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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.

Prof. Dr. Mukund Sarda

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CONTRIBUTIONS BY JUSTICE P.N. BHAGWATI TO SOCIAL ACTION LITIGATION; SIGNIFICANCE OF A MOOT COURT; AND CONCERNS ABOUT HUMAN RIGHTS*

Justice Shiva Kirti Singh**

Contributions by Justice P.N. Bhagwati to Social Action Litigation

Justice P.N. Bhagwati occupies a unique position amongst the most distinguished jurists of post-independent India. As a judge and chief justice of the apex court he made enormous contribution in developing the concept of Public Interest Litigation which was earlier more befittingly referred to as Social Action Litigation, in India. It is no secret that the legal edifice which India inherited from the colonial rulers was designed to suit Britisher's interests and concepts. It was individualistic in orientation and status quo in approach. After independence the initial burden upon the higher judiciary was to strengthen the roots of constitutionalism in free India and that task was successfully accomplished in the initial three decades.

Thereafter, conscientious thinkers and jurists noticed the need for judicial activism and for adding new dimensions to the justice delivery system so as to provide hope and succor to the millions of Indians suffering from poverty, ignorance and discrimination. The Supreme Court and particularly Justice Bhagwati gradually shaped the higher judicial system to respond to the challenge of making fundamental rights under the Constitution of India, 1950 (hereinafter the Constitution) meaningful to the masses including the tiny Indian at the end of social and economic ladder. To make the social and collective rights meaningful for the large under-privileged population of India the courts had to evolve a strategy of cutting down the traditional barriers of locus standi which was based upon right of an individual only to move the court if he or she could demonstrate invasion of his or her personal rights. The movement of Social Action Litigation has gained strength after the Supreme Court and particularly judgments rendered by Justice Bhagwati afforded much

* Extracts of the address by Hon'ble Mr. Justice Shiva Kirti Singh, Judge, Supreme Court of India, on the occasion of Justice P.N. Bhagwati 4th International Moot Court Competition organised by Bharati Vidyapeeth Deemed University, New Law College, Pune on March 8, 2014.

** Judge, Supreme Court of India.

meaningful and liberal accessibility to the higher courts through well meaning individuals or organizations representing social and collective rights requiring protection. Even a letter containing necessary details was held to be sufficient for a constitutional court to take up causes worthy of public interest litigation.

No doubt, the vested interests adversely affected by such liberal approach of the higher judiciary have, time and again, attempted to criticize the pro-active attitude necessary for granting relief to the affected people as a class but on the whole the experiment has yielded good results for the country. The cooperation of the executive was made possible by clarifying that in such litigations the approach of the parties should be that of cooperation in place of traditional adversarial approach. With passage of time more high and mighty vested interests are getting affected by the outcome of Social Action Litigation and hence at times the cooperation is conspicuous by its absence. But the constitutional courts have persisted in this direction to fulfill the role assigned to them as a guardian of the Constitution and particularly of fundamental rights enshrined under Chapter III thereof. In order to make the exercise meaningful and enforce directions issued in such litigations, the courts have entrusted inquiry and monitoring to eminent lawyers or experts whose reports have been taken note of for issuing further orders and directions after granting opportunity to the concerned parties to offer their comments on such reports. The reliance upon such commissions has made it possible for the handicapped groups to get justice because the materials and evidence which they could not bring before the court are made available through the efforts of such commission of eminent persons or lawyers appointed as *amicus curiae*.

Justice P.N. Bhagwati not only helped in bringing about aforesaid positive developments but also headed the efforts for providing legal aid to the needy persons in order to provide them accessibility to the justice delivery system. He has rendered phenomenal help in propagating the values of human rights within India as well as outside. Even after his retirement he remained associated with the human rights organizations of United Nations as member and Chairman of the United Nations Human Rights Committee for a number of years.

For students of law it will be useful to note some of the important cases and judgments of the Supreme Court indicating growth of Social Action Litigation in India. The barrier of *locus standi* was relaxed in the case of *S.P. Gupta v. Union of India*¹ and also in

¹ 1981 Suppl. S.C.C. 87.

*People's Union for Democratic Rights v. Union of India*². In the case of *Hussainara Khatoon v. Home Secretary, State of Bihar*³, the Court dispensed justice to the undertrial prisoners as a class; in the case of *Vishaka v. State of Rajasthan*⁴ to women in distress at their work places; in *Munna v. State of Uttar Pradesh*⁵ to juveniles in jails; in *Bandhua Mukti Morcha v. Union of India*⁶ to the bonded labour; and in the case of *M.C. Mehta v. Union of India*⁷ to the victims of environmental pollution. Adversarial procedure or approach was given a go-by in the case of *Upendra Baxi v. State of Uttar Pradesh*⁸ and the strategy of appointing the socio-legal Commissions of Inquiry was introduced and followed in cases of *Bandhua Mukti Morcha*⁹ and *Kamla Devi Chattopadhyay v. State of Punjab*¹⁰. Today we have huge reservoir of case laws on the aforesaid issues. The process which began in the 1980s has now come to acquire a permanent status. Along with the superior judiciary in India, Justice P.N. Bhagwati will always be remembered for his notable contribution in the field of Social Action Litigation, legal aid movement and human rights development in India as well as in some other countries which could not remain isolated from judicial developments taking place in India.

Significance of “Moot Court”

It will serve us well to look into the concept and significance of a “moot court”. Till recently, the law graduates could hope to learn the practical skills of advocacy only after entering the Bar; in the colleges the students learnt only from the law books and lectures by the teachers. Gradually the practical training has assumed significance and now the Bar Council of India, which regulates the legal education in India, has prescribed it in the curriculum of LL.B. courses keeping in view the necessity of practical training which has been made mandatory. The importance of learning through case law and developing the practical skills like drafting and advocacy in college itself has been fully acknowledged and it is being achieved by inclusion in the prescribed course of studies for law students.

Moot courts provide practical training by creating a simulated court proceeding where two rival teams argue before a judge or team of judges presumed to be a court or treated like a court. Howsoever

² (1982) 3 S.C.C. 235.

³ (1980) 1 S.C.C. 81.

⁴ (1997) 6 S.C.C. 241.

⁵ (1982) 1 S.C.C. 545.

⁶ (1984) 3 S.C.C. 161.

⁷ (2001) 3 S.C.C. 756.

⁸ (1986) 4 S.C.C. 106.

⁹ *Supra* note 8.

¹⁰ (1985) 1 S.C.C. 41.

good the teaching standard may be in a traditional class room, it cannot be sufficient to impart excellence in the tools of advocacy unless the students are encouraged to participate in moot court competitions. The moot cases or questions thrown open for holding a moot court grant an opportunity to the students of law to gain experience of preparing arguments of law and presenting the same in accordance with the established practice and court procedure. The art of persuasion and eloquence is as necessary for a successful lawyer as hard work and knowledge of law. The present generation of law students is fortunate in having practical training through moot courts. Whether you call lawyering an art or science, such practical training is of great advantage to the students in honing their legal knowledge and practical skills.

Adward Abott Parry, an English Judge has highlighted seven lamps of advocacy for a successful advocate and they are: the lamp of honesty, the lamp of courage, the lamp of industry, the lamp of wit, the lamp of eloquence, the lamp of judgment, and the lamp of fellowship. All these guiding lamps and particularly the lamp of eloquence come to the forefront in a sincere and serious practice of moot court. We can hope that all the participants in a moot court competition will gain not only courage and eloquence but also experience in the art of case preparation, identification of issues as well as presentation of facts and law to a judge. Although wit is not everybody's forte but if appropriately used, it enhances the overall effect of arguments by acting like a good spice which is essential for a good recipe. I am sure, you will be taught and shall learn the best of court room mannerism while preparing for the moot court competition. Good manners, especially in court rooms, do not cost a dime but are likely to reap great rewards. When I was a young lawyer, I was told by an experienced judge that I could be sure of success in the profession if I could earn the respect of my clients, colleagues and the court. Good manners and the seven lamps indicated earlier can be sure guide in leading a law student in the desired direction in the highly competitive practical world of advocacy.

Concerns about Human Rights

The subject of the current competition, that is, "Human Rights" is one topic which has engaged the attention of thinkers and philosophers since last several centuries. Human rights are quite akin to and offspring of natural rights which many philosophers considered to be rights available to human beings as gifts from the nature itself and they are believed to exist even when there was no organized society and humans lived in natural conditions. The most basic human right is of course right to life. The earliest theories propounded for

justifying the authority of the state highlighted this very right. It was argued by propounder of such theories that a man may be justified in standing against the state or the sovereign power if his right to life is not protected. However, with the advancement of human race the right to life has been overtaken by higher aspirations which signify a desire for right to better or dignified life, free from want or fear. The right to freedom of speech and expression has now taken over as the highest of human rights in the opinion of several renowned philosophers who hold the view that without liberty and freedom of speech, a human being loses all dignity and voice and therefore, may not be able to demand any right because he then may be forced to live in a tower of silence. It is not necessary for a common human being to decide which is a superior human right, life or freedom of speech. All the rights indicated above, i.e., right to life, right to speech, freedom from fear and freedom from want necessarily include right to liberty, equality and freedom of religion.

The rights of individuals against the state or any similar authority enshrined in our Constitution, have received recognition as human rights only recently after the 2nd World War, through international charters and conventions including the Charter of United Nations adopted at San Francisco on June 25, 1945. This Charter was not binding and merely declared the ideals which ought to be developed and adopted. The United Nations General Assembly adopted the Universal Declaration of Human Rights in December 1948 and concrete steps were taken thereafter for formulating various human rights and making them effective. It was as late as in December 1965 that the United Nations General Assembly adopted two covenants for the observance of human rights—firstly, the Covenant of Civil and Political Rights, and secondly, the Covenant of Economic, Social and Cultural Rights. The first deals with legally enforceable rights of the individuals, and the second addresses to the states to implement them by legislation. The requisite number of member states ratified the Covenants in December 1976, but many states ratified them at the end of 1981. These Covenants are legally binding of the ratifying states which include India. To honour the international obligations, India promulgated the Protection of Human Rights Ordinance, 1993 on September 28, 1993 and the same was subsequently replaced by the Protection of Human Rights Act, 1993 effective from the aforesaid date itself. This Act provides for the constitution of a National Human Rights Commission, State Human Rights Commissions in states and Human Rights Courts for protection of human rights in a better manner and matters connected therewith or incidental thereto.

The important rights available to human beings are well recognized in the Preamble as well as in Chapter III of the

Constitution. The basic human rights are well understood by every student of law. The real challenge is how to secure the implementation of such rights in a better and effective manner. The newspapers are full of report disclosing deprivation being faced by large of population of this country in the form of non-availability of basic education, health care and sometimes even adequate food. Such deprivations clearly violate human rights and particularly the right to live a decent or dignified human life. Similar issues arise from report disclosing brutal discrimination against women and children. Real equality to women is a distant cry when as a society we are still to work out adequate protection against exploitation of women and children in several barbarous ways. Wanton deprivation and discrimination can also be noticed in the case of extremely poor, illiterate and ignorant sections of the society who are residing in remote villages. Many a times they are influenced by extremist philosophies which attract strong action by the state leading to further threat to their human rights. Such issues, as noticed above, pose a great challenge to all students of law as well as to those who are associated with the justice delivery system in any manner.

The human rights get trampled and sacrificed on a much larger scale in case of war or civil disturbance. The plight of refugees and displaced families is not even reported properly much less taken serious note of by the state. Sometimes the refugees have to stay away from their home and hearth for generations. The magnitude of their suffering and consequent violation of human rights poses a serious problem for all those who are concerned with human rights.

I have attempted a brief glimpse of practical situation showing how large number of persons in this country and elsewhere are being deprived of their human rights for no fault of theirs. It is the concern of all of us and the civilized world to take corrective steps to ensure that basic human rights are protected in all such cases to the best of our capacity even at considerable cost to the state. I am sure, all of us shall keep the aforesaid aspects of human rights and their violations in mind so that as students of law we bestow more thought to this human problem. As a strong, vibrant and largest democracy, India has to play a distinguished role in such matters in the fast emerging new world order. The tremendous economic gains made by our country impose greater responsibility on our shoulders to ensure that collective thoughts are bestowed to eradicate from this great country all such human miseries which are necessary corollary of human rights violation.

I am confident that the experience gained by the participants of the Justice P.N. Bhagwati Moot Court Competition will make them

better advocates, useful for the country and its justice delivery system.



HUMAN RIGHTS ISSUES OF MINORITIES IN CONTEMPORARY INDIA

Justice Rajindar Sachar*

In any discussion on 'Human Rights Issues of Minorities in Contemporary India' one has necessarily to be reminded of the aspirations that our founding fathers and mothers had. This vision they encompassed in the Constitution of India. Any stocktaking must therefore be judged by how far we have carried out this mandate.

The Preamble of the Constitution of India mandates:

WE THE PEOPLE OF INDIA, have solemnly resolved to constitute India into a [SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC] and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

and to promote among them all

FRATERNITY assuring the dignity of the individual and the [unity and integrity of the Nation];

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

It is well settled that Preamble is the key to the Constitution and the objectives mentioned in the Preamble, namely the ideals of Socialism, Secularism and Democracy must govern any programme of the governments.

It is self-evident that to the extent there is lacuna by the government in following the above directives, government will be held guilty of not discharging its duty. It is meaningless to speak of democratic society where men and women are divided into social classes grossly in wealth, opportunity, status, education. It is self evident that secularism as a philosophy as highlighted in the Preamble is one of the working foundation of the Indian Constitution.

It is implicit in the secular character of Indian State that no religion can claim superiority of status on any other religion. All religions under our Constitution have equal acceptance and status. A

* Former Chief Justice, High Court of Delhi, New Delhi.

single citizenship is assured to all persons irrespective of their religion.

Secularism does not signify anti-religion. In India people fervently believe in their respective religions and overwhelming number of persons of all communities give equal respect to the religion of others. Secularism signifies giving equal dignity and respect to all religions. Of course it goes without saying that Indian State has no religion of its own, nor for that matter can any religion claim superiority over another religion as by resorting to false premise that any religion in the country is indigenous while others are foreign. This is heresy not permitted by our Constitution, which gives equal reverence to all the religions practiced by various communities of India. The Supreme Court of India has said that the concept of secularism is that the State will have no religion of its own.

All religions have the same message. Thus *Vasudhaiva Kutumbakam* (the world is one family) shows the spirit of tolerance in Hinduism. Same message of humanity and common good runs through all religions. Thus Holy *Quran* proclaims: “All the created ones belong to the family of God..... so, an Arab has no precedence over a non-Arab, a white over a black.” And Christ said succinctly: “All are children of God.”

Many in the West wrongly boast that spirit of tolerance and acceptance of coexistence of various religions is the legacy of Western civilization. How horrendously wrong! Let me prick this bubble by quoting from United Nations (UN) Human Development Report, 2004, which emphasizes the following:¹

The first Arabs came to India only as traders and found peaceful settlement in Kerala. Jawaharlal Nehru in his celebrated book, *The Discovery of India* in Chapter VI page 244 referring to the growth of Hindu-Muslim culture and Indo-Arab relationship wrote as follows: “There were no invasions, contacts between India and Arab world grew, by travel to and from, embassies were exchanged, Indian books, especially on mathematics and astrology were taken to Bagdad and were translated into Arabic; many Indian physicians went to Bagdad. These trade and culture relations were not confined to north India. The southern states of India also participated in them, especially the Rashtrakutas, on the west coast of India, for purpose of trade...” This frequent intercourse inevitably led to Indians getting to know the new religion-Islam; missionaries also came to spread this new faith and they were welcomed; mosques were built. There was no

¹ Dated Feb. 21, 2013.

objection raised either by the state or by the people; nor were there any religions conflicts. It was the old tradition of India to be tolerant to all faiths and forms of worship. In the matter of the tolerance and fellow feeling both India and Arab lands have shared a common philosophy, much earlier than the West. This is emphasized by UN Human Development Report, 2014, which emphasizes the following:

“The specific claim that tolerance is a special—and very nearly unique—feature of Western civilization, extending way back into history, is particularly hard to sustain. This is not to deny that tolerance and liberty are among the important achievements of modern Europe (despite some aberrations, such as brutal imperialist rules over two centuries and the Nazi atrocities six decades ago). The world indeed has much to learn from the recent history of Europe and the Western world, particularly since the period of European Enlightenment but to see a unique line of historical division there—is remarkably fanciful. The history of the world does not suggest anything like a division between a long-run history of Western and that of non-Western despotism.”

Political liberty and tolerance in their full contemporary form are not an old historical feature in any country or civilization. Plato and Augustine were no less authoritarian than were Confucius and Kautilya. There were, of course, champions of tolerance in classical European thought; but there are plenty of similar examples in other cultures as well. E.g., Emperor Ashoka’s dedicated championing of religious and other kinds of tolerance in the 3rd century BCF (arguing that: “[T]he sects of other people all deserve reverence for one reason or another”) is certainly among the earliest political defences of tolerance anywhere. Similarly, when a later Indian Emperor, Akbar, the Great Moghal, was making comparable pronouncements on religious tolerance at the end of the 16th century (such as: “[N]o one should be interfered with on account of religion, and anyone is to be allowed to go over to a religion that pleases him”), the inquisition was in full swing in Europe. To take another illustration, when the Jewish philosopher Maimonides was forced to emigrate from an intolerant Europe in the 12th century, he found a tolerant refuge in the Arab world and was given an honoured and influential position in the court of Emperor Saladin in Cairo. His tolerant host was the same Saladin who fought hard for Islam in the Crusades.”

It is truism that in any country the faith and the confidence of the minorities in the impartial and even functioning of the state is the acid test of being civilized state. This is accepted wisdom, and was expressed succinctly by Lord Action as: “A state which is incompetent to satisfy different races condemns itself; a state which labours to

neutralize, to absorb or to expel them is destitute of the chief basis of self-government”, we need only substitute minorities for races to in the above quotation to apply the test in India. We need only substitute minorities for races in the above quotation to apply the test in India.

International Covenant on Civil and Political Rights, 1966 (ICCPR) Article 27 is too accepted as a foundation for all minority rights:

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex language, religion, political or other opinion national or social origin, property, birth or other status.”

But, much earlier founding fathers/mothers of Indian Constitution with their vision to secure to all its citizen justice, liberty equality and fraternity so provided the rights for the minorities. Thus Fundamental Right Chapter in Part III of our Constitution specifically provides *vide* Articles 25 to 30 the various rights and privileges for the minorities such as:

1. Freedom of conscience and free profession, practice and propagation of religion.
2. Freedom to manage religious affairs.
3. Freedom as to payment of taxes for promotion of any particular religion.
4. Freedom as to attendance at religious instruction or religious worship in certain educational institutions.
5. Protection of interests of minorities.
6. Rights of minorities to establish and administer educational institutions.

However, mere provisions of rights can no assurance by itself. It is for this reason that Article 32 guarantees to every citizen the right to move the Supreme Court for the enforcement of fundamental rights. This article gives assurance to the minorities that their apprehension that if political process does not give them justice, they are not without remedy. The Supreme Court made this clear in no uncertain terms in the word of Chief Justice S.R. Das in the case pertaining to the effect:²

² In re Kerala Education Bill, 1957, A.I.R. 1958 S.C. 956.

“We, the People of India, have given to ourselves the Constitution which is not for any particular community or section but for all. Its provisions are intended to protect all, minority as well as majority communities.... We conceive the duty of this Court to uphold the fundamental rights and thereby honour the sacred obligation to the minority communities who are our own.”

The same sentiment was emphasized by the Supreme Court when it said:³

“It is clear from the constitutional scheme that it guarantees equality in the matter of religion to all individuals and groups irrespective of their faith emphasizing that there is no religion of the State itself. The Preamble of the Constitution read in particular with Articles 25 to 28 emphasizes this aspect. The concept of secularism is one facet of the right to equality woven as the central golden thread in the fabric depicting the pattern of the scheme in our Constitution.”

The Court stressed that: “The purpose of law in plural societies is not the progressive assimilation of the minorities in the majoritarian milieu. This would not solve the problem; but would vainly seek to dissolve it.”

Posing the question what is the purpose it referred with approval to the test laid down by Lord Scarman of House of Lords UK: “The purpose of the law must be not to extinguish the groups which make the society but to devise political, social and legal means of preventing them from falling apart and so destroying the plural society of which they are members.”

Thus inclusive development in India and for that matter in any country alone is the path to prosperity. It is an undeniable truth and needs to be irrevocably accepted by all in India, namely that minorities, Muslims and Christians are not outsiders. They are an integral part of India. Let me quote what Swami Vivekanand, one of the greatest spiritual personality of India, has to say of the intimate connection between the spirit of Islam and Hinduism thus: “He also told Hindus not to talk of the superiority of one religion over another. Even toleration of other faiths was not right; it smacked of blasphemy. He pointed out that his guru, Sri Ramkrishna Paramhansa, had accepted all religion as true. Swami Vivekanand in fact profusely praised Islam and in a letter to his friend Mohammed

³ Dr. M. Ismail Faruqui & Ors. v. UOI & Ors., (1994) 6 S.C.C. 360.

Sarfraz Hussain⁴ without any hesitation wrote: “[T]herefore I am firmly persuaded that without they may be are entirely valueless to the vast mass of mankind. For our own motherland a junction of the two great systems Hinduism and Islam–*Vedanta* brain and Islam body–is the only hope.....the future perfect India.” There thus can be no real progress in India which does not include minorities, Muslims, Christians as equal stakeholders.

It needs to be emphasized that development and growth in the country has to be all inclusive–the mode of development must necessarily take into account the needs and sensitivities of minorities, *dalits*, tribals in India. This was reaffirmed and emphasized recently by the Socialist Party (India) which is inspired and follows the philosophy and programme of Shri Jaya Prakash Narain and Dr. Ram Monohar Lohia, thus: “[T]hat they must be treated as a special trust and there is an urgent need to attend to their problems immediately.”

UN Declaration of the rights of persons belonging to national or ethnic, religious and linguistic minorities 1992 mandates in Article 1 that ‘states shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity’.

The minorities, many a time, may feel that there is discrimination against them in the matter of employment, housing, for obtaining loans from the public or private sector banks, or opportunities for good schooling. It is self evident that if minorities have these perceptions, law must provide an effective mechanism which should examine their complaints and be able to give effective relief. It is imperative that if the minorities have certain perceptions of being aggrieved, all efforts should be made by the state to expeditiously. This mechanism should operate in a manner which gives full satisfaction to the minorities that any denial of equal opportunities or bias or discrimination in dealing with them, either by public functionary or any private individual, will immediately be attended to and redress given. Such a mechanism should be accessible to all individuals and institutions desirous to complain that they have received less treatment from any employer or any person on the basis of his/her Supporting Resources Collection (SRC) background and gender. It is wrong to assume that there is an inevitable conflict between the interests of majority and minority communities in the country. This is flawed reasoning and assumption. Deprivation,

⁴ June 10, 1898.

poverty and discrimination may exist among all SRCs although in different proportions. But the fact of belonging to a minority community has, it cannot be denied, an in-built sensitivity to discrimination. This sensitivity is natural and may exist among religious minorities in any country. Recognizing this reality is not pandering to the minorities nor sniping at the majority. This recognition is only an acceptance of reality. It is a well accepted maxim in law that not only must justice be done but it must appear to be done.

In this connection it heartening to find confirmation in the report of UN Human Right Council, Forum on Minority issued on December 14 and 15, 2010 wherein it has made some significant recommendations on minorities and their effective participation in economic life, which each country is mandated to follow:

The Council emphasizes: “Consequently, the right of minorities to participate effectively in economic life must be fully taken into account by governments seeking to promote equality at every level—from implement non-discrimination in employment and enforcing protection laws in the private to developing national economic development and international development assistance schemes.”

“Governments can consider both targeted and inclusive approach to addressing the economic and social exclusion of minorities. Targeted approach aim programme or project outcomes specifically at minorities, whereas inclusive approach integrate minorities in a wider focus population for programme or project outcomes. If existing policies are not benefiting minorities equally or gaps in inequality are growing, targeted approaches should be considered. Decisions on policy choices should be made with the full and effective participation of all minority groups, should be transparent, and where possible, should be supported by disaggregated data demonstrating existing inequalities.”

“Governments should gather and regularly publicize disaggregated data to measure and monitor the effective participation of minorities in economic life. Improved data collection should be made a priority for the areas of employment and labour rights, poverty rates, access to social security, access to credit and other financial services, education and training, and property and land tenure rights.”

In the Report of Working Group on Minorities formed by UN Sub Commission on Protection of Minorities, it was the unanimous view that the assimilative approach was not one promoted by the UN and

that formal recognition of minorities is the first crucial step towards their effective participation in society. This means not only participation in governance, but also involvement in the economy. Also accepted were the need for multi-lingual education and respect for cultural identity of minorities and the need to ensure fair representation of minorities within the law enforcement system and the workplace. The basic task is to reconcile the pluralism which then exists in that State, and the need to respect the identity of the various groups, with the overall concerns of non-discrimination, equality, national security, territorial integrity, and political independence.

The above declaration is a forthright rebuke to all those mischievous quarters that propagate that government action at highlighting the conditions of minorities is any way divisive. Frankly the collection of any data is a neutral innocuous exercise. It is for this reason that many sociologists and human rights activists have recommended that these in an urgent need to ensure diversity in living, educational and work spaces.

There is an urgent to enhance diversity in living, educational and work spaces. With increasing ghettoisation and limited participation of certain SRCs in regular employment and educational institutions, the spaces available for interaction among SRCs have shrunk. Enhancement of diversity in different spaces should be seen as a larger policy objective.

Incentives are in the form of larger grants to those educational institutions that have higher diversity and are able to sustain it. These incentives can apply to both colleges and universities, both in the public and the private sector. Incentives are to builders for housing complexes that have more 'diverse' resident population to promote 'composite living spaces' of SRCs.

Most poor children do not have access to parks, libraries and even study spaces within their own houses. Such spaces can enhance interaction among SRCs and also provide the much needed fillip to educational initiatives; such spaces can be used by the community or civil society to organize remedial classes, reading rooms and other constructive initiatives. The state should encourage such initiatives in mixed localities and across neighborhoods so that children belonging to different SRCs can interact and at the same time pursue studies. These spaces can also be used for interaction and constructive activities among adults of different SRCs. Such initiatives are essentially a domain of civil society but mechanisms to encourage such activities through provision of unused/vacant municipal premises/and etc., can be quite useful. Part of the funds earmarked

for the Jawaharlal Nehru National Urban Renewal Mission (JNNURM) can be used for this purpose.

The school text book is one of the most enduring influences in the formative years of childhood. Along with the family, the school teaches the child not only the three “R”s, but values and attitudes those shapes the child’s character and create a sense of values.

The text book should not only reflect reality but also help in creating appropriate values. Since the children tend to read their text books several times, their familiarity with the text is significant and acts to reinforce the values being suggested in the text. If the texts do not reflect diversity or re derogatory with respect to specific communities, they can alienate children of those communities from the wider society. Simple things in the text books can sow the seeds for religious intolerance, create caste bias and/or reduce sensitivity to gender differences, which the intent and purpose of texts should be to do just the opposite a process of evaluating the content of the school text books needs to be initiated to purge them of explicit and implicit content that may impart inappropriate social values, especially religious intolerance.

It is incumbent on the central and state governments to pay due heed to this warning which alone will be measure of its real concern for the uplift of minorities consisting of 13.1% of population of the country. As per 2001 census total minorities are 189 million of which 138 million are Muslims, and the rest are Sikhs, Christian, Buddhists, Jains. Census 2011 has not released the population as per religious denomination, but broadly inters proportion between the minorities will almost be the same.

In this connection it is encouraging to find that certain concerned persons and non-governmental organizations (NGOs) have made penetrating studies about the neglect of the government in executing programmes under the central government’s ‘Minority 15 Points Programme’. This finds corroboration in the Planning Commission Approach Paper to the 12th Plan which says that: “[T]he acceleration of growth in recent years has been accompanied by efforts at greater inclusiveness which has had resonance in many of the slower growing states. However, within this framework of acceleration, despite efforts to be inclusive, there are concerns whether historically disadvantaged groups have benefited adequately... The 12th Plan needs to proactively address these concerns.”⁵

⁵ INDIAN SOCIAL DEVELOPMENT REPORT, 2012, at 248.

Thus inclusive development in the country alone is the path to prosperity. It is an undeniable truth and needs to be irrevocably accepted by all in the country that minorities, Muslims and Christians are not outsiders; they are an integral part of India. There can be no real progress which does not include minorities, Muslims and Christians as equal stakeholders. I cannot put it better than what Sir Sayyed Ahmed Khan, one of the greatest leader of our country had to say over a century back. Gandhiji repeated it in 1921, and also in another prayer meeting at Rajghat on March 24, 1947 thus: “In the words of Sir Sayyed Ahmed Khan.... I would say that Hindus and Muslims are two eyes of Mother India-just as the trouble in one eye affect the other too, similarly the whole of India suffer when either Hindu or Muslim suffers”.

Maulana Abdul Kalam Azads clarion call emphasizing that composite culture is the bed stock of Indian secularism pervading our country. He said thus:

“Full 11 centuries have passed by since then. Islam has now as great a claim on the soil of India as Hinduism. If Hinduism has been the religion of the people here for thousands of years, Islam also has been their religion for a thousand years. Just as a Hindu can say with pride that he is an Indian and follows Hinduism; so also we can say with equal pride that we are Indians and follow Islam. I shall enlarge this orbit still further the Indian Christian is equally entitled to say with pride that he is an Indian and is following a religion of India, namely Christianity....

If there are any Hindus amongst us who desire bring back the Hindu life of a thousand years ago and more, they dream, and such dreams are vain fantasies. So also if there are many Muslims who wish to receive their past civilization and culture, which they brought a thousand years ago from Iran and Central Asia, they dream also and the sooner they wake up the better. These are unnatural fancies which cannot take root in the soil of reality. I am one of those who believe that revival may be necessity in a religion but in social matters it is a denial of progress....

I am proud to be a Muslim. Everything bears the stamp of our joint endeavor. Our languages were different, but we grew to use a common language. Our manners and customs were different, but they produced a new synthesis..... No fantasy or artificial scheming to separate and divide can break this unity-Islam has now as great a claim on the soil of India as Hinduism, and that is true of Christianity too.”

MOBILE CELL PHONES AND CYBER CRIMES IN INDIA: HOW SAFE ARE WE?

Mr. Nikhil A. Gupta*

Introduction

Telecommunication was introduced in India long back in the year 1882. There was a mushroom growth of telecommunication after the advent of internet and mobile technology in India. It was on August 15, 1995 when the first mobile telephone service started on a non-commercial basis in India. On the same day internet was also introduced in this nation. After the liberation and privatization in this area India didn't look back; telecommunication conquered life of citizens of India and in no time India's telecommunication network became the second largest in the world. In May 2012 there were 929.37 million mobile users in India. In this *dot com* era a person is looked with surprise if he is not a mobile user.

Impact of Cell Phones on Human Life

Communication technology has left no aspect of human life untouched. Even our morning alarm clocks are been replaced by the mobile cell phones. Technology is constantly bringing advancement in our mobile cell phones. Mobile cell phones have now become new personal laptops and desktops which are having capacity to store as much data as our laptops and desktops are and in additional they are providing flexibility and portability. Internet enabled smart phones, tablets etc...are performing the functions of our computer, but one vital feature is missing and that is security. Rapid growth in the use of internet enabled mobile cell phones allows us to use manage our banking transaction, official and institutional transactions, rapid communication through email or social networks, and many more. Virtually we can perform the task of a computer on our mobile; this means alike our computer our mobile phone is also vulnerable to the risk of fraud, theft of financial information and identity theft etc.

Cell Phones: An Open Door for Cyber Criminals

Recent reports have suggested that with the advancement of the telecommunication technology there is increase in cyber crime in the

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nation. The technological advancement provided opportunities to the miscreants in the society, who are using technology for their selfish gains. There are cases where hackers have breached in Nokia's Symbian, Apple's iOS and Google's android operating system. Thus to be safe we must be vigilant. But it is really unfortunate that whenever a discussion about cyber crime ignites, a particular class of the people escapes the discussion saying that; they neither use computers nor they use internet for communication and therefore cyber crime is not a threat for them. People try to hide their ignorance about cyber crimes on the ground that cannot become its victim, but they have absolutely no idea that knowingly or unknowingly they can be adversely affected by cyber crime. Every person using an internet, blue tooth or even an infra red enabled cell phone can easily be fished in the web of cyber criminals.

Is Cell Phone a Computer?

The broadest definition of cyber crime that is available is-any crime where computer is used either as a tool or weapon. In common parlance computer is understood to be a desktop, laptop or a palm top. But as per Wikipedia: "A computer in a general purpose device that can be programmed to carry out a finest set of arithmetic or logical operation." Also as per Section 2(i) of the Information Technology Act, 2000 (hereinafter the IT Act): "Computer means any electronic, magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software or communication facilities which are connected or related to the computer in a computer system or computer network." This broad definition encompasses every gadget we are using in our day to day life to make our life simpler as a computer. Mobile cell phones are just one of it.

Common Cyber Crimes Associated with Cell Phones

- 1. Bluebugging:** As the name suggests this is the attack on the mobile cell phone through Bluetooth. Bluetooth is not a stranger term today. Almost every mobile cell phone is embedded with Bluetooth technology. We use Bluetooth for sharing photos, audio or video files etc. Bluebugging allows the hacker to take over complete control over your mobile phone. The victim cannot even realize that his mobile cell phone is attacked, because even if the Bluetooth device is disabled or turned off the mobile cell phone can be victim of this attack. Bluebugging allows the hacker to read the information in your mobile cell phone, he can access

calendar, address book etc., he can make calls and even send messages. The hacker can even listen to the conversation of your mobile phone. Every time you receive a call on your infected mobile cell phone the call is also forwarded to the hacker and he can listen the conversation. In Bluesnarfing the hacker can commit theft of all the data and information in your mobile phone using his laptop.

- 2. Vishing:** This is a tool for committing financial crime by using mobile. Use of mobile making is increased on the mobile phones. Mobile phones are now used for online shopping and managing banking transactions. This has made mobile cell phone an easy victim of Vishing. Motive of the hacker is to get easy money. These attacks are similar to phishing attacks. It includes identity theft like credit cards numbers and other secret information. Scammer calls the victim and by use of his voice tries to extract the confidential information of the victim. Therefore every mobile user must be vigilant towards these fooling calls. We should not be carried away by the lucrative offers or scheme the scammer offers us.
- 3. Malware:** This is one of the biggest threats to mobile cell phones. It is a program (software) designed to perform malicious activities in the device infected. Malware enters the mobile cell phone of victim through SMS, file transfer, downloading programs from internet etc. Malware enters and functions in the victim are mobile without his knowledge and perform several malicious activities like usage of talk time, etc.
- 4. Smishing:** In this e-age the term “SMS” do not need any introduction. It signifies Short Message Service. It is a common term for sharing messages on mobile phone. This service is the one of the most used service on mobile phones. Hence criminals are targeting it as a tool to satisfy their greed. Smishing is a security attack in which the user is sent an SMS posing as a lucrative service that indulges them into exposing their personal information which is later misused. This is also used for introducing a malware in the cell phone of the user. These are alike Phishing and Vishing attacks in which personal confidential information is gained and later misused. In these attacks the criminal obtains the internet banking passwords, credit card details, email ID and password etc.

Mobile Cell Phones and the Information Technology Act, 2000

As per definition of term “computers”, as provided by Section 2(i) of the IT Act, mobile phones are encompassed in the definition of a computer. Mobile phones are been used for exchange of information. As per Section 2(r) of the IT Act, “electronic form”, with reference to information, means any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device.... . Thus any information shared on the mobile phone though it may be talks, text or entry of information they are encompassed in the purview of the IT Act.

Section 66A of The IT Act, provides for punishment for sending offensive messages through communication service etc. This provision of law is parallel provision to Sections 294, 504, 506, 507 and 509 of Indian Penal Code, 1860 only difference is that in this provisions of law the criminal uses his cell phone or computer to express the offensive feeling. The punishment prescribed under this section is imprisonment for a term which may extend to three years and with fine. This section is embedded with an explanation which states that for the purpose of this section, terms electronic mail and electronic mail message means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message. This explanation widens the scope of this section and assures that the criminal cannot escape his liability.

Newly added provision in the IT Act in the form of Section 67(A) provides for punishment for publishing or transmitting of material containing sexually explicit act, etc., in electronic form. This is most important for teenagers. The trends of sharing pornography material on cell phones are on increase. The incident of indecent MMS is not unknown to anyone. This provision of law books those who publishes or transmits or causes to be published or transmitted in the electronic form any material which contains sexually explicit act or conduct. This provision of law is analogous to provisions of Sections 292 and 292A of the Indian Penal Code, 1860. It provides for a punishment on first conviction for imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees. In the even to second or subsequent conviction for imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees.

This provision of law elaborates Section 67 which provides for punishment for publishing or transmitting obscene material in electronic form. Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to five lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees.

Conclusion

A mobile phone is just like a match stick. A match stick can ignite a lamp and can also ablaze a house. Choice is of the person having it. Alike is with mobile technology you can use it to make you life simpler, or for satisfying you selfish gain by misusing it. As we are careful while using match stick in home, and keep it in safe place out of the reach of children. A mobile phone also should be used with caution. Your ignorance can bring you in trouble. People must be vigilant and educated towards the game of dirty business played on mobile phones. A certain class of people is exploiting the technology. All the glitters is never gold must be remembered by mobile users. People must be sensitive towards suspicious or malicious information received on their mobile phones. They shall forthwith report against it. This will ensure not only their security but security of others too. Care also should be taken when we are shopping online; know as much as you can about the site, its policies and procedures. Never share our personal information with stranger on mobile phones. Also no secret information like passwords, PIN, credit card details etc., must be stored on the mobile phone. Precaution is the only means to stay secured in this e-world. In this e-world one must never forget the words of Fransis Bacon that knowledge is power, because in the world of computers, more you know about computers, the more you will know that you don't know! Thus with following tips for securing your cell phone I end up this article.

Tips for Securing Cell Phones

- Turn on Bluetooth or enable internet only when required.
- Do turn off the wireless connections when not needed.
- Regularly update the cell phone software.
- Install latest anti-virus software, and keep it updated.

- Use strong passwords to lock your cell phone.
- Never share personal information with stranger.
- Never store personal banking details in cell phones.
- Be suspicious while entertaining strangers on social networking website.
- Consider disabling the geo-tagging feature on your phone.
- If you are connected to a public WiFi, don't access sites where you need to enter your password, credit card information etc.
- While banking and shopping online, ensure the sites are *https* or *shttp*.
- Always keep in mind that you cell phone is a device that contains a lot of your personal information. Keep it safe and secure.



PROTECTION OF RIGHTS OF INDIGENOUS PEOPLE: INTERNATIONAL AND NATIONAL LEGAL PERSPECTIVE

Dr. Aneesh V. Pillai*

“Indigenous people suffered centuries of oppression, and continue to lose their lands, their languages and their resources at an alarming rate. Despite these obstacles, indigenous people make an enormous contribution to our world, including through their spiritual relationship with the earth. By helping indigenous peoples regain their rights, we will also protect our shared environment for the benefit of all.”

- Ban Ki-moon¹

Introduction

Indigenous peoples are those people, who are practicing unique traditions, culture and way of life and retain social, cultural, economic and political characteristics that are distinct from other segments of the population in the societies in which they live.² It is estimated that all over the world, there are about 300-500 million indigenous people. They live in nearly all the countries on all the continents of the world and form a spectrum of humanity, ranging from traditional hunter-gatherers and subsistence farmers to legal scholars.³ In some countries, they form majority of the population while in others they comprise small minorities. Among many indigenous people are the Indians of America. E.g., the Mayas in Guatemala or Aymaras of Bolivia; Saami of Northern Europe; the aborigines and Torres Strait Islanders of Australia; and the Maori of New Zealand.⁴

Indigenous people are mostly concerned with preserving their land, protecting and conserving biological diversity and traditional knowledge, protecting their unique language and culture. However

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¹ Ban Ki-moon is the 8th and current Secretary-General of the United Nations after succeeding Kofi Annan in 2007.

See *UN Launches First Global Partnership to Advance Rights of Indigenous Peoples* (Feb. 2, 2013), http://www.unicef.org/lac/media_20659.html.

² See *Who are Indigenous Peoples?*,

http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf.

³ See *The Rights of Indigenous Peoples* (Feb. 2, 2013),

http://www1.umn.edu/humanrts/edumat/study_guides/indigenous.html.

⁴ K.C. JOSHI, INTERNATIONAL LAW AND HUMAN RIGHTS 487 (2006).

due to their distinct culture and unique position in the society, they often face discrimination from other sections of the society. The common problem of indigenous people throughout history has been the loss of their native land due to invasion of their territory and its subsequent colonization or development by the other sections of society and governments. In recent decades, the international community has shown concern towards the rights of indigenous people and given special attention towards them. Various international standards and guidelines have been adopted and institutions and bodies have been specifically established at international and at regional level for the protection of rights of indigenous people.⁵ In India, the indigenous people are known as “tribals” and constitute 8.14% of the total population of the country. According to 2001 census, the tribals are nearly 84.51 million and cover about 15% of the country’s area.⁶ However, the indigenous and tribal people do not enjoy their basic rights to the same degree as the rest of the population. They are also poor and illiterate and exposed to all forms of violations. In India, though the constitutional provisions and other legislations guarantee various rights to the tribal people, these rights are not realized in reality. This paper seeks to examine the concept of indigenous people and the legal frameworks at international and national level for protection of their rights. It also attempts to provide some pragmatic solutions to avoid those barriers and ensure the protection and promotion of rights of indigenous people.

Indigenous People: Meaning and Definition

Indigenous people or aboriginal people are those who were living on their land before settlers came from elsewhere. They are people who belong to pre-invasion and pre-colonial societies and consider themselves distinct from other sections of the societies prevailing in those territories.⁷ The term indigenous is derived from the Latin word *indigena* meaning “native” or “born within”. It is used to describe people belonging to ethnic group or community and who trace their traditional tribal land claim to some particular region or location. During the 20th century the term indigenous people is used to refer culturally distinct groups that had been affected by the processes of colonization.⁸

⁵ See *Special Rapporteur on the Rights of Indigenous Peoples* (Feb. 2, 2013), <http://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/SRIPeopleIndex.aspx>.

⁶ See <http://tribesindia.com>.

⁷ H.O. AGARWAL, HUMAN RIGHTS 157 (2002).

⁸ See www.wikipedia.org.

The United Nations Special Rapporteur to the Sub-Commission on Prevention of Discrimination and Protection of Minorities defines indigenous communities, peoples and nations as:

“...those which having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.”⁹

It is to be noted that, due to the variety and multiplicity in cultures all over the world, it is difficult to have a uniform definition of indigenous people. This fact has also been highlighted by the Background Paper for a United Nations (UN) Workshop on Data Collection and Disaggregation for Indigenous Peoples, 2004. It discusses some of the attempts to define indigenous peoples and states that ‘the prevailing view today is that no formal universal definition of the term is necessary’. This is further supported by the UN Declaration on the Rights of Indigenous Peoples, adopted in 2007, which does not include an official definition of the peoples to which it refers.

However, the World Bank has given certain criteria to identify and classify the indigenous people. According to World Bank, indigenous peoples can be identified in particular geographical areas by the presence in varying degrees of the following characteristics:

1. Close attachment to ancestral territories and to the natural resources in these areas;
2. Self-identification and identification by others as members of a distinct cultural group;
3. An indigenous language, often different from the national language;
4. Presence of customary social and political institutions; and
5. Primarily subsistence-oriented production.

An analysis of the numerous literatures available on the meaning of indigenous people shows that, the definition of indigenous people can include cultural groups and their continuity or association with a

⁹ See *Definition of Indigenous Peoples* (Feb. 2, 2013), <http://indigenouseoples.nl/indigenous-peoples/definition-indigenous>.

given region, or parts of a region, and who formerly or currently inhabit the region either:

- before or its subsequent colonization or annexation; or
- alongside other cultural groups during the formation or reign of a colony or nation-state; or
- independently or largely isolated from the influence of the claimed governance by a nation-state; and who,
- have maintained at least in part their distinct cultural, social/organizational, or linguistic characteristics, and in doing so remain differentiated in some degree from the surrounding populations and dominant culture of the nation-state; and
- are self-identified as indigenous, or those recognized as such by other groups.¹⁰

Thus indigenous peoples are generally having ethnic, religious, or linguistic characteristics that are different from the dominant groups in the societies where they exist.¹¹

Indigenous People and International Law

At the international level there are numerous instruments which protect and promote the human rights of all individuals. Though these documents are not specifically dealing with the rights of indigenous people, they are applicable to the indigenous people also and the various provisions in these documents are relevant for the protection and promotion of their rights. E.g., UN Charter, 1945¹²; Universal Declaration of Human Rights, 1948¹³; The International Covenant on Civil and Political Rights, 1966¹⁴; and The International Convention on the Elimination of All Forms of Racial Discrimination, 1965¹⁵, etc.

The most important documents that specifically address the rights of indigenous peoples in the world are, the International Labour Organization's Convention No. 169 of 1989 and the UN Working Group on Indigenous Population's Draft Declaration of the Rights of Indigenous Peoples, 2007. The Convention No. 169 is the first

¹⁰ See *The Concept of Indigenous Peoples* (Feb. 2, 2013), www.un.org/esa/socdev/unpfii/.../workshop_data_back_ground.doc.

¹¹ See *Study Guide: The Rights of Indigenous Peoples* (Feb. 2, 2013), <http://www1.umn.edu/humanrts/edumat/studyguides/indigenous.html>.

¹² Art. 1(2): Right to Self Determination.

¹³ Art. 2: Right against Discrimination.

¹⁴ Art. 27: Right of Ethnic, Religious or Linguistic Minorities to exist and to enjoy their own culture, to profess and practice their own religion, or to use their own language.

¹⁵ Art. 1: Right against Racial Discrimination.

international instrument which deals specifically with the rights of indigenous peoples. This Convention is a legally binding international instrument open to ratification and it has been ratified by 20 countries.¹⁶ The convention consists of a Preamble followed by forty-four articles and can be divided in ten parts.¹⁷ This Convention deals with various issues like, land rights, employment, vocational training, social security and health, means of communication and cooperation. The Convention states that governments shall have the responsibility for developing a systematic and coordinated action to protect the rights of indigenous and tribal peoples¹⁸ and ensure that appropriate mechanisms and means are available.¹⁹ The greatest significance of this Convention is that it can be used as is a tool for communication between governments and indigenous peoples and prevent any possible conflicts between them.

The Declaration on the Rights of Indigenous Peoples was adopted by the UN General Assembly on September 2007 by a majority of 144 states in favour and 4 states against²⁰ with 11 abstentions.²¹ The Declaration consists of a Preamble and 46 Articles. It recognizes various human rights and fundamental freedoms of indigenous peoples such as the right to unrestricted self-determination, an inalienable collective right to the ownership, use and control of lands, territories and other natural resources, their rights in terms of maintaining and developing their own political, religious, cultural and educational institutions along with the protection of their cultural and intellectual property. The Declaration also highlights the need for prior and informed consultation, participation and consent in activities of any kind that has an impact on indigenous peoples, their property or territories. It also establishes the need for fair and adequate compensation for violation of the rights recognized in the Declaration and establishes guarantees against ethnocide and

¹⁶ See <http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm> (last visited Feb. 2, 2013).

¹⁷ Part I. General Policy;
Part II. Land;
Part III. Recruitment and Conditions of Employment;
Part IV. Vocational Training, Handicrafts and Rural Industries;
Part V. Social Security and Health;
Part VI. Education and Means of Communication;
Part VII. Contacts and Co-operation Across Borders;
Part VIII. Administration;
Part IX. General Provisions;
Part X. Final Provisions.

¹⁸ Art. 3.

¹⁹ Art. 33.

²⁰ Australia, Canada, New Zealand and the U.S.

²¹ Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine.

genocide. The Declaration also provides for fair and mutually acceptable procedures to resolve conflicts between indigenous peoples and States, including procedures such as negotiations, mediation, arbitration, national courts and international and regional mechanisms for denouncing and examining human rights violations.²²

An analysis of all the above international instruments shows that there is great concern for rights of indigenous people at international level. However, it is to be noted that only the International Labour Organization (ILO) Convention No. 169 is legally binding and all other instruments are merely a voluntary guideline to the state parties. Thus in the absence of a binding obligation, it is difficult to ensure the realization of these rights by the states in reality.

Indigenous People in India

India is having the largest concentration of indigenous people in the world. However, the term indigenous people is not accepted in India as it is considered “divisive and undermining the unity of the Indian nation”²³. Instead of the term indigenous people, the Constitution of India uses the term Scheduled Tribe (hereinafter ST). Recently, the Indian judiciary has also unequivocally asserted that STs are indigenous peoples of India.²⁴ Tribal groups in India are considered to be the earliest inhabitants of the country. However, to identify the precise origin of today’s tribal people due to the fact that, the tribal population was exposed to diverse waves of invaders and other settlers over thousands of years.²⁵ Though the Constitution of India uses the term ST, it is nowhere defined in the Constitution. Instead, Article 366 (25) refers to STs as those communities who are scheduled in accordance with Article 342 of the Constitution. According to Article 342 of the Constitution, the STs are the tribes or tribal communities or; part of or groups within these tribes and tribal communities that have been declared as such by the President of India through a public notification.

The literature review in this context reveals that, a tribe can be identified on the basis of the following criteria:

²² See *The UN Declaration on the Rights of Indigenous Peoples* (Feb. 2, 2013), <http://www.iwgia.org/human-rights/international-human-rights-instruments/undeclaration-on-the-rights-of-indigenous-peoples>.

²³ GILLETTE H. HALL, HARRY ANTHONY, INDIGENOUS PEOPLES, POVERTY, AND DEVELOPMENT 205 (2012).

²⁴ *Kailas and Ors. v. State of Maharashtra*, (2011) 1 S.C.C. 793.

²⁵ See Maitreyi Bordia Das, Gillette Hall, Soumya Kapoor, and Denis Nikitin, *India’s Adivasis*, http://siteresources.worldbank.org/EXTINDPEOPLE/Resources/407801-India_brief_clean_0110.pdf.

1. Geographical isolation: They live in cluster, exclusive remote and inaccessible areas like hills and forests;
2. Backwardness: They depend upon primitive agriculture for livelihood and have low level of literacy, employment and health;
3. Distinctive culture, language and religion.²⁶

Thus an ST is a group who lives in hilly areas and forest away from civilized society and who follow traditional way of life, culture and language.

The STs are also called as *adivasis* in India which means original inhabitants (*adi* means earliest time; and *vasi* means resident of).²⁷ *Adivasi* is an umbrella term for a heterogeneous set of ethnic and tribal groups claimed to be the aboriginal population of India. They comprise a substantial indigenous minority of the population of India.²⁸ However the term *adivasi* is not synonymous to ST because *adivasi* is a general term used to describe all the aboriginal population of India, while ST is a group which is officially declared as ST for administrative convenience. Thus, though there are number of *adivasi* groups in India, only 645 groups are recognized as ST.²⁹ It is pertinent to point out here that the terminology may differ such as *adivasi* or ST but the characteristics are similar, and hence all these groups must be recognized as indigenous people in India.

Legal Provisions in India for the Protection of Indigenous People

In India, the supreme law of the land, i.e., the Constitution of India provides for a comprehensive framework for the socio-economic development of STs and for preventing their exploitation by other groups of society.³⁰ The Constitution contains 209 Articles and 2 special schedules that are directly relevant for STs. The rights granted by the Indian Constitution to the tribal people can be classified as follows:

²⁶ P.R. Memorial Foundation, *A Report on Status of Panchayat Extension to Scheduled Areas (PESA) Act 1996: In the States of Andhra Pradesh, Orissa, Jharkhand, Gujarat and Chhattisgarh*,
http://planning.commission.nic.in/reports/sereport/ser/ser_pesa.pdf.

²⁷ http://siteresources.worldbank.org/EXTSOCIALDEVELOPMENT/Resources/244362-65299949041/6766328-1285599693282/India-PSE-Adivasis_Brief.pdf.

²⁸ www.wikipedia.org.

²⁹ J.J. Roy Burman, *Adivasi: A Contentious Term to denote Tribes as Indigenous Peoples of India*, MAINSTREAM, Vol. XLVII, No.32, 2009.

³⁰ See Y.K. Sabharwal, *Plenary Session: Rights of Indigenous Peoples*, www.supremecourtofindia.nic.in/speeches/speeches_2006/ila-toronto.pdf.

1. Educational and cultural rights (Articles 15(4), 29, 46 and 350);
2. Social rights (Articles 23 and 24);
3. Economic rights (Articles 244 and 275);
4. Political rights (Articles 164(1), 243, 330, 334 and 371);
5. Employment rights (Articles 15(4), 16(4) and 16(4A))

In addition to these rights the Fifth and Sixth Schedule of the Indian Constitution completely deals with the tribal people.³¹

The provisions relating to the administration and control of the Scheduled Areas and STs in any state, other than Assam, Meghalaya, Tripura and Mizoram are contained in the Fifth Schedule to the Constitution. The administration of the tribal areas in the State of Assam, Meghalaya, Tripura, and Mizoram is carried on according to the provisions of the Sixth Schedule. It provides for autonomous districts and autonomous regions. In addition to constitutional provisions, there are a number of legislations which contains provisions in favor of STs in India. They are, the Protection of Civil Rights (Anti-Untouchability) Act, 1955; the Bonded Labour (Abolition) Act, 1976; the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989; the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993; the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Rights) Act, 2006; the *Panchayat* (Extension to the Scheduled Areas) Act 1996 (PESA). Among all these legislations, PESA is considered as very significant. It is applicable to the Fifth Schedule Areas in 9 states i.e., Andhra Pradesh, Gujarat, Himachal Pradesh, Jharkhand, Madhya Pradesh, Chhattisgarh, Maharashtra, Odisha and Rajasthan. The Act recognizes the hamlet or group of hamlet level assembly of people (*gram sabha*) as against the elected members (*gram panchayat*) to be pre-eminent.³²

In 2004, the Government of India established, the National Commission for Scheduled Tribes (NCST) to address violations and ensure the rights of the tribals. The Commission consists of a chairman, vice-chairman and three other members. The main duties of Commission are to investigate and monitor all matters relating to the safeguards of STs under the Constitution and any other law or any order of the government and to evaluate the working of such safeguards. The Commission enquires into specific complaints with

³¹ Laasya Priya Ponnada, *Constitutional Provisions for the Welfare of Tribal's* (Feb. 2, 2013), <http://legalservices.co.in/m/writingcontest/view/>.

³² Ajay Dandekar & Chitragada Choudhury, *PESA, Left-Wing Extremism and Governance: Concerns and Challenges in India's Tribal Districts*, <http://www.downtoearth.org.in/dte/userfiles/images/PESAchapter.pdf>.

respect to the deprivation of rights and safeguards of STs. It also advices on planning process of socio-economic developments of STs and evaluates the progress of their development under the union and any state. The Commission presents reports to the President of India upon the working of all those safeguards annually and at such other times as the Commission deems fit and also makes recommendations as to measures that should be taken by the centre and states for the effective implementation of those safeguards and other measures for the protection, welfare and socio-economic development of STs. The Commission also discharges any other functions for protection, welfare, development and advancement of STs as the President may, subject to the provisions of any law made by parliament, by rule specify.

A landmark development in the issue of tribal protection in India was the release of a draft National Tribal Policy by the Ministry of Tribal Affairs in 2006. The Policy aims ‘uplift the tribals who have been facing acute poverty, alienation from land and lack of livelihood opportunities’ in many parts of India.³³ In spite of all these legal provisions the indigenous people continue to face violations of their basic rights.

The Gap between the Legal Framework and the Reality

At international and national level there are number of documents for protecting the rights of indigenous people. However, there is a gap between the legal promise and the reality as evident from the various instances all over the world. A study report of the Asian Indigenous and Tribal People Network reveals that, indigenous people in India suffer from various types of violations which are as follows: violation of right to life; arbitrary arrest, illegal detention and torture; killing by Maoists; abduction; various atrocities by security forces; violence by caste *panchayat*/village council.³⁴ So also a major violation of rights of indigenous people is the violation of their right to land and right to natural resources. The land of tribal people is acquired for developmental projects and they are being forcefully evicted. Thus they are separated from their ancestral land and natural habitat. This affects their right to livelihood and traditional way of life. So also the rehabilitation and resettlement of displaced people is in a poor stage in India and thus their basic right to life, dignity and livelihood are blatantly violated by the authorities. It is an irony that in a welfare state where the government is having an obligation to protect the rights of the people, it is causing violation of the rights of indigenous

³³ <http://www.pib.nic.in/newsite/erelease.aspx?relid=18976>.

³⁴ See Asian Indigenous & Tribal People Network, *The State of India's Indigenous and Tribal Peoples, 2009*, www.aitpn.org/Reports/Tribal_Peoples_2009.pdf.

people either through its own machinery or by adopting an indifferent attitude.

Conclusion

Indigenous people are often subject to discrimination and suffer severe violations of their rights. In almost every country of the world the indigenous people are living in poverty and are socially and economically backward. Though, there are various legal measures at international and national level, these measures are either not implemented properly or the benefits are not made available equally to all. India is having the largest population of indigenous people in the world and being a welfare state, it is the duty of the government to take all possible measures for protecting the rights of indigenous people. Though, the Constitution of India guarantees numerous rights such as right to life, education, and culture, etc., the actual realization of these rights is a distant goal. So also though there are a number of legislations in favour of indigenous people, the studies shows that their rights are often violated and they are still living in social and economically backward conditions. Hence there is a need to have a holistic approach towards the protection of rights of indigenous people. In this regard following measures are suggested:

1. It is necessary to remove the confusion with respect to the various terms i.e., tribe, *adivasi* and indigenous people. Hence a uniform meaning should be adopted and all the tribes and *adivasi* groups in India should be declared as indigenous people.
2. The government should conduct annually a survey and collect proper and correct information regarding the various types of indigenous people in India.
3. The indigenous people's right over their ancestral land should be recognized and they should not be forcefully evicted from their land. Therefore the developmental projects should be planned accordingly and must exclude the land of indigenous people. In case it is necessary to acquire the land of indigenous people it should be made mandatory for the concerned authority to rehabilitate the indigenous people in a land of similar characteristics prior to the implementation of the project.
4. The security forces should be sensitized about the rights and special needs of the indigenous people. They must be made accountable for any violations of the rights of such people.
5. The right to self-determination of the indigenous people must be recognized not only on paper but in reality. The government must not interfere with the traditional way of life of such people and must not try to force them to live life as other civilized sections of the society.

6. Community participation should be encouraged while implementing any policy for the protection and promotion of rights of indigenous peoples.
7. The basic rights like right to food, right to education, and right to health must be given special attention and the concerned local authorities of that area must take all possible steps to ensure these rights to the indigenous people.
8. Efforts must be made for strengthening the communication system between the authorities and indigenous people. Training should be given to a selected group comprising of youth, elders and women, from every indigenous group so that they can act as a link between the indigenous group and the authorities. So also every six months there should be a meeting of the authorities and the indigenous group so that the problems of the indigenous people can be discussed and immediate steps can be taken for solving them.



ISSUES AND CONSTRAINTS IN IMPLEMENTATION OF THE RIGHT TO INFORMATION ACT, 2005

Dr. Ritu Salaria*

“Knowledge will forever govern ignorance and a people who meant to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means for obtaining, it is but a prologue to force or tragedy or perhaps both.”

- James Madison

Introduction

India being a welfare state, it is the duty of the government to protect and enhance the welfare of the people. It is obvious from the Constitution of India, 1950 (hereinafter the Constitution) that we have adopted a democratic form of government. Where a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their government is doing. The citizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on those who can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of government. It is only if people know how government is functioning that they can fulfill the role which democracy assigns to them and make democracy a really effective participatory democracy.¹

The citizen's right to know the facts, the true facts, about the administration of the country, is, thus, one of the pillars of a democratic state. And that is why the demand for openness in the government is increasingly growing in different parts of the world.²

Need for Right to Information Act

In recent years, there has been an almost unstoppable global trend towards recognition of the right to information by countries, intergovernmental organizations, civil society and the people. The right to information has been recognized as a fundamental human right, which upholds the inherent dignity of all human beings. The

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¹ J.N. BAROOWALA, THE RIGHT TO INFORMATION ACT 2005 5 (2010).

² S.P Gupta v. Union of India, A.I.R. 1982 S.C. 149.

right to information forms the crucial underpinning of participatory democracy-it is essential to ensure accountability and good governance. Greater the access of the citizen to information, greater the responsiveness of government to community needs. Alternatively, the more restrictions that are placed on access, the greater will be the feelings of 'powerlessness' and 'alienation'. Without information, people cannot adequately exercise their rights as citizens or make informed choices.³

The free flow of information in India remains severely restricted by three factors:

- i.** The legislative framework includes several pieces of restrictive legislation, such as the Official Secrets Act, 1923;
- ii.** The pervasive culture of secrecy and arrogance within the bureaucracy; and
- iii.** The low levels of literacy and rights awareness amongst India's people.

The primary power of the right to information is the fact that it empowers individual Citizens to requisition information. Hence without necessarily forming pressure groups or associations, it puts power directly into the hands of the foundation of democracy-the citizen.

In the Constitution, Article 19 has been interpreted to mean that right to information is one of the essential ingredients of Article 19(1)⁴.

After going through Article 19 of the Constitution, it is pertinent to note that the interpretation of the provisions of the Constitution is the duty of the Supreme Court of India and the law declared by the Supreme Court is binding under Article 141 of the Constitution which reads as under: "[T]he law declared by the supreme court shall be binding on all courts within the territory of India."⁵

When we come to the interpretation of Article 19 of the Constitution *vis-a-vis* right to information, the Supreme Court of India has laid

³ http://www.legalserviceindia.com/articles/rti_dh.htm (last visited Jan. 21, 2013).

⁴ INDIA CONST. art. 19: Protection of certain rights regarding freedom of speech etc.- (1) All citizens shall have the right-(a) to freedom of speech and expressions;..... Reasonable restrictions in clause(2) are nothing in sub-clause (a) of clause(1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

⁵ *Supra* note 2, at 6.

down that right to information is a fundamental right under Article 19(1)(a) of the Constitution. The state under clause (2) of Article 19 of the Constitution, however, is entitled to impose reasonable restrictions, inter alia in the interest of the state.⁶

Right of information is a facet of the freedom of “speech and expressions” as contained in Article 19(1)(a) of the Constitution. Right of information, thus, indisputably is a right of freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution. A citizen has a fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for the purpose.⁷

The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security.⁸

Right to information and the recommendation by NCRWC

The right to information is such basic right today that this right to information was considered by the National Commission to Review the Working of the Constitution (NCRWC) and as per its report under Chairmanship of Justice M.N. Venkatachaliah, dated March 31, 2002, and it was held that right to information should be guaranteed and needs to be given real substance.

Accordingly NCRWC suggested that Article 19(1)(a) of the Constitution may be amended as:

- “(1) All citizens shall have the right-(a) to freedom of speech and expression which shall include the freedom of the press and other media, the freedom to hold opinions and to seek, receive and impart information and ideas.
- (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the state from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court,

⁶ People’s Union for Civil Liberties v. Union of India, A.I.R. 2004 S.C.1442.

⁷ Secretary, Ministry of Information and Broadcasting, Government of India v. Cricket Association of Bengal, A.I.R. 1995 S.C. 1236.

⁸ State of Uttar Pradesh v. Raj Narain, A.I.R. 1975 S.C. 865.

defamation or incitement to an offence, or preventing the disclosure of information received in confidence except when required in public interest.”

Reason for being right to information as a basic human right

The freedom of speech and expression includes right to acquire information and disseminate it. Freedom of speech and expression is necessary for self-fulfillment. It enables people to contribute to debates on social and moral issues. It is the best way to find a truest model of anything, since it is only through it that the widest possible range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy. Equally important is the role it plays in facilitating artistic and scholarly endeavours of all sorts.⁹

The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments.¹⁰

In one of the leading English case, Lord Simon of Glaisdale¹¹ has said that the public interest in freedom of discussion (of which the freedom of the press is one aspect) stems from the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently the decisions which may affect themselves.

Freedom of expression has four broad social purposes to serve:

- i.** It helps an individual to attain self-fulfillment;
- ii.** It assists in the discovery of truth;
- iii.** It strengthens the capacity of an individual in participating in decision-making; and
- iv.** It provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.

In our democratic set up the enlightenment of the electorate is very important for the fair functioning of the democracy i.e., for the fair election of the representatives of the power of the people of India. It is we, the people of our country, who will decide the future of our country. So, it is possible only if we are well informed about the

⁹ Secretary, Ministry of Information and Broadcasting, Government of India v. Cricket Association of Bengal, A.I.R. 1995 S.C. 1236.

¹⁰ Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India, A.I.R. 1986 S.C. 515.

¹¹ Attorney General v. Times Newspapers Ltd., (1973) 3 All. E.R. 54.

choices we have to make. It is only the knowledge, the information that can show us the right path.

All members of society should be able to form their own beliefs and communicate them freely to others. In sum, the fundamental principle involved here is the people's right to know. Freedom of speech and expression should, therefore, receive a generous support from all those who believe in the participation of people in the administration.¹²

The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1) (a). Therefore, disclosure of information in regard to the functioning of the government must be the rule and secrecy an exception. To conclude, right to information is a basic human right and even Article 19 of the International Covenant on Civil and Political Rights (ratified in 1978) declares that: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference, and to seek, and receive and impart information and ideas through any media and regardless of frontiers". The Supreme Court of India while interpreting Article 19(1)(a) of Constitution. Right of expression, thus, indisputably is a fundamental right,¹³ a basic human right.

Access to information is at the foundation of a democracy. The right to know has been seen to be at the base of the democratic process and in *Romesh Thapar v. State of Madras*¹⁴, the Supreme Court of India found the freedom of discussion to be included in Article 19(1)(a) of the Constitution and the freedom of press to be an aspect of the freedom of discussion so that members of a democratic society should be sufficiently informed to 'be able to form their own beliefs and communicate them freely. The fundamental principle is the people's right to know'. Later in many cases this view has been amplified by the Supreme Court.¹⁵

In *Maneka Gandhi v. Union of India*¹⁶, in *S.P Gupta v. Union of India*¹⁷, it has been held for a clean and healthy administration and

¹² Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India, A.I.R 1986 S.C. 515.

¹³ People's Union for Civil Liberties v. Union of India, A.I.R. 2004 S.C. 1442.

¹⁴ A.I.R. 1950 S.C. 124.

¹⁵ Sakal Papers (P) Ltd., v. B.N. Sarpotdar, A.I.R. 1962 S.C. 305; Bennett Coleman & Co. v. Union of India, A.I.R. 1973 S.C. 106; Indian Express Newspapers (Bombay) P. Ltd., A.I.R. 1986 S.C. 515; Dinesh Trivedi v. Union of India, (1997) 4 S.C.C. 306; Vineet Narain v. Union of India, (1998) 1 S.C.C. 226.

¹⁶ A.I.R. 1978 S.C. 597.

¹⁷ A.I.R. 1982 S.C. 149.

effective participatory democracy the information or the means of obtaining it, is very important.

Legislative background of the Right to Information Act, 2005

The Preamble of the Constitution embodies the essence of democracy and declares the “people” as the source of power in our country. So the citizen’s have fundamental right to know what the government is doing in its name. Freedom of speech is life and blood of democracy. The free flow of information and ideas informs political debate. It is a safety valve; people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a break on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration in the country.¹⁸

From time to time various provisions were made in various acts passed by the legislature for imparting information to the citizens. E.g.:¹⁹ Sections 74 to 78 of the Indian Evidence Act 1872 give right to the person to know about the contents of the public documents, and in this connection Section 76 of the Indian Evidence Act lays down that the public officials shall provide copies of public documents to any person who has the right to inspect them. Under the Factories Act, compulsory disclosure of information has to be provided to factory workers regarding dangers including health hazards arising from their exposure to dangerous materials and the measures to overcome such hazards. Under Section 25(6) of the Water (Prevention and Control of Pollution) Act, every state is required to maintain a register of information on water pollution and it is further provided that so much of the register as relating to any outlet or any effluent from any land or premises shall be open to inspection at all reasonable hours by any person interested in or affected by such outlet, land or premises. Under Section 33A of the Representation of the People Act, a candidate contesting elections is required to furnish in his nomination paper the information in the form of an affidavit concerning: (i) accusation of any offence punishable with two or more years of imprisonment in any case including the framing of charges in pending cases; and (ii) conviction of an offence and sentence of one or more than one year imprisonment.

During the last decade, the right to information has got such a momentum as never before and on the civil societies side also some organizations, social activists and individuals did excellent work in this field. The Mazdoor Kissan Shakti Sangathan (MKSS in 1990) has

¹⁸ R. v. Secretary of State for the Home Department Ex. P. Simms, (2000) 2 L.R. 115 (AC).

¹⁹ *Supra* note 2, at 19.

done a great job in the field of right to information in rural India and its struggle for minimum wages and to get the information regarding muster rolls being maintained ultimately led the Government of Rajasthan to enact Right to information Act and then various other state governments enacted the Right to Information Acts, viz.: the Tamil Nadu Right to Information Act, 1997; the Goa Right to Information Act 1997; the Karnataka Right to Information Act 2000; the Assam Right to Information Act 2001; the Madhya Pradesh Right to Information Act 2001; the Delhi Right to Information Act 2001; the Orissa Right to Information Act 2002; the Maharashtra Right to Information Act 2003; the Jammu and Kashmir Right to Information Act 2004.

Then Government of India enacted Freedom of Information Act, 2002, which received the assent of the President of India on January 6, 2003 with an aim to make the government more transparent, and accountable to the public. But with the passage of time, it was felt that this Act has not fulfilled the aspirations of the citizens of India in the field of right to know and to get information and therefore this Act need to be more progressive, participatory and meaningful. To achieve this object, the Right to Information Bill was introduced in the Parliament in December 2004 and was passed by both the Houses of Parliament with major amendments in May, 2005. It received the assent of the President of India on June 15, 2005.

Empowerment of Public Interest Litigation due to right to information

The rule of law is the common way of life in a civilized society and it is also used to protect the interests of the society and the public at large to fulfill the ideals of the modern welfare state. The interpretation of the law is the function of judiciary in a democracy like ours and the main concern of administration of justice is protection of the rights of the people for the well-being of its subjects. The right to freedom of speech and expression guaranteed under Article 19(1) of the Constitution includes the right to receive and inspect information. Freedom of speech is the lifeblood of democracy. The Supreme Court in *Union of India v. Association of Democratic Reforms*²⁰ has passed various directions for the disclosure of information by the candidates who are seeking election to Parliament or a State Legislature like information about any offence committed by them, details of property and assets, any liabilities, educational qualification etc.

²⁰ A.I.R. 2002 S.C. 2112.

So, the right to get information in democracy is recognized all throughout and it is a natural right flowing from the concept of democracy.²¹

Structural and Functional Framework

The Right to Information Act, 2005 (hereinafter the RTI Act) mandates a legal-institutional framework to establish a practical arrangement for the right to access public information. It prescribes both the mandatory disclosure of certain kinds of information by public authorities and the designation of public information officers (PIOs) or assistant public information (APIOs) in all public authorities to attend to requests from citizens for information. It also provides citizens the right to appeal. Further, the RTI Act mandates the constitution of State Information Commissions (SICs) and a Central Information Commission (CIC) to enquire into complaints, hear appeals, and oversee and guide its implementation. The RTI Act imposes certain obligations on public authorities and the Information Commissions. The RTI Act includes the provisions for imposition of penalties in case of non-compliance of the provisions of the RTI Act.²²

Political parties as “Public Authorities”

In the case of *Subhash Chandra Aggarwal and Anil Bairwal v. 6 Political Parties*,²³ it is held that 30% of their income which these political parties would have otherwise paid by way of income tax has been given up in their favour by the Central Government. No one can dispute that this is substantial financing, though indirectly. Added to this are the concessional allotment of land and buildings in prime locations in the national capital and in several state headquarters. The political parties enjoy an almost unfettered exemption from payment of income tax, a benefit not enjoyed by any other charitable or non-profit non-governmental organizations. Political parties affect the lives of citizens, directly or indirectly, in every conceivable way and are continuously engaged in performing public duty. It is, therefore, important that they become accountable to the public.

Right to privacy and right to information

The scheme of the RTI Act contemplates for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to

²¹ *Supra* note 2, at 102.

²² Shreyaskar & K.P. Pankaj, *Investigating Compliance of the RTI Act*, ECONOMIC AND POLITICAL WEEKLY, Vol. XLVIII. No. 9, Mar. 2, 2013 at 19.

²³ File No. CIC/SM/C/2011/001386, decision dated June 3, 2012.

promote transparency and accountability in the working of every public authority. It was aimed at providing free access to information with the object of making governance more transparent and accountable. Another right of a citizen protected under the Constitution is the right to privacy. This right is enshrined within the spirit of Article 21 of the Constitution. Thus, the right to information has to be balanced with the right to privacy within the framework of law.

Areas of major concern in implementation of right to information

It is evident now that India's right to information laws have in a short period of time made the people aware of their rights in a whole new way. In developing countries, which face the twin challenges of corruption and inefficiency in governmental institutions and the need for rapid economic and social progress, the operation of right to information laws have shown they hold vast potential for transformation. The RTI Act has given the citizens an instrument to directly challenge the system. So, during the course of its implementation over the period of time since its enforcement, many issues regarding its effective working have cropped up. These issues require concern and immediate remedial measures need to be adopted.

The Department of Personnel and Training (DoPT) in 2009 had engaged PricewaterhouseCoopers (PwC) for assessing and evaluating the level of implementation of the RTI Act with specific reference to the key issues and constraints faced by the "Information Providers" and "Information Seekers".

This report has been prepared by PricewaterhouseCoopers (PwC) in association with IMRB (market research partner). This study takes into account the feedback of over 2000 information seekers and over 200 information providers across public authority (PA) at Centre, State, and local levels in 5 States. It also includes feedback of 5000 citizens with respect to their awareness of the RTI Act. As part of the study, the team also conducted four national workshops, in which Central Information Commissioners, State Information Commissioners, Civil Society Organizations, and the media participated. Apart from this, the team has also (i) participated in several seminars conducted by Civil Society Organizations, (ii) conducted various focused group discussions/one to one meeting with several stakeholders, including PIOs and first appellate authorities. The issues and constraints which were found are discussed below:

1. Issues faced by information seekers

- i. **Faced in filing applications:** Sections 27(1), 28(1) and Section 6 of the RTI Act requires the PIOs to provide assistance to the applicant in drafting and submission of the application. But, practically there is non-availability of user guides for the applicants. The survey shows 52% of citizen surveyed requested availability of a user guide/manual at all the Public Authorities.
- ii. **Low public awareness and quality of awareness:** Section 26 provides provision regarding public awareness about how to exercise the rights under the RTI Act. Survey shows only 15% of the respondents were aware of the RTI Act.
- iii. **Poor quality of information provided:** The survey shows that more than 75% of the citizens are dissatisfied with the quality of information being provided.
- iv. **Constraints faced in inspection of records:** The discussion with the PIOs during the survey shows that 89% of the PIOs did not use the provision for inspection of records.

2. Issues faced by information suppliers

- i. **Failure to provide information within 30 days:** During the study, more than 50% of the information seekers mentioned that it took more than 30 days to receive the information from the PIO. The experience of citizens from disadvantaged communities was similar to the overall experience levels.
- ii. **Inadequate trained PIOs and First Appellate Authorities:** Findings of the report show that only 55% of surveyed PIOs had received RTI training. During discussions with the PIOs and the ATIs, it was highlighted that the frequent transfers/ changes in the PIOs adds to the challenge. This place additional work-load on the training institutes entrusted with providing RTI training.
- iii. **Poor record management practices and obsolete guidelines:** Ineffective record management systems and procedures to collect information from field offices lead to delays in processing RTI applications. As per Section 4(1)(a) of the RTI Act, a public authority needs “to maintain all its records duty catalogued and indexed in a manner and form which facilitates the right to Information under this Act and ensure that all records that are appropriate to be computerized are, within a reasonable time and subject to availability of resources, computerized and connected

through a network all over the country on different systems so that access to such records is facilitated”.

- iv. **Non-availability of basic infrastructure:** The implementation of RTI requires the PIOs to provide information to the applicant through photocopies, soft copies etc. While these facilities are considered to be easily available at a district level, it is a challenge to get information from Block/ Panchayat level. PIOs highlight that the lack of infrastructure hampers the RTI implementation at the PA level.
- v. **Lack of motivation among PIOs:** During the RTI workshops organized in the surveyed States, PIOs cited that there were no incentives for taking on the responsibility of a PIO; however penalties were imposed in cases of non-compliance. There is also a wide variance in the seniority levels of PIOs.
- vi. **Ineffective implementation of Section 4(1)(b):** The internal processes within the public authorities are not defined, so as to take care of the requirement of the relevant suo-motu clauses. Various departments and ministries of government of India have in the last one year posted the requirements specified under Section 4(1)(b) on the website. However the status of the same in the state government departments and websites is significantly poor.

3. Issues faced at Information Commissions

- i. **SIC Annual Reports:** During the survey it was also found that there is no centralized data base of RTI (at the State/Centre level) applicants. A centralized database of all RTI applicants with their information requests and responses from information providers would enable the information commission to publish more accurate numbers in the annual reports.
- ii. **Perception of being lenient towards PIOs:** When the information which is not given within the stipulated time then if PIO as a person is not responsible, then it has to be a systemic failure within the public authority. However as highlighted in the next sub-section, the information commission does not possess adequate monitoring and review mechanism to track the failures of the Public Authorities in complying with the RTI Act.
- iii. **Lack of monitoring and review mechanism:** There are inadequate processes and records available with the information commission to take such steps.

- iv. **High level of pendency:** This is a grave situation; the pendency at the commission is a huge challenge. It is due to non optimal processes for disposing off appeals and complaints.
- v. **Geographical spread of Information Commissions:** Some of the state governments have set up regional offices of their state commissions at various places in the state which saves lot of time and expenses. The CIC which has jurisdiction over RTI appeals relating to central government Public Authorities spread across the country is located in Delhi which results in wastage of considerable time/ expenses of PIOs and the appellants, who come from far off areas.
- vi. **Variation in assumptions of role by SIC and State Governments:** It was found during the survey that there is no clear division of responsibilities between the SICs and Nodal Department in terms of monitoring the implementation of RTI Act.

4. Issues and constraints found in survey

While assessing the entire situation during the survey the following issues emerged:

- i. The Public Authorities have to enhance the level of ownership to ensure the RTI delivery happens as per the spirit of the Act. They have to be ultimately responsible for identifying the gaps in their offices in the delivery of the information, thereafter identify the resources needed and appropriately budget for it.
- ii. Maintenance of the information required to be furnished to the State Information Commission as per Section 25(3) the role of the Centre/State Government is to facilitate the Public Authorities in implementation of the Act. This can happen through providing support to Public Authorities for training, development of software applications, e-Training modules, generating awareness amongst citizens etc.
- iii. The role of the Information Commission has to go beyond the hearing of the appeals. As per the Act, they are expected to issue orders/directions to the Public Authorities to carry out their duties as per the mandate of the Act. However till the time Information Commission assumes the role of ensuring the compliance of the RTI Act by the various Public Authorities, there would not be any control

mechanism. The State Government has to play a facilitative role to the Information Commission through issuance of supporting rules/orders to the Public Authorities.

Conclusion

The effective implementation of the RTI Act will not be possible until or unless the governments and its Public Authorities realize that it is their sincere responsibility to serve their duty. All the agencies involved have to work efficiently and transparently. The infrastructure and resources are conducive for the successful working of the RTI Act. The issues and constraints found in the survey have to be effectively dealt with to empower this right of common citizen.

Further the RTI Act has also been criticized on several grounds. It provides for information on demand, so to speak, but does not sufficiently stress information on matters related to food, water, environment and other survival needs that must be given pro-actively, or *suo moto*, by public authorities. The RTI Act does not emphasize active intervention in educating people about their right to access information-vital in a country with high levels of illiteracy and poverty or the promotion of a culture of openness within official structures. Without widespread education and awareness about the possibilities under the RTI Act, it could just remain on paper. The RTI Act also reinforces the controlling role of the government official, who retains wide discretionary powers to withhold information.

The most scathing indictment of this RTI Act has come from critics who focus on the sweeping exemptions it permits. Restrictions on information relating to security, foreign policy, defence, law enforcement and public safety are standard. But the RTI Act also excludes cabinet papers, including records of the council of ministers, secretaries and other officials; this effectively shields the whole process of decision-making from mandatory disclosure.

Another stringent criticism of the RTI Act is the recent amendment that was to be made allowing for file noting except those related to social and development projects to be exempted from the purview of the Act. File notings are very important when it comes to the policy making of the government. It is these notes that hold the rationale behind actions or the change in certain policy?; why a certain contract is given or why a sanction was withheld to prosecute a corrupt official. Therefore the government's intention to exempt the file notings from the purview of the RTI Act has come in for stringent

criticisms.

In the end we can say that in enacting the Right to Information Act, 2005 India has moved from an opaque and arbitrary system of government to the beginning of an era where there will be greater transparency and to a system where the citizen will be empowered and the true centre of power. Only by empowering the ordinary citizen can any nation progress towards greatness and by enacting the RTI Act India has taken a small but significant step towards that goal. The real *swaraj* will come not by the acquisition of authority by a few but by the acquisition of capacity by all to resist authority when abused. Thus with the enactment of RTI Act India has taken a small step towards achieving real *swaraj*.



JUDICIAL ATTITUDE TOWARDS JUSTICE OF VICTIMS

Dr. Janardan Kumar Tiwari*

A victim of crime cannot be a 'forgotten man' in the criminal justice system. It is he who has suffered the most. His family is ruined particularly in case of death and other bodily injury. This is apart from the factors like loss of reputation, humiliation etc. An honour which is lost or life which is snuffed out cannot be recompensed, but then monetary compensation will at least provide some solace.¹

In an effort to look after and protect the human rights of the convict the court cannot forget the victim and his family in case of his death or who is otherwise incapable to earn his livelihood because of criminal act of the convict. The victim is certainly entitled to reparation, restitution and safeguards of his rights. Criminal justice would look hollow if justice is not done to the victim of the crime.

Judges, as well as other criminal justice professionals are most conscious of the public reactions from victims and victim support groups concerning the treatment victims receive within the criminal justice system.

Judicial Approach towards Victim's Compensation

No system can develop properly until it aligns itself with the socio-economic evolution of the masses whose destinies it is meant to guide and control. Judiciary being the custodian of the rights of the people must recognize the development of the nation and to apply the principles of the position which the nation in its progress assumes from time to time.² Article 21 of the Constitution of India, 1950 which deals with the life and personal liberty has been the subject matter of controversy before the judiciary throughout its inception. The widest possible interpretation has been given to this precious fundamental right so as to provide right to effective justice.

Recognizing the importance being given to the concept of compensation to victims, the Supreme Court of India has granted

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¹ State of Gujarat v. High Court of Gujarat, A.I.R. 1998 S.C. 3164.

² B.P. Singh Sehgal, *Compensation to Victims of State Excesses-A New Dimension in the Field of Victimology in India*, in JURIS VICISSITUDE LAW AND CHANGING TOWARDS 21ST CENTURY 177 (K.L. Bhatia ed., Deep & Deep Publication, Delhi, 1995).

compensation to those people whose rights was violated by the state and its administration, so as to make right to life and personal liberty more effective.³ The Supreme Court has forged new tools, devised new methods and adopted new strategies for the purpose of making fundamental right meaningful even to the victims of crime.

There is a plethora of decisions, where the Supreme Court awarded compensation to the victims, whose plight was brought to the notice of the apex court either by them or by way of public interest litigation. Millions of victims of crime, who cannot approach the apex court out of ignorance or lack of resources, are still crying for justice with the aim of protecting the human rights of victims in our criminal justice system and to fulfill the constitutional obligation.

The Supreme Court should ask the government to confer jurisdiction on the criminal courts by making statutory provisions for the compensation of victims of crime, irrespective of whether the accused is convicted or not and to make statutory provisions for the participation of the victims in prosecution, along with prosecuting agency in a criminal case instituted on report of police. Judicial view on this vital issue of award of compensation to the victim or his dependants can be scrutinized in two phases: compensation in criminal cases and compensation in (criminal) writ proceedings. The Criminal Procedure Code, 1973 (Cr.P.C.) reflects the general law concurring compensation to the victims of crime to some extent. Section 357 of the code is the main provision dealing with the compensation to victims.

Compensation in Criminal Cases

Legislation conferred jurisdiction on the criminal court under Section 357(1) of Cr.P.C., the compensation to the victims of the crime has to be paid out of the fine and the first concern of the court is to consider whether the sentence of fine, is at all called for and if so imposition of how much of such fine would meet the ends of justice.

Section 357(3) of Cr.P.C. is for awarding unlimited amount of compensation to the victims at the time of passing judgment of conviction. This provision is not ancillary to the other provisions of Cr.P.C., but in addition thereto.

³ Rudal Shah v. State of Bihar, (1983) 2 S.C.C. 141; Devki Nundan Prasad v. State of Bihar, A.I.R. 1983 S.C. 1134; Sebastian M. Hungary v. Union of India, (1984) 3 S.C.C. 82, Bhim Singh v. State of J&K, (1985) 4 S.C.C. 677.

By the landmark judgment in *Hari Kishan and State of Haryana v. Sukhbir Singh and Others*⁴ the Supreme Court not only granted compensation of Rs.50,000 to the victim, but also directed the subordinate criminal courts to exercise the power of awarding compensation to the victims of offence in such a liberal way that the victims may not have to rush to the civil courts for compensation to the victims.

Unfortunately, the subordinate judiciary is rarely invoking this provision to award compensation to the victim, where the accused is acquitted of the charge on benefit of doubt or on any technicalities of laws.

The first case in the line which attracted the mind of the court came way back in 1952, where the apex court connected general principles of sentencing i.e., while passing a sentence the court must bear in mind the proportionality between offence and penalty with granting of compensation and observed that while imposing the fine court must consider gravity of offence and the pecuniary condition of the offender. Then came the case of *Prabhu Prasad Shah v. State of Bihar*⁵ where the Supreme Court not only uphold the conviction of 15 years old boy (actually at the time of commission of crime, the accused was 15 years) but also observed that although requirements of social justice demands the imposition of heavy fine, but taking into consideration the condition of the accused, awarded fine of Rs.3,000 to be paid by him to the children of the deceased. In *Adamaji Umar v. State of Bombay*⁶ the Supreme Court observed that 'while passing a sentence' the court has always to bear in mind the necessity of proportion between an offence and the penalty. In imposing a fine it is necessary to have much regard to the pecuniary circumstance of the accused person and to the character and magnitude of the sentence. Where a substantial term of imprisonment is imposed, an excessive fine could not accompany it except in exceptional cases.

Under Section 357(1) of Cr.P.C. an order for compensation can be passed only after the accused has been convicted and fine is imposed on him. It is important to recognize that it is purely within the discretion of the criminal court to order or not to order payment of compensation. There is, however no provision of law which gives power to a court to award compensation for alleged offences other than those which from the subject of injury in the case in which the order is made. Section 357 does not empower the court to award compensation for offence of which the accused has been acquitted or

⁴ A.I.R. 1988 S.C. 2127.

⁵ A.I.R. 1977 S.C. 704, 1977 Cr.L.J. 346.

⁶ A.I.R. 1952 S.C. 14.

discharged. It is not within the competence of the court to award compensation to an acquitted accused out of fine imposed on a convicted accused. In *Re Ravindran* the Madras High Court held that, when the accused are found guilty for the same offence the Code doesn't contemplate giving compensation by one accused to the other.⁷

Specifically, the court has thus a very limited discretion under Section 357(1): it can award compensation only out of the fine, if imposed on the offender. The court has, however much more discretion under subsection (3) of Section 357, though only if fine does not form a part of the sentence. No doubt subsection (3) of Section 357 was added as a recommendation by the Law Commission of India in its 41st report in the new Cr.P.C., 1973. If the section is read simply, the power of the court is unlimited, though practically a magistrate can order for higher compensation than the amount of fine he can impose.

In pursuance of recommendation of the Law Commission of India in its 41st report 1969, a comprehensive provision for compensation to the victims of crime has been provided in Section 357(1) and subsection (3), the court may award compensation to victims of crime at the time of passing of the judgment if it considers appropriate in a particular case in the interest of justice. Under Section 357 of Cr.P.C. the trial court and the appellate courts (while exercising revisional powers) are competent to award compensation to victims of crime only after trial and conclusion of guilt of accused.

Restitution to Victims of Crime

Restitution refers to the responsibility that offenders bear to their victims. In this context it is also important to discuss some of the judgment wherein the principle of restitution to victims of crime has been introduced or were upheld by the courts in India. But in all these cases, the word compensation has been used to refer to restitution which is the accepted terminology by the international scholars for payment made by offenders to victims of crime. As observed by Chockalingam, the Indian courts use the term compensation to refer to restitution as well as the real compensation wherein the money is paid to the victim by the state or other agency for abuse of power.⁸

⁷ B.B. Das, *Compensation to the Victims of Crime*, 30 (1, 2) THE BANARAS LAW JOURNAL, Jan.-Dec., 2001 at 175.

⁸ K. Chockalingam, *Restitution to Victim of Crime in India-Recent Developments*, 21(2) INDIAN JOURNAL OF CRIMINOLOGY 72-81 (July 1993).

In *Nand Ballabh Pant v. State (Union Territory of Delhi)*⁹ the appellant was convicted under Section 304-A Indian Penal Code, 1860 (IPC). He was sentenced to two month rigorous imprisonment with a fine of Rs.500. On appeal to the apex court, the sentence was reduced to one month but the fine was enhanced to Rs.1000 with the direction that the same be paid to the wife of the deceased by way of compensation.

Apart from invoking Section 357 of Cr.P.C., the victim may approach the higher courts under Section 482 of Cr.P.C. to claim compensation which empowers a higher court to exercise the inherent powers in the interest of justice. However, the Supreme Court has not favoured invoking of such power in view of existing statutory provisions under Section 357 of Cr.P.C. For instance, in *Palaniappa Gounder v. State of Tamil Nadu*¹⁰ the court said that:

“If there is an express provision in a statute governing a particular subject matter, there is no scope for invoking or exercising the inherent power of the court because the court ought to apply the provisions of the statute. Hence, the application made by the heirs of the deceased for compensation could not have been made under Section 482 since Section 357 expressly confers power on the court to pass an order for payment of compensation.”¹¹

In this case, the High Court after commuting the sentence of death on the accused to one of life imprisonment, imposed a fine of Rs.20,000 on the appellant and directed that out of the fine, a sum Rs.15,000 should be paid to the son and daughters of the deceased under Section 357(1)(C) of Cr.P.C. The Supreme Court while examining the special leave petition of the appellant observed that there can be no doubt that for the offence of murder, courts have the power to impose a sentence of fine under Section 302 of IPC but the High Court has put the ‘cart before the horse’ in leaving the propriety of fine to depend upon the amount of compensation. The court further observed: “The first concern of the court after recording an order of conviction, ought to determine the proper sentence to pass. The sentence must be proportionate to the nature of the offence and sentence including the sentence of fine must not be unduly excessive”. In fact the primary object of imposing a fine is not to ensure that the offender will undergo the sentence in default of payment of fine but to see that the fine is realized, which can happen only when the fine is not unduly excessive having regard to all the circumstances of the case, including the means of the offender. The

⁹ A.I.R. 1977 S.C. 892, 1977 Cr.L.J. 549.

¹⁰ A.I.R. 1977 S.C. 1323.

¹¹ *Id.* at 1325.

Supreme Court thus reduced the fine amount from Rs.20,000 to a sum of Rs.3,000 and directed that the amount recovered shall be paid to the son and daughters of the deceased who had filed the petition in the High Court. This is a case wherein the Supreme Court reduced the amount of fine and achieved a proper blending of offender rehabilitation and victim compensation. The important point, which emerged in the case, was the Supreme Court upholding the order of compensation.

It is therefore, very clear from this judgment that the criminal court's power to award compensation is limited by consideration which governs the imposition of fine and punishments. This has been again, in a way reiterated by the Supreme Court in *Sarwan Singh v. State of Punjab*¹². In this case the deceased was murdered by his two brothers and their sons. Both the trial court and the High Court convicted all the offenders under Section 302 read with Section 149 of IPC. The apex court set aside the conviction under Section 302 read with Section 149 and found the appellant guilty under Section 304(1) read with Section 149 of IPC and sentenced them to five years rigorous imprisonment with a fine of Rs.3500 each with the direction that same be paid as compensation to the widow of the deceased. While awarding compensation the Supreme Court observed that:

“The object of the section, therefore, is to provide compensation payable to the persons who are entitled to recover damages from the persons sentenced even though fine does not form part of the sentence though Section 545 enabled the court only to pay compensation out of the fine that would be imposed under the law but Section 357(3) when a court imposes a sentence, of which fine does not form a part, the court may direct the accused to pay compensation. In awarding compensation it is necessary for the court to decide whether the case is a fit one in which compensation has to be awarded. It is found that compensation should be paid, then the capacity of the accused to pay a compensation has to be determined. In directing compensation the object is to collect the fine and pay it to the person who has suffered the loss. The purpose will not be served if the accused is not able to pay the fine or compensation for imposing a default sentence for non-payment of fine would not achieve the object. If the accused is in a position to pay the compensation to the injured or his dependants to which they are entitled to, there could be no reason for the court not directing such compensation.

¹² A.I.R. 1978 S.C. 1525.

When a person who cause injury due to negligence or is made vicariously liable to bound to pay compensation, it is only appropriate to direct payment by the accused who is guilty of causing an injury with the necessary *mens rea* to pay compensation for the person who has suffered injury.”

The Supreme Court further observed that:

“It is duty of the court to take into account the nature of the crime, the injury suffered, the justness of the claim for compensation, the capacity of the accused to pay and other relevant circumstances in fixing the amount of fine or compensation.”

The Supreme Court recommended in advisory note to all courts to exercise this power liberally so as to meet the ends of justice in a better way. The court high lightened that: “This power of court to award compensation is not ancillary to other sentences but it is in addition thereto”. This power was intended to do something to reassure the victim that he is not forgotten in the criminal justice system. The court characterized this power as ‘a constructive approach of crime’ and described it as a measure of responding appropriately to crime as well as reconciling the victim with the offender. In the words of the Supreme Court: “It is indeed a step forward in our criminal justice system”.

In an earlier decision of a full bench of Punjab High Court¹³ which is really a landmark in the history of the victim right to compensation never came to light. Peculiarly this judgment was not reported in all important law reporters of the country. It may be because they could not understand the importance of the judgment. In this case, the court observed that it is desirable that the trial court in all appropriate cases, should consider the question of award of compensation at the time of passing the sentence. The accused may be questioned and necessary evidence may be taken in the matter relevant to the award of compensation. While a criminal court should not convert itself into a civil court for the purpose of assessing compensation, the social purpose intended to be served by Section 357 should not be ignored and criminal courts should brush aside the question of determination of compensation and proceed on what appears to be an erroneous and unwarranted assumption that the award of compensation is not true concern of criminal law.

¹³ Surinder Singh v. The State, (1976) 78 P.L.R. 867 cited in B.B. DAS, VICTIMS IN THE CRIMINAL JUSTICE SYSTEM 85 (APH Publishing Corporation, New Delhi, 1997).

The Supreme Court responded somewhat differently in *Guruswamy v. State of Tamil Nadu*¹⁴ where it was held that in case of murder, it is only fair that proper compensation should be provided for the dependants of the deceased. In the instant case, the accused was convicted on a charge of murder. The victims were his father and brother. The accused was found guilty in two courts under Section 302 IPC and was sentenced to death by each court. The conviction of the appellant was confirmed by the apex court but the sentence was reduced to imprisonment of life. While reducing the sentences, the Supreme Court held that the offence was committed during a family quarrel and though the victims are the father and brother of the appellant, in the circumstances of the case, the extreme penalty was not called for. The accused had also been under sentence of death for a period of six years. But in reducing the death sentence to imprisonment for life, it was held that the widow and her minor children should be compensated for the loss they have suffered by the death of the second deceased. The court imposed a fine of Rs.10,000 to the appellant and ordered the same to be paid as compensation to the dependents of the victim.

It was observed by the Supreme Court that criminal justice has many dimensions beyond conviction, sentence, acquittal and innocence. The victim is not to be forgotten but must be restored to the extent possible.¹⁵

Our criminal justice system does not pay much attention to victims of crime. Perhaps the criminal justice system is arbitrary and oppressed to the disadvantage of the victim. An observation made a quarter century ago by Justice V.R. Krishna Iyer that: "It is a weakness of our criminal jurisprudence that victims of crime and the distress of the dependants of the victim do not attract the attention of law and the victim reparation is still the vanishing point of the criminal law". This is the deficiency in the system which must be rectified by the legislature, seems valid even today.¹⁶

The Gujarat High Court in *Shah Chandu Lal v. Patel Baldevbhai*¹⁷ emphasized the need of principle of natural justice in Section 358 of Cr.P.C. The High Court held that the principle of natural justice must be read in the Sections 357 and 358. It was regarded as implicit in the section that opportunity of showing cause against the order proposed to be pushed should be given to the person against whom

¹⁴ A.I.R. 1979 S.C. 1177, 1979 Cr.L.J. 704.

¹⁵ A.I.R. 1980 S.C. 423, 1980 Cr.L.J. 324.

¹⁶ Rattan Singh v. State of Punjab, (1979) 4 S.C.C. 719 in XL ANNUAL SURVEY OF CRIMINAL LAW 184 (2004).

¹⁷ 1980 Cr.L.J. 514 (Guj.).

the order for compensation was proposed to pass. In the absence of such opportunity the order of compensation liable to be set aside. This was described as violation of reasonable procedural requirement contemplated by the Constitution.

The Supreme Court in recent years invoked the concept of victim restitution in appropriate cases. The court has realized the merit of compensating the victim for the losses incurred by them. There is an emergent mend in penology to re-assure the victim that he/she is not forgotten in the criminal justice system, a measure of responding appropriately to crime as well as reconciling the victim with the offender. On the other hand the courts feel that amount affixed should be reasonable depending upon facts and circumstances of each case.¹⁸

The aspect of compensatory justice in criminal law has been elaborately dealt with by the Supreme Court in the leading case of *Hari Kishan and State of Haryana v. Sukhbir Singh and Others*¹⁹ where it was recommended to all courts in the country to exercise the power of awarding compensation to the victims of offence in accordance with Section 357 of Cr.P.C. so as to achieve the goal of social justice. In the instant case two groups of persons during the course of fight inflicted injuries on each other. The accused though armed with *ballam* and other sharp edged weapons used only the blunt side. All the seven accused were convicted under various sections and sentenced by the Additional Session Judge. On appeal to High Court, two of them were acquitted. The others five accused were acquitted of the offences under Section 307 read with Section 149 and under Section 148 of IPC. The conviction under Section 325 read with Section 149 and Section 323 read with Section 149 were maintained. They were released on probation but each was ordered to pay compensation of Rs.2,500 to one of the victim who was seriously injured. When the matter was brought before the Supreme Court in appeal, the Supreme Court questioned the legality of the compensation to the victim which could legally sustain and if so what amount should be proper compensation in the present case? The Supreme Court further observed that:

“It is an important provision but courts have seldom invoked it, perhaps due to ignorance of the object of it. It empowers the court to award compensation to victims while passing judgment of conviction. In addition to conviction, the court may order the accused to pay some amount by way of compensation to victim

¹⁸ Dr. Jacob George v. State of Kerala, 1994 Cr.L.J. 3851; See also 1994 A.I.R. S.C.W. 2282, (1994) 3 S.C.C. 430.

¹⁹ A.I.R. 1988 S.C. 2127.

who has suffered by the action of accused. It may be noted that these power of court to award compensation is not ancillary to other sentences but it is an addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We therefore, recommended to all courts to exercise this power liberally so as to meet the ends of justice in a better way.”

The Supreme Court further observed:

“The payment by way of compensation must however, be reasonable. What is reasonable may depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the justness of crime by the victim and the ability of the accused to pay, if there are more than one accused, they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment may also vary depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary by installment, may also be given. The court may enforce the order by imposing the sentence in default.”

In the aforesaid case, the Supreme Court has rightly pointed out that the criminal courts below have seldom invoked this important provision. The High Court may therefore orient the judicial officer in this new aspect of compensatory criminal jurisprudence.

The court in the above case pointed out that the victim was unfortunate and observed further that: “His power of speech has been permanently impaired.....the lifelong disability of the victim ought not to be bye-passed by the court. He must be made to feel that the court and accused have taken care of him. Any such measure which would give him succor is for better than a sentence of deterrence. The compensation awarded by the High Court, in our opinion appears to be inadequate having regard to the nature of injury suffered by the victim. We have ascertained the means of accused and the ability to pay further sum to the victim. We are told that they are not unwilling to bear the additional burden. The learned counsel said that his clients are willing to pay any amount determined by this court. It is indeed a good gesture on the part of the counsel and his clients. With due regard to all the facts and circumstances of the case, we consider that Rs.50,000 compensation to the victim would meet the ends of justice. We direct the respondent to pay the balance within two months in equal proportion”.

This is a landmark case where the Supreme Court of India has not only enhanced the quantum of compensation (restitution) to the victim awarded by the High Court in a just and reasonable manner but also issued a directive to all the courts in India to make use of the provisions of restitution liberally with a set of guidelines to decide the amount of restitution to the victim.

The apex court also failed to see any reasons for the courts in not awarding compensation even when the accused is in a position to pay it to the entitled injured persons. The apex court asserted that the requirement of social justice demands that heavy fine should be imposed in law of reduction of sentence to compensate the victim of crime.

The above decision of the Supreme Court clearly indicates that judicial trend in compensating the victim is attaining new dimensions. In awarding compensation following factors play vital role:

Firstly, much depends upon the paying capacity of the offender.

Secondly, there is a general reluctance on the part of the criminal court regarding the use of criminal law process for compensation purpose coupled with the indifference and even ignorance on the part of lawyers and clients.

Thirdly, the courts are reluctant to impose fine along with substantial imprisonment.

Fourthly, maximum fines have been laid down by various offences which were fixed long time ago and quantity of fine is very small.

Lastly, conviction is necessary for the payment of compensation. But unfortunately conviction is very less irrespective of the merit of the case.²⁰

From the above discussion it is clear that Section 357 of Cr.P.C. provides provision for payment for compensation to the victims or his family out of the fine imposed on the accused. It is very strange to find out that if the accused is acquitted the victim or his family members depends on him are under obligation to bear the agonies in the society due to loss of the bread earner. So, it is observed that

²⁰ SAMMAIAH MUNDRATHI, LAW ON COMPENSATION TO VICTIMS OF CRIME AND ABUSE OF POWER 147-148 (Deep & Deep Publications Pvt. Ltd., New Delhi, 2002).

conviction of accused is necessary evil to get the compensation under Cr.P.C.

The progressive judgment of the Supreme Court in *Hari Kishan and State of Haryana v. Sukhbir Singh and Others* to compensate victim of crime under Section 357(3) of Cr.P.C. was not followed by court in two of its later judgments, *Brij Lal v. Prem Chand*²¹ and *State of U.P. v. Jodha Singh and Others*²². In these two cases the court awarded compensation to the victim of crime out of the fine amount (i.e., is under Section 357(1) of Cr.P.C). In both the cases, Supreme Court was more sympathetic towards the accused rather than the victim.²³

In case of *Brij Lal v. Prem Chand*²⁴ the accused husband used to demand money from the deceased wife and the accused quarreled with the wife everyday over the payment of money. The deceased wife on the faithful day reacted by saying that she preferred death to life in this world. The accused husband further said that she can provide him relief quicker by dying on the very same day. The deceased set fire to herself immediately thereafter and died. The reversed decision of the High Court to acquit the accused against conviction by the trial court was held illegal by the Supreme Court. In this case of dowry death the Supreme Court upheld the conviction of the accused by the lower court under Section 306 of IPC. But regarding the sentence of four years of rigorous imprisonment by the Session Judge, the Supreme Court felt that as more than eleven years had elapsed since the High Court acquitted the accused and the accused is leading a settled life and that he and his family members would be ruined if he, is to be sent back to prison to serve any further term to sentence. However, the court restored the conviction but reduced the sentence to the period of imprisonment already undergone. Taking all the factors into consideration, the Supreme Court said that the ends of justice would be met or if the sentence awarded to the accused was substituted with the sentence of imprisonment for the period already undergone by him and the sentence of fine was enhanced from Rs.500 to Rs.20,000 with a direction that out of the fine amount, if paid, a sum of Rs.18,000 should be paid to the father of the deceased for bringing of the minor son of the deceased.

²¹ A.I.R. 1989 S.C. 1661.

²² A.I.R. 1989 S.C. 1822.

²³ B.B. DAS, VICTIMS IN THE CRIMINAL JUSTICE SYSTEM 88 (APH Publishing Corporation, New Delhi, 1997).

²⁴ A.I.R. 1989 S.C. 1661.

In *State of U.P v. Jodha Singh and Others*²⁵, which is a case of appeal against acquittal, the accused party was charged for assaulting the deceased of whom two of them died of injuries and third sustained several injuries. The defense pleaded that only two accused were present on scene and they acted in self-defense. The plea was taken to be unbelievable as acts in self-defense of only two accused could not have caused death of two persons and injured third. Moreover different kinds of injuries found on deceased could not be caused by two persons alone. It was held that the High Court acquitted the accused without considering the question whether right of self-defense was exceeded by the accused.

In the above case the occurrence had taken place nearly seventeen years ago and the accused A1 and A7 were acquitted of all the charges and convicted A2 to A6 under Section 304 read with Section 34 of IPC sentencing them to the period of imprisonment already undergone by them. In addition the Supreme Court sentenced A2 to A4 and A6 to pay a fine of Rs.5000 each. For the conviction under Section 326 read with Section 34 of IPC the accused was sentenced to undergo for the period already undergone by them and in addition to pay a fine of Rs.250 in each. Out of the fine amount imposed to A2 to A6 under Sections 304 and 34 of IPC, the court directed that 75% of the fine amount to be given in equal shares to the two heirs of the deceased. Out of the fine amount collected for the conviction under Section 326 and 34 of IPC, the court directed that 75% of the amount to be given to prosecution witness 1, who was also a victim as he was injured.

Though the Section 357 of the Cr.P.C. provides for compensation to the victim of crime, the criminal law in India is not at all victim oriented and due attention has not been paid by the criminal courts to compensate the victim of crime. This provision is very rarely invoked by the criminal courts. The victim is totally at the mercy of the court for award of compensation because of the word 'may' in Section 357(1) and (3) of Cr.P.C. Mere punishment to the criminal law is not total fulfillment of rule of Law. Hence the court should be liberal in utilizing power vested in them in granting compensation to the injured in a criminal case.

Compensation under this section can be awarded not only by the trial court but also by a court of appeal or revision. The award of compensation should be 'a part of the sentence and order' made upon a conviction for an offence for 'any loss or injury' which means a loss that can be compensated in money, including substantial

²⁵ A.I.R. 1989 S.C. 1822.

determinant from a worldly point of view, and loss of support and even loss of liberty. Injury denotes any harm whatever illegally causes to any person in body mind reputation or property²⁶. In order to claim compensation under this section it is necessary to show that the person has 'suffered' loss or injury which can be appraised in money and not otherwise, and that loss has been caused by an offence and such person can recover compensation in a civil court. Not only the persons directly injured by the offence, but also the heirs are entitled to an award of compensation. In the following cases the court awarded the compensation to the heirs of the deceased.

In *K. Bhaskaran v. Shankar Vaidhyan Balan*²⁷ the apex court held that it is well to remember that this court has emphasized the need for making liberal use of Section 357(3). No limit is mentioned in subsection and therefore a magistrate can award any sum as compensation. Of course, while fixing the quantum of such compensation the magistrate has to consider what would be reasonable amount of compensation payable to the complainant.

In *Balraj v. State of U.P.*²⁸ the appellant was convicted under Section 302 of IPC for committing the murder of four persons and injuring some other members of his elder brother's family. In this case the court reduced the sentence of death to imprisonment of life and directed the appellant to pay Rs.10,000 by way of compensation as she is left without any support with a family.

The High Court also adopted the law of victimology on the lines held by the highest court. In *Kunhimon and Others v. State*²⁹ the Kerala High Court Justice Shankaran Nair observed that:

"The offence proved in this case is a heinous one and the accused had displayed moral depravity of uncommon dimension. The victim was treated like cold meat, or worse, as a sub-human object. An offence of this nature must receive a deterrent sentence. Any rational system of sentencing involves a correspondence between the nature of the offence committed, and the nature of the sentence imposed. The concept of rehabilitation is recognized in the sentencing area. This is not confined to accused, but to victims of crime too, as it should be. Section 357 of Cr.P.C. is recognized of

²⁶ In *Yalla Gangula v. Manido Dali*, I.L.R. 21 Mad. 74 the High Court considered meaning of the word injury in reference to Section 44 of IPC for the purpose of interpretation of the word 'injury' under Section 545 of Cr.P.C. (present Section 357): Cited in B.B. DAS, VICTIMS IN THE CRIMINAL JUSTICE SYSTEM 90 (APH Publishing Corporation, New Delhi, 1997).

²⁷ A.I.R. 1999 S.C. 1362.

²⁸ A.I.R. 1996 S.C. 1935.

²⁹ 1987 (2) K.L.T. 751.

this principle. Criminal justice system is not designed solely to protect the interest of the criminal defendant. The victim in this case has to be compensated. There can be no compensation for what she has suffered or lost. The intangibles are incommensurable and cannot be translated into monetary terms. 'All that judges can do is to award reasonable sums which must be regarded as reasonable compensation'. Court must compensate her for her deprivation, as nearly as possible. This is the philosophy of the justice system and courts should enforce the conscience of law, as seen in Section 357 of Cr.P.C."

The Madhya Pradesh High Court in *State of M.P. v. Mangu*³⁰ held that Section 357 of Cr.P.C considered the 'offenders liability'. State liability doesn't enter the picture however desirable it may be as there is no reference to such under the section. But emerging theories of victimology support grant-in-aid to assist the victim. So it is not desirable that a welfare state which has proceeded half way by enacting statutory provisions in Cr.P.C. and M.V.A shall devise ways and means to ensure expenditure payment and incorporate such in legislation.

The restorative and reparative theories that have developed in response to the plight of the victims of crime also underline the necessity to compensate the victim of crime. Their argument is that sentence should move away from punishments of offenders towards restitution and reparation, aimed at restoring the harm done and calculated accordingly. Restorative theory encompasses the notion of reparation for the effects of the crime. It envisages less resort to custody with onerous community based sanctions requiring offenders to work in order to compensate victims and also contemplating support and counseling offenders to re-integrate them into community. Such theories therefore tend to act on a behavioral premise similar to rehabilitation, but their political premise is that compensation for victims should be recognized as more important than notice of just punishment on behalf of the state.³¹ While explaining the rationale of compensating the victims of crime the Supreme Court of India in *State of Gujarat v. Hon'ble High Court of Gujarat*³² observed:

³⁰ 1995 Cr.L.J. 3852 (MP).

³¹ Andrew Ashworth, *Sentencing in* OXFORD HANDBOOK OF CRIMINOLOGY, Oxford University Press, London 340 (M. Meguire, R. Morgan and R. Reiner eds., 1994) cited in B.B. Das, *Compensation to Victims of Crime*, 30(1, 2) THE BANARAS LAW JOURNAL 173 (Jan. 2001-Dec. 2002).

³² A.I.R. 1998 S.C. 3164.

“In our effort to look after and protect the human rights of the convict we cannot forget the victim or his family in case of his death or who is otherwise incapacitated to his livelihood because of criminal act of the convict. The victim is certainly entitled to reparation, restitution and safeguard of his rights. Criminal justice will look hollow if justice is not done to the victims of crime. A victim of crime cannot be a ‘forgotten man’ in the criminal justice system. It is he who suffered most. His family is ruined particularly in case of death and other bodily injury; this apart from factors like loss of reputation, humiliation, etc. An honour, which is lost or life which is snuffed out cannot be recompensed but then monetary compensation will at least provide some solace.”

In the above case, the Supreme Court has recommended to the state concern to make law for setting apart a portion the wages earned by the prisoners to be paid as compensation to deserving victims of the offence, the commission of which entail the sentence of imprisonment to the prisoner, either directly or through a common fund to be created for this purpose or in any other feasible mode.

The Gujarat High Court in *Lalsingh Bhikabhai Chaudhary v. State of Gujarat*³³ held that power given under Section 357 of Cr.P.C was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent a constructive approach to crimes. It is indeed a step forward in our criminal justice system. Compensation should be liberally awarded. The victim of offence who has lost power of speech permanently is entitled to Rs.50,000.

In *Pamula Saraswathi v. State of Andhra Pradesh*³⁴ the Supreme Court held that where theft was also proved and the deceased was the main earning member, a fine of Rs.10,000 was imposed on each of the accused person to be paid as compensation to the wife of the deceased.

In *Rachhpal Singh v. State of Punjab*³⁵ case occurred due to a civil dispute pending between the deceased and the appellant. The deceased obtained an interim order pertaining to the civil dispute. This in turn led to a fight between the deceased and the appellants. The first appellant armed with gun and the second appellant armed with a rifle along with three other accused attacked the deceased. The

³³ 2004(4) Crimes 542 (Guj.).

³⁴ A.I.R. 2003 S.C. 2416.

³⁵ 2002 Cr.L.J. 3540 S.C.

first and second appellant fired shots at the two deceased and they received two bullet injuries each and died on the spot. The sessions judge after considering the materials placed before him, found the appellants guilty and convicted and sentenced the first two appellants to death of an offence under Section 302 of IPC and the other accused to life imprisonment. They were also sentenced to varying terms of imprisonment with fine with regard to other offences. Against this order the accused preferred an appeal challenging the convictions and sentences. The complainant separately preferred a Criminal Revision Petition praying for compensation under Section 357 of Cr.P.C. The High Court concurred with the findings of the Sessions Court on the conviction imposed but held that the imposition of capital punishment was uncalled for as the case was not one of the other rarest of rare case and hence their sentence was reduced to imprisonment for life. With regard to the other three accused, they were acquitted under Section 302 read with Section 148 of IPC. However, the conviction under Section 449 of IPC was maintained but the period of sentence was reduced to the period undergone. Considering the revision petition the High Court held that it was a fit case for exercising the jurisdiction under Section 357 of Cr.P.C. and directed each of the appellant to pay a sum of Rs.2,00,000 totaling Rs.4,00,000 and in default was to undergo a sentence of five years rigorous imprisonment. Against this order the appellants filed an appeal before the apex court. The court after hearing the learned counsels, held that there was no ground to differ from the reasoning of the court below and upheld the conviction and sentence.

With regard to the award of compensation under Section 357, the Court held that the High Court in the instant case did not have sufficient material before it to correctly assess the capacity of the accused to pay compensation but keeping the object of the section it is a fit case in which the court was justified in invoking Section 357. The court after having gone through the records and materials found that the appellants were reasonably affluent. Hence, the appellants were capable of paying at least Rs.1,00,000 per head as compensation. Therefore, the order of the High Court is modified by reducing the compensation payable from Rs.2,00,000 each to Rs.1,00,000 each.

Further the Supreme Court in *Mangilal v. State of Madhya Pradesh*³⁶ held that the power of the court to award compensation to the victims under Section 357 is not ancillary to other sentences but in addition thereto. The basic difference between subsections (1) and (3) of the Section 357 is that in the former case, the imposition of fine

³⁶ A.I.R. 2004 S.C. 1280.

is the basic and essential requirement while in the latter even the absence there of empowers the court to direct payment of compensation. Such power is available to be exercised by an appellate court, the High Court or the Court of Sessions when exercising revisional powers.

In *Bipin Bihari v. State of Madhya Pradesh*³⁷ the facts of the case was that the complainant while grazing his ox in his field heard his sister-in-law's cry and rushed towards her. He found that the appellant had entered into an altercation with his sister-in-law and restrained her from cutting the crop. The appellant was carrying a gun and threatened of dire consequences. Despite the threat, the complainant tried to get hold of the gun and in the scuffle the appellant threatened to kill him. He fired a shot which struck on the right calf of the complainant and as a result the flesh was ripped off. Further, the appellant tried to load the gun again but was not able to do so as the complainant was grappling with him. At this point of time, some persons arrived on the spot and on seeing them the appellant fled from the scene leaving the gun. The incident was reported and charge was framed under Section 307 of IPC against the appellant. The trial court convicted the appellant under Section 307 of IPC and sentenced him to undergo rigorous imprisonment for life and pay a fine of Rs.5,000 in default of which he was to undergo two years of simple imprisonment. The trial court directed that the fine amount be paid to the complainant as compensation under Section 357, of Cr.P.C. The appellant preferred an appeal against this order in the High Court. The court after hearing the learned counsels held that it was not justified to impose sentence of life imprisonment on the appellant. Further, it was held that it would be proper to impose two years rigorous imprisonment. Regarding the award of compensation, the court referred to the case of *Bhaskarn v. Sankaran Vaidhyan Balan*³⁸, in which the apex court while considering the scope of Section 357(3) of Cr.P.C laid down that the magistrate cannot restrict itself in awarding compensation under Section 357(3), since there is no limit in sub-section (3) and therefore the magistrate can award any sum of compensation. Further, it was also held that while fixing the quantum of compensation, the magistrate should consider what would be the reasonable amount of compensation payable to the complainant. In *Hari Kishan and State of Haryana v. Sukhbir Singh and Others*³⁹, the court held: “[T]he power of imposing fine intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well as reconciling the victim

³⁷ 2005 Cr.L.J 2048 MP.

³⁸ A.I.R. 1999 S.C. 3762.

³⁹ A.I.R. 1988 S.C. 2127.

with the offender. It is to some extent a constructive approach to crime and a step forward in a criminal justice system. It is because of this that it was recommended that all criminal courts should exercise this power liberally so as to meet the ends of justice, by cautioning that the amount of compensation to be awarded must be reasonable". The court further held that: "In order that collective may not lose faith in criminal adjudication system and the concept of deterrence is not kept at a remote corner we are disposed to enhance the amount of compensation to Rs.30,000". The court referred to the case of *Sarup Singh v. State of Haryana*⁴⁰, wherein the apex court while reducing the sentence for the period already undergone by the accused under Section 304 of IPC, directed to pay a sum of Rs.20,000 by way of compensation. The court further emphasized that the amount of compensation was enhanced taking into consideration the gravity of the injury, the strata to which the accused belongs, the milieu in which the crime has taken place and further keeping in view the cry of the society for the victims at large. The entire amount shall be paid to the injured on proper identification. The amount shall be deposited before the trial court within four months failing which the appellant shall have to undergo further rigorous imprisonment of four years. The sentence of conviction of the appellant under Section 307 of IPC is maintained with modification in the sentence.

The Supreme Court in *Suba Singh v. State of Haryana*⁴¹ held that: "The quantum of compensation will however depend upon the facts and circumstances of each case. Award of such compensation by way of public law remedy will not come in the way of the aggrieved person claiming additional compensation in a civil court, in the enforcement of private law remedy in Tort, nor come in the way of the criminal court ordering compensation under Section 357 of Cr.P.C."

In the case of *Manjappa v. State of Karnataka*⁴², the appellant-accused had voluntarily caused simple hurt to the complainant. The appellant was also said to have assaulted the complainant with a stone resulting in grievous injuries to the complainant. Moreover, the appellant accused intentionally insulted the complainant by using abusive language thereby provoking him, knowing full well that such provocation would make the complainant to break public peace or to commit other offences. The charge was framed against the accused for offences punishable under Sections 323, 325 and 504 of IPC. The trial court after appreciating the prosecution evidence, by its judgment, dated 8th March 1999, held that it was proved by the prosecution that the accused caused simple as well as grievous injury

⁴⁰ A.I.R. 1995 S.C. 2452.

⁴¹ (2006) 3 S.C.C. 178.

⁴² 2007 S.C.C.L. COM. 599.

to the complainant and thereby he had committed offences punishable under Sections 323 and 325 of IPC. However, regarding the third charge—that the accused committed an offence punishable under Section 504 of IPC according to the court, the prosecution was not able to establish it and the accused was ordered to be acquitted. So far as sentence was concerned the trial court awarded simple imprisonment for three months and a fine of Rs.500 in default to undergo simple imprisonment for fifteen days for the offence punishable under Section 323 of IPC. He was also ordered simple imprisonment for one year and fine of Rs.3000, in default to undergo simple imprisonment for three months for the offence punishable under Section 325 of IPC. The court also ordered that out of the fine amount so received, the injured-complainant will be paid compensation of Rs.2000 under Section 357(1)(b) of Cr.P.C. 1973. Against this order of conviction and sentence, the appellant preferred an appeal in the court of sessions judge. The sessions judge, after considering the evidence and hearing the argument, acquitted the appellant for the offence punishable under Section 323 of IPC and set aside the order of conviction and sentence. He, however, confirmed the order of conviction of the accused for the offence punishable under Section 325 of IPC. The appellate court, however, was of the view that it was a fit case to reduce sentence of simple imprisonment from one year to six months. The appellate court also directed the accused to pay compensation of Rs.3000 to the complainant who had sustained grievous injuries, independently of what the trial court awarded. The sentence of fine and compensation passed by the trial court was confirmed. The appellant filed a revision petition in the High Court challenging the order of the Court of Sessions. The High Court confirmed the order of conviction. The High Court also partly allowed the revision by reducing sentence and ordering the appellant to undergo simple imprisonment for one month and to pay a fine of Rs.1000 in addition to what was ordered by the courts below. The appellant then approached the Supreme Court against the order passed by the High Court. The honorable judges of the Supreme Court in their order stated that “keeping in view all the facts and circumstances, in our opinion, ends of justice would be met, if we order that the substantive sentence which the appellant has already undergone is held sufficient. We are also of the view that it would be appropriate if over and above the amount which the appellant herein has paid towards fine and also towards compensation to the injured victim. The appellant is ordered to pay an additional amount of Rs.10,000 to the complainant by way of compensation”.

An analysis of the above case laws gives an indication that the courts in India at least at the higher level have started realizing the

importance of the victim and the necessity to ameliorate the plight of the victim to the extent possible by restitution.

Victims of Homicidal Crime

In the case of *Dr. Jacob George v. State of Kerala*⁴³, the Supreme Court had brought out some concepts relating to victimological relevance. The case was related to the death of a woman while causing miscarriage with consent. It was due to the act of a quack (homeopathic doctor) performing surgical operation for abortion of a pregnant lady with her consent resulting in her death. The Supreme Court reduced the sentence of 4 years rigorous imprisonment imposed by the High Court to 2 months imprisonment already undergone. The apex court enhanced the fine amount of Rs.5000 awarded by the High Court to Rs.1,00,000. The court also directed respondents to deposit the fine amount in the name of the deceased's son in a nationalized bank which would allow the child's guardian to withdraw the interest for the child's maintenance till the child becomes a major.

Thus, this is also a case where the Supreme Court thought it appropriate to think in terms of invoking remedial jurisdiction by granting compensation. It is indeed appreciable that there is a remarkable change in the attitude of higher judiciary in delivering justice to victims.

In another interesting case *State of Punjab v. Ajaib Singh*⁴⁴, the Supreme Court has gone one step further and granted a huge compensation to the victim even after acquitting the accused-respondent. The case involved the causing of death in the course of an altercation between the accused police officer and the two deceased persons who were also officers of the police force. This led to the death of two persons. The Supreme Court upheld the decision of the High Court in holding that the accused was acting within his right to private defense. The court also held that the High Court's order of acquittal does not call for any interference. But the significance of the case is that during the pendency of the trial the accused had offered to pay a sum of Rs.5,00,000 so that the unnecessary litigation can be avoided. The victims did not accept it but chose to proceed with the case. Later, the Supreme Court directed the respondent to deposit Rs.5,00,000 to be paid to the heirs of the deceased. *Ajaib Singh's* case is hence noteworthy because though the respondent's acquittal has been upheld by the court, the

⁴³ (1994) 3 S.C.C. 430.

⁴⁴ (1995) 2 S.C.C. 486.

compensation was asked to be paid. This is what the real and true relevance of victimological jurisprudence. This innovative decision of the highest judiciary, it is hoped, will go a long way in delivering justice to victims of all malaises. The Supreme Court decision in above case, even after acquitting the accused on grounds of private defense, the court directed him to pay compensation to the victim's families. Victim interest protection is paramount irrespective of guilt or innocence of the accused.

In *Baldev Singh v. State of Punjab*⁴⁵, it was held as another important case in the victimological approach of judicial law making. The Supreme Court ordered for grant of compensation by invoking Section 357 (3) of Cr.P.C. This was a case of property dispute between father and son leading to the death of the son. The appellants were convicted under Sections 299 and 304 of IPC. The Supreme Court held in the circumstances of the case, that an order for compensation would be appropriate instead of sentence of imprisonment. The sentence was hence reduced to the period already undergone. Both the appellants were directed to pay by way of compensation a sum of Rs.35,000 each to the widow of the victim and her children. This is again a case where the apex court has wisely used its judicial discretion to the benefit of the victims and opting for the compensation theory instead of extending the sentence of imprisonment.

Justice to Rape Victims: Guideline for Victim Assistance

The Supreme Court of India observed plight of the rape victims in India and expressed serious concern and suggested that the defects in criminal laws be removed soon. In *Delhi Domestic Working Women's Forum v. Union of India*⁴⁶, some *Jawans* raped six women while travelling in the train. Appropriate action was not taken against the culprits. In that context, the Supreme Court observed as follows:

“The defects in the present system are firstly, complainants are handled roughly and are not given such attention as is warranted. The police more often than not, humiliate the victims. The victims have invariably found rape trials an experience. The experience of giving evidence in court has been negative and destructive. The victims often say they considered the ordeal to be even worse than the rape itself. Undoubtedly, the court proceedings added to and prolonged the psychological stress they had to suffer as a result of the rape itself.”

⁴⁵ (1995) 6 S.C.C. 593.

⁴⁶ (1995) 1 S.C.C. 14.

In view of this, the court let down the following guidelines for the rape cases:

1. The complainants of sexual assault cases should be provided with legal representation. Such a person must be well acquainted with criminal justice. The victim's advocate role should not be only to explain to her the nature of proceedings, to prepare her for the case and to assist her in the police station and in Court but to provide her with guidance to how she might obtain help of a different nature from other agencies, for example mind counseling or medical assistance. It is important to secure continuity of assistance by ensuring that the same person who looked after the complainant's interest in the police station represents her until the end of the case.
2. Legal assistance will have to be provided at the police station since the victim of sexual assault might very well be in a distress state at the police station, the guidance and support of a lawyer at this stage would be of great help to her.
3. The police should be under a duty to inform the victim of her right to representation before any question were asked of her and the police report should state that the victim was so informed.
4. A list of advocates willing to act in these cases should be kept at the police station for victims who did not have any particular lawyer in mind, or whose own lawyer was unavailable.
5. The advocate shall be appointed by the court on application by the police at the earliest convenient moment, but in order to ensure that victims were questioned without undue delay advocates would be authorized to act at the police station before leave of the court was sought or obtained.
6. In all rape trials anonymity (name not to be disclosed) of the victim must be maintained as far as necessary.
7. It is necessary having regard to the directive principles contained under Article 38(1) of the Constitution to set up Criminal Injuries Compensation Board. Rape victims frequently incur substantial loss. Some for example, are too terrorized to continue in employment.
8. Compensation for victim shall be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board will take into account pain, suffering and shock as well as the loss of earning due to pregnancy and childbirth if this occurs as a result of the rape.

The National Commission for Women should be asked to frame schemes for compensation and rehabilitation to ensure justice to

victims of such crimes. The Union of India shall then examine and take necessary steps to implement them at the earliest.

In landmark case of *Bodhisattwa Gautam v. Subhra Chakraborty*⁴⁷, the Supreme Court of India has brought out some creative principle of justice to victims which will have an admirable impact. In this case, the respondent-victim filed a complaint against the appellant for developing sexual relationship with her on false assurance of marriage and later marrying her before God by putting vermilion on her forehead, but after having impregnated her twice. He was also accused of compelling her to undergo abortion on both occasions and ultimately deserted her. The Supreme Court was hearing the special leave petition preferred by the appellant and held that it has jurisdiction to pass orders compelling the accused to pay maintenance to the victim during pendency of the criminal proceeding. Accordingly, on being prima facie satisfied about the allegation, appellant's plea that his service having been terminated, he may not be burdened with liability to pay maintenance was rejected. The appellant was asked to pay Rs.1000 per month as interim compensation to the respondent during the pendency of the criminal case.

Therefore it can be observed that the courts have taken little softer view (with regard to monetary aspect) when question of the award of compensation come under Cr.P.C as compared to when it comes under the Constitution.

This case is unique for many reasons. Firstly, it has held that award of compensation as an interim relief is necessary so that undue delay in delivering justice to the victim is not caused. Secondly, it held that the court had jurisdiction to award such compensation to the victim under such conditions when the accused is not convicted due to slow progress of the criminal proceedings. In this case the court also referred its earlier decision in *Delhi Domestic Working Women's Forum v. Union of India*, where it has held that the jurisdiction to pay compensation shall be treated to be part of the overall jurisdiction of the courts trying the offences of rape which is an offence against basic human rights as also the fundamental rights of personal liberty and life.

In another landmark decision, *Chairman Railway Board v. Chandrima Das*⁴⁸, a Bangladeshi Woman was gang raped by Indian Railway employees in a railway building. The apex court asked the

⁴⁷ 1996 S.C.C. 490; A.I.R. 1996 S.C. 922.

⁴⁸ A.I.R. 2000 S.C. 988; (2000) 2 S.C.C. 465.

railways to pay Rs.10,00,000 as compensation for the infringement of her right to life. Under Article 21 of the Constitution. In the opinion of the court Smt. Hanuffa Khatoon, who was not the citizen of this country but came here as a citizen of Bangladesh was nevertheless, entitled to all the constitutional rights available to a citizen so far as 'right to life' was concerned. She was entitled to be treated with dignity and was also entitled to the protection of her person as guaranteed under Article 21 of the Constitution. As a national of another country, she could not be subjected to a treatment which was below dignity nor could she be subjected to physical violence at the hands of government employees who outraged her modesty. The right available to her under Article 21 was thus violated. Consequently the State was under the Constitutional liability to pay compensation to her.

In the latest judgment of the Supreme Court of India in *D.K. Basu v. State of West Bengal*⁴⁹, the Supreme Court reiterated its emphasis on victomological justice and remedial jurisprudence. This was again a case of custodial death and the court has given specific directions in the form of requirements to be followed in all cases of arrest or detentions till legal provisions are made in this behalf. The Supreme Court has further given impetus to the old principle of *ubi jus ibi remedium* which means that there is no wrong without a remedy. There is indeed no express provision in the constitution of India for grant of compensation for violation of a fundamental right to life. Nevertheless, the Supreme Court has judicially evolved a right to compensation in cases which establish unconstitutional deprivation of personal liberty or life.

While bringing out the various facets of justice, the court has strengthened the scope and relevance of granting compensation to victims of abuse of powers. The following observation of the court is of great relevance:

“The claim in public law for compensation for unconstitutional deprivation of fundamental right to life and liberty, the protection of which is guaranteed under the constitution, is a claim based on strict liability and is in addition to the claim available in private law for damages for tortious act of the public servants, Public law proceedings serve a different purpose than the private law proceedings. Award of compensation for established infringement of the indefeasible rights guaranteed under Article 21 is a remedy available in public law since the purpose of public law is not only to civilize public power but also to assure the citizens that they live

⁴⁹ (1997) 1 S.C.C. 416, A.I.R. 1997 S.C. 610.

under a legal system wherein their rights and interest are protected and preserved. Grant of compensation in proceeding under Article 32 or Article 226 of the Constitution of India for the established violation of the fundamental rights guaranteed under Article 21 is an exercise of the courts under the public law jurisdiction for penalizing the wrong doer and fixing the liability of public wrong on the state which failed in discharge of its public duty to protect the fundamental rights of the citizen.”⁵⁰

The Supreme Court in the same case further held that:

“Monetary compensation for redressal by the court finding the infringement of the indefeasible right to life of the citizen is, therefore, useful and at time, perhaps the only effective remedy to apply balm to the wounds of the family members of the deceased victim, who may have been the breadwinner of the family.”

Thus, *D.K. Basu's* case has achieved a lot in terms of creating a legal foundation based on principles of victim justice. It has also given adequate emphasis to the other available remedies of the victims. It is hoped that this judgment of the Supreme Court is given wide publicity so that all concerned people shall direct their activities in consonance with the letter and speed of this judgment. This judgment has indeed demonstrated that judicial creativity based on jurisprudence foundation of remedial action can ultimately achieve victim justice.

It is further clear that the principle of social justice enunciated in the preamble, guaranteed personal liberty under Article 21 and the scheme of Directive Principles of State Policy in the Part IV of the Constitution irrevocably held the State responsible for the misdeed committed by its agencies. The judicial approach led full support in this view. Hence the apex court and the High Court have developed new jurisprudential parameters concerning payment of compensation to the victims.

An analysis of the above case laws gives an indication that the courts in India, at least at the higher level have started realizing the importance of victim and the necessity to ameliorate the plight of the victim to the extent possible by restitution. In this process, the offender is also involved in the rehabilitation of the victim. But among the international victimological objectives the intent to change the status of the victim in criminal procedure show that the plight of the victim is recognized, validated and acted upon is primary. Under the

⁵⁰ *Id.*

legal provision in India, restitution to victim is made out of the fine imposed to the offender which is against the philosophy of restitution because punishment is designed to injure whereas restitution is designed to help the victim. Hence, philosophically it is inconsistent to order restitution to be paid out of the amount of fine.

However, the intention of the Supreme Court is also in agreement with these victimologist as is evident from the judgement of the case of *Hari Kishan and State of Haryana v. Sukhbir Singh and Others*⁵¹ wherein it is important to know that restitution to the victim was not ordered to be paid out of fine but under separate section, namely Section 357(3) of Cr.P.C. This is the correct approach to order restitution. In other words restitution should be made independent of fine and independent of the ability of the offender to pay because the hierarchy of concern should be reflected in the priority of procedure. Rather than imposing fine on the offender, victim's plight and restitution should be the first consideration in resolving the criminal victim conflict. In this process the victims condition should be objectively assessed by a dispassionate person may be the probation officer or of a village officer or anyone who is familiar with the community and thus not have a vested interest in the outcome of the criminal justice conflict. After the victims condition is determined, the administrative realities of how those needs could be resources has to be decided within the framework of the sentencing structure. The method of resourcing the victim can include direct restitution or in case of the offender's inability to fully pay the victim, the offender's services can be directed or insurance or state compensation. For this purpose, a separate state compensation fund should be created to which a portion of fine imposed on the offender should be devoted, which becomes a symbolic when the identity of the victim is unknown or generalized. It is also the responsibility of the court to direct the executive to establish a mechanism to provide restitution services. In case the offender is found without enough immediate funds to pay restitution, the court should direct the offenders to perform services so that his obligation to the victim is fulfilled.

From the above referred decisions one could verily see that the courts in India are in favour of compensation to victims of crime. But what lacks is the adequate statutory provision in this regard which accounts for the rare exercise of power to pay compensation. In all cases where the accused is found guilty, payment of compensation to the victims of crime has definite advantage in promoting the cause of justice. If there is an assurance in the statute that compensation will be paid to the victim, the victim will have an interest, hope and

⁵¹ A.I.R. 1988 S.C. 2127.

involvement in successfully prosecuting the case. He will not stumble and fall a victim for money or any other allurements and get himself tempted or gained over by the accused. If the accused were to shell out his money as compensation to the victim, he will think twice before committing crime and the crime rate will surely come down drastically.

The power to award compensation is intended to reassure and promise the victim that he or she is not forgotten in the criminal justice system and it is a constructive approach to crime dispensation which powers should be exercised liberally. The social purpose intended to be served by this should not be ignored in the broad dimensions of equitable justice delivery.



RESEARCH PAPER ON CHARGE SHEET UNDER ADMINISTRATIVE LAW

Mr. Hari Ram Anthala*

Introduction

The administrative law attempt to devise all the possible modes of control for providing adequate safeguard against the misuse of their powers. In India a system of both administrative legislation and adjudication were in existence from very early time. In early British India, executive had the overriding powers in the matter of administrative of justice. During the British Rule in India, the executive powers were vested with such wide powers to make rules as a modern democratic legislature cannot even imagine. Although the Court had ample powers to set aside the administrative action in that period yet paid great respect and attention to their decisions. The judicial relief was available only when the administrative remedies were exhausted. The philosophy of welfare state was made the creed of Indian Constitution, when India became free. Justice Ramaswami while tracing the reasons for the growth of administrative powers in the present century, observed: “The administrative authority interferes in all domains of social and economic life, in the field of industry, commerce, education, transport, banking, insurance and so on. From the constitutional stand point, there is a large scale of delegation of legislative and judicial powers to administrative agencies. Without such delegation, the working of administration cannot be efficient or prompt. In administration, there is obvious need for individual action. There is call for speedy determination; there is necessity for direction, guidance and expert advice. A large number of freedoms are, therefore, conferred on government officials for carrying out administrative scheme. Unless there is a rule of law, there is the danger that administration would become totalitarian.”

The increasing number of disputes of technical nature gave rise to adjudicatory power to administrative agencies. The Industrial Tribunals, Income Tax Appellate Tribunal, Service Tribunals and others show how it became inevitable to entrust upon administrative agencies the task of judiciary. This all shows a tremendous growth in the powers of administration and the necessity to give effect to rule of laws in administrative process.

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‘Charge sheet’

A charge sheet can be issued by the competent Disciplinary Authority or by any other authority empowered by the rules and service conditions of the employees. The charge sheet is issued to the delinquent employees or officers after conducting the primary investigation by the departmental authority, which contains statement of allegations and article of charges as per the service regulations of the concerned department/organizations duly signed by the Disciplinary Authority. Consequent upon delivery of charge sheet the employee concerned have to submit his/her reply within the stipulated period to the Disciplinary Authority.

Purpose of charge sheet

It is the prerogative of the organization/department that where it is proposed to proceed against an employee with a view to impose major penalty, the first step is to issue a charge sheet to him. A charge sheet has been defined as: “A prima facie proven essence of allegations against an employee.” The purpose of the charge sheet is to inform the employee of the charges against him so that he knows the accusation and can make a reply to the charges leveled against him to defend himself. In the sense, issue of charge sheet is a part of *audi alteram partem* rule. The issue of charge sheet is a mandatory, not only because it is requirement of natural justice but also various statutory rules expressly provide for it. Even Article 311(2) provides that the government servant shall be informed of the charges against him. In *Khem Chand v. Union of India*¹ it was held that the issue of charge sheet is an essential requirement.

Contents of charge sheet

Since the employee is to be informed not only of the charges against him but also of the evidence on which those charges are sought to be established. The charge sheet consists of a letter or a memorandum containing the proposal to take such action and has the following documents, as its four annexure:

- i.** Definite and distinct article of charges;
- ii.** Statement of allegations, imputation of misconduct or misbehavior on which the charge is based containing all relevant facts with full particularity including any admission or confession made by the employee;
- iii.** List of documents; and

¹ A.I.R 1958 S.C. 330 ¶ 19.

- iv.** List of witnesses by whom the articles of charge are proposed to be sustained.

Where Central Vigilance Commission (C.V.C.) was consulted a copy of their first stage advice may be made available to the employee along with the charge sheet, for his information—C.V.C instructions².

Charge sheet should be specific with full particularity

It is imperative that the specific charges are framed in clearest terms and with full particularity as held in *State of U.P. v. Mohd. Sharif*³ and *Sawai Singh v. State of Rajasthan*⁴.

The charges must not be vague and should state in definite terms the allegations on which they are based and the grounds which they have led the authority to take action as held in *Suresh Chandra v. State of West Bengal*⁵.

The language used should be clear and free from ambiguity and incapable of misconstruction. In *Transport Commissioner v. A. Radha K. Moorthy*⁶, the charge sheet was general in nature to the effect that the respondent along with eight other officials indulged in misappropriation by falsification of accounts. No statement giving full particulars of the charge accompanied the charge. The Supreme Court frowned upon the charge issuing authority for drafting the charge in a very general and vague manner. The court observed: “What part did the respondent play; which account did he falsify or help falsify; which amount did he individually or together with other named person, misappropriate, are not particularized. A vague statement of charges which does not unfold the exact nature and particulars of the misconduct is of no use and vitiates the entire proceedings.

The Supreme Court has held in number of cases, that inordinate delay in issue of charge sheet, i.e., initiating the disciplinary proceedings must be avoided. In *P.V. Mahadevan v. M.D. Tamil Nadu Housig Board*⁷, has decided by the Supreme Court on 8.8.2005, the appellant a superintending engineer, was issued a charge memo on 8.6.2000 relating to an irregularity in issuing a sale deed in 1990. The appellant had retired from service. The appellant did not come up

² No. 99/VGL/66 dated 28.9.2000 ¶ 3.

³ A.I.R. 1982 S.C. 937 ¶ 3.

⁴ A.I.R. 1986 S.C. 795 ¶ 14.

⁵ A.I.R. 1971 S.C. 752.

⁶ (1995) S.C.C. 332.

⁷ C.A. No. 4901 of 2005.

with explanation regarding the inordinate delay in initiating the disciplinary proceedings. The court quashed the charge memo because the delay in initiating proceedings. The court relied on their earlier judgment in *State of M.P. v. Bani Singh*⁸.

Issue of charge sheet

The charge sheet can be issued by the competent Disciplinary Authority or by any other authority empowered by the rules in this behalf-*State of M.P. v. Shardul Singh*⁹. Where there are no rules, the charge sheet may be issued by the Disciplinary Authority or the controlling authority of the employee concerned-*P.V. Srinivasa Sastry v. C. & AG of India*¹⁰. The Supreme Court has held that if the competent Disciplinary Authority is personally involved in the case or is an important witness therein, it should refrain from acting as Disciplinary Authority in that case-*Arjun Chouby v. Union of India*¹¹.

Delivery of charge sheet: Form of communication

The charge sheet has to be delivered to the concerned employee either in person or through registered post. Mere communication is not sufficient-*Union of India v. Dina Nath Karekar*¹².

Reasonable time for reply

The charged employee must be allowed reasonably sufficient time to make up his mind about his defense and to submit a reply-*Khem Chand v. Union of India*¹³. In the following case, it was held that plea could not be taken that a reasonable opportunity was not granted:

- i.** Where although only 48 hours were given for submitting explanation, the employee neither asked for more time nor complained about-*Prafulla Kumar v. Calcutta*¹⁴.
- ii.** Where a government servant went on applying for time after it had been refused to him and did not attend the inquiry-*Laxmi Narayan v. Puri*¹⁵.
- iii.** Where 11 days were allowed instead of usual period of three weeks, but it could not be shown that the shorter period

⁸ A.I.R. 1990 S.C. 1308.

⁹ (1970) S.C.C. 108.

¹⁰ A.I.R. 1993 S.C. 1321.

¹¹ A.I.R. 1984 S.C. 1356.

¹² A.I.R. 1988 A.S.C. 2722.

¹³ A.I.R. 1958 S.C. 30.

¹⁴ S.T.C. A.I.R. 1963.

¹⁵ A.I.R. 1954 Cal. 335.

prevented him from making a suitable reply—*Ahman Hassan v. Deputy Commissioner*¹⁶.

- iv. On the other hand where the enquiry has been completed in one day and the order of dismissal was also passed on the same day, the Rajasthan High Court held that it amount to abuse of process of law—*Kanhaya Lal v. State of Rajasthan*.

Recourse to courts of law at charge sheet stage

It will not be a sound practice if the government servant on receiving the charge sheet, rather than replying to the charges or raising his other objections against the charge sheet before the Disciplinary Authority rushes to a court of law. Therefore, normally the court of law does not entertain such petitions, holding them as premature. In *Union of India v. Ashok Kacker*¹⁷, the Supreme Court observed: “It is premature for court to consider a challenge to the charge sheet where the employee has just rushed to the court on receiving the charge sheet. He should have made a reply to the charge sheet and raised all the points against the issue of charge sheet in his that reply for consideration of the Disciplinary Authority; the stage of judicial review canaries only thereafter.”

However, there is an important exception to this principle. It is where there is malice, mala fide or bias in issuance of charge sheet that a court of law may interfere at the stage of issue of charge sheet to avoid harassment to public servant. In *State of Punjab v. V.K. Khanna*¹⁸, the Supreme Court held: “Where it is true that justifiability of the charges at this stage of initiating a disciplinary proceedings cannot possibly be delved into by any court pending inquiry but it is equally well settled that in the event there is an element of malice or mala fide, motive involved in the matter of issue of charge sheet or the concerned authority is so biased that the inquiry would be mere farcical show and the conclusions are well known then and in that event law courts are otherwise justified in interfering at the earliest stage so as to avoid the harassment and humiliation of public official.”

But where it is done the court cannot interfere with the truth or correctness of the charges. Its jurisdiction is limited to find out whether there is malice or mala fides in issuance of charge sheet; if the charges framed (head with imputations) do not amount to

¹⁶ A.I.R. 1963 MN 53.

¹⁷ (1995) Supp. 1 S.C.C. 180.

¹⁸ 2000 A.I.R. S.C.W. 4472.

misconduct or whether the charges framed are contrary to any law-*Union of India v. Upendra Singh*¹⁹.

Reply to charge sheet

After issue of charge sheet a regular inquiry is not automatic. An inquiry is necessary only if in his written statement the delinquent employee denies the charges and disputes the supporting evidence. Thus while submitting written statement of defense by the employee the option open to him are:

- i.** Admit the charge; or
- ii.** Admit the charge partially while denying the rest; or
- iii.** Deny the charges altogether; or
- iv.** Submit a detailed reply to the charge bringing out how the charge is false attacking the supporting evidence cited by the Disciplinary Authority and citing evidence in support of his defense version.

What is ‘admission’, ‘confession’, ‘apology’?

Admission

There is an admission where any statement of fact made in the charge sheet is accepted as correct by the charged officer. The effect of admission is that it is not necessary to produce any evidence to prove that fact or statement in departmental inquiries an admission may be made in reply to the charge sheet or before the inquiry officer. However, such admission must be voluntary and not forced upon.

In *Delhi Transport Corporation v. Shyam Lal*²⁰, the Supreme Court observed: “It is fairly settled position in law that admission is the best piece of evidence against the person making the admission. It is however open to the person making the admission to show why the admission is not to be acted upon.”

Confession

In *Sahoo v. State of U.P.*²¹, it was held by the Supreme Court that the confession is that part of admission in which the guilt is admitted.

In *Narayana Swami v. Empror*²², ‘confession’ was defined by Lord Atkin as: “A confession is a statement made by an accused which

¹⁹ (1994) 3 S.C.C. 357.

²⁰ A.I.R. S.C.W. 4711 ¶ 7.

²¹ A.I.R. 1966 S.C. 40.

must either admit in terms of offence or at any rate substantially all the facts which constitute the offence.” In this way, every confession is an admission but converse is not true. An admission will become confession only if what is admitted constitutes the guilt.

In *Krishan Lal v. State*²³, the court observed as under: “A confession must either admit it in terms of offence or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incremental fact, is no of itself a confession. Likewise, a statement that contains self explanatory matter cannot amount to confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. This is how, the confession is construed under the criminal law and I may invite attention to *Narayana Swami v. Empror*²⁴. While one may not adopt this concept of a confession for the purposes of departmental enquiry, the so called statement to be utilized as confession must, at any rate, admit the material facts on the basis of which an inference about guilt of the person making the statement could be drawn in unambiguous terms.”

Distinction between admission and confession

It is common that since an enquiry is necessary only, if there is a dispute as to the question of facts, an admission has the effect of dispensing with the inquiry to the extent of facts admitted, but the confession can straightway lead to the assessment of the guilt and imposition of the penalty by dispensing with the inquiry altogether-as held in *V.V. Brahm Bhatt v. Union of India*²⁵ and *Krishn Dev Puri v. Union of India*²⁶.

The Supreme Court held in *J.M. Ajwani v. Union of India*²⁷ that if orders are passed on the basis of clear admission made by the charged officer, there is no violation of principle of natural justice.

Free and voluntary confession

A free and voluntary confession yields to the finding of guilt the Supreme Court held in *State of Rajasthan v. Raja Ram*²⁸ decided on 13.08.2003. The Supreme Court observed that:

²² A.I.R. 1939 P.C. 47.

²³ S.L.R. 1969 Raj.

²⁴ A.I.R. 1939 P.C. 47.

²⁵ Lab.I.C. 1984 Guj. 869.

²⁶ Lab.I.C. 1984 DL. 532.

²⁷ S.L.R. 1967 S.C. 471.

²⁸ Cri. A. Nos. 815-16 of 1966.

“A free and voluntary confession is deserving of highest credit, because it is presumed to flow from the highest sense of guilt.²⁹ It is not to be conceived that a man would induce to make a free a voluntary confession of guilt, so contrary to the feelings of human nature, if the facts confessed were not true. Deliberate and voluntary confessions of guilt, if clearly, proved, are among the most effectual proofs in law.”

A free and voluntary confession is one which cannot be traced to the threats, fraud or inducement.

Clear and unambiguous language

In *Jagdish Prasad Saxena v. State of M.P.*³⁰, the Supreme Court held that if the statement made by charged officer does not contain a clear and unambiguous admission of his guilt, failure to hold a formal inquiry shall constitute a serious infirmity. Thus, in clear order to constitute a clear confession:

- i.** It must come after the issue of the charge sheet when the specific charges stand leveled;
- ii.** It admits, in clear and unambiguous term, not only the guilt but also the material facts constituting the guilt;
- iii.** It must be in writing; and
- iv.** It must be voluntary, without fraud, inducement or coercion.

It will not be out of place to mention here a reference to the Rule³¹, which provides as under:

“If an accused person pleads ‘guilty’, that plea shall be recorded as the finding of the Court, but before it is recorded, the court shall ascertain that the accused understands the nature of the charge to which he was pleaded guilty and shall inform him of the general effect of that plea, and in particular of the meaning of the charge to which he has pleaded guilty, and shall advise him to withdraw that plea, if it appears from the summary of evidence (if any) or otherwise, that the accused ought to plead not guilty.”

The above rule, in terms, applies to departmental inquiries held under the Army Act and Rules only, but its statutory provisions are worthy of notice in other departmental inquiries, as well.

²⁹ See *R. v. Warkwickshall*, (1783) Lesch 263.

³⁰ A.I.R. 1961 S.C. 1071.

³¹ 115(2) of the Army Rules, 1954.

Apology

- i. If the charged officer tenders an unconditional apology, after he is served with the charge sheet, it implies that he is admitting the charge and is begging to be excused. In such cases, inquiry is not necessary and the Disciplinary Authority is straightaway seized with the task of assessing his guilt, on the basis of information available on records, and deciding the quantum of punishment, if any to be awarded.
- ii. It is necessary that the apology tendered by the charged employee must be unconditional and unreserved. In the case of *Ram Lal v. Union of India*³², it was held by the Rajasthan High Court that: “An apology can be said to be unqualified only if the charged employee owns its fault and throws himself at the mercy of superior officers, as distinguished from politely denying the charge and begging pardon. The departmental authorities have, therefore, to be cautious when they decide to dispense with the regular inquiry on account of an admission or apology tendered by the charged officer. For instance where the respondent was informed that his explanation was touched in impolite, insulting, unparliamentarily and disrespectful language and he has casted unwarranted and baseless aspersions against his superiors and management.”

Conclusion

Ongoing through the above research paper it may not be out of order to highlight that the under administrative law which is a part of constitutional law quasi-judicial powers have been delegated to the respective departments under service conditions, rules, regulations and by-law to take departmental action against the delinquent/erring employees/officers by way of issuing show cause notice at the early stage and if the reply is not found satisfactory by the authority, then the Disciplinary Authority is appointed for issuing charge sheet which includes statement of allegations and articles of charges, along with the requisite documents and served upon the concerned erring officials for submission of reply to the concerned issuing Disciplinary Authority. If the Disciplinary Authority is not satisfied with the reply then Regular Departmental Inquiry is conducted by appointment of enquiry officer and presenting officer through notification. The employee concerned is also given the reasonable opportunity to engage his colleagues to defend the charge sheet. After conduction of inquiry the presenting officer have to submit the brief and copy of the brief is supplied to the charge sheeted employee for reply. The

³² A.I.R. 1963 Raj. 57.

enquiry officer submit his report to the Disciplinary Authority, which is supplied to the charge sheeted employee for reply within the stipulated period and after the stipulated period the disciplinary passed the punishment order to the charge sheeted employees. The appeal is preferred before the appellate authority. If the appellate authority does not provide relief then the review petition is preferred before the reviewing authority and they have the powers to dispose of the cases within six months. After exhausting all the departmental channel, the concerned employee has right to place his petition under Article 226 before the High Court, before the Tribunals or Court of Session as the case may be as per prevailing law of the land. The appellate jurisdiction after high court is the Supreme Court of India against the misuse of administrative powers for restoring natural justice.

Suspension from service

What is suspension?

Important things about suspension are as under:

- i.** The employer has no inherent right to place an employee under suspension. Such a right flows either from the terms of contract of service or rules and regulations governing conditions of service;
- ii.** Where the rules provides for suspension, the right can be exercised strictly within provision of the rules; and
- iii.** Suspension can be ordered either by the appointing authority or by an authority specifically empowered by the rules.

Definition of suspension

Case law: *Khem Chand v. Union of India*³³

‘Suspension’ has been defined as temporary deprivation of one’s office or position. It does not put an end to relationship of master and servant but simply keeps the employee away from the work situation during the pendency of some departments or criminal proceedings against him.

Further during the period of suspension instead of pay and allowances, he is paid, ‘subsistence allowance’ which normally less

³³ A.I.R. 1963 S.C. 687.

than his salary held in *Khem Chand v. Union of India*³⁴, the Supreme Court observed:

“An order of suspension of a government servant does not put an end to his service under the government. He continues to be a member of the service in spite of the order of suspension... The real effect of the order of suspension is that though he continued to be a member of the government service he was not permitted to work, and further, during the period of his suspension he was paid only some allowance-generally called ‘subsistence allowance’-which is normally less than his salary-instead of pay and allowances he would have been entitled to if he had not been suspended. There is no doubt that order of suspension affect a government servant injuriously. There is no basis for thinking however that because of the order of suspension he ceases to be a member of the service.”

The following are the implication of the suspension:

- i.** The suspension is not a penalty. It is an interim order to keep powers, functions and privileges of the employee in abeyance.
- ii.** The relationship of master and servant is not over; it remains in a state of suspended animation.
- iii.** There is no loss in his rank, status or pay.
- iv.** However, since no functions are discharged, the principle-‘no work–no pay’ applies. But there is no entitlement to salary, the employee can draw ‘subsistence allowance’ under these rules. This amount should be sufficient to maintain the employee and his family.
- v.** Since the employee does not discharge his duties, he cannot enjoy the privileges connected with his functioning.
- vi.** He continues to be subject to same discipline and penalties and, to the same authorities. In fact, the various Service Rules including the Discipline and Conduct Rules continue to apply to him, as before.
- vii.** If permanent, he retains his lien on the post, *vide* F.R. 13(e).
- viii.** Since he remains subject to Conduct Rules, he cannot supplement his subsistence allowance, which is only a fraction of the emoluments, by engaging himself in any other employment, business, profession or vocation.

³⁴ A.I.R. 1963 S.C. 687.

- i.** Though not a penalty under the Service Rules, there is no doubt that an order of suspension affects a government servant adversely.
- ii.** An employee under suspension cannot be asked to render any service or perform any duty. It is not even necessary for him to mark his attendance regularly at work place.

Kinds of suspension

The Supreme Court has observed three kinds of suspension in *V.P. Gindroniya v. State of M.P.*³⁵, as under:

- i.** Suspension as mode of punishment;
- ii.** Suspension during the period of any inquiry, if the terms of employment provide for it;
- iii.** The act merely forbidding him from discharging his duties.

Right to suspend

Suspension is a mode of punishment can be ordered only, if the service rules include ‘suspension’ in the list of the penalties which can be imposed for good and sufficient reasons. It is not so in the case of Civil Services of the Union and the States. It will be interesting to know that ‘suspension from service’ used to be a ‘penalty’ included in Rule 49 of the Central Civil Service (Classification, Control and Appeal) Rules of 1930 but was deleted by notification dated 23rd June, 1955. At the moment, it is included to a limited extent of three days, as a ‘penalty’ in the standing orders applicable to industrial employees. It goes without saying that where suspension is treated as a penalty, it can be imposed only after following the procedure prescribed for imposing the penalties.

Suspension is not a penalty; therefore no show cause is necessary

The law is settled the suspension pending a departmental or criminal proceeding against a government servant is not a punishment and does not amount to ‘reduction in rank’ in the sense the term is used in Article 311 (2) of the Constitution as held in *Mohd. Ghose v. State of Andhra Pradesh*³⁶, and *Union of India v P.K. More*³⁷. When the criminal proceeding is pending against him, the government servant is placed under suspension held in *R.P. Kapoor v. Union of India*³⁸ or when his suspension is automatic on his arrest as held in *S.K. Chatterjee v. S.N. Banerjee*³⁹. Even refusal to pay subsistence allowance which in this case was due to misleading of the rule, could not turn an order of suspension into that of punishment.

³⁵ A.I.R. 1970 S.C. 1494.

³⁶ A.I.R. 1957 S.C. 246.

³⁷ A.I.R. 1962 S.C. 630.

³⁸ A.I.R. 1964 S.C. 787.

³⁹ A.I.R. 1955 Cal. 365.

No speaking order is necessary; suspension is an administrative action

In *Jammu University v. D.K. Ram Pal*⁴⁰, it has been held by the Supreme Court that an order of suspension is not a quasi-judicial order. It is an administrative order. It is immaterial that evil effects flow from such order. Hence mere contemplation of an inquiry or pendency of criminal trial will be sufficient to exercise the power without actually recording judicial or quasi judicial satisfaction for making the order as held in *T. Shiv Shankar v. State of Karnataka*⁴¹, purpose of suspension: An order of suspension must be based on an objective assessment of the situation by the competent authority himself as a result of dictation or direction by an extraneous authority in *C.E. Eranimose v. State*⁴², in this case the order of suspension which had been passed as a result of political pressure was quashed.

In *R. Madhvan v. D.G. Telecoms*⁴³, the C.A.T. has observed that an order of suspension cannot be issued blindly without application of mind. The power of suspension cannot be exercised mechanically simply because the prosecuting agency has advised in its favour.

Purpose of suspension

The purpose of placing a government servant under suspension is to keep him away from the work situation so that he cannot interfere with the conduct of inquiry or tamper with the documentary or oral evidence against him in any manner, or where, having regard to the nature of charge against him.

Who may order suspension?

- i. The Appointing Authority can always order suspension-Section 16 of the General Clauses Act, 1897. Any other authority cannot order suspension only if it is authorized by the rules.
- ii. The 'administrative control' includes right to suspend. The Supreme Court has held that the term 'control' is of very wide connotation and amplitude. Suspension from service pending a disciplinary inquiry clearly falls within its ambit-incorporation of *Nagpur v. Ramchandra G. Modak*⁴⁴.

⁴⁰ A.I.R. 1977 S.C. 1148.

⁴¹ 1985 Lab.I.C. (Kar.) 630.

⁴² 1970 S.L.R. 520.

⁴³ S.L.J. (1988).

⁴⁴ A.I.R. 1984 S.C. 626.

- iii. In case of government servants, by virtue of Article 310 of the Constitution, the President or the Governor, as the case may be, can also place the government servant under suspension.
- iv. In case of officers on deputation, the power to place under suspension may be exercised by the 'Borrowing Authority' of the circumstance leading to the order of suspension. In *Ram Adhar Singh v. Supdt. Central Excise, Kasganj*⁴⁵, it has been held that the failure to send such an intimation does not render the order of suspension as invalid.
- v. In case of officers in charge in the Field Establishments, who do not normally have the power to place certain employees under suspension, may be authorized by a special order to do so but the exercise of power in their case shall be subject to the approval of the appointing authority. In this connection the Government of India have issued orders⁴⁶, which provides that in case the order of suspension is not confirmed by the reviewing authority within a month, it shall become void, *ab-initio*.
- vi. An order of suspension made with the approval of the authority competent to suspend but signed by another officer for him is valid in law as held in *B. Chakravarty v. Kaula*⁴⁷. In such cases presumption would be that the order has been passed by the authority specified in the order. The presumption is, however, rebuttable and department can produce relevant papers to prove their point held in *State of Orissa v. Saila Behari*⁴⁸.

When suspension can be ordered?

It is settled principle that since suspension can be ordered within the four walls of the rules only. It must be insured that the relevant situation is the one in which suspension is permitted by the rule. Thus Disciplinary Rules authorize a suspension in the following three situations:

- i. Where the disciplinary proceedings against the employees is contemplated or is pending; or
- ii. Whereas case against him in respect of any criminal offence is under investigation or trial; of
- iii. For reasons of security of the state.

⁴⁵ 1980 S.L.J. 714.

⁴⁶ *Vide* MHA. O.M. No.7/4/74-Estt. (A) dated 9th Aug. 1974.

⁴⁷ A.I.R. 1957 All. 671.

⁴⁸ A.I.R. 1963 OR 73.

Holding of preliminary inquiry is not an essential requirement

Though, normally the fact finding inquiry is held before an order of suspension is made but it is not mandatory requirement. The reason is that the term ‘contemplation’ does not admit of any such restriction. In *Hari Dev Pillai v. Union of India*⁴⁹-the Principle Bench of the Central Administrative Tribunal disagree with the judgments of the Allahabad High Court in *Arya VirSaxena v. State of U.P.*⁵⁰ and observed that principle of *res ipsalquitur* (the thing speaks for itself) applies in such a situation. Decision to the same effect was taken by the Bombay High Court in *Durukuma S. Chandnani v. Shri Chittahtosh Mukhejee*⁵¹, that where the fact are self evident, suspension may be ordered without a formal fact finding inquiry.

During pendency of departmental proceedings

The order of suspension may be made at any time during the pendency of the proceedings, and kept in force even if the department proceedings are suspended or postponed to a future-date as held in *Binod Chandra v. Union of India*⁵². In the same way, the order of suspension can be revoked at any time during the pendency of the disciplinary proceedings.

Suspension: Pending criminal charge

In case of offences of serious nature involving moral turpitude and not for petty offences unrelated to morality or official duties of the public servant, the Suspension is ordered during pendency of criminal charges.

Investigation, trial, inquiry

‘Investigation’ under the Criminal Procedure Code, 1973 includes all proceedings for collection of evidence. It is stage before ‘inquiry’ or ‘trial’ in criminal case does not go hand to hand held in *B.B. Mondal v. State Lab*⁵³. The investigation in criminal case starts with the registration of an F.I.R. by the local police, or an P.E./R.C. by the C.B.I. that the ‘trial’ being when a *challan* is presented to a court of law and ends with acquittal or conviction by the court. When the order of suspension stated that it has been passed pending

⁴⁹ (1988) 7 A.T.C. 916.

⁵⁰ (1979) 1 S.L.R. 436.

⁵¹ 1992 Lab.I.C. 80.

⁵² A.I.R. 1960 PB 147.

⁵³ I.C. 1974 (Cal.) 606.

‘prosecution’ the order was upheld by the Supreme Court in *Director General of Police v. K. Ratnagiri*⁵⁴.

Arrest for debt

Government of India has issued instruction⁵⁵ that a government servant against whom a proceeding has been taken for his arrest for debt but who is not actually detained in custody may be placed under suspension only if disciplinary proceeding against him is contemplated.

Involvement in ‘dowry death’

A very serious view of offence against women has been taken by the government and it has been decided that where a case is registered by the police against a government servant under Section 304-B of Indian Penal Code, 1860 and government servant is arrested, he shall be placed under suspension immediately irrespective of the period of detention. In case of non arrest, he shall be placed under suspension immediately on submission of a police report under section⁵⁶ to the Magistrate as per government order⁵⁷.

Cases related to All India Service

Rule No.3 of All India Services (Discipline and Appeal Rules, 1969) contained that the powers of suspension can be exercised by the central or state government under whom the member of the service is serving. While interpreting the said Rule 3(1), the Supreme Court in *P.R. Nayak v. Union of India*⁵⁸, held that suspension could be ordered only after actual initiation or commencement of the disciplinary proceedings. The said rule was substituted⁵⁹ according to which suspension can be ordered during contemplation of proceedings as well. The suspension order shall be valid only if either the disciplinary proceedings are initiated or the order is confirmed by the central government within a period of 45 days, extendible by the central government up to 90 days, for the reasons to be recorded in writing. The Calcutta Bench of Central Administrative Tribunal in *Abullais Khan v. State of West Bengal*⁶⁰ has held that:

⁵⁴ A.I.R. 1990 S.C. 1423.

⁵⁵ *Vide* O.M. No. GI, MOF No. 15(8)-E IV/57 dated 28.3.59.

⁵⁶ CODE CRIM. PROC. § 173(2).

⁵⁷ D.O.P. & T.O.M. No.11012/8/87–Estt.(A) dated 22nd June 1987.

⁵⁸ A.I.R. 1972 S.C. 554.

⁵⁹ *Vide* D.P. & A.R. Notification No. 6/9/72 AIS (III) dated 5th July 1975.

⁶⁰ A.T.R. (1986) 2 PG 97.

- i. The state government may make reference of the central government for confirmation of the suspension within 45 days;
- ii. The period(s) by which an interim order of stay is made by a court of law should be deducted in order to compute the order of 45/90 days, and;
- iii. The period occupied for obtaining certified copies, from the date of application and till the date when they were ready for delivery should be excluded in accordance with the provisions of the Limitation Act. Where the order of suspension has been made by the state government, it has to forward the detailed report of the case to the central government, ordinarily within 15 days.

Provisions relating to railway servant

Rule 5 of the Railway Servant (Discipline and Appeal) Rules, 1968 contained the similar Rule of 10 of CCS (CCS) Rules, 1965 applicable to the Central Civil Services. Rule 4 read with Schedule I, II, III specified the Authorities competent to order of Suspension.

Provision relating to judicial services

It has been held by the Supreme Court that the control over the subordinate judiciary vested in High Courts exclusively in nature, comprehensive in extent and operation. It includes powers to suspend from a service a member of Judiciary, with a view to holding of departmental inquiry against him as held in *High Court of Andhra Pradesh v. V.S. Krishnamurthy*⁶¹. The power of interim suspension is incidental to the power of disciplinary control held in *Amarnha Saha v. High Court of Calcutta*⁶².

Justification of suspension order

The central government has issued the following instructions⁶³ that order of suspension may be justified:

- i. Any offence or conduct involving moral turpitude;
- ii. Corruption, embezzlement or misappropriation of official money, possession of disproportionate assets, misuse of official power for personal gain;
- iii. Serious negligence and dereliction of duty resulting in considerable loss to the organization;

⁶¹ A.I.R. 1979 S.C. 246.

⁶² 1985 Lab.I.C. 1150.

⁶³ Vide MHA Letter No. 43/56/64-ADV dated 22.10.64.

- iv.** Refusal to delegate failure to carry out written orders of the superior officers.

In addition to above, the Central Vigilance Commission has also issued instructions⁶⁴ that under the following circumstances, it may be appropriate to place a public servant under suspension:

- i.** The continuance of public servant in the office is likely to prejudice investigation, trial or inquiry (apprehending tampering with documents or witness); or
- ii.** Where the continuance of public servant in the office is likely to seriously subvert discipline in the office in which he is working;
- iii.** Where the continuance of public servant in the office will be against the wider public interest e.g., there is a public scandal and it is considered necessary to place the public servant under suspension to demonstrate the policy of the government to deal strictly with officers involved in such scandals, particularly corruption;
- iv.** Where the investigation has revealed a prima-facie case justifying criminal/departmental proceedings which are likely to lead to his conviction and or dismissal, removal or compulsory retirement from service; or
- v.** Where the public servant is suspected himself in activities prejudicial to the interest of the security of the State.

Sexual harassment of women at the work place

Keeping in view the urgent need of prevention of sexual harassment of women at work place it has been emphasized by inserting a new Rule⁶⁵. The Government Order⁶⁶ issued there under terms it as a misconduct calling for quick disciplinary action. The Supreme Court in *Vishaka v. State of Rajasthan*⁶⁷ has also stressed that appropriate disciplinary action should be taken in such cases. Although it has not been expressly provided, but the Supreme Court in appeal *Export Promotion Council v. A.K. Chopra*⁶⁸, has upheld the penalty of removal from service in such a case. It shall be appropriate for the authorities, in a case where prima facie case is made out, to consider placing the culprit under suspension. Such an action, on one hand, shall be in consonance with the policy of the government to order suspension in a grave case calling for major penalty action, and on the other, it may

⁶⁴ Vide No. 2000 Vigilance/VGL/70 dated 25.9.200.

⁶⁵ 3C in The CCS (Conduct) Rules, 1964.

⁶⁶ No. DOP & T O.M.11013/10/97-Estt.(A) dated 13.2.1998.

⁶⁷ A.I.R. 1997 S.C. 3011.

⁶⁸ A.I.R. 1999 S.C. 625.

provide immediate relief to the hapless victim till the matter is finally decided and also act as a deterrent to others.

Moral turpitude:

Meaning of 'Moral turpitude' has been defined as in *Webster's Dictionary* that quality of crime involving grave infringement of the moral sentiments of the community. In *Baleshwar Singh v. District Magistrate*⁶⁹, it was held that it is an act which could shake the moral sentiments of the society in general and the perpetrator could be considered to be person of a depraved character or looked down upon by the society. An act will be considered as involving moral turpitude, if it involves baseness, vileness or depravity, when judged in the context of private and social duties which a man owes to his fellow men or to the society in general.

The Delhi High Court in *Bank of Maharashtra v. Om Parkash Malviya*⁷⁰, has observed that dictionary meaning of the word 'moral' stands for right and wrong conduct, virtues, moral lessons or principles and 'turpitude' stand for 'wickedness'. The Punjab and Haryana High Court in case of *Durga Singh v. State of Punjab*⁷¹, considering the facts defined what is 'moral turpitude'. It observed at that: "The term 'moral turpitude' is rather vague one and it may have different meaning in different context. The term has generally been taken to mean to be a conduct contrary to justice, honesty, modesty or good morals and contrary to what a man owes to a fellow man or to society in general. It has never held that gravity of punishment is to be considered in determining whether the misconduct involves moral turpitude or not."

In *Mangali v. Chaki Lal*⁷², the tests to find out 'moral turpitude' were given as:

- i. Whether the act is such as would shock the moral conscience of society;
- ii. Whether the motive which led to the act was base one; and
- iii. Whether on account of the act having been committed the perpetrator could be considered to be of depraved character or a person who was to be looked down by the society.

The conduct of moral turpitude need not necessarily relate to an activity in the course of employment and it could relate to an activity

⁶⁹ A.I.R. 1959 All. 71.

⁷⁰ 1997 Lab.I.C. 1932.

⁷¹ A.I.R. 1957 PB 97.

⁷² A.I.R. 1963 All. 527.

outside the scope of employment as held in *State of Tamil Nadu v. P.M. Bellippa*⁷³.

In *Noor Ahmed v. State Bank of India*⁷⁴ relying on *G. Eswara Reddy v. P. Rama Krishna Reddy*⁷⁵, it has been held that every violation of law, does not involve moral turpitude, nor can it be said that a particular category of crime do not necessarily involve moral turpitude unless of course, it is an offence inherently criminal, the very commission of which implies a base and depraved nature.

Deemed suspension

This is a situation where in an employees have been placed under suspension by an order of the appointing authority, on the happening of some contingency specified in the rules. The various disciplinary rules provide that such situations as under:

- i.** Where the employee is detained in custody for a period exceeding 48 hours. The suspension takes effect from the date of detention. Though the police authorities send such intimations, the employees are also bound, by departmental instructions, to inform their controlling authorities about arrest a detention, even for periods less than 48 hours.
- ii.** Where an employee is convicted by a court of law, sentenced to imprisonment exceeding 48 hours and he actually undergoes imprisonment for more than 48 hours, broken period counting.
- iii.** Where the penalty of dismissal, removal or compulsory retirement from service is set aside by a departmental authority but with further directions relating to the same or any other matter, provided the employee was originally under suspension on the date of penalty. The deemed suspension takes effect from the date of penalty.
- iv.** Where the penalty of dismissal, removal or compulsory retirement is set aside by a court of law on technical grounds and the department decides to hold further inquiry in the same matter. The deemed suspension shall take effect from the date on which the original penalty was imposed.

It is to be noted that while in case of (4) above, further action must relate to same charge on which penalty was imposed, this condition is not there in (3) above.

⁷³ 1985 Lab.I.C. (Mad.) 51 ¶ 20.

⁷⁴ 1992 Lab.I.C. (AP) 1469.

⁷⁵ 1978 A.P.L.J. (HC) 266.

Deemed suspension: Conviction by in the foreign courts

In *Union of India v. S.N. Mukherjee*⁷⁶, it has been held by the Calcutta High Court that words ‘offence’, ‘conviction’ and ‘imprisonment’ occurring in Rule⁷⁷ do not include conviction by a foreign court and imprisonment in a foreign country. He could, however, be placed under suspension in terms of the provisions of Rule 10(2)(b). The court observed that if the word ‘conviction’ was construed as also including a conviction by a court of foreign country, it would indirectly be giving effect to a penal law of a foreign country. Hence such conviction cannot be taken notice of as a ground of suspension of a government servant or for his removal, dismissal or retirement from service.

Change of headquarters during suspension

Normally the headquarters of the employee under suspension should be his last place of duty. He cannot leave the station without permission. A request for change of headquarters is usually granted where it is not likely to put the government to any extra expenditure like traveling allowance, or raise other complications as per Government of India instructions contained in⁷⁸. In *W.B. Khadi and Village Industries Board v. D.P. Bhattacharya*⁷⁹, the Calcutta High Court held that where the order of suspension stated: “It is further orderd that during the period of suspension of the headquarters of Sh. Bhattacharya will be at 2, Ripon Street, Calcutta-16 and Sh. Bhattacharya shall not leave headquarters without obtaining pervious permission of the authority. The Calcutta High Court in this case held that this portion of the order as illegal and quashed it.

Payment during suspension

Subsistence allowance: An employee under suspension is not entitled to his salary during the period of suspension. The payment to him is been strictly regulated by the Rules applicable to him.

In *Capt. M. Paul Anthony v. Bharat Gold Mines*⁸⁰, the Supreme Court held that: “If there is no provision in the Rules applicable to a particular class of service for payment of salary at a reduced rate, the employer would be liable to pay full salary even during the period of suspension.”

⁷⁶ 1977 Lab.I.C. 811 (Cal.).

⁷⁷ 10(2) of CCS (CCA) Rules, 1965.

⁷⁸ MHA. O.M. No. 39/56-Ests.(A) dated 8th Sept. 1956.

⁷⁹ 12980 S.L.J. 682.

⁸⁰ 1999(2) SCALE 363.

As per the Provisions of F.R. 53 of the Central Civil Services and the same rule is followed by the various state governments, public sector undertakings and government companies, provides that an employee under suspension shall be paid subsistence allowance equal to 50% of his salary for the first 3 months. The dearness allowance is paid at pro rata; but house rent and compensatory allowances are paid at the same rate at which he was getting earlier provided the conditions relating to grant of such allowances are fulfilled.

Review of subsistence allowance

In *Bhubananda v. Jeypore Municipality*⁸¹, the Orissa High Court has held that the term 'directly attributable' means 'wholly responsible'. After 90 days, an upward/downward review of subsistence allowance to the extent of 50% of the amount originally sanctioned has to be done depending upon whether or not delay in finalizing the proceedings is directly attributable to the employee concerned.

In *B.D. Shetty v. Ceat Ltd.*⁸² decided on 30.10.2001, it was held that the departmental proceedings which had been instituted simultaneous with criminal proceedings were stayed by a court of law, in such situation subsistence allowance of employee could not be reduced as the delay in holding proceedings cannot be said to be 'directly attributable' to him.

Timely payment of subsistence allowance and it must be sufficient to maintain the employee and his family. Frequent review should be taken to ensure it.

Time and again the Government of India has emphasized the need for timely and regular payment of subsistence allowance to the employees under suspension. The Hon'ble Supreme Court in its judgment in *P.L. Shah v. Union of India*⁸³, has quoted in its original words:

"The very nomenclature of the allowance makes it clear that the amount paid to such a government servant should be sufficient for bare subsistence in this world in which the prices of the necessaries of life are increasing every day on account of the conditions of inflation obtaining in the country. It is further to be noted that a government servant cannot engage himself in any other activity during the period of suspension. The amount of

⁸¹ A.I.R. 1971 OR 48.

⁸² Civil Appeal No.7382/2001.

⁸³ A.I.R. 1989 S.C. 985.

subsistence allowance payable to the government servant concerned should, therefore, be reviewed from time to time where the proceedings drag on for a long time, even though there may be no express rule insisting on such review.”

Appeal against order or suspension or subsistence allowance

Where an order is made by the President (or the Governor) no appeal lies but an application for review is possible. An appeal lies to the appellate authority as specified in the relevant Discipline and Appeal Rules.

Re-instatement and subsequent orders

Re-instatement is resumption of his duty in the office by a government servant under suspension by his act, the period of suspension ends and he is permitted to resume duties of his office. Though the word ‘re-instatement’ in this sense is in common use. In *Hemanta Bhattacharjee v. Union of India*⁸⁴, the Calcutta High Court has observed that: “Re-statement can only arise if a man is dismissed or removed from service or if otherwise his service is terminated and he is brought back to service. If a person is merely suspended, he will continue to be in service, but in a state, as it war, of suspended animation. When the period is over, he is simply to be allotted a job. The word ‘re-instatement’ if used in this respect, is only loosely used and has n legal significance.”

Cases of exoneration

Full pay and allowances is payable as per normal Rule. In exceptional cases, suitable reduction can be made if the proceedings were delayed for the reasons directly attributable to the employees. But in such case, a show cause notice returnable within sixty days is necessary. The period of suspension shall, however be treated as duty for all purposes-F.R. 54 B(3).

Position in case of discharge of employees

In *Gurdeep Singh v. Union of India*⁸⁵, where the appellant had been placed under suspension and charge sheeted but disciplinary proceedings were dropped consequent upon termination of his service on abolition of post. The Supreme Court held that he was entitled to full pay and allowances during the period of suspension.

⁸⁴ A.I.R. 1958 Cal. 239.

⁸⁵ A.I.R. 1982 S.C. 1176.

Penalties

Imposito of different penalties for same misconduct amounts to discrimination

In *Shamsher Singh v. Pepsu*⁸⁶-In this case the petitioner one Sh. Jagdish Singh was held guilty of misappropriation, misuse and exceeding power. Imposition of the penalty of dismissal from service on the petitioner amounts to discrimination against the other, who was awarded lesser penalty, and it would therefore amount to denial of justice. The Punjab & Haryana High Court quashed the order of dismissal of the petitioner and granted liberty to the disciplinary authority to pass orders of penalty afresh.

Penalties that may be imposed on the government servants: The following penalties may be imposed on a government servant for good and sufficient reasons. In *Mohinder Pal Singh v. State of U.P.*⁸⁷ case proceedings for minor penalty were conducted, major penalty were imposed. A minor penalty charge sheet was issued but after holding the inquiry, major penalty was imposed. The High Court held that it is not proper and only a minor penalty could be imposed. In *Dhirendra Chander Debnath v. Union of India*⁸⁸ the applicant while working as Tax Assistant in the Office of Income tax was served with a charge for minor penalty proceedings. The applicant denied the charge and gave reply. The minor penalty charge was dropped and a major penalty charge-sheet under Rule 14 of the CCS (CCA) Rules, 1965 was issued. The Disciplinary Authority felt the charge that he barged in to the room of ITO and tore of papers from the file of his own father-in-law is very serious and he felt major penalty inquiry should be done. The Central Administrative Tribunal held that there is nothing wrong in dropping minor penalty proceedings and instituting major penalty proceedings, considering the gravity of the misconduct.

Kinds of minor penalties

- i. Censure;
- ii. With holding of promotion;
- iii. Recovery from his pay of the whole or part of any pecuniary loss caused by him to the government by negligence or breach of orders;

⁸⁶ R.T.C. 2002(3) S.L.R. P & H 144.

⁸⁷ 2003(3) S.L. Delhi 46.

⁸⁸ 2003(3) S.L. CAT CAL 258.

- iv. Reduction to a lower stage in the time-scale of pay for a period no exceeding 3 years, without cumulative effect and not adversely affecting is pension;
- v. With holding of increments of pay.

In *M. Ravi Kumar v. Union of India*⁸⁹ proper consideration necessary in request for inquiry in minor penalty proceedings. In this case the facts were that the applicant was proceeded against in minor penalty proceedings. He requested for an inquiry and his request for inquiry was rejected and penalty was imposed. He agitated the same request before the appellate and revisionary authorities but not considered by anyone. The inquiry is not necessary in minor penalty proceedings but a proper consideration of the request for inquiry is necessary. The Tribunal held that the orders are bad in law and hence quashed them.

In *Suraj Kumar Bagchi v. Union of India*⁹⁰ minor penalty where inquiry is not conducted, is necessary to pass speaking order. In this case the applicant was working as leverman, was awarded minor penalty without conducting inquiry. The order of disciplinary authority does not dispose why or how the guilt stood proved, whether passengers who were supposed to be witnesses had given statement, whether cabinman was given statement etc.

In minor penalty more clear orders are necessary as (i) The decision is conducted without conducting the inquiry, (ii) affects on service conditions and (iii) the order is appealable. Similarly the Appellate Authority should pass the order on all points raised in the appeal.

Kinds of major penalties

Major penalties are given as under in the disciplinary proceedings against the charged employees/officers:

- i. Reduction to a lower stage in the time-scale of pay for a specified period;
- ii. Reduction to a lower time-scale of pay, grade, post or service;
- iii. Compulsory retirement;
- iv. Removal from service which shall not be disqualification for future employment under the government;
- v. Removal from service which shall ordinarily be a disqualification for future employment under the government.

⁸⁹ 2003(1) SL CAT Ernakulam 337.

⁹⁰ 2003(2) SL CAT CAL 392.

Dismissal and removal

The word 'dismissed' and 'removed' have not been defined in the Constitution. The scope and term has been defined by *Suba Rao, J.*, in *Moti Ram v. N.E. Frontier Railway*⁹¹, in the following words:

“Article 311 used two well known expressions 'dismissed' and 'removed'. The article does not, expressly or by necessary implication, indicate that the dismissal or removal of government servant must be of particular category. As the said article gives protection and safeguard to the Government servant who will otherwise be at the mercy of the government, the said words shall ordinarily be given a liberal or at any rate their natural meaning, unless the said article of the Constitution, expressly or by necessary implication, restrict their meaning. I do not see any indication in the Constitution which compels the court to reduce the scope of protection.”

The dictionary meaning of the word 'dismiss' is 'to let go', 'to relieve from duty'. The word 'remove' means 'to discharge', 'to get rid of', 'to dismiss'. In their ordinary parlance, therefore the said words mean nothing more or less than termination of a person's office.

The effect of dismissal or removal of one from his office is to discharge him from that office. In that sense, the said words comprehend every termination of the services of the government servant.

Removal with disqualification for future employment is dismissal

As provided in Government Service Rules, dismissal from service disqualifies a Civil Servant from future employment, whereas removal from service ordinarily does not. Where however, removal from service was accompanied with a bar against future employment in such a case, the word 'removed' may be taken to have been used loosely, and what was intended by the government was to dismiss him from service which created absolute disqualification for future employment. The order of the government, therefore, may be interpreted to be an order of dismissal and not that whole order has become ineffective as held in *Tribhuvan Nath v. State of Bihar*⁹².

⁹¹ 1964(5) S.C.R. 683;1964(2) L.L.J. 467, AI 1964 S.C. 600.

⁹² A.I.R. 1960 Pat. 116.

Difference between removal and dismissal

Removal from service does not disqualify for future employment. Dismissal from service does disqualify for future employment as held in *Govt. of U.P. v. Sabir Hussain*⁹³.

Termination when amounts to removal and dismissal

*Jagdish Mittal v. Union of India*⁹⁴: Having regard to the legislative history of provisions contained in Article 311, the word ‘removed’, ‘dismissed’ and ‘reduction in rank’ as used in Articles 311(1) and (2) have attained the significance in of term of article.

Every order terminating the service of public servant who is either temporary servant of a probationer, will not amount to dismissal or removal from service within the meaning of Article 311. It is only when the termination of the public servant’s services can be shown to have been ordered by way of punishment that it can be characterized either as dismissal or removal from service.

Termination for conviction not sustainable where released as per Section (10)(1)(b) of the Banking Regulation Act

Termination of the services of a bank official convicted under Section 354 of IPC ‘outraging the modesty of a woman’ and released under Section 4(1) the Probation of Offender Act is not sustainable, as he suffers disqualification. The termination is based upon his conviction of an offence involving moral turpitude as per Section 10(1)(b) of Banking Regulation Act. Section 12 of the Probation of Offender Act provides that a person found guilty of an offence and dealt with under provision of Sections 3 or 4 ‘shall not suffer disqualification’ attaching to a conviction for an offence under such law and the section does not make a distinction between an offence involving moral turpitude and an offence to which there is no element of moral turpitude involved as such as held in *Parupureddi Satyanarayana v. Zonal Manager, Indian Bank*⁹⁵.

A case of gravest misconduct

In this case the act of the constable of Haryana Police being absent from duty and taking liquor during that period is an act of gravest misconduct and the word ‘acts’ in Rule 6.2(1) of Punjab Police Rule, 1934 would, as laid down by the Supreme Court in the *State of*

⁹³ 1975 Supp. S.C.R. 354:1975(4) S.C.C. 703.

⁹⁴ 1964(1) L.L.J. 418:A.I.R. 1964 S.C. 449.

⁹⁵ 1988(6) SLR A.P. 671.

*Punjab v. Ram Singh, Ex constable*⁹⁶, would include singular act as well. Accordingly the Punjab and Haryana High Court upheld the penalty of dismissal imposed on constable-*Chaman Lal v. State of Haryana*⁹⁷.

Retrospective dismissal of a bank employee: In this case the Petitioner, Cashier-cum-Clerk of Jasdan Branch of State Bank of Saurashtra, was dismissed from service by an order dated 8.1.91 w.e.f. 30.4.90, following his conviction in a criminal case of misappropriation by judgment dated 30.4.90. The petitioner contended that the order is illegal, inasmuch as no retrospective effect could have been given to the order of dismissal and that Clause 19.3(b) of the Bipartite Settlement of 1966 by which power is conferred on the Bank to dismiss an employee with retrospective effect from date of conviction must be held to be arbitrary, unreasonable and ultra vires.

The High Court observed that the Supreme Court in *R. Jeevaratnam v. State of Madras*⁹⁸, did not hold that in no case an order of dismissal could be passed with retrospective effect but that even when such order was not in accordance with laws, it can be given prospective effect. In the instant case, there is binding settlement which empowers the Bank to dismiss its employees retrospectively and thus that action is permissible held in *P.J. Badlia v. State Bank of Saurashtra*⁹⁹.

Penalty–dismissal, where held to be in order: The Supreme Court held that one the question of quantum of punishment one should bear in mind the fact that it is not the amount of money misappropriated that becomes a primary factor for awarding punishment. On contrary, it is the loss of confidence which is the primary factor to be taken into consideration. The Supreme Court held that when a person is found guilty of misappropriating corporation's funds, there is nothing wrong in the corporation losing confidence or faith in such person and awarding a punishment of dismissal-*Divisional Controller, KSRTC v. A.T. Mane*¹⁰⁰.

Penalty-Misappropriation by Conductor-in Regional Manager, *Rajasthan State Transport v. Mohan Lal*¹⁰¹, in this case the conductor was charged with collecting fare but not issuing tickets and was

⁹⁶ 1992(5) SLR S.C. 543.

⁹⁷ 1993(2) SLR P & H 256.

⁹⁸ A.I.R. 1966 S.C. 951.

⁹⁹ 1993(3) SLR Guj. 746.

¹⁰⁰ 2005 SLJ 227 SC.

¹⁰¹ 2005(1) SLJ 232 SC.

dismissed from service. The Supreme Court held that where charges are proved court cannot mould there life and direct reinstatement as such action also causes loss of confidence.

Power to dismissal cannot be delegated

The appointing authority cannot delegate its powers of dismissal or removal to a subordinate authority so as to destroy the protection afforded by Article 311(1) of the Constitution unless, of course, the Constitution itself authorizes such delegation by other provisions as held in *Kapur Chand v. State of Rajasthan*¹⁰² and *Balbir Singh v. State of Punjab*¹⁰³.

Compulsory retirement

Compulsory retirement, where not maintainable-where the petitioner was served with a show-cause notice for compulsory retirement after due enquiry and the petitioner filed a detailed statement of defense which the disciplinary authority did not refer but ordered the compulsory retirement of the petitioner without applying his (disciplinary authority) mind and on the objective assessment, and without making any speaking order of compulsory retirement is not maintainable held in *R.S. Sehgal v. Director Posts and Telegraphs*¹⁰⁴.

Reduction in rank

Reduction from rank is different from removal or dismissal-While dismissal and removal put an end to relationship; existing between two parties, reduction in rank does not end the contract but the terms of service are altered to the disadvantage of servant by his demotion by putting him to a lower grade or lower scale of pay or lower post.

Opportunity before ordering reversion

Reversion from the officiating appointment without any reason violates Article 311 of the Constitution. Such as order is quasi-judicial and entails penal consequences and opportunity of hearing must be given before reversion held in *State of Uttar Pradesh v. Varindra Nath Srivastava*¹⁰⁵. Reduction to lower grade and lower stage in time scale amount to two penalties: Imposition of reduction to lower grade and to a lower stage in the time scale for the same

¹⁰² A.I.R. 1962 Raj. 258.

¹⁰³ A.I.R. 1970 Punj. 459.

¹⁰⁴ 1983(2) SLR 474.

¹⁰⁵ 1970 SLR All. 48.

misconduct amounts to imposition of two penalties and is not permissible as held in *Nand Kishore Katyal v. Bank of India*.

Recovery of pecuniary loss from pay

Recovery of loss of tickets, only after inquiry: In *Daya Shankar Parshad v. Union of India*¹⁰⁶ the applicant, Station Superintendent, Railways was held responsible for loss of tickets and Rs.1,20,000 was recovered from retiral dues. The rule provides for inquiry and if inquiry shows tickets were sold and used then such recovery is permissible. Inquiry did not show any sale or reuse of tickets. The CAT held that tickets cannot be converted into their money value and at best Railway can recover cost of paper for printing the tickets. One of the minor penalties that may be imposed on government servant is recover from his pay of the whole or part of any pecuniary loss caused by him to the government by negligence or breach or orders.

Withholding of increments or promotion

This is another minor penalty that may be imposed on government servant, when the increments of an incumbent are stopped his future prospects are brought to a stand still for a particular length of time. This penalty is different from the penalty of reduction in rank.

Deferring of promotion

Every civil servant has a right to his case considered for promotion according to his turn and it is a guarantee flowing from Articles 14 and 16(1) of the Constitution. The consideration of promotion could be postponed only on reasonable grounds. To avoid arbitrariness, it would better to follow certain uniform principle. The promotion of persons against whom charge has been framed in the disciplinary proceedings or charge-sheet has been filed in criminal case may be deferred till the proceedings are concluded. They must, however, be considered for promotion if they are exonerated or acquitted from the charges. If found suitable, they shall be given the promotion with retrospective affect from the date on which their juniors were promoted held in *C.O. Arumugum v. State of Tamil Nadu*¹⁰⁷.

The sealed cover procedure

The 'sealed cover procedure' should be followed only after the conclusion of the investigation and when the competent authority on

¹⁰⁶ 2002(1) SLJ CAT Patna 313.

¹⁰⁷ 1989(4) JT 337.

consideration of the result of investigation either by the C.B.I. or any other agency, departmentally or otherwise has formed the opinion that a charge sheet may be issued to him on specific imputations where the departmental action is contemplated or the sanction for prosecution may be accorded where the prosecution is proposed and till this stage is reached, the government servant concerned has to be treated at par with other in the matter of promotion and confirmation. In the instant case, admittedly, the promotion was being denied to the applicant only on the sole ground that a criminal case was under investigation against him but no stage had reached where the *challan* had been put in the court of the government had applied its mind to accord sanction to the proposed prosecution of the applicant. In fact the investigation agency concerned has now clearly communicated that no case is made out against the applicant- *Ramesh Chand v. Registrar Cooperative Societies*¹⁰⁸.

Case law: *Union of India v. K.B. Janki Raman*¹⁰⁹

Sealed cover procedure-views of the court summarized: Central Administrative Tribunal reiterated the considered views of the Supreme Court in the case of *Union of India v. K.B. Jankiraman*¹¹⁰, and listed some of the settled features of the law laid down by the Supreme Court in *D.K. Srivastava v. Union of India*¹¹¹.

Sealed cover procedure does not apply where sanction of prosecution was issued but no charge sheet was filed. The applicant was selected by the DPC, but before promotion, sanction to prosecute was given, and therefore he was not promoted and the result was with held in sealed cover. The Central Administrative Tribunal in this case referred the case of *Union of India v. K.B. Jankiraman*¹¹², where the Supreme Court held that sealed cover procedure can be followed only if one was suspended or charge-sheet was initiated or a criminal case is pending. Mere sanction may not be converted to filing of charge sheet in court and hence it is not covered. The Tribunal held that the action of the respondents is wrong and directed them to implement the DPC results-*A.D. Khadtar v. Union of India*¹¹³.

¹⁰⁸ 1990(6) SLR HPAT 309.

¹⁰⁹ A.I.R. 1001 S.C. 2010.

¹¹⁰ A.I.R. 1991 S.C. 2010.

¹¹¹ 2002(3) CAT Ahmedabad 57.

¹¹² A.I.R. 1991 S.C. 2010.

¹¹³ 2002(1) CAT Ahmedabad 250.

Sealed cover procedure cannot take into account proceedings of later period

The Supreme Court observed that the sealed cover procedure is well established concept in service jurisprudence. The procedure is adopted when an employee is due for promotion, increment etc., but disciplinary/criminal proceedings are pending against him and hence the findings as to his entitlement to the service benefit of promotion, increments etc., are kept in a sealed cover to be opened after the proceedings in question are over.

*In Bank of India v. Degala Suryanarayana*¹¹⁴-the facts of the case are that as on 1.1.1986, the only proceedings pending against the respondent were the criminal proceedings which ended in acquittal of the respondent wiping out his retrospective effect the adverse consequences. If any, flowing from the pendency thereof. The departmental inquiry proceedings were initiated with the delivery of the charge sheet on 3.12.91. In the year 1986-87, when the respondent became due for promotion and when the promotion committee held its proceedings, there were no departmental enquiry proceedings pending against the respondent. The sealed cover procedure could not have been resorted to nor could the promotion in the year 1986-87 with held for the departmental enquiry proceedings initiated at the far end of the year 1991. The Supreme Court held that the High Court was therefore right in directing the promotion to be given effect to which respondent was found entitled as on 1.1.1986 and that the order of punishment made in the year 1995 cannot deprive the respondent of the benefit of the promotion on 1.1.1986.

Commencement of fresh disciplinary proceedings should not come in the way of giving effect to recommendation of Departmental Promotion Committee, where exonerated in earlier proceedings in-*Delhi Jal Board v. Mahinder Singh*¹¹⁵.

Rule 11(ii) of the CCS (CCA) Rules, 1965 provides that with holding of promotion can be resorted to by way of punishment. But the Statutory Rules do not say that the withholding of promotion cannot be resorted to for other valid reasons and they are silent. It is to provide for such a contingency, the sealed cover procedure has been thought of and executive instructions had been issued in that regard.

¹¹⁴ 2001(1) SLJ S.C. 113.

¹¹⁵ 2000(1) SLJ S.C. 398.

Explanation (iii) Rule 11 carves out from the main provision, non promotion after consideration of special reasons. It does not say what circumstances, non promotion after consideration will fall there under and the instructions of the sealed cover procedure fill in the gap. It will be against public interest if any employee who is being preceded against say on a charge of corruption were to be promoted while facing the corruption charges. The sealed cover procedure is intended to protect the interest of employee in the matter of promotion and also to advance the public interest and to sustain purity of public service. Sealed cover procedure is to be followed only proceedings are initiated i.e., when the charge sheet is filed in the criminal court or charge memo under the CCA Rules is served on the official *K.Ch. Venkata Reddy v. Union of India*¹¹⁶.

A disciplinary case against any one can be considered as initiated only on the issue of charge sheet to that person under the CCS (CCA) Rules. If no charge sheet has been issued before the D.P.C. consideration, it cannot be said that any disciplinary action was pending on the date of the D.P.C. consideration. In this view the Tribunal directed to open the sealed cover and if the applicant, an Upper Division Clerk, Office of the Chief Postmaster General Madras was found fit for promotion by the D.P.C. to promote him from the date his junior was promoted and to pay him consequential arrears of emoluments and grant seniority etc., in case of *V. Rajamani v. Union of India*¹¹⁷.

In case of *G. Satyanarayan v. Secretary to Govt. Deptt. of Telecom*¹¹⁸, the disciplinary proceedings were quashed by the High Court not on merit but on technical ground. The Tribunal held that denial of arrears for the period of notional promotion with retrospective effect was just and proper.

Denial of promotion where disciplinary proceedings are not pending, on the ground that they are contemplated is illegal as held in *S. Shivachandra Moorthy v. Union of India*¹¹⁹ and *N.K. Gupta v. Union of India*¹²⁰.

In order to overall assessment of the fitness, the promotion committee has to examine/consider the service record of prospective promotee including all penalties major or minor (including even a penalty of censure or stoppage of annual grade increment of one or

¹¹⁶ 1987(4) SLR CAT Hyd. 46.

¹¹⁷ 1991(7) SLR CAT Mad. 197.

¹¹⁸ 1992(5) SLR CAT Hyd. 44.

¹¹⁹ 1992(6) SLR CAT Mad. 403.

¹²⁰ 1992(8) SLR CAT Bom. 431.

more than one) imposed upon him. If as a result of such examination/consideration a government servant is not found fit for promotion then it cannot be said that penalty has been imposed upon him. Doctrine of double jeopardy is not attracted. No government servant has any vested right of promotion. No doubt a minor penalty can have no effect so far as seniority of a government servant is concerned, but in order to have overall assessment, his entire record of service has to be considered as and when he becomes due for consideration for promotion and even the minor penalty has also to be considered. Denial of promotion as a result of such consideration is not a punishment held in *Suraj Mal Soni v. State of Rajasthan*¹²¹.



¹²¹ 1992(8) SLR Raj. 653.

CRITICAL ANALYSIS OF CONFESSION UNDER TADA AND POTA

Mr. S.G. Goudappanavar*

Introduction

The Terrorist and Disruptive Activities (Prevention) Act, 1987 and the Prevention of Terrorism Act, 2002 (commonly known TADA and POTA respectively) had made provisions to admit the confessions made by the accused before the police authorities.¹ A confession is an acknowledgement in express words, by the accused in a criminal case, of the truth of the guilty fact charged or of some essential part of it.² The Indian Evidence Act, 1872³ (hereinafter the Evidence Act) provides that confession made before police authority or under police custody is inadmissible.⁴ The policy is that substantive rule of law that confession whenever and wherever made to police, or while in the custody of the police to any person whomsoever unless made in the immediate presence of a Magistrate shall be presumed to have been obtained under the coercion or inducement.⁵ Article 20(3) of the Constitution of India (hereinafter the Constitution) gives the privilege of right to silence to accused. If confession to police were allowed to be proved in evidence, the police would torture the accused and thus force him to confess to crime which he might not have committed. The nature of Indian police investigation is explained by Goswami, J., noted:

“The archaic attempt to secure confessions by hook or by crook seems to be the be-all and end-all of the police investigation. The police should remember that confession may not always be a short-cut to solution. Instead of trying to “start” from a confession they should strive to “arrive” at it. Else, when they are busy on their short-route to success, good evidence may disappear.”⁶

In view of the changed set-up since independence it was claimed by the police officers all over India that the police should be shown a

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¹ TADA § 15; POTA § 32.

² WIGMORE, 3 EVIDENCE IN TRIALS AT COMMON LAW 821 (Wolters Kluwer (India) Pvt. Ltd., New Delhi).

³ Act No. 1 of 1872.

⁴ Indian Evidence Act, 1872 §§ 25, 26.

⁵ M.C. SARAKAR ET AL., 1 LAW OF EVIDENCE 436 (Wadhwa and Company Pvt. Ltd., Nagpur, 14th ed. 1993).

⁶ *Dagdu v. State of Maharashtra*, (1997) 3 S.C.C. 93.

greater measure of confidence and statements or confessions made to the police should be admissible in evidence.⁷

Whether anti-terrorist laws which allow confession made before a police officer is admissible is violative of Articles 14 and 21 of the Constitution.⁸ Even the confession of co-accused, abettor or conspirator who is tried in the same trial is made admissible under Section 15 of TADA. The apex court has held that anti-terrorist laws are based on a reasonable classification, yet its procedure must satisfy the doctrine of reasonableness under Article 21 of the Constitution. Another limb of *marginal ratio* is that a valid classification is no passport to oppressive or arbitrary procedure.⁹ The procedure contemplated by Article 21 must be right and just and fair, and not arbitrary, fanciful or oppressive; otherwise, it would not be procedure at all; and the requirement of Article 21 would not be satisfied.¹⁰ Whether a procedure which allows admission of confession made before a police authority could be claimed as arbitrary under Article 14 or unjust procedure under Article 21 is a million dollar question. True and voluntary confession is the highest sort of evidence.¹¹ No innocent man can be supposed ordinary to be willing to risk life or property by a false confession.¹² The leading author on evidence, Wigmore observed that a confession may be excluded under one condition that it is “testimonial untrustworthy”. Further he rationalized the common law doctrine of confession in the following words:

“(a) A confession is not excluded because of any breach of confidence or of good faith which may thereby be involved ... (b) A confession is not excluded because of any illegality in the method of obtaining it ... (c) ... A confession is not rejected because of any connection with the privilege against self-crimination.”¹³

Wigmore cites also the dissent view expressed by American eminent scholar Professor Charles McCormick on law of evidence and quotes:

⁷ LAW COMMISSION OF INDIA, REP. NO. 48, SOME QUESTIONS UNDER THE CODE OF CRIMINAL PROCEDURE BILL 1970, at 5; LAW COMMISSION OF INDIA, REP. NO. 69, REVIEW OF THE PROVISIONS OF THE INDIAN EVIDENCE ACT 1872, at 206; *also see supra* note 5, at 439.

⁸ TADA § 15; POTA § 32.

⁹ *In re Special Courts Bill*, 1978 A.I.R. 1979 S.C. 479, at 529.

¹⁰ *In re Special Courts Bill*, 1978 A.I.R. 1979 S.C. 479, at 528; *Menaka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597.

¹¹ *Supra* note 5, at 364.

¹² WIGMORE, *op. cit. supra* note 2, at 826.

¹³ *Id.* at 822.

“Certainly the right to be immune in one’s person from the secret violence of the police seems to be even more deserving of judicial protection than the constitutional immunity from searches and seizures... The reason for extending to the person from whom a confession has been wrung by torture, a similar privilege, whether the confession be true or false, is even stronger...”¹⁴

There are two schools of thought on admissibility of confession. One school proposes that truthful confession even though extracted by compulsion is always relevant because end (justice) justifies the means. The second school propagates that coercive confession is always irrelevant because end is not justified unless means employed to achieve justice is fair. Democratic countries which follow the rule of law more inclined towards latter school of thought than the former. Common law focuses more on truthfulness of confession rather than the means of obtaining it. On the other hand, United States of America’s (U.S.) legal system focuses more on the manner in which confession is extracted. Indian legal system has also followed the policy of U.S. system. Confession is result of competitive value. On one hand, efficient investigation of offence in the interest of society makes questioning of accused and getting information inevitable. On other hand, the zeal and powers of law enforcement officers may outrun their self-restraint and wisdom and accused may become victim of torture.¹⁵

Chief Justice Warren of the Supreme Court of America declared that the government may not use statement obtained from “custodial interrogation” of defendant unless it can show that his right against self-incrimination had been carefully secured by effective “procedural safeguard” that does not violate due process law. This proposition is known as Miranda Rule.¹⁶ Before the interrogation, the police must warn the accused that he has right to remain silent. Secondly, accused must be informed that whatever statement he makes would be used against him. Thirdly, accused is entitled to engage counsel during such interrogation. These three conditions must be strictly complied or defendants must have waived these rights voluntarily, knowingly and intelligently; otherwise confession is inadmissible.¹⁷ American federal statute provides that confession of accused is admissible unless it is given voluntarily.¹⁸ Singapore legal system

¹⁴ *Id.*

¹⁵ LAW COMMISSION OF INDIA, REP. NO. 48, SOME QUESTIONS UNDER THE CODE OF CRIMINAL PROCEDURE BILL 1970, at 5.

¹⁶ *Miranda v. Arizona*, (1966) 384 U.S. 436; *Escobedo v. Illinois*, (1964) 378 U.S. 478.

¹⁷ LAW COMMISSION OF INDIA, REP. NO. 69, REVIEW OF THE PROVISIONS OF THE INDIAN EVIDENCE ACT 1872, at 196.

¹⁸ 18 U.S.C. § 3501 (a) & (b).

which virtually follows Indian legal system has empowered the sergeant-level officers to record the confession.¹⁹

The Malimath Committee on Reformation Criminal Justice System observed that Section 25 of the Evidence Act deprives the investigation agency of valuable piece of evidence in establishing the guilt of the accused.²⁰ Therefore recommended that Section 25 of the Evidence Act may be amended to accommodate the confession recorded by the police officer not below the rank of Superintendent of Police is admissible.²¹ Professor Glanville Williams quotes the Bentham's strong criticism of right to silence that "one of the most pernicious and most irrational notions that ever found its way into the human mind".²² Further he quotes: "Innocence never takes advantage of it; innocence claims the right of speaking, as guilt invokes the privilege of silence." Bentham questions the rationality of exempting the confession made before the police because the same confession either written on a document or conversations of such confession heard by any witness is not exempted from furnishing the evidence. Thus Bentham said: "What the technical procedure rejects is his own evidence in the purest and most authentic form; what it admits is the same testimony, provided that it be indirect, that it have passed through channels which may have altered it, and it be reduced to the inferior and degraded state of hearsay."²³

The Law Commission of India's 14th Report and 48th Report suggested that confession before high ranking officer should be made admissible in the light of changed value of Indian police.²⁴ However, in *Nandini Satpathy v. P.L. Dani*²⁵ the Supreme Court spoke through Justice Krishna Iyer as follows:

¹⁹ MALIMATH COMMITTEE REPORT, VOL. 1, COMMITTEE ON REFORM OF CRIMINAL JUSTICE SYSTEM 122 (Minster of Home Affairs, Government of India 2003).

²⁰ *Id.*

²¹ *Id.* at 123.

²² Right to silence justified on the ground that to try to get an accused person to give evidence against himself was not playing the game; it was hitting below the belt, or hitting a man when he was down. Bentham criticizes this philosophy which has led to evil result because it hindered the conviction of guilt. Further he said it neglected the immediate interest of society that dangerous criminals should not be left free. When guilty is acquitted, the society is punished; see GLANVILLE WILLIAMS, *infra* note 23, at 49-52.

²³ GLANVILLE WILLIAMS, THE PROOF OF GUILT 52 (Stevens & Sons Ltd., London, 3rd ed. 1963).

²⁴ LAW COMMISSION OF INDIA, REP. NO. 14, VOL. 2, THE REFORMATION OF JUDICIAL ADMINISTRATION, at 748; *supra* note 15, at 5.

²⁵ *Nandini Satpathy v. P.L. Dani*, A.I.R. 1978 S.C. 1025.

“The first is that we cannot afford to write off the fear of police torture leading to forced self-incrimination as a thing of the past. Recent Indian history does not permit it; contemporary world history does not condone it.”

The Supreme Court in *Karatar Singh v. Union of India*, considered the constitutional validity of Section 15 of TADA. Senior advocate Ram Jethmalani made a scathing attack on Section 15 which overrides the century old existing Evidence Act and the Code of Criminal Procedure, 1973 (Cr.P.C.) as atrocious and totally subversive of any civilized trial system and such confessions are untrustworthy. Confession before police is either affected by coercion or inducement. Confessions recorded in mechanical devices by police are certainly inferior to confession recorded by Magistrate in open court with safeguard provided in the statute. Further as such mechanical devices enable selective recording, tampering, tailoring and editing, confessions recorded using mechanical devices are not reliable. If the confession of a co-accused that accused has committed offence is proved, presumption shall be drawn by Designated Court that the accused has committed offence unless the contrary is proved.²⁶ Confession of co-accused is a weak type of evidence because it is not taken on oath, not in the presence of accused, and such confession is not subjected cross-examination.²⁷ Section 30 of the Evidence Act suggests that confession of the co-accused may be considered by the court but it does not amount to proof, there must be some other evidence to prove it.²⁸ Therefore, Ram Jethmalani argued that TADA which has made confession of the co-accused as substantial evidence is a discriminatory and unjust procedure.

On the other hand, Additional Solicitor General argued that Section 15 of TADA merely provides that confession is admissible but does not say anything about its probative value and leaves it to the court to decide it. Moreover it is a well-established doctrine that court could act upon only voluntary confessions. Therefore procedure of Section 15 is well within parameter of just and reasonable. In *Gurbachan Sing v. State of Bombay*,²⁹ it was noted that a law which contains an extraordinary procedure can be made to meet the exceptional circumstances otherwise the purpose and object of the Act would be defeated. The Court took the note of National Police Commission Report which reported that the police are at the greater

²⁶ TADA § 21(1)(c).

²⁷ *Bhuboni Sahu v. King*, 1949 P.C. 257; *Hari Charan Kurmi & Jogia Hajam v. State of Bihar*, A.I.R. 1964 S.C. 1184.

²⁸ *Kashmir Sing v. State of Madhya Pradesh*, A.I.R. 1952 S.C. 159; *Nathu v. State of U.P.*, A.I.R. 1956 S.C. 56.

²⁹ *Gurbachan Singh v. State of Bombay*, A.I.R. 1952 S.C. 221.

disadvantage compared to other investigation agencies which are empowered to take confession.³⁰ Further it cannot be denied that greater vigilance is exercised over the behaviour of police by the vibrant media, public and there is a greater awareness of the rights of individuals. Morality of police is also changed over the last hundred years. Under such circumstances small step like making statement by accused before police admissible in evidence before court is a progressive step.³¹

Law Commission of India's 185th Report presents different picture of police. It stated that: "In the last three decades, as revealed from the media and innumerable law reports of the Supreme Court and High Courts, police conduct appears to have deteriorated rather than improving from what it was years ago".³² Therefore it rejected the suggestion made by the 48th and 69th Reports of the Law Commissions of India. Even National Judicial Commission also expressed displeasure over the conduct of the police who regularly tortures accused in their custody to get quick results.³³ The Hon'ble Supreme Court acknowledged brutality, atrocity, barbaric, and inhuman treatment adopted by the police over the accused and held that confession extracted by means of third degree, torture and atrocity is inadmissible.³⁴

On the other hand, Additional Solicitor General sighted that in United States of America,³⁵ United Kingdom,³⁶ and Australia have accommodated the confession before the police as admissible and courts have upheld the legal competence of the legislature to make law prescribing a different mode of proof. In terrorism cases the victims as well as public are reluctant to give evidence because of risk to their life. Therefore the impugned Section 15 cannot be said to be suffering from any vice of unconstitutionality.³⁷

The Court held that Section 15 is not violative of Articles 14 and 21 after taking into consideration deletion of Section 21(1)(c) of TADA, probative value of the confession of the co-accused is now similar to

³⁰ The Railway Protection Force Act, 1957 § 12; the Customs Act, 1962 § 108; the Railway Property Unlawful Possession Act, 1996 §§ 8, 9-empowers the authority to record the confession of accused.

³¹ NATIONAL POLICE COMMISSION, REP. NO. 4 (1980).

³² LAW COMMISSION OF INDIA, REP. NO. 180, ARTICLE 20(3) OF THE CONSTITUTION OF INDIA AND RIGHT TO SILENCE, at 127.

³³ NATIONAL JUDICIAL COMMISSION, REP. NO. 4.

³⁴ Kartar Singh v. State of Punjab, (1994) 3 S.C.C. 569, at 679.

³⁵ *Supra* note 16.

³⁶ The Terrorism Act, 2000 § 76-is applicable to Northern Ireland, says that any relevant admission made by the accused is not excluded by mere fact that accused was subjected to torture, inhuman, or degrading treatment.

³⁷ *Supra* note 34, at 680.

the one under Section 30 of the Evidence Act, the fact that people are not coming forward to give evidence in terrorist related cases, that the authority to take confession is vested in higher officer, and that the strict rules required to be complied with for taking confession ensure true and voluntary confession.³⁸ The Court's decision is justifiable in the light of things that happened in the Jammu and Kashmir (J&K) and Punjab where the witnesses never came forward to give evidence against the terrorists.³⁹ However the Court set certain guidelines to ensure fairness of recording true and voluntary confession and suggested the central government to accommodate these guidelines by making appropriate amendments to the Act and the Rules.⁴⁰

- i.** The confession should be recorded in a free atmosphere in the same language in which the person is examined and narrated.
- ii.** The accused must be produced before the Chief Judicial Magistrate to whom the confession is required to be sent without any unreasonable delay after making such confession before police along with recoded confession on mechanical devises.
- iii.** The Chief Metropolitan Magistrate or the Chief Judicial Magistrate should record the statement of accused, if any allegation of torture and get signature on such complaint. The accused should be immediately sent to a medical officer not lower in rank than Assistant Civil Surgeon for examination.
- iv.** Notwithstanding anything contained in Cr.P.C. no police officer below the rank of Assistant Commissioner of Police or Deputy Superintendent of Police should investigate any offence punishable under the TADA.

³⁸ *Id.*

³⁹ LAW COMMISSION OF INDIA, REP. NO. 173, *on* PREVENTION OF TERRORISM BILL, 2000, at 60. Shri Veeranna Aivalli, who was commissioner of security of aviation in J&K wrote letter to Law Commission of India, stating that: "Our experience of TADA that in J&K has not been good. There has not been a single case, which has been decided by the court of law. The difficulties encountered have been with regard to the non-availability of witness to testify in the courts of law on account of fear and reprisal. There is another difficulty and that is the collection of evidence in cases where the search, seizure and arrest in areas where there is no habitation... In such a case, the arrested person's confession to the security forces leading to recovery of arms and ammunition and explosive is the only thing, which can be bought on record. Even the security force personnel do not come forward for tendering evidence because they keep on moving from one place to another for performance of their duties not only within J&K but even outside J&K and some time outside India... In the last 15 years of militancy in J&K, thousands of people have been arrested, lakhs of weapons seized and millions of rounds collected and quantities of explosive materials seized. These figures are real eye openers and the fact that not a single case has ended in conviction nor has there been any recording of evidence."

⁴⁰ *Supra* note 34, at 682.

- v. The police officer who seeks police custody of accused form judicial custody for interrogation should file affidavit with reasons for such custody.
- vi. Before the interrogation of the accused, the police officer should warn the accused that he is not bound to make confession and if he does so, the said confession may be used against him as evidence. On the other hand, if the accused asserts his right to silence the police officer must respect that right without compelling accused to make statement.

The Court should have made the recording of the confession in mechanical device along with recording in writing mandatory because mere recording of confession in writing would certainly gives more scope for abuse of police power. Another ambiguity is that the Court did not say anything about the consequences of non-compliance of these guidelines.⁴¹ The same deficiency is carried even in POTA also.⁴²

Tragedy of these guidelines which are meant for fair trial and ensuring true and voluntary confession is that they are never incorporated into either the Rules or the Act. Law Commission of India suggested that presence of defendant's advocate is mandatory in case confession is recorded by an officer, who is lower in rank than Superintendent of Police, and in other cases, presence of advocate is optional and the same has to be decided by the accused.⁴³ Had the Law Commission of India made the presence of advocate mandatory in both situations it would have been more appropriate and would certainly have reduced the scope of involuntary confessions? However, Justice Pandian, failed to take note of this important suggestion made by the Law Commission of India. Further, the Court should have interpreted the word "mechanical device" to mean only camera and not other mechanical devices because camera provides means to determine the voluntariness of confession by recording it live. Further the burden of proof that confession is voluntary should have been put on prosecution rather than putting the burden of proof that confession is involuntary on the accused. Obviously it is very difficult for accused to prove it because things have happened inside the four walls of the police station and no one was there to hear his cry.

Nevertheless, Justice Ramswamy K., who delivered the dissenting judgment, said that even though high ranking officers are presumed to have exercised the power in accordance with law yet unlike an

⁴¹ Lal Singh v. State of Gujarat, A.I.R. 2001 S.C. 431.

⁴² POTA § 32-was silent on the consequences of non-compliance of *proviso* related to manner in which confession was recorded.

⁴³ *Supra* note 17, at 206-207.

independent agency, the power of police from which suspicion least generates is called civilized procedure.⁴⁴ If once this power is allowed, further, they may claim other judicial powers in cases of lesser crisis and it may be normalized in grave crass. Therefore such erosion is anathema to the rule of law, unfair, unjust, and unconscionable and offends Articles 14 and 21 of the Constitution.⁴⁵ Justice Ramaswamy's logic is unfounded because merely on the premises of slippery slope that it is likely to lead to subversion of judiciary no rule can be declared unconstitutional unless supported by facts.

Justice Sahai who also delivered separate dissenting judgment and held that unlike British police, Indian police officer is trained to achieve the result irrespective of the means they employed. Indian police requires drastic changes in the outlook and culture. Therefore Section 15 of TADA is violative of Articles 14 and 21 of the Constitution. Justice Sahai's reasoning is in tune with majority judgment because Justice Pandian is ready to trust the police reformation; but Justice Ramswamy is not unless police are reformed. If confession made before the police is made admissible naturally the outlook and culture of police will change because any evidence of torture would result in rejection of such valuable evidence which would put the clock back again. Gradually it may build up some kind of discipline in police which is good in long run.

Certainly the majority judgment appears to be more logical, rational and practical and in tune with our legal system. All the suggestions made by the Supreme Court in *Kartar Singh* about confession were incorporated in Section 32 of POTA. In the POTA⁴⁶ case petitioner argued that when confessed accused has to be produced before Judicial Magistrate within forty eight hours from making such confession, then it can be done before the Judicial Magistrate himself. Therefore where is the necessity of empowering the police to record the confession? Justice Rajendra Babu replied that it is matter of policy and domain of Parliament to decide which confession is admissible as long as it is in tune with the Constitution.⁴⁷ Further the Court held that POTA has provided additional safety of producing confessed accused before Judicial Magistrate. Duty caste upon the Magistrate to record complaint of any torture by the police and send him to medical examination, makes the provision of confession fair, just and not violative of the Constitution.⁴⁸ However the Unlawful Activities (Prevention)

⁴⁴ *Supra* note 34, at 727.

⁴⁵ *Id.*

⁴⁶ *People's Union for Civil Liberties v. Union of India*, A.I.R. 2004 S.C. 456.

⁴⁷ *Id.* at 478.

⁴⁸ *Id.*

Amendment Act, 2008 (35 of 2008) (commonly known as UAPA) restored the normal status of confession of accused as under the Evidence Act.

Use of confession obtained under anti-terrorist laws against offences committed under ordinary laws is arbitrary and unjust procedure

TADA and POTA had empowered the police officer to extract confession.⁴⁹ Further the Designated Court was empowered to try any other offence committed by accused under any other laws along with terrorist offences.⁵⁰ The crucial question is, can a confession obtained under TADA be used against other offences committed by the accused. The Supreme Court in *Bilal Ahmed Kaloo v. State of A.P.* held that once accused is acquitted from the offence under TADA, there is no question of looking confession for other offences.⁵¹ It means that confession extracted under TADA can be used against accused for other offences only when accused is convicted for terrorist offence otherwise not that interpretation is harmonious with the object TADA that says an act to make special provisions for terrorist offences and matters connected therewith or incidental thereto. Nevertheless, the three-judges bench of the Supreme Court in *State of Tamil Nadu, v. Nalani*⁵² *per curiam* overruled the *Bilal Ahmed Kaloo ratio*. Justice Thomas K. observed:

“The correct position is that the confession statement duly recorded under Section 15 of TADA would continue to remain admissible as for the other offence under any other law which too were tried along with TADA offences, no matter that the accused was acquitted of offences under TADA in that trial.”⁵³

⁴⁹ TADA § 15(1)-prescribed that notwithstanding anything in the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872, the police officer not below the rank of Superintendent of Police recorded confession of the accused either in writing or mechanical device shall be admissible in the trial of such person for an offence under this Act or rules made thereunder; *also see* POTA § 32(1).

⁵⁰ TADA § 12(1)-provided that: “When trying any offence, a Designated Court may also try any other offence with which the accused may, under the Code, be charged at the same trial if the offence is connected with such offence.” TADA § 12(2)-says that: “If, in the course of any trial under this Act of any offence, it is found that the accused person has committed any other offence under this Act or any rule made thereunder or under any other law, the Designated Court may convict such person of such other offence and pass any sentences’ authorized by this Act or such rule or, as the case may...”; *also see* POTA § 26.

⁵¹ *Bilal Ahmed Kaloo v. State of A.P.*, (1977) 7 S.C.C. 431.

⁵² *State of Tamil Nadu v. Nalani*, A.I.R. 1999 S.C. 2640.

⁵³ *Id.* at 2663.

The Court virtually followed the literal interpretation of Section 12(2) of TADA without taking into the consideration of ramification of such interpretation. The use of confession obtained under TADA for other offences committed by accused is appreciable where the accused is convicted for terrorist offences also along with other offence. But it is hard to digest other way, where accused is acquitted for terrorist offences and making use of such confession against other ordinary offence is undoubtedly unjust procedure. This kind of interpretation creates rift between the Indian Penal Code, 1860 (IPC) and the Evidence Act one side, and TADA on the other side. That means the confession which is inadmissible under Sections 25 and 26 of the Evidence Act for ordinary offence under IPC becomes admissible under Section 15(1) read with 12(2) of TADA.

The Supreme Court's interpretation tends to encourage the police to just add any provision of TADA to the charge sheet of the accused, get the confession from accused and make use of that confession against other offences to convict accused. It encourages the police to do indirectly what cannot be done directly. That is why, the Supreme Court in 1990 itself, cautioned the police against this kind of practice because anti-terrorist laws visit the accused with serious penal consequences.⁵⁴ Rational interpretation suggests that: "[W]here the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconveniences or absurdity, hardship or injustice, presumably not intended by the legislature."⁵⁵ A two-judge bench of the Supreme Court, in *Gurprit Singh v. State of Punjab*, declined to follow the *ratio decidendi* of *Nalani* but endorsed the *Bilal Ahmed* case and held that unless the accused is convicted under TADA provisions, the confession recorded under TADA provisions cannot be used against accused to convict him for murder under IPC.⁵⁶ However, a constitutional bench of the Supreme Court in *Prakash Kumar v. State of Gujarat*, finally held that confession recorded under TADA can be used against accused for other offences notwithstanding accused is convicted or not under TADA.⁵⁷ The confession provision has not found place in the UAPA. Nevertheless, the interpretation of *Nalani* and *Prakash Kumar* cases needs to be re-

⁵⁴ *Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijja*, A.I.R. 1990 S.C. 1962, at 1968.

⁵⁵ MAXWELL, THE INTERPERTATION OF STATUE 221 (P.St.J. Langan ed., N.M. Tripathi Pvt. Ltd., New Delhi, 12th ed. 1962) *approved in* *Tirath Singh v. Bachittar Singh*, A.I.R. 1955 S.C. 830, at 835; *State of M.P. v. Azad Bharat Finance Co.*, A.I.R. 1967 S.C. 276, at 278; *Molar Mal v. Kay Iron Works Ltd.*, A.I.R. 2000 S.C. 1261, at 1266.

⁵⁶ *Gurprit Singh v. State of Punjab*, A.I.R. 2002 S.C. 2390.

⁵⁷ *Prakash Kumar v. State of Gujarat*, (2005) 2 S.C.C. 409, at 422-23.

examined because they are not in tune with the due process law under Articles 14 and 21 of the Constitution.

Immaturity of judiciary in evaluating co-accused confession

After the deletion of clauses (c) and (d) of Section 21(1) of TADA by the Parliament, Justice Pandian observed in *Kartar Singh*⁵⁸ case that the value of the confessional statement of the co-accused is similar to that under Section 30 of the Evidence Act.⁵⁹ Confession of the co-accused in true sense is not an evidence but it can be used for corroboration other evidences.⁶⁰ A two-judge bench in *Kalpanath Rai v. State (Through CBI)* speaking through Justice Thomas held that the evidentiary value of the confession of a co-accused under Section 15 of TADA is similar to that under Section 30 of the Evidence Act and this ruling is in conformity with Justice Pandian's reasoning in *Kartar Singh* case.⁶¹ It means that the confession of a co-accused against others is not substantive evidence but has only corroborative value. In *State of Tamil Nadu v. Nalani*, Shri Altaf Ahmad, Additional General Solicitor of India pleaded that the non-obstante clause in Section 15(1) of TADA ("notwithstanding anything contained in the Code or Evidence Act") is a clear indication of the legislative intent to treat the confession of a co-accused as substantive evidence against others. Therefore *ratio* of *Kalpanath Rai* needs to be reconsidered. Justice Wadhwa and Quadri agreed with Additional General Solicitor of India and held that confession of co-accused is substantive evidence against others and there is no room to import the requirement of Section 30 of the Evidence Act in Section 15 of TADA 87.⁶² Hence, *ratio* of *Kalpanath Rai* case is overruled. Reasons cited for arriving at this conclusion that the confession of a co-accused is substantive evidence, however, do not necessarily mean that it is qualitative evidence and as a matter of prudence, the court may look for some corroboration if such confession is to be used against a co-accused.⁶³

The Court itself was in confusion; on the one side it admitted that confession of the co-accused is substantive evidence, while on the other side it cautioned that the confession needs to be corroborated by other evidence which is to be qualitative. The word "substantive"

⁵⁸ *Supra* note 34, at 780.

⁵⁹ The Indian Evidence Act § 30-provides that when co-accused persons are tried jointly for the same offence, any confession of co-accused may be considered against others.

⁶⁰ *Bhuboni Sahu v. The King*, A.I.R. 1949 P.C. 1257; *Kashmir Sing v. State of Madhya Pradesh*, A.I.R. 1952 S.C. 159; *Nathu v. State of U.P.*, A.I.R. 1956 S.C. 56.

⁶¹ *Kalpanath Rai v. State (Through CBI)*, (1977) 8 S.C.C. 732, at 754.

⁶² *Supra* note 52, at 2732 and 2847.

⁶³ *Id.*

itself indicates that it is qualitative evidence and no need to be corroborated by other evidences. That is why convictions proceeding merely on the confession which is voluntary and truthful against makers are justified.⁶⁴ Therefore apex court in *Kartar Singh* rightly held that confession of a co-accused is not substantive but subject to the provisions of Section 30 of the Evidence Act. Another noteworthy point is that neither the *ratio* of *Kartara Singh* case which was decided by five-judges' bench was cited nor distinguished. Thus *ratio* of *Nalani* case is *per incuriam*.

Now the question is, whether confession of a co-accused should be corroborated by independent evidence or by another co-accused's confession. Fairness of justice demands that such confession should be corroborated by independent evidence rather than by another co-accused confession. Nevertheless, the Supreme Court in *Jamel Ahamed v. State of Rajasthan* thought otherwise and held that confession of one co-accused can be corroborated by confession of another co-accused.⁶⁵ It can be said without second thought such procedure transgresses the due procedure because TADA tends to be very-harsh and drastic.⁶⁶

The Supreme Court in series of cases⁶⁷ followed the *ratio* of *Nalani* case in respect of confession of co-accused against others as substantive evidence and no attempt was made by any lawyers of the accused to convince the court that *ratio* of *Nalani* was *per incuriam* and that the *ratio* of *Kartar Singh* was right. POTA did not contain any specific provisions in respect of confession of co-accused. However Section 32 (1) of the POTA starts with: "Notwithstanding anything contained in the Code or in the Indian Evidence Act, 1872..." In *Indian Parliament Terrorist Attack* case,⁶⁸ an attempt was made to convince the Court that confession of co-accused is still applicable with equal force against others because Sections 25, 26 and 30 of the Evidence Act are not applicable to Section 32 of POTA, and therefore, confession of accused can be used against himself as well as against others. Justice Venkatarama Reddi who delivered judgment rejected that attempt and held that: "[T]he language of the section cannot be stretched so as to bring the confession of the co-accused within the fold of admissibility."⁶⁹

⁶⁴ Davendra Pal Singh v. State N.C.T. of Delhi, A.I.R. 2002 S.C. 1661; Sahib Singh v. State of Haryana, (1997) 7 S.C.C. 231.

⁶⁵ Jamel Ahmed v. State of Rajasthan, A.I.R. 2004 S.C. 588, at 603.

⁶⁶ *Supra* note 34, at 653.

⁶⁷ Bharati Bhai *alias* Jimi Premchandbhai v. State of Gujarat, (2002) 8 S.C.C. 4471; S.N. Dube v. N.B. Bhoir, A.I.R. 2000 S.C. 776; Lal Singh v. State of Gujarat, A.I.R. 2001 S.C. 746; Jamel Ahmed v. State of Rajasthan, A.I.R. 2004 S.C. 588.

⁶⁸ State (N.C.T. of Dehli) v. Navjot Sandhu, A.I.R. 2005 S.C. 3820.

⁶⁹ *Id.* at 3853.

Supreme Court's strict guidelines for procedural norms of recording confession are sidelined

The Supreme Court had suggested additional guidelines to ensure free, fair and voluntary recording of confessions which have to be strictly complied with while recording the confession.⁷⁰ Those guidelines should have been incorporated either in Rules or TADA itself as desired by the Supreme Court; but unfortunately that did not happen.⁷¹ These guidelines were silent on the point of validity of confessions that have been recorded in breach of these guidelines. Nevertheless Section 32 of POTA incorporated those guidelines of Supreme Court but *casus omissus* continued to exist in respect of the validity of confession recorded without complying with the provision relating to the recording the confession. In *S.N. Dube v. N.B. Bhoir*, the Supreme Court solved this problem to some extent by holding that the confession recorded in breach of Rules 15(2)⁷² and (3)⁷³ of the TADA Rules is inadmissible.⁷⁴ It is substance, not the formality is vital for deciding the validity of confession. Further, Court held that even in *Kartar Singh's* case itself it is not suggested that if the guidelines are not complied the confession is said to be inadmissible.⁷⁵

A two-judge bench in *Lal Singh v. State of Gujarat*⁷⁶ held contrary to the *ratio* of *Kartar Singh*, and reduced the nature of entire guidelines to mere directory than mandatory. In the present case accused challenged the validity of confession on the ground that he was kept in police custody for five days after making confession therefore his confession inadmissible in the light of *Kartar Singh's* guidelines. Justice Shah, speaking through the Court observed that these guidelines were neither incorporated in the Rules nor in the Act; therefore it would be difficult to accept the contention that non-compliance of these guidelines leads to inadmissibility of confession.⁷⁷ It is not debatable that all the rules of recording

⁷⁰ *Supra* note 34, at 682.

⁷¹ *Id.*

⁷² Rule 15(2) prescribed that police officer must explain the accused that he is not bound to make confession and if he makes it will be used against him, police officer shall not record confession unless he has reason to believe that he is making confession voluntarily.

⁷³ Rule 15(3) stated that confession is signed by the accused, police officer certify in his own handwriting that confession is recorded in his presence and recorded by him and records contains a full and true account of the confession, and such officer shall make memorandum at a the end of confession to the effect of above conditions and confession is read over to the accused and he admitted that it is true.

⁷⁴ *S.N. Dube v. N.B. Bhoir*, A.I.R. 2000 S.C. 776, at 794.

⁷⁵ *Id.*

⁷⁶ *Lal Singh v. State of Gujarat*, A.I.R. 2001 S.C. 431.

⁷⁷ *Id.* at 757.

confession carry equal weight. But nonetheless some of the rules which touch conscience of justice are very vital and such rules should be held mandatory.⁷⁸

This interpretation is erroneous. Those guidelines are not *obiter dicta* but *ratio decidendi* and even though they are not incorporated in statute, still by virtue of Article 141 of the Constitution they have to be respected as law by all courts including the Supreme Court until they are overruled by a larger bench. Undoubtedly the *ratio* of *Lal Singh v. State of Gujarat* is *per incuriam*. In *Devendra Pal Singh v. State of N.C.T. of Delhi*,⁷⁹ the police authorities added their own sentences to the confession of the accused which was admitted by court. Nevertheless the Court following the rule of evidence that officials are presumed to discharge their functions honestly⁸⁰ held that mere irregularities in recording confession do not make the confession inadmissible.⁸¹ The Supreme Court should not have admitted such confession the contents of which were manipulated by the authorities.

Conclusion

Confession is the best and qualitative evidence among all the evidence which prosecution can possibly produce before the court. Great utilitarian Jeremy Bentham's two simple propositions would better explain the justification of confession: one, that every person is the best judge of his own interest; the other that no man will consent to what he thinks hurtful to himself.⁸² It means that no sane accused will make statement against himself unless it is true. There are two schools of thought on admissibility of confession. One school proposes that truthful confession even though extracted by compulsion is always relevant because end (justice) justify the means. Second school propagates that coercive confession is always irrelevant because ends are not justified unless employed means to achieve justice are fair. Democratic countries based upon the rule of law more inclined towards latter school of thoughts than former.

⁷⁸ Suggestions regarding recording the confession in the language of accused, taking signature of accused, producing accused before Magistrate, taking complaint of police torture and sending accused to judicial custody.

⁷⁹ *Devendra Pal Singh v. State N.C.T. of Delhi*, A.I.R. 2002 S.C. 1661.

⁸⁰ The Indian Evidence Act § 114(e)-mentioned as general presumptions of law illustrating maximum: that a man, in fact acting in a public capacity, was properly appointed and is duly authorized so to act, that in the absence of proof to the contrary, credit should be given to public officers who have acted prima facie within the limits of their authority, for having done so with honesty and discretion.

⁸¹ *Supra* note 79, at 1667.

⁸² JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 164 (N.M. Tripathi Pvt. Ltd., Bombay, 1995).

Admissibility of confession is the result of competitive value between the right of accused that no person is punished on forced extracted confession even though the confession is true and right of society that no undeserved person should be acquitted merely on the basis of his right to silence. American and Indian Constitutions have explicitly provided the right to silence to accused.⁸³ Protection against forced self-incrimination is the product of due process concept of common law. This is mere privilege of accused who can waive it. Further, he can make voluntarily confession which does not violate the accused right to silence because it does not involve the element of compulsion. Therefore the voluntary confession is always made admissible under the Evidence Act and Cr.P.C.⁸⁴

The only question investigating authority raises is that why there is general ban on the admissibility of confession made before us by an accused without considering the basic element of voluntariness of confession which is arbitrary and offends due process. Sections 25 and 26 of the Evidence Act attaches social stigma to all Indian police that they are untrustworthy to be believed in respect of extraction of confession. The irony is that the presumption which law has made that Indian police have extracted confession under coercion or reward is conclusive and even not made rebuttable in appropriate case is the bone of contention. It is un-debatable fact that no confession affected by coercion against the conscience of justice is admissible. But every confession of accused before police is subjected to that presumption without providing an opportunity to police to prove that confession was voluntary one is harsh and unjust. The law is heavily loaded in-favour of accused and even not balanced also. Look at the right to silence which is so rigorously protected by law even the prosecution is not allowed to prove the adverse inference where accused is refused to answer the question of police on the premises of his right to silence.

The 18th and 19th century societies were founded on high moral ethical value which led to the invention of doctrine that accused is presumed to be innocent until guilt is proved. Further, it invented another doctrine that *nemo tenebatur prodere seipsum* which is in the form of right to silence.⁸⁵ It means fault of accused was not wrung out

⁸³ US CONST. amend. V-provides that: “No person....shall be compelled in any criminal case to be a witness against himself... .” US CONST. amend. XIV-states that: “...nor shall any State deprive any person of life, liberty, or property, without due process of laws... .” INDIA CONST. art. 20(3)-states: “No person accused of any offence shall be compelled to be witness against himself.”

⁸⁴ The Code of Criminal Procedure, 1973 § 164-empowers the either Metropolitan Magistrate or Judicial Magistrate to record the confession of accused who is in the custody of police and expressed his desire to make voluntary confession.

⁸⁵ WILLIAMS, *op. cit. supra* note 23, at 37.

himself but rather to discovered by other means and other men.⁸⁶ Professor Glanville Williams quotes the Bentham's strong critic of right to silence that: "[O]ne of the most pernicious and most irrational notions that ever found its way into the human mind".⁸⁷ Further he quotes: "Innocence never takes advantage of it; innocence claims the right of speaking, as guilt invokes the privilege of silence". Bentham questions the rationality of exempting the confession made before the police because the same confession either written in the document or any witness heard conversations of such confession is not exempted from furnishing the evidence. Thus Bentham said: "[W]hat the technical procedure rejects is his own evidence in the purest and most authentic form; what it admits is the same testimony, provided that it be indirect, that it have passed through channels which may have altered it, and it be reduced to the inferior and degraded state of hearsay".⁸⁸

The right to silence based upon the idea that 'it is better that a hundred of the guilty should escape than that one innocent person should perish'.⁸⁹ The security of innocence may be complete without favoring the impunity of crime.⁹⁰ Every precaution, which is not absolutely necessary for the protection of innocence, affords a dangerous lurking-place to crime.⁹¹ Finally Bentham said: "If it is wished to protect the accused against punishment, it can be done at once, and with perfect efficiency, by not allowing any investigation".⁹² It is accused who has committed the offence. Obviously he has abundance of information about the commission of offence. Naturally rationality allows the investigation authority to explore that source of information at optimum level. But ironically law suggests otherwise that the evidence of guilt of accused must be found from other source that is ridiculous and absurd. Clarence Darrow wrote:

⁸⁶ Bentham has used another maxim *Nemo tenetur seipsum accusare* (or *prodere*) which means that no one was bound to start a prosecution against himself. That leads to the assertion that no one should be punished for refusing to make a confession of guilt; see WILLIAMS, *op. cit. supra* note 23, at 52.

⁸⁷ Right to silence is justified on the ground that try to get an accused person to give evidence against himself was not playing the game; it was hitting below the belt, or hitting a man when he was down. Bentham criticizes this philosophy which has led to evil result because it hindered the conviction of guilt. Further he said it neglected the immediate interest of society that dangerous criminals should not be left free. When guilty is acquitted, the society is punished; see WILLIAMS, *op. cit. supra* note 23, at 49-52.

⁸⁸ WILLIAMS, *op. cit. supra* note 23, at 52.

⁸⁹ BENTHAM, *op. cit. supra* note 82, at 258.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Supra* note 88.

“The methods of the criminal courts are hundreds of years old and their conceptions a thousand years older than that. The whole material world has been made over, but the law and its administration have stood defying time and all the intellectual changes of our day and ages.”⁹³

Justice V.R. Krishna Iyer said: “[L]aw is a human institution created by human agents to serve human ends, therefore the rule of law must run close to the rule of life”.⁹⁴ Criminal law with all its built-in safeguards to protect the innocent hesitates to bite and is reluctant even to bark. Criminal law breaks down in its primary purpose of social protection when there is no general obedience to legal norm by number of people and they get with it because of ineffectiveness of law. Inefficient law is worse than no law because it undermines the faith of the community in the rule of law. Thus, the confession made before the police is made admissible not only in the terrorist related offence even in the ordinary offence. Therefore there is need to reform the Sections 25 and 26 of the Evidence Act. The confession before the police should be made admissible unless prosecution proves that it is voluntary. The apprehension that such rule is likely to be abused therefore such rule should not be enacted is unacceptable philosophy because every law is subjected to its abuse and misuse. IPC is the most abused law by the authority. Therefore it would be immature to suggest that government should delete IPC. The remedy lies in providing safeguards in the law to prevent its abuse and misuse but not in either not enacting or deleting the law. State cannot have law that is absolutely free from its abuse. If experience of such laws proves that, it is defective one, then let the government, amends and corrects the loopholes. In *Kesavananda Bharathi v. State of Kerala*, Khanna, J., said: “The door has to be left open for trial and error... Opportunity must be allowed for vindicating reasonable belief by experience”.⁹⁵ The Law Commission of India rightly commented while drafting the POTA Bill: “It is one thing to say we must create and provide internal structures and safeguards against possible abuse and misuse of the act and altogether a different thing to say that because the law is liable to be misused, we should not have such Act at all”.⁹⁶



⁹³ WILLIAMS, *op. cit. supra* note 23, at 37.

⁹⁴ V.R. KRISHNA IYER, PERSPECTIVES IN CRIMINOLOGY, LAW AND SOCIAL CHANGE 67 (Allied Publication Pvt. Ltd., New Delhi, 1990).

⁹⁵ A.I.R. 1973 S.C. 1461.

⁹⁶ LAW COMMISSION OF INDIA, REP. NO. 173, *on* PREVENTION OF TERRORISM BILL 2000, Ch. III, 1.10.1, at 5.

CASE COMMENT: SURESH KUMAR KOUSHAL & ANOTHER V. NAZ FOUNDATION & OTHERS

Ms. Divya Sharma*

Introduction

The Supreme Court of India on December 11, 2013 in *Suresh Kumar Koushal & Another v. NAZ Foundation & Others*¹ reversed the decision of Delhi High Court and again upheld the validity of Section 377 of Indian Penal Code, 1860 (IPC) negating the contentions of the respondents that the above section violates Articles 14, 15, 19(1)(a)-(d) and 21 of the Constitution of India, 1950 (hereinafter the Constitution). These appeals are directed against order dated July 2, 2009 by which the Division Bench of the Delhi High Court allowed the writ petition filed by NAZ Foundation–respondent No.1 herein, by way of Public Interest Litigation (PIL) challenging the constitutional validity of Section 377 of IPC. Respondent No.1 is a Non-Governmental Organization (NGO) registered under the Societies Registration Act, 1860 which works in the field of HIV/AIDS intervention and prevention. Its’ work has focused on targeting “Men who have Sex with Men (MSM) or homosexuals or gays” in consonance with the integrationist policy.

Alleging that its efforts have been severely impaired by the discriminatory attitudes exhibited by state authorities towards sexual minorities, MSM, lesbians and transgender individuals and that unless self respect and dignity is restored to these sexual minorities by doing away with discriminatory laws such as Section 377 IPC it will not be possible to prevent HIV/AIDS, NAZ Foundation filed WP(C) No. 7455/2001 before the Delhi High Court impleading the Government of NCT of Delhi, Delhi Commissioner of Police, Delhi State Aids Control Society, National Aids Control Organization (NACO) and Union of India through Ministry of Home Affairs and Ministry of Health and Family Welfare, and prayed for grant of a declaration that Section 377 of IPC to the extent it is applicable to and penalizes sexual acts in private between consenting adults is violative of Articles 14, 15, 19(1)(a)-(d) and 21 of the Constitution. Respondent No.1 further prayed for grant of a permanent injunction restraining Government of NCT of Delhi and Commissioner of Police, Delhi from enforcing the provisions of Section 377 of IPC in respect of

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¹ Civil Appeal No. 10972 of 2013.

sexual acts in private between consenting adults. Respondent No.1 pleaded that the thrust of Section 377 of IPC is to penalize sexual acts which are “against the order of nature”; that the provision is based on traditional Judeo-Christian moral and ethical standards and is being used to legitimize discrimination against sexual minorities; that Section 377 of IPC does not enjoy justification in contemporary Indian society, and that the section’s historic and moral underpinning do not resonate with the historically held values in Indian society concerning sexual relations.

Respondent No.1 relied upon 172nd Report of the Law Commission of India which had recommended deletion of Section 377 and pleaded that notwithstanding the recent prosecutorial use of Section 377 of IPC, the same is detrimental to people’s lives and an impediment to public health due to its direct impact on the lives of homosexuals; that the section serves as a weapon for police abuse in the form of detention, questioning, extortion, harassment, forced sex, payment of hush money; that the section perpetuates negative and discriminatory beliefs towards same sex relations and sexual minorities in general; and that as a result of that it drives gay men, MSM and sexual minorities generally underground which cripples HIV/AIDS prevention methods. According to respondent No.1 Section 377 is used predominantly against homosexual conduct as it criminalizes activity practiced more often by men or women who are homosexually active. The evidence that refutes the assumption that non-procreative sexual acts are unnatural includes socio-scientific and anthropological of homosexuality in society at large; that private consensual sexual relations are protected under Article 21 under the privacy and dignity claim. It was further pleaded that Section 377 of IPC is not a valid law because there exists no compelling state interest to justify the curtailment of an important fundamental freedom; that Section 377 of IPC in so far as it criminalizes consensual, non-procreative sexual relations is unreasonable and arbitrary and therefore violative of Article 14.

Decision of the Delhi High Court

The Division Bench of the Delhi High Court extensively considered the contentions of the parties and declared that Section 377, in so far as it criminalizes consensual sexual acts of adults in private is violative of Articles 21, 14 and 15 of the Constitution. While dealing with the question relating to violation of Article 21, the High Court outlined the enlarged scope of the right to life and liberty which also includes right to protection of one’s dignity, autonomy and privacy, the Division Bench referred to Indian and foreign judgments, the literature and international understanding (*Yogyakarta* principles)

relating to sexuality as a form of identity and the global trends in the protection of privacy and dignity rights of homosexuals and held:

“The sphere of privacy allows persons to develop human relations without interference from the outside community or from the state. The exercise of autonomy enables an individual to attain fulfillment, grow in self-esteem, build relationships of his or her choice, and fulfill all legitimate goals that he or she may set. In the Indian Constitution, the right to live with dignity and the right of privacy both are recognized as dimensions of Article 21. Section 377 IPC denies a person’s dignity and criminalizes his or her core identity solely on account of his or her sexuality, and thus violates Article 21 of the Constitution. As it stands, Section 377 IPC denies a gay person a right to full personhood which is implicit in notion of life under Article 21 of the Constitution.

The criminalization of homosexuality condemns in perpetuity a sizable section of society and forces them to live their lives in the shadow of harassment, exploitation, humiliation, cruel and degrading treatment at the hands of the law enforcement machinery. The Government of India estimates the MSM number at around 25 lacs. The number of lesbians and transgender is said to be several lacs as well. This vast majority (borrowing the language of the South African Constitutional Court) is denied “moral full citizenship”. Section 377 IPC grossly violates their right to privacy and liberty embodied in Article 21 insofar as it criminalizes consensual sexual acts between adults in private. These fundamental rights had their roots deep in the struggle for independence and, as pointed out by Granville Austin in *The Indian Constitution—Cornerstone of a Nation*: “[T]hey were included in the Constitution in the hope and expectation that one day the tree of true liberty would bloom in India”. In the words of Justice V.R. Krishna Iyer these rights are cardinal to a decent human order and protected by constitutional armour. The spirit of man is at the root of Article 21, absent liberty, other freedoms are frozen.

A number of documents, affidavits and authoritative reports of independent agencies and even judgments of various courts have been brought on record to demonstrate the widespread abuse of Section 377 IPC for brutalizing MSM and gay community persons, some of them of very recent vintage. If the penal clause is not being enforced against homosexuals engaged in consensual acts within privacy, it only implies that this provision is not deemed essential for the protection of morals or public health *vis-a-vis* said section of society. The provision, from this perspective, should fail the “reasonableness” test.”

Decision of the Supreme Court

An appeal was filed in the Supreme Court against the decision of the High Court. The Supreme Court in *NAZ Foundation*² observed that:

“The High Court discussed the question whether morality can be a ground for imposing restriction on fundamental rights, referred to the judgments in *Gobind v. State of Madhya Pradesh and Another* (1975) 2 S.C.C. 148, *Lawrence v. Texas* 539 U.S. 558 (2003), *Dudgeon v. UK*, European Court of Human Rights Application No. 7525/1976, *Norris v. Republic of Ireland*, European Court of Human Rights Application No. 10581/1983, *The National Coalition for Gay and Lesbian Equality v. The Minister of Justice*, South African Constitutional Court 1999 (1) SA 6, the words of Dr. Ambedkar quoting Grotius while moving the Draft Constitution, Granville Austin in his treatise *The Indian Constitution-Cornerstone of A Nation*, the Wolfenden Committee Report, 172nd Law Commission of India Report, the address of the Solicitor General of India before United Nations Human Rights Council, the opinion of Justice Michael Kirby, former Judge of the Australian High Court and observed: “Thus popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of “morality” that can pass the test of compelling state interest, it must be “constitutional” morality and not public morality.”

The Supreme Court further stated that:

“The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute. Respondent No.1 attacked Section 377 IPC on the ground that the same has been used to perpetrate harassment, blackmail and torture on certain persons, especially those belonging to the LGBT community. In our opinion, this treatment is neither mandated by the section nor condoned by it and the mere fact that the section is misused by police authorities and others is not a reflection of the *vires* of the section. In its

² *Supra* note 1, at 9-10.

anxiety to protect the so-called rights of LGBT persons and to declare that Section 377 IPC violates the right to privacy, autonomy and dignity, the High Court has extensively relied upon the judgments of other jurisdictions. Though these judgments shed considerable light on various aspects of this right and are informative in relation to the plight of sexual minorities, we feel that they cannot be applied blindfolded for deciding the constitutionality of the law enacted by the Indian legislature.

In view of the above discussion, we hold that Section 377 IPC does not suffer from the vice of unconstitutionality and the declaration made by the Division Bench of the High Court is legally unsustainable. The appeals are accordingly allowed, the impugned order is set aside and the writ petition filed by respondent No.1 is dismissed.

While parting with the case, we would like to make it clear that this Court has merely pronounced on the correctness of the view taken by the Delhi High Court on the constitutionality of Section 377 IPC and found that the said section does not suffer from any constitutional infirmity. The Supreme Court reversed the order passed by the Delhi High Court holding that the NAZ Foundation had miserably failed to prove that section 377 was discriminatory to gays; the section was non discriminatory as it punished everyone who indulged in unnatural offences and not just homosexuals.”

Case Analysis

After analyzing the decision it can be concluded that Supreme Court has not acted wisely while interpreting this section. The Supreme Court of India is well known for protecting the rights of not only of its citizens but also of aliens. Article 21 of Constitution is a proof to this where the Supreme Court has widely interpreted it giving numerous rights not only to citizens of Indians but also to aliens and thus upholding the human rights jurisprudence. The Supreme Court has always acted as anchor sheet for human rights.

But this decision of the Supreme Court in *NAZ Foundation* case is truly a regrettable one, a step towards backwardness for India where it has departed from its long tradition of protecting the human rights. India is a democratic country where under Article 14 of the Constitution everyone is equal before law and has equal protection of law. Article 21 gives right to privacy to individuals as interpreted by our honourable judiciary. If this is the case then why LGBT (Lesbian, Gay, Bisexual and Transgender) have not given the freedom of

consensual sex in privacy. Why such a discrimination for them by Supreme Court? The decision of the court is based on morality and religious values made by so called the leaders of different religions. If this is the case that Supreme Court wants to preserve the morality of the society then the question arises here is that: Is Live-in-Relationship not against the culture and morality of our society? Is it good to approve such relation where two individuals can live together with their consent and have sex also and procreate children also? Why not here the judiciary bans such relationships which is hitting the institution of marriage and making it a mockery.

The decision of the Supreme Court has reminded me here the *Hart Devlin* controversy. Devlin has disputed the conclusion of the Wolfenden Report of 1957, which contained the results of a committee investigation into homosexuality and prostitution. The writers of that report recommended to the United Kingdom Parliament that have English law prohibiting homosexual behaviour between consenting adults in private should be repealed. According to the writers of the report, such private conduct is not the proper concern of the criminal law. Devlin criticized the findings of the report and argued for a much different conclusion i.e., the proper concern of the criminal law is to protect society and that concern may require prohibition of immoral acts, even those carried out in private and with no outward other regarding effects.³ But Hart was opposed to all this and claimed that law must not interfere in the private acts of the individuals. Law must not extend its boundaries to such an extent that it becomes difficult for the individuals to breath in their privacy and even acts done in privacy make them criminals.

It is true that the Supreme Court is known as the protector of the fundamental rights enshrined in Part III of the Indian Constitution but in the present case it has shocked everyone by giving such a regressive decision. But still there is a hope for LGBT community as review petition has been filed in the Supreme Court and it is believed that the court will reverse the decision given by Justice G.S. Singhvi and will restore the decision given by Delhi High Court. At this point of time when India is changing at a rapid pace and is becoming more open than our courts should also walk along with this change.

To criminalize private and consensual sex violates the right to privacy enshrined in Article 21 of the Constitution. Homosexuality is prevalent in Indian society since time immemorial and one cannot shut its eyes to this reality. Sexual orientation is not acquired

³ READING IN THE PHILOSOPHY OF LAW 32 (Keith Culver ed., Broadview Press Ltd., 1999).

willfully by any human being but it is natural and so our society has to accept this. When we have allowed LGBT's to live in our society then why to violate their rights? Hopefully, the Supreme Court will correct its decision and if not then our Parliament has to pass a law in the interest of the LGBT's and uphold their rights. The 172nd report of Law Commission has to be implemented as soon as possible which advocates for repealing Section 377 of IPC. It is high time when Indian Parliament must take strong step and should bring our penal code in line with the international standards adopted for protection of human rights of all the communities.



JUDICIAL REGULATION AND FREEDOM OF MEDIA

Mr. Nizam Khan*

“Strange! That a man who has wit enough to write a satire should have folly enough to publish it”.

- Benjamin Franklin

Introduction

Media provide readers, listeners and viewers with information and that range of ideas and opinion which enables them to participate actively in a political democracy.¹ Its power and ability of forming the mass opinion is widely acknowledged. But, sometimes, media starts adventuring with its acquired power. Instances are not scarce when manipulated reports have been publicized, and before the mass could come to know about the truth of authenticity, the damage is already done. On the flipside media has exposed some of the worst corruption scams in Indian history as well. So the see-saw swings both ways. It cannot be denied that the side of honest reporting still has more weight, fortunately. It is because of this only that judiciary in India has been explicitly liberal in dealing the cases related to press or media. Though, sometimes, certain circumstances arise either on factual basis or on the basis of existing law that the judiciary cannot ignore to rule against the interest of the media entity concerned in the particular case. It is fortunate though, that the process of dealing with such cases has been more of reconciling nature than conflicting. Judiciary has been extremely cautious in delivering its rulings in cases involving media as it is aware that any harm to this fourth pillar of the government would mean harm to whole of the democratic institution. Freedom of media has been elucidated beautifully in the Royal Commission’s final report on press which says that- “We define freedom of the press as that degree of freedom from restraint which is essential to enable proprietors, editors and journalists to advance the public interest by publishing the facts and opinions without which a democratic electorate cannot take responsible judgments.”

In India the freedom of media is construed by the courts from Article 19(1)(a) of the constitution which talks about freedom of speech and expression. The paper thus probes into various steps taken by the judiciary to regulate and liberalize the media

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¹ ERIC BARENDT, FREEDOM OF SPEECH 417-18 (2d ed. 2007).

encroachments and actions under the light of the very important Article 19(1)(a).

Judicial Exploration of Article 19(1)(A)

Judiciary recognized the freedom of media as back as 1950 in *Romesh Thappar* case². It is now well settled that Article 19(1)(a) which guarantees the right to freedom of speech and expression, also assures the freedom of media, though it is not separately stated there, unlike some other constitutions like that of the U.S.A.³ The right to free speech and expression includes within it the right to collect and receive information from anywhere and through any legitimate means, the right to hold and express opinion, the right to disseminate news and views even across the border, and by any available means including broadcasting.⁴ But this gift of freedom of media is not absolute, as it cannot encroach upon the fundamental right of others, including individual.⁵ Thus, the judiciary has at various junctures attempted to pull back the unbridled galloping of media horse whenever it trespassed into *ultra vires* domain of the supreme text of Indian constitution. It has time and again emphasized that the freedom of the press is not so much for the benefit of the press as for the benefit of the general community because the community has a right to be supplied with information and the government owes a duty to educate the people within the limits of its resources.⁶

It is more than 20 decades ago that the learned judiciary had made clear the reasons of extending the freedom of speech and expression to media and why such proposition must be encouraged. In the famous case of *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India*⁷ the apex court very meticulously laid down that: “[T]he purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot

² *Infra* note 14.

³ JUSTICE P.B. SAWANT, MASS MEDIA IN CONTEMPORARY SOCIETY 68 (1998).

⁴ *Id.* at 69. Also, Article 19 of Universal Declaration of Human Rights, 1948 says—“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

Article 19 of International Covenant on Civil and Political Rights formulates the same right in the following language—(1) Everyone shall have the right to hold opinions without interference. (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

⁵ *Id.* at 70.

⁶ M.P. JAIN, INDIAN CONSTITUTIONAL LAW 991 (5th ed. 2004).

⁷ A.I.R. 1986 S.C. 515.

make responsible judgments.” The court further asserts that: “[T]he freedom of speech and expression should, therefore, receive a generous support from all those who believe in the participation of people in administration.” Almost similar was the interpretation of the U.K. court in the case of *Loutchansky v. Times Newspaper Ltd.*,⁸ where it stated that: “In a modern democracy in free expression and, more particularly, in the promotion of a free and vigorous press to keep the public informed. The vital importance of this interest has been identified and emphasized time and again in recent cases and needs no restatement here.”

Press/Media has been gifted by various sub-rights of freely employing the desired volume of circulation,⁹ conducting interviews,¹⁰ advertisements, broadcasting¹¹ etc., by the judiciary as offshoots of parent right of speech and expression. Though it is also right that where an activity involves questions of freedom of speech as well as questions of freedom to carry on a business, profession or vocation, it is legitimate for the State to regulate the business aspect in terms of Article 19(1)(g).¹² As far as Article 19(1) (a) is concerned, it is subject to certain restrictions under Article 19(2).¹³ Subsequent is the analysis of the manner in which the Indian higher judiciary has dealt with different restrictions as and when the cases appeared under those categorical entries.

Intelligent Equilibrium in Context of Article 19(2) by Judiciary

1. Sovereignty and integrity of India

Till now, there has been no apparent attempt by media to go *ultra vires* in this regard as they are aware of the severe penalties that could be imposed upon them.

⁸ [2001] EWCA 1805; Though, in the same year Lord Hoffmann went a bit too liberal when in his typical forthright assertion in the case of *Campbell v. MGN Ltd.*, [[2004] UKHL 22]⁸ he stated that: “... [T]he press is free to publish anything it likes. Subject to the law of defamation, it does not matter how trivial, spiteful or offensive the publication may be.” He confined the limitation over the press only in defamatory cases which is not the case in India as such.

⁹ *Sakal Papers v. Union of India*, A.I.R. 1962 S.C. 305.

¹⁰ *Tata Press Ltd. v. Mahanagar Telephone Nigam Limited*, (1995) 5 S.C.C. 139.

¹¹ *Odyssey Communications (P) Ltd. v. Lokvidayan Sanghatana*, (1988) 3 S.C.C. 410.

¹² *A. Suresh v. State of Tamil Nadu*, A.I.R. 1997 S.C. 1889.

¹³ Article 19(2)-Nothing in Article 19(1)(a) shall effect the operation of any existing law, or prevent the state from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interest of the sovereignty and integrity of India, the Security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

2. Security of the state and public order

Patanjali Sastri, J., asserted categorically in *Romesh Thappar v. State of Madras*¹⁴ that unless a law restricting freedom of speech and expression is directed solely against the undermining of the security of the State or its overthrow, such law cannot fall within the restriction under clause (2) of Article 19, although the restrictions which it seeks to impose may have been conceived generally in the interest of public order.

Also, mere criticism of government action would not fall within the mischief of 'public order' as it was established in *Kedar nath Singh v. State of Bihar*¹⁵. While interpreting the Sections 124-A and 505 of Indian Penal Code, 1860 the Supreme Court held that the activity would be rendered penal only when it is intended to create disorder. Criticism of public measures on government action, however strongly worded, would be within reasonable limits and would be consistent with the fundamental right of free speech and expression.

But, in *Dalbir Singh v. State of Punjab*¹⁶ the Honorable Court upheld the challenged Section 3 of the Pepsu Police (Incitement to Disaffection) Act, 1953 which penalized attempts to undermine the loyalty of members of the police service, as it did not violate Article 19(1)(a) since there was a proximate connection between the impugned provision and the maintenance of public order. Thereby, in the backdrop of justice and equity, it becomes evident that the judiciary may alter or modify its stand as per the facts and circumstances of the case.

3. Friendly relations with foreign states

Restrictions under this category would include not only libel of foreign dignitaries but also propaganda in favour of rivals to authority in a foreign state after India has recognized a particular authority in that state, or propaganda in favour of war with a state at peace with India.¹⁷ Though there is no legislation on this point but laws such as Cinematograph Act, 1952, Cable Television Networks (Regulation) Act, 1955 and Right to Information Act, 2005 which contains provisions that deals with such issues.

¹⁴ A.I.R. 1950 S.C. 124.

¹⁵ A.I.R. 1962 S.C.C. 955.

¹⁶ A.I.R. 1962 S.C. 1106.

¹⁷ MADHAVI GORADIA DIVAN, FACETS OF MEDIA LAW 31 (1st ed. 2006).

4. Incitement to an offence

Though there are not too many judicial assertions on this point but it is well settled that when such situation comes, the court must look into the circumstances in each case in judging such a tendency, the purpose of the work, the time at which it was published, the class of the people who would read it, the effect it would have on their minds, the context of the words and the interval between the incidents narrated and the publication of work.¹⁸

5. Contempt of court

It must be understood beforehand that judiciary, like any other institution does not enjoy immunity from criticism. Right to criticize judgments has been recognized and reiterated on number of occasions.¹⁹ But, it is permitted only if there is no attribution of motive as held in the recent case of *Rajendra Sail* where the court categorically held that: “The judgments of the courts are public documents and can be commented upon, analyzed and criticized, but in a dignified manner without attributing motives. Before placing before public, whether on print or electronic media, all concerned have to see whether any such criticism has crossed the limits as aforesaid and if it has then resist every temptation to make it public.”²⁰

6. Decency or morality

There are ‘n’ number of laws dealing with the decency and morality. E.g., –the Cinematograph Act, 1952 which prohibits the certification of any film if it is indecent or immoral, similarly Information Technology Act, 2000 makes the publication and transmission in electronic form of material which is ‘lascivious’ or that which appeals to ‘prurient’ interests or that which depraves or corrupts a person. Other laws such as the Cable Television Networks (Regulation) Act, 1995, the Customs Act, 1962, the Indecent Representation of Women (Prohibition) Act, 1986 etc deal directly or indirectly with the issues of decency and morality.

The Supreme Court’s attitude towards the degree of decency or morality has been somewhat liberal. For instance, in *K.A. Abbas v. Union of India*²¹ and also in *Bobby Art International v. Om Pal Singh*

¹⁸ State of Bihar v. Shailabala Devi, A.I.R. 1952 S.C. 329.

¹⁹ Surya Prakash Khatri v. Madhu Trehan, 2001 92 D.L.T. 655; S. Mulgaokar, In re, (1978) 3 S.C.C. 339.

²⁰ Rajendra Sail v. M.P. High Court Bar Association, (2005) 6 S.C.C. 109.

²¹ (1970) 2 S.C.C. 780.

*Hoon*²² the apex court clearly distinguished between sex/nudity and obscenity which is considered to be a subset of indecency. The court in these cases remarked that sex and obscenity are not always synonymous and that it was wrong to classify sex as essentially obscene or even indecent or immoral. But, yes, the court is alert enough to draw the line as it did efficiently in *Ranjit D. Udeshi v. State of Maharashtra*²³ where it stated that pornography is obscenity in a more aggravated form. The court said: “Something much less than actual knowledge must therefore suffice... the difficulty of obtaining legal evidence of the offender’s knowledge of obscenity of the book etc., has made the liability strict.”

7. Defamation

The press is not immune from the general law of liability for defamation.²⁴ There may arise a civil as well as criminal liability if any act done by media fulfills the essentials of defamation which are-(1) The statement must be defamatory; (2) The statement must refer to the plaintiff; (3) It must be published. All the defamatory statements which are open to public are deemed to be published. Statement written on a telegram or postcard may also amount to defamation as it is readable by others.²⁵

Other Evolved Restrictions on Media and the Court’s Attitude

1. Infringement of right to privacy

Justice Subba Rao in 1963, writing for the minority in *Kharak Singh’s* case²⁶ was of the view that the liberty in Article 21 was comprehensive enough to include privacy also. It is true that our constitution does not expressly declare the right to privacy as fundamental right, but the right is an essential ingredient of personal liberty, that in the last resort, a person’s house, where he lives with his family, is his ‘castle’, that nothing more is needed to a man’s physical happiness that to live in freedom from calculated interference with his privacy.²⁷ But now, it is a settled proposition of law that Right to Privacy is a part of Article 21 of the constitution which says that: “No person shall be deprived of his life or personal liberty except according to procedure established by law.”²⁸

²² (1996) 4 S.C.C. 1.

²³ A.I.R. 1965 S.C. 881.

²⁴ *Printers Mysore v. Assistant Commercial Law Officer*, (1994) 2 S.C.C. 434.

²⁵ *G. Narasimhan v. T.V. Chokappa*, (1972) 2 S.C.C. 680.

²⁶ *Kharak Singh v. State of U.P.*, A.I.R 1963 S.C. 1295.

²⁷ Justice Subba Rao’s minority statement as cited in Justice V.R. Krishan Iyer & Dr. Vinod Sethi, *Essays on Press Freedom*, CAPITAL FOUNDATION SOCIETY 99-100.

²⁸ *Govind v. State of Madhya Pradesh*, 1975 Cri. L.J. 1111.

Instances can be recalled when the apex court held that the press does not have an absolute or unrestricted right to information and there is no legal obligation on the part of citizens to supply that information.²⁹ Furthermore, the court even has the inherent power under Section 151 of Civil Procedure Code, 1908 to order a trial to be held in camera. Thus, it may restrict the publicity of proceedings ‘in the interests of justice’, but only where the court is satisfied beyond doubt that the ends of justice would be defeated if the case were to be tried in open court.³⁰

But as we know, justice and reason combined rules and should the psyche of judges. It was this reason that in *PUCL v. Union of India*³¹ the Supreme Court held that electoral candidates were under a duty to disclose information about their antecedents, including about their assets and liabilities, and could not be protected by any right to privacy when it came to disclosing information which the public had a right to know. Also, in *Mr ‘X’ v. Hospital ‘Z’*³² court held valid the disclosure of the AIDS patient’s disease to his fiancée so as to save her life. Thus we see that it is factual and circumstantial, varying from cases to cases that the court try to put the restrictions as reasonably as possible in the matters involving right to privacy.

2. Copyright issues

In copyright infringement, liability of the legal entity arises if it publishes the work of any other entity against the provisions of Indian Copyright Act, 1957. In such issues where the original work of the author or writer or maker is at stake, what is protected is not the original thought but the expression of the thought in concrete form. Since, there can be no copyright in ideas or information, it is not infringement of copyright to adopt the ideas of another or to publish information derived from another provided there is no copying of the language in which those ideas have, or that information has been previously embodied.³³ The copyright of an individual is protected irrespective of the registration done.³⁴ Thus, any act done by any media entity which without any prior permission or license publish the work of any other person then the victim may drag the offender in the court of law and claim the compensation that arise.

²⁹ *Prabha Dutt v. Union of India*, (1982) 1 S.C.C. 1; also see *Sheela Barse v. Union of India*, (1987) 4 S.C.C. 373; *State v. Charulata Joshi*, (1999) 4 S.C.C. 65. It is noticeable here that in all these cases the media was restricted to interview the prisoners if the interview was against their will or not of public importance.

³⁰ *Naresh Shridhar Mirajkar v. State of Maharashtra*, A.I.R. 1967 S.C. 1.

³¹ (2003) 4 S.C.C. 399.

³² (1998) 8 S.C.C. 296.

³³ *Deeks v. Wells*, A.I.R. 1933 O.C. 26.

³⁴ *Asian Paints (I) Ltd. v. Jaikishan Paints*, (2002) 6 Bom. C.R. 1.

Conclusion

It is no unknown fact that media's stature is getting colossal with every passing day with new dimensions being acquired by it or added to its might now and then. But, going back to the assertions of Plato, Aristotle or Hegel and if not as it is, then taking into account the milder version of their submissions—state should be respected and treated as supreme regulatory authority. Judiciary forms one of the three pillars of the government and its decisions must be welcomed and adhered to. One fact that cannot be declined is that media is now referred to as the fourth pillar of our democratic setup. Therefore, it is necessary that all the stakeholders in the democratic institutions which definitely include free media and independent judiciary, may sit together, exchange ideas and workout solutions so that the media continue to serve the larger public interest in a fair manner without in anyway threatening or affecting the right of the litigants or the accused to have a fair trial.³⁵ It is for this reason that most citizens, including journalists believe it is reasonable that certain restrictions on their freedom of speech should exist. E.g., the law must strike a balance between the public interest in exposing wrong doing and the individual's right to have his reputation defended from malicious and baseless attacks.³⁶ To put it in nutshell, both the organs being essential to democracy require working with coordination instead of any direct conflicts other than legitimate checks and balances.

As rightly and beautifully versed by Sir William Blackstone: “The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure from criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press: but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.”



³⁵ Justice Shiva Kirti Singh, *Freedom of Media vis-à-vis Independence of Judiciary*, 1 CNLU L.J 103, 104-05 (2010).

³⁶ Tom Welsh & Walter Greenwood, *McNae's Essential Law for Journalists* 3.

PLANT VARIETY PROTECTION AND FARMERS' RIGHTS IN INDIA: AN ANALYSIS

Mr. Pradip Kumar Kashyap*
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Introductory

Plant variety management relates to the conservation, use and commercial exploitation of plant varieties by farmers, commercial breeders, governments and relevant international organizations. Plant variety protection is one subset of this broad field which focuses exclusively on knowledge which can be commercially exploited. In other words, plant variety protection relates to intellectual property rights over plant varieties which guarantee rights holder's exclusive commercial rights for a specific period of time.¹

The Agreement on Trade Related Aspects of Intellectual Property Rights (hereinafter the TRIPs Agreement) states that: "Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof."² In order to fulfill its obligations under the TRIPs Agreement, India has implemented the Protection of Plant Varieties and Farmers' Rights Act, 2001 (hereinafter the PPVFR Act). This Act has been passed in order to provide for the establishment of an effective system for protection of plant varieties, the rights of farmers and plant breeders, and to encourage the development of new varieties of plants. The Act helps to stimulate investment for research and development to produce new plant varieties. Such protection is also likely to facilitate the growth of the seed industry that will ensure the availability of high quality seeds and planting material to the farmers. Registration of a plant variety gives protection only in India and confers upon the rights holder, its successor, agent, or licensee the exclusive right to produce, sell, market, distribute, import, or export the variety.³

The PPVFR Act was passed by the Government of India in 2001. After India became signatory to the TRIPs Agreement in 1994, a

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¹ <http://www.ielrc.org/content/f0304.html> (last visited Nov. 3, 2012, 2:45 IST).

² TRIPs AGREEMENT art. 27.3(b).

³ <http://newdelhi.usembassy.gov/iprplantfarm.html> (last visited Nov. 3, 2012, 3:45 IST).

legislation was required to be formulated. Article 27.3(b) of TRIPs Agreement requires the member countries to provide for protection of plant varieties either by a patent or by an effective *sui generis* system or by any combination thereof. Thus, the member countries had the choice to frame legislations that suit their own system and India exercised this option. The existing Indian Patent Act, 1970 excluded agriculture and horticultural methods of production from patentability. The *sui generis* system for protection of plant varieties was developed integrating the rights of breeders, farmers and village communities, and taking care of the concerns for equitable sharing of benefits.⁴

***Sui Generis* Protection Systems**

India explored the *sui generis* option given in the TRIPs Agreement to fulfill its World Trade Organization (WTO) obligation.⁵ India developed a regime for the PPVFR Act. This is a unique legislation because it involves all the commercial actors involved in Plant Genetic Resources management (PGR management) i.e., breeders and farmers, in a comprehensive manner. Presently, India is also contemplating a new seeds law; which, if enacted, will replace the existing Seeds Act, 1966. The move towards enacting the new seeds law is important when seen in light of the PPVFR Act and India's proposed membership of International Union for the Protection of Plant Varieties (*Union Internationale pour la Protection des obtentions Vegetales* or U POV).⁶ This research paper looks at the interplay between the PPVFR Act, the Seeds Bill, 2004 and India's proposed membership of the U POV.

The question of *sui generis* intellectual property right protection for plant varieties has become a matter of great importance following the adoption of the TRIPs Agreement. As a result of a negotiating compromise, TRIPs Agreement requires the introduction of plant variety protection in all member states but it does not impose the introduction of patents. Article 27.3(b) specifically requires all member states to 'provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof'.⁷ The introduction of the *sui generis* concept reflects two broad elements. First, a number of countries in the North

⁴ assets.wwfindia.org/.../the_protectio (last visited Nov. 4, 2012, 4:53 IST).

⁵ ELIZABETH VERKEY, LAW OF PLANT VARIETIES PROTECTION 5 (Eastern Books Agency, Lucknow 2007).

⁶ <http://agropedia.iitk.ac.in/openaccess/sites/default/files/WS%204.pdf> (last visited Nov. 4, 2012, 5:10 IST).

⁷ Agreement on Trade Related Aspects of Intellectual Property Rights, Marrakesh, Apr. 15, 1994, reprinted in 33 International Legal Materials 1125 (1994) (the TRIPs Agreement).

and the South rejected the compulsory introduction of plant patents. Second, negotiators did not manage to agree on one specific alternative to patents. As a result, TRIPs Agreement gives member states a wide margin of appreciation in determining how to implement their obligation to introduce plant variety protection.

The prominence of the U POV Convention in the debates concerning *sui generis* plant variety protection is in part linked to the fact that the interpretation of the concept of 'effective' *sui generis* system in Article 27.3(b) TRIPs remains problematic. The only generally agreed upon interpretation is that U POV is an effective *sui generis* protection regime under TRIPs. This has led some countries like the member states of the African Intellectual Property Organization to simply adopt a regime modeled after U POV 1991 and at the same time to commit them to join the U POV Convention.⁸

Some countries like India have decided to implement plant variety protection regimes which seek to provide protection to commercial plant breeders and to farmers. Thus, the Indian plant variety protection regime introduces both Plant Breeders' Rights (PBRs) and farmers' rights.⁹ While a number of countries have attempted to draw up their own *sui generis* plant variety protection regimes, the member states of the Organization of African Unity have taken a unique initiative in adopting a Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources.¹⁰ The model legislation is premised on the rejection of patents on life or the exclusive appropriation of any life form, including derivatives. Its provisions on access to biological resources make it clear that the recipients of biological resources or related knowledge cannot apply for any intellectual property right of exclusionary nature. The model legislation focuses mainly on the definition of the rights of communities, farmers and breeders. Community rights recognized include rights over their biological resources and the right to collectively benefit from their use, rights to their innovations, practices, knowledge and technology and the right to collectively benefit from their utilization. In practice, these rights allow communities the right to prohibit access to their resources and knowledge but only in cases where access would be detrimental to the integrity of their natural or cultural heritage.¹¹ Further, the state is to ensure that at least fifty per cent of the benefits derived from the utilization of their resources or knowledge is channeled back to the

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ AFRICAN MODEL LEGISLATION art. 20.

communities. The rights of farmers are to a certain extent more precisely defined. These include the protection of their traditional knowledge relevant to plant and animal genetic resources, the right to an equitable share of benefits arising from the use of plant and animal genetic resources, the right to participate in decision making on matters related to the conservation and sustainable use of plant and animal genetic resources, the right to save, use, exchange and sell farm-saved seed or propagating material, and the right to use a commercial breeder's variety to develop other varieties. The breeders' rights defined under the model legislation generally follow the definition given in the U POV Convention and the duration of the rights is modeled after U POV 1991. One specifically of the plant breeders' rights regime under the model legislation is the rather broad scope of the exemptions granted. Exemptions to the rights of breeders include the right to use a protected variety for purposes other than commerce, the right to sell plant or propagating material as food, the right to sell within the place where the variety is grown and the use of the variety as an initial source of variation for developing another variety.¹²

The development of *sui generis* plant variety protection is still in its infancy. Until now, efforts have been made by developing countries to balance their obligations under Article 27.3(b) of TRIPs with their specific needs and conditions. Since U POV is the only model which is generally recognized as fulfilling the criteria of an 'effective' *sui generis* plant variety protection regime, a number of states that have not had the time or resources to devise a completely separate *sui generis* protection regime have decided to take PBRs as a basis for a plant variety protection regime. In addition to the PBR system, there seems to be a growing trend towards recognizing farmers' rights alongside and to provide for different compensation mechanisms (benefit-sharing). Other *sui generis* protection regimes will probably be developed in years to come, in particular by least developed countries which still have until 2005 to implement their plant variety protection regimes. Further, even countries classified as developing countries may amend their legislations over time as further *sui generis* models evolve. *Sui generis* protection is evolving and significant innovations can be expected in years to come.¹³

Protection of Plant Varieties and Farmers' Rights Act of 2001

The PPVFR Act is an act in India to provide for the establishment of an effective system for protection of plant varieties, the rights of

¹² AFRICAN MODEL LEGISLATION art. 43.

¹³ <http://www.ielrc.org/content/f0304.htm> (last visited Nov. 12, 2012, 12:44 IST).

farmers and plant breeders and to encourage the development and cultivation of new varieties of plants. This Act was passed by Parliament of India and received the assent of the President of India on the October 30, 2001.¹⁴

This Act extends to whole of India. It shall come into force on such a date as the central government may by notification in official gazette appoint and different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of the provision.¹⁵

Salient features of the PPVFR Act

The objective of India's *sui generis* regime embodied in the PPVFR Act is to “provide for the establishment of an effective system for protection of plant varieties, the rights of farmers and plant breeders and encourage the development of new plant varieties”.¹⁶

Some important definition under the PPVFR Act

I. Authority

Means the Protection of Plant Varieties and Farmers' Rights Authority established under sub-section (1) of Section 3.¹⁷

II. Breeder

Means a person or group of persons or a farmer or group of farmers or any institution which has bred, evolved or developed any variety.¹⁸

III. Convention country

Means a country which has acceded to an international convention for the protection of plant varieties to which India has also acceded, or a country which has a law on protection of plant varieties on the basis of which India has entered into an agreement for granting plant breeders' right to the citizens of both the countries.¹⁹

IV. “Farmer” means any person who²⁰

- a.** cultivates crops by cultivating the land himself; or
- b.** cultivates crops by directly supervising the cultivation of land through any other person; or

¹⁴ http://en.wikipedia.org/wiki/President_of_India (last visited Nov. 12, 2012, 10:45 IST).

¹⁵ The PPVFR Act § 1.

¹⁶ The PPVFR Act pmb1.

¹⁷ The PPVFR Act § 2(a).

¹⁸ The PPVFR Act § 2(c).

¹⁹ The PPVFR Act § 2(f).

²⁰ The PPVFR Act § 2(k).

- c. conserves and preserves, severally or jointly, with any other person any wild species or traditional varieties or adds value to such wild species or traditional varieties through selection and identification of their useful properties.

Establishment of authority

The Central Government shall, by notification in the Official Gazette, establish an Authority to be known as the Protection of Plant Varieties and Farmers' Rights Authority for the purposes of this Act.²¹ The Authority shall be a body corporate by the name aforesaid, having perpetual succession and a common seal with power to acquire, hold and dispose of properties, both movable and immovable, and to contract, and shall by the said name sue and be sued.²² The head office of the Authority shall be at such place as the Central Government may, by notification in the Official Gazette, specify and the Authority may, with the previous approval of the Central Government, establish branch offices at other places in India.²³ The Authority shall consist of a Chairperson and fifteen members.²⁴ The Chairperson shall appoint a Standing Committee consisting of five members, one of whom shall be a member who is a representative from a farmers' organization, to advise the Authority on all issues including farmers' rights.²⁵ The Chairperson shall be entitled to such salary and allowances and shall be subject to such conditions of service in respect of leave, pension, provident fund and other matter as may be prescribed. The allowances for non-official members for attending the meetings of the Authority shall be such as may be prescribed.²⁶ The Chairperson may resign his office by giving notice thereof in writing to the Central Government and on such resignation being accepted, he shall be deemed to have vacated his office.²⁷ On the resignation of the Chairperson or on the vacation of the office of the Chairperson for any reason, the Central Government may appoint one of the members to officiate as Chairperson till a regular Chairperson is appointed in accordance with clause (a) of sub-section (5).²⁸

²¹ The PPVFR Act § 3(1).

²² The PPVFR Act § 3(2).

²³ The PPVFR Act § 3(3).

²⁴ The PPVFR Act § 3(4).

²⁵ The PPVFR Act § 3(5).

²⁶ The PPVFR Act § 3(8).

²⁷ The PPVFR Act § 3(9).

²⁸ The PPVFR Act § 3(10).

Registration of new varieties and plant breeder's rights

➤ **Application for registration**

Any person specified in Section 16 may make an application to the Registrar for registration of any variety–

- I.** of such genera and species as specified under sub-section (2) of Section 29; or
- II.** which is an extant variety; or
- III.** which is a farmers' variety.²⁹

➤ **Person who may make registration**

- I.** An application for registration under Section 14 shall be made by-
 - a.** any person claiming to be the breeder of the variety; or
 - b.** any successor of the breeder of the variety; or
 - c.** any person being the assignee of the breeder of the variety in respect of the right to make such application; or
 - d.** any farmer or group of farmers or community of farmers claiming to be the breeder of the variety; or
 - e.** any person authorized in the prescribed manner by a person specified under clause (a) to (d) to make application on his behalf; or
 - f.** any university or publicly funded agricultural institution claiming to be the breeder of the variety.
- II.** An application under sub-section (1) may be made by any of the persons referred to therein individually or jointly with any other person.³⁰

➤ **Compulsory variety denomination**

- I.** Every applicant shall assign a single and distinct denomination to a variety with respect to which he is seeking registration under this Act in accordance with the regulations.
- II.** The Authority shall, having regard to the provisions of any international convention or treaty to which India has become a party, make regulation governing the assignment of denomination to a variety.
- III.** Where the denomination assigned to the variety does not satisfy the requirement specified in the regulations, the Registrar may require the applicant to propose another

²⁹ The PPVFR Act § 14.

³⁰ The PPVFR Act § 16.

denomination within such time as may be specified by such regulations.

- IV.** Notwithstanding anything contained in the Trade Marks Act, 1999 (47 of 1999) denomination assigned to a variety shall not be registered as a trade mark under that Act.³¹

➤ **Forms of application**

- I.** Every application for registration under Section 14 shall-
- a.** be with respect to a variety;
 - b.** state the denomination assigned to such variety by the applicant;
 - c.** be accompanied by an affidavit sworn by the applicant that such variety does not contain any gene or gene sequence involving terminator technology;
 - d.** be in such form as may be specified by regulations;
 - e.** contain a complete passport data of the parental lines from which the variety has been derived along with the geographical location in India from where the genetic material has been taken and all such information relating to the contribution, if any, of any farmer, village community, institution or organization in breeding, evolving or developing the variety;
 - f.** be accompanied by a statement containing a brief description of the variety bringing out its characteristics of novelty, distinctiveness, uniformity and stability as required for registration;
 - g.** be accompanied by such fees as may be prescribed;
 - h.** contain a declaration that the genetic material or parental material acquired for breeding, evolving or developing the variety has been lawfully acquired; and
 - i.** be accompanied by such other particulars as may be prescribed:

Provided that in case where the application is for the registration of farmers' variety, nothing contained in clauses (b) to (i) shall apply in respect of the application and the application shall be in such form as may be prescribed.

- II.** Every application referred to in sub-section (1) shall be filed in the office of the Registrar.
- III.** Where such application is made by virtue of a succession or an assignment of the right to apply for registration, there shall be furnished at the time of making the application, or within

³¹ The PPVFR Act § 17.

such period after making the application as may be prescribed, a proof of the right to make the application.³²

➤ **Test to be conducted**

- I. Every applicant shall, along with the application for registration made under this Act, make available to the Registrar such quantity of seed of a variety for registration of which such application is made, for the purpose of conducting tests to evaluate whether seed of such variety along with the parental material conform to the standards as may be specified by regulations:

Provided that the Registrar or any person or test center to whom such seed has been sent for conducting test shall keep such seed during his or its possession in such manner and in such condition that its viability and quantity shall remain unaltered.

- II. The applicant shall deposit such fees as may be prescribed for conducting tests referred to in sub-section (1).
- III. The tests, referred to in sub-section (1) shall be conducted in such manner and by such method as may be prescribed.³³

➤ **Acceptance of application or amendment thereof**

- I. On receipt of an application under Section 14, the Registrar may, after making such inquiry as he thinks fit with respect to the particulars contained in such application, accept the application absolutely or subject to such conditions or limitations as he deems fit.
- II. Where the Registrar is satisfied that the application does not comply with the requirements of this Act or any rules or regulations made there under, he may, either-
 - a. require the applicant to amend the application to his satisfaction; or
 - b. reject the application:

Provided that no application shall be rejected unless the applicant has been given a reasonable opportunity of presenting his case.³⁴

³² The PPVFR Act § 18.

³³ The PPVFR Act § 20.

³⁴ The PPVFR Act § 21.

➤ **Advertisement of application**

- I.** Where an application for registration of a variety has been accepted absolutely or subject to conditions or limitations under sub-section (1) of Section 20, the Registrar shall, as soon as after its acceptance, cause such application together with the conditions or limitations, if any, subject to which it has been accepted and the specifications of the variety for registration of which such application is made including its photographs or drawings, to be advertised in the prescribed manner calling objections from the persons interested in the matter.
- II.** Any person may, within three months from the date of the advertisement of an application for registration on payment of the prescribed fees, give notice in writing in the prescribed manner, to the Registrar of his opposition to the registration.
- III.** Opposition to the registration under sub-section (2) may be made on any of the following grounds, namely-
 - a.** that the person opposing the application is entitled to the breeder's right as against the applicant; or
 - b.** that the variety is not registrable under this Act; or
 - c.** that the grant of certificate of registration may not be in public interest; or
 - d.** that the variety may have adverse effect on the environment.
- IV.** The Registrar shall serve a copy of the notice of opposition on the applicant for registration and, within two months from the receipt by the applicant of such copy of the notice of opposition, the applicant shall send to the Registrar in the prescribed manner a counter-statement of the grounds on which he relies for his application, and if he does not do so, he shall be deemed to have abandoned his application.
- V.** If the applicant sends such counter-statement, the Registrar shall serve a copy thereof on the person giving notice of opposition.
- VI.** Any evidence upon which the opponent and the applicant may rely shall be submitted, in the manner prescribed and within the time prescribed, to the Registrar and the Registrar shall give an opportunity to them to be heard, if so desired.
- VII.** The Registrar shall, after hearing the parties, if so required, and considering the evidence, decide whether and subject to what conditions or limitations, if any, the registration is to be permitted and may take into account a ground of objection whether relied upon by the opponent or not.
- VIII.** Where a person giving notice of opposition or an applicant sending a counter-statement after receipt of a copy of such

notice neither resides nor carries on business in India, the Registrar may require him to give security for the cost of proceeding before him and in default of such security being duly given may treat the opposition or application, as the case may be, as abandoned.

- IX.** The Registrar may, on request, permit correction of any error in, or any amendment of, a notice of opposition or a counter-statement on such terms as he may think fit.³⁵

➤ **Registrar to consider grounds of opposition**

The Registrar shall consider all the grounds on which the application has been opposed and after giving reasons for his decision, by order, uphold or reject the opposition.³⁶

Farmers' right

- I.** Notwithstanding anything contained in this Act,-
- a.** a farmer who has bred or developed a new variety shall, be entitled for registration, and other protection in like manner as a breeder of a variety under this Act;
 - b.** the farmers' variety shall be entitled for registration if the application contains declaration as specified in clause (h) of sub-section (1) of Section 18;
 - c.** a farmer who is engaged in the conservation of genetic resources of land races and wild relatives of economic plants and their improvement through selection and preservation shall be entitled in the prescribed manner for recognition and reward from the Gene Fund;
 - d.** Provided that material so selected and preserved has been used as donors of genes in varieties registrable under this Act;
 - e.** a farmer shall be deemed to be entitled to save, use, sow, resow, exchange, share or sell his farm produce including seed of a variety protected under this Act in the same manner as he was entitled before the coming into force of this Act.

Provided that the farmer shall not be entitled to sell branded seed of a variety protected under this Act.

Explanation.- For the purposes of clause (iv), "branded seed" means any seed put in a package or any other container and labeled in a manner indicating that such seed is of a variety protected under this Act.

³⁵ The PPVFR Act § 21.

³⁶ The PPVFR Act § 22.

II. Where any propagating material of a variety registered under this Act has been sold to a farmer or a group of farmers or any organization of farmers, the breeder of such variety shall disclose to the farmer or the group of farmers or the organization of farmers, as the case may be, the expected performance under given conditions, and if such propagating material fails to provide such performance under such given conditions, the farmer or the group of farmers or the organization of farmers, as the case may be, may claim compensation in the prescribed manner before the Authority and the Authority, after giving notice to the breeder of the variety and after hearing the parties, may direct the breeder of the variety to pay such compensation as it deems fit, to the farmer or the group of farmers or the organization of farmers, as the case may be.³⁷

➤ **Certain information to be given in application for registration**

- I.** A breeder or other person making application for registration of any variety under Chapter III shall disclose in the application the information regarding the use of genetic material conserved by any tribal or rural families in the breeding or development of such variety.
- II.** If the breeder of such other person fails to disclose any information under sub-section (1), the Registrar may, after being satisfied that the breeder or such person has willfully and knowingly concealed such information, reject the application for registration

➤ **Right of communities**

- I.** Any person or group of persons (whether actively engaged in farming or not) or any governmental or non-governmental organization may, on behalf of any village or local community in India, file in any center notified, with the previous approval of the Central Government, by the Authority in the Official Gazette, any claim attributable to the contribution of the people of that village or local community, as the case may be, in the evolution of any variety for the purpose of staking a claim on behalf of such village or local community.
- II.** Where any claim is made under sub-section (1), the center notified under that sub-section may verify the claim made by such person or group of person or such governmental or non-governmental organization in such manner as it deems fit,

³⁷ The PPVFR Act § 40.

and if it is satisfied that such village or local community has contributed significantly to the evolution the variety which has been registered under this Act, it shall report its findings to the Authority.

- III. When the Authority, on a report under sub-section (2) is satisfied, after such inquiry as it may deem fit, that the variety with which the report is related has been registered under the provisions of this Act, it may issue notice in the prescribed manner to the breeder of that variety and after providing opportunity to such breeder to file objection in the prescribed manner and of being heard, it may subject to any limit notified by the Central Government, by order, grant such sum of compensation to be paid to a person or group of persons or governmental or non-governmental organization which has made claim under sub-section (1), as it may deem fit.
- IV. Any compensation granted under sub-section (3) shall be deposited by the breeder of the variety in the Gene Fund.
- V. The compensation granted under sub-section (3) shall be deemed to be an arrear of land revenue and shall be recoverable by the Authority accordingly.³⁸

➤ **Protection of innocent infringement**

Notwithstanding anything contained in this Act,-

- I. a right established under this Act shall not be deemed to be infringed by a farmer who at the time of such infringement was not aware of the existence of such right; and
- II. a relief which a court may grant in any suit for infringement referred to in Section 65 shall not be granted by such court, nor any cognizance of any offence under this Act shall be taken, for such infringement by any court against a farmer who proves, before such court, that at the time of the infringement he was not aware of the existence of the right so infringed.³⁹

➤ **Authorization of farmer variety**

Notwithstanding anything contained in sub-section (6) of Section 23 and Section 28, where an essentially derived variety is derived from a farmers' variety, the authorization under sub-section (2) of Section 28 shall not be given by the breeder of such farmers' variety except with the consent of the fanners or group of fanners

³⁸ The PPVFR Act § 41.

³⁹ The PPVFR Act § 42.

or community of farmers who have made contribution in the preservation or development of such variety.⁴⁰

➤ **Exemption from fees**

A farmer or group of farmers or village community shall not be liable to pay any fees in any proceeding before the Authority or Registrar or the Tribunal or the High Court under this Act or the rules made there under.

Explanation.- For the purposes of this section, “fees in any proceeding” includes any fees payable for inspection of any document or for obtaining a copy of any decision or order or document under this Act or the rules, made there under.⁴¹

Grounds for challenging registration and compulsory license

Another novel feature of the PPVFR Act is that it also provides grounds on which the registration of a plant variety can be challenged. The grounds on which such a challenge can be made are that the person opposing the application is entitled to the breeder's right as against the applicant or that the variety is not registrable under the Act⁴² or other grounds where certificate of registration may not be in the public interest or may violate any environmental grounds.⁴³ Further, the Act allows for issuance of compulsory licence (CL) against a registered variety after 3 years of registration if the breeder fails to satisfy the reasonable requirements of the public for the seed or other propagating material or that the seed or propagating material has not been made available to the public at a reasonable price.⁴⁴

Notwithstanding these important features of the PPVFR Act, an important critique of this Act is from the point of view of its overlap with another Indian law' the Biological Diversity Act, 2002 (hereinafter the BD Act). Two overlaps can be pointed out. First, the subject matter of plant variety protection also falls under the purview of the BD Act because the definition of biological resources in the BD Act includes plants and parts thereof.⁴⁵ Thus, plant varieties are not excluded from the BD Act, which can give rise to significant overlap with the PPVFR Act because the BD Act also deals with the

⁴⁰ The PPVFR Act § 43.

⁴¹ The PPVFR Act § 44.

⁴² The PPVFR Act § 23(3)(a).

⁴³ The PPVFR Act § 21(3)(c).

⁴⁴ The PPVFR Act § 47(1).

⁴⁵ The Biological Diversity Act, 2002 § 2(c).

commercial exploitation of biological resources and sharing of benefits arising out of use of such biological resources. Second, an overlap between the PPVFR Act and the BD Act can also arise on account of both the legislations having benefit-sharing provisions.

Another important issue, while discussing the salient features of the PPVFR Act, is to find out the possible effects of this law on private investment to boost the development of new plant varieties in India. Arguably, plant protection could boost research in plant biotechnology by both private and public bodies. In a country like India, where major investment towards developing new plant varieties is undertaken by the public bodies, a regime that protects plant varieties could change this trend by boosting private investment, although most of the private investment, even after the PPVFR Act, may be in vegetables and other commercial crops where the commercial returns are high. In the case of India, it is difficult to find out, at this early stage of the implementation of the PPVFR Act, how this legislation will impact private investment by the seed companies or more generally research investment towards developing new plant varieties. In this context, it is interesting to note that in India the private seed sector has grown despite a strong plant variety protection regime mainly due to liberal seed laws. It has been argued that a strong plant variety protection mechanism is not a necessary condition for the growth of the initial seed sector, but may play a role subsequently. In India, the seed sector, up to the late 1990s, was dominated by the public sector. However, things changed after the seeds policies of 1988 and 2002, and today there are many private seed companies that are doing active business in India.⁴⁶

The seed sector in India has welcomed the PPVFR Act because this law can be used for the protection of its hybrid seeds and the seed sector also expects that the plant variety protection regime will bring a new policy that provides greater access to public to germplasm. It is of interest to note that during the early days of deliberations on the PPVFR Bill, the seed industry in India was not happy with those provisions of the PPVFR Bill that gave rights to farmers to sell seeds, arguing that this would undermine the very purpose of having legislation on plant variety protection. However, the seeds industry, later, softened its stand on farmers' rights provisions in a process of accommodation and compromise, where industry understood that the concept of farmers' rights as an alternative means of intellectual property protection reinforced their position on Intellectual Property

⁴⁶ www.new-agri.co.uk/01-2/focuson/focuson6.html Last visited on 12.12.2012, at 12:34 IST.

Rights (IPRs) and enabled them to gain PBR rights in India. Before the PPVFR Act came into existence, India did not recognize PBR.

The issue related to enforceability of the PPVFR Act is also important. One of the major challenges that India will face, given its size and diversity, in properly enforcing the legislation, is in making poor and illiterate farmers realize their rights. The other enforceability-related issues may range from selecting appropriate sites for novelty, distinctiveness, stability and uniformity (NDUS) testing; developing administrative mechanisms to administer benefit sharing and ensuring that there are no infringements of the rights that flow from the protection of a plant variety. For the effective implementation of the PPVFR Act, the Protection of Plant Variety and Farmers' Rights Authority of India has been constituted. The actual process of plant variety registration started only in 2007⁴⁷ and therefore one will have to wait a while longer to find out how effective the plant variety authority has been in enforcing the legislation.

The New Seeds Bill, 2004 and Its Impact upon the Protection of Plant Varieties

After having understood the salient features of the PPVFR Act, their U POV plus features and India's U POV membership application, we now turn to examine the significance of the new Seeds Bill in India in light of the PPVFR Act and India's U POV membership application. In 2004, the Indian government brought a bill for regulating the quality of seeds for sale, import and export and to facilitate the production and supply of seeds.⁴⁸ The Seeds Bill, if analyzed in isolation at the micro level, is concerned with the regulation, production and supply of seeds and is not a law on PBR. However, a careful examination of the Seeds Bill reveals that in the name of regulating the quality of seeds, the Bill actually introduces provisions that either conflict with the PPVFR Act or reduce its efficacy by jeopardizing the rights given to farmers under the PPVFR Act. Because the Bill directly affects the PPVFR Act, it has a direct link with the U POV membership issue, notwithstanding the fact that it is not a law *per se* on protecting plant varieties. The features of the Seeds Bill that undermine or conflict with the PPVFR Act raise the issue of indirectly diluting the PPVFR Act and establishing a legal regime based on the U POV model. Hence, the Seeds Bill needs to be understood in the broader perspective and in light of the PPVFR Act and India's desire to join U POV. However, before one discusses these features of the Seeds Bill, it is important to point out that the Indian government constituted a

⁴⁷ The PPVFR Act nft.

⁴⁸ The Seeds Bill, 2004 intro. stmt.

Parliamentary Standing Committee on Agriculture of look into various aspects of the Seeds Bill. This Committee made its report public in October 2006.⁴⁹ The report of the Committee has been submitted to the Indian Parliament.⁵⁰ However, discussion on this report, and whether the Seeds Bill needs to be revisited in light of the recommendations made by the Committee, is yet to take place in the Indian Parliament. In other words, the discussion on the Seeds Bill is pending in the Parliament there is no change in the status of the Seeds Bill from the time when the Bill was first introduced in the Indian Parliament. It is also not clear when the discussion on the Committee report and the Seeds Bill will take place in the Indian Parliament.⁵¹ However, because the status of the Seeds Bill has not changed and because the Bill is still available on the website of the Agriculture Ministry of India,⁵² which is the nodal executive organ in India for matters related to the Seeds Bill, discussions will be taken up in the future when the Parliament deliberates on the issues raised by the Committee. Therefore, it is extremely pertinent and timely to analyze the features of the Seeds Bill both in light of the PPVFR Act and the U POV membership issue.

One of the insidious provisions of the Seeds Bill is the mandatory registration of all the seeds. Clause 13 of the Seeds Bill states: “No seed of any kind or variety shall, for the purpose of sowing or planting by any group, be sold unless such seed is registered”. This is a sweeping provision not recognizing any exception and covers even the farmer varieties because the definition of the term “variety”, occurring in clause 13, includes farmer’s variety.⁵³ Hence, farmer’s varieties of seeds held by farmers cannot be sold or bartered unless they are registered.⁵⁴ Such mandatory registration of farmer’s varieties, as against the voluntary registration option in the PPVFR Act, obstructs the ability of the farmer to sell or barter seeds because many illiterate and poor farmers in India will not be aware of the complexities associated with the registration procedure. Further, by requiring mandatory registration of all seeds, the Seeds Bill ignores the fact that varieties developed by traditional breeding do not pose a threat to environmental safety unlike the seeds developed through genetic engineering. Therefore, there is no rationale to treat farmer’s varieties of seeds on par with other varieties of seeds and make it mandatory

⁴⁹ <http://164.100.24.208/is/committeeR/Agriculture/22ndreport.pdf>. (last visited Nov. 13, 4:56 IST).

⁵⁰ *Id.*

⁵¹ The website of the Indian Parliament contains no information regarding when the discussions on the Report of the Committee and the Seeds Bill will take place.

⁵² http://agricoop.nic.in/seeds/seeds_bill.htm (last visited Nov. 13, 3:54 IST).

⁵³ The Seeds Bill, 2004 cl. 2(29).

⁵⁴ K.M. Gopakumar & Sanjeev Saxena, *Seeds Bill 2004: For Whom?*, 47 JOURNAL OF INDIAN LAW INSTITUTE 490 (2005).

for farmers to register their varieties. Such a mandatory registration of all seeds including farmer's varieties will directly affect farmers' rights recognized in the PPVFR Act because farmers will not be able to sell their seeds until they are registered and hence will turn to the market each time they need seeds for sowing.

The Committee has also expressed its concern regarding the mandatory registration of the farmer's varieties.⁵⁵ The Committee has recommended that clause 13 should make it clear that farmer's varieties are excluded from registration. Again, clause 22 of the Seeds Bill states: "Every person who desires to carry on the business of selling, keeping for sale, offering to sell, bartering, import or export or otherwise supply any seed by himself or by any other person on his behalf shall obtain a registration certificate as a dealer in seeds from the state government". "Dealer" has been defined as a person who carries on the business of buying and selling, exporting or importing seed and includes an agent of a dealer. This definition of a dealer opens the question of whether a farmer is a dealer. The definition of a dealer does not answer the question because it does not exclude farmers from the definition of a dealer. A clue is given in the definition of farmer in the Bill, in clause 2(9), which states that a farmer means "a person who cultivates crops either by cultivating the land himself or through any other person but does not include any individual company trader or dealer who engages in the procurement and sale of seeds on a commercial basis". On the basis of the definition of a "farmer" it can be argued that because the definition explicitly excludes a dealer, a dealer is not a farmer and clause 22 applies only to seed dealers and not to farmers.

However, such an interpretation is problematic because clause 22 starts with the words "every person" without providing any exception. Moreover, the clause does not explicitly state that it applies only to dealers. It states that persons who are carrying on the business of selling and bartering of seeds should obtain a registration certificate as a dealer. Thus, if farmers are also involved in the business of seed selling, and bartering, although it may not be like an organized business activity on a large commercial scale, they will have to obtain the certificate of registration. In other words, this clause also applies to farmers. This clause, read with clause 13, imposes a double obstacle for farmers to sell their varieties because they not only have to register their varieties but also obtain the registration certificate as seed dealers before selling or bartering their seeds.

⁵⁵ Committee Report ¶¶ 28, 29.

The proponents of the Bill may argue that the proposed legislation is not taking away the right of the farmers to sell or exchange seeds because clause 43 of the Bill safeguards that right. Clause 43 states that nothing in the Act shall restrict the right of the farmer to save, use, exchange, share or sell his farm seeds or planting material. This clause may appear to be protective of the rights of the farmers. However, this provision is in conflict with clause 22, that requires “every person” to obtain the registration certificate before selling or marketing seeds, without recognizing any exceptions. Further, the primary reason for conflict between clauses 22 and 43 is the presence of the word “barter”, whose dictionary meaning is also “exchange”, in the former clause.⁵⁶ As the provisions stand in the present Bill, for exchanging seeds, the farmer does not need registration, but will need registration if he or she wants to barter the seeds. This is an ambiguous situation because as pointed out above “barter” also means “exchange”. The Committee has recognized this problem and hence has recommended that the word “barter” should be added in clause 43 so that clause 43 will read as “nothing in the Act shall restrict the right of the farmer to save, use, exchange, barter, share or sell his farm produce and planting material.”⁵⁷

The other onerous obligation imposed on the farmer by clause 43 that dilutes the safeguarding provision is the requirement to sell seeds that conform to the minimum limit of germination, physical purity and genetic purity. This is an onerous obligation when understood in the context in which most farmers operate in India. As mentioned earlier, as many farmers are poor and illiterate, they do not possess the technical information related to genetic purity and the minimum limit of germination of a seed. Therefore, it will be difficult for the farmers to find out whether their seeds satisfy these requirements or not. In fact, the Committee has also stated that most of the farmers in India will not follow these scientific and technical terms and hence may not conform to these standards while selling or bartering their seeds. Mandatory imposition of such onerous obligations indirectly restricts the right of farmers to sell or barter seeds. Recognizing this, the Committee has recommended that this requirement should be deleted.

One of the important provisions of the PPVFR Act that gives strength to farmers’ rights is the disclosure requirement, whereby the breeder, in the registration application, has to give information about the passport data of the parental lines from which the variety has been derived, along with the geographical area in India, which is the

⁵⁶ Philippe Cullet, *Seeds Regulation, Food Security and Sustainable Development*, 40 (32) ECONOMIC AND POLITICAL WEEKLY 3607–13 (2005).

⁵⁷ Committee Report ¶ 83.

source of the genetic material. However, the Seeds Bill does not have a disclosure requirement to either disclose the passport data or the geographical area, which is the source of the genetic material. This, in turn, implies three things that will severely undermine farmers' rights given in the PPVFR Act. First, it will encourage the misappropriation of genetic resources. Commercial breeders could register farmer's varieties as their varieties under the Seeds Bill without going through the PPVFR Act, as under the Seeds Bill they do not need to disclose the source of origin. Second, no benefit sharing will take place because it will not be known from where the commercial breeder has taken the genetic resource used in developing its varieties. Absence of a disclosure requirement may result in the commercial breeders using a farmer's variety in developing a new variety without paying anything to them. Third, as there is no requirement to disclose information about the parental line, the breeder will have exclusive information about the parental lines. This information can be used by the breeder as a trade secret to enjoy market monopoly.

Further, the Seeds Bill does not provide any criteria for registration, unlike the PPVFR Act that requires the NDUS criteria. Hence, any variety could be registered. Also, the Seeds Bill does not have a CL provision. In other words, under the Seeds Bill, unlike the PPVFR Act, subsequent to registration, the state has no power to issue a CL even if the reasonable requirements of the public for seed or other propagating material are not being satisfied. The argument here could be that the Seeds Bill is not an IPR law; therefore, it does not have a CL provision. However, the real substance and character of the Seeds Bill is that it impacts IPR laws like the PPVFR Act. Therefore, not being an IPR law cannot be an argument in favour of not having a CL provision. A CL provision gives the policy space to countries to pursue or protect any public interest as and when the situation may arise. The Seeds Bill, if passed in its present form, will imply that even in cases where a seed is not available to the general public at reasonable prices, a CL cannot be issued. The issuing of CL is also convoluted because no information about parental lines is disclosed at the time of registration, which means that the registering authorities do not have the knowledge needed to produce the same seeds. The commercial breeder could use this knowledge as a trade secret to enjoy market exclusivity.

A final point in this analysis is that if a conflict arises between the new seeds law⁵⁸ and the PPVFR Act, there is nothing to suggest that the Seeds Bill will trump over the PPVFR Act. In other words, in case of a conflict, depending on the interpretative techniques adopted by

⁵⁸ In case the Seeds Bill is passed in the present form by the Indian Parliament.

the courts, even the PPVFR Act can trump the new seeds law. However, notwithstanding this interpretative legal jugglery that the courts may perform to decide which provision of which act will prevail in case of conflict, existence of two conflicting statutes will create confusion about the rights and obligations of different actors involved in the process of plant variety protection. Such a conflict may give rise to conflict claims and counter-claims, eventually leading to disputes. Therefore, it is important for the Indian Parliament to clarify the law rather than to leave it to the courts to interpret and determine the rights and obligations of the actors involved.



WOMEN EMPOWERMENT THROUGH REDESIGNING SYLLABI AT TERTIARY LEVEL

Mr. Ashish Govindrao Deshpande*

Introduction

“The divine are extremely happy where women are respected; where they are not, all actions (projects) are fruitless.” In spite of such a wonderful quote, in reality, women are subjected to male domination and violence. Unfortunately, in daily news line, at least 4-5 cases we can see about the women violence in any of the form.

Human beings are divided into man and woman on the basis of the sex i.e., male and female. Proper education is indispensable to change the situation. Lack of women education can be an impediment to the country’s economic development.¹ Women empowerment through education is crucial for Indian progress worldwide and to curtail violence against the women.

“Education” as per Oxford Dictionary means a process of receiving or giving systematic instruction, especially at a school or university.² “Empowerment” means give (someone) the authority or power to do something.³ The education must be compatible to the need of time. Syllabi play a fundamental part in education process; and specifically at tertiary level education, it should be very carefully designed to cope with the situation. Unfortunately, in India, the syllabi at tertiary level are not compatible with the challenges before the women. Indian women cannot get proper education of self defense and protection compulsorily by the education institutions.

If the gang rape victim in the *Delhi Gang Rape* case (Incidence happened in Delhi during December 2012) would have been properly educated and trained to how to cope up with the situation and restraint, she might not have been raped and brutally murdered. Nellie McClung advised the society never to underestimate the power of a woman. Education a woman can be likened to educating the

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¹ N. Sharmila & A.C. Dhas, *Development of Women Education in India* (Feb. 16, 2010, 00.35 UTC), <http://mpraub.uni-muenchen.de/20680/MPRA Paper No. 20680>.

² <http://oxforddictionaries.com/definition/english/education> (last visited Nov. 17, 2013).

³ <http://www.oxforddictionaries.com/definition/english/empower> (last visited Nov. 17, 2013).

whole family because of the role they play in families.⁴ But that education must be coping with all the challenges before the women.

Without educating the women of the country we can't hope for a developed nation. Women play a vital role in the all round progress of a country. If we want to make democracy successful, women must be educated. They are the real builders of happy homes.⁵

Women plays significant role in forming homes. Happy home constitutes happy nation and ultimately happy world. Every woman is a potential mother. The future of a child depends on how it is brought up and educated in child hood. And educated mother is naturally expected to bring up and educated her children better then and uneducated mother. Napoleon Bonaparte said that: "Give me a educated mother; I will give you an educated nation".⁶ Hence, proper education compatible with the need of hour is indispensable to empower women and to increase national growth.

Nature of Indian Women

Indian women are by nature, soft spoken, physically delicate and more sentimental comparing to men. Indian women carry great potential. From very beginning Indian prays Goddess Durgamata for power and protection against evils; Goddess Laxmi for wealth prosperity; Goddess Saraswati for educational growth; and so on. Generally during Navaratra festivals, we pray for these goddesses with full faith. However, instead of momentary worships continuous women empowerment of women through proper education through curriculum redesigning at tertiary level is a need of time for Indian women.

In reality the rule is 'might is right'. 'Survival of fittest' is a bitter truth of the earth. Indian women carry her responsibilities in various capacities during her life time. She is daughter; she is a wife, a mother a grandmother and all. But Indian education pattern is more employment oriented and hardly practical oriented. Under tertiary syllabi for women, women and laws, women empowerment, women physical fitness and self defense, etc., fundamental courses are not mandatory one. Women weaknesses lead to face them violence. That may be in the form of chain snatching, eve teasing, rape, murder, etc.

⁴ <http://www.womenempowermentinindia.com/importance-of-women-education/> (last visited Nov. 14, 2013).

⁵ <http://www.preservearticles.com/2011081510624/492-words-essay-on-the-importance-of-female-education-in-india.html> (last visited Nov. 14, 2013).

⁶ <http://essay-24.blogspot.in/2013/03/importance-of-female-education-it-is.html> (last visited Nov. 14, 2013).

Kinds of Indian Women

Indian women are a mixture of rural and urban, poor and rich, literate and illiterate women. In order to enhance women empowerment through education, they need to treat separately as per their status and understanding level.

Indian territory is divided into rural and urban areas. Hence, the skill set required at rural level women is different from the urban women. On the basis of financial conditions, women are divided in to rich and poor. Poverty is one of the major hindrances of such women. Poverty leads to illiteracy. Poor women are engaged in wining bread and butter for their family from their childhood; it affects their education, career and such women remains less educated and empowered compared to rich women in the society.

Terms Defined

Following words are used in this research paper:

- “Women”: A female person associated with a particular place, activity, or occupation.⁷
- “Syllabi”: The subjects in a course of study or teaching.⁸
- “Empowerment”: To equip or supply with ability; enable.⁹
- “Curriculum” means,¹⁰
 - all the courses of study offered by an educational institution;
 - a group of related courses, often in a special field of study.
- “Violence”: It connotes aggression, hostility, brutality; cruelty, sadism etc., are the dimensions of the term violence. As per dictionary meaning violence is:¹¹
 - physical force exerted for the purpose of violating, damaging, or abusing; crimes of violence;
 - the act or an instance of violent action or behavior;

⁷ <http://www.oxforddictionaries.com/definition/english/woman> (last visited Nov. 29, 2013).

⁸ <http://www.oxforddictionaries.com/definition/english/syllabus> (last visited Nov. 29, 2013).

⁹ <http://www.thefreedictionary.com/empower> (last visited Nov. 29, 2013).

¹⁰ <http://www.thefreedictionary.com/curriculum> (last visited Dec. 1, 2013).

¹¹ <http://www.thefreedictionary.com/violence> (last visited Dec. 1, 2013).

- intensity or severity, as in natural phenomena; untamed force; the violence of a tornado;
- abusive or unjust exercise of power;
- abuse or injury to meaning, content, or intent; do violence to a text;
- vehemence of feeling or expression; fervour.

Major Finding

- In education process, tertiary level syllabi for women is not compatible with the recent challenges of women violence in India.
- Redesigning syllabi at tertiary level education can reduce violence against women in major extent.

Methodology

In order to get results the doctrinal methodology is used by the author.

Existing Syllabi at Tertiary Level and New Ray of Redesign Syllabi at Tertiary Level

India is a union of states. Education is a matter under the concurrent list. Hence, the central government as well as the state government is empowered to draft curriculum and offer education.

We consider languages are essential; mathematics, science, technology etc., are indispensable. In order to protect character of women, their physical protection is a need of hour. No male person will dare to attack on a physically fit and strong woman, and it would resist the violence in Indian society.

At teenage age, the learning process is considered much high comparing to primary and secondary level education. Hence, that period is a golden period to inculcate proper education for women. Generally 11th standard onwards the tertiary education starts.

Generally tertiary level is a stage of everybody's life where education, skill building, personality development processes goes on. The *modus operandi* of the individual is polished at this time.

At this age, specifically for women is considered as a danger zone. Hence, much physical protection is needed at this specific age. Hence, in this period, if Indian women are given physical fitness education, then that women can protect her from evil attacks forever.

Indian education pattern is very formal one and is concentrated on the employment generation. This formal education or theoretical education is need of time for getting fitted jobs, earning money, wealth, etc. However, in order to live better in the society, physical education like Judo, Karate is a need of time.

Violence against women is not a new or recent phenomenon women have been the victims of violence all through the age, in all societies, cultures regions or religious communities in the world. In the Vedic period, Indian women enjoyed a relatively comfortable position. Gradually violence against them began to be practiced; the doors of educational, economic, social, political and cultural opportunities were gradually closed for them. In an average, generally, 2-3 news we can trace out about women violence. Might is right. Goats and chicks are subjected to kill before Gods and Goddesses. Tigers, lions are all the time respected and never be subjected to offer for any God.

If we go in to the root, the offenders take undue advantages of the physical weakness and they commits rapes, outrages modesty, etc., offences which fatal for future women empowerment in India.

Till date, we have lost much potential women, hence in order to prevent women violence, there is an urgent need to educate women with full skill set of self defense, and protect her person and property.

Legislative Framework for Safeguarding Indian Women

• Indian Constitutional Law

Article 14 advocates equality before law and equal protection of laws. Article 15 (3) authorises government to pass special laws to protect the interest of women and children. Article 16 protects equality of men and women in government services; Article 21 speaks about right to life and personal liberty. The courts have interpreted very widely the right to life and personal liberty. In several cases, this article has come to the rescue of women who have been wronged. In the case of *Bodhisatva Gautam v. Subhra Chakrabarti*,¹² the Supreme Court of India awarded interim compensation to the rape victim. Soon after that in the case of *Vishaka v. State of Rajasthan*,¹³ due to lack of any specific law, the Supreme Court gave certain guidelines to prevent sexual harassment of women in workplace.¹⁴

¹² A.I.R. 1996.

¹³ A.I.R. 1997.

¹⁴ <http://hanumant.com/WomenAndLaw.html> (last visited Nov. 17, 2013).

Under Directive Principles of the State Policy *vide* Article 39(e) there are certain principles of policy to be followed by the state: the state shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means to livelihood.

Article 40 and Article 243(D) advocate 1/3 seats to be reserved for women at village *panchayats*. Under Fundamental Duties, Article 51 A(e) says that it is the duty of the citizens to renounce practices that are derogatory to the dignity of women.

• **Central Statues**

Following are the laws directly or indirectly regulating Indian women's rights in India:¹⁵

- The Employees State Insurance Act, 1948
- The Plantation Labour Act, 1951
- The Family Courts Act, 1954
- The Special Marriage Act, 1954
- The Hindu Marriage Act, 1955
- The Hindu Succession Act, 1956 (with amendment in 2005)
- The Immoral Traffic (Prevention) Act, 1956
- The Maternity Benefit Act, 1961 (Amended in 1995)
- The Dowry Prohibition Act, 1961
- The Medical Termination of Pregnancy Act, 1971
- The Contract Labour (Regulation and Abolition) Act, 1976
- The Equal Remuneration Act, 1976
- The Prohibition of Child Marriage Act, 2006
- The Criminal Law (Amendment) Act, 1983
- The Factories (Amendment) Act, 1986
- The Indecent Representation of Women (Prohibition) Act, 1986
- The Commission of Sati (Prevention) Act, 1987
- The Protection of Women from Domestic Violence Act, 2005

Along with this there are special initiatives for women like National Commission for Women, Reservation for Women in Local Self-Government, the National Plan of Action for the Girl Child (1991-2000), and National Policy for the Empowerment of Women, 2000.

¹⁵ <http://hanumant.com/WomenAndLaw.html> (last visited Nov. 17, 2013).

Continuous Government Initiatives

Women, by nature are a petite and delicate one. In comparison to the males women are weak and sentimental one. These shortcoming offers commission of sexual assaults, chain snatching, etc., offences against the women. Along with suitable legislations, Indian women needs to physically train to tackle such attacks alone. No male will dare to attack or snatch chain of physically sound and alert women. Hence, physical fitness training is must for women at least at tertiary level from the government. The government should offer suitable programmes for women empowerment through education. It can take assistance from the private educational institutions, media and the Non Governmental Organisations (NGOs) to get the women empowerment programmes done successfully. Maximum participation of commerce, vocational, management and the law colleges to create women empowerment by availing such programmes amongst students in urban and rural areas in order to enhance women education would serve the purpose. Local autonomous bodies from *grampanchayat*, municipal corporations shall assist in execution of the women protection policies and the programmes. Still the destination of violence free society will not be achieved in a night. For this reason continuous rigorous work by the government is a need of hour.

Education Pattern

Indian education pattern is more theoretical and aimed at employment generation. Various skill building programmes needs to be involved in the curriculum. However, to protect the interest of women, the course “women empowerment and protection” needs to be added in all of the curriculums of the state and private universities. Along with formal education, Indian women needs to get training of physical education including Judo, Karate, Boxing, etc., aggravated form of fighting.

Media

Media plays a fundamental role in the publicity of any event, may good or bad. Unfortunately, now a days media is concentrated on stunt scenes, hot political discussions, promotion of specific goods and services etc., agendas. Along with these things, media should take more initiative for women empowerment through education of self defence. Media has that power. Media, being forth pillar of the democracy, shall impartially and incessantly work for the women empowerment through education. Media needs to sharpen their weapons to bring before society the omission of the specific local

autonomous bodies or the commendable works of any organisation for women empowerment through physical fitness and self defence education. Television, radio, press etc., has a wide power to create women education and enhance the women empowerment. It can create a good impact on the tribal or remote women who are detached from the main stream of education. Because of technological development, it is possible to target such remote areas for their educational push through media.

Role of NGOs

Generally, after commission of any heinous crime, NGOs protests, offers helps to the victims and family. But, as prevention measures, if NGOs take initiatives for training women who are away from the educational opportunities, then it can bring miracle. Along with the government organizations, NGOs can contribute for women empowerment through physical fitness and self defence education. *Vishakha Guidelines* and Bill is one of the commendable products of NGOs initiative. Most of the NGOs are interested in sponsoring for art, drama, cultural events competition, big hoardings etc., stunt and publicity-based programmes. They spend crores of rupees for those momentary entertainment programmes. Hence, those NGOs needs to take initiatives to create more and more women empowerment by sponsoring and coordinating women education programmes along with the local autonomous bodies and the schools and colleges who are conducting those programmes.

Summary and Conclusion

Syllabi in the education process plays vital role in shaping nation. With need in the society, the syllabi also need to be amended to cope with increasing violence against women. Women empowerment through redesigning syllabi at the tertiary level is a cooperative destination. Cent percent women empowerment is a challenging accomplishment, but not an impossible task. Dedicated, sincere and continuous efforts from all segments will bring success. A well coordination amongst the governmental bodies, NGOs, local autonomous bodies, and all sorts of women would boost the self defense education and skill set at tertiary level. It leads to enhance potential level o the nation. Hence very soon India will be an ideal example of powerful and terror free women.

A COMPARATIVE ANALYSIS OF THE LAW RELATING TO ANTI-ARBITRATION INJUNCTIONS

Mr. K.R. Avinash*

Introduction

With the advent of globalization and with the role of information technology becoming greater in global business, import, export, outsourcing and several other economic activities across borders have increasing at exponential rates, which has created a pressing need for better adjudication of disputes between parties indulging in cross border economic activities.¹ International arbitration has developed as a solution to these needs of parties engaging in international trade, wherein parties from different countries agree to settle their disputes in a particular forum like the International Centre for Settlement of Investment Disputes (ICSID), the International Criminal Court (ICC or ICt), the Singapore International Arbitration Centre (SIAC) etc., or agree to settle their disputes through ad hoc arbitral tribunals.² With the number of international arbitrations increasing, anti-suit/anti-arbitration injunctions have assumed a significant role in this context. It has become very common for one of the parties to institute a parallel court proceedings in another jurisdiction to frustrate the arbitration proceeding which has become a major menace in international arbitration. It is to curb such practices that common law courts have developed the remedy of anti-suit injunctions against parallel court proceedings that are vexatious and oppressive and courts have granted this remedy at all stages of arbitration proceedings, i.e., before, during or after the arbitration proceedings.

The grant of injunctions by courts can generally be classified into two categories, namely anti-suit injunctions granted in favour of arbitration and anti-suit injunctions granted against arbitration, widely known as anti-arbitration injunctions.³ Anti-suit injunctions can further be classified into injunctions granted by the court and

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¹ Pierre Karrer, *Interim Measures Issued by Arbitral Tribunals and the Courts: Less Theory, Please*, in ICCA CONGRESS SERIES NO. 10, INTERNATIONAL ARBITRATION AND NATIONAL COURTS, THE NEVER ENDING STORY 97, 106 (A.J. van den Berg ed., 2001).

² Sandrine Clavel, *Anti-suit Injunctions Et Arbitrage*, 2001 REV. ARB. 669.

³ JEAN FRANÇOIS POUURET & SÉBASTIEN BESSON, DROIT COMPARÉ DE L'ARBITRAGE INTERNATIONAL (2002).

injunctions granted by the arbitral tribunal.⁴ This paper will deal with the concept and context of international arbitration in the first part; will analyze the origin, concept and scope on anti-suit injunctions in international arbitration in the second part and will examine the impact of anti-arbitration injunctions in international arbitration in the third part. This study will be along the lines of injunctions granted by courts, by arbitrators and in favour of arbitration and against arbitration as introduced earlier. The last part of this paper will deal with the concept of anti-suit and anti-arbitration injunctions in India and shall seek to establish a comparison between the principles for granting such injunctions in contemporary jurisdictions.

The Concept and Context of International Arbitration

As stated earlier, owing to the process of globalization, commercial transactions across borders have been more complex and sophisticated and disputes arising therein are no longer pertaining to one jurisdiction but involve parties and law from more than one jurisdiction.⁵ To resolve such conflicts, parties have several options such as adjudicating the dispute in the court in one's own jurisdiction; adjudicating it in the courts in the opposite party's jurisdiction or resorting to an out of court adjudication mechanism such as arbitration.⁶ Today, parties more often than not opt for the third option, i.e., an out of court settlement for its perceived benefits as compared to submitting to the jurisdiction of some court of law.⁷ A few advantages stated by authors include (i) an arbitral tribunal is considered a more neutral forum as compared to a state court owing to suspected bias, favouring the local party;⁸ (ii) there exists complete party autonomy in choice of law, choice of forum, choice of procedure, powers of arbitrators and others; (iii) resolution of conflict is faster in arbitrations; (iv) subject matter expertise can be ensured in choice of arbitrators; (v) proceedings can be maintained confidential, thereby not affecting value of shares in the stock exchange, company reputation and others; (vi) few authors have also opined that due to the consensual nature of arbitration proceedings, parties readily submit to the jurisdiction of arbitrators and comply with the award.⁹

⁴ FOUCHARD GAILLARD GOLDMANN ON INTERNATIONAL COMMERCIAL ARBITRATION ¶ 1319, at 718 (E. Gaillard & J. Savage eds., 1999).

⁵ Pierre Karrer, *supra* note 1.

⁶ Ricardo Quass Duarte, *Anti-Suit Injunctions in the Context of International Commercial Arbitration*.

⁷ *Id.*

⁸ CHRISTIAN BÜHRING-UHLE, LARS KIRCHHOFF & GABRIELE SCHERER, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* 17 (Kluwer Law International 2d ed. 2006).

⁹ *Coopers v. Ateliers De La Motobecane, S.A.*, 57 N.Y.2d 408, 414 (N.Y. 1982).

It is submitted that with the increasing number of member nations to the New York Convention, the recognition and enforcement of arbitral awards is also increasing thereby giving parties certainty and ensuring *res judicata* in the adjudication of their disputes. As the Hon'ble Court observed: “[W]hen parties choose arbitration, they trade the procedures and opportunity for review of the court for simplicity, informality and expedition of arbitration”.¹⁰

Similarly, several authors have pointed out several disadvantages and shortcomings of arbitration too such as the proceedings being highly expensive due to the fact that the cost of arbitrators as well as counsels for the arbitration has to be borne by the parties;¹¹ the arbitration proceedings need continuous assistance from courts such as support for investigation, collecting evidence, enforcing awards and others.¹² Further, where the execution of the decree is not possible within the state where the award is made due to lack of assets of the losing party in the state, then support from foreign courts is required which shall test the arbitration award in accordance with its domestic law and public policy.¹³

Irrespective of these disadvantages, arbitration presents itself as an effective dispute resolution mechanism as its advantages outweigh the possible disadvantages. This can be seen from the fact that arbitration which was once only considered as possible in western common law countries today has become highly famous in Asian as well as South American countries.¹⁴ It is reported that in 1963, nearly 75% of the cases in the ICC were from European countries and 20% of the cases came from Americas.¹⁵ However, this scenario has drastically changed since the 1990s with the number of cases from European countries to the ICC going below 50%.¹⁶ Also, civil law countries from Latin America have also adopted arbitration as a means of dispute resolution with over 10% of the cases in the ICC arising from these states.¹⁷ Owing to these developments, it is no longer the case that only European and American countries resort to

¹⁰ Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

¹¹ RUSSEL J. WEINTRAUB, INTERNATIONAL LITIGATION AND ARBITRATION 605 (Carolina Academic Press 5th ed. 2006).

¹² STEPHEN C. YEAZELL, CIVIL PROCEDURE 292 (Aspen Publishers 7th ed. 2008).

¹³ Phool Chand v. OOO Pairot.

¹⁴ Philippe Fouchard, *L'arbitrage Et La Mondialisation De L'économie*, in PHILOSOPHIE DU DROIT ET DROIT ÉCONOMIQUE: QUEL DIALOGUE? MÉLANGES EN L'HONNEUR DE GÉRARD FARJAT 380, 383 (Frison-Roche 1999).

¹⁵ Arnaldo Wald, *As Anti-Suit Injunctions No Direito Brasileiro*, 9 REVISTA DE ARBITRAGEM E MEDIAÇÃO 29, 36 (2006).

¹⁶ *Id.*

¹⁷ BERNARDO M. CREMADES, ENFORCEMENT OF ARBITRATION AGREEMENTS IN LATIN AMERICA 1 (Kluwer Law International 1999).

arbitration as a means to dispute resolution, but also several developing countries such as India, China, Brazil, Argentina and Canada amongst others also have also increasingly participated in arbitration.¹⁸

Origin, Concept and Scope of Anti-Suit Injunctions

The term ‘anti-suit injunction’ can be defined as an order of a court, requiring the injunction defendant not to commence, or to cease to pursue, or not to advance a particular claim(s), or to take steps to terminate or suspend, court or arbitration proceedings in a foreign jurisdiction.¹⁹ The concept of anti-suit injunctions are said to have evolved from the ordinary injunction, which used to be granted by the English Courts of Chancery when the English Common Law Courts’ judgment violated the principles of equity.²⁰ The earliest instance of granting such injunction can be traced back to the 17th century case of *Love v. Baker* wherein the court for the first time granted such injunction.²¹ However, such injunctions did not become common till the 19th century when the British courts started granting injunctions to restrain proceedings in other jurisdictions under the British Empire.²² Similarly, the concept of granting anti-suit injunctions also developed in the United States of America (hereinafter the U.S.) courts in the early 19th century wherein such injunctions were used to restrain parties from instituting suits in different states within the U.S. for the same cause of action.²³ It is only after the 1970s did the U.S. courts started issuing international anti-suit injunctions.²⁴ Today, anti-suit injunctions have grown as a remedy not only in common law jurisdictions, but also in civil law jurisdictions such as Brazil, Venezuela and others.²⁵

With the growth of anti-suit injunctions as a remedy, several approaches have evolved in granting this remedy.²⁶ While the U.S. courts have recognized their power to grant anti-suit injunctions, they have subjected themselves to the satisfaction of two criteria subject to which such injunction shall be granted namely (i) the

¹⁸ *Id.*

¹⁹ THOMAS RAPHAEL, *THE ANTI-SUIT INJUNCTION* 4 (Oxford 2008); *See also* GEORGE A. BERMAN, *TRANSNATIONAL LITIGATION IN A NUTSHELL* 113-114 (West 2003).

²⁰ RAPHAEL, *Id.* at 42-43.

²¹ *Id.* at 42-43.

²² *Id.* at 42-43.

²³ George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L. 589, 594 (1990).

²⁴ *Id.* at 593.

²⁵ Emmanuel Gaillard, *Anti-suit Injunctions Issued by Arbitrators*, in *INTERNATIONAL ARBITRATION 2006: BACK TO BASICS?* 235, 235 (Albert Jan Van Den Berg 2008).

²⁶ George A. Bermann, *supra* note 23.

parties to the suit in U.S. as well as the foreign suit should be the same and (ii) the issues involved in both the suits should be same.²⁷ While these are the basic principles that govern the granting of anti-suit injunctions, other factors such as principles of international comity, balance of convenience and others play an important role.²⁸ However, these factors are subject to the competing interests in protecting the courts' jurisdiction, discouraging forum shopping and vexatious litigation, and avoiding conflicting decisions.²⁹ It is in balancing these factors that the U.S. Courts have evolved several approaches in granting the remedy of anti-suit injunction.³⁰

While the third, sixth, eighth and D.C. Circuit courts have adopted the 'conservative standard';³¹ the fifth, seventh and ninth circuit courts have adopted a liberal standard in granting injunctions.³² The first and second circuit courts have adopted the more amicable 'middle ground standard' in granting this remedy.³³ While adopting the conservative standard, courts have given more importance to principles of international comity and granted injunctions only when the principles of *res judicata* apply to bar foreign proceedings or the foreign proceedings in against U.S. public policy.³⁴ On the other hand, courts adopting the liberal approach have placed greater emphasis on equitable principles as compared to the principles of international comity.³⁵ These courts also consider the principles of international comity while granting injunctions but do not restrict themselves from granting such remedy while the same in equitable unlike the courts adopting the conservational approach.³⁶ The courts adopting the middle ground standard have tried to find a balance between the conservative and liberal approach by laying emphasis on principles of international comity to create a rebuttal presumption

²⁷ *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F. 2d 33 (2d Cir. 1987).

²⁸ *E.g., European Court of Justice Prohibits Anti-Suit Injunctions in Favor of Arbitration between National Courts of Member States*, STAY CURRENT, Mar. 13, 2009.

²⁹ *China Trade & Dev. Corp. v. M.V. Choong Yong*, *supra* note 27.

³⁰ Ricardo Quass Duarte, *supra* note 6.

³¹ *Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods., N.V.*, 310 F. 3d 118, 125, 128 (3d Cir. 2002); *Gau Shan Co. v. Bankers Trust Co.*, 956 F. 2d 1349, 1352-54 (6th Cir. 1992); *Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F. 3d 355, 361-63 (8th Cir. 2007).

³² *Kaepa, Inc. v. Achilles Corp.*, 76 F. 3d 624 (5th Cir. 1996); *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F. 3d 425, 431-33 (7th Cir. 1993); *Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League*, 652 F. 2d 852, 856 (9th Cir. 1981).

³³ *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F. 3d 11, 17-19 (1st Cir. 2004); *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F. 2d 33 (2d Cir. 1987).

³⁴ *Karaha Bodas Co. LLC v. Perusahaan*, 264 F. Supp. 2d 470 (S.D. Tex. 2002), *rev'd* 335 F. 3d 357 (5th Cir. 2003).

³⁵ *Gen. Elec. Co. v. Deutz AG*, 270 F. 3d 144, 160 (3d Cir. 2001).

³⁶ *Id.*

against the issuance of an injunction.³⁷ If these courts find it equitable and necessary in light of the facts and circumstances of the case to grant an injunction, then such injunctions are granted.³⁸

Like the U.S. courts, the English courts also possess the power to grant anti-suit injunctions by virtue of Section 37(1) of the Supreme Court Act, 1981.³⁹ It exercises this power in cases where the following two conditions are satisfied, namely (i) the court must be able to assert jurisdiction over the claimant to the foreign litigation proceedings, thereby preventing it from carrying on those proceedings, so that the dispute is resolved in a manner as agreed to by the parties and (ii) the court must be satisfied that it is equitable to do so.⁴⁰ The courts have expressed other criteria for the proceeding being oppressive and vexatious; the proceeding being against English public policy; the proceeding being an illegitimate interference with the English process; to protect the jurisdiction of English courts and others.⁴¹

Thus, the criteria for granting anti-suit injunctions by the U.S. and English courts are similar to the greater extent except that the courts in England treat applications for anti-suit injunctions from Non-European Union (hereinafter the EU) parties different from applications from parties belonging to members from the EU.⁴² This difference in treatment in English courts arises by virtue of Article 27 of the Brussels Regulation and its interpretation by the European Court of Justice (ECJ) in *Turner v. Grovit* to preclude English courts from granting anti-suit injunctions against courts in EU countries, even if such proceedings are vexatious and oppressive.⁴³

Although the remedy of anti-suit injunctions are being used more frequently these days and the U.S. and English courts have granted them quite often, the same is not without opposition, especially when the order is made, enjoining commencement or continuation of proceedings in another country.⁴⁴ It is argued that although such injunctions are directed against individuals, they have an effect of interfering with the jurisdiction of another sovereign from deciding

³⁷ See *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, *supra* note 33.

³⁸ *Id.*

³⁹ *Pena Copper Mines Ltd v. Rio Tinto Co. Ltd.*, (1911) 105 LT 846.

⁴⁰ *Navigation Maritime Bulgare v. Rustal Trading Ltd.*, (2002) 1 Lloyd's Rep at 106.

⁴¹ *Starlight Shipping Co. v. Tai Ping Insurance Co. Ltd.*, (2007) EWHC 1893 (Comm).

⁴² Arif Ali, *Anti Suit Injunctions in Favour of International Commercial Arbitration in the U.S. and the U.K.* (2008) INTL. ALR Issue 1, at 13.

⁴³ *Turner v. Grovit*, (2005) 1 AC 101.

⁴⁴ Frédéric Bachand, *The UNCITRAL Model Law's Take on Anti-Suit Injunctions*, in IAI SERIES ON INTERNATIONAL ARBITRATION NO. 2, ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 87, 102-103 (E. Gaillard ed., 2005).

which cases it should hear⁴⁵ and is also considered an offence to international comity.⁴⁶ Authors have also argued that such injunctions have the ‘potential for embarrassing the political branches of government and disturbing relations with a foreign country’.⁴⁷ Another argument against the issuance of anti-suit injunctions is the principle of *kompetenz-kompetenz* which recognizes the inherent power of courts to determine their own jurisdiction.⁴⁸ Owing to these reasons, several problems have stemmed in the efficient adjudication of disputes through international arbitration. One author cites the *Laker Airways* case as an episode to show how a battle of anti-suit and counter anti-suit injunctions may be used to frustrate the purpose of arbitration.⁴⁹

On the other hand, supporters of anti-suit injunctions argue that since the enjoining court issues an injunction against the defendant who is within its own jurisdiction, the court does not interfere with the process of administration of justice in a foreign country.⁵⁰ It is submitted that this argument although made very frequently is not very convincing as enjoining a party to a proceeding from continuing the same or preventing a party from commencing a proceeding indeed has the effect of interfering with the jurisdiction of a foreign court.⁵¹ As observed by the Hon’ble Court in *China Trade and Dev. Corp. v. M.V. Choong Yong*: “[T]he fact that the injunction operates only against the parties, and not directly against the foreign court, does not eliminate the need for due regard to principles of international comity, because such an order effectively restricts the jurisdiction of the court of a foreign sovereign”.⁵²

Anti-Suit Injunctions and International Arbitrations

With growing complexity in international disputes and their resolution mechanisms, international commercial arbitration has become a fertile landscape for anti-suit injunctions, notwithstanding the lack on statistics on this regard.⁵³ Anti-suit injunctions are

⁴⁵ Berman, *supra* note 23 at 597.

⁴⁶ *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

⁴⁷ Berman, *supra* note 23 at 597.

⁴⁸ Laurent Lévy, *Anti-Suit Injunctions Issued by Arbitrators*, in IAI SERIES ON INTERNATIONAL ARBITRATION NO. 2, ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 115, 128 (E. Gaillard ed., 2005).

⁴⁹ Bermann, *supra* note 23, at 608.

⁵⁰ RAPHAEL, *supra* note, at 16.

⁵¹ Bermann, *supra* note 23, at 589.

⁵² *China Trade & Dev. Corp. v. M.V. Choong Yong*, *supra* note 27.

⁵³ Julian D.M. Lew, *Anti-Suit Injunctions Issued by National Courts to Prevent Arbitration Proceedings*, in IAI SERIES ON INTERNATIONAL ARBITRATION NO. 2, ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 25, 33 (E. Gaillard ed., 2005).

granted either by the arbitrators to preserve the jurisdiction of arbitral tribunals, to safeguard the effectiveness of the award and to prevent the aggravation of the dispute whereas such injunctions are granted by domestic courts to favour or prevent arbitration.⁵⁴ As already noted, such injunctions can be granted at any stage of the proceedings.

Anti-Suit Injunctions Ordered by Arbitrators

It may be noted that while discussing the disadvantages of arbitration, one of the disadvantages stated was its continuous need for support from courts for effectively conducting the arbitration proceeding. This brings us to an important question as to whether the arbitrator possesses any power to order an injunction against instituting a proceeding in a court of law. To answer this question, it is important to understand the scope of the arbitration agreement, which is the primary source of the powers possessed by the arbitral tribunal.⁵⁵ Arbitration being a consensual method of dispute resolution, parties are free to determine through their agreement whether the tribunal shall possess the powers to grant an anti-suit injunction or not.⁵⁶ If the parties fail to determine such powers, then the same shall be governed by the curial law of the arbitration proceeding, i.e., the *lex arbitri*.⁵⁷

To this end, several conventions which have been adopted by states in their domestic arbitration statutes do not provide for a remedy of anti-arbitration injunction. E.g., the New York Convention does not mention whether the arbitrators have a power to grant anti-suit injunction. Similarly, the UNICITRAL Model Law also does not specifically address this issue. However, it is argued that by virtue of Article 17 of the Model Law, which provides for the power of arbitral tribunal to order interim measures, recognizes the power of arbitrators to grant anti-suit injunctions.⁵⁸ One makes this argument in light of the amendment made in 2006 to the aforesaid provision

⁵⁴ Ricardo Quass Duarte, *supra* note 6.

⁵⁵ *E.g.*, The English Arbitration Act, 1996 allows the parties to freely “agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings” (§ 38.1), including “power to order on a provisional basis any relief which it would have power to grant in a final award” (§ 39.1).

⁵⁶ *E.g.*, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“Washington Convention”) art. 47.

⁵⁷ Konstantinos D. Kerameus, *Anti-Suit Injunctions in ICSID Arbitration*, in IAI SERIES ON INTERNATIONAL ARBITRATION NO. 2, ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 131, 136 (E. Gaillard ed., 2005).

⁵⁸ UNCITRAL Model Law on International Commercial Arbitration art. 17,
available at

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

after specifically considering the issue of the arbitrators' power to issue anti-suit injunctions.⁵⁹ Similarly, the ICC Rules of Arbitration are also silent about this issue, although authors recognize the roots of this power in the principle of *kompetenz-kompetenz* read with Article 6(2) and Article 23(1) of the Rules which recognize the principle of *kompetenz-kompetenz* and the power of the tribunal to order any interim measure it deems appropriate respectively.⁶⁰

Notwithstanding the silence or ambiguity in international law and domestic statutes regarding the power of an arbitral tribunal to grant anti-suit injunctions, it is submitted that the tribunal possesses such powers and the same is well founded in the principles of *kompetenz-kompetenz*.⁶¹ It is submitted that the power to determine one's own jurisdiction includes the power to protect the same and to issue all such orders and directions to this end.⁶² The effect of any such injunction which may be granted by the arbitrator is not in the nature of enjoining the courts' jurisdiction but is in the nature of a remedy of specific performance to ensure that a party which agreed to resolve its disputes through arbitration complies with the same.⁶³ The first case at the ICSID, where such an injunction was granted was in the case of *Holiday Inns SA v. Morocco* in the year 1972.⁶⁴ Subsequently, several orders of this nature have been issued by the ICSID.⁶⁵ In the case of *Republic of Ecuador v. Occidental Exploration & Production*, the Hon'ble Court while rejecting the plea of the applicants to vacate an injunction granted by the arbitral tribunal to desist from raising any claim in Ecuadorean courts which has already been dealt with by the tribunal, the court observed that the tribunal was well within its powers to make such orders.⁶⁶ Similarly, there have been several instances in the ICC where such injunctions have been granted to protect arbitration proceedings.⁶⁷

However, the issuance of such injunctions is not without problems. As already submitted, the issue of the arbitral tribunals

⁵⁹ Emmanuel Gaillard, *Anti-suit Injunctions Issued by Arbitrators*, in INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 235, 235 (Albert Jan Van Den Berg 2008).

⁶⁰ Washington Convention arts. 6, 13.

⁶¹ Gaillard, *supra* note 59, at 238.

⁶² Universally accepted principle recognized in India in *BALCO v. Kaiser Aluminium* (2012) 9 SCALE 333.

⁶³ Gaillard, *supra* note 59, at 239.

⁶⁴ *Holiday Inns S.A. and Ors. v. Morocco*, ICSID Case No. ARB/72/1.

⁶⁵ See ICSID Case No. ARB/02/18, Procedural Order No. 1 dated July 1, 2003, 4; *also* ICSID Case No. ARB/03/24, Procedural Order dated Sept. 6 2005, 12.

⁶⁶ *Republic of Ecuador v. Occidental Exploration & Production*, [2006] EWHC 345 (Comm).

⁶⁷ ICC Case No. 3896 of 1983; for others, see generally Gaillard, *supra* note 59, at 240, 253, 255.

being subordinate to the courts⁶⁸ and the possibility of the other party pursuing an anti-anti-suit injunction⁶⁹ pose as serious deterrents to the remedy being granted by tribunals. Also, the fact that the tribunal depends upon courts to enforce their orders including the anti-suit injunction acts as a serious deterrent in the progress of such remedy in the interests of justice.⁷⁰ To conclude, it is submitted that retaining the power of arbitrators to issue such injunctions will go a long way in effectively conducting arbitration proceedings with minimum interference from courts as is the objective set out in several domestic arbitration acts.

Anti-Arbitration Injunctions Ordered by Courts

Apart from the arbitrators, courts also exercise their powers to grant such injunctions, which do not face the same set of problems as faced by the arbitrators, but raise a set of serious questions regarding international comity and sovereignty, especially when such injunctions are granted to stop proceedings in another state.⁷¹ Injunctions granted by the courts can further be classified into two parts, namely (i) injunctions to prevent arbitration (ii) injunctions to favour arbitration.

(i) Injunctions to prevent arbitration

These are the most common types to injunctions granted by courts in relation to arbitration proceedings wherein, the courts order restrains the implementation of arbitration proceedings or prevents actions for the enforcement of arbitral awards. Such injunctions are more commonly known in common-law countries as 'anti-arbitration injunctions'.⁷² When issued in relation to the international arbitrations, such injunctions have the effect of precluding arbitration proceedings with 'seat' outside its territory, thereby violating the rule of territoriality. It is owing to this feature of such injunctions supporters of international arbitration have strongly criticized courts for granting such injunctions. Mr. Stephen Schwebel, former Judge and President of the ICC has opined that granting of such injunctions

⁶⁸ Peter Karrer, *Interim Measures Issued by Arbitral Tribunals and the Courts: Less Theory, Please*, in INTERNATIONAL ARBITRATION AND NATIONAL COURTS, THE NEVER ENDING STORY, 97, 106 (Kluwer Law International 2001).

⁶⁹ Gaillard, *supra* note 59, at 262.

⁷⁰ Philippe Fouchard, *Anti-Suit Injunctions in International Arbitration—What Remedies?*, in IAI SERIES ON INTERNATIONAL ARBITRATION NO. 2, ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 153, 153 (E. Gaillard ed., 2005).

⁷¹ Laurent Lévy, *Anti-Suit Injunctions Issued by Arbitrators*, in IAI SERIES ON INTERNATIONAL ARBITRATION NO. 2, ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 115, 128.

⁷² Ricardo Quass Duarte, *supra* note 6.

is against the very tenets of the New York Convention and principles of international law. He states:

“When a domestic court issues an anti-suit injunction blocking the international arbitration agreed to in the contract, that court fails ‘to refer the parties to arbitration’ (Article II(3)). In substance, it fails anticipatorily to ‘recognize arbitral awards as binding and enforce them,’ (Article III) and it pre-emptively refuses recognition and enforcement on grounds that do not, or may not, fall within the bounds of Article V of the New York Convention . . . The object and purpose of the New York Convention is to ensure that agreements to arbitrate and the resultant awards—at any rate, the resultant foreign awards—are recognized and enforced. It follows that the issuance by a court of an anti-suit injunction that, far from recognizing and enforcing an agreement to arbitrate, prevents or immobilizes the arbitration that seeks to implement that agreement, is inconsistent with the obligations of the state under the New York Convention.”⁷³

Similar opinion has also been expressed by late Kerr, L.J., when he said: “.. [e]very arbitration must have a seat or *locus arbitri* or forum which subjects its procedural rules to the municipal law there in force... Prima facie, i.e., in the absence of some express and clear provision to the contrary, it must follow that an agreement that the curial law of the arbitration is to be the law of *X* has the consequence that *X* is also the law of the seat of the arbitration. The *lex fori* is then the law of *X* and, accordingly, *X* is the agreed forum of the arbitration. A further consequence is then that the courts which are competent to control or assist the arbitration are the courts exercising jurisdiction at *X*.”⁷⁴

Such arbitrations are also criticized on the ground that the same precludes the arbitral tribunal from deciding its own jurisdiction based on the principles of *kompetenz-kompetenz*, which gives the tribunal the power to adjudicate upon its own jurisdiction.⁷⁵

On the other hand, courts that are less arbitration friendly consider themselves as playing a parentalistic role, thereby trying to enforce rights of parties irrespective of their obligation to arbitrate

⁷³ Stephen M. Schwebel, *Anti-Suit Injunctions in International Arbitration: An Overview*, in IAI SERIES ON INTERNATIONAL ARBITRATION NO. 2, ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 5, 10-11.

⁷⁴ *Nav Amazonica v. Cie Internet De Seguros*, [1988] 1 Lloyd’s Rep. 116.

⁷⁵ PHILIPPE FOUCHARD ET AL., FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, ¶ 660 (Kluwer Law International 1999); see also Case No. 12656/KGA/CCO, Partial Award dated Dec. 6, 2004.

disputes.⁷⁶ Such courts consider it the sacred right of parties to have a dispute adjudicated by the courts which cannot be taken away by an agreement to arbitrate.⁷⁷ One such country to state is Brazil, wherein the courts took almost 5 years to uphold the constitutional validity of the Arbitration Act.

It is owing to this attitude of courts towards arbitration that there have been instances where irrespective of orders of the court enjoining proceedings, arbitral tribunals have proceeded, as in the case of *Companhia Paranaense de Energia–COPEL v. UEG Araucaria Ltda.*⁷⁸ In this case, when according to the agreement, the parties had to adjudicate disputes in the ICC, the plaintiff filed a suit in Brazil and also obtained an anti-arbitration injunction, enjoining the defendant from pursuing arbitration proceedings in the ICC. However, when the matter came up for consideration before the ICC, irrespective of the injunction granted by the court in Brazil, the ICC declared its jurisdiction on the basis of the principle of *kompetenz-kompetenz*.⁷⁹ The Court opined: “As the Parties have agreed that this Tribunal has its judicial seat in Paris and therefore is subject to French arbitration law, any decision of a Brazilian court or any other court as to the validity of the arbitration agreement is not binding on the Tribunal. Under French law as the *lex loci arbitri*, it is for the Tribunal to decide on the validity of the arbitration clause in the first instance. This decision may be reviewed by state courts only after an award has been rendered . . . The decisions by the lower state court in the State of Parana do not necessarily reflect federal policy regarding arbitration but rather seem to contradict it . . . It is understandable that the lower state courts may be slow to adopt new laws and policies introduced at federal level in Brazil. However, the Supreme Court’s decision represents Brazilian Federal policy in accepting the consequences of Brazil having joined the family of the New York Convention countries, in particular its treaty obligation to enforce arbitration agreements pursuant to Art. II.”⁸⁰

Another instance of continuation of arbitration proceedings, despite an anti-arbitration injunction, based on the rule of *kompetenz-kompetenz* is the case of *Himpurna California Energy v.*

⁷⁶ Julian D.M. Lew, *Anti-Suit Injunctions Issued by National Courts to Prevent Arbitration Proceedings*, in IAI SERIES ON INTERNATIONAL ARBITRATION NO. 2, ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 25, 33.

⁷⁷ *E.g.*, see Case No. SE-AgR 5206, Dec. 12, 2001.

⁷⁸ *Companhia Paranaense de Energia–COPEL v. UEG Araucaria Ltda.* Case No. 12656/KGA/CCO.

⁷⁹ *Companhia Paranaense de Energia–COPEL v. UEG Araucaria Ltda.* Case No. 24.334/2003, 3rd State Court of Curitiba, PR.

⁸⁰ *Id.*, Case No. 12656/KGA/CCO, Partial Award dated Dec. 6, 2004.

Indonesia,⁸¹ where an Indonesian court granted an anti-arbitration injunction to prevent further arbitration proceedings to take place, imposing a fine of \$1 million dollar per day in case of non-compliance. Nevertheless, the arbitral tribunal found a way to circumvent the injunction; two of the arbitrators met in the Netherlands and made the award, despite the fact that the third arbitrator, who was Indonesian, was prohibited to participate in the proceeding due to an intervention of the Indonesian government.

It is submitted that as a general rule, courts should grant preliminary anti-arbitration injunctions only in cases where a prima facie case of the agreement being void or inoperative has been made, or a prima facie case of the issue being non-arbitrable as in case of fraud has been made, however subject to the rule of *kompetenz - kompetenz*.⁸² Apart from these exceptional cases, courts should refrain from interfering with the arbitration proceedings to ensure party autonomy and to uphold the principle of territoriality. As the New York Court of Appeals put it: “The essence of arbitration is resolving disputes without the interference of the judicial process and its strictures. When international trade is involved, this essence is enhanced by the desire to avoid unfamiliar foreign law. The U.N. Convention has considered the problems and created a solution, one that does not contemplate significant judicial intervention until after an arbitral award is made”.⁸³

(ii) Injunctions made in favour of Arbitration

As already submitted, courts have limited powers to interfere with arbitrations, but anti-suit injunctions in favour of arbitrations are highly useful to ensure that parties stick to their agreed obligations to settle their disputes by arbitration. This is all the more useful in the sense that arbitral tribunals have no *imperium* to enforce their own awards, thereby making such injunctions the call for the day to protect arbitration process from abuse.⁸⁴ To this end, several domestic arbitration legislations make it obligatory for courts to refer such matters to arbitration.⁸⁵ The basis for these provisions can be found in the New York Convention as well as the UNICITRAL Model

⁸¹ PHILIPPE FOUCHARD ET AL., FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, ¶ 660.

⁸² Julian D.M. Lew, *supra* note 53.

⁸³ *Coopers v. Ateliers De La Motobecane, S.A.*, 57 N.Y. 2d 408, 416 (N.Y. 1982).

⁸⁴ José Carlos Fernández Rozas, *Anti-suit Injunctions Issued by National Courts—Measures Addressed to the Parties or to the Arbitrators*, in IAI SERIES ON INTERNATIONAL ARBITRATION NO. 2, ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 73, 74 (E. Gaillard ed., 2005).

⁸⁵ See *e.g.*, New York Convention art. II 3, U.S. Federal Arbitration Act § 7 and UNCITRAL art. 8.1; Arbitration and Conciliation Act, 1996 of India § 8.

Law, wherein assistance by courts in favour of arbitration has been prescribed, such as:

Article 5: Extent of court intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.

Article 6: Court or other authority for certain functions of arbitration assistance and supervision

The functions referred to in Articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ... [Each state enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

Article 9: Arbitration agreement and interim measures by court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

Article 17 J: Court-ordered interim measures

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this state, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

It is submitted that a reading of the aforesaid provisions provides an idea about the type of assistance that can be provided by courts in favour of arbitration. Further, the courts can grant anti-suit injunctions with respect to arbitration in two stages, namely (i) during the arbitration proceedings, when the recalcitrant party seeks an action at another court to disrupt the ongoing arbitration proceeding and to avoid that an award is made; (ii) after the award is made, the losing party tries to institute court proceedings to avoid enforcement of the arbitral award or to recover what was paid in connection with the enforcement of an award.⁸⁶ In both these scenarios, the losing party may seek to set aside the award or prevent arbitration process by seeking an anti-arbitration injunction, wherein the opposite party may seek an injunction in favour of the arbitration proceeding.⁸⁷ One of the famous cases along these lines is the *Pertamina* case, wherein a series of anti-suit and anti-arbitration injunctions were granted by

⁸⁶ Bermann, *supra* note 23, at 288.

⁸⁷ *Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 2007 WL 2537466 (2d Cir. 2007).

the U.S. and Indonesian courts.⁸⁸ In this case, a U.S. company, holding an award in its favour sought to enforce the same in the U.S., which was confirmed. In the mean time, the losing party had applied for a declaration that the award void in Indonesia. The U.S. court granted an anti-suit injunction in favour of the U.S. company. However, the losing party obtained a decree annulling the award, against which another anti-suit injunction was granted by the U.S. court. Finally, the U.S. and Indonesian courts vacated their respective orders and the losing party chose to prefer a challenge the award on grounds of fraud. Dismissing the petition, the Court held:

“After almost six years of litigation in district and appellate courts based on the Arbitral Award, the American courts had finally resolved all the issues presented to them about whether the Arbitral Award should be confirmed and about the method by which KBC should recover the large amount due. Although procedures were available under federal law for Pertamina to make its claim of fraud and to seek to prevent KBC from recovering the \$319 million, there was no attempt whatever by Pertamina to make use of such procedures.... Instead, Pertamina engaged in the six years of litigation in the United States without any mention of its claim of fraud. Finally, at the very moment when the litigation was to be legitimately ended, Pertamina brought the action in the Cayman Islands after engaging in literal subterfuge in dealing with the court in New York. The purpose of this lawsuit is to effectively wipe out the effect of the United States judgments and to do this with as great an amount of delay as possible.”⁸⁹

Confirming the decision of the lower court, the 2nd Circuit Court held: “[F]ederal courts do have inherent power to protect their own judgments from being undermined or vitiated by vexatious litigation in other jurisdictions.... would be undermined were we to permit Pertamina to proceed with protracted and expensive litigation that is intended to vitiate an international arbitral award that federal courts have confirmed and enforced”.⁹⁰

It is submitted that this approach of the U.S. court in favour of arbitration should be encouraged to support arbitration and to ensure that the process is not abused.

⁸⁸ Axel H. Baum, *Anti-Suit Injunctions Issued by National Courts to Permit Arbitration Proceedings*, in IAI SERIES ON INTERNATIONAL ARBITRATION NO. 2, ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 19, 20 (E. Gaillard ed., 2005).

⁸⁹ *Pertamina* case, *supra* note 87, at 12.

⁹⁰ *Id.* at 9.

Anti-Arbitration Injunctions: An Indian Perspective

Having discussed the legal position of anti-suit injunctions in arbitration across jurisdictions, now let's discuss the Indian position. There is no specific provision in the Indian Arbitration and Conciliation Act, 1996 to empower courts to grant anti-suit injunctions. In fact, some argue that few provisions of the Specific Relief Act, 1963 prohibit the granting of such injunctions. Section 41(b) of the Specific Relief Act provides that: 'An injunction cannot be granted... to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought...'⁹¹ A literal interpretation of the said section would mean that a court could only grant an anti-suit injunction in a matter involving a court subordinate to it. Thus, the Delhi High Court can grant an anti-suit injunction in relation to a matter in a court subordinate to it, but not to a court subordinate to the Madras High Court. A simple extension of the same would mean that no such injunction could be granted against a foreign arbitration as no foreign court is subordinate to an Indian Court. One way to overcome the same is by construing the term "court" to mean an "Indian court". This seems to be the approach adopted by the Madras High Court in the case of *Rajshree Sugars v. Axis Bank*, where the Court held: "Thus, *Cotton Corporation* case was distinguished in *Oil and Natural Gas Commission* case, to the limited extent of recognizing the power of the courts to grant anti-suit injunctions despite the principle of subordination of courts, found in Section 41(b) of the Specific Relief Act, 1963."⁹²

In the context of the Arbitration and Conciliation Act, 1996, the rule of *kompetenz-kompetenz* as enshrined in Section 16 of the Act empowers the arbitral tribunal to rule on its own jurisdiction.⁹³ To this end, Section 8 of the Act makes it obligatory on courts to refer parties to arbitration where the court finds that there exists a valid agreement to arbitrate disputes between the parties.⁹⁴ However, Section 9 and Section 45 of the Act provide certain powers to the court to interfere with such proceedings in domestic and foreign arbitrations respectively.⁹⁵ Section 9 empowers the court to grant interim remedies in support of arbitration during the pendency of the proceedings⁹⁶ whereas Section 45 of the Act requires the court to refer parties to arbitration unless it finds the arbitration agreement to

⁹¹ The Specific Relief Act, 1963 § 41(b).

⁹² *Rajshree Sugars v. Axis Bank*.

⁹³ Arbitration and Conciliation Act, 1996 § 16.

⁹⁴ *Id.* § 8.

⁹⁵ *Id.* §§ 9, 45.

⁹⁶ *Id.* § 9.

be null and void or inoperative.⁹⁷ Although there is no provision in Part II of the Act like Section 34 of the Act and the Supreme Court in *BALCO v. Kaiser Aluminium* has held that Section 34 is not applicable to foreign arbitrations,⁹⁸ which empowers the courts to set aside foreign arbitral awards, Section 45 still seeks to limit the costs of parties who contest that there exists no valid arbitration agreement, as getting such declaration from the courts of the seat of arbitration may be costly. It is submitted that this rule under Section 45 is subject to the general principle of *kompetenz-kompetenz* governing arbitration, which although present only in Part-I of the Act, is a general principle in the New York Convention and governs all arbitrations.⁹⁹ Thus, courts as a general rule refuse to interfere with arbitral proceedings where parties have willingly agreed to arbitrate disputes with one another.¹⁰⁰

The Andhra Pradesh High Court in *Cultor Ford Science v. Nicholas Piramal*,¹⁰¹ refused to grant an injunction against arbitration under the LCIA Rules as the parties had willingly entered into the agreement and had spent a considerable amount of money in participating in the proceedings. However, in conditions where the court deems it necessary to intervene, injunction is granted against commencing the arbitration proceeding. The Delhi High Court in *Union of India v. Dabhol Power*,¹⁰² held that the Section 45 does not oust the jurisdiction of the court from issuing an injunction if the proceedings are found to be oppressive, which essentially means that the courts have powers to grant injunctions against arbitral proceedings, in cases where it deems it necessary. The Bombay High Court in *MSM Satellite (Singapore) Pvt. Ltd. v. World Sport Group (Mauritius) Limited*¹⁰³ granted injunction against a foreign arbitration between two foreign parties in which the subject matter of the dispute was in India.

Thus, from the above discussion, it is submitted that courts in India possess a limited power to grant anti-arbitration injunctions, subject to Sections 8 and 16 of the Act. Such powers should be used by the courts only in extreme cases where the balance of conveniences is strongly in favour of granting such injunctions and such injunctions propel the end of preventing abuse of process of arbitration to frustrate the other parties' claims.

⁹⁷ *Id.* § 45.

⁹⁸ *BALCO v. Kaiser Aluminium*, (2012) 9 SCC 552.

⁹⁹ *Shin-Etsu Chemical Co. Ltd. v. M/s Aksh Optifibre Ltd. & Anr.* (2005) 7 SCC 234.

¹⁰⁰ *Id.*; see also *Shakthi Bhog Foods Ltd. v. Kola Shipping Ltd.*, (2009) 2 SCC 134.

¹⁰¹ *Cultor Ford Science v. Nicholas Piramal*, 2002 (1) ALD 154.

¹⁰² *Union of India v. Dabhol Power*, MANU/DE/0379/2004.

¹⁰³ *MSM Satellite (Singapore) Pvt. Ltd. v. World Sport Group (Mauritius) Limited*, MANU/MH/1112/2010.

Conclusion

In conclusion, it is submitted that common law courts have time and again exercised their jurisdiction to grant anti-suit and anti-arbitration injunctions in favour of as well as in derogation of arbitration proceedings. Although such injunctions are said to be granting against parties, their inevitable consequence is that they have an effect of enjoining a proceeding in a foreign court. However, this alone, such not restrict common law courts from granting such injunctions when the conditions are such that justice and equity demand the grant of such injunctions. To this end, the author disagrees with the strict view taken by certain civil law countries which have weighed international comity over the fundamental rule of justice. However, caution must be taken here not to grant anti-arbitration injunctions frequently but only to exercise such jurisdiction in extraordinary circumstances as the very object of the Arbitration and Conciliation Act is to reduce the interference by courts in arbitration proceedings. Thus, the correct approach to have in granting anti-arbitration injunctions is the middle-ground approach as has been adopted by the 1st and 2nd Circuit Courts in the U.S. in granting such injunctions. The author hereby submits that to resolve problems raised by civil law nations regarding sovereignty and international comity, the right approach would be to improve upon the existing New York Convention to enable courts to grant such injunctions in certain circumstances and for foreign courts to recognize such injunctions if certain conditions are satisfied. Consensus on the said point would remove concerns raised on points of sovereignty and international comity.



CORPORATE SOCIAL RESPONSIBILITY: GLOBAL IDEA AND NATIONAL IMPORTANCE

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Introduction

It is rightly stated by William Ford Jr., Chairman, Ford Motor Co.: “A good company delivers excellent product and services, and a great company does all that and strives to make the world a better place”. With the emergence of civilization of mankind, social behavior became an integral part of life and every activity. A society is a group of individuals with different cultural background. Culture is the environment in which people live. Society and culture remain backbone of each other. Society becomes the community consisting of members. Business is created by the society and success of business depends on society as the goods and services provided by business are ultimately consumed by society. Business and society are closely knit and have dependency on each other. Business is affected by the society’s legal, political, economic and governmental system and laws. The forces of social change (including science, technology and extent of relationship among nations) do influence business.

The last 50 years have witnessed a revolutionary change in the world’s business environment. This necessitated the business to realign its objectives and goals from the historical objective of profit or wealth maximization to social objectives. Corporate Social Responsibility (hereinafter CSR) is also called corporate responsibility, corporate citizenship, responsible business, sustainable responsible business or corporate social performance.

The concept of CSR is not new. The history of corporate activity shows that businesses have always encompassed the nation of broader obligations to the communities in which they operate. Companies have recognized the value of enlightened self interest responding to their own specific circumstances. A project on corporate social responsibility was launched in 1969 by Ralph Nader and several other lawyers to change the purpose of corporation. In

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Nader's view the corporation is to be transformed from a means of maximizing investor wealth to a vehicle for using a private wealth to redress social ills. Stakeholder theory embodies many aspects of the theory of corporate social responsibility. On the other hand, value based management holds that the social mission of corporation is to make as much money as possible for its owners while conforming to the rules of society and let shareholders, employees and customers undertake their own efforts.

Objectives of the Research

Although there is unanimous acceptance over the responsibility of business towards customers, employees, investors, suppliers, and community as a whole yet there are different opinions regarding the degree of responsibility due to various reasons like, financial constraints, time constraint, human energy constraint etc. Therefore, the initiatives taken by the Indian companies need to be examined to determine how far the companies are assuming their responsibility towards different stakeholders and the nation.

The main objective of this study is to examine the initiative taken by the Indian companies with respect to their responsibility towards the nation. Based on the opinion of respondents of different Indian companies, the study has the following specific objectives:

- To identify the main drivers and agenda for undertaking CSR activities;
- To understand the implementation strategies for accomplishment of CSR programmes;
- To check the allocation budget of the companies for CSR activities;
- To examine its impact on a nation.

Methodology

We know that the objective of legal research is not only to propose suggestions for legal reform. It may be carried on for many other purposes as well. Where, however, the object of research is only to indicate in which way it is to be carried on, such a research is termed as critical research. Critical research is termed as critical research because in such cases the objective is to ascertain a common principle or norm and hence, it is also termed as 'normative research'. In this kind of research gathered material is thoroughly becomes the basic norm.

For the purposes of critical research, the necessary material is obtained from codified law, judicial observations and

pronouncements and academic writings. In matters of critical research, public opinion also plays an important role and public opinion must be ascertained in a proper manner.¹

Genesis

A practice of CSR dates back to the ancient Greece. A similar development on CSR took place on the Indian subcontinent from the Vedic philosophy.² Early conceptualization of CSR was broadly based on religious virtues and values such as honesty, love, truthfulness and trust. CSR refers to the obligations of an organization which considers the interests of all their stakeholders which includes the customers, employees, shareholders, communities and ecological considerations in all aspects of their operations. Such values were found dominant in the golden rule constructed by the Immanuel Kant's Categorical Imperative. It has also been argued that this golden rule can be applied in viewing companies as responsible to stakeholders and society. Implicitly, this argument suggests that those who do not practice such values are deemed to be unethical and not concerned of social welfare. Since then, civilizations has been in the process of wealth accumulation through a series of business venture travels to colonize; then industrial revolution to capitalize production processes; and finally multinational corporations to maximize profits from the modern theories of comparative advantage. Practices of CSR were neglected and overshadowed by the pursuit of wealth accumulation.

A revival of interest in CSR began after the World Wars. Contemporary western conceptualization of CSR from an academic perspective was initiated with Bowen's definitive text through his publication in 1953. His work on CSR broadly focused on the pursuit of policies that makes decisions or to follow those lines of action that are desirable in terms of the objectives and values of our society. Carroll argued that social responsibilities of business encompass the economics, legal, ethical, and discretionary expectations that the society has of organizations at a given point of time. The World Business Council for Sustainable Development (WBCSD 2000) argued that companies have an obligation to society and are responsible to the numerous stakeholders (outsiders) including owners, employees,

¹ S.R. MYNENI, LEGAL RESEARCH METHODOLOGY 130 (Pioneer Books, 2nd ed. 2001).

² Balakrishnan Muniapan & Mohan Dass, *Corporate Social Responsibility: A Philosophical Approach from an Ancient Indian Perspective*, 1(4) INTERNATIONAL JOURNAL ON INDIAN CULTURE AND BUSINESS MANAGEMENT 408, 412 (2008).

customers, suppliers, competitors, government regulators and communities viz., nation as a whole.³

Differing Views on Social Responsibility

The issue of social responsibility evokes varying-and, often, extreme-responses from academicians and businessmen. At one end, the body of opinion clearly does not favour including social responsibility in business considerations. Under this view, which has been propounded by notably by the economists Adam Smith and Milton Friedman, the only responsibility of the business is to perform its economic function efficiently and provide goods and services to the society and earn maximum profits. By doing so, it is felt, market forces would ensure that business performs its economic functions and leaves the social functions to other institutions of society such as government.

At the other extreme, there is an opposite view which favors the position that it is imperative for business to socially responsible. This is based on the argument that business organizations are a part of society and have to serve primarily social interests rather than narrow economic objectives such as profit generation. In doing so, they have to deal with social concerns and issues and have to allocate resources for solving social problems.

In between the two extreme views, there is considerable support for the opinion that all business organization should not attempt to solve all, or any, types of social problems. Rather, social responsiveness should be exercised on a selective basis and responsibility should be discharged in such a manner that corporate competence act as a limitation and the scope of social responsibility is limited to those areas where the business organization can achieve self-enlightened interests. In other words, the economic goals and social responsibility objectives need not be contradictory to each other and should be achieved simultaneously.⁴

Definition of Corporate Social Responsibility

WBCSD defines CSR as “the commitment of the company to contribute to the sustained economic development by working with employees, their families, the local community, and the entire society in order to improve life quality”.⁵

³ *Id.* at 413.

⁴ AZHAR KAZMI, BUSINESS POLICY 300 (Tata McGraw-Hill Publishing Com. Ltd., 8th reprint 1996).

⁵ HOLIDAY ET AL. 2002, at 103.

The Global Compact (2000)

The Global Compact, United Nations Global Compact Programme (2000) launched by United Nations in 2000 calls on companies to embrace nine principles in the areas of human rights, labor standards and environment. The Global Compact is a value-based platform designed to promote institutional learning. It utilizes the power of transparency and dialogue to identify and disseminate good practices based on universal principles. The nine principles are drawn from the Universal Declaration of Human Rights, the International Labor Organization's Fundamental Principles on Rights at Work and the Rio Principles on Environment and Development.

India taking a clue from international scenario incorporated Corporate Social Responsibility Voluntary Guideline, 2009.

Core Elements

The CSR policy should normally cover following core elements:

1. Care for all stakeholders

The companies should respect the interests of, and be responsive towards all stakeholders, including shareholders, employees, customers, suppliers, project affected people, society at large etc., and create value for all of them.

2. Ethical functioning

Their governance systems should be underpinned by ethics, transparency and accountability. They should not engage in business practices that are abusive, unfair, corrupt or anti-competitive.

3. Respect for workers' rights and welfare

Companies should provide a workplace environment that is safe, hygienic, and humane, and which upholds the dignity of employees. They should provide all employees with access to training and development of necessary skills for career advancement, on an equal and on non-discriminatory basis. They should uphold the freedom association and the effective recognition of the right to collective bargaining of labor have an effective grievance redressal system, should not employ child or forced labor.

4. Respect for human rights

Companies should respect human rights for all and avoid complicity with human rights abuses by them or by third party.

5. Respect for environment

Companies should take measures to check and prevent pollution; recycle, manage and reduce waste, should manage natural resources in a sustainable manner and ensure optimal use of resources like land and water, should proactively respond to the challenges of climate, change by adopting cleaner production methods, promoting efficient use of energy and environment friendly technologies.

6. Activities for social and inclusive development

Depending upon their core competency and business interest, companies should undertake activities for economic and social development of communities and geographical areas, particularly in the vicinity of their operations.

This was further improved and imbibed by incorporating National Voluntary Guidelines on Social Environmental and Economic Responsibilities of Business, 2011.

Principles and Core Elements

Principle 1: Business should conduct and govern themselves with ethics, transparency and accountability.

Principle 2: Business should provide goods and services that are safe and contribute to sustainability throughout their life cycle.

Principle 3: Business should promote the wellbeing of all employees.

Principle 4: Business should respect the interest of and be responsive towards all stakeholders especially those who are disadvantaged, vulnerable and not original.

Principle 5: Business should respect and promote human rights.

Principle 6: Business should respect, protect and make efforts to restore the environment.

Principle 7: Business when involved in influencing public and regulatory policy should do so in a responsible manner.

Principle 8: Business should support inclusive growth and equitable development.

Principle 9: Businesses should engage with and provide value to their customers and consumers in a responsible manner.

National Importance

Can a country where the corporate sector keeps on destroying the environment just to generate profits become a great country? Nay, such a behavior would even threaten the very ecological balance of the country and thereby inviting disaster.

Consequently, can respect for environment be treated merely as a social obligation or responsibility of a company or should it be one of the fundamental pillars on which the business of a company is based, particularly when the business would result in damage to environment. Once it becomes a basic requirement for a company, the business should not proceed unless due care is taken to avoid ecological disaster or undue loss to the environment or measures have been initiated for finding alternative methods to reduce the likely damage that would be caused by the company's business.

There are three bases which make corporate to assume social responsibility voluntarily, as under:

- The corporations/companies are creatures of society and thus respond to the demands of society.
- Long term self-interests of business are best served when corporate assume social responsibilities.
- It is the moral and right thing to do.

For instance, Internationally Merck Pharmaceutical (established in 1891) has set an example. If we actually want to know the meaning of corporate social responsibility, we must look at the policies adopted by Merck. Where other companies are exploiting their employees and not contributing to the society, Merck has become successful by practicing distinguished tactic. It is one of the best companies involved in CSR strategy. The company devotes extensive efforts to increase access to medicines through far-reaching program that only donate Merck medicines, but help deliver them to the people who need them. Merck became the leading company CSR practice in 1987, when it produced the drug Mectizan (Ivermectin). This drug

treats Onchocerciasis also called as “River Blindness”. This disease mainly occurs in Africa and Yemen. Around 122 million were affected by this epidemic. Through the Mectizan Donatio Programme undertaken by Merck, more than 50 billion people are treated every year for Lymphatic Filariasis. Merck has undertaken a long term commitment to donate maximum to prevent and treat River Blindness. The company’s CSR strategy has made it a globally reputed company. It was also praised by United States President Jimmy Carter as ‘company with the highest possible quality’.⁶

CSR is often called the triple bottom-line approach—Sustainability in Environment, Social Community and Business. The law is here and so is the implementation mandate. However, it remains to be seen how long India takes to redefine the concept and how corporate India moves away from philanthropy to a world of redistribution of wealth. Till 2012, there was no concrete legislative provision with respect to CSR for companies in India. Official notifications by the government were issued in the form of “guidelines”—some mandatory and some voluntary. The first official notification was issued by the Ministry of Petroleum and Natural Gas, whereby the public sector oil-companies had agreed to spend at least 2% of their net profits on CSR initiatives.⁷ This was followed by the ‘Corporate Social Responsibility Voluntary Guidelines’ which was issued by the Ministry of Corporate Affairs in 2009.⁸ Further guidelines were issued for Central Public Sector Enterprises (CPSEs) in April 2010, whereby the creation of a “CSR Budget” was made mandatory.⁹ The next notification was the ‘Guidelines on CSR and Sustainability for Central Public Sector Enterprises’, which came into effect from April 1, 2013.¹⁰

⁶ Manali Singhal, *Corporate Social Responsibility*, THE CHARTERED ACCOUNTANT 112 (Mar. 2011).

⁷ Press Information Bureau, Ministry of Petroleum and Natural Gas, Government of India, *Oil PSUs Agree to Spend 2% of profits on Social Responsibilities* (Feb. 2, 2009), available at <http://pib.nic.in/newsite/erelease.aspx?relid=47172>.

⁸ MINISTRY OF CORPORATE AFFAIRS, CORPORATE SOCIAL RESPONSIBILITY VOLUNTARY GUIDELINES (2009), available at http://www.mca.gov.in/Ministry/latestnews/CSR_Voluntary_Guidelines_24dec2009.pdf.

⁹ Press Information Bureau, Ministry of Corporate Affairs, Government of India, *Corporate Social Responsibility* (Aug. 11, 2011), available at <http://pib.nic.in/newsite/erelease.aspx?relid=74428>.

¹⁰ DEPARTMENT OF PUBLIC ENTERPRISE, GUIDELINES FOR CSR AND SUSTAINABILITY FOR CENTRAL PUBLIC SECTOR ENTERPRISES, available at http://www.dpemou.nic.in/MOUFiles/Revised_CSR_Guidelines.pdf.

Corporate Social Responsibility in the Companies Act, 2013

“Like for all good things, corporate India had to wait a long time for a corporate reporting framework that is current, and with some work, can be considered visionary. Introduction of the comply or explain principle in the case of CSR rule is one such example.”

– Vishesh C. Chandiok¹¹

The Companies Act, 2013 Act has introduced several provisions which would change the way Indian corporates do business and one such provision is spending on CSR activities. CSR, which has largely been voluntary contribution, by corporates has now been included in law. The Act is a proactive endeavour by the Indian government to provide a more formalized and structured manner of CSR spending in India. Section 135 of the Companies Act, 2013 contains provisions exclusively dealing with CSR.

The purpose of inclusion of CSR provisions in the Companies Act, 2013 is basically to facilitate deeper thought and long term strategies for addressing some of the most persistent social, economic and environmental problems. The intention is that the companies should come forward to contribute towards nation-building. It is not about the quantum of money, it is about being part of the social and economic development of the country.¹² It shall allow a corporate to harness and channelize their core competencies as well as develop effective business models.¹³

According to Section 135, there shall be a Corporate Social Responsibility Committee of the Board in every company having:

- Net worth of Rs. 500 crore or more, or
- Turnover of Rs. 1000 crore or more ,or
- Net profit of Rs. 5 crore or more during any financial year.

Such committee shall comprise of three or more directors, out of which at least one director shall be an independent director.¹⁴ The mandate of such committee shall be:

¹¹ National Managing Partner, Grant Thornton India LLP.

¹² *Commented by* Sachin Pilot, Union Corporate Affairs Minister, India (Oct. 4, 2013), available at

<http://www.dnaindia.com/money/report-religious-contributions-by-corporates-not-csr-activity-sachin-pilot-1898387>.

¹³ *Commented by* Bhaskar Chatterjee, Director General & CEO of the Indian Institute of Corporate Affairs.

¹⁴ “Independent Director” in accordance to the Companies Act 2013 § 149-means any director other than a managing director or a whole time director or a nominee

- a. to formulate and recommend to the Board, a Corporate Social Responsibility Policy, which shall indicate the activities to be undertaken by the company as specified in Schedule VII;
- b. to recommend the amount of expenditure to be incurred on the activities referred to above;
- c. to monitor the Corporate Social Responsibility Policy of the company from time to time.

The Board of the Qualifying Company shall after taking into account the recommendations made by the CSR Committee, approve the CSR Policy for the company and disclose contents of such policy in its report and also place the same on the company's website and also ensure that the activities as included in the CSR Policy are undertaken by the Company in a proper manner.¹⁵

The Board of the Qualifying Company shall ensure that the company spends, in every financial year, at least two percent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of the CSR Policy.¹⁶ For this purpose of first CSR reporting the Net Profit¹⁷ shall mean average of the annual net profit of the preceding three financial years ending on or before March 31, 2014.¹⁸

This 2% is not a tax that is to be paid to the government, state government or any agency. It is not a levy or cess. It is primarily the money of the company and by mandating CSR the intent of the government is to urge them to spend their own money in the areas that they feel the most comfortable through agencies they feel familiar with.¹⁹ In case the company fails to meet such criteria, the board shall specify the reasons for not spending the amount. The activities so included in the Schedule VII are as follows:

- Eradicating extreme hunger and poverty;
- Promotion of education;
- Promoting gender equality and empowering women;
- Reducing child mortality and improving maternal health;

director who in the opinion of the Board is a person of integrity and possesses relevant expertise and experience or who didn't have any pecuniary relationship with the company or transaction with the company and doesn't hold any position of a key managerial personnel in the company.

¹⁵ The Companies Act, 2013 §135 (4).

¹⁶ The Companies Act, 2013 §135 (5).

¹⁷ "Net Profit" for §135; and these rules shall mean net profit before tax as per books of accounts and shall not include profits arising from branches outside India.

¹⁸ Draft CSR Rules of Companies Act, 2013.

¹⁹ *Commented by Sachin Pilot, Union Corporate Affairs Minister, India.*

- Combating human immunodeficiency virus, acquired immune deficiency syndrome, malaria and other diseases;
- Ensuring environmental sustainability;
- Employment enhancing vocational skills;
- Social business projects;
- Contribution to the Prime Minister's National Relief Fund or any other fund set-up by the central government or the state governments for socio-economic development and relief, and funds for the welfare of the scheduled castes and Tribes, other backward classes, minorities and women;
- Such other matters as may be prescribed.

Draft CSR Rules under Companies Act, 2013

The Draft Rules for CSR were made available on August 9, 2013 for public comments. The Preamble of the Draft CSR Rules under the Act indicates that the objective is to integrate the economic, environmental and social objectives with a company's operations and growth.

- CSR activities may generally be conducted as projects or programmes (either new or ongoing) excluding activities undertaken in pursuance of the normal course of business of a company. The Committee constituted under Section 135(1), shall prepare the CSR Policy of the company which shall include the following:
 - a. specify the projects and programmes that are to be undertaken;
 - b. prepare a list of CSR projects/programmes which a company plans to undertake during the implementation year;
 - c. CSR projects/programmes of a company may also focus on integrating business models with social and environmental priorities and processes in order to create shared value;
 - d. surplus arising out of the CSR activity will not be part of business profits of a company;
 - e. would specify that the corpus would include 2% of the average net profits, any income arising there from, and surplus arising out of CSR activities.
- The CSR Committee shall prepare a transparent monitoring mechanism for ensuring implementation of the projects/programmes/activities.

- Where a company has set up an organization which is registered as a Trust or Section 8 Company, or Society or Foundation or any other form of entity operating within India to facilitate implementation of its CSR activities in accordance with its stated CSR Policy, the following shall apply:
 - a. The contributing company would need to specify the projects/programmes to be undertaken by such an organization, for utilizing funds provided by it;
 - b. The contributing company shall establish a monitoring mechanism to ensure that the allocation is spent for the intended purpose only;
- A company may also conduct/implement its CSR programmes through Trusts, Societies, or Section 8 companies operating in India, which are not set up by the company itself.
- A company may also implement its CSR programs through not-for-profit organizations that are not set up by the company itself. Such spends may be included as part of its prescribed CSR spend only if such organizations have an established track record of at least three years in carrying out activities in related areas.
- Companies may collaborate or pool resources with other companies to undertake CSR activities.
- Only such CSR activities will be taken into consideration as are undertaken within India.
- Only activities which are not exclusively for the benefit of employees of the company or their family members shall be considered as CSR activity.
- Companies shall report, in the prescribed format, the details of their CSR initiatives in the Directors' Report and in the company's website.
- The CSR provisions under the 2013 Act require a minimum of 3 directors for the constitution of the CSR committee, clarification needed as to whether qualifying private companies would be required to appoint a third director to comply with the CSR provisions.
- Such spends may be included as part of its prescribed CSR spend only if such organizations have an established track

record of at least three years in carrying on activities in related areas.

- Companies may collaborate or pool resources with other companies to undertake CSR activities and any expenditure incurred on such collaborative efforts would qualify for computing the CSR spending.
- Only such CSR activities will be taken into consideration as are undertaken within India.
- Only activities which are not exclusively for the benefit of employees of the company or their family members shall be considered as CSR activity.

Golden example of CSR

Though there is many Indian corporate which are well known for so many years and have been contributing to the society and disseminate socially responsible behavior, it will not be out of place to mention the Corporate “Tatas”. Tata Steel is a golden example. It is pointed out here that the founder of Tata Steel, Jamsetji Nusserwanji Tata was a visionary in his own right. In his words the business is defined as: “in a free enterprise, the community is not just another stakeholder in business, but is, in fact the very purpose of our existence”. From the above, it can be easily concluded that unless a Corporate tries to improve the socio economic status and conditions of the community in which it is operates, the existence of that Corporate will be a question mark. In fact, Tata Steel is the forerunner in providing CSR activity and has incorporated its CSR responsibility and mandate in this regard in its Articles of Association. Tata Steel has gone a further step in CSR activity and adopted Corporate Citizenship Index, Tata Business Excellence Model and Tata Index for Sustainable Development. It is said that Tata Steel under a broad spectrum, about 5 to 7% of its net profit is spent on CSR activities, with core areas specified as employee welfare, environment and community, nation welfare at large.

Limitations of Corporate Social Responsibility

There are a few limitations related with the notion of corporate social responsibility. Firstly, the concept of CSR says that business needs to be committed towards the stakeholders and perform its activities in a socially responsible way. The term “socially responsible” can never be defined. There is no limit to social responsibility and also no definite point where a business can claim to be socially responsible. Secondly,

for whose interest business needs to be responsible? Should it be for the stakeholders, Customers, Suppliers or Government? In the practice of CSR, sometimes money is used for the purpose which is not directly related to the business. Furthermore, if the corporation pays more attention to the practice of CSR, there might be a shift of focus from a main business concern (profit maximization).²⁰

Conclusion

The Indian concept of CSR translates to philanthropic activities. It is more about giving donations, and about uplifting the poor. CSR, however, has a larger manifesto and fold. It is more to do with shared value and about distribution of wealth. The previous idea was about after making and then giving away some of it, CSR relates also to “how” that money is made. Companies currently may have a few programs and initiatives going here and there, what is needed is to create an integral CSR strategy.

Lord Sri Krishna says in *Bhagavad-Gita* (3-13) that: “All sorrows from the society would be removed if socially conscious members of a community feel satisfaction in enjoying the remnants of their work performed in *yagna* spirit (selfless welfare of others)”. In short, the Indian philosophy of business management is to inculcate corporate social responsibility.



²⁰ *Supra* note 5, at 114.