:

1. **Universal Declaration of Human Rights, 1948**
   The unequivocal prohibition on torture is included in the founding document of the international human rights system: the Universal

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[7] Maryam Bacha, *Third Degree Torture: State Terrorism to Combat Other Forms of Terrorism*, III Cr.L.J. 2 (2005).

Declaration of Human Rights, 1948 (UDHR). It provides that: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[8]

2. Standard Minimum Rules for the Treatment of Prisoners, 1955

In the year 1955, Standard Minimum Rules for the Treatment of Prisoners, was adopted. It provided the basis for human treatment of suspects/accused.[9] It provides that, corporal punishment, punishment by placing in dark cell, and all cruel, inhuman or degrading punishment shall completely prohibited.[10]

3. International Covenant on Civil and Political Rights, 1966

International Covenant on Civil and Political Rights, 1966 (ICCPR) provides that: "[N]o person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".[11] It also provides that: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".[12]

ICCPR provides that anyone claiming that their rights have been violated shall have an effective legal remedy. Further, no derogation is allowed regarding the right; not to be subjected to torture and other forms of ill-treatment.

4. Code of Conduct for Law Enforcement Officials, 1979

To realize freedom from torture to every individual the U.N. General Assembly has adopted a Code of Conduct for Law Enforcement Officials on December 17, 1979.

It provides that law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.[13] They may use force only when strictly necessary and to the extent required for the performance of their duty.[14] It also prohibits use of torture and no enforcement official may invoke superior orders or exceptional circumstances such as war, political instability or public emergency as a justification for torture.[15]

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8 UDHR art. 5.
9 Subrahamanyam, *Rights Against Torture; A Review*, 4 Cr.L.J. 178 (2000).
10 Standard Minimum Rules for the Treatment of Prisoners, r. 31 (1955).
11 ICCPR art. 7.
12 *Id.* art. 10.
13 Code of Conduct for Law Enforcement Officials, art. 2 (1979).
14 *Id.* art. 3.
15 *Id.* art. 5.

5. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1984

The U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1984 (CAT) is the most comprehensive international treaty dealing with torture.

It contains a series of important provisions in relation to the absolute prohibition of torture. CAT requires each state party to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under their jurisdiction, not to expel or extradite a person to another state where he would be in danger of being subjected to torture, and to outlaw torture in their criminal legislation. CAT further clarifies that no order from superior officer on exceptional circumstances may be invoked as a justification for torture.

CAT: An Overview

Over the past several decades, a number of international agreements and declarations has condemned and/or sought to prohibit the practice of torture by public officials, leading some to conclude that torture is now prohibited under customary international law. Perhaps the most notable international agreement prohibiting torture is CAT.

1. Definition of Torture

It is important to stress at the outset that the legal definition of "torture" differs quite significantly from the way the term is commonly used in the media or in general conversation, which often emphasizes the intensity of pain and suffering inflicted. Whereas a number of prior international agreements and declarations condemned and/or prohibited torture, CAT appears to be the first international agreement to actually attempt to define the term.

It provides the internationally agreed legal definition of "torture" as:

"Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or

> suffering arising only from, inherent in or incidental to lawful sanctions".[16]

Importantly, this definition specifies that both physical and mental suffering can constitute torture, and that for such suffering to constitute torture, it must be purposefully inflicted. Further, acts of torture covered under CAT must be committed by someone acting under the color of law.

2. CAT Requirements Concerning the Criminalization of Torture

A central objective of CAT is to criminalize all instances of torture. It requires states to ensure that all acts of torture are criminal offenses, subject to appropriate penalties given their "grave nature".[17] State parties are also required to apply similar criminal penalties to attempts to commit and complicity or participation in torture. CAT's prohibition of torture is absolute:

> "No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture".[18]

3. CAT Requirements Concerning the Availability of Civil Redress for Victims of Torture

CAT provides that signatory states must ensure that their legal systems provide victims of torture (or their dependents, in cases where the victim has died as a result of torture) with the ability to obtain civil redress in the form of "fair and adequate compensation including the means for as full rehabilitation as possible".[19]

4. CAT Requirements Prohibiting Cruel, Inhuman, or Degrading Treatment or Punishment

Article 16 of CAT requires signatory states to take preventative measures to prevent "cruel, inhuman, or degrading treatment or punishment" within any territory under their jurisdiction when such acts are committed under the color of law.

5. CAT Enforcement and Monitoring Measures

CAT also established a Committee Against Torture (CAT Committee), composed of 10 experts of recognized competence in the field of human rights who are elected to biannual terms by

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16 CAT art. 1.
17 *Id.* art. 4.
18 *Id.* art. 2(2).
19 *Id.* art. 14.

state parties.[20] Each party is required to submit, within a year of CAT entering into force for it, a report to the committee detailing the measures it has taken to give effect to the provisions of CAT, as well as supplementary reports every 4 years on any new measures taken, in addition to any other reports the committee may request.[21]

The CAT Committee monitors state compliance with CAT obligations;[22] investigates allegations of systematic CAT violations by state parties, and makes recommendations for improving compliance;[23] and submits annual reports to CAT parties and the U.N. General Assembly.[24]

Article 30 of CAT provides that disputes between 2 or more signatory parties concerning the interpretation and application of CAT can be submitted to arbitration upon request. If, within 6 months of the date of request for arbitration, the parties are unable to agree upon the organization of the arbitration, any of the parties may refer the dispute to the International Court of Justice. Article 30 contains an "opt-out" provision, however, that enables states to make a reservation at the time of CAT ratification declaring that they do not consider themselves to be bound by Article 30.

The Prevention of Torture Bill, 2010: An Overview

It is an understatement to say that the Prevention of Torture Bill, 2010 is a disappointment. The Bill falls exceedingly short of national and international human rights standards. Not only are the present provisions wholly insufficient to address, much less punish, the full scale of torture that is practiced in the country; there are critical omissions. If the government's sole objective is to pass a piece of legislation to ratify CAT, irrespective of the public interest and national importance of an act such as this, the government has already failed. The Bill in its current form does not bring India's domestic law in conformity with CAT. The Bill fails to establish a strong, credible legal framework for the prevention of torture.

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20 *Id.* arts. 17, 18.
21 *Id.* art. 19(1).
22 *Id.* art.19.
23 *Id.* arts. 20-23.
24 *Id.* art. 24.

1. Restrictive definition of torture

Clause 3 of the Bill defines "torture":

> "Whoever, being a public servant or being abetted by a public servant or with the consent or acquiescence of a public servant, intentionally does any act for the purposes to obtain from him or a third person such information or a confession which causes,-
>
> **(i)** grievous hurt to any person; or
>
> **(ii)** danger to life, limb or health (whether mental or physical) of any person
>
> is said to inflict torture...."

The above definition of "torture" is narrow and restrictive. It does not capture the spirit and essence of CAT.

Despite the prevalence of custodial deaths as a result of torture, it makes no reference to death as a result of torture. This means acts of torture that result in death are likely to be prosecuted as a murder and, thus, sentences may not incorporate the gravity of the crime of torture as the cause of death. Similarly, there is no reference to "other cruel, inhuman or degrading treatment or punishment" anywhere in the Bill.

2. Lenient punishment for torture

It punishes torture in Clause 4 as follows:

> "Where the public servant referred to in section 3 or any person abetted by or with the consent or acquiescence of such public servant, tortures any person-
>
> **(a)** for the purpose of extorting from him or from any other person interested in him, any confession or any information which may lead to the detection of an offence or misconduct; and
>
> **(b)** on the ground of his religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, shall be punishable with imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine." [25]

Clause 4 of the Bill provides for a maximum of 10 years imprisonment for those who are convicted of torture. The Bill once again does not take into account Indian realities of custodial deaths as a result of torture. For India to comply with CAT,

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[25] The Prevention of Torture Bill, cl. 4 (2010).

punishments for offenders of torture should reflect the gravity of the crimes committed, as stated in CAT Article 4(2). If torture leads to death, will the law enforcement personnel be still awarded 10 years imprisonment?

The Bill equates crimes by law enforcement personnel, including torture, with normal crimes. This is a serious omission considering that law enforcement personnel exercise the sovereign power of the state. Through being entrusted with carrying out duties by the state, they are afforded special powers and, thus, have a higher level of responsibility. Hence, the crimes committed by law enforcement personnel should receive harsher punishment than is provided under the Indian Penal Code, 1860 (I.P.C.).

3. Limitation for cognizance of offences falls far below national law

Clause 5 of the Bill provides that:

> "Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (Cr.P.C.), no court shall take cognizance of an offence under this Act unless the complaint is made within 6 months from the date on which the offence is alleged to have been committed."[26]

The limitation of 6 months for taking cognizance is less than that for other comparable crimes under Cr.P.C. In its definition, the Bill includes "grievous hurt" as part of infliction of torture. However, for normal crimes of grievous hurt there are no limitations under Section 468 of the Cr.P.C. as provided below:

> "**Section 468**.-Bar to taking cognizance after lapse of the period of limitation
>
> **1.** Except as otherwise provided elsewhere in this Code, no court, shall take cognizance of an offence of the category specified in sub-section (2), after the expiry of the period of limitation.
> **2.** The period of limitation shall be-
> **a.** Six months, if the offence is punishable with fine only;
> **b.** One year, if the offence is punishable with imprisonment for a term not exceeding one year;
> **c.** Three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

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[26] *Id.* cl. 5.

3. For the purposes of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment."

Victims of torture need longer to be able to gather courage and resources to make the complaint. Under Section 468 of Cr.P.C. the limitation of 6 months for taking cognizance is applicable only to offences punishable by a fine. Torture would definitely not fall within this category. As a general rule criminal laws tend not to fix a limitation period for serious offences.

Since the punishment given under the Bill is maximum of 10 years, the limitation of 6 month for taking cognizance is contrary to Cr.P.C. and therefore, inappropriate.

4. Sanction for prosecution

Clause 6 of the Bill provides that:

"No court shall take cognizance of an offence punishable under this Act, alleged to have been committed by a public servant during the course of his employment, except with the previous sanction,-

(a) in the case of a person, who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;
(b) in the case of a person, who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;
(c) in the case of any other person, of the authority competent to remove him from his office."[27]

The regime of prior sanction exists in many laws including Section 197 of the Cr.P.C. and has been consistently used in India to provide impunity by denying permission. This provision does not comply with the requirement of Article 2 of CAT that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture".

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[27] *Id.* cl. 6.

Alarmingly, in the current Bill, the wording of Clause 6 is excessively and unjustifiably broad, and moves far beyond the protection already afforded in Section 197 Cr.P.C. Clause 6 calls for prior sanction for any alleged offence committed by a public servant "during the course of his employment". It seems the law ministry has taken it upon itself to provide blanket protection for public servants from prosecution for torture.

5. Issues excluded in the Bill

The Bill also does not include any text pertaining to the following provisions of CAT:

I. Penal offences

In a serious omission, the Bill does not incorporate the offences in I.P.C. which constitute acts of torture, even those which specifically set out custodial crimes by public servants. The Law Commission of India in 1994 described the types of custodial crimes being perpetrated in "alarming dimensions"–torture, assault, injury, extortion, sexual exploitation and death in custody.[28]

The Bill also makes no reference to gender-based violence perpetrated by public servants particularly sexual violence affecting women in custody. Given the wide ambit for states to codify a broad definition of torture as advised by the U.N. Committee Against Torture, borrowing from domestic definitions, the relevant I.P.C. offences need to be incorporated into the definition of torture in Clauses 3 and 4 of the Bill. The addition of these offences will serve to broaden the definition of torture in the Bill both in terms of intent and effects. It is crucial to legislate torture as a continuum of offences, and not curtail its gravity because limited cause and effect are written into the anti-torture law.

II. Deaths in custody

In spite of the high numbers of custodial deaths in India, many of them obviously resulting from torture, the Bill is totally silent on deaths in custody. It can be strongly recommended that Clauses 3 and 4 are amended to include a provision that establishes death in custody, or death occurring as a result of injuries sustained while in custody, as a part of the definition of torture. Any death in custody, or as a result of injuries sustained while in custody, should be made punishable with the offence of murder, or culpable homicide, depending on the specific circumstances of each case.

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[28] LAW COMMISSION OF INDIA, CUSTODIAL CRIMES (Aug. 1994).

III. Exclusion of evidence obtained by torture

The Bill remains silent on the issue of evidence obtained through torture. No statements or evidence obtained by torture can be used in legal proceedings. To address the problem, any discovery of evidence entered in court, if found through the use of torture, should ideally be excluded in proceedings. Admittedly it is probably more appropriate to include this requirement through amendment of the Indian Evidence Act, 1872.

IV. Right of victims to redress and compensation

Article 14 of CAT provides that: "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible". The Bill fails to include any such provision. Such a right should apply whether or not any individual is identified as responsible, charged or convicted of torture. Such a provision also falls in line with the recommendation of the Law Commission which suggested the addition of a new Section 357-A in the Cr.P.C. to provide a statutory right to compensation in custodial offences.

V. Criminal liability of superior officers for acts of torture

It is another gaping omission that command responsibility has not been addressed at all in the Bill. The Committee Against Torture has interpreted the absolute prohibition of torture to include command responsibility. Article 2(3) of CAT holds that "an order of a superior or public authority can never be invoked as a justification of torture". In parallel, the Committee has also held that senior officials are criminally liable for acts of torture committed by juniors.

The prevalence of torture at the behest of superior officers is rampant but little known. In spite of their role, superior officers escape all accountability because they are not actually involved in the acts, and the hierarchies in security forces are so entrenched that it is unthinkable for a junior officer to implicate his senior for wrongful orders. The inclusion of a provision codifying senior officers' criminal liability for torture will act as a tremendous deterrent, and also better ensure that the law is upheld.

Conclusion

It is unacceptable that the Ministry has prepared such a shoddy and inept draft of such an important bill. It is a matter of shame for the Government of India that rampant and institutionalized torture continues to occur in India's police stations, and all other places of detention. Alarmingly, the Government of India has not demonstrated

its opposition to the continuing practice of torture–it has not acted to strengthen access to justice for victims, by strengthening their legal rights or enabling prosecution; nor has it taken substantial steps to punish the perpetrators. The weak "Statement of Objects and Reasons" provided in this Bill reveals the absence of the government's commitment to hold public servants accountable for torture.

The current Bill is an eyewash and is nowhere in conformity with CAT. It needs serious consideration and amendments if it is to live up to its object and if it is going to curb the rampant practice of torture in the country. The Bill in its present form seems to be designed more to address the diplomatic embarrassment over the inordinate delay in ratifying CAT, rather than to increase the accountability of law enforcement personnel for resorting to torture.

Thus, in spite of constitutional and legal safeguard, established procedural law, judicial verdicts, international conventions and treaties against the torture and death in police lock-up, the menace is on increase and nothing seems to have substantially changed on ground level. The torture leading to lock-up death is a fundamental violation of human rights and extremely misuse of power by the state law enforcing agency. Therefore, the immediate steps are required to eradicate this growing menace otherwise the constitutional provisions assuring justice, liberty and dignity of the individual would remain on paper unless the police are brought under greater central of civil magistracy.

If this country has to set the human rights record correct it is time to come up heavily on those who indulge in custodial killings sometime in the name of establishing laws and order and sometimes in the name of national interest. The concept of "rule of law" enshrined in the Constitution of India is of no use if we cannot protect those citizens/human beings that are in the custody of state. A state cannot claim itself to be a welfare state if its citizens are killed when they are in state custody.

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ELECTORAL REFORMS: ISSUES AND CHALLENGES IN THE DOMAIN OF CRIMINALIZATION

Mr. Mithun Bansode *

Introduction

Free and fair election is a mandate given by the Constitution of India, 1950 for a parliamentary democracy. The word "democracy" coined in the Preamble of the Constitution can be realized if we have the content of free, fair and effective election process in our system. Only free and fair elections to the various legislative bodies in the country can guarantee the growth of a democratic polity.[1]

In India election is always a gigantic exercise because the country having biggest democracy in the world, millions of electorates goes to polls to elect members for Parliament, state legislative bodies and Legislatures of the Union Territories. In *Kihoto Hollohan*[2] the court emphasized that democracy is a basic feature of the Constitution and election conducted at regular prescribed intervals is essential to the democratic system envisaged in the Constitution. So it is current requirement and need to protect and sustain the purity of electoral process. For that it would be better to assess the electoral process, its legislation, and issues and challenges for its reforms. Several committees like Goswami Committee on Electoral Reforms (1990), Indrajit Gupta Committee on State Funding of Elections (1998), Vohra Committee (1993), as well the Law Commission Report on Reform of the Electoral Laws (1999), the Election Commission of India–Proposed Electoral Reforms (2004) verified the issue of electoral reform. They suggested the solution for the same; but still some vacuum has been left under the gamut of constitutional mandate of election and under the other statutes like the Representation of People Act, 1951 (RPA).

Therefore, there is a dire need to analyze the process of election to protect the democracy. This paper attempts to reveal issues and challenges in election reforms in India in relation with criminalization of politics. As this issue is very basic, it needs to be corrected at the

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1 M.P. JAIN, INDIAN CONSTITUTIONAL LAW 872 (Butterworths and Wadhawa, reprint 2012).

2 A.I.R. 1993 S.C. 1535.

earliest so that to some extent we can save not only system of election but also the democracy from being criminalized.

Criminalization Prevalent in Elections in India

During the period of election one gets to read in newspapers very often that, a particular *x y z* candidate contesting election has 200 criminal cases pending in courts against him; a Member of Legislative Assembly (MLA) is contesting in election as an independent candidate while he is still serving a life term in the jail. He was convicted in a kidnapping case but an appeal has been entered in the High Court. These kinds of stories have now become very familiar to citizens of India. It is shameful for the world's biggest democracy like ours that these criminals, who have many cases of murder, rape and dacoity charged against them, are sitting in a forum of law making i.e., Parliament and State Legislatures. According to the Central Bureau of Investigation (CBI) report to the Vohra Committee: "[A]ll over India crime syndicates have become a law unto themselves; even in the smaller towns and ruler areas muscle man becomes the order of the day". The reflection of this can be found not only in election to House of People or a State Legislature, but even in at the ground level of corporation elections.[3] The nexus between the criminal gangs, police, bureaucracy and politicians has come out clearly in various parts of the country.[4] To curb this element of criminalization law proves to be very short.

Legal Mandate for De-criminalization under Section 8 of RPA

Certain legal provisions are provided in Section 8 of the Representation of the People Act, 1951[5] which provides for the

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[3] SAKAL TIMES, Feb. 21, 2012: After Pune Municipal Corporation election in Sutarwadi, a supporter of an independent candidate attacked on the supporter of National Congress Party candidate who won the seat from Pashan.

[4] NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION, REVIEW OF ELECTION LAW, PROCESSES AND REFORM OPTIONS, 2001.

[5] **8. Disqualification on conviction for certain offences**. 5[
(1) A person convicted of an offence punishable under--
(a) section 153A (offence of promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony) or section 171E (offence of bribery) or section 171F (offence of undue influence or personation at an election) or sub-section (1) or sub-section (2) of section 376 or section 376A or section 376B or section 376C or section 376D (offences relating to rape) or section 498A (offence of cruelty towards a woman by husband or relative of a husband) or sub-section (2) or sub-section (3) of section 505 (offence of making statement creating or promoting enmity, hatred or ill-will between classes or offence relating to such statement in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies) of the Indian Penal Code; or

(b) the Protection of Civil Rights Act, 1955 which provides for punishment for the preaching and practice of "untouchability", and for the enforcement of any disability arising therefrom; or
(c) section 11 (offence of importing or exporting prohibited goods) of the Customs Act, 1962 (52 of 1962); or
(d) sections 10 to 12 (offence of being a member of an association declared unlawful, offence relating to dealing with funds of an unlawful association or offence relating to contravention of an order made in respect of a notified place) of the Unlawful Activities (Prevention) Act, 1967 (37 of 1967); or
(e) the Foreign Exchange (Regulation) Act, 1973 (76 of 1973); or
(f) the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985); or
(g) section 3 (offence of committing terrorist acts) or section 4 (offence of committing disruptive activities) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987); or
(h) section 7 (offence of contravention of the provisions of sections 3 to 6) of the Religious Institutions (Prevention of Misuse) Act, 1988 (41 of 1988); or
(i) section 125 (offence of promoting enmity between classes in connection with the election) or section 135 (offence of removal of ballot papers from polling stations) or section 135A (offence of booth capturing) of clause (a) of sub-section (2) of section 136 (offence of fraudulently defacing or fraudulently destroying any nomination paper) of this Act; [or]
(j) 6[section 6 (offence of conversion of a place of worship) of the Places of Worship (Special Provisions) Act, 1991,"] [or] 7
(k) 7[section 2 (offence of insulting the Indian National Flag or the Constitution of India) or section 3 (offence of preventing singing of National Anthem) of the Prevention of Insults to National Honour Act, 1971 (69 of 1971);] shall be disqualified for a period of six years from the date of such conviction.

(2) A person convicted for the contravention of--
(a) any law providing for the prevention of hoarding or profiteering; or
(b) any law relating to the adulteration of food or drugs; or
(c) any provisions of the Dowry Prohibition Act, 1961 (28 of 1961); or
(d) any provisions of the Commission of Sati (Prevention) Act, 1987 (3 of 1988), and sentenced to imprisonment for not less than six months, shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

(3) A person convicted of any offence and sentenced to imprisonment for not less than two years [other than any offence referred to in sub-section (1) or sub-section (2)] shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.]

(4) Notwithstanding anything in sub-section (1), sub-section (2), or sub-section (3)] a disqualification under either sub-section shall not, in the case of a person who on the date of the conviction is a member of Parliament or the Legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court.

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1. Subs. by Act 47 of 1966, s. 20. for Chapter II (w.e.f. 14-12-1966). Previous ss. 10 and 11 were rep. by Act 103 of 1956, s. 66.
2. Subs. by Act 35 of 1969, s. 5. for certain words.
3. Ins. by Act 106 of 1976, s. 21, (w.e.f. 19-11-1976).
4. Ins. by Act 3 of 1988, s. 19 (w.e.f. 21-3-1988).
5. Subs. and renumbered by Act 1 of 1989 s. 4 (w.e.f. 15-3-1989).
6. Ins. by Act 42 of 1991, s. 8 (w.e.f. 18-9-1991).
7. Added and Ins. by Act 21 of 1996, s. 3 (w.e.f. 1-8-1996).

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disqualifications for membership of Parliament and State Legislatures on conviction for certain offences.

1. Sub-section (1) of Section 8 provides disqualification for a person who had committed and convicted for the offences mentioned in this section for 6 years from the date of conviction.
2. Sub-section (2) offences mentioned in this subsection, if attracted, the sentence of imprisonment for not less than 6 months, then person shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of 6 years since his release.
3. Sub-section (3) provides offences other than specified in subsection (1) and (2), for which sentence is more than 2 years, person convicted for such offence shall be disqualified from the date of conviction and shall be continue to be disqualified for further period of 6 years since his release.
4. Sub-section (4) provides that disqualification take into effect in case of Member of Parliament (MP) or State Legislature until 3 months elapsed from date of conviction or if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court.

Issues and Suggested Reforms under Section 8 of RPA

- Section 8 of RPA needs to be amended at the earliest. Offences mentioned in sub-section (1) of Section 8 except the offence of rape, provides punishment of less than 3 years in Indian Penal Code, 1860. Proposed candidates are mostly committing offences like extortion, kidnapping, murder. Whether they entitled to hold position in any government? In 1950 politicians were considered as pioneers of good governance. That was the moral content of then society. So the legislatures of that time not even think that in future politics will be criminalized with this motion; this could be the reason of insertion of specific offences in Section 8(1).

- Disqualification of candidate should be attracted for every offence committed by the candidate, or otherwise to fulfill the objectives of the Section 8 of RPA, the punishment provided in related statues (e.g., Indian Penal Code, 1860) mentioned in Section 8 should be enhanced.

- In this section there is need to include other grave offences of person, property and election etc., with enhanced punishment.

For that in RPA one specific schedule should be provided for enhanced punishment for the offences referred in Section 8 of RPA on the ground of public interest to disqualify the proposed candidate for election or member of State Legislature or Parliament.

- The Election Commission of 2004[6] proposed on the issue that, disqualification for criminal offences provided for in Section 8 of RPA, applies to a person (disqualified from contesting election) only on the conviction by the court of law. It means this provision sets in motion after the decision of court. There have been several instances of candidates charged with serious and heinous crimes like murder, rape, dacoity etc. contesting elections. As a result, in mean time during pending of the trial, the person may contest and be elected with majority. This may leads to undesirable and unethical situation i.e., a person who is a law breaker becomes the law maker.

  Therefore, the Commission proposed that the law should be amended to provide that any person who is accused of an offence punishable by imprisonment for 5 years or more should be disqualified from contesting election, even when the trial is pending in which charges have been framed against him by a competent court. But this bar on a candidate might be used against the innocent persons; for that there is need of establishment of special court of Election Commission to determine the qualification of candidate who has criminal antecedents, and this court will determine the cases summarily which will not affect the actual cases of court. There may be possibility that cases of false charges would be raised. Such situations can be dealt by imposing time frame on the cases filed prior to 6 months of election alone would lead to disqualification, and not otherwise.

- Sub-section (4) of Section 8 says that disqualification takes into effect in case of MP or member State Legislature until 3 months elapsed from date of conviction, or if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court.

  This privilege of 3 months for attraction of disqualification for MP is nothing but an instance of destruction of basic tenets of equality. It is arbitrariness once the lower court convicted the person who is MP or member of State Legislature that order

[6] REPORT OF ELECTION COMMISSION OF INDIA, 2004.

should be final one to attract the disqualification. Law should be effective from the date of decision of conviction of MP. If law allows enjoying all the privileges to MP during pendency of appeal in higher court then it would be like issuance of license for them to commit crime and be there in the power and exploits the democratic principles of the system. This convicted clause should be amended to the effect that: "Disqualification takes into effect in case of MP or member of State Legislature from the date of decision of the court decided the conviction, though the appeal or application for revision is brought in respect of the conviction or the sentence in higher court, the conviction order should be treated as final for disqualification and such person shall cease to be MP or member of State Legislature".

- From the side of legislatures there has been half-hearted attempt made because ultimately legislative or law making power in relation with election recognized from Parliament or Legislatures of States. Political parties they use these *dadas* and *goondas* in elections so that they will secure some seats in the Parliament or in State Legislatures. This should mandated to each political party that, if any political party gives ticket for election to the person charged with criminal case such person will disqualify from contesting election, and further such party should be derecognized by the Election Commission of India. Such power should be given to the Election Commission. But time and again it was realized that the intention of these legislatures is to protect their interests and not the democracy.

- Criminal antecedent in Sections 33A and 33B of RPA: In relation with the criminal antecedents of the candidates the Supreme Court in *Union of India v. Association for Democratic Rights*[7] observed that it is right of voters to access the information guaranteed in Article 19(1)(a) is equally vital as like right of citizens for the same. This was considered as dynamic judgment delivered by the Supreme Court which is having the authority of law under Article 141 of the Constitution. But the ordinance issued by the President which is known as the Representation of the People (Amendment) Ordinance, 2000 made amendment in RPA which can be seen in the form of Sections 33A and 33B.

  In this Ordinance Section 33A provides for right to information which is recognized as a fundamental right of every citizen to know the past antecedents their proposed candidate. This section obligates to furnish the information as to whether–(1) he is accused of any offence punishable with imprisonment for 2 years

[7] A.I.R. 2003 S.C. 2363.

or more in a pending case in which a charge has been framed by the court of competent jurisdiction, (2) he has been convicted of an offence and sentenced to imprisonment for 1 year or more.

The Ordinance then adds the following section as Section 33B:

> "Notwithstanding anything contained in any judgment, decree or order of any court or any direction, order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under this Act or the rules made there under."

This provision is an illustration of fraud committed by the legislature itself, under the umbrella of the right to privacy. It nullifies the effect of Section 33A which is unconstitutional and out of legislative competence. A person who is going to hold public office cannot be allowed to undisclosed the information required for public purpose. This Ordinance or Amendment was beyond the legislative competence.

Peoples Union for Civil Liberties v. Union of India[8] emphasized that to disclose the antecedents is the necessity of the day because of statutory provisions of controlling wide spread corrupt practices as repeatedly pointed out by all concerned including various reports of Law Commission and other committees. The Supreme Court had not made any radical suggestion but even these suggestions are not acceptable to the politicians. It means that Section 33B takes away the judicial competence. This shows that there exists a wide gulf between preaching and practice in today's political arena. This section directly nullifies Article 19(1)(a) of the Constitution. It is undemocratic and directly strikes at the peoples' right to know–a democratic right.[9] This decision will be known as the milestone for the process of reforms in election. This judicial order nullifies the legislative order of Section 33B of RPA.

[8] A.I.R. 2003 S.C. 2408.

[9] M.P. JAIN, INDIAN CONSTITUTIONAL LAW 896 (Butterworths and Wadhawa, reprint 2012).

FOREIGN DIRECT INVESTMENT IN INDIAN RETAIL: A CLOSE LOOK

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Dr. Dipa Dube***

Introduction

It can be argued that nothing new settles easily into a set pattern of life till the physical manifestation of its beneficial output becomes an accepted practice among the mass. India we believe is no exception to it. One such issue which has drawn a lot of debate as well as accentuated wide hue and cry, cutting across various sections of the society is Foreign Direct Investment (hereinafter FDI) in retail sector. FDI in Indian retail is the outcome of the reform initiative which had been implemented way back in 1991, when India embraced liberalization and globalization as part of its economic strategy for the free flow of trade and business in Indian market for a global transaction. India's huge population and rising consumer taste may be a possible reason for the rising global focus in floating business in a market of ample avenues. The Prime Minister of India, Dr. Manmohan Singh views FDI in Indian retail as "the Second Reform" and describes reform as an ongoing process.[1] However the veteran social activist and champion leader of "India Against Corruption", Shri. Anna Hazare believes that FDI in Indian retail will make Indians slaves in their own country.[2] The two contrasting and counter attacking views if taken as two facets of FDI in Indian retail, then a step in this regard in resolving this issue is the practical necessity of time. Up till now the matter on FDI in Indian retail has extended a long debate in the electronic media as well as in the political circle. It appears like "Hamlet's riddle" i.e., "to be or not to be" which can be viewed as a matter of challenge and opportunity too.

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1 Legal Correspondent, *Reform is a Continuous Process: PM*, THE HINDU, Sept. 30, 2012, at 1.

2 *Available at* http://timesofindia.indiatimes.com/india/FDI-in-retail-will-enslave-India-says-Anna-Hazare/articleshow/10933264.cms.

The research finding suggests FDI in organized retail a threat to the majority interest. The much sought benefits like profit to farmer and consumer is an imaginative speculation and it will not concur with real life experience. The difficulties which will foil the desired interest are restriction in purchasing, predatory pricing and evil business practice. The people in India have no veto power like in United States of America (U.S./U.S.A.), in determining the fate of the big retailers. India's benefit to a great extent is related to the infrastructural development which can be supplemented by the back end infrastructural growth. It is acknowledged that the research limitation is based on the secondary data. Any kind of ambiguity automatically creates scope for future research. Finally, we suggest that the government should take necessary step in restoring the life and livelihood of the small retailers by imparting loan and in checking the malafide trick of the big players so that they cannot intrude the vicinity of the small sellers and *kirana* stores. Even though organized retail is targeted to the foreign players still the native companies running retail business on single entrepreneurship should be regimented in accordance with law.

Objective

India's present policy on organized retailing shows its obligation and expansion of World Trade Organization (WTO) agreement on FDI. This extension of FDI in retail sector has been viewed as an alternative step to check inflation and to stabilize the economy. By FDI in organized retailing India targets huge capital flow in the country and it will incur substantial growth in revenue in form of tax collection. Indian retail sectors are of two types i.e., organized and un-organized. When 96% retail sectors are un-organized, mere 4% are organized. Thus retailing in organized sector is at its nascent stage. As a part of reformation, FDI in multi-brand retailing in organized sector has been extended up to 51% and for single brand retailing there is no bar. "FDI excludes investment through purchase of shares. FDI can be used as one measure of growing economic globalization."[3] It has been estimated that the benefit of FDI in organized retailing will strengthen the national exchequer and meet the consumer interest. It will also help the farmers who can get good return of their product by selling their stuff to the retail owners. So it is assumed that FDI in organized retailing will promote the national economy, cater the consumers' interest and value the farmers' labor in fair means of purchase.

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[3] Gourav Bisaria, *Foreign Direct Investment in Retail In India*, 2(1) INTERNATIONAL JOURNAL OF ENGINEERING AND MANAGEMENT RESEARCH 31 (2012).

Table-1 FDI Share in Organized Sector in 5 Countries[4]

Country	Share of Organized Sector (%)
U.S.	85
U.K.	80
Japan	66
Russia	33
India	04

The benefits of FDI in organized retailing can be challenged on various grounds. In India retail sector provides around 35 million engagements which is second largest employment after agriculture.[5] It is feared that the big magnets like Wal-Mart will displace the traditional un-organized small stores called as *kirana* stores by their global experience and competitive approach. It may bring huge un-employment to the small vendors and the middlemen who earn their livelihood in the wide gamut of supply chain circulation in business. "In terms of employment in retail sector around 38% in rural areas and around 47% in urban areas depend on retail trade for their livelihood, which will be affected. 14 *crore* people are directly or indirectly earning from the retail sector and if we associate their family members then this number would reach 40 *crore*."[6] Besides, the competitive advantage of organized FDI retail owners over the small shop-keepers can never be overlooked as they are well equipped in their business skill. They have good access to improved technology and financial mobility. They also know how to facilitate attractive offer and quality service to the consumers. Basing on these added advantages it can be anticipated that the imperial retail business in our country would be at the upper hand to distract the poor and indigent sundry sellers and vendors from the main stream of supply chain middle man ship of retailing to the cavern of grief. The fear of extinction may jeopardize the livelihood of these struggling indigenous sellers. In a world of cut throat competition success to one at the cost of extinction to the other may prove true to the Darwin's Theory of Evolution but it will hold no good if the poor and raucous mass are pressed under the gluttony of reformation.

Developmental initiative in form of reformation brings transformation in the society. The benefits of reformation should address the problems of the most vulnerable and under privileged

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4 ORGANISED_OR_UNORGANISED_RETAIL_FINAL.PDF, *available at* http://zeenews.india.com/business/Special/Organised_or_Unorganised_Retail_Final.pdf.

5 *Id.*

6 *Id.* at 33.

sections who strive for their livelihood. To overcome any crisis we can seek guidance from the time tested wisdom of Gandhiji who sticked to the means than the ends. He advised to focus on small and practicable things which will improve the national economy as well as benefit the poor community. Before instituting any reformative initiative its pros and cons impact should be properly analyzed. So that it's adverse impact can be checked to a great extent. Taking the huge criticism from various sections of society it can be said that a psychological fear has haunted FDI issue like "Adam's forbidden apple" which may dilute the truth. FDI in organized retail sector is believed to check the national crisis of uncontrolled inflation and incur revenue to stabilize the economy, benefit the consumers and farmers but it is also alleged that the middleman in the supply chain mostly small shopkeepers and sundry sellers will be pressed out from the competition as the mammoth retail owners are robust enough to push them out for an un-certain future and loss of livelihood. Therefore we wish to undertake a close study on FDI retail in India. Our comprehensive effort will take all due diligence in finding some remedial measures.

Review of Literature

The literature reviewed on FDI in organized retailing can be categorized into two groups. When some literature focuses on the brighter side of FDI in organized retailing,[7] others speculate the consequence of its adverse impact on the small *kirana stores* and vendors in the supply chain.[8] *Economic Survey 2010-11* shows the brighter perspective of FDI in organized retail enterprise and it attributes technology and modernization as pre-requisite for effective supply management and development. This would be beneficial for the farmers and consumers. Critics favoring FDI in organized retail argue that consumers will get quality stuff of their choice in low price. They reason it out when competition will be wide spread, there will be transparency, choice, variety and trust in consumer service. It will also reduce the marketing monopoly and create a win-win situation for consumers as well as retailers to be truthful and careful in the exchange of quality and service. The farmers will supply their product to the retail store owners and out of this transaction they will harvest good price of their product.[9] FDI in organized retailing will strengthen the national economy in form of huge revenue which can be spent in national welfare. All the benefits of FDI in organized retailing cited by

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7 Keerti Kulkarni et al., *Foreign Direct Investment in Indian Retail Sector: Issues and Implications* 280-283, 3(3) I.J.E.M.S. (2012).

8 Sukhpal Singh, *FDI in Retail: Misplaced Expectations and Half-Truths*, XLVI(51) ECONOMIC AND POLITICAL WEEKLY 13-16 (2011).

9 http://www.technopak.com/about%20technopak/Article_of_the_month_jan_2012.pdf.

the critics will redeem the national crisis from inflation and enrich the economy through tax collection and surplus foreign currency. This reformation they believe will bring all kinds of prosperity to the nation. However reformation at the cost of agony and embarrassment of many displaced middlemen vendors and sellers will certainly create further problem and it will dismantle the welfare spirit of a democratic nation.

The apprehension on FDI in organized retailing holds introspection in value judgment as its adverse consequence on the un-organized workforce will break their middlemen ship and employment in the supply chain.[10] It is also anticipated that FDI in retailing will once again capture the imperial hold in our land like the East India Company succeeded in reining India through trade and business.[11] But time is changing and the global scenario of the liberal economy has been expanded to explore the resource and utility of consumer taste by the ample scope of open market and keen competition. In China FDI in retail sector has brought success in retailing business as well as benefit to the consumers. It may be asserted that India's FDI policy will rewrite the success story as it has been experienced in the neighboring state China.

One researcher is so vociferous in greeting FDI in Indian retail that he never fails in saying that it is better in doing something than in not doing anything. In his research finding majority people opine in favor of FDI in organized retailing because it will benefit consumers and farmers. However he has overlooked the majority people's apprehension i.e., the colossus impact of organized FDI on the un-organized retailers' in loss of job and livelihood. It criticizes his own criticism on "some" who oppose FDI in India because it goes against his own research finding.[12]

Table-2 Projected Size of the Organized Retail Industry[13]

Year	Increase in Size (in *crore*)
2008	965
2010	1728
2015	5610
2022	17368

[10] Bisaria, *supra* note 3.

[11] B.B. Salunkhe, *Swot Analysis of Foreign Direct Investment in Indian Retail Sector,* 3(30) I.I.R.R.J. 58-59 (2009).

[12] Bisaria, *supra* note 9.

[13] SKILL GAP ANALYSIS REPORT FOR ORGANISED RETAIL INDUSTRY | REPORT ON HUMAN RESOURCE AND SKILL REQUIREMENTS IN ORGANISED RETAIL SECTOR -ORGANISED-RETAIL.PDF, *available at* http://www.nsdcindia.org/pdf/organised-retail.pdf.

India's present population shares one sixth of the total global population.[14] So there is no doubt that India's huge population has been a big attraction for FDI in retail sector. Besides Indian market attracts the global retailers the most and it is also preferred by them because they face no steep competition.[15] Retail sector in India contributes 13% to Gross Domestic Product (GDP) and shares 6% of the total work force.[16] These facts and congenial environment can be a possible reason to attract the foreign retail players to have their enterprise in India.

We agree with the researcher's prudent argument on China's policy on FDI in retail sector. "China took over 12 years to liberalize its FDI regime, and in stages. It first allowed only 26% FDI in retail in 1992, took another 10 years to raise the limit to 49%, and allowed full foreign ownership in 2004, but only in certain cities."[17] Basing on this report it can be said that China is very cautious in accepting FDI in organized retailing. India, on the other hand, has not sought any strategic public opinion to adopt the same. FDI in retail sector is a matter of national interest but it is regretted that the seriousness of the matter has not been acknowledged by the leaders. China's foreign policy shows a lot of maturity because it has taken substantial care to promote its indigenous and traditional shop keepers and businessmen with top priority before allowing the foreign investors to spread their business. India's move in FDI does not show much promise because our small shopkeepers and vendors are not well equipped to compete with global competitors like Wal-Mart.

Research Questions

Basing on the literature review some research questions can be put forth which we will analyze in the end part of our discussion:

1. Will the reformation in FDI in organized sector bring financial gain to our national economy?
2. Who are going to gain and to what extent?
3. How can the unemployment in the supply chain of business be mitigated?
4. What should be the strategic implementation of FDI in India?
5. What can be a sustainable paradigm between growth and livelihood?

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[14] *Available at* http://defenceforumindia.com/forum/politics-society/30771-indias-population-2012-a.html.

[15] A.T. Kearney, *Growth Opportunities for Global Retailers* (2007), *available at* www.atkearney.com.

[16] Price Water House, *The Benefits of Modern Trade to Transitional Economies*, CII (2008).

[17] Singh, *supra* note 7, at 16.

Method

Research has been made basing on secondary data. This data includes newspaper and journal articles and web materials. The researchers have taken due care in maintaining objectivity and transparency before relying on the importance of the data.

Discussion

1. The Discussion Paper

The discussion paper has laid down some propositions on organized FDI in multi-brand retailing. Its observation suggests FDI will bring improvement in-technology and supply chain management, skilled man power, growth in agricultural production and overall benefit to consumers and farmers. It will also increase the national GDP and create scope for employment. It has been expected that FDI will bring employment opportunity to the rural youths up to 50% and the big foreign retailers will procure 30% food stuff or goods from Small and Medium Enterprises (SMEs) on mandatory basis. This provision shows that FDI will be beneficial to the rural youths in finding jobs when un-employment problem has shattered the village economy to a great extent. However it is feared that the big retailers need skilled man power of business acumen to which the rural youths may not be fit into. The proposition that the big retailers will buy their 30% goods from SMEs is not consistent with WTO rules of Article 3 and Article 11 of the General Agreement on Tariffs and Trade, 1994 (hereinafter GATT). As per the provision under the Trade Related Investment Measures (TRIMs), the retailers cannot be forced to purchase commodity in any specific country. India being a signatory of WTO cannot induce the foreign retailers to purchase the same from the SMEs of its own. Thus, the expected benefits of FDI may not be helpful neither to the rural youths nor the SMEs.

The discussion paper foresees that FDI will benefit both the farmers and consumers. But research finding shows the adverse scenario. "Carrefour was fined in South Korea for unfair business practices, i.e., forcing suppliers over 10 months to cut prices to save 1.737 billion won in 2005. It was also fined $170,000 by the Indonesian Business Competition Authority in 2005 for not sourcing goods from a listed supplier who then went bankrupt, which was considered an unfair competition practice."[18] It is a pity that the Indian super markets procure maximum goods from

[18] *Id.* at 14.

the whole sale markets rather than the product of the farmers.[19] Some researchers have estimated 4% reduction of farmers' income in America in 2005 in comparison to their 20th century earning i.e., 70 cent for every one dollar of sales. It has occurred at the presence of Wal-Mart.[20] Similarly Tesco pays less to the farmers in United Kingdom (U.K.) and due to this farmers of Scotland had no option till they had formed "Fair Deal Food Committee".[21] If it will be the trade practice of the foreign retailers then farmers' profit will be a kind of distant dream for them.

The discussion paper also refers about the successful business of the organized FDI in the countries like Brazil, Argentina, Singapore, Indonesia, and China. In one research observation in Thailand it has been found 14% reduction in the traditional "mom and pop" stores due to the advent of super markets in 4 years time span of FDI permission.[22] It is feared that the global retail players will take no time in vanquishing and displacing the supply chain of the un-organized indigenous sellers who are quite unmatched to sustain their business in a dubious environment. It is also seen that the manufacturers give substantial rebate to the big retailers but keep no transaction with the small retail stores. "If we take examples of 2 soft drinks like Coca-Cola and Pepsi, we will know that wherever they have gone they have killed the domestic products. They did the same in India. Today we don't hear about the brands like Campa Cola. It has vanished from the market."[23] So the threat of the foreign retailers can bring death knell to the small retailers who have no other means of livelihood. Once the competition is over, the foreign players will dictate the market levying high price on the consumers. In this way the consumers are going to be fooled like the farmers in not so distant future. So the entry of foreign retailers will harass the farmers when they get less money for their product. It will also disappoint the consumers when they face the brunt of evil trade practice by the foreign retailers.

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19 S. SINGH & N. SINGHAL, FRESH FOOD RETAIL CHAINS IN INDIA: ORGANISATION AND IMPACTS (Allied 2011).

20 A.K. Tyagi & Mohammad Rizwan, *Critical Review of FDI on Retail Industry in India,* 2(2) I.J.I.R.C.M. (2012).

21 *Id.*

22 MYRIAM VANDER STICHELE, SANNE VAN DER WAL & JORIS OLDENZIEL, WHO REAPS THE FRUIT? CRITICAL ISSUES IN THE FRESH FRUIT AND VEGETABLE CHAIN (Center for Research in Multinational Corporations, June 2006).

23 Bisaria, *supra* note 3, at 34.

2. People's Participation and Veto Power

In U.S. people at the local level enjoy veto power which helps them in preventing the big stores like Wal-Mart. The people's forum in Watertown and Somerville there has been successful in exerting pressure on Wal-Mart from withdrawing its business initiative even though it planned to open stores in both the towns.[24] The people's success not only highlights their community right but also leaves a reminder to the government as well as the big retail stores. In India where government decision is highly centralized and people have least scope to intervene in the governmental action suffer the most. Even the civic society movement waged by Shri. Anna Hazare which has stirred the voice of the nation, has not brought any change in government's decision in framing the *Jan Lokpal* Bill. Thus it is futile to hope that government will delegate any power to people which would ascertain their interest.

3. Predatory Pricing and Competition Law

Section 4 of the Competition (Amendment) Bill, 2007 restricts the abuse of monopoly in business. The fear of un-fair trade practice by the foreign retail players is an open possibility which may exterminate the un-organized vendors and sellers in a market of competition. Predatory pricing is one such dangerous thing which puts tremendous pressure on the small sellers. The big retailers initially sell their stuff in rock bottom price to attract the customers and to hold their rein in the competition. Selling things less than purchasing price is a capricious business trick which tramples the economy of the small sellers in the political game of business waged by the big players. Another threat is the policy of restriction. The big players while dealing with the farmers put a condition that they will purchase all the stuff from them and the farmers in the mutual deal cannot sell their product to any other middle man. This kind of informal agreement restricts the scope of the unorganized sellers in availing the stuff from the producer. "To prove dominance of a corporate retailer, particularly multi-product retailer, would not be simple because corporate retailers deal with many products and many geographical markets. Their dominance in one geographical market may be used to enter new markets, and to do so they may use a combination of predatory pricing and high

[24] Garga Chatterjee, *Let Grass Roots Decide on Walmart,* THE HINDU, Oct. 12, 2012, at 6.

promotional expenditure."[25] Therefore in retail business it is very difficult to check such type unfair trade practices.

4. 90th Standing Committee Report

The 90th Standing Committee's report on organized multi-brand FDI retail has raised deep concern for the poor sellers and vendors and along with this it has suggested for setting up of a Retail Regulatory Authority. The Committee going deep into the anguish ridden and uncertain livelihood of the indigent sellers fervently realizes that: "[I]n a country with huge numbers of people and high level of poverty, the existing model of retailing is most appropriate in terms of economic viability. Unorganized retail is a self-organized industry, having low capital input and high levels of decentralization. The Committee, therefore, recommends that the government should ensure that some in-built policy must be established to relocate or re-employ the people who are dislocated due to opening up of big malls in the vicinity of their shops". Besides the Committee has cited that: "[T]here is a compelling need to prepare a legal and regulatory framework and enforcement mechanism for the same, that would ensure that the large retailers are not able to displace the small retailers, by unfair means".

To uphold justice for the lowly indigenous businessmen the Committee recommends: "[F]or setting up of a Retail Regulatory Authority, to look into the problems and act as a whistle blower, in case of anti-competitive behavior and abuse of dominance. Urban planning, zoning laws and environmental laws in urban areas should be used to limit the multiplication of malls and corporate retailers, by creating transparent criteria for licenses, that are linked to the density of population and the stage of existing competition in retail in the zone. The regulatory mechanism should be strengthened and be made more democratic, by including the representatives of farmers also". The Committee has also suggested for a National Shopping Mall Regulation Act which would regulate the entire retail sector. All these provisions placed by the Committee in its report highlights an anticipated threat to the life and livelihood of traditional shop keepers.

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[25] Anuradha Kalhan & Martin Franz, *Regulation of Retail: Comparative Experience,* KLIV (32) ECONOMIC AND POLITICAL WEEKLY 58 (2009).

5. Silver Linings in FDI

In spite of the apprehension and criticism FDI can be perceived as a catalyst and problem shooter in catering the basic need of the nation. It is believed that FDI in Indian organized retail will improve 50% back end infrastructure. Here back end infrastructure does not include purchase of land and rental expenditure for the establishment of the big retailers. The reformative vision to impart the supply chain for the beneficiaries has some advantage but it can only be feasible when there would be proper development in infrastructure facilities like road, transport, cold storage etc., to check any kind of wastage of the food stuff. One thing which has disappointed the farmers is continuous devaluation of their food grain and loss of harvest due to draught and agriculture related calamities. The most shocking thing is that in some cases being over burdened with the loan and loss of production they opt for committing suicide. It is believed that the back end infrastructure will help the farmers in preserving their food grains and increase their productivity through sensitization of new technology.

Finding

Basing on the discussion it can be said that FDI in retail sector will certainly bring financial gain to the national exchequer in form of tax collection. This will also improve the national economy. If financial gain is taken into account, then FDI retailing is a welcome step in this regard. Our research finding sees no significant benefit to the farmers and consumers by the present policy on FDI in organized retailing. But this policy will definitely benefit the government and the foreign players in retail business. The fear of unemployment to the small sellers has been cited by the 90th Standing Committee and many of the researchers. We also see similar type of predicament to these vulnerable sections of the society because the present policy has not addressed properly how to re-settle the 4 *crore* population from un-organized retail sector who are the main contributor in the supply chain of business. The unemployment problem of the small retailers can be mitigated by proper regulation of completion and labor law. The small retailers should be given financial assistance on regular basis for their life and livelihood. Forcing someone to live in hunger goes against the very spirit of Article 21 of the Constitution of India, 1950.

The strategic implementation of FDI in organized retail needs collective participation of all the stake holders in determining the future course of action along with expert opinion which can resolve the present crisis. In this context a well-documented law is so much

required to check and punish the perpetrator and help the victims in business and competition. Growth is a statistical report and it is related to the improvement in the standard of living of the people. In a country like India the growth curve has not yet been able to bring any parity between poor and rich. Thus a sustainable paradigm lies in facilitating the minimum means of livelihood to the under privileged sellers whose life is in great risk due to the entry of the foreign players in organized retail. Therefore we prefer livelihood of the unorganized sellers than growth because by it a sustainable paradigm can be developed. It is also part of the United Progressive Alliance (UPA) election agenda which they should never fail to fulfil.

Conclusion

Our research finds FDI in organized retail a threat to the majority interest. The much sought benefits like profit to farmer and consumer is an imaginative speculation which will not concur with real life experience. The hindrances which will foil the desired interest are restriction in purchasing, predatory pricing and evil business practice. It will be very difficult to check the dominance of the big retailers in retail business. The people in India have no veto power like U.S., in determining the fate of the big retailers. The success story of U.S. opens scope for local people to take part in the decision making process so that the big players will not overlook the community strength. India's benefit to a great extent is related to the infrastructural development which can be supplemented by the back end infrastructural growth. It is a shining vision of FDI. We acknowledge our research limitation as it is based on the secondary data. Any kind of ambiguity automatically creates scope for future research. So we leave the rest for the future researcher to extend the work. Finally, we suggest that the government should take necessary steps in restoring the life and livelihood of the small retailers i.e., by imparting loan and in checking the malafide trick of the big players so that they cannot intrude the vicinity of the small sellers and *kirana* stores. Even though organized retail is targeted to the foreign players still the native companies running retail business on single entrepreneurship should be regimented in accordance with law.

EUTHANASIA-AN END TO TERMINAL SUFFERING: A MEDICO-LEGAL PERSPECTIVE

Ms. Kavita Rai *

Introduction

The essence of human life is to be able to live a dignified life; but if prevailing laws force us to live in intense pain and humiliation, they must be changed. Medical science and technology have made great advances in recent years. The medical profession today has more power over life and death than they would choose to have. They have power to prolong life where life seems to have lost its meaning and have power to terminate life without suffering. But none has got the right to prolong the life of one who is suffering, and has decided without any undue pressure that he would like to be put to rest. Obviously legalization of euthanasia should not include anyone aspiring to end his/her life at the flimsiest of excuses; but a patient should be allowed to choose when he has suffered enough, and the life has become one of unbearable pain and misery.

While arriving at the proper meaning and content of the right to life, the attempt of the court should always be to expand the reach and ambit of the fundamental right rather than to attenuate its meaning and content. A constitutional provision must be construed, not in a narrow and constricted sense, but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that the constitutional provision does not get atrophied or fossilized but remains flexible enough to meet the newly emerging problems and challenges. The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit, so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person.[1]

The right to life enshrined in Article 21 of the Constitution of India, 1950 cannot be restricted to mere animal existence. It means something much more than just physical survival. Every limb or faculty through which life is enjoyed is thus protected by Article 21

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1 [527 C-D, 528 A-C] Weems v. U.S., 54 LAWYERS EDITION 801.

and a fortiori; this would include the faculties of thinking and feeling.[2]

Every person is entitled to a quality of life consistent with his human personality. The right to live with human dignity is the fundamental right of every Indian citizen. Life is not mere living, but living in health. Health is not the absence of illness but a glowing vitality. The right to life including the right to live with human dignity would mean the existence of such a right up to the end of natural life. This also includes the right to a dignified life up to the point of death including a dignified procedure of death. In other words, this may include the right of a dying man to also die with dignity when his life is ebbing out.

An English writer, H. Romilly Fedden observed:

> "It seems a monstrous procedure to inflict further suffering on even a single individual who has already found life so unbearable, his chances of life so slender, that he has been willing to face pain and death in order to cease his living. That those for whom life is altogether bitter should be subjected to further bitterness and degradation seems perverse legislation."

In such circumstances where the state has perennially failed to discharge its obligation and we the people of India are unable to avail medical facilities. The parliament should think for legalizing euthanasia by coming up with proper measures that if a person, afflicted with terminal disease, should be given the right to refuse being put on life support system or to be administered with some medication to relieve him form intractable pain and suffering forever, after medical experts declare that he or she has reached a point of no return. In the present era, when the medical advancement has been able to control the conception and birth of child as per the ease of parents then why not trust be embodied in the same fraternity to do the best as per the patients wish at the end of life when it has lost its vitality.

Meaning of Euthanasia

The term "euthanasia" comes from two ancient Greek words: "eu" means "good", and "thantos" means "death"; so euthanasia means good death. It is an act or practice of ending the life of an individual suffering from a terminal illness or in an incurable condition by injection or by suspending extra ordinary medical treatment in order

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[2] Francis Coralie Mullin v. The Administrator, Union Territory of Delhi and Others, 1981 A.I.R. 746, 1981 S.C.R. (2) 516.

to free him of intolerable pain or from terminal illness. Euthanasia is defined as an intentional killing by an act or omission of person whose life is felt is not to be worth living. It is also known as "mercy killing" which is an act where the individual who, is in an irremediable condition or has no chances of survival as he is suffering from painful life, ends his life in a painless manner. It is a gentle, easy and painless death. It implies the procuring of an individual's death, so as to avoid or end pain or suffering, especially of individuals suffering from incurable diseases. Oxford dictionary defines it as the painless killing of a person who has an incurable disease or who is in an irreversible coma. Thus it can be said that euthanasia is the deliberate and intentional killing of a human being by a direct action, such as lethal injection, or by the failure to perform even the most basic medical care or by withdrawing life support system in order to release that human being from painful life. It is basically to bring about the death of a terminally ill patient or a disabled. It is resorted to so that the last days of a patient who has been suffering from such an illness which is terminal in nature or which has disabled him can peacefully end up his life and which can also prove to be less painful for him. Thus the basic intention behind euthanasia is to ensure a less painful death to a person who is in any case going to die after a long period of suffering. Euthanasia is practiced so that a person can live as well as die with dignity. In brief, it means putting a person to painless death in case of incurable diseases or when life become purpose less or hopeless as a result of mental or physical handicap.

Types of Euthanasia

As euthanasia is a complex matter there are many different types of euthanasia. Euthanasia may be classified according to consent into 3 types:

1. **Voluntary euthanasia**-when the person who is killed has requested to be killed.
2. **Non-voluntary euthanasia**-when the person who is killed made no request and gave no consent. In other words, it is done when the person is unable to communicate his wishes, being in coma.
3. **Involuntary euthanasia**-euthanasia conducted against the will of the patient is termed involuntary euthanasia.

There is a debate within the medical and bioethics literature on whether or not the non-voluntary or involuntary killing of persons can be regarded as euthanasia, irrespective of consent. Beauchamp, Davidson and Wreen are of the opinion that the consent on the part of the patient is not considered to be one of the criteria. But others opine that consent is essential. The European Association of Palliative

Care (EPAC) Ethics Task Force, 2003 came forward with an unambiguous statement that medical killing of a person without the consent of the person, whether non-voluntary (where the person is unable to give consent) or involuntary (against the will of the person) is not euthanasia; it is murder. Hence, euthanasia can be voluntary only. Euthanasia can be also divided into 2 types according to means of death.

1. **Active euthanasia-**it is also known as "positive euthanasia" or "aggressive euthanasia". It refers to causing intentional death of a human being by direct intervention, viz., by giving lethal dose of a drug or by giving a lethal injection. Active euthanasia is usually a quicker means of causing death.
2. **Passive euthanasia**-it is also known as "negative euthanasia" or "non-aggressive euthanasia". It is intentionally causing death by not providing essential, necessary and ordinary care or food and water. It implies to discontinuing, withdrawing or removing artificial life support system. Passive euthanasia is usually slower and more uncomfortable than active. Most forms of voluntary, passive and some instance of non-voluntary, passive euthanasia are legal.

There is no euthanasia unless the death is intentionally caused by what was done or not done. Thus, some medical actions often leveled as passive euthanasia are no form of euthanasia, since intention to take life is lacking. These acts include not commencing treatment that would not provide a benefit to the patient, withdrawing treatment that has been shown to be ineffective, too. Active euthanasia is taking specific steps to cause the patient's death, such as injecting the patient with some lethal substance, e.g., sodium pentothal which causes a person deep sleep in a few seconds, and the person instantaneously and painlessly dies in this deep sleep.

An important idea behind this distinction is that in passive euthanasia the doctors are not actively killing anyone; they are simply not saving him. While we usually applaud someone who saves another person's life, we do not normally condemn someone for failing to do so.

Thus, proponents of euthanasia say that while we can debate whether active euthanasia should be legal, there can be no debate about passive euthanasia. You cannot prosecute someone for failing to save a life which has become burdensome or is unwanted, and the giving of high doses of pain-killers that may endanger life, when they have been shown to be necessary. All those are part of good medical practice, endorsed by law, when they are properly carried out. At the heart of this distinction lies a theoretical question. Why is it that a

doctor who gives his patient a lethal injection which kills him commits an unlawful act and indeed is guilty of murder, whereas a doctor, who by discontinuing life support, allows his patient to die, may not act unlawfully and will not do so, if he commits no breach of duty to his patient? Professor Glanville Williams has suggested that the reason is that what the doctor does when he switches off a life support machine 'is in substance not an act but an omission to struggle', and that 'the omission is not a breach of duty by the doctor because he is not obliged to continue in a hopeless case'.[3]

Difference between Suicide and Euthanasia

There is a conceptual distinction between suicide and euthanasia. In a suicide a man voluntarily kills himself by stabbing, poisoning or by any other way. No doubt, in suicide one intentionally attempts to take his life. It is an act or instance of intentionally killing oneself mostly due to depression or various reasons such as frustration in love, failure in examinations or in getting a good job etc. On the other hand, in euthanasia there is an action of some other person to bring to an end the life of a third person. In euthanasia, a third person is either actively or passively involved i.e., he aids or abets the killing of another person. Mercy killing is not suicide and an attempt at mercy killing is not covered by the provisions of Section 309 of the Indian Penal Code, 1860 (I.P.C.).[4]

Euthanasia and Physician-Assisted Suicide

Some people mistakenly believe "physician-assisted suicide" and "euthanasia" are the same, and use the terms interchangeably. While the terms are arguably related by subject matter, the two actions are different and the distinctions are significant.

Physician-assisted suicide involves a medical doctor who intentionally provides a patient with the means to kill him or herself, usually by an overdose of prescription medication. Assisting in a suicide is not necessarily an action limited to physicians. The term "assisted suicide" applies if a layperson provides the deadly means to the patient.

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3 *See* GLANVILLE WILLIAMS, CRIMINAL LAW 282 (2nd ed., Steven and Sons, London 1983).

4 Naresh Marotrao Sakhre v. Union of India, 1996(1) Bom. C.R. 92, 1995 Crim.L.J. 96.

Euthanasia and Code of Medical Ethics

Over the past few decades a number of philosophers concerned with medical ethics have found it increasingly difficult to justify the blanket exclusion of taking life. Harris, in his influential work on medical ethics[5] talks of killing as being a caring thing to do (at least in some cases). Health care professionals have an inherent ethical delegation to respect the sanctity of life and to provide relief from suffering. Beneficence, autonomy and justice are accepted moral principles governing the behaviour of health care professionals within society. Technological and medical advances have created a conflict between application of these moral principles and use of certain types of medical treatment. Two of the cardinal principles of medical ethics are patient autonomy and beneficence.

1. **Autonomy**-means the right to self-determination, where the informed patient has a right to choose the manner of his treatment. To be autonomous the patient should be competent to make decisions and choices. In the event that he is incompetent to make choices, his wishes expressed in advance in the form of a living will, or the wishes of surrogates acting on his behalf ("substituted judgment") are to be respected. The surrogate is expected to represent what the patient may have decided had he/she been competent, or to act in the patient's best interest. It is expected that a surrogate acting in the patient's best interest follows a course of action because it is best for the patient, and is not influenced by personal convictions, motives or other considerations.

2. **Beneficence**-is acting in what is (or judged to be) in patient's best interest. Acting in the patient's best interest means following a course of action that is best for the patient, and is not influenced by personal convictions, motives or other considerations. In some cases, the doctor's expanded goals may include allowing the natural dying process (neither hastening nor delaying death, but 'letting nature take its course'), thus avoiding or reducing the sufferings of the patient and his family, and providing emotional support. This is not to be confused with euthanasia, which involves the doctor's deliberate and intentional act through administering a lethal injection to end the life of the patient.

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5 J. HARRIS, THE VALUE OF LIFE (1985).

Hippocratic Oath and International Code of Medical Ethics

Hippocratic Oath (*horkos*) and the International Code of Medical Ethics pose ethical contradiction for doctors. According to the Oath and the ethics, the doctor is to relieve the pain of his patient on one hand, and protect and prolong his life on the other. First is in favour of euthanasia and second counters the doctrine.

The principle of self-determination applies when a patient of sound mind requires that life support should be discontinued. The same principle applies where a patient's consent has been expressed at an earlier date before he became unconscious or otherwise incapable of communicating it as by a living will or by giving written authority to doctors in anticipation of his incompetent situation.

If the doctor acts on such consent there is no question of the patient committing suicide or of the doctor having aided or abetted him in doing so. It is simply that the patient, as he is entitled to do, declines to consent to treatment which might or would have the effect of prolonging his life and the doctor has in accordance with his duties complied with the patient's wishes. "Whilst this court has held that there is no right to die (suicide) under Article 21 of the Constitution and attempt to suicide is a crime *vide* Section 309 I.P.C., the court has held that the right to life includes the right to live with human dignity, and in the case of a dying person who is terminally ill or in a permanent vegetative state he may be permitted to terminate it by a premature extinction of his life in these circumstances and it is not a crime *vide* Gian Kaur's case."[6]

"If there is no hope of recovery for a patient, it is only humane to allow him to put an end to his pain and agony in a dignified manner," said Dr. B.K. Rao, Chairman of Sir Ganga Ram Hospital in New Delhi, "If it is established that the treatment is proving to be futile, euthanasia is a practical option for lessening the misery of patients."

In United Kingdom (U.K.), the Mental Capacity Act, 2005 now makes provision relating to persons who lack capacity and to determine what is in their best interests and the power to make declaration by a special Court of Protection as to the lawfulness of any act done in relation to a patient.

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[6] Aruna Ramchandra Shanbaug v. Union of India and Ors., Writ Petition (Crim.) No. 115 of 2009; (2011) 4 S.C.C 454.

Ethics in Patient Care Delivery

Two diverse ethical theories affect attitudes towards health care delivery and services:

- Utilitarian/Consequentiality view
- Formalist/Deontological view.

The utilitarian view point, expressed by John Stuart Mill[7] sees ethical decisions as those that produce the greatest positive balance of value over negative balance of value for all persons affected. The deontological view point of ethics, which was expressed by Immanuel Kant[8] states some acts are wrong and others are right independent of their consequence. American society highly values tolerance of conflicting moral values. It also values the right of the individual to control or govern himself or herself according to his or her own reasoning and ethical values.

In a *Discussion Paper on Treatment of Patients in Persistent Vegetative State* issued in September, 1992 by the Medical Ethics Committee of the British Medical Association certain safeguards were mentioned which should be observed before constituting life support for such patients:

> "(1) Every effort should be made at rehabilitation for at least six months after the injury;
> (2) The diagnosis of irreversible Persistent Vegetative State (PVS) should not be considered confirmed until at least 12 months after the injury, with the effect that any decision to withhold life prolonging treatment will be delayed for that period;
> (3) The diagnosis should be agreed by 2 other independent doctors; and
> (4) Generally, the wishes of the patient's immediate family will be given great weight."

Law and Euthanasia

Active euthanasia is a crime all over the world except where permitted by legislation. In India active euthanasia is illegal and a crime under Section 302 or at least Section 304 I.P.C. Physician-assisted suicide is a crime under Section 306 I.P.C. (abetment to suicide). Section 87 of I.P.C. lays down that consent cannot be pleaded as defense in a case where the consent is given to cause death or grievous hurt. With

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7 J.S. MILL, LIBERTY (W.W. Norton and Company, INC., New York, 1975).
8 C.J. FRIEDRICK, THE PHILOSOPHY OF KANT: INMANUAL KANTS MORAL AND POLITICAL WRITINGS (N.Y. 1977).

regard to death, the restriction is absolute and unconditional though consent may have the effect of reducing the gravity of offence.

In India, suicide per se is not a crime, but attempted suicide is an offence under Section 309 of I.P.C. Exception 5 of Section 300 of I.P.C. protects a person who causes the death of another above the age of 18 with his/her consent. However this section has a limited scope. It only reduces the gravity of the offence and the person charged is made liable for culpable homicide not amounting to murder under Section 304 of I.P.C. Cases of non-voluntary and involuntary euthanasia would be struck by Proviso 1 to Section 92 of the I.P.C. and thus be rendered illegal.

The question whether Article 21 includes right to die or not first came into consideration in the case *State of Maharashtra v. Maruti Shripathi Dubal*[9]. It was held in this case by the Bombay High Court that "right to life" also includes "right to die" and Section 309 was struck down. The court clearly said that right to die is not unnatural; it is just uncommon and abnormal. Also the court mentioned about many instances in which a person may want to end his life. This was upheld by the Supreme Court in the case *P. Rathinam v. Union of India*[10]. However in the case *Gian Kaur v. State of Punjab*[11] it was held by the 5 judge bench of the Supreme Court that the right to life guaranteed by Article 21 of the Constitution does not include the right to die. The court clearly mentioned that Article 21 only guarantees right to life and personal liberty, and in no case can the right to die be included in it.

A landmark judgment was passed by Justice Markandey Katju and Gyan Sudha Mishra which tends to legalize passive euthanasia. During Aruna's case, the learned judges commented on deletion of the Section 309 of I.P.C. as it has become anachronistic. It was further held in Aruna's case that in case the patient is incompetent person to decide whether life support system should be discontinued, then in such situation the family member or close relatives, or in their absence doctors attending patient can decide in best interest of patient with the bonafide intention. However, such a decision requires approval from the concerned High Court. The Court laid a set of tough guidelines under which passive euthanasia can be legalized through High Court monitored mechanism. The judgement made it clear that passive euthanasia will "only be allowed in cases where the person is in PVS or terminally ill".[12] The apex court while

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9 Cr.L.J. 549 A.I.R. 1987.
10 3 S.C.C. 394, A.I.R. 1994.
11 2 S.C.C. 648, A.I.R. 1996.
12 (2011) 4 S.C.C. 454.

framing the guidelines for passive euthanasia asserted that it would now become the law of the land until parliament enacts a suitable legislation to deal with the issue.

It must be remembered that the 17th Law Commission of India, then headed by Justice M. Jagannadha Rao, in its *196th Report* submitted in April, 2006 titled as *Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners)* had supported and made recommendations for drafting legislation on the passive euthanasia.

Legal Decisions across the Globe: The Airedale Case[13]

In this case the broad issue raised before the House of Lords was-in what circumstances, if ever, can those having a duty to feed an invalid lawfully stop doing so? This was precisely the question raised in the case of Aruna Shanbaug before the Supreme Court of India.[14]

In February, 1993 the British House of Lords determined that it was lawful to withdraw medical treatment and support, including nutrition and hydration from Anthony Bland, a patient in a PVS using the Bolam Principle which states that the decision to provide care should be based on a responsible body of medical opinion and that care is not required when a case is hopeless.[15] The House of Lords stated that the health professionals can act on what they believe is in the best interest of the patient, and thus may start or curtail treatment considered inappropriate. The bland decision, however, is not legally binding in United States of America (U.S.).[16] It would be worthwhile to discuss the landmark cases pertaining to the PVS.

Helga Wanglie[17]: Helga Wanglie was 86 when she broke her hip in December, 1989 after falling on a rug in her Minneapolis home. She was treated and released from a local hospital and moved to a nursing home. In January, 1990 she was readmitted to the hospital and placed on a respirator, due to respiratory complications. Wanglie suffered a heart attack while under the care of this facility. Resuscitation efforts were successful, although she had been deprived of oxygen for several minutes, resulting in severe and irreversible brain damage. She was readmitted to the hospital on May 31, 1990 where she continued to use a respirator and was provided

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13 Airedale N.H.S. Trust v. Bland, (1993)1 All E.R. 821.
14 Aruna Ramachandra Shanbaug v. Union of India, (2011) 4 S.C.C. 454.
15 (1957) 1 W.L.R. 582.
16 Brahamas D. - Persistent Vegetative State. Lancet 1993; 341: 428.
17 *In re* Helga Wanglie, Fourth Judicial District (Dist. Ct., Probate Ct. Div.) PX-91-283, Minnesota, Hennepin County.

food and fluids through a tube implanted into her stomach. After repeated evaluations, she was diagnosed as PVS with the complication of permanent respirator dependency.

Wanglie had left no written record of her wishes in the form of a living will or advance directive, and was no longer in a position to indicate her preferences. Because of her prognosis, the medical staff suggested that the family re-evaluate continuing the extensive care required to prolong her existence. Relatives opposed termination of treatment. Doctors countered that in Wanglie's case, they would have to go beyond the limit of "reasonable care" to maintain her existence.

The matter was referred to court. In a ruling issued on July 1, 1991 Judge rejected the hospital's position and turned over full guardianship to Oliver Wanglie, Helga's 87 year old husband. Helga Wanglie died of multi system organ failure on July 4, 1991.

Karen Ann Quinlan[18]: In 1975, after consuming alcohol and tranquilizers at a party, Quinlan collapsed into an irreversible coma that left her unable to breathe without a respirator or eat without a feeding tube. Her parents asked that she be removed from the respirator, but her doctors objected. The New Jersey Supreme Court case that ruled the case was the first to bring the issue of euthanasia into the public eye. In 1976 the court allowed Quinlan's parents to have the respirator removed. Although Quinlan lived for another 9 years (her parents did not want her feeding tube removed), the case set a precedent for a patient's right to refuse unwanted medical treatment.[19] This case led to the legalization of euthanasia in California.

Nancy Cruzan[20]: Cruzan had gone into an irreversible coma in 1983 after a severe car crash, and her parents wanted the machine that was keeping her alive removed. However, in this case the machine consisted of intravenous feeding tubes that provided Cruzan with hydration and nutrition. Her parents viewed the removal of the machine as the termination of unwanted treatment. However, the State of Missouri argued that to remove the feeding tubes would be to intentionally kill Cruzan through starvation. The Cruzan family appealed this decision to the U.S. Supreme Court, which, in June 1990 issued a decision that recognized the existence of a right to die, but qualified that finding by arguing that it was entirely appropriate for the states to set "reasonable" standards to guide the exercise of

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18 *In re* Quinlan, 70 N.J. 10, 355 A.2d 647(1976).

19 B.D. COLEN, KAREN ANN QUINLAN: DYING IN THE AGE OF ETERNAL LIFE (New York: Nash, 1976).

20 Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990).

that right. The State of Missouri was asking that "clear and convincing evidence" of a patient's wishes be produced before allowing the Cruzans' whishes to be honored. Consequently, the U.S. Supreme Court sided with the state and remanded the case back to Missouri.

Subsequently several of Nancy's friends, doctors came forward to testify before Judge Teel about conversations they had remembered having with Nancy regarding her preferences in matters such as this. On December 14, the Jaspar County Court ruled that there was, indeed, sufficient evidence that Nancy would not wish to be kept alive while hopelessly ill. On December 15 the feeding tube that had sustained Nancy for nearly 8 years was removed, and 11 days later she died.

The 2 most significant cases of the U.S. Supreme Court that addressed the issue whether there was a federal constitutional right to assisted suicide arose from challenges to state laws banning physician-assisted suicide brought by terminally ill patients and their physicians. These were:

Glucksberg's Case[21]: In here the U.S. Supreme Court held that the asserted right to assistance in committing suicide is not a fundamental liberty interest protected by the "due process clause" of the 14th Amendment. The Court observed:

> "The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection. Indeed the two acts are widely and reasonably regarded as quite distinct."

Vacco's Case[22]: In here the U.S. Supreme Court again recognized the distinction between refusing life saving medical treatment and giving lethal medication. The Court disagreed with the view of the 2nd Circuit Federal Court that ending or refusing lifesaving medical treatment is nothing more nor less than assisted suicide. The Court held that: "The distinction between letting a patient die and making that patient die is important, logical, rational, and well established". The Court held that the State of New York could validly ban the latter.

Gonzales Case[23]: On January 17, 2006 the Supreme Court ruled that the 1970 Controlled Substances Act (CSA) does not give the U.S.

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21 Washington v. Glucksberg, 521 U.S. 702 (1997).
22 Vacco v. Quill, 521 U.S. 793 (1997).
23 Gonzales v. Oregon 546 U.S. 243 (2006).

attorney general the authority to prohibit Oregon doctors from prescribing lethal doses of drugs to certain terminally ill patients who want to end their own lives. The court's decision in *Gonzales v. Oregon* resolves a conflict between the state's Death With Dignity Act (DWDA) and the attorney general's interpretation of the federal drug statute. Oregon is currently the only state that has an assisted-suicide law.

Baxter's Case[24]: On December 31, 2009 the Montana Supreme Court issued a landmark ruling in the case of *Baxter v. State of Montana*, upholding the right of terminally ill Montanans to seek aid in dying from their physicians without the fear that the doctors could be criminally prosecuted for assisting them. Montana thus joined Oregon and Washington as the only states recognizing such a right, but it is the only state that has done so through the judicial process rather than by the ballot. The Supreme Court's decision was based upon Montana public policy as embodied in state statutes and court decisions. It stated that while the state's Constitution did not guarantee a right to physician-assisted suicide, there was "nothing in Montana Supreme Court precedent or Montana statutes indicating that physician aid in dying is against public policy".

Conclusion

Regarding euthanasia, at the present juncture, the debate largely revolves around active euthanasia and not passive euthanasia. Euthanasia, both in active and passive form, should be allowed in every society.

> "The objections to legalizing active euthanasia are based on religious principles, professional and ethical aspects and the fear of misuse. But, it cannot be forgotten that it was by overruling similar objections that abortion was legalized and later raised as an ingredient of the right to privacy. It is submitted that just like abortion, the modern societies demand the right to assisted suicide."[25]

It should be legalized owing to the amount of pain an individual goes through due to the fatal disease or disorder for a long period of time. Having a patient suffer endlessly is not giving him a better quality of life. The kind of quality of life is defined by the patient, not the doctor or government. Consequently, when the patient feels he is not getting the quality of life he wants the doctors can insist upon

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[24] *In* Baxter v. Montana, (2009) 224 P.3d 1211, 2009, WL 5155363 (Mont).

[25] Law Commission of India, *Passive Euthanasia-A Relook Report No. 241* (August 2012).

Physician-Assisted Death (PAD). Supporters of active euthanasia contend that since society has acknowledged a patient's right to passive euthanasia (e.g., by legally recognizing refusal of life-sustaining treatment), active euthanasia should similarly be permitted. Court needs to lay reasonable grounds as to why there is a refusal in the first place to grant euthanasia; be it active or passive. When arguing on behalf of legalizing active euthanasia, proponents emphasize circumstances in which a condition has become overwhelmingly burdensome for the patient, pain management for the patient is inadequate, and only death seems capable of bringing relief. In a liberal democracy like India where fundamental rights are given highest significance over any other substantial law, right to die should be treated at par with the fundamentals of the Constitution. It is argued that euthanasia respects the individual's right to self-determination or his right of privacy. Interference with that right can only be justified if it is to protect essential social values, which is not the case where patients suffering unbearably at the end of their lives request euthanasia when no alternatives exist.

The debate regarding euthanasia has going on from very long time but only recently euthanasia gained massive importance. After the landmark judgment passed by the Indian court in Aruna's case it's clear that passive euthanasia is now allowed in India. But still there is some ambiguity with regard to euthanasia. Hence there has been an urgent need to pass legislation on euthanasia. Law on euthanasia is the need of the hour. As has already been pointed out earlier, we also have to keep in mind the limited medical facilities available in India and the number of patients. This question still lies open that who should be provided with those facilities; a terminally ill patient or to the patient who has fair chances of recovery. It has been ruled in the Gian Kaur case that Article 21 of the Constitution of India does not include right to die by the Supreme Court. But one may try to read it as is evident in the rights of privacy, autonomy and self-determination, which is what has been done by the courts of United State and England, which issue was not raised in an earlier case. Thus, considering all aspects, the balance tilts towards the legalization of euthanasia by appropriate legislation.

ANALYZING INDIAN CRIMINAL JUSTICE ADMINISTRATION FROM VICTIMS' PERSPECTIVE

Adv. Amit Bhaskar *

"[P]eople by and large have lost confidence in the criminal justice system..... Victims feel ignored and are crying for attention and justice."[1]

Introduction

The victim constitutes the most important as well as the most aggrieved entity in any criminal justice administration. The emergence of "victimology[2] movement" in the late 1970s and early 1980s in the United States of America[3] (U.S.) is credited for putting at the forefront the plights of the victims by describing them as the "forgotten entity" in the criminal justice administration. The movement in the U.S. was a result of the continuous neglect and ignorance of the rights of the victims in the criminal justice process.

The story holds true for India also. In India, it is widely believed that victims do not have sufficient legal rights and protections, and hence they are considered to be the most neglected entity in the entire criminal justice administration. There is a general feeling that unless justice to the victims is made the focal point of the Indian criminal justice administration, the system is likely to become an institution for perpetuation of injustice against the victims.

Unfortunately in India, after the crime is reported and the criminal motion is brought into force, the entire focus tilts towards the accused, forgetting completely the victims' rights and perspectives. As a result, the victims are sometime termed as "forgotten entity" or "marginalized entity" in the Indian criminal justice administration.

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1 *Justice V.S. Malimath Committee Report on Reform of Criminal Justice.*

2 It is an academic scientific discipline which studies data that describes phenomena and causal relationships related to victimizations. This includes events leading to the victimization, the victim's experience, its aftermath and the actions taken by society in response to these victimizations. Therefore, victimology includes the study of the precursors, vulnerabilities, events, impacts, recoveries, and responses by people, organizations and cultures related to victimizations.

3 ANN WOLBERT BURGES, REGEHR CHERYL & ALBERT R. ROBERTS, VICTIMOLOGY: THEORIES AND APPLICATION 31-32 (Jones and Bartlett Publishers, Massachusetts 2010).

The unresponsive attitude of the criminal justice administration contributes to the plights and pains of the victims in many and varied ways. When we look at the criminal justice administration along with its procedure, we find that it is tilted more and more in favour of the accused at the expense of the rights of the victims. The accused have been provided with protection at all the stages-pre trial, trial and post trial of the criminal justice. As soon as the crime is committed and accused is nabbed, effort is made to provide him with all the rights such as the right to legal representation, right to medical examination, production before the magistrate within 24 hours, right to be informed of the ground of arrest, etc. However, as against this, victim is left at his/her mercy. The fine imposed on the accused form part of the compensation to the victim. However, the fine amount is too inadequate to bring any substantial meaningful changes in the life of the victim. Further, rehabilitation is the most neglected area in the entire criminal justice administration. Since rehabilitation has financial implications, the state generally neglects this dimension. However, such attitude of the state adds to the plights of the victims especially when victims have been subjected to sexual offence, which at times result in loss of employment, unwanted pregnancy, mental trauma, and ostracization from society and several other problems. Hence, for all these reasons, victims continue to be the "marginalized entity" of the Indian criminal justice administration. However, in the last few years, with the growing awareness regarding the plights of the victims, efforts have been made to undo the situation. E.g., some changes have been made in the law and procedure to take care of the victims' rights. One such example is the insertion of Victim Compensation Scheme in Section 357A of the Criminal Procedure Code (Cr.P.C.), 1973 (inserted by Act 5 of 2009).

This paper aims to critically look at the rights which a victim should have in our criminal justice administration, and what are the obstacles to it. The paper looks at the response of the various actors in the criminal justice administration towards the victims' rights. The paper focuses on Indian scenario with special reference to position at international level.

Victims' Rights

Generally, 2 types of rights are recognized of victims in any sound criminal justice administration: First, victim's right to participate in criminal proceedings and secondly, right to seek compensation from the criminal court and/or from the state for injuries suffered.

Global Recognition of the Rights of the Victims

In 1973, a dedicated group of victim advocates and scholars from around the world assembled in Jerusalem, Israel for the 1st international symposia on victimology.[4] This symposium brought into limelight the plights of the victims at international level and it revitalized advocacy for victims' rights. As the pressure grew, the United Nations (U.N.) adopted two General Assembly resolutions dealing with the rights of the victims. The first[5] one is U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 (the Declaration) and the second[6] one is Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violation of International Human Rights Law and International Humanitarian Law, 2006[7]. The Declaration and the Principles are considered to be kind of *Magna Carta* of the rights of the victims. The Declaration recognized the following rights of the victim[8] of the crime:

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4 P.J. John Dussich, *Victimology-Past, Present and Future,* http://www.unafei.or.jp/english/pdf/RS_No70/No70_12VE_Dussich.pdf.

5 http://www.un.org/documents/ga/res/40/a40r034.htm (last visited May 15, 2013).

6 http://www1.umn.edu/humanrts/instree/res60-147.html (last visited May 15, 2013).

7 It provided for following rights of the victim:
- Restitution
- Compensation
- Rehabilitation
- Satisfaction and
- Guarantee of non-repetition.

It further says that victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. It further says that victims shall have following rights:
- Equal and effective access to justice;
- Adequate, effective and prompt reparation for harm suffered;
- Access to relevant information concerning violations and reparation mechanisms.

8 The term "victim" has been defined under the Declaration as: "[P]ersons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within member states, including those laws proscribing criminal abuse of power". It further says: "A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victim-mization".

- Access to justice and fair treatment[9]
- Restitution[10]
- Compensation[11]
- Assistance[12]

Despite Indian judiciary being very clear and forthcoming, the India could not even adopt the 1985 U.N. Declaration on Justice for Victims of Crime and Abuse of Power which turned out to be blue print to as many as 75 nations for creating victim based legislations. As a result, victim continues to be the forgotten entity in the Indian criminal justice administration.

Primary Victimization and Secondary Victimization

Generally, it is said that victims suffers victimization at 2 level- primary and secondary.[13] Primary victimization is the initial interaction between the person who is the victim and the one who caused the harm. In other words, it is the moment that the crime took place. This will result in immediate consequences and impact that victim's overall perception of the world. Some examples of a primary victimization would be rape, robbery or a violent attack. Secondary victimization is when a victim of family or sexualized violence speaks out about the abuse and is re-victimized through the words or actions of service providers, family, "friends" or other members of the community. This can happen in many ways including disbelieving or denying, blaming the victim, criticizing, etc. Sometimes, secondary victimization is much more agonizing than the primary victimization as the victim has to constantly explain to state and private individuals as to how she/he suffers primary victimization which bring backs old horrible memories and sometimes the victim itself is blamed for the victimization especially in sexual offences cases, both inside and outside the court.

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9 It says that victims should be treated with compassion and respect; judicial system should be established that enable victims to seek redress; victims should be informed; victims' views should be presented and considered; victims should be assisted in the process; privacy and safety should be ensured; informal mechanisms for dispute resolution should be available.

10 It says that offenders should be responsible for their behavior and make restitution; governments should consider restitutions; where public officials acting in an official capacity violated national laws, victims should receive restitution from the state.

11 It says that where compensation is not fully available from the offender, the state should endeavour to provide financial compensation.

12 It says that victims should receive material, medical, psychological and social assistance; police, justice, health and social service personnel should receive training or sensitize theme to the needs of victims.

13 HARVEY WALLACE & CLIFF ROBERSON, VICTIMOLOGY: LEGAL, PSYCHOLOGICAL AND SOCIAL PERSPECTIVES, 67 (3rd ed., Pearson Publication 2011).

Victims' Assistance Initiative at International Level

American Initiative

The victimology movement in U.S. started in 1970's and 1980's and became a very powerful movement. Some of the initiatives in the U.S. for the assistance and protection to the victims include the following:

- In 1982, the U.S. President Reagan Commissioned the President's Task Force on Victims of Crime under the direction of Assistant Attorney General Lois Haight Harrington. As a result of the recommendation of the Commission, in 1984, the Victims of Crime Act was passed which established the Crime Victims Fund (CVF). The Fund is supported by money collected through criminal fines, forfeited bail bonds, penalties and special assessments. Victims can apply to this fund to cover crime related medical costs, funeral costs, mental health counseling, or lost wages that are beyond the insurance coverage. Generally, victims are required to report to crime within 3 days and file claim within 2 years. Maximum awards generally range from $10,000 to $25,000.

- In April 2004, the U.S. Congress enacted the Crime Victims' Rights Act. This Act identifies the following rights of the victims:
  - To be reasonably protected from the accused.
  - To have reasonable, accurate and timely notice of proceedings.
  - To not to be excluded from any such public proceedings.
  - To be reasonably heard.
  - To confer with an attorney for the government in the case.
  - To full and timely restitution as provided by law.
  - To be free from unreasonable delay.

  This federal Act was the basis for many states in U.S. to enact state legislation for the victims' protection.

- National Organization for Victim Assistance (NOVA): It was established in 1975 as a national umbrella organization dedicated to expanding current victim services, developing new programmes and supporting passage of victims' rights legislation. In addition to this, NOVA also serves as a conduit of information and technical assistance for local and regional victim assistance programme.

- Victim Information and Notification Everyday (VINE): The VINE program is a national initiative that enables victims of domestic violence or other related crimes to access reliable information about criminal cases and custody information of offenders 24

hours a day via phone, internet or email. Through, VINE, victims can be registered to be notified immediately in the event of their offender's release, escape, and transfer or court appearance.

- Victim Impact Assessment (VIA): In the U.S., one of the most effective tools victims have in the fight against crime is VIA used at the time of sentencing of defendants. Most states allow either oral or written statements, or both, from the victim at the sentence hearing, and require it to be included in the pre-sentence report, given to the judge prior to imposing sentence. Typically, a VIA will contain the following:

  - The physical, financial, psychological or emotional impact of the crime.
  - The harm done to the family relationship by the crime, such as the loss of a parent.
  - The need for restitution.
  - The medical and psychological treatment required by the victims.
  - The victim's viewpoint regarding quantum and nature of sentence to imposed on the offender.

Other Jurisdictions

Canada: In recognition of the U.N. Declaration on the Rights of the Victims, many provincial governments in Canada enacted victims' right legislation, beginning with Manitoba's Justice for Victims of Crime Act, 1986. The Manitoba legislation included provisions such as crime prevention, mediation, and conciliation and reconciliation procedures as means of assisting victims. The State of Ontario enacted Victims' Bill of Rights, 1995 that focuses on crime control. Subsequently, all the other states also passed legislation for victims' assistance.

New Zealand: In 1963, the New Zealand passed the New Zealand Criminal Injuries Compensation Act that resulted in the establishment of a 3 member Crimes Compensation Tribunal with discretionary powers to receive victims' claims and determine appropriate remuneration.

England: In England, the initiative was taken by Marjory Fry, a magistrate, who brought into national attention the inadequacy of court-ordered restitution where offenders are often either not apprehended or not convicted, and when they are convicted, they do not have the financial resources to compensate the victim. As a result, Criminal Injuries Compensation Scheme was framed in 1964. Under the scheme, Criminal Injuries Compensation Board was set up

which later on was renamed to Criminal Injuries Compensation Authority. Since the scheme was set up in 1964, the authority and its predecessor, the Criminal Injuries Compensation Board, have paid more than £3 billion in compensation, making it among the largest and most generous of its type in the world. Under the scheme, the claim must be based on the crime that has been reported to the police. One interesting feature of the scheme is that claim is not dependent on the conviction of the accused as it is based on the principle of civil law principle of "balance of probabilities" rather than the criminal law principle of "guilt beyond reasonable doubt". Further, in 2003, the Criminal Justice Act was enacted. This act is a comprehensive legislation dealing with almost all the aspects of the criminal justice such as police powers, bail, disclosure, allocation of criminal offences, prosecution appeals, double jeopardy, hearsay, bad character evidence, sentencing and release on license.

France: In France, crime victims are entitled to become parties to the proceeding from the investigation stage itself. A victim also has a dynamic role in trial stage. Victims can be appointed prosecutors, when the prosecutors fail to act diligently. The role of the victims in the matter of deciding the grant or cancellation of bail, fixing up of compensation is also noteworthy in the French system. In 1993, France attempted to reinforce the possibilities of victim compensation by supplementing the laws in force.

International Criminal Court: An example of pro-victim approach is the newly established International Criminal Court (I.C.C.) in The Hague, Netherlands. The I.C.C. is the first international tribunal to give rights to the victim. Inspired by the 1985 U.N Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the I.C.C. allows victim to participate in criminal justice proceedings and makes it possible for the victims to obtain reparation through the court. Article 68, Section 3 of the Rome Statute states that: "Where the personal interest of victims are affected, the court shall permit their views and concerns to be presented and considered at stages of proceedings determined to be appropriated by the court and in a manner which is not prejudiced to or inconsistent with the rights of the accused and a fair and impartial trial".

Situation in India

Grievances of the Victims in Indian System

The main grievances of the victims in India are as follows[14]:

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[14] Deepak Bade, *Concept of Victimology in India*, http://www.academia.edu/1787492/CONCEPT_OF_VICTIMOLOGY_IN_INDIA (last visited accessed May 11, 2013).

- Inadequacy of the law in allowing the victim to participate in the prosecution in a criminal case instituted on a police report.
- Failure on the part of the police and prosecution to keep the victims informed about progress of the case.
- Inconvenience during interrogation by the police and lengthy court proceeding.
- Lack of prompt medical assistance to the victims of body offences and victims of accident.
- Lack of legal assistance to the victim.
- Lack of protection when the victims are threatened by the offender.
- Failure in restitution of victim.

Victims Compensatory Provisions in Indian Criminal Law

Section 357 of the Criminal Procedure Code, 1973: It is the basic provision dealing with the power of the court to order compensation. Clause 2 sub-section 1 of Section 357 of Cr.P.C. provides that when a court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the court may, when passing judgment order the whole or any part of the fine recovered to be applied in the payment of any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the court, recoverable by such person in civil court. Though the principle underlying Section 357 of Cr.P.C. is salutary, yet it is limited in its scope. The section will apply only when the accused is convicted that is to say that proving the guilt of the accused beyond reasonable doubt is pre-requisite for the section to come into play. Further, it also depend upon the recovery of fine from the accused, when fine form part of the sentence. If the fine is not imposed, the magistrate may order any amount to be paid by way of compensation which he considers just in the circumstances of the case. It is generally seen that either Section 357 is not invoked or even if it is invoked, the compensation amount is highly inadequate as compared to the sufferings and pain of the victim. Sometime, the financial capacity of the accused is taken into account and this further reduces the quantum of compensation as most of the accused are from lower socio-economic background. Further, given the low rate of conviction in India, Section 357 had remained almost dormant for very long.

Section 357A of the Criminal Procedure Code, 1973: Then the most recent and important legal provision is Victim Compensation Scheme under Section 357A of the Cr.P.C. inserted by Criminal Law Amendment Act, 2009. Clause (1) of Section 357A provides that every state government in co-ordination with the central government shall

prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation. Clause (2) provides that whenever a recommendation is made by the court for compensation, the District Legal Service Authority or State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme.

Section 5 of the Probation of Offenders Act, 1958: This provision has also empowered the courts to require released offenders to pay the restitution and costs as under. The section says that:

1. The court directing the release of an offender under Section 3 or Section 4 may, if it thinks fit, make at the same time a further order directing him to pay:
   a. Such restitution as the court thinks reasonable for loss or injury caused to any person by the commission of the offence; and
   b. Such cost of the proceeding as the court thinks reasonable.
2. The amount ordered to be paid under sub-section (1) may be recovered as a fine in accordance with the provisions of Sections 357 and 358 of the Cr.P.C.
3. A civil court trying any suit out of the same manner for which the offender is prescribed, shall take into account "any amount paid or recovered as restitution under sub-section (1) in awarding damages".

Section 163 of the Motor Vehicles Act, 1988: In "hit and run" cases, accident victims are eligible for compensation through a special fund called "Solatium Fund". The amount of compensation is Rs. 25,000/- in the event of death and Rs. 12,500/- for grievous injuries. A portion of the "gross written premium" is contributed towards this fund every year by both public and private insurers. However, in case the vehicle is without insurance, the victim/dependents have the right to claim compensation from the owner/driver under Motor Vehicles Act, 1988.[15]

Justice Malimath Committee Recommendations regarding Victims' Rights

The Malimath Committee on the Reform of the Criminal Justice, while dealing with the victims' perspectives, observed that criminal justice administration will assume a new direction towards better and quicker justice once the rights of the victims are recognized by law and restitution for loss of life, limb and property are provided for in

[15] http://pib.nic.in/newsite/erelease.aspx?relid=74471(11/08/2011) (last visited May 15, 2013).

the system. The Committee categorically pointed out that dispensing justice to the victims of crime can no longer be ignored on the ground of scarcity of resources. The Committee observed that victim compensation is a state obligation in all serious crimes, whether the accused is apprehended or not, convicted or acquitted. Some specific recommendations are:

1. The victim, and if he/she is dead, his legal representative shall have the right to be impleaded as a party in every criminal proceeding where the charge is punishable with 7 years imprisonment or more.
2. In select cases notified by the appropriate government, with the permission of the court an approved voluntary organization shall also have the right to implead in the court proceedings.
3. The victim has a right to be represented by an advocate of his/her choice; provided that an advocate shall be provided at the cost of the state if the victim is not in a position to afford a lawyer.
4. The victim shall have the right to participate in criminal trial.
5. The victim shall have a right to prefer an appeal against any adverse order passed by the court acquitting the accused, convicting for a lesser offence, imposing inadequate sentence, or granting inadequate compensation. Such appeal shall lie to the court to which an appeal ordinarily lies against the order of conviction of such court.
6. Legal services to victims in select crimes may be extended to include psychiatric and medical help, interim compensation and protection against secondary victimization.
7. Victim compensation is a state obligation in all serious crimes, whether the offender is apprehended or not, convicted or acquitted. This is to be organized in a separate legislation by the parliament. The draft bill on the subject submitted to the government in 1996 by the Indian Society of Victimology provides a tentative framework for consideration.
8. The victim compensation law will provide for the creation of a victim compensation fund to be administered possibly by the Legal Services Authority. The law should provide for the scale of compensation in different offences for the guidance of the court. It may specify offences in which compensation may not be granted and conditions under which it may be awarded or withdrawn.

Judicial Observations on Victims' Plights

It was observed by the Supreme Court in the case of *State of M.P. v. Shyamsunder Trivedi*[16] that the exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt, by the prosecution, ignoring the ground realities, the fact situation and the peculiar circumstances of a given case often results in miscarriage of justice and makes the justice delivery system a suspect. In the ultimate analysis, the society suffers and a criminal gets encouraged. Sometimes it is stated that only rights of the criminals are kept in mind, the victims are forgotten. In *Hari Singh v. Sukhbir Singh*[17], the Supreme Court observed that courts have seldom invoked Section 357 of Cr.P.C. perhaps due to the ignorance of the object behind it. The power under Section 357 is intended to assure the victim that he is not forgotten in the criminal justice administration. The court recommended that the power of the courts to award compensation under this section be exercised liberally so as to meet the ends of justice in a better way. In *State of Gujarat v. High Court of Gujarat*[18], on the question regarding fixation of wages for the prisoners, Wadhwa, J., observed that in deciding on the question of wages payable to the prisoners the state has to show equal concern for the victim and the family. In the efforts to look after and protect the human rights of the convict, court cannot forget the victim or his family, he said. The victim is certainly entitled to reparation, restitution and safeguard of his rights. Criminal justice would look hollow if justice is not done to the victim of the crime. A victim of crime cannot be a forgotten entity in the criminal justice administration. It is he who suffers the most.

Compensatory Jurisprudence Evolved by the Supreme Court

The Supreme Court of India has played the most commendable role in evolving compensatory jurisprudence for the victims. Some of the landmark cases in which the Supreme Court provided compensation to the victim include *Chairman, Railway Board and Others v. Mrs. Chandrima Das*[19], in which the Supreme Court ordered compensation to the rape victim, who was a Bangladeshi national, by the government for the rape committed in the *Yatri Niwas* managed by the Indian Railways at Howrah Station. Then again, in *Nilabati Behara v. State of Orissa*[20], the Court ordered compensation for custodial killing of the victim by the police in the State of Orissa. In both the cases, the Court held that victims' fundamental rights under

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16 (1995) 4 S.C.C. 262.
17 (1988) 4 S.C.C. 551.
18 (1998) 7 S.C.C. 392
19 (2000) 2 S.C.C. 465.
20 (1993) 2 S.C.C. 746.

Article 21 of the Constitution of India, 1950 were violated. In *Rudal Shah v. State of Bihar*[21], the Supreme Court made it categorically clear that the higher judiciary has the power to award compensation for violation of fundamental rights through the exercise of writ jurisdiction and evolved the principle of compensatory justice in the annals of human rights jurisprudence. Thus, the role of the Supreme Court in this direction is laudable. The only thing required is the assistance of the legislature in the form of comprehensive law on victims' compensation and rehabilitation and executive assistance in the form of better implementation of the law.

Broad Guidelines of the Supreme Court for the Assistance to the Rape Victims

Shocked and aghast at the plight of the rape victims, the Supreme Court in *Delhi Domestic Working Women's Forum v. Union of India*[22] laid down broad guidelines for the assistance of the rape victims:

- The complainant of sexual assault cases should be provided with legal representation. It is important to have someone who is well-acquainted with the criminal justice administration. The role of the victim's advocate would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the police station and in the court, but to provide her with guidance as to how she might obtain help of a different nature from other agencies, e.g., counseling through medical assistance. It is important to secure continuity of assistance by ensuring that same person who looked after the complainant's interests in the police station, represent her till the end of the case.
- Legal assistance will have to provide at the police station. Since the victim might be in a distressed state upon the arrival at the police station, the guidance and support of the lawyer at this stage is very important.
- The police should be under a duty to inform the victim of her right to representation.
- A list of the advocate willing to act in those cases should be kept at the police station for the victims who did not have particular lawyer in mind, or whose lawyer was unavailable.
- In all rape trials, anonymity of the victims must be maintained as far as necessary.
- It is necessary, having regard to the Directives Principles of State Policy (D.P.S.P.) under Article 38(1) of the Constitution

[21] (1983) 3 S.C.C. 508.
[22] 1995(1) S.C.C. 14.

of India to set up Criminal Injuries Compensation Board (C.I.C.B.). Compensation to the victim shall be awarded by the court on the conviction of the offender and by the C.I.C.B., whether or not the conviction has taken place. The court shall take into account the pain, suffering and shock as well as loss of earning due to pregnancy and the expenses of child birth, if this occurred as a result of the rape.

These Principles were reiterated in *Bodhisattwa Gautam v. Subhra Chakraborty*[23].

Real Hindrances to Victim Assistance in India

Police Act, 1861: The Colonial Police Act, 1861 continues to govern Indian police administration in the country. The police are insensitive towards the needs and problems of the common citizen. The police are still romanticizing with the colonial era wherein its role was confined to maintenance of law and order as well as the suppression of freedom struggle. The same mental attitude is followed in socialist welfare society which India initiated post independence. The role of the police is highly disappointing when it comes to the assistance of the victim. The police are probably the first official machinery to whom the victim of a crime approaches. But the general trend of the Indian police is to ignore the plight of the victim and look at the victim as a suspicious creature and sometime even casting doubt on the integrity and character of the victim especially women victims. Lot of effort was made since independence to reform the police and make it more democratic and people-centric but all effort went in vain due to the lack of political will power. The police are important machinery in the hand of ruling elite and no political master would like to part with it. This trend has acquired phenomenal acceptance among the ruling political elite in recent times due to the increased criminalization of politics and administration in the country. Little wonder, some of the important recommendations of the Administrative Reforms Commissions such as first and second Administrative Reforms Commissions went in vain. The National Police Commission (1977) recommendations on police reform was also not given due consideration by the government. Not only that, even the salutary directives of the Supreme Court in *Prakash Singh v. Union of India*[24] to the states regarding implementation of the police reform did not bear any result. The Police Act Drafting Committee under the Chairmanship of Shree Soli Sorabjee submitted its Model Police Act in the year 2006, but it was not implemented. Rather, after the crime is committed and victim approaches the police station for

[23] 1996(1) S.C.C. 490.
[24] 2006(1) 8 S.C.C. 1.

the assistance of the police, the secondary victimization of the victim starts which, at times, is much more agonizing than the primary victimization of the victim. Further, no training is given to the police regarding handling of the victim. The tough training given to the police regarding handling of the criminal is sometimes blindly applies to the victim which multiplies the pain of the victim. Training in victim assistance is alien to Indian system of training. The psychological support which victim requires by the criminal administration machinery is altogether missing, thus, adding to the plight of the victim. The concept of "Victim Impact Statement' is also alien to Indian system of criminal administration. The police, as the most important arm of criminal justice administration, lack the compassionate mindset requires for handling of the victim. As a result, the victim suffers secondary victimization at the hand of the police. Sensitization and democratization of the police is the need of the hour.

Lack of Speedy Trial: It is the major contributor to the pain of the victim. The victim crying for justice is left at the mercy of the court system wherein a case drags on for years. In the meantime, the witnesses are threatened, purchased, intimidated, material evidence tampered, key player in criminal administration bribed which ultimately result in low conviction rate and accused is set free and becomes role model for prospective criminals in the society. In the meantime, victim is traumatized and ultimately led a life of depression. Mental pain is compounded rather than alleviated due to slow nature of judicial administration in our country.

Lack of Rehabilitation: The government failure at rehabilitation of the victim is the most serious factor contributing to the pain and plight of the victim. The victim of sexual offences and victims who are minor or insane requires better psychological environment to make a new beginning in life. But the rehabilitation infrastructure is very poor in India. There is no fixed budgetary allocation for the rehabilitation and everything is left at the mercy of the concerned ministry. In the past few years, Ministry of Women and Child have shown interest in focusing on rehabilitation infrastructure, yet the overall picture is dismal. Most of the rehabilitation work done by Non-governmental Organizations (NGOs) is also not very satisfactory. Further, regular medical and psychological counseling is missing in these rehabilitation centres. There has been report that these centres have become den of exploitation of inmates by the authorities himself.[25] E.g., "A living hell with stinking toilets, abusive staff and

[25] *A Living Hell, Can't Be Called Rehabilitation Centre,* http://articles.timesofindia.indiatimes.com/2012-12-

lack of supervision by senior officers of the department of women and children. This place can't be called a rehabilitation centre", is how the rehabilitation home in Mumbai named *Navjeevan Mahila Sudhar Vastigruha* was described by the 2-member committee set up by the Mumbai High Court. The committee, comprising superintendent of police Rashmi Karandikar and psychiatrist Dr. Harish Shetty, was appointed to hold a preliminary enquiry against allegations of sexual abuse after repeated incidents of inmates escaping the home. The centre came into limelight because of repeated escape of inmates from the centre. "It is a failed centre. The women have experienced accelerated trauma in the rehabilitation centre and they have a sense of deep mistrust, rejection and injustice with no faith left in the establishment. It is a deep sense of shame to society that we still have medieval, feudal rescue homes which marginalize these women more than they already were," said Dr. Harish Shetty. In another shocking incidence, mentally ill women lodged at a rehabilitation centre in West Bengal were subjected to sexual abuse.[26] The caretaker of the rehabilitation centre allowed inside the centre outsiders in evenings, who then sexually abused the inmates. This mental asylum was run by NGO and funded by central government. When the media reported the matter, the West Bengal government cancelled the license of the rehabilitation centre and shifted the inmates to another rehabilitation centre. The story holds true for many rehabilitation centers across the country. Hence, constant monitoring and supervision of this rehabilitation centers needs urgent attention so that such centers do not become den of exploitation of the victims. A fixed budgetary allocation for rehabilitation infrastructure by the central and state ministry is the need of the hour. It is to be hoped that Section 357A will play a major role in this direction. Some states have taken a lead in this direction. E.g., the Maharashtra Government is in process of drafting a victim rehabilitation policy.[27] This was informed by the Maharashtra Government to the Mumbai High Court which was hearing a petition filed by an NGO called "Forum Against Oppression of Women".[28] The draft policy will provide assistance for rape victims, acid attack victims and sexual assault victims. The scheme will provide financial, medical and legal assistance to the above mentioned victims. This draft rehabilitation scheme is in pursuance

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04/mumbai/35593850_1_rehabilitation-centre-mankhurd-shelter-resource-centre (4/12/2012) (last visited May 15, 2013).

26 *Mentally Ill Women Sexually Abused, Tortured In West Bengal*, http://zeenews.india.com/news/west-bengal/mentally-ill-women-sexually-abused-tortured-in-wb_787228.html (13/07/2012) (last visited May 15, 2013).

27 *State to Pay Victims of Crime*, http://articles.timesofindia.indiatimes.com/2011-06-14/mumbai/29656573_1_compensation-victim-policy (14/06/2011) (last visited May 15, 2013).

28 *Maharashtra Rape Compensation Policy to Be Tabled Soon*, http://zeenews.india.com/news/maharashtra/maharashtra-rape-compensation-policy-to-be-tabled-soon_837836.html (25/03/2013) (last visited May 15, 2013).

of newly inserted Section 357A of the Cr.P.C. which obligates the state to frame a scheme for rehabilitation and compensation to the victims. According to the policy, immediately after the incident of crime, a victim will be entitled to compensation as the policy is not linked to the outcome of court cases. Apart from these progressive steps, there is a need to provide vocational training to the victims so that they can be self reliant in life.

Suggestions

- India should adopt and ratify U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 as soon as possible which will show her commitment to make its criminal justice administration more victims oriented.
- A comprehensive legislation at the central level is required for victim compensation and rehabilitation which will be obligatory for the state government to follow. The proposed legislation should be a comprehensive one, and should deal with all the aspects of victim compensation and rehabilitation. A Victim Compensation Authority has to be established under the new Act. Any lethargic approach on the part of the concerned officials in implementing the Act should be met with imposing penalty. The monitoring mechanism should be tight which can ensure better implementation of the legislation. The rehabilitation of the victim should not depend on the conviction of the accused. Special care must be taken of the victims of sexual violence. The legislation may be called Victims Compensation and Rehabilitation Act. All the broad guidelines given by the Supreme Court in a number of cases regarding compensation and rehabilitation of the victim must find place in the new legislation. There should be special stringent punishment and penalty for public servant being perpetrator of crime against the victim. The rehabilitation should definitely include vocational training and employment component. Further, witness protection should be an integral part of the new legislation.
- Every effort must be made to recover fine from the accused as his liability is primary. The fine for most of the crimes should be substantially increased in view of the modern day expenses, keeping in mind that a good portion of fine will go towards compensation and rehabilitation of the victim. If the fine amount appears inadequate for victim rehabilitation, the gap must be bridged by state assistance for the rehabilitation of the victim. This approach will reduce unnecessary financial burden on the state.

- Police should be sensitized towards the rights and plights of the victims. All rank of police hierarchy should undergo compulsory training course on victim assistance in which concerned NGOs can also play an important role. The course should enable the police to understand the medical, psychological, legal and financial needs of the victims. The presence police mindset is not supportive of victims. Sometimes, victims and accused are treated in the same manner thus compounding the plight of the victim. The police are the most important machinery in the criminal justice administration, and if the police are not victim sensitive, then all efforts at victim rehabilitation are bound to fail.
- Victim Impact Assessment (VIA) should be made an integral part of Indian criminal justice administration.
- Victim should have a prominent say in criminal justice right from filing of the First Information Report (FIR) till the conviction and sentencing of the accused. They should be allowed to play active part in investigation and trial stage.
- A panel of lawyers should be available to provide legal assistance to the victims as soon as the matter is reported to the police, as per the guidelines of the Supreme Court.
- The efforts of Indian Society of Victimology (I.S.V.), Chennai must be commended by the government and if possible, a periodic grant should be made to them. If the efforts of I.S.V. are channelized in proper direction, they can play a very prominent role in the area of victim assistance. The research conducted by them can be of great help to the government and NGOs working in the field of victim assistance.

Conclusion

The movement for victim assistance will have to go a long way before any tangible result can be produced. The endeavour must be to make the victim an integral entity of the criminal justice administration from the present status of forgotten entity in the criminal justice administration. A movement has already been initiated by the I.S.V., Chennai whose result will definitely be felt in the coming years. No criminal justice administration can afford to ignore the rights and plights of the victims of the ever increasing number of crimes. The plights of the victims are many and varied, and hence it requires greater attention by the criminal justice administration. The need is to make the system more sensitive to the plights of the victims.