

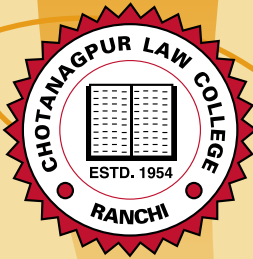
# CHOTANAGPUR LAW JOURNAL

ISSN - 0973-5858

• Vol : 9

• No : 9

• 2014-15



*Published by :*

**CHOTANAGPUR LAW COLLEGE**

Nyay Vihar Campus, Namkum, Tata Road, NH-33, Ranchi, Jharkhand

Phone : 0651-2205877, 2261050

Email : [info@cnlawcollege.org](mailto:info@cnlawcollege.org) • Website : [www.cnlawcollege.org](http://www.cnlawcollege.org)

### Board of Patron

**Vice-Chancellor of Ranchi University, Ranchi** : *Chief Patron, Ex-Officio*

**Mr. C.P. Singh, (M.L.A.) President, Governing Body** : *Executive Chief Patron*

**Mr. Lal Muni Sahu, Secretary, Governing Body** : *Patron*

### Editorial Advisory Board

**Hon'ble Justice Mr. R.K.Merathia**, Rtd. Judge, Jharkhand High Court, Ranchi, Jharkhand

**Hon'ble Justice Mr. A.P. Sinha**, Rtd. Judge, Patna High Court, Ranchi Bench, Jharkhand

**Hon'ble Justice Mr. Vikramaditya Prasad**, Rtd. Judge, Jharkhand High Court, Ranchi, Jharkhand

**Prof. B.C.Nirmal**, Vice Chancellor, NUSRL, Ranchi.

**Prof. Umesh Chandra**, Ex-Professor of Law, Allahabad University, Allahabad, U.P.

**Prof. R.N. Chaudhary**, Ex-Professor of Law, DDU Gorakhpur University, Gorakhpur, U.P.

**Prof. R.N.Sharma**, Ex-Professor of Law, J.N.V., Jodhpur University, Rajasthan

**Prof. K. N. Poddar**, Ex-Professor of Law, Ex. Principal, Patna Law College, Patna, Bihar

**Prof. Kamaljeet Singh**, Professor of Law, H.P. University, Shimla, H.P.

**Prof. Rakesh Verma**, Professor of Law, Patna Law College, Patna, Bihar

**Prof. Ratan Singh**, Professor of Law, Punjab University

**Prof. Harmeet Singh Sandhu**, Professor of Law, Punjab University

**Dr. Ajay Kumar**, Associate Professor, Chanakya National Law University, Patna, Bihar

**Dr. Madhu Soodan Rajpurohit**, Principal, Government Law College, Sirohi, Rajasthan, India

**Dr. Rakesh Kumar**, Associate Professor, Agra College, Agra, U.P.

**Dr. Uday Shankar**, Assistant Professor, RGSOIPL, IIT Kharagpur, W.B.

**Dr. Anurag Deep**, Associate Professor, Indian Law Institute, New Delhi.

**Dr. J.P. Rai**, Associate Professor, Law School, Banaras Hindu University, Varanasi, U.P.

### Editorial Board

**Prof. R.K.Walia** : Chairman

**Dr. P.K. Chaturvedi** : Executive Editor

**Prof. V. Kumar** : Member

**Mrs. Sakshi Pathak** : Co-Editor

**Dr. Nandita Adhikari** : Member

Mr. V. N. Choudhary : Co-Editor

**Dr. Gandhi A. Bilung** : Member

# CHOTANAGPUR LAW JOURNAL



**BARRISTER S. K. SAHAY**

Founder: Chotanagpur Law College, Ranchi

Cite This Volume As: 9 CNLJ-2014-15

## Important Notes

The Journal of Chotanagpur Law College is published Bi-annually. Contributions to the Journal are invited in the form of articles, notes and case comments. Contributions should be typed in double space on one side of the A-4 size paper with proper footnote.(The recommended footnote style is Blue Book citation) Main text must be - font size 12 pt. and footnote 10 pt. and in Times New Roman should also be sent in 700 MB Compact Disk or as an attachment with e- mail at: [chotanagpurlawjournal@gmail.com](mailto:chotanagpurlawjournal@gmail.com)

The Chotanagpur Law College, Ranchi shall be the sole copyright owner of all the published material. Apart from fair dealing for the purpose of research, private study or criticism no part of this Journal may be copied, adapted, abridged, translate, stored in any form by any means whether electronic, mechanical, digital, optical, photographic, or otherwise without prior written permission from the publisher.

The Board of Editors, Publishers and Printer do not claim any responsibility for the views expressed by the contributors and for the errors, if any, in the information contained in the Journal.

Suggestions for the improvement of this Journal are welcomed and will be gratefully acknowledged.

*A Peer Reviewed / Referred International Journal*



# CHOTANAGPUR LAW JOURNAL

## INDEX

ISSN-0973-5858

VOLUME 9

No. 9

2014-2015

Sl. No.	Article / Author	Page No.
01.	Breaking Silence - Christian Women's Inheritance Rights under Indian Succession Act, 1925 <i>Archana Mishra</i>	1-30
02.	Relationship between NGOs and the UN : A Historical Perspective <i>Nabanita Mandal, Rashwet Shrinkhal</i>	31-53
03.	Novartis decision : Redefining the Constitutional parameters <i>Dr. Sanjay Gupta, Ms. Manju Sharma</i>	54-60
04.	Supreme Court and rights of the Accused of Speedy Trial <i>Prof. (Dr.) C. L Patel</i>	61-70
05.	International Drug Trafficking and Terrorism - A Dangerous Mix <i>Dr. Harmeet Singh Sandhu, Kamaljeet Kaur</i>	71-83
06.	Higher Education in India: A Critical Analysis <i>Dr Arun Kumar Singh</i>	84-90
07.	Role of Stock Exchange and Investor Protection in India: An Overview <i>Dr. Raghuvinder Singh, Maneesh Yadav</i>	91-100
08.	Critical Perspectives of Evidentiary Issues in Sexual Offences against Women: Realities of Adversarial Criminal Justice System and the Need for Reforms <i>Manoranjan Kumar</i>	101-119

Sl. No.	Article / Author	Page No.
09.	Banking Services in India and Consumer Protection <i>Dr. Renu Jamwal</i>	120-128
10.	Advertisement by Lawyers: A Changing Face of Legal Profession <i>Dr. Rajneesh Kumar Patel</i>	129-150
11.	Economic Empowerment of the Tribal Communities Through Traditional Knowledge—Problems and Prospects. <i>Dr. S.C. Roy</i>	151-162
12.	The Pursuit of Sustainable Development in India : An Analysis of National Strategies <i>Dr. Rinku Gupta</i>	163-180
13.	Proposed Suggestion for Amendments under Negotiable Instrument Act, 1881 <i>R.N. Chaudhary</i>	181-190
14.	How Hindu Dharma Impacts on Justice Dispensation in India <i>Dr. Madhu Soodan Rajpurohit</i>	191-219
15.	Decriminalization of Homosexuals – Time to Change <i>Dr. G. Shaber Ali</i>	220-231
16	Changing Law on Rape : A Critical Evaluation <i>Dr. Manu Sharma</i>	232-241



# CHOTANAGPUR LAW COLLEGE

## NAMKUM, RANCHI, JHARKHAND

Estd. 1954

Chancellor	:	His Excellency Hon'ble Dropadi Murmu ( Governor of Jharkhand)
Vice-Chancellor	:	Prof. (Dr.) Ramesh Kumar Panday
Pro Vice-Chancellor	:	Prof. (Dr.) M. Raziuddin
President of Governing Body	:	Mr. C. P. Singh (M. L. A., Ranchi)
Secretary of Governing Body	:	Mr. L. M. Sahu
Dean Faculty of Law	:	Prof. R. K. Walia
Principal of the College	:	Prof. R. K. Walia

### The Governing Body Members :

( Governing Body Constituted under Jharkhand State University Act 2002 & Statutes No.32)

Name	Designation
Mr. C. P. Singh (M. L. A., Ranchi)	President
Mr. L. M. Sahu	Secretary
Prof.(Dr.) Ramesh Sharan	University Representative
S. D. O., Ranchi	Ex-Officio
Prof. R. K. Walia	Principal
Dr. P. K. Chaturvedi	Member (T.R)

### The Faculty Staff :

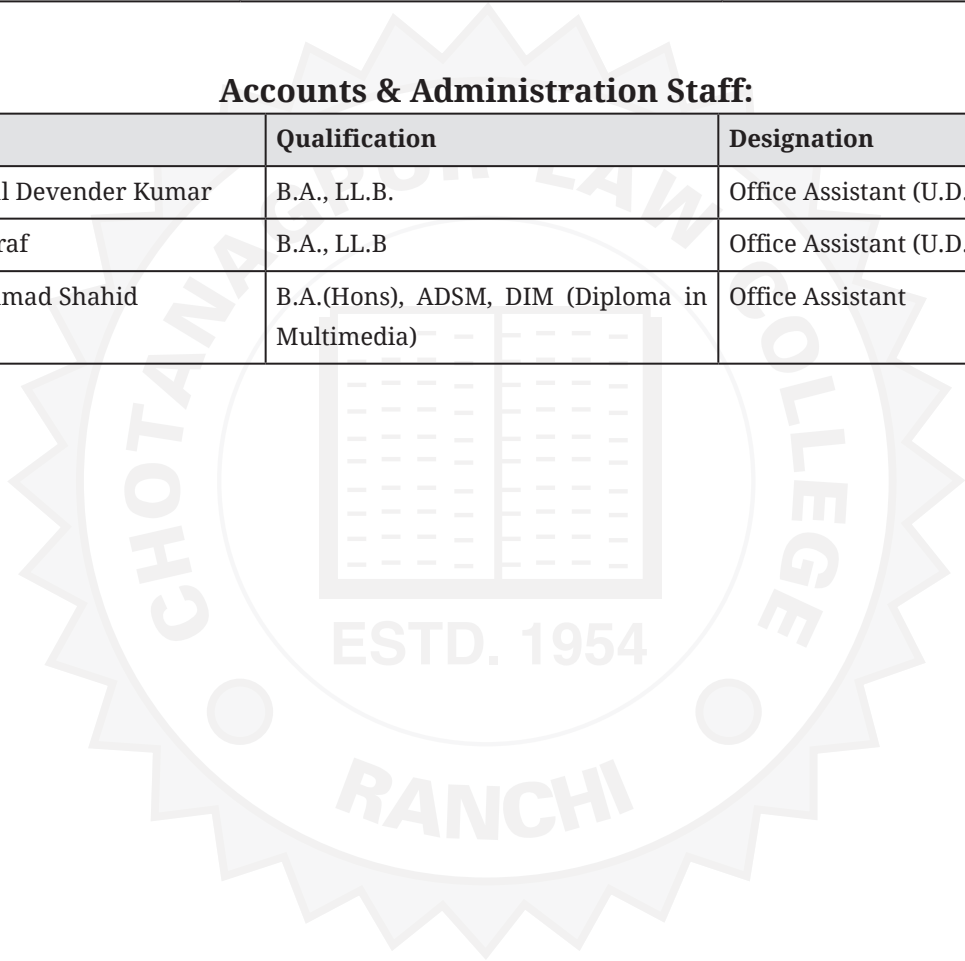
Name	Qualification	Designation
Adhikari Nandita	M.L., Ph.D. (Law)	Assistant Professor
Bilung Gandhi Anand	LL.M, Ph.D. (Law)	Assistant Professor
Chaturvedi Pankaj Kumar	M.A., LL.M., Ph.D. (Law)	Associate Professor
Kumar Vijay	LL.M., DLT	Assistant Professor
Kumari Rashmi	LL.B., LL.M.	Visiting Faculty
Mahato K. C.	M.A., LL.B.,	Part Time Asstt. Professor
Pathak Sakshi	L.L.M.	Assistant Professor
Pati A. B.	LL.B., LL.M.	On Contract - Assistant Professor
Pati P. A. S.	LL.B., LL.M.	Visiting Faculty
Prasonjit Mukerjee	LL.B., LL.M.	Assistant Professor
Walia Raj Kumar	LL.M.	Principal
Waris H.	M.A., LL.B., Ph.D (Psychology)	Part Time Asstt. Professor

### Library Staff:

Name	Qualification	Designation
Choudhary Vidyanand	LL.M, LL.B., M.Lib., B.Com, DBA, Dip. E-Commerce (Computer)	College Librarian
Prashar Ravi	LL.B.	Office Asstt. (Library)(U.D.C)
Verma Manoj	B.A.	Office Asstt. (Library)

### Accounts & Administration Staff:

Name	Qualification	Designation
Agrawal Devender Kumar	B.A., LL.B.	Office Assistant (U.D.C)
Ali Ashraf	B.A., LL.B	Office Assistant (U.D.C)
Mohammad Shahid	B.A.(Hons), ADSM, DIM (Diploma in Multimedia)	Office Assistant





# Breaking Silence - Christian Women's Inheritance Rights under Indian Succession Act, 1925

*Archana Mishra*<sup>1</sup>

Diversity prevails in law of succession among Indian Christians. Christian constitute the third major population in India after Hindu and Muslim but still has been not able to act as influential group either socially or politically to draw sufficient attention of the Legislature to their problems in personal law particularly in field of succession. Majority of Christians are governed by the Indian Succession Act, 1925 (ISA, 1925) in matters of succession. The ISA, 1925 guided by patriarchal mindset allows unfairness to women in intestate succession. The irony is that the law framed more than one and a half century ago discriminating women in succession rights continues even today. The share of Christian widow fluctuates with the presence or absence of lineal descendants, she gets rights over entire property only in absence of distant kindred of the deceased husband extending upto great great uncle or great uncle's son, widowed daughter-in-law has no right in her father-in-laws property. Mother has been relegated to lower position as she inherits only in absence of father and even when she inherits she gets rights with the deceased's brother and sister. There appears no justifiable reason to continue with such provisions which do not give equal rights to women. The present study deals with the drawbacks in the ISA, 1925 with respect to inheritance rights of Christian women, the transition of law for granting her such rights with the reports of Law Commission of India and the proposed amendments in the existing legal framework to ensure them such rights based on principle of rationality and fairness.

## **Historical aspect of ISA, 1925**

Before 1865 in matters of succession considerable uncertainty prevailed as to law applicable to persons other than Hindus and Muslims. Hindus and Muslims were governed by their respective personal laws but position of Indian Christians, Parsis, Europeans domiciled in India, Eurasians, Jews, Armenians and others, were obscure. In general English law was applied to Presidency towns but the position as regards the Moffussil was not very clear as court sometimes applied law of the country of the parties or the customs observed by them which were not entirely

---

<sup>1</sup> Archana Mishra, LL.B, LL.M (Delhi) is a Faculty member at Jindal Global Law School, OP Jindal Global University, Sonapat, Haryana, India

free from doubt<sup>2</sup>. The need was therefore to have a consolidated Indian law relating to succession exempting Hindus and Muslims. The Third Law Commission led to the enactment of Indian Succession Act, 1865 (ISA, 1865). The Act of 1865 based on English law, was enacted with the intention of applying it to different communities of India who did not have their own law in matters of succession, be it testamentary or intestate. The object was to consolidate the large number of laws which were in existence and not to unify them. Intestate succession of Hindus, Muslims, Buddhists, Sikhs or Jainas and testamentary succession regulating Muslims were to be governed by their personal laws therefore they were expressly kept out of its purview. Consequently its application with regard to intestate and testamentary succession was limited only to some Christians, Parsis, Europeans domiciled in India, Eurasians, Jews, Armenians and others. ISA, 1865 was consolidated by Indian Succession Act, 1925 (ISA, 1925). In the process of consolidating, two clear schemes in matter of intestate succession were adopted – one dealing with succession rights of persons like Indian Christians, Jews and those married under Special Marriage Act, 1955 and one for succession rights to Parsis<sup>3</sup>. Considering the population sizes of the religious community to be governed by the Act the first scheme largely affects intestate succession for Christian community.

General provisions under ISA, 1925 relating to intestate succession are based on the law of England, the notable features of which are (1) that there is no discrimination based on sex among the heirs (2) that there is no discrimination between persons related by full blood and those related by half blood and (3) relations by adoption are not recognized<sup>4</sup>. Both movable and immovable property could be inherited under ISA, 1925 by kindred. Kindred under the Act contemplates only relation by blood through lawful wedlock, therefore the terms ‘wife’, ‘husband’ or ‘lineal descendants’ refer to legitimate relationships only<sup>5</sup>. It lays uniform rule for devolution of property for both male and female dying intestate. The husband surviving his wife has the same rights in respect of her property, if she dies intestate, as the widow has in respect of her husband’s property, if he dies intestate. The shares inherited by the heirs, are always absolute and freely alienable, therefore even what a women inherits is her absolute property. Under Hindu law, before Hindu Succession Act, 1956 women were generally

---

2 M.P. Jain, *Outlines of Indian Legal and Constitutional History*, Lexisnexis, India, ed.2006, p. 470

3 “Towards Equality”, Report of the Committee on the Status of Women in India, Ministry of Education & Social Welfare Department of Social Welfare, Government of India, December 1974

4 B. Sivaramayya, “The Indian Succession Act, 1925”, in K. D. Gangrade (ed.), *Social legislation in India*, p. 89 Vol. II, Concept Publishing Company Pvt. Ltd., New Delhi, ed.1978 (reprinted 2011)

5 *Emma Agnes Smith v Thomal Massey* (1906) ILR 30 Bom 500; *Sarah Ezra In Re* AIR 1931 Cal 560

given limited rights in immovable property<sup>6</sup> absolute rights being only in stridhan<sup>7</sup> and under Muslim law she was made one of many sharers whose share varied with the presence or absence of child. Granting women absolute rights in property in the year 1865 when the society being patriarchal was driven by personal laws being favourable for men and biased against women, indeed shows considerable progression. At the same time the Act has left some void which is discriminatory towards women.

### ***I. Applicability of Indian Succession Act, 1925 to Christians***

Neither the ISA, 1865, nor the Act of 1925 was to apply to all Christians in the whole of India. The adjective “Indian” had to be used since certain rules applicable to Christians coming from outside India were not to apply to Indian Christian defined under the Act<sup>8</sup>. As State Government is empowered to exempt any race, sect or tribe or any part of such race, sect or tribe from the application of the Act, it notified the exemption of Native Christians in the province of Coorg, tribals of North-East including Khasis and Jaintias in Khasi Hills and Jaintia Hills, and Mundas and Orans in Bihar and Orissa. Certain classes of the Roman Catholic Christians of the Latin rite and certain Protestant Christians living in Karunagappally, Quilon, Chirayinkil, Trivandrum, Neyyattinkara are also not governed by the Indian Succession Act 1925<sup>9</sup>. Christians in Goa, Daman and Diu are governed by Portuguese Civil Code, 1867 while those in Pondicherry are governed by customary Hindu law, ISA, 1925 and French Civil Code, 1804. Thus the analysis with respect to applicability of law to Indian Christian shows great diversity. It is only when Indian Christians are not subject to any of the above customary or statutory laws; they are governed by the general scheme of inheritance laid down under the ISA, 1925. Christian population is scattered all over India but it comprises of major population of Kerala where it is heterogeneous community in matters relating to property rights. In view of majority of Christian population living in Kerala the applicability of ISA, 1925 to Christians of Kerala has its own significance.

6 In immovable property which woman received by way of inheritance or partition or any other mode under Mitaskhara school of Hindu law, she generally enjoyed limited rights of enjoyment during her lifetime without power of alienation which on her death passed on the heirs of the last owner of the property.

7 Means ‘woman’s property’ which under classical Hindu law included property gifted to a woman by her parents or other relations, or at her marriage ceremonies, her self-acquired property. She had absolute ownership rights with rights of alienation over such property.

8 110th Report of Law Commission of India on the Indian Succession Act, 1925 (February 1985), p. 20. The Law Commission was of the view that some link or association with India is of the essence of the concept of Indian Christians and in absence of better word it was not possible to change the definition in clause (d).

9 Dr. Sebastian Champappilly, *Christian Law of Succession in India*, Southern Law Publishers, Kerala, India ed. 1997

(i) *Applicability of ISA, 1925 to Christians in Kerala*

State of Kerala was formed under the State Reorganization Act, 1956 by integrating the Travancore- Cochin State and certain parts of Malabar. Before the reorganization in 1956, rights over property were based on customs which varied with denominations and region. Uncertainty in determination of property rights led to passing of *Travancore Christian Succession Act* (Regulation II of 1092) in 1916 for State of Travancore and *Cochin Christian Succession Act* (Regulation VI of 1097) in 1921 State of Cochin. Malabar area was to be governed by Indian Succession Act, 1865, which was later amended by the Indian Succession Act, 1925. Indian Succession Act, 1925 was not made applicable to Travancore because power of legislation over Travancore had never been conceded to the British. Parliament enacted the Indian Independence Act, 1947 under which existing laws were to continue and Travancore was declared to be independent for which Travancore Interim Constitution was framed which did not affect the continuance of marriage and succession laws among the Christians. Later Travancore and Cochin were merged with India and on passing of Constitution of India, all laws in force in the territory of Travancore-Cochin became subject to the Constitution of India under which it became Part B State. Then Part B States (Laws) Act, 1951 (Central Act III of 1951) was enacted for the purpose of providing for the extension<sup>10</sup> of certain enactments mentioned in the Schedule including ISA, 1925 to Part B States and also for repealing the corresponding Acts and Ordinances then in force in the Part B States<sup>11</sup>. Travancore-Cochin among others were Part B states. When the Kerala State was formed by merging Travancore- Cochin State and certain parts of Malabar, specific provisions were made to save the “existing laws” and the “law in force” by Section 119 of the States Re-organisation Act, 1956. Consequently three legislations prevailed in the three different regions - Travancore, Cochin and Malabar - guiding the succession rights of Christians in the State<sup>12</sup>.

10 Section 3 of Part B States (Laws) Act, 1951 - *Extension and amendment of certain Acts and Ordinances. The Acts and Ordinances specified in the schedule shall be amended in the manner and to the extent therein specified, and the territorial extent of each of the said Acts and Ordinance shall, as from the appointed day and in so far as any of the said Acts or Ordinances or any of the provisions contained therein relates to matters with respect to which Parliament has power to make Laws, be as stated in the extent clause thereof as so amended.*

11 Section 6 of Part B States (Laws) Act, 1951 provided that if immediately before the appointed day (which was 1st April, 1951), there is in force in any Part B State any law corresponding to any of the Acts or Ordinances now extended to that State, that law shall, save as otherwise expressly provided in this Act, stand repealed

12 Sindhu Thulaseedharan, “Christian Women and Property Rights in Kerala-Gender Equality in Practice”, A Project under the Kerala Research Program(KRPLLD), Centre for Development Studies (CDS), Trivandrum available at [www.cds.ac.in/krpcds/report/sindhu.pdf](http://www.cds.ac.in/krpcds/report/sindhu.pdf) viewed on 5/12/2014

**(a) Property Rights to Christian Women in Travancore and Cochin**

The Legislatures of Travancore and Cochin codified the law of succession in accordance with the customs prevailing in the Christian Communities namely Travancore Christian Succession Act, 1916 and Cochin Christian Succession Act, 1921. The native Christians of both these places generally followed the customary Hindu law in matters of succession which was highly patriarchal. There had been some perversities regarding the right to inheritance under these Acts. Women were assigned an inferior status which being discriminatory wounded women's equality. Males had absolute power to dispose of his property and there was no restriction on his testamentary capacity. They always inherited the property even if they were belonging to remote degree of consanguinity. Christian women were excluded from inheritance. Therefore when these Acts were enacted they followed the Hindu customs of giving no property rights to women. Under Travancore Christian Succession Act, 1916 if a man died without making a will, all his property went to his sons, to the exclusion of his daughters. A Christian widow had only an alienable life-estate in her half share of the immovable property of her deceased husband<sup>13</sup> and mother also had only life interest in the property. Widow did not even have the right to represent the estate of her husband<sup>14</sup>. Further the life estate that a Christian widow took in her husband's property was terminable by her death or remarriage<sup>15</sup>. Even if such right was terminable at death or remarriage it did not in any way curtail her right of claiming a share and having a separate allotment of the properties and enjoying them<sup>16</sup>. She had no right to alienate the property as such although it was opened to her to transfer her life interest<sup>17</sup>. Such transference of which right also came to an end with her death or remarriage and the son who had the vested interest in such property had the right to set aside such life interest alienation by mother within 3 years of attaining majority under Article 44 of the Limitation Act. A daughter was not entitled to succeed to the property of the intestate in the same share as

---

13 Under Section 24 of Travancore Christian Succession Act, 1916, a widow who became entitled over any immovable property under Section 16 or 17 had only a life interest. On the termination of such life-interest, the property was to be distributed among the heirs of the original intestate as if the holder of the life - estate had not survived him.

14 *Neelakanta Pillai v. Abraham* 1963 KLT 271

15 *Sebastian George v. Narayan Pillai* 1962 KLT 649

16 *Joseph v. Joseph Annamma*, 1979 KLT 322

17 *Neelakanta Pillai v. Abraham* 1963 KLT 271

the son but that was entitled to one-fourth the value of the share of the son or Rs. 5,000 whichever was less and even to this amount she was not entitled on intestacy, if *streedhanam* was provided or promised to her by the intestate or in the life time of the intestate, either by his wife or husband or after the death of such wife or husband, by his or her heirs<sup>18</sup>. This *streedhanam* meant and includes any money ornaments, any property, moveable or immovable given to a female which could have been maximum upto Rs 5,000/- only. In the Cochin area, under the Cochin Act, the daughter was also a sharer but entitled only to one-third of the share of a son's, but she was excluded by the other male heirs, if she had been given *streedhanam*<sup>19</sup>. Under the Travancore Act, *streedhanam* meant and included any money or ornaments, or in lieu of money or ornaments, any property, moveable or immovable, given or promised to be given to a female or, on her behalf, to her husband or to his parent or guardian by her father or mother, or after the death of either or both of them, by any one who claimed under such father or mother, in satisfaction of her claim against the estate of the father or mother<sup>20</sup>. The maximum amount which a daughter could claim as *streedhanam*, which had no reference at all to marriage, was Rs. 5,000/-. Under the Cochin Act, *streedhanam* meant any property given to a woman, or in trust for her to her husband, his parent or guardian, in connection with her marriage, and in fulfillment of a term of the marriage treaty in that behalf<sup>21</sup>. The denial of women's rights to property rested on 'fears' of domestic disharmony and ruin arising from frequent litigation and fragmentation of property<sup>22</sup>.

The Legislative Assembly of State of Kerala introduced "Christian Succession Acts (Repeal) Bill, 1958 to repeal the Travancore Christian Succession Act, 1916 and the Cochin Christian Succession Act, 1921. The "Statement of Objects and Reasons" of the Bill of 1958 introduced by Justice V.R. Krishna Iyer read "*it is considered necessary to have a uniform law to govern the intestate succession among Christians for the whole of the State and for that purpose to repeal the Travancore*

---

18 Section 28 of Travancore Christian Succession Act, 1916.

19 Section 20 (b) of Cochin Christian Succession Act, 1921

20 Section 5 of Travancore Christian Succession Act 1916

21 Section 3 of Cochin Christian Succession Act 1921

22 Mridul Eapen and Praveena Kodoth, "Family structure, women's education and work: Re-examining the high status of women in Kerala", Working Papers from Centre for Development Studies, Trivendrum, India, available at <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN025232.pdf> viewed on 5/12/2014

*Christian Succession Act and the Cochin Christian Succession Act. The Bill is intended for this purpose*". The Bill sought to make ISA, 1925 govern succession among all Christians in Kerala but lapsed, it did bring to light the necessity to bring uniform law for whole of the State of Kerala by repealing the discriminatory succession laws prevalent in some parts of Kerala.

**(b) Judicial Responses to challenges to Travancore Christian Succession Act, 1916 and Cochin Christian Succession Act, 1921**

The discriminatory provisions under the Act of 1916 were challenged for the first time before the Travancore-Cochin High Court in *Kurien Augusty v. Devassy Aley*<sup>23</sup>. The High Court while answering the question whether with reference to the language contained in Section 29 (2)<sup>24</sup> of the Indian Succession Act, 1925, the Travancore Christian Succession Regulation II of 1092 must be deemed to have been adopted by reference, upheld the validity of Travancore-Christian Succession Regulation II of 1092 holding that this Act would come within the expression "any other law for the time being in force" mentioned in Section 29 (2) of the ISA, 1925 and therefore it formed part of the ISA, 1925 itself and consequently it was not repealed by Section 6 of the Central Act III of 1951. It further held that ISA, 1925 was not intended to interfere with the personal law of communities which have settled laws of their own as regards intestate succession and even if Travancore formed part of the former British India, Part V, ISA, 1925 would not apply to Christians in Travancore who were governed by the Travancore Christian Succession Act, 1916.

The issue of application of ISA, 1925 for Syrian Christians again came before the Single Judge of Madras High Court in *Solomon v. Muthiah*<sup>25</sup> wherein the court upheld the application of ISA, 1925 for Syrian Christians by expressing that "*the provisions of Part V are of universal application except in so far as that application has been excluded by Sub-section (1) or any other law for the time being in force. The mere fact that there is a custom relating to intestate succession or there is some other law dealing with intestate succession will not*

23 1956 KLT 559; J. Duncan M. Derret in "The Personal Law of Syrian Christians in Tamil Nadu" 1975 KLT (Jour) at p. 3 has acclaimed the decision in *Kurien Augusty* as laying down the correct proposition of law.

24 Section 29(2) of ISA, 1925 reads: "Save as provided in Sub-section (1) or by any other law for the time being in force, the provisions of this Part shall constitute the law of India in all cases of intestacy."

25 (1974) 1MLJ 53

*lead to the exclusion of the applicability of the provisions of Part V of the Indian Succession Act, 1925. From the very nature of the case, a custom cannot exclude the applicability of the provisions of a particular statute. But a statute can do it. So long as an existing statute has not excluded the applicability of Part V of the Indian Succession Act, 1925, the provisions of the said Part V will apply”.*

The oscillation of applicability of either Travancore Act or ISA, 1925 continued for Indian Christians in *D. Chelliah Nadar and Anr. v. G. Lalita Bai and Anr.*<sup>26</sup> wherein the Division Bench of same High Court negated the view taken in *Soloman’s case* and upheld the validity of Travancore Act for Indian Christians by holding that Section 6 of the part B States (Laws) Act does not require the law to be identical, but only requires that it should correspond to the Central Act. It further held that though the Central Act as well as the Travancore Regulation related to the same subject, namely, intestate succession, and covered identical fields and to that extent is corresponding law, it will not be corresponding law for the purpose of Section 6, as the ISA, 1925 does not cover Travancore Christians governed by the Travancore Regulation. The position of law settled by decisions of Travancore-Cochin High Court and the Division Bench of the Madras High Court was to the effect that the ISA, 1925 was not applicable to the Travancore-Cochin Christians. This issue was then finally settled by Supreme Court in *Mary Roy v. State of Kerala*<sup>27</sup>. In *Mary Roy’s case* writ petitions were filed to challenge the constitutional validity of Travancore Christian Succession Act, 1916 on the basis that sections 24, 28 and 29 of the Act were unconstitutional and void as being violative of Article 14 of the Constitution. It was also to determine whether after the coming into force of the Part B States (Laws) Act 1951, the Travancore Act continued to govern intestate succession of the Indian Christian Community in the territories originally forming part of the erstwhile state of Travancore or was it governed by ISA, 1925. While answering for the second issue it expressly overruled *Kurien Augusty case* and held *D. Chelliah Nadar case* not to represent good law. While restoring the judgment of *Solomon’s case* it made very clear that the ISA, 1925 was extended to Part B State of Travancore-

---

26 AIR1978 Mad 66

27 *Mary Roy v. State of Kerala* AIR 1986 SC 1011



Cochin by virtue of Section 3 of Part B State (Laws) Act, 1951 and if therefore, there was in force in part B State of Travancore-Cochin any law corresponding to the Indian Succession Act, 1925 immediately prior to 1st April, 1951, such law would stand wholly repealed. Since Travancore Act which was admittedly in force in Part B State of Travancore-Cochin immediately prior to 1st April, 1951, was a law corresponding to Chapter II of Part V of the ISA, 1925 and this law must consequently be held to have been repealed in its entirety on the extension of the provisions of Chapter II of Part V to the ISA, 1925 to the territories of the former State of Travancore. If that be so, the continuance of the Travancore Christian Succession Act, 1092 could not possibly be regarded as saved by Section 29 Sub-section (2) of the ISA, 1925. The court struck down the discriminatory provisions on technical ground but it restrained itself from examining the provision under the constitutional mandate of equality and non-discrimination on ground of sex under Articles 14, 15 of the Constitution<sup>28</sup>. It took the view Travancore Act stood repealed from April 1, 1951 and the law applicable to intestate succession among Christians of Travancore area of the State of Kerala is the Indian Succession Act, 1925 to be given effect from April 1, 1951. Following the decision of the Supreme Court in *Mary Roy*, the High Court of Kerala ruled that the Cochin Christian Succession Act, 1921 also stood repealed by the Part B States (Laws) Act, 1951<sup>29</sup>. Prior to the decision in *Mary Roy*'s, the ISA, 1925 applied only to 34% of India's Christian but the decision in *Mary Roy* brought another 30% of India's Christian population within the ambit of the Indian Succession Act, 1925<sup>30</sup>.

### **Mary Roy case and its aftermath:**

The case only decided the limited question as to the applicability of ISA, 1925 to Part B States but it did not go directly into the issue of discrimination in property rights between males and females as violative of right of equality under the Constitution or as to the declaration that male and female heirs are equally entitled to or are co-sharers to the property of their intestate parents. But extending

---

28 Flavia Agnes, *Family Law and Constitutional Claims*, Oxford University Press, ed. 2011

29 *V.M. Mathew v. Eliswa*. 1988(1) KLT 310 (DB); *Joseph v. Mary* 1988(2) KLT 27 (DB)

30 C.A. Sebastian, "Gender Discrimination in the Law of Divorce and Succession among Christians" available at <http://dyuthi.cusat.ac.in/purl/3152> (viewed on 16/12/2014)

the application of ISA uniformly to Part B States it has done away with all the discriminatory provisions present under the impugned Acts. Daughters could now inherit as son, receive share equivalent to son so question of *streedhanam* does not arise, women now have absolute rights in property with all rights of alienation. There are other implications as well. When the Supreme Court declared in 1986 that law of that land was ISA, 1925 and not the Travancore and Cochin Acts, the property transactions done according to the provisions of the 1916 and 1921 Acts of Travancore and Cochin respectively in matters of intestate succession became illegal<sup>31</sup>. There were no provisions for probating of wills under Travancore and Cochin Acts but under Indian Succession Act<sup>32</sup> before the Indian Succession (Amendment) Act, 2002 it was mandatory for Indian Christians to get their wills probated therefore any family settlement based on Wills that were not probated had suddenly become invalid in view of application of s. 213 with effect from 1.4.1951<sup>33</sup>. In case of intestate succession all partitions already made in accordance with the Travancore Act became invalid and daughter who under the Travancore Act had no share in the property of her parents now got right to claim her share and thus reopen all partitions and family arrangements. The decision also has led to rise in frequency of father allotting all property to his sons via testamentary disposition during his life-time so that no share goes to his daughter after his death to avoid division of his property to more smaller units. The daughters are compelled to sign documents declaring that their claim have been settled. The need is to make changes in the ISA, 1925 for placing limit on the right of testamentary disposition of property.

### (c) Law Commission Recommendations

#### **104<sup>th</sup> Report of Law Commission of Kerala on the Law of Intestate Succession Among Christians in Kerala, 1968**

Submitted under the chairmanship of T.R.Balakrishna Iyer, the Law Commission of Kerala in its 104<sup>th</sup> Report on Law of Intestate

31 Sebastian Champappilly, "Christian Law of Succession and Mary Roy's case", (1994) 4 SCC (Jour) 9

32 Section 213 of Indian Succession Act, 1925. After Indian Succession (Amendment) Act, 2002 even Indian Christians are included within the exemption with Hindus and Muslims who are exempted to obtain probate of Will. Before the amendment only Hindus and Muslims were exempted from obtaining probate of Will but Indian Christians were mandatorily required to obtain probate of will.

33 *Supra* 30

Succession Among Christians in Kerala, taking its clue from Christian Succession Acts (Repeal) Bill, 1958 under which Kerala Government itself had realized the need for uniform law for intestate succession among Christians, strongly supported for laying down uniform rules of intestate succession for all Christians without exception. It was of the view that continuance of different laws of succession over different regions in the State was not in consonance of principle of equality under Article 14 and 15 of the Constitution. Laying down of uniform law of intestate succession would have been a step towards the establishment of Uniform Civil Code envisaged under Directive Principles of the Constitution. The Commission made the following recommendations<sup>34</sup>:-

- 1) Uniform law of intestate succession among Christians in Kerala be enacted, on the lines of Part V of the Indian Succession Act, 1925 incorporating changes as regards the rights of the widow, and the father and mother as indicated in its conclusion and also the provisions as to the disqualification of a murderer, right of pre-emption, retention of Section 49 of the Central Act, excluding special provisions as to disinheritance of a heir by record during the life time of the intestate and abolishing limited interest; and
- 2) The joint family system among Tamil Christians of Chittur Taluk be abolished by replacing joint tenancies by tenancies-in-common, the shares the members would be entitled to, being what they would get if a partition would have taken place among them on that date.

The recommendations of the Report were not taken into consideration for any change in the legislation.

### **110<sup>th</sup> Report of Law Commission of India on Indian Succession Act, 1925**

Unsettled position with regard to applicability of Indian Succession Act, 1925 to Indian Christians of Travancore and Cochin area of the State of Kerala coupled with conflicting decisions of various High Courts (before the Supreme Court judgment of *Mary Roy's* case in 1986) led Law Commission of

India in 1985 under the chairmanship of Justice K. K. Mathew to submit its Report of the Law Commission of India on Indian Succession Act, 1925. It mainly looked into same issues which before the High Courts viz.,

- (i) Whether, by virtue of Section 6 of the Part B states (Law) Act, 1950, the Travancore Christian Succession Act, 1921 stood repealed with effect from 1st April, 1951, or whether that Act was saved by the words “save as provided in any other law for the time being in force” in Section 29 (2) of ISA, 1925; and
- (ii) Whether customary law of succession was saved by Section 29 (2) of ISA, 1925?

The Commission made the following recommendations:

- (a) The Travancore Christian Succession Regulation of 1092 should be repealed by an express provision. This course may be adopted, if as a matter of social policy, it was considered that the Indian Succession Act should apply to the persons governed by the Travancore Regulation.

If on the other hand, it is considered that as a matter of social policy, the provisions of the Travancore Christian Succession Regulation should govern succession to the persons concerned, then there should be inserted a provision in Section 29 of the Indian Succession Act to the effect that the Travancore Regulation would apply to Christians governed by that Regulation in respect of intestate succession:

- (i) in the State of Kerala, and
  - (ii) the adjoining areas in the state of Tamil Nadu (in the district of Kanyakumari and Shencottah taluk)
- (b) Besides the above amendment, an explanation should be added to Section 29 (2) of the Indian Succession Act, to the effect that ‘law’ in this Section does not include custom.
  - (c) The recommendations made above in relation to the Travancore Act apply with necessary adaptations, to the Cochin Christian Succession Act, also.

- (d) If the Indian Succession Act becomes applicable to the persons in question, provisions made for daughters by the father should be taken into account when the succession opens on intestacy. It was therefore recommended that suitable provision should be made to the effect that the share to be distributed to a daughter on intestacy, the amount or value of the property so provided by the father during his life time should be deducted, provided that following conditions are fulfilled:
- (i) the making of such gift is evidenced in writing, whether or not the writing is stamped or registered; and
  - (ii) the amount of the gift or provision or its value on each individual occasion is not less than five hundred rupees.

The Government of India is yet to act upon the report.

The property rights given to Christian women under the Act was immense but the application of ISA, 1925 had not reached many even among the limited number of Christians in India due to narrow interpretation of s. 29 in *Kurian Augusty case*<sup>35</sup> but after the decision of *Mary Roy's* the position of women among Indian Christians have considerably improved. More improvement in the status of Christian women can be brought by the changes in the ISA, 1925

## ***(II) Inheritance Right of Christian Widow under ISA, 1925***

Unlike other personal laws, widow of deceased husband under Christian law has been given the main preference in devolution of property of spouse dying intestate. Property devolves on others heirs only after share of property is first reserved for her which share varies with the presence or absence of lineal descendant. Presence of lineal descendants of the spouse dying intestate decreases her share whereas their absence leads to increase in her

---

35 *Supra* 3

share. Though her share varies with presence of different degree of kindred she is never denied any share. Christian widow of deceased husband being placed highest in the order of succession tacitly recognizes her contribution in the accumulation of property by the deceased. Before the Indian Succession (Amendment) Act, 2002 widow's right to inheritance depended whether there was any pre-nuptial agreement with her husband but after the Indian Succession (Amendment) Act, 2002 (IS(A) Act, 2002) the amount of share a widow receives in her husband's property depends on three possible situations:

- a) survival of lineal descendants of deceased i.e., child, children or remoter issues – surviving spouse takes 1/3 and rest is distributed among the lineal descendants
- b) Net value of property less than or greater than Rs 5,000/- if the net value of the property does not exceed Rs 5,000/- the whole of his property goes to his widow but where the net value exceeds the sum of Rs 5,000/- she is entitled to Rs 5,000/- and charge upon the whole property for Rs 5,000/- with interest at the rate of Rs 4% per annum from the date of death of husband until payment<sup>36</sup>.
- c) Subject to (b), absence of lineal descendant - widow takes half of the property and the other half goes to his kindred i.e., father, mother, brother, sister and their issues
- d) Absence of kindred – the whole of the property belongs to the widow

**(i) Rights of widow under Pre-nuptial Settlement**

The pace of Legislature in recognizing the injustice met to Christian women though has been slow but at times the Legislature has taken initiatives to remove such injustices. Before passing of IS(A) Act, 2002, the ISA, 1925 recognized pre-nuptial settlement<sup>37</sup>. ISA, 1925 following the English doctrine of pre-nuptial settlement, for the first time in the history of India had introduced the concept of pre-nuptial agreement for persons governed by the Act which also includes Christian women. Such an ante-nuptial agreement between husband

---

36 Section. 33A of ISA, 1925

37 Explanation to Section S. 32 of ISA, 1925 which read as: “32. *Devolution of such property.*-The property of an intestate devolves upon the wife or husband, or upon those who are of the kindred of the deceased, in the order and according to the rules hereinafter contained in this Chapter.

*Explanation.*--A widow is not entitled to the provision hereby made for her if, by a valid contract made before her marriage, she has been excluded from her distributive share of her husband's estate.” (Explanation has been omitted by IS(A) Act, 2002)

and wife excluded the widow from claiming her share in the estate of her husband if he died intestate. Widow was disentitled from inheritance in her husband's property by such pre-nuptial contract.

Such provision rendered her destitute at the time when she became a widow so the need was to remove such a provision. The issue was brought under Indian Succession (Amendment) Bill, 1994. It proposed for deletion of pre-nuptial agreement provision from the statute as it was against the interest of a widow. Though the 1994 Bill lapsed it was again brought before the Legislature by Indian Succession (Amendment) Bill, 2001. The then Law minister, Mr. Arun Jaitley while defending the proposal for deletion of such a provision, observed that the object of pre-nuptial agreement was the protection of those Englishmen, who came in large numbers to India before independence, marry here but made sure that their Indian wives were not entitled to inheritance to their British properties<sup>38</sup>. Since the provision was made for that purpose which was no more relevant the Legislature agreed for removal of such provision. Accordingly the IS(A) Act, 2002 had done way with such explanation under the provision. After IS(A) Act, 2002 even if a widow has made such an agreement before marriage she will not be deprived of her share in her husband's property. Since the Act majorly affects Christian in India such omission of provision which curtailed the rights of Christian women restores the primacy to the rules of devolution notwithstanding any pre-nuptial agreement with the husband. It relieves a Christian widow of the bar to succeed distributive share of her husband's estate even if there was a valid contract made to that effect before her marriage. This act of Legislature is a welcome step in the direction of strengthening the Christian widow's right in property and doing away with the discrimination against the Christian widows.

### **(ii) Rights of widow in presence of lineal descendants of husband**

Taking stimulus from Muslim law of succession, the right of widow under the Act in her husband's property depends on the presence or absence of the lineal descendants of the deceased husband. In presence of lineal descendants widow including Christian widow

---

38 Rajya Sabha, 194th Session, 3rd Dec., 2001 available at <https://www.youtube.com/watch?v=DSnYr4LqvMw> viewed on 18/9/2014

inherits only one-third estate and the remaining two-third goes to the lineal descendants. When there is more than one child then the share reserved for widow seems justified, for it gives her better share but when deceased husband has left behind a widow and only one child, her share being reduced to one-third appears to be unjustified as the single child gets the majority share of two-third and the widow is to be satisfied with lesser share of one-third. Though the Hindu law<sup>39</sup> provides for equal distribution of shares among sons, daughters, their issues, widows and mothers who are placed under Class I it answers such instance by dividing equal share between widow and the single child in absence of mother and other children or their issues.

In some common law jurisdiction the anomaly has been rectified and the property is distributed equally, the Act therefore should be amended to remove this unsatisfactory aspect of law<sup>40</sup>. Neither the 110<sup>th</sup> Law Commission Report<sup>41</sup> nor did the recently submitted 247<sup>th</sup> Law Commission Report on ISA, 1925<sup>42</sup>, which though has recommended plethora of changes in the ISA, 1925, has envisaged such a situation and suggest accordingly. When other English statute can make changes in their law by providing equal share to both widow and single child there appears to be no justification for still continuing the primeval law under the Indian statute.

### **(iii) Rights of widow in absence of lineal descendants of husband**

- (a) Where the net value of the property is less than Rs 5,000/- the whole of deceased husband's property in absence of lineal descendants goes to his widow. But where the net value exceeds the sum of Rs 5,000/- she is entitled to Rs 5,000/- and charge upon the whole property for Rs 5,000/- with interest at the rate of Rs 4% per annum from the date of death of husband until payment. The net value has to be ascertained by deducting from

---

39 Hindu Succession Act, 1956, Ss. 9, 10

40 *Supra* 3

41 *Supra* 7

42 247<sup>th</sup> Report of Law Commission of India on Proposed reforms in sections 41-48 of Indian Succession Act, 1925 (September 2014) submitted to the Government of India on 12<sup>th</sup> September 2014



the gross value all debts, funeral and administration expenses and all other lawful liabilities and charges to which the property is subject. This right of surviving spouse is in addition and without prejudice to her interest and share in the residue of the estate remaining after payment of the sum of Rs 5,000 with interest, and the residue will be distributed in accordance with the provisions of the Act as it were the whole of the intestate's property.

Object of placing a condition where certain sum was mandatorily reserved for the widow was to improve the condition of the widow when estate is small. Further it applies only in case of total intestacy i.e., will apply only when there is complete failure by lapse of all beneficial interests under a will with respect to all kinds of property be it movable or immovable. But even this benefit of minimum guaranteed payment is denied to Indian Christians women, any child or grandchild of any male person who is or was at the time an Indian Christian and any Hindu, Buddhist, or Jain, succession to whose property is governed by ISA, 1925. Thus it applies basically to Europeans domiciled in India, Parsis, Eurasians, Jews, Armenians and others. When the Act was enforced in the year 1925 it was basically to protect the rights of widows of Europeans domiciled in India, Eurasians, Jews, Armenians and others. The object was to guarantee added property rights basically to Christian widows of Europeans domiciled in India only and not to extend the benefit to Indian Christian widows or Hindus living in India. For widows falling under such exceptional group she is not to be given additional share but is to be just allotted half share in absence of lineal descendants of the deceased husband.

With the fall of value of rupee the 110<sup>th</sup> Report recommended for amendment in the provision. In its Working Paper it had suggested for increase upto Rs 20,000/- but on further considerations the Commission was of the view that the amount mentioned of Rs 5,000/- be increased to Rs 35,000/- and rate of interest be increased from 4% to 9%. The Law Commission had tried to draw the attention of the Legislature for change in the

guaranteed sum given to the widow considering the plunging cost of rupee. The Government introduced Indian Succession (Amendment) Bill 1994 by proposing to extend the benefit to Indian Christians and to raise the minimum amount owing to spirally inflationary conditions but no step has been taken in this respect to make it a concrete law.

Such provision of added benefit was placed during that time when Europeans domiciled in India were in abundance to essentially benefit those European widows domiciled in India. Continuing of such provision even after decades of independence when such residents are none or negligible and negating those beneficial rights to Indian Christian widows need introspection. Though it is creditable that the framers of the ISA, 1925 thought of supporting the widow by granting her mandatory sum, such issue not even being touched under other personal laws, denial of such benefits to Indian Christian widows for whom Act was primarily framed frustrates the very purpose of continuing the provision in present period. As it is a beneficial provision for uplifting the financial and social position of women primarily Christian widows it would be better if this benefit is extended to Indian Christians widows by removing the exception clause under the provision. Since this proviso seeks to give better rights to a widow without lineal descendants, the denial of the benefit to the above mentioned groups cannot be justified on the grounds of policy<sup>43</sup> and therefore the exceptions are illogical and should be deleted<sup>44</sup>. Further the amount of Rs 5,000/- mentioned in the year 1926 continues even after 88 years of the insertion of such provision. Despite attention of Legislature being diverted to the archaic provisions, Legislature has yet to take a call on extending the benefit to Indian Christians and increasing the mandatory sum to be given to widows.

- (b) Subject to the condition discussed above if husband has left no lineal descendants i.e., child, children or remote issue of such

---

43 *Supra 2*

44 *Supra 3*

child but has left persons who are kindred to him viz., father, mother, brother, sister or their issue then the widow's share is one half of the estate and remaining one-half goes to the father of the deceased if alive or, failing him, to the mother or the brothers and sisters. The deceased's father, mother, brothers and sisters inherit only when there are no lineal descendants surviving him/her. When apart from widow the issues of brothers or sisters are present and none else, even then widow is entitled to half the property and remaining half goes to those distant kindred.

The Act only recognises relationship by consanguinity therefore lineal descendants from lawful wedlock only have right in the property. Lineal consanguinity is that which subsists between person, of whom one is descended in a direct line from the other e.g., father, grandfather in ascending line or son, grandson in descending line and collateral consanguinity subsists between persons who are descended from same ancestor<sup>45</sup>. Relation by affinity, except wife/husband is excluded from the list of heirs under ISA, 1925. No rights are reserved for relations brought in family by marriage, therefore no shares are reserved for widow of pre-deceased son or widow of pre-deceased son of a pre-deceased son. The widowed daughter-in-law is denied any rights in her father-in-law/mother-in-law's property but the child born to her or conceived by her has share in his grandfather's/grandmother's property. That right is denied to the widowed daughter-in-law who has given birth to such child.

It may have been logical for ISA, 1865 originally intended for Europeans to exclude relation by marriage. Under law of England such exclusion does not result in much hardship because of the prevalence of marriage settlements, the higher social status of women, the larger opportunities available to women to engage in professions and the greater frequency of widow remarriages but in Indian conditions a different

---

45 Section 25 of ISA, 1925

approach is necessary<sup>46</sup>. When the Act was framed in 1865 for application in India the intention was to deny any right to Indian widow of any European domiciled in India in the property of English father/mother domiciled in England. The Act primarily focused on such widows to deny them the rights but lost sight that it also applied to Indian Christians, Parsis, Armenians, Jews etc., domiciled in India where the condition is not suitable to deny property rights to widowed daughter-in-law.

After decades of passing of the Act and the object no longer being served it would be appropriate for the Legislature to bring in changes in the Act by including even the widowed daughter-in-law to be the heir. As Hindu law, apart from recognizing relation by consanguinity recognizes relation by affinity, widow of pre-deceased son or widow of pre-deceased son of a predeceased son inherits property of the intestate. She loses her right to inherit only when she gets remarried before property devolves on her in the capacity of widowed daughter-in-law. Similarly the ISA, 1925 could be amended to include relation by affinity and grant property rights to widowed daughter-in-law. It may also be amended to reserve such right when she gets remarried in the lifetime of the father-in-law/mother-in-law whose property she would have inherited if she would not have remarried. The need for change of law is far greater as ISA, 1925 is also applicable to succession of persons who solemnize their marriage under SMA<sup>47</sup>.

- (c) Widow is entitled to entire property only when none of the distant relatives extending upto the great grandfather's father or great grandson, great great uncle or brother's grandson, second cousin or grandson of cousin german is present. The complete rights of the widow over property of deceased husband are thus depended on the presence or absence of any kindred mentioned in the Schedule of the Act. Presence of any kindred under the schedule reduces her share to half and the other half is reserved for that distant kindred of the deceased.

---

46 *Supra* 3

47 *Supra* 3

Property is reserved for that distant kindred of the deceased whom the deceased may not have even met during his lifetime. During such time when the dimensions of family is narrowing day by day, variation in share of widow being dependent on the presence or absence of the distant kindred or the property being reserved for that distant kindred whom the deceased may not have even met during his lifetime does not appear to be justifiable.

In order to be in more consonance with present day sentiments, the 110<sup>th</sup> Law Commission Report<sup>48</sup> stirred by Intestate's Estates Act, 1952<sup>49</sup> of England suggested for appropriate change. Under Intestate's Estates Act, 1952 on the death of husband intestate, his whole estate passes to the widow if he leaves no surviving issue, parents, brother or sister of the whole blood or issue of such brother or sister. The 110<sup>th</sup> Report suggested that where the intestate dies leaving his widow and kindred but no lineal descendants, the widow take the whole of the property<sup>50</sup>. Consequently the issue was brought by Indian Succession (Amendment) Bill, 1994 which also suggested for giving full rights to widow in the property of her deceased husband if husband dies without making a will and without leaving children and parents. It also suggested that in such situation there was no need to share the assets with the remote kindred of the deceased. The suggested change has not seen light of the day by being brought up as amendment in ISA, 1925.

Under Hindu law the widow is made the Class I heir along with the mother, children and issues of predeceased children of the deceased husband. The share of widow only varies with the number of claimants present under Class I. The claimant under Class I are all lineal descendants of the deceased along with mother. Even father belongs to Class II along with brothers and sisters of the deceased. If no other scheduled heir is present under Class I widow inherits the entire property of the deceased

---

48 *Supra* 7

49 Section 46, Intestates' Estates Act, 1952

50 *Supra* 7

husband. Her share is not even dependent on the presence of father or brother or sister of the deceased. Varying of her share in the presence of distant kindred of the deceased is out of question under Hindu law. Rights in property to Muslim widow though have been granted but her share is not equal to the share received by lineal descendants. She is a sharer and her share is fixed under Quran. She either inherits one-fourth in absence of lineal descendants and one-eighth in their presence. The presence of other sharers or residuaries does not affect her allotted share. If there are other sharers, allotted shares are given to them and rest passes on to the residuaries. After allotting of specific shares to different sharers if share is left but no residuaries are left, by *doctrine of radd* the property returns back to all the sharers except the spouse. Distant kindred under Muslim law inherits only when there are no residuaries unlike ISA, 1925 where they inherit together with the widow in absence of lineal descendant, father, mother, brother and sister or their issues. It is under muslim law that when there are no other sharers except the spouse and the share after being allotted to him/her is left without there being any residuary or distant kindred, the left over share by *doctrine of radd* returns to the spouse thereby resulting in devolution of entire property on him/her. Women before advent of Prophet Mohammed was considered to be property herself with no vested inheritance rights which state of affairs was changed by Prophet by making inheritance rules just and equitable. Women are given inheritance rights but her share is to be one half of the corresponding male relations share thus there exists sex-linked discrimination. ISA, 1925 lays down uniform rules of succession for both males and females and does not discriminate heirs on the basis of sex. The philosophy of Muslim law and that of ISA, 1925 are quite different thus ISA, 1925 relying on Muslim law for granting entire rights in property to widow only on the condition that none of the kindred relatives of the deceased husband is present appears to be erroneous. The Act may be amended to restrict the variation of widow's share only in presence of lineal descendants, father and mother.

### ***(III) Inheritance Right of Christian Mother under ISA, 1925***

Status granted to mother under ISA, 1925 for getting inheritance right in property is unfair. The Act discriminates between father and mother in devolution of property. The opportunity of other near relatives to the deceased to inherit arises only in absence of lineal descendants. In absence of lineal descendants, one-half share of the property is reserved for the widow and the other half devolves on father, if living. In his absence it passes to mother, brothers and sisters and issues of predeceased brother or sister<sup>51</sup>. Mother is deprived of the share in presence of father. Even when she inherits, she is to share the property with brothers and sister or their issue. Since no amount of share is fixed for mother it varies with the presence or absence of siblings of the deceased. Increase in the number of brothers or sisters further decreases her share. It is only when brother, sister or their issues do not survive that she inherits the entire other half of the property.

Under ISA, 1925 which affects mainly Christians in India firstly, there is clear discrimination between father and mother without any justifiable reason and secondly mother's share is made to depend on the presence of siblings of the deceased unlike Hindu law where mother's share varies on the presence of deceased's own children. The provision excluding one parent completely in presence of other parent appears to be illogical. To exclude the mother in presence of the father ignores the role that the mother plays in the upbringing and settlement of the child from the beginning to the attainment of maturity (Poonam Pradhan Saxena, "Succession Laws & Gender Justice" in Archana Parasar, Amit Dhanda *et.al.*(eds.), *Redefining Family Law in India*, p. 289 (Routledge, New Delhi, 2008) . Giving mother a secondary treatment reflects the attitude that mother does not need property but only needs to be looked after and protected when the practical reality is that mother in majority of the cases is financially dependent while father is economically secure. Again no reason can justify placing mother and brothers/sisters of deceased on the same platform. These provision is not in conformity with current thinking as to the status of women.

Under law of England<sup>52</sup> both mother and father takes equally even in presence of brothers and sisters of the intestate. If only one of them survives he or she takes the whole share. Under Hindu law mother inherits as Class I heir of male dying intestate. Her importance can be judged from the fact that she

51 Section 44 of ISA, 1925

52 Administration of Estates Act, 1925 s. 46

is the only ascendant given the right under Hindu law to inherit as Class I heir, rest all other Class I heirs, fifteen in number, are the descendants of the deceased related to him by consanguinity or affinity. It is only when none of the sixteen heirs as mentioned in scheduled Class I, the property devolves on Class II. Father has been placed in Class II though being the first among the Class II heir to inherit the property. Thus under Hindu law only mother inherits in presence of father in property of male dying intestate. Mother she has been placed in Class I heir to recognise her sanctity and also on the logic that she would be in more need for property than the father of the deceased. Mother's share varies only with the presence of number of lineal descendants and is not depended upon the presence or absence of the brother/sister of the deceased. Also she receives equivalent share as received by each child of deceased. Brother/sister being placed in lower entry than father among scheduled Class II heirs are disentitled in presence of father. Brother/sister is ousted from inheritance in presence of father who himself is disentitled in presence of mother. Though Hindu law recognizes brother/sister as heir, they are not considered to be equivalent to mother in getting the share rather her presence completely debars them from inheriting. Muslim law also gives due importance to mother than to father. Father inherits as a sharer in presence of child and in his absence takes as residuary. But mother irrespective of absence of presence of child always takes as sharer with only variation in share in presence or absence of such child. Brother/sister does inherit as sharer under Muslim law but they are disentitled from getting any share in presence of child of the deceased. Thus the presence of child affects only mother's quantity of share but debars brothers and sisters from inheriting. The Portuguese Code, 1867 also gives equal right in the property of the deceased to both father and mother in absence of descendants of the deceased. Presence of father and mother or either of them excludes the right of brother and sister under this Code. If deceased is survived only by mother and his brothers and sisters, mother takes the entire property. The Code also does not treat mother and brothers or sisters of the deceased to be on the same platform as is being done under Indian Succession Act, 1925. The need is to address the unfairness meted to the Christian mother. The Indian Succession Amendment Bill, 2004 had suggested for dividing equal shares between father and mother but the Bill lapsed. After a decade initiative has been taken by Law Commission of India which has recently submitted its recommendation for uplifting the position of Christian mothers<sup>53</sup>.

---

53 *Supra* 41



### **247<sup>th</sup> Law Commission of Indian Report on Indian Succession Act, 1925 affecting Rights of Mother**

Existing provisions mother's right of inheritance under Indian Succession Act are archaic in nature and foster an approach that solidify distinctions based on gender, thus prejudicial and unfair to status of women and Christian mother of deceased intestate<sup>54</sup>. Bringing into light the wrong done to the mother in devolution of the property, the Law Commission of India has suggested the following:

- 1) After allotment of one-half of the share to widow, mother to take equal share with father in absence of lineal descendants of the deceased
- 2) On death of either of the parents of the deceased, the other parent to succeed the entire other half left after allotting one-half to the widow.
- 3) In absence of father and mother, the one-half share left after allotting other one-half to widow, to be distributed among brothers and sisters equally
- 4) In absence of parents, brothers and sisters, the share to be divided per-stripe among the children of brothers and sisters of the deceased.
- 5) The property when is to be divided between the children of predeceased brother or pre-deceased sister as distant kindred the property to be divided per stripe rather than per-capita to bring uniformity with other provision.

With these changes the status of mother would be uplifted and would be given the same position as being given in other personal laws. Biasness against female would, to an extent, be removed by promoting mother to be equivalent to father in matters of inheritance. The unjustness of placing her with deceased's brothers and sisters would thereby be removed. These changes would go a long way in bringing consonance with time and in addressing concerns of Christian and other community governed by ISA, 1925.

#### ***(IV) Christian Women and Applicability of Section 213 of ISA, 1925***

Before IS(A) Act, 2002 persons governed by ISA, 1925, which mainly included Christians, were legally required to obtain probate when other communities

---

54 *Supra* 41

were exempted to do so<sup>55</sup>. The Christian widows were required to establish right to property of deceased. The 110<sup>th</sup> Law Commission considered the applicability of s. 213 for Christians. The Commission considered the suggestion received on the Working paper Letter of the Catholic Bishop's Conference of India, dated 3<sup>rd</sup> October, 1984 that since Hindus and Muslims get relief from the court on basis of a will but Christians have to get a probate therefore Christians should be excluded from s. 213. The Commission recommended for amendment of s. 213 to exclude Christians as well and for consequential changes wherever necessary in other Sections of the Act. The Commission also took note of uncertainty surrounding probate. Uncertainty is whether the provisions merely bar the passing of decree or whether they bar the very institution of the suit to enforce the right claimed under the will. The commission recommended for amendment of Section 213 to make it clear that where probate has not been obtained, the institution of suit should not be barred rather passing of decree should be barred.

Despite such recommendation in 1985 for exempting Christians from the applicability of s. 213 there was no consequential change in law. Since entries "wills" and "succession" are in the Concurrent List and states being free to pass amendments to the ISA, 1925, Kerala Legislature passed the Indian Succession (Kerala Amendment) Act, 1996 (Kerala Amendment Act, 1996) to exempt

---

55 *S. 213 of ISA, 1925 - Right as executor or legatee when established.-(1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in India has granted probate of the will under which the right is claimed, or has granted letters of administration with the will or with a copy of an authenticated copy of the will annexed.*

*(2) This section shall not apply in the case of wills made by Muhammadans [ or Indian Christians]\*, and shall only apply--*

*(i) in the case of wills made by any Hindu, Buddhist, Sikh or Jaina where such wills are of the classes specified in clauses (a) and (b) of section 57; and*

*(ii) in the case of wills made by any Parsi dying, after the commencement of the Indian Succession (Amendment) Act, 1962, (16 of 1962.) where such wills are made within the local limits of the ordinary original civil jurisdiction of the High Courts at Calcutta, Madras and Bombay, and where such wills are made outside those limits, in so far as they relate to immovable property situate within those limits.*

*\* added by IS(A)Act, 2002*

*S. 57 of ISA, 1925 - Application of certain provisions of Part to a class of wills made by Hindus, etc. -The provisions of this Part which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply--*

*(a) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina, on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and*

*(b) to all such wills and codicils made outside those territories and limits so far as relates to immoveable property situate within those territories or limits; and*

*(c) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of January, 1927, to which those provisions are not applied by clauses (a) and (b):*

*Provided that marriage shall not revoke any such will or codicil.*

Christians of Kerala from the applicability of Section 213. The High Court of Kerala in *Kalari Thresslamma v. Kathidukkanamikhal Joseph*<sup>56</sup> endorsed that Christians of Kerala did not require probate, by virtue of IS(KA)Act, 1996. But the Kerala Amendment Act, 1996 did not give immunity to wills executed by Christians of Kerala for property outside Kerala. Thus for wills executed for property situated outside Kerala the Christians in Kerala still required probate or letters of administration to establish rights in such property. It was a great relief to the Christians of Kerala particularly Christian women to establish their right through probate.

Writ petitions were filed in Supreme Court to challenge the constitutional validity of section 213 on the ground that the provision discriminated persons on the basis of religion as it subjected only Christians to fulfil the requirement of obtaining probate of will when Muslims, Hindu, Buddhist, Sikh, Jaina and Parsi had been expressly exempted<sup>57</sup>. Upholding the constitutional validity of the provision the Apex court emphatically held that since it also applied to Parsis and to Hindus who reside within the territories which on 1.9.1870 were subject to the Lt. Governor of Bengal or to areas covered by original jurisdiction of the High Courts of Bombay and Madras and to all wills made outside those territories and limits so far as they related to immovable property situated within those territories and limits, it could not be said that the section was exclusively applicable only to Christians and, therefore, discriminatory. Apex court refusal to declare the provision constitutionally invalid was a severe blow to Christians particularly Christian women who against all odd situation of being economically poor had to go through the tedious and costly affair for obtaining probate.

Due to recommendation of Law Commission of India, persistent demands of Christian community, Members of Parliament belonging to Christian community, Kerala Women's Commission and various other individuals and organisations, the Government of India was required to take legislative action of exempting Christians from the purview of S. 213 of ISA, 1925. The Government enacted Indian Succession (Amendment) Act, 2002 to insert the words "or Christians" after the word "Mohammedans" in sub-section (2) of Section 213 of ISA, 1925 as had been done in the Kerala Amendment Act, 1996. The IS(A)Act, 2002 obliged a significant section of country's citizen, namely,

---

56 AIR 1998 Ker 116

57 *Clarence Pais and Others v. Union of India* AIR 2001 SC 1151

Christians. After the amendment the Christians are also not required to obtain probate to get benefit under the Will. This has brought a great relief to Christian women who then are saved from the perils of undergoing the tiresome process of obtaining probate from the court. The government could further take proactive steps to secure the rights of Christian women. ISA, 1925 confers no restriction on the power of a person to make testamentary disposition of his property. Muslim law imposes restriction on testamentary disposition by allowing a person to make a will upto the extent of only one-third of his property thereby protecting the share of Muslim widow in the estate of deceased husband and Hindu law guarantees maintenance of widows but widows including Christian widows under ISA, 1925 are devoid of any such protection. There is therefore, a need to incorporate some restrictions, on testation similar to that prevailing under Muslim law to prevent a widow from being left destitute<sup>58</sup>.

### ***(V) Conclusion and Suggestion***

ISA, 1925 being the law of land in respect to intestate and testamentary succession needs to change with change in time and society. Continuing with certain discriminatory archaic provisions goes against the tenets of Constitution. Women's right to inheritance plays a vital role in the socio-economic and political empowerment but unfortunately they are often given unequal right to inheritance due to deep-rooted patriarchal system<sup>59</sup>. Condition of women could further be improved by giving her equal inheritance rights in the property. Amendment of ISA, 1925 by removal of gender discriminatory provisions would go a long way in positively affecting women's status particularly Christian women as they make the major community governed by the Act. Following changes in ISA, 125 could be incorporated to make ISA, 1925 gender just laws:

- (i) Equal distribution between widow and a single child as been done under English law
- (ii) The guaranteed sum along with the rate of interest reserved for widow must be increased keeping plunging cost of Indian Rupee.
- (iii) The guaranteed sum to widow must be extended even to Indian Christian widow to benefit more number of widows.

---

58 *Supra* 2

59 "Women's right of Inheritance" Study report of National Commission on the Status of Women available at [www.ncsw.gov.pk/prod\\_images/pub/Right\\_of\\_Inheritance.pdf](http://www.ncsw.gov.pk/prod_images/pub/Right_of_Inheritance.pdf) viewed on 23/12/2014

- (iv) Share ought to be reserved also for widowed daughter-in-law. When children born to her from pre-deceased husband get right in their deceased grandfather's property there appears no justifiable reason to deny the right to one who is more needy and who has given birth to these children. Such share could be withdrawn if she gets remarried during the lifetime of the father-in-law.
- (v) Widow's right over entire property getting curtailed by presence of even distant kindred needs relook. Heirs being only near relatives of the deceased husband must be considered so important to truncate the rights of widow.
- (vi) As has already been suggested by Law Commission<sup>60</sup> mother must be promoted and her position be made equal to father. There is no reason to discriminate between father and mother of the deceased and to allow mother to inherit along with brother/sister. In presence of father both must divide the share equally and in absence of father she must be given the right to take the complete share.
- (vii) Limits must be placed on testamentary disposition of property as fathers now tend to make will to give rights to son and take away the entire rights of women.
- (viii) Women are emotionally compelled to relinquish her share in favour of other male heirs. Relinquishment of women's right to inheritance must be subjected to strict conditions, limitations on such relinquishment and on Court's intervention.

But some major questions remain - how many women are aware of their inheritance rights, how many women can afford litigation in patriarchal set-up to claim their inheritance rights. The changes in the law would fail unless women are educated about their rights in property. The need is to make them aware of their rights in property. By being aware of their inheritance rights in property and by asserting it they can afford themselves adequate financial security and prevent destitution. Law as it is applied in India today shows a positive reform with regard to the position of females and clearly shows that rules of personal law based on religion are not above reform in order to bring them into conformity with social and legal change<sup>61</sup>. The Supreme

60 *Supra 41*

61 Christa Rautenbach, "Indian succession laws with special reference to the position of females: A model for South Africa?" available at: <http://ssrn.com/abstract=1915940>; [ssrn-id1915940](http://ssrn.com/abstract=1915940)

Court decision in *Mary Roy* is important legal milestone in the Indian women's march to gender equality<sup>62</sup>. It is the responsibility of the judges and the legislature in India to participate more actively in the eradication of gender discrimination<sup>63</sup>. The Indian Succession Act needs toning up to be in tune with the mores of the community placed at the threshold of the twenty-first century<sup>64</sup>. The social goals envisaged in the Preamble, the guarantee of equality before law enshrined in Article 14, and abolition of discrimination on ground of birth or sex assured in Article 15 of the Constitution calls for immediate overhaul of the ISA, 1925 to uplift the position of Christian women in matters of inheritance.



---

62 Amali Philips, "Stridhanam: Rethinking Dowry, Inheritance and Women's Resistance among the Syrian Christians of Kerala", *Anthropologica*, Vol. 45, No. 2 (2003), pp. 245-263

63 J. V.R. Krishna Iyer, 'Woman and the law – a plea for gender justice' 1984 *IslamicCLQ* 251

64 *Supra* 29

## Relationship between NGOs and the UN : A Historical Perspective

*Nabanita Mandal*<sup>1</sup>  
*Rashwet Shrinkhal*<sup>2</sup>

The term Non-Governmental Organisations (NGOs) is a post World War II expression that was initially coined by the UN.<sup>3</sup> When the UN Charter was adopted in 1945, it was stipulated in Article 71 that, NGOs should be accredited to the UN for consulting purpose.<sup>4</sup> Thus, the term NGO was applied referring to those societal actors which are international bodies and engage with the UN context. Before the term became solidified through the UN practice, other expressions were employed for it. For example, they were referred to as ‘private organisations’<sup>5</sup> or ‘international pressure groups’.<sup>6</sup> The League of Nations used the term ‘voluntary agencies’ or ‘volas’.<sup>7</sup> Today, the word ‘NGO’ is prominent in most languages. Although they are not recent phenomenon, NGOs have not sufficiently been defined. NGOs remain *terra incognita*.<sup>8</sup> NGO is a commonly accepted phrase within the academic world, but is unclear what the phrase actually encompasses. NGOs are regarded as the major players in the development agenda today. It is widely believed that they represent civil society and that the UN and the World Bank would be strengthened

- 
- 1 Nabanita Mandal, is a doctoral research student at the Centre for International Legal Studies, School of International Studies, JNU, New Delhi.
  - 2 Rashwet Shrinkhal, is an Assistant Professor at the Centre for Tribal and Customary Law, Central University of Jharkhand, Ranchi.
  - 3 Kerstin Martens, *Mission Impossible? Defining Nongovernmental Organizations*, 13 Int'l J. Voluntary Nonprofit Org. 271, 272 (2002). To define NGO is challenging as the term is defined with elastic boundaries, Tolly Jr. noted that nongovernmental means anti-government in the Chinese context, See, P. Willets, *What is a Non-Governmental Organization* in UNESCO: Encyclopedia of Life Support System (2001) available at <http://www.staff.city.ac.uk/p.willetts/cs-ntwks/NGO-ART.HTM> [accessed on 12.12.2014]; There are authenticity issues as there more, in the words of Richard Holloway, “pretenders” than “real”, see, M. Shamsul Haque, *Non-Governmental Organizations* in the Sage Handbook of Governance, 332 (Mark Bevir ed., 2011)
  - 4 Bruno Simma, *The Charter of United Nations a Commentary*, 902-904 (1995).
  - 5 L. C. White, *The Structure of Private International Organizations: Their Purpose Methods and Accomplishments* (1933)
  - 6 P. Willets (Ed.), *Pressure Groups in the Global System* (1992)
  - 7 J. Ziegler, *Die Beteiligung von Nichtregierungsorganisationen (NGOs) am Menschenrechtssystem der Vereinten Nationen* (1988).
  - 8 Helmut K. Anheier & Regina A. List, *a Dictionary of Civil Society, Philanthropy, and the non-Profit sector*, XVII (2005).

if NGOs were given larger influence over policy formulation and development.<sup>9</sup>

The world order is not what has long been depicted by state-centric paradigm.<sup>10</sup> Slaughter draws attention to the failure of international world order based on nation states and the intergovernmental organisations. The influence of transnational actors in the present world affairs does not necessarily mean the extinction of nation state. Slaughter notes that the power shift is not a zero sum game. In other words, the transnational actors' increasing eminence should not lead to the conclusion that states are losing control and prominence.<sup>11</sup> In her final analyses she asserts that the new and "real world order" is based on cooperation between the states and transnational actors on global problems. Resolving these problems requires enforcement ability, which could mainly be provided by member states of democratic governments on a positive consensual basis. The presence of NGOs in international fora would not eliminate the role of state, since the intergovernmental policy making arena is likely to remain a central point for coordinating action on the international arena such as human rights and the environment.<sup>12</sup>

In the Millennium report, Secretary General Kofi Annan re-emphasised that strengthening the relations between the United Nations and private actors constitutes a priority of his mandate. He sought to give full opportunity to the NGOs and other non state actors to make their indispensable contribution to the work of the UN. Despite the increasing involvement of NGOs in the processes and proceedings of global politics and international law, the features and functions of NGO have not been clearly identified. In international law the term is confusing in its application.<sup>13</sup> There is lack of agreement on NGOs as subjects of international personality. While in many countries domestic legislation for 'private organisations' serves a basis for NGO identification and recognition, at the international level,

9 See, J Clark, *Democratizing Development: The Role of Voluntary Organization* (1991); C. Malena, *Working with NGOs: A Practical Guide to Operational Collaboration between The World Bank and NGOs* (1995); To have a critical picture as how the role of NGOs to empower local people is often misconstrued, See, Kimberly Vallejo, *NGOs, Politics, and Participation : A Critical Case Study of the Foreign Funded NGO Sector and its Capacity to Empower Local Communities*, available at <http://reconsideringdevelopment.org/issues/ii/ngos-politics-and-participation/> [accessed on 15.01.2015]

10 Anne-Marie Slaughter, *The Real New World Order*, 76 *Foreign Affairs* 183 (1997).

11 *Ibid*, p.184

12 *Ibid*, p.183-197; For an alternative view, See, B Maragia, *Amost There : Another way of Conceptualizing and Explaining NGO's Quest for legitimacy in Global Politics*, 2 *Non-State Actor Int'l L.* 301-331 (2002); NGOs also can give 'competition' to government in international trade, See, Daniel C. Esty, *Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion*, 1 *J. Int'l Eco. L.* 123, 135 (1998).

13 Kerstin Martens, *Examining the (Non-) Status of NGOs in International Law*, 10 *Ind. Global Legal Stud.* 1, 2 (2003); Iveta Silova in her Article observes that " what a decade of intellectual debate on research has brought, however, is a realization that NGOs are obscure organizations, whose impact is often impossible to predict", See, Iveta Silova, *International NGOs and Authiritatrian Government in the Era of Globalisation*, 10 *Current Issues Comp. Educ.* 26 (2008).



international legal standards to define and regulate the perception of NGOs have yet not been established.

The present Article examines the status of NGOs in international law through a historical analysis covering the last century and the analytical problems resulting from NGOs lack of status in international law. It traces back the various attempts to codify an international standard for NGOs from 1910 till the present day and provides an overview of the history and evolution of those organisations as actors in international realm, their collaboration during the League era and the background of codification of their status under the UN context. It would provide a comprehensive picture of how the presence of NGOs in the international legal and political system has evolved into the many varying arrangements that NGOs have with international organisations. The Article attempts to take a closer look at the juridical approaches to the international personality of NGOs in international laws. It also focuses upon the formal requirements for consultative status, the status-specific privileges of NGOs. It sums up with an evaluation and inadequacies of the present status of NGO in the UN system.

**1. Juridical Approach of NGOs in International Law:** This approach places emphases on the legal status of NGOs. They have been heavily involved in the formulation and implementation of international law and norms. Most important, they take part in all forms of global conferences. In the field of human rights protection, NGOs have been identified to the contribution of international standards.<sup>14</sup> Human rights NGOs have continuously gathered information on human rights abuses and put forward proposals on the development and implementation of human rights law. For example, experts of Amnesty International participated during the establishment and writing process of the Convention for Abolition of Torture<sup>15</sup> and drafting of the Convention of the Rights of the Child<sup>16</sup>. Similarly in the field of environmental protection, NGO input on advancing international standards to protect the environment has been of much import.<sup>17</sup>

States have established conventions and treaties to regulate and define important relations in the international arena. NGOs, however, have not yet

14 Theo van Boven, *The Role of Non-Governmental Organizations in International Human Rights Standard-Settings: A Prerequisite of Democracy*, 20 Cal. W. Int'l L. J. 207, 219-220 (1990); Stuart E. Eizenstat concludes that "[NGOs] put pressure on corporations, governments, and intergovernmental organizations to adhere to higher standards", See, Stuart E. Eizenstat, *Nongovernmental Organization as Fifth Estate*, 5 Seton Hall J. Dipl. & Int'l Rel. 15, 25 (2004).

15 Paul Gready (ed.), *Fighting for Human Rights*, 5 (2004).

16 Michael Longford, *NGOs and the Rights of the Child*, in *The Conscience of the World: The Influence of Non-Governmental Organisations in the US System*, 214-216 (1996).

17 Karl Raustiala, *The "Participatory Revolution" in International Environmental Law*, 21 Harv. Env'tl L. Rev. 537, 582-584 (1997).

been recognised by states as having international personality. Despite several attempts since the beginning of the twentieth century to define NGOs and codify their legal status, there is not yet any widely adopted international convention on the nature and law of those organisations. At present, there are no regulations under international law governing the establishment, requirements and the legal status of NGOs. Thus, international legal studies can generally be said to use UN criteria for NGOs.<sup>18</sup>

Since NGOs have become significant players in global affairs they are researched as subjects of international legal studies. From a legal perspective, different studies have examined the involvement and contribution of NGOs in the formulation and implementation of international law and norms. Various studies have shown the important role that NGOs play in the process of establishing new international standards or modifying existing international law according to evolving criteria. Most of these studies have examined the influence of non-governmental representatives on the creation of international law at global conferences. Scholars have widely recognised NGO-IGO links as expanding the channels through which NGOs influence political processes on a global level.<sup>19</sup> They have identified NGOs as contributing significantly to the advancements of international standards in the fields of human rights protection and also been involved in the drafting processes for various conventions. Despite all these, their characteristics have not yet been defined precisely nor has their legal status in international affairs clearly determined.

The juridical approach has so far appeared to be more problematic, as the status of NGOs under international law is still ambiguous, and with a few exceptions<sup>20</sup> there is no international legal arrangement regulating their role and legal setting. With the ever increasing number of NGOs entering the UN system, there is dilemma due to lack of regulation for NGOs.<sup>21</sup> The new scheme allows governments to misuse the system of accreditation and promote their own NGOs to obtain consultative status. As a result, more dubious NGOs

---

18 On the classification of NGOs, See Antonio Cassese, *How Could Nongovernmental Organization Use UN Bodies More Effectively*, 1 *Universal Hum. Rts.* 73, 73-73 (1979).

19 See, Shamima Ahmed, David M. Poter, *NGOs in International Politics* (2006); Hildey Teegan, Jonathan P. Doh and Sushil Vachani, *The Importance of Nongovernmental Organization (NGOs) in Global Governance and Value Creation: An International Business Research Agenda*, 35 *J. Int'l Business Stud.* 463, 472 (2004).

20 Council of Europe, *The European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations*, ETS No. 124 entered into force on 01.01.1991. By the Convention, signatory states undertake to recognize the organizations that shall satisfy the requirements specified under the Convention as international NGOs having legal status within borders.

21 Pierre-Marie Dupuy, Luisa Vierucci (eds.), *NGOs in International Law: Efficiency In Flexibility?* 15 (2008).

the so-called Government-Organised Non-Governmental Organisations (GONGOs), from human rights violating states, obtain status and thus have the ability to advocate as NGOs in favour of their governments at the UN. In recent years however, more and more GONGOs seek to take the floor in order to give an account of wonderful human rights situation in states well known for violation for such. Such statements not only reduce the available time for more legitimate human rights NGOs, but also undermine the system of NGO accreditation at the UN as a whole. In particular, some Chinese and Iranian organisations have been suspected of being government organised.<sup>22</sup>

Thus, it is observed that despite the increasing participation in international affairs, the non status of NGOs in international sphere has created several problems. The following sub-sections have examined the status of NGOs in international law by exploring their recognition by different intergovernmental organisations.

### ***1.1 Status of 'NGOs' in the International Arena from a Historical Perspective :***

International law has traditionally been state centric. It elaborates the body of law and rules that are based on customs, treaties, and legislation, which control or affect the rights and duties of nation states. In other words states are the framers and principal actors of international law.<sup>23</sup> For instance, in human rights law, states are seen as the principal duty bearers of obligations to respect, protect and fulfil human rights, even though in many cases, they have also been found culprits of human rights violation. On the other hand NGOs have also been very influential at the international plane since the mid nineteenth century. Although some scholars argue that the history of non-state actors in the international system started after World War II because of increased NGO activities following the creation of the United Nations, the emergence of those organisations cannot be regarded as a completely new phenomenon in international relations.<sup>24</sup> As earliest examples of international NGOs

22 Christopher Heurlin, *Governing Civil Society: The Political Logic of NGO-State Relationship under Dictatorship*, 21 Int'l J. Voluntary & Nonprofit Orgs. 220-239 (2010); Janne Bjerre Christensen, *Drugs, Deviancy and Democracy in Iran: The Interaction of State and Civil Society*, 91 (2011).

23 Carlo Focarelli, *International Law As A Social Construct: The Struggle For Social Justice* 1 (2012).

24 Alexis de Tocqueville during his visit to America from France identifies voluntary associations as a particular genius of American country. In his own word "men had bound themselves publically to a cause", See, Sabine Lang, *NGOs, Civil Society, and The Public Sphere* 37 (2013).

one can probably point out the Christian Churches and their spiritual and secular order that was formed in the sixth century and represented private transnational networks at that time. Two of these entities Holy See and Sovereign Order of Malta are regarded as legally recognised actors under international law. However, the system of sovereign states did not exist in medieval times, which were characterised by a system based on hierarchical and parallel religious or secular concepts of subordination and dependence<sup>25</sup>. It remains therefore doubtful whether these entities can be regarded as ‘nongovernmental’ in the present understanding of the term and for that reason the status of Holy See is ambiguous and which may lead to an inference of it being as a state actor.<sup>26</sup>

The earliest organizations which can be regarded as forerunner of today’s NGOs operated in the late eighteenth century, when private individuals with shared interest created problem-targeting organisations to spur and shape decision making.<sup>27</sup> Slavery and the slave trade triggered the emergence of early NGOs, like Pennsylvania Society for Promoting the Abolition of Slavery in 1775 and the British and Foreign Anti Slavery Society in 1839.<sup>28</sup> These organisations cooperated among them and connecting with each other became transnational in the middle of the nineteenth century and put their efforts in organising international conferences like the International Anti-Slavery Conference in London in 1840.<sup>29</sup> The most outstanding illustration of this period for the effective advancement of international legal regimes by NGOs is the activity of the International Committee of Red Cross (ICRC). Outraged by the cruelty of Italian war, Henry Dunant in 1863 persuaded the Geneva Welfare Society to solicit and address the humanitarian situation of wounded soldiers.<sup>30</sup> The organisation strongly lobbied for an international governmental conference which took place in 1864 and at which European states

---

25 Christopher Schreuer, *The Warnings of the Sovereign States: Towards a New Paradigm of International Law*, 4 Eur. J. Int’l L. 447 (1993) also cited in , Karsten Nowrot, *Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law*, 6 Ind. Global Legal Stud.579, 582 (1999).

26 See, Yasmin Abdullah, *The Holy See at United Nations Conferences: State or Church?*,96 Col. L. Rev. 1835 (1996), also cited in, Karsten Nowrot, *Id.*

27 Peter Macalister-Smith, *Non-Governmental Organizations, Humanitarian Action and Human Rights*, In *Recht Zwischen Umbruch Und Bewahrung* 477, 483 (Ulrich Beyerlin et al. eds., 1995).

28 Ann Florini, *The Coming Democracy: New Rules for Running a New World* 121 (2013).

29 Steve Charnovitz *Two Centuries of Participations: NGOs and International Governance*, 18 Mich. J. Int’l L. 183, 192 (1997).

30 *Ibid.*, at 200.

adopted the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. From that time on, the ICRC, private organisation run by Swiss citizens and supported by a network of national Red Cross societies around the world, and has played a major role in the development of international humanitarian law.<sup>31</sup>

The first attempt to take part in the intergovernmental decision making process by the NGOs has its origin in the nineteenth century. For example, the First Geneva Conference was suggested and formulated by ICRC. Most of the major conferences starting with the Congress of Vienna in 1815 until the Hague Peace Conference in 1908 were attended by numerous nongovernmental organizations. Governments often used the preparatory work of private NGO conferences to formulate multinational conventions in the areas of intellectual property rights and international narcotic control.<sup>32</sup>

At the end of World War II the phrase “human rights” was nearly unidentified, whether in the news, in standard text books or as a protocol for state behaviour in the emerging international community. It was the NGOs that made the phrase the basic principle in the UN Charter in 1944. This was a beginning of a historic effort to make the UDHR a fundamental standard for measuring progress in civilised societies. In fact the phrase Nongovernmental organisation (NGO) itself came into popular use with the establishment of the United Nations in 1945.<sup>33</sup> Some aspects, processes and provisions of the UN give recognisable role to NGOs. The UN offers a consultative status to organisations that are neither governments nor member states. This signifies the initiation of substantial engagement of NGOs in the UN processes, although a comparatively and ad hoc and minor role at that time.

Prior to the UN’s recognition of NGOs, several proposals were made since the early 1920s to clarify the legal status of international nongovernmental organisations. Efforts have been undertaken to develop an international order on the subject of NGOs. This issue was first raised by the Commission on Legal Status of International Associations of the

---

31 Malcom N Shaw, *International Law* 806-823 (1997).

32 Charnovitz, *supra* note 27 at 195-198

33 Ajibade, Idowu Mopelola, *A Synopsis: Rights, Responsibilities and Roles of Human Rights NGOs under International Law* (October 10, 2008). Available at SSRN: <http://ssrn.com/abstract=1300103> or <http://dx.doi.org/10.2139/ssrn.1300103>

Institute of International Law in 1910, when at its session in Paris, it brought forward a draft convention on NGOs and proposed a study on “the juridical conditions of international associations”.<sup>34</sup> Others followed the example at another session at Madrid in 1911 and thus in 1912, a first draft treaty on the international legal personality of NGOs was developed. In spite of all these efforts, none of these treaties led to the establishment of an internationally agreed convention on NGOs. Several other attempts at NGOs failed because of lack of consent of states.<sup>35</sup> As a result NGOs are obliged to accept the national legislation of the state in which they have been established and where they are based. Since national law varies from country to country, their status too. Because of these differences in national laws issues arise for NGOs operating in a transnational sphere. Difficulties arise when, for example, an NGO transcends the border of its own state of origin. An internationally operating NGO with branches in several states would fall under different national systems of law. At the same time, NGOs cannot evade national jurisdiction when they are participating at the international level, since some IGOs including the UN require that NGOs have certain legal status when applying for consultative status. NGOs have been aiding in administration of the implementation of the Global Compact, a program among the United Nations, multinational companies, and nongovernmental organisations to improve labor standards, human rights and environmental protection.<sup>36</sup>

Interaction with Intergovernmental Organisations (IGO) has always represented a central part of NGO activity at the international level. Since the League of Nations, various forms of cooperation have developed in response to a convergence of NGOs and IGOs interests. On the one hand, institutional structures of international cooperation provide NGOs with the forum they necessitate to make their voices heard beyond the boundaries of nation state and with a target for exercise of their nongovernmental diplomacy. On the other, IGOs have looked at nongovernmental organisations as strategic allies to ensure the success of their policies and programmes, either by disseminating information and raising public awareness or by means of direct action on the field.

---

34 A.Von Weiss, *Die non-governmentalen organization und die Vereinten Nationen*, 27 *Zeitschrift fur Politik* 387,395 (1980) cited in Kerstin Marten, *supra* note 1 at 4.

35 Charnovitz, *supra* note 27, at 395

36 For the ten principle of Global Compact, See, <https://www.unglobalcompact.org/aboutthegc/thetenprinciples/> [accessed on 19.12.2014]; Jean-Philippe Therien, *The Role of the United Nations in the Governance of Development*, In *Handbook of International Political Economy of Governance* 289 (Anthony Payne and Nicola Phillips eds.,2014)

## 1.2 NGO Participation during the League Era:

The Covenant of the League of Nations of 1919 established no formal rules governing the relationship between the League and NGOs. The Covenant referred only indirectly to NGOs, by recognising the work of the ICRC.<sup>37</sup> In Article 25, members of the League agreed to advance and promote the foundation and cooperation of national branches of the ICRC for the purpose of improvement of health, prevention of diseases and mitigation of sufferings throughout the world. In 1921 the League Council made an attempt to give Article 24, which addressed the relationship with other international organisations, a wide interpretation in order to incorporate NGOs in the Article. It included the phrase “all international bureaux”,<sup>38</sup> an expression that leaves open the question whether it refers to all international bodies such as NGOs, in addition to ICRC. During its first years, the Council allowed for the interpretation of Article 24 broadly as referring to all kinds of international organisations.<sup>39</sup>

Although no formally recognised status at the League did exist, it was often possible for them to propose and advance their standpoints and opinions. They presented oral reports to the League committees, submitted written statements and participated in discussions, advised the League in many counts, proposed resolutions as well as amendments to international negotiations and even sat in official delegations at meetings. The League cooperated with NGOs on a wide range of issues in diverse ways.<sup>40</sup> They contributed in various legislative arenas such as finance, transport, narcotics, refugees, minority rights and many more. It is assumed that around 450 international NGOs had contact with the League on a regular and close basis. They participated as “assessors” within the League system. Some NGO representatives enjoyed all rights and privileges of official representatives other than voting rights. There was an intensive consultation process between the League and

37 The Covenant of the League of Nations (28<sup>th</sup> April 1919) [Online: web] Available at <http://www.worldcourts.com/pcij/eng/laws01./html> [accessed on 23. 12.2013]

38 “There shall be placed under the League all international bureau already established by general treaties if the parties to such treaties consent. All such international bureau and all commissions for the regulation of matters of international interest hereafter constituted shall be placed under the direction of League. League of Nations Covenant Art 24, para 1

39 During the League era the expression ‘NGOs’ was not commonly used. In League the term “private organizations” were used instead. In the alternative, the expressions “voluntary organisations” or “volas” were also used.

40 Karsten Nowrot, *supra* note 23 at 587.

the international NGOs on a range of activities.<sup>41</sup> The establishment of a High Commissioner for Russian Refugees in 1921 occurred because of an initiative by a consortium of NGOs, including the Federation of Trade Unions. They were also given the opportunity to consult government representatives at the World Disarmament Conference in Geneva in 1932. On labour issues, NGO participation has been intense in the League system. The International Chamber of Commerce occupied three seats on the League of Nations Economic Consultative Committee and enjoyed full voting rights and direct participation in League negotiations.<sup>42</sup>

The early League attitude towards the private organisations was one of whole hearted cooperation. The League system and its relation with NGOs had various effects in international law. Many new NGOs and IGOs were developed on the initiative of the League in this era. Some received financial support from the League. Most important, the League gave a grant to the Union of International Associations, enabling it to expand its activities.

Over the years the League changed its policy towards NGOs concerning formal arrangements. In June 1921, the League proposed support for all international organisations, including private organisations, and the Council of the League tried to provide official character to all NGOs on the basis of Article 25.<sup>43</sup> However, the Council withdrew from its position and reversed itself two years later and deserted the plan of applying Article 24 to the NGOs because of manifested worries that the introduction of official supervision could inhibit the activities of international NGOs.<sup>44</sup> Despite the large amount of previous interaction with NGOs it cut its relationship with NGOs. In 1923 it declared that the references in Articles 24 and 25 are referred only to IGOs. It justified its decision by claiming that it was avoiding the potential risk associated with official supervision of the activity of voluntary organisations. The League shifted its intense interaction with NGOs to minimal contacts. The International Labour Organisation (ILO) maintained a constantly open and interactive relation with NGOs. The Constitution of ILO provided for a tripartite system, which encompassed

---

41 Deirdre M. Curtin, '*Civil Society*' and the European Union: *Opening Space for Deliberative Democracy*, IN 1996 European Community Law 214 (Academy of European Law eds., 1999)

42 Charnovitz, *supra* note 27, at 16

43 Charles Chatfield, *Intergovernmental and Nongovernmental Association to*, In *Transnational Social Movements and Global Politics : Solidarity Beyond The States* 26 (Jackie Smith et al eds, 1997) cited in Kerstin Martens, *supra* note 11 at 12

44 Chiang Pei-Heng, *Non-Governmental Organization at The United Nations* 37 (1981).



the representatives of workers, employers and governmental bodies. The labour and employer representatives had equal status, with the same rights and duties as governmental delegates. Consequently, the workers' representatives had a chance to shape the policy of the ILO, and the ILO gained much due to cooperation with NGOs.<sup>45</sup>

NGOs also delivered a major part at the Permanent Court of International Justice (PCIJ). Unlike the successor, the International Court of Justice (ICJ), the PCIJ allowed for the inclusion of NGOs before the Court. Contrary to the ICJ, the PCIJ backed the opinion that the term "international organisations" also refers to nongovernmental organisations. In particular, trade unions and worker's organisations used the opportunity to place their demands before the Court. In 1922 for example, when issues concerning worker's rights were discussed at the International Labor Conference, the PCIJ allowed any organisation that expressed the desire to be heard to participate.<sup>46</sup>

### ***1.3 Evolution of NGO Engagement in the United Nations:***

The United Nations initially coined the term NGOs after World War II.<sup>47</sup> NGOs were first officially acknowledged in international law in 1945, with the introduction of the UN Charter, whose Article 71 referred to "nongovernmental organisations". The arrangement introduced a new form of cooperation between actors in international society, "though the recognition has only limited effect and can in no way regarded as "legal status".<sup>48</sup> It introduced a negatively composed term (*non-governmental organisation*) to encompass a variety of actors without defining the term precisely. Members of the academia essentially used the term "NGOs" only when referring to those societal actors which are international bodies and engage within the UN context. Since roughly the mid-1980s, however, the term "NGO" became dominant term for all kinds of societal actors also engaging outside the UN System.<sup>49</sup> That is to say, it provided only for ECOSOC to consult with NGOs for specific purposes when dealing with matters falling within the competence of the UN. According to

45 Lyman Cromwell White, *International Non-Governmental Organizations: Their Purpose, Methods, And Accomplishment* 258 (1968)

46 Statute of Permanent Court of International Justice (1936), Article 66 [Online web] URL: Available at <http://www.worldcourts.com/.pcij/english/html/eng./laws>

47 UN Charter (1948), Article 71

48 Marcel Merle, *A Legal Tangle: The "Status" of Non-Governmental Organizations Between International Law and National Laws*, *Transnat'l Ass'sns* 326 (1995) cited in Kerstin Martens, *supra* note 11 at 15.

49 Kerstin Martins, *supra* note 11 at 15 fn 60.

the UN, NGOs are primarily understood as being international bodies, as Article 71 explicitly states that national NGOs are considered only under special circumstances.<sup>50</sup> In accordance with Article 71, particular resolutions are specified in detail how the interaction between the two types of organisations is regulated. These resolutions<sup>51</sup> on the consultative relationship focus more on the principles and objectives of this relationship rather than on defining the term precisely.

NGOs were influential in demanding for and developing public opinion in favour for the First World Disarmament Conference which was held in 1932. Feminist, pacifist and other organisations in the United States had made the Conference an important component of their programme during the several years preceding this Conference. NGO activities in the area of both disarmament and human rights generated controversy for governments that were active in the League of Nations, some Countries advocated writing into the Charter some consultative roles for NGOs.<sup>52</sup>

Relevant for the present study is how UN has organised its relation with NGOs. The basis of NGO involvement is set in the UN Charter since 1948. According to Chapter X Article 71, ECOSOC had the right to negotiate with non-state actors when it was believed to be relevant.<sup>53</sup> In the preliminary discussions at Dumbarton Oaks, the question of the relation of NGOs to the proposed general international organisation, i.e. the United Nations, was not considered. At San Francisco, the question came up in connection with that of the relation of intergovernmental organisation such as the ILO to the conference and to the proposed organisation. The issue arose as the result of the insistence of the Soviet Union that the World Trade Unions Conference (WTUC), a nongovernmental labour organisation with strong Soviet backing, should be given the same observer status at San Francisco as the ILO in the same relationship to the proposed “general international Organisation” under the terms of the Charter.<sup>54</sup> The issue as regards the

---

50 UN Charter Article 71

51 For example E.S.C. Res 1996/31, U.N. ECSCOR, 49<sup>th</sup> mtg, Supp. No.1, 10,11, 13, U.N. Doc.E. 1996/31 (1996)

52 Charnovitz supra note 27 at 351 cited in Paul Taylor & Ajr Groom, *United Nations at The Millenium : The Principal Organs* 273 (2000).....

53 *Ibid*

54 Neri Sybesma-Knol, *Non-State Actors in International Organizations : An attempt at Classification*, 19 SIM Special, 31 available at <http://www.uu.nl/faculty/leg/NL/organisatie/departementen/departementrechtsgelijkheid/organisatie/onderdelen/studieeninformatiecentrummensenrechten/publicaties/simspecials/19/Documents/19-03.pdf> [accessed on 16.12.2014]

future relationship of NGO to the UN was sharpened by the effort of the UK to get assurance in the Charter that the ILO would be recognised as the organisation responsible for securing improved labour standards and to give nongovernmental organisations an official relationship to the proposed organisation. Agreement was achieved in a compromise solution under which the Council could arrange with intergovernmental agencies for reciprocal exchange of non-voting participation in meetings and for suitable consultation with NGOs concerned with matters within its competence.<sup>55</sup>

The General Assembly finally approved a resolution on 14 February 1946 recommending that ECOSOC should as soon as possible adopt a suitable arrangement enabling these organisations as well as other international, national and regional nongovernmental organisation whose experience the Council will find necessary to use, collaborate for the purpose of consultation with ECOSOC.<sup>56</sup> Taking note of the resolution, the ECOSOC at its first session created a Committee on temporary arrangements for consultation with NGOs.<sup>57</sup> The Committee was instructed to submit detailed proposals concerning consultation with national, regional and international NGOs.<sup>58</sup> The Committee has 19 members at present elected by ECOSOC on the basis of equitable geographical representation. It deals mainly with procedural questions but has subcommittees where substance is also discussed. It holds periodic meetings to study existing consultative arrangements and consider application for consultative status and review quadrennial reports submitted by NGOs on their UN-related activities.<sup>59</sup>

The drafting Committee provided a way out of the impasse by providing for the establishment of a relationship between the ECOSOC and the NGO formalising the League practice of consultation with the NGOs. Thus, the two related paragraphs 70 and 71, of the Charter dealing with

---

55 See, UN Charter Article 71.

56 GA Resolution 4 (I), 14<sup>th</sup> February 1946 [Online:web] Available at <http://www.un.org./res./eng./html> Accessed on 10th January 2012.

57 ECOSOC Res 2/3-21 June 1946; Maya Prasad, *The Role of Non-Governmental Organizations in the New United Nations Procedures for Human Rights Complaints*, 5 J. Int'l L. Policy 440,442 (1975)

58 Ibid

59 The Committee known as the NGO Committee, became in 1949 the Council Committee on Non-Governmental Organisations. Its membership was subsequently increased in 1950 to seven, and in 1966 to thirteen. See E COSOC Res. 288B (X) of 27<sup>th</sup> February 1950 and 1099 (XL) of 4<sup>th</sup> March 1966

relationships with the specialised agencies and NGOs became a package that satisfied the Soviet Union on the issue of the WTCU and the British Government agreed to drop the request to name the ILO in the Charter. The Dumbarton Oaks proposal were immediately published, with the US Department of State distributing approximately 1900000 copies of the text domestically and public response was enormous. As a result, the US delegation to the San Francisco conference included representatives of 42 national organisations as consultants in the field of labour, law, agriculture, business, education, etc. The rationale was to inform the NGOs on the conference and to procure their advice.

## **2. Rights of NGOs under International Law:**

Most NGOs operate nationally, and hence the legal status, their rights and obligations are determined by the law of the country through which they operate. The NGOs which operate transnationally, such as Amnesty International, Care, Oxfam have international character and their legal status is generally determined either by state of incorporation or, in the absence of incorporation, by the state where their headquarters, or other organised activities are located. The NGOs which operate transnationally are governed by the domestic laws of the country by which they are established.<sup>60</sup> In the absence of specific code of conduct for NGOs, the rights of NGOs can be derived various from treaties, norms and practices which include amongst others, freedom of association, right of participation, right of recognition and right to initiate legal proceedings. These rights are not exhaustive. NGOs also have rights to acquire property and receive gifts and bequests. The rights display the emerging role of NGOs in international law. Amongst these rights, Freedom of Association can be considered the primary basis for the formation of NGOs in domestic level. Every citizen has a right to form association to carry out specific objectives. Several human rights instruments both global and regional have general guarantees of freedom of association. General guarantees can be found in Article 20 of the Universal Declaration of Human Rights (UDHR), Article 22 of the International Covenant for Civil and Political Rights (ICCPR), Article 10 of the African Charter of Human and Peoples Rights, Article 16 of the American Convention of Human Rights and Article 11 of the European Convention on Human Rights and Fundamental

---

<sup>60</sup> Wouters, J and Ingrid, Rossi, working paper no.14 (November 2001) [Online:web] URL: Available at, <http://www.law.kuleven.ac.be/iir/nl/wp/WP/pdf> [accessed on 10th May 2010]

Freedom. Furthermore, Article 5 of the United Nations General Assembly Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms promotes the protection of human rights and fundamental freedom and states that “everyone has rights individually and in association with others at national and international level to meet peacefully, to form, join and participate in NGO or groups and to communicate with NGO or IGO”.<sup>61</sup>

The recognition of NGOs under international law can be categorised into two segments. One is direct and the other is indirect recognition. From the League of Nations till today they have been accorded recognition with the UN. Even if the recognition at times was informal and adhoc, NGO representatives made oral contributions and also had a voice in different commissions of the League. NGOs participated in the Hague Convention of 1956, at the World Conference on Disarmament, and at the UN conferences and other international and regional conferences. All these participatory roles grant in a subtle manner some indirect recognition status to NGOs. The Belgian Law of 1919,<sup>62</sup> Article 71 of the UN Charter, different ECOSOC resolutions and European Convention on the Legal Personality of International NGOs seem to give more formal and direct recognition to NGOs, acknowledging their relevance and contribution to development and implementation of the rule of law. NGOs have participated in various capacities at the international level. They have participated as advisors, monitors, amicus curiae partners and so on.<sup>63</sup>

### 3. Present Status of UN-NGO Relationship:

There is no doubt in the fact that NGOs have become a long-term phenomenon in international law. As discussed earlier, NGOs have been attached informally to the League system. To make their role more formal and permanent, UN has envisaged Article 71 to create a mutually beneficial working relationship. The UN has been the only intergovernmental organisation to formulate

61 Ajibade, Idowu Mopelola, *Supra note* 31.

62 The Belgian Law recognizes internationally operating NGOs as having a preferential statute even when their headquarters are located outside Belgium. Article 8 of the Belgian Law of 1919 states “international associations with their registered office abroad, which are governed by foreign law, may in Belgian exercise the rights accruing from their national status. It is not essential that the administration shall include at least once Belgian member”.

63 *Methanax Corporation v. United States*, Decisions on Petitions from Third Persons to Intervene as “Amici Curiae” paras 33,53; NAFTA Ch. 11Arbitral Tribunal. of (15<sup>th</sup> January, 2001) available at <http://www.state.gov/docs/organisations./pdf> [accessed on 7th March 2010]

a legal status to NGOs. Although the provision of Article 71 is confined to ECOSOC, NGOs have rather succeeded to enter into working relationship with other principal organs of UN. NGOs have engaged themselves with several development programmes, “educational work and operational activities of the UN formally and informally”.<sup>64</sup> NGOs applying for the consultative status with ECOSOC can be admitted into one of the three categories specified in ECOSOC Resolution E/1996/31 of July 1996.<sup>65</sup> They provide a vital role in providing consultation to ECOSOC falling within the matters of its competence. The consultative status gives them an opportunity to voice for the concerns of the neglected or unrepresented, which would otherwise go unheard. The status brings the privilege of influencing decision making by members of UN. There are diverse numbers of NGOs who represent diverse perspectives on complex issues arising from different corners of the world’s people. UN gives them the platform to be heard on several complicated issues of international relations. NGOs have thus engaged themselves with many specialised agencies for various purposes, such as, international economic and social development, the promotion and maintenance of peace, establishment of international law and humanitarian assistance.<sup>66</sup>

### **3.1 Formal Requirements for Conferment of Consultative Status:**

ECOSOC resolution 1996/31 has outlined the fundamental requirements for conferment of consultative status that may be established with international, regional, sub-regional and national organisations,<sup>67</sup> and, in the case of a national organisation, only after consultation with member states concerned. The organisation in search of consultative status must be concerned with the matters falling within the competence of ECOSOC and its subsidiary bodies.<sup>68</sup> The organisation seeking such status must be able to express that its programme of work is of direct relevance to and can

64 *UN System and Civil Society-An Inventory and Analysis of Practices*, Background Paper for the Secretary General’s Panel of Eminent Persons on United Nations Relations with Civil Society, May 2003. [online:web] <http://www.un-ngls.org/orf/ecosoc%20HL%20Panel%20-%20Background%20paper%20by%20Secretariat.doc>

65 UN Economic and Social Council, Resolution 1996/31, adopted 25 July 1996, UN Document E/1996/31. [online:web] available at <http://www.un.org/documents/ecosoc/res/1996/eres1996-31.htm>, para 21 to 24,

66 *Guidelines Association between the United Nations and Non-Governmental Organisations*, 2 available at <http://www.staff.city.ac.uk/p.willetts/NGOs/Guidelns.pdf> [accessed on 11.11.2014] [hereinafter Guidelines]

67 UN.Doc E/1996/31 of (25<sup>th</sup> July 1996), See *supra* note 63, at para 5

68 *Ibid*, at para, 1

contribute to the aims and purposes of the UN.<sup>69</sup> The aims and purposes of the organisation must be in conformity with the spirit, purposes and principles of the UN Charter.<sup>70</sup> The organisation must be of recognised standing within its field of competence<sup>71</sup> and must have an established headquarters with an executive officer.<sup>72</sup> Furthermore, the organisation must have a democratically adopted constitution,<sup>73</sup> a representative and an accountable inner structure<sup>74</sup> and authority to speak for its members. As regards the funding of the organisation, the basic resources must be derived either from national affiliates or other components or from individual members.<sup>75</sup> Lastly the organisation must attest that it has been in existence for at least two years at the date of receipt of its application.<sup>76</sup> Depending on the nature of the organisation, its scope and activity and the contribution it can be expected to make to the work of ECOSOC, an NGO can ask for General consultative status, or Special consultative status, or can be put on the Roster.

### ***3.2 NGOs working with the UN:***

NGOs have now become an important resource of UN by providing expert analysis in diversified field of international law. They help monitor and implement international agreements, volunteer resources and execute and oversee developmental projects. UN and NGOs share many interests and work together in many ways. *First*, NGOs may seek and obtain consultative status with ECOSOC to one of the three categories namely, General, Special or Roster. Each category entails different set of privileges within the activity of UN. The consultative NGOs are permitted to send representatives to meetings and make contributions to United Nations events based on category of status they hold. *Second*, NGOs may receive accreditation through the Secretariat office to attend and any conference, summit or any other incident organised by the UN. *Third*, NGOs may establish functional relations with other five organs of UN, particular departments and its specialised agencies. Although such participation

---

69 *Ibid*, at paras, 3 and 8

70 *Ibid*, at para, 2

71 *Ibid*, at para, 98

72 *Ibid*, at para, 10

73 *Ibid*

74 *Ibid*, at para, 12

75 *Ibid*, at para, 11

76 *Ibid*, at para, 13

are not codified, it has been usual practice of NGOs to work informally towards common goals. <sup>77</sup> Finally, NGOs can conduct effective information programmes of UN activities, both within and outside its constituencies to a larger audience either by publishing newsletters, pamphlets, or television programmes; or through conducting conferences and seminars.<sup>78</sup>

### **3.3 Three Levels of ECOSOC Consultative Status for NGOs:**

Depending on the nature of organisation, its scope of activity and the contribution it can be expected to make to the work of ECOSOC, an NGO can ask for any of the three categories provided by the Council mentioned below:-

#### **3.3.1 General Status**

NGOs which are concerned with most of the activities of ECOSOC can apply for General consultative status, from which NGOs can contribute to the substantive and substantial issues of UN. It is the most far reaching category amongst all three categories. Usually NGOs who operate transnationally in larger regions of the world have been obtaining this General status. The rights and privileges relating to this status are the most far-reaching of the three categories.<sup>79</sup> Any organisation enjoying it may designate UN representatives, is invited to UN Conferences,<sup>80</sup> may attend UN meetings, may speak and shall circulate statements at meetings of ECOSOC and of subsidiary bodies of ECOSOC and may even propose items for agenda of this principal organ.<sup>81</sup>

77 NGOs are engaged in informal arrangements in Security Council through the "Arria Formula Arrangement". The Arria Formula enables a member of the Council to invite other Council members to an informal meeting, held outside of the Council chambers. elected members of the Council sought to broaden the use of the Arria Formula, to include NGOs and other non-state representatives. See, James Paul, The Arria Formula, October 2003, <https://www.globalpolicy.org/security/mtgsetc/arria.htm>. [accessed on 13.12.2014]

78 Guidelines *Supra* note 64 at 3

79 P.Van den Bossche, Maastricht Faculty of Law Working Paper 2005-10, *Rules on Ngo Accreditation Do Existing Legal Arrangements Facilitate the Legitimization of the Role of Ngos in International Organisations?*,5 .. Available at SSRN: <http://ssrn.com/abstract=977382> or <http://dx.doi.org/10.2139/ssrn.977382> [accessed on 18.12.2014]

80 Invitation does not amount to accreditation. According to para 41 of Res.1996/31, where nongovernmental organizations' have been invited to participate in an international conference convened by the UN, their accreditation is the prerogative of member states exercised through the respective preparatory committee. However, organizations with consultative status at the UN shall as a rule be accredited.

81 I. Rossi Hansberg., *Legal Status of Non-Governmental Organisations in International Law*,79 (2009) available at [http://www.icsw.org/doc/Advocacy\\_in\\_International\\_Institutions\\_by\\_Civil\\_Society\\_Organizations.pdf](http://www.icsw.org/doc/Advocacy_in_International_Institutions_by_Civil_Society_Organizations.pdf). [accessed on 21.12.2014].



### 3.3.2 Special Status

The scope and activity of NGOs in Special consultative status is limited as compared to the fields of activity covered by ECOSOC. Organisations which are affiliated to Special status enjoy the same privileges as those with General consultative status except proposing an item for the ECOSOC agenda or speaking at the meetings of ECOSOC. Also, there is a limitation of 500 words in submitting written statements to ECOSOC and 1500 words to its subsidiary bodies.<sup>83</sup>

### 3.3.3 Roster Status

Often NGOs coming from different backgrounds are unable to satisfy the criterion required for General or Special consultative status, but can make occasional and useful contributions to the work of ECOSOC. Such organisations are put in the third category, known as the Roster.<sup>84</sup> They provide consultations at the request of ECOSOC and its subsidiary bodies. The scope and privilege appertaining to this status is limited to the designation of UN representatives, attendance at UN meetings and invitation to UN Conferences. Many NGOs are in the Roster list not because they have fulfilled the formal ECOSOC requirements but by virtue of their status with the UN specialised agencies and other UN bodies.<sup>85</sup>

The table below shows the status specific privileges of NGOs in consultative status.<sup>86</sup>

#### STATUS SPECIFIC PRIVILEGES

General Status	Special Status	Roster
<ul style="list-style-type: none"> <li>Able to consult with officers from the Secretariat on matters of interest to the NGOs.</li> </ul>	<ul style="list-style-type: none"> <li>Able to consult with officers from the Secretariat on matters of interest to the NGO.</li> </ul>	<ul style="list-style-type: none"> <li>Able to consult with officers from the Secretariat on matters of interest of NGO.</li> </ul>

82 ECOSOC Res. Supra note 63, para 23.

83 Ibid, Supra note 63, para 31 (e)

84 Ibid, Supra note 63, para 24

85 Ibid, para 50, 51 and 52

86 The table has been prepared by the NGO Section of the Department of Economic and Social Affairs (DESA), p.5 [online web], available at <http://www.staff.city.ac.uk/p.willetts/NGOS/GUIDELNS.PDF>

General Status	Special Status	Roster
<ul style="list-style-type: none"> <li>Allowed to make oral statements based on recommendations by the NGO Committee.</li> </ul>	<ul style="list-style-type: none"> <li>Allowed to make oral statements based on recommendations by the NGO Committee.</li> </ul>	
<ul style="list-style-type: none"> <li>Allowed to submit written statements of 2000 words at ECOSOC and its subsidiary bodies.</li> </ul>	<ul style="list-style-type: none"> <li>Allowed to submit written statements of 500 words at ECOSOC and 1500 words to its subsidiary bodies.</li> </ul>	
<ul style="list-style-type: none"> <li>Have the right to place items on agenda of ECOSOC and its subsidiaries</li> </ul>		
<ul style="list-style-type: none"> <li>May designate representatives to sit at meetings of ECOSOC and its subsidiaries.</li> </ul>	<ul style="list-style-type: none"> <li>May designate representatives to sit at ECOSOC and its subsidiaries.</li> </ul>	<ul style="list-style-type: none"> <li>May designate representatives to attend meetings in the NGOs field of competence.</li> </ul>

### 3.4 An Assessment of the Present Status

The UN-NGO relationship has been obstructed in recent times. The presence of NGOs in the UN has always been characterised by a dichotomy: willingness of the member states to allow participation on the one hand and their desire to keep it firmly under control on the other. The consultative status is granted by Committee of Non-Governmental Organisations (CONGO), comprised of 19 members from the basis of equitable geographical distribution of the world.<sup>87</sup> The Committee has been criticised by several NGOs. Often member states have been critiqued of blocking the uniform accreditation

<sup>87</sup> See E/1996/31, *supra* note 63, para 61(c)

process.<sup>88</sup> The extent of NGO involvement in international law is therefore a contested issue and their legal status in international law is unresolved. The legal arrangements for NGO involvement in UN are highly politicised. This strains the organisational capacities of NGOs and leads to constant friction among the member states. Some individual member states block the accreditation of NGOs as a means of keeping domestic opposition off the international stage.

Furthermore, in the absence of any accountability mechanisms for NGOs, they carry a legitimacy problem of its own. NGOs are generally dominated by industrialised countries. Probably NGOs from other regions of the world lack the money they need to get involved in the global decision-making process. This increasing visibility of NGOs has developed a debate amongst international scholars, whether to welcome the participation of NGOs in international legal processes. Some authors have expressed discomfort about the participation of NGOs in international law.<sup>89</sup>

NGOs have an externally defined terrestrial or community and their concerns also differ according to their background. They cannot represent the entire unrepresented population of the world. They can at best epitomize the hazard and concerns of the members of which they are composed. In the worst scenario they can put forward the stake of the donors who make immense fund contribution for the particular NGO.<sup>90</sup> Furthermore, NGOs from the North are in an advantageous position of sharing their own perspectives and interests. This gives an assumption that NGO influences may be channelled in a specific “predetermined course”. Also NGOs are sometimes seen as being as forerunner of the intercultural interference taking place in recent times and sometimes states feel it

---

88 The Committee is in particular criticised by the policy towards those NGOs that deal with human rights issues. Those states that are frequently targeted by human rights NGOs are the same states those decide whether the NGOs should obtain consultative status. For more See, J. D. Aston, *The United Nations Committee on Non governmental Organizations: Guarding the Entrance to a Politically Divided House*. 12 Eur. J. Int'l L., 949 (2001).

89 Pearson, Z. (2009). Anna-Karin Lindblom. Non-Governmental Organizations in International Law Sergey Ripinsky and Peter Van den Bossche. NGO Involvement in International Organizations Anton Vedder (ed.). NGO Involvement in International Governance and Policy: Sources of Legitimacy Pierre-Marie Dupuy and Luisa Vierucci (eds). NGOs in International Law: Efficiency in Flexibility?. *European Journal of International Law*, 20(4), 1289-1297,

90 For “Different NGOs, Different Strategies”, See, Steinar Andersen and Lars H. Gulbrandsen, *Report on the Role of Green NGOs in Promoting Climate Compliance*, FNI Report 4/2003 3-7, (2003).

to be upsetting to the long-established principles, culture, practices and to governments as well.<sup>91</sup> Finally, not all NGOs encourage “change” in international community. Some carry out the functions of “geopolitical interest groups” with agendas that satisfy the growth of common international goals and concerns.<sup>92</sup>

The contemporary era of globalisation has witnessed the growth of multiple transnational corporate powers (TNC) and multinational corporations (MNC). TNCs and MNCs are the current source of knowledge provider, provider of technologies, goods and services, mostly essential in solving global problems. NGOs are “non-profit” in nature, but in the absence of a proper definition, question which becomes relevant is whether they perform the same ‘profit driven’ functions of business corporations which is ethically opposed to basic “value based” notion of NGOs. Article 71 enshrines UN’s relationship to the private sector, which has changed to one of “confrontation to cooperation”. Corporations are progressively more interested in the UN as a vehicle for demonstrating their social responsibility. They play an active role in devising voluntary codes of conduct on health programmes.<sup>93</sup>

#### 4. Conclusion

The historical analysis of NGOs in international law demonstrates that the question of international personality of NGOs has not sufficiently been answered. From a legal perspective, NGOs seem to remain *terra incognita*. The analysis of NGO involvement from the League era till the days of UN has revealed the status of NGOs in international law is underdeveloped. The rights and duties of NGOs under the Charter do not differ much from the League system. The global partnership about the UN-NGO status in essence concerns participation. Handled well, it increases the excellence of decision making, increases accountability and transparency of the process. Proper functioning of NGOs, through a variety of views and experiences can enrich outcomes. But handled badly it can confuse choices, hamper the intergovernmental

---

91 The United Nations and Civil Society: *Report of the Thirteenth UN Issues Conference*, Sponsored by Stanley foundation, February 19-21,1999,available at, <https://www.globalpolicy.org/ngos/ngo-un/gen/2000/1128.htm> [accessed on 21.12.2014]

92 *Ibid.*, See, Statement by, Richard H. Stanelly.

93 Fues, Thomas, *The United Nations at the Historic Fork Road*, Briefing Paper (May, 2004) [Online: web] Available at <http://www.un.ngls.org/UNreform./html>. [accessed on 7th September 2010]

search for common ground, corrode privacy needed for sensitive discussions, overcrowd agendas and present distractions at important meetings. To meet the global opportunities that lie ahead, UN and NGOs must reassess their strengths, weaknesses and comparative advantages. They must approach one another with an institutional will to collaborate where appropriate and feasible.



## Novartis decision : Redefining the Constitutional parameters

*Dr. Sanjay Gupta*<sup>1</sup>

*Ms. Manju Sharma*<sup>2</sup>

A patent is a monopoly right granted to a person who has invented a new and useful product or an improvement of an existing product or a new process of making a product. It consists of an exclusive right to formulate the new product invented or formulate a product according to the inventive process for a limited period. Unlike copyright, which arises automatically on creation of a work, patents are only granted after applicant satisfies the requirements of registration. The registration process imposes a number of limits and safeguards on the types of inventions that are patented, the scope of monopoly granted and the nature of information that is disclosed in the patent. The owner of a patent has the power to sell the whole or the part of its property and can also grant licenses to others to use and exploit it. However, the patent application has to undergo the rigorous test of inventiveness, non-obviousness and patentability, which has been a point of deliberation before the Apex Court in *Novartis* case.

### ***Novartis decision***

#### *Facts*

In *Novartis AG v. Union of India*<sup>3</sup>, an appeal was filed by the Novartis against the decision of Chennai Patent Office. The appellant in his application before the Patent Office claimed the product patent for the invented product, the beta-crystal form of Imatinib Mesylate as it has (i) more beneficial flow properties; (ii) better thermodynamic stability; and (iii) lower hydroscopicity than the alpha crystal form of Imatinib Mesylate. The company further claimed that the aforesaid properties makes the invented product “new” as it “stores better and is easier to process”; has “better processability of the methanesulfonic acid addition salt of a compound of formula I”, and has a “further advantage for processing and storing”. In 1997, when the appellant filed its application for patent, the law in India with regard to product patent was in a transitional stage and the appellant’s application lay dormant under an arrangement called “the mailbox procedure”. Before the

---

1 Associate Professor, Law Deptt., Univ. of Jammu

2 Research Scholar, Law Deptt., Univ. of Jammu

3 AIR 2013 SC 1311

application, on March 27, 2002, for grant of Exclusive Marketing Rights (EMR) for the product<sup>4</sup>. The Patent Office granted EMR to the appellant by order dated November 10, 2003.<sup>5</sup>

The appellant's application for patent was taken out of the "mailbox" for consideration only after amendments were made in the Patents Act, with effect from January 1, 2005. But before it was taken up for consideration, the patent application had attracted five (5) pre-grant oppositions in terms of section 25(1) of the Act, and it was in response to the pre-grant oppositions that the appellant had filed the affidavits on the issue of bioavailability of Imatinib Mesylate in beta crystalline form.<sup>6</sup>

The Assistant Controller of Patents and Designs heard all the parties on December 15, 2005, and rejected the appellant's application for grant of patent for the product. The Assistant Controller held that the invention claimed by the appellant was anticipated by prior publication, i.e., the Zimmermann patent; that the invention claimed by the appellant was obvious to a person skilled in the art in view of the disclosure provided in the Zimmermann patent specifications.<sup>7</sup>

The appellant, therefore, challenged the orders passed by the Assistant Controller in writ petitions filed directly before the Madras High Court. Apart from challenging the orders of the Assistant Controller, the appellant also filed two writ petitions ( one by the appellant and the other by its Indian power attorney holder) seeking a declaration that section 3(d) of the Act is unconstitutional because it not only violates Article 14 of the Constitution of India but is also not in compliance with "TRIPS".

After the formation of the Intellectual Property Appellate Board, the five writ petitions challenging the five orders of the Assistant Controller were transferred from the High Court to IPAB where these cases were registered as appeals.

The other two writ petitions assailing section 3(d) of the Act were finally heard by a Division Bench of the High Court and dismissed by the judgment and order dated August 6, 2007<sup>8</sup> wherein the Madras High Court observed: "We have borne in mind the object which the amending Act wanted to achieve namely, to prevent evergreening; to provide easy access to the citizens of the country to life saving

---

4 section 24A of the Act

5 *Ibid.*, para 12 at p. 1317

6 *Ibid.*, para 13

7 *Ibid.*, para 14

8 *Ibid.*, para 15 at p. 1318

drugs and to discharge their constitutional obligation of providing good health care to its citizens.”<sup>9</sup> IPAB observed that when the Appellant was holding the right as EMR on GLEEVEC it used to charge Rs.1,20,000/- per month for a required dose of the drug from a cancer patient, not disputed by the Appellant, which in our view is too unaffordable to the poor cancer patients in India. Thus, we also observe that a grant of product patent on this application can create a havoc to the lives of poor people and their families affected with the cancer for which this drug is effective. This will have disastrous effect on the society as well. Considering all the circumstances of the appeals the court observed that the Appellant’s alleged invention won’t be worthy of a reward of any product patent on the basis of its impugned application for not only for not satisfying the requirement of section 3(d) of the Act, but also for its possible disastrous consequences on such grant, which also is being attracted by the provisions of section 3(b) of the Act which prohibits grant of patent on inventions, exploitation of which could create public disorder among other things.<sup>10</sup>

The IPAB reversed the findings of the Assistant Controller on the issues of anticipation and obviousness. It held that the appellant’s invention satisfied the tests of novelty and non-obviousness, and further that in view of the amended section 133, the appellant was fully entitled to get July 18, 1997, the date on which the patent application was made in Switzerland, as the priority date for his application in India. The IPAB, however, held that the patentability of the subject product was hit by section 3(d) of the Act.<sup>11</sup> Though agreeing with the Assistant Controller that no product patent for the subject patent could be allowed in favor of the appellant, the IPAB held that the appellant could not be denied the process patent for preparation of Imatinib Mesylate in beta crystal form.<sup>12</sup>

Against the order of the IPAB the appellant came directly to this Court in a petition under Article 136 of the Constitution. Initially some of the respondents strongly opposed the maintainability of the petitions made directly to this Court by passing the High Court, but in the end all agreed that given the importance of the matter, this Court may itself decide the appeals instead of directing the appellant to move the High Court. However the Court made it clear that any attempt to challenge the IPAB order directly before this Court, side-stepping the High Court, needs to be strongly discouraged and this case is certainly not to be treated as a precedent.<sup>13</sup>

---

9 Ibid., para 18

10 Ibid., para 19

11 Ibid., para 17

12 Ibid., para 20

13 Ibid., para22 at p. 1319



## ***The Decision***

After analyzing the provisions of the Patent act, the court opined that it is fundamental that for grant of patent the subject must satisfy the twin test of “invention” and “patentability”. Something may be an “invention” as the term is generally understood and yet it may not qualify as an “invention” for the purposes of the Act. Further, something may even qualify as an “invention” as defined under the Act and yet may be denied patent for other larger considerations as may be stipulated in the Act. The court further opined that no doubt that the amendment/addition made in section 3(d) is meant especially to deal with chemical substances, and more particularly pharmaceutical products. The amended portion of section 3(d) clearly sets up a second tier of qualifying standards for chemical substances/pharmaceutical products in order to leave the door open for true and genuine inventions.

Refuting the claim that the coming into being of Imatinib Mesylate from Imatinib in free base was the result of an invention that involved technical advance as compared to the existing knowledge and brought into existence a new substance as a result of complicated research process undertaken, the court held that it is not a new product and the process involved is not so advanced that it is not obvious to a person skilled in the art as Imatinib Mesylate is all there in the Zimmermann patent. The teaching of a patent lies in the disclosure/specification that supports the claim. The disclosure describes the invention. The claim defines through language the various ways the invention could be used, i.e., possible but not actualized products. This is the scope of protection granted under the patent. For the purpose of prior art, it is the disclosure in the specification supporting the claim and not the written description or the claims themselves, that must be assessed.

Furthermore, the court opined that efficacy means “the ability to produce a desired or intended result”. Hence, the test of efficacy in the context of section 3(d) would be different, depending upon the result the product under consideration is desired or intended to produce. In other words, the test of efficacy would depend upon the function, utility or the purpose of the product under consideration. Therefore, in the case of a medicine that claims to cure a disease, the test of efficacy can only be “therapeutic efficacy”. The mere change of form with properties inherent to that form would not qualify as “enhancement of efficacy” of a known substance.<sup>14</sup>

The court thus opined that Imatinib Mesylate was a known substance from the Zimmermann patent. The subject product, that is, beta crystalline form of Imatinib Mesylate, is thus clearly a new form of a known substance, i.e., Imatinib

---

14 Ibid., para 181

Mesylate, of which the efficacy was well known. It, therefore, fully attracts section 3(d) and must be shown to satisfy the substantive provision and the explanation appended to it. When all the pharmacological properties of beta crystalline form of Imatinib Mesylate are equally possessed by Imatinib in free base form or its salt, where is the question of the subject product having any enhanced efficacy over the known substance of which it is a new form.<sup>15</sup> On account of these factors the Supreme Court dismissed the appeal filed by Novartis AG as Beta crystalline form of Imatinib Mesylate fails in both the tests of invention and patentability.

### ***The Review***

The decision thus calls for a debate on the following matters;

1. Whether the Supreme Court can entertain the special leave to appeal when the cases are lying pending in the High Court.
2. When a product can be classified as new.
3. Where the company was wrong.

### **Special Leave To Appeal**

The Special Leave to Appeal is the distinguished potent weapon in its armoury to resist injustice and to deliver justice. This power of the Supreme Court of India is discretionary in nature and Judiciary has exhibited utmost self restraint in the exercise of discretionary power and has laid down certain principles for the exercise of the same. The same stance can be highlighted by the analysis of significant judgments pronounced by the apex court during the first decade of independent India.

In *Pritam Singh v. State*<sup>16</sup>, the Supreme Court laid down the criteria for admitting the Special leave petition as :

- i) The Supreme Court is not an ordinary Court of appeal so it will not allow the facts to be reopened.
- ii) The admission of appeal is not a licence to raise any point.
- iii) The discretionary power is to be exercised sparingly when special circumstances are shown to exist.
- iv) The discretionary power is to be exercised in exceptional cases where substantial and grave injustice has been done.

---

15 Ibid., para 163 at p.1362

16 AIR 1956 SC 415

In *Union of India v. Lt. Col. G.K. Apte*<sup>17</sup> the Supreme Court held that it will not interfere if it feels that it will not promote the interest of justice to set aside the orders of the High Court, even assuming that High Court was somewhat wrong in quashing the charges and the proceedings,

In *M/s Hindustan Tin Works Pvt. Ltd. v. The Employees*<sup>18</sup>, the apex Court opined that the court will entertain a petition for special leave in which a question of general public importance is involved or when the decision would chock the conscience of the court.

In the *State of Bombay v. M/s Ratilal Vadilal and Bros*<sup>19</sup>, the apex Court made a serious observation that ordinarily the apex Court will not allow the High Court to be by-passed and the proper course for appellant is to exhaust all the remedies before invoking jurisdiction of Supreme Court under Article 136.

Though the special leave was allowed in this case but the court observed that such departure from the general principle as stated above must not be treated as the *cursus curiae* for the court.

In *Chandi Prasad Cokhani v. State of Bombay*<sup>20</sup>, the apex Court opined that the court will not exercise its power under Article 136 in such a way as to by-pass the High Court by entertaining an appeal directly from the order of the Tribunal .

In *Penu Balakrishna Iyer v. Ariya M Ramaswami Iyer*<sup>21</sup>, the question which was raised before the apex Court by the appellant by filing of special leave was with regard to the correctness, propriety and legality of the decree passed by the High Court of Madras. On the other hand, the contention of the respondent was that as the appellant had not filed Letters Patent appeal against the decision of Single judge, so the special leave granted by the apex Court should be revoked.

The apex Court while allowing the appeal opined that it cannot be said as a general proportion that if special leave is granted under Article 136 in a given case it can never be revoked. If the respondent brings to the notice of the Supreme Court facts which would justify the court in revoking the leave already granted, the Supreme Court would, in the interest of justice, not hesitate to adopt that course. There is no doubt that if a party wants to avail himself of the remedy provided by Article 136 in cases where the decree of the High Court under appeal has been

---

17 AIR 1971 SC 1533

18 AIR 1979 SC 75

19 AIR 1961 SC 1106

20 AIR 1961 SC 1708

21 AIR 1965 SC 195

passed, it is necessary that the party must apply for leave under the Letters Patent. Normally, an application for special leave against a second appellate decision would not be granted unless the remedy of a Letters Patent Appeal has been availed. It is only where an application for special leave against a second appellate judgment raises issued of law of general importance that the court would grant the application and proceed to deal with the merits of the contentions raised by the appellant. But even in such case it is necessary that the remedy by way of a Letters Patent Appeal must be resorted to before a party comes to this court.

In *Master Constructions Co.(P)Ltd v. State of Orrisa*<sup>22</sup> the Apex court opined that there is no justification to throw out an appeal under Article136 on the ground that the appellant has not exhausted all his remedies, including one under Article226.

Similar stance was taken by apex Court in *M/S. Lakshmi Engineering works Ltd. v. Asst. Commissioner (Judicial 1), Sales Tax*<sup>23</sup> and in *Zila Parishad Muradabad v. M/S Kundan Sugar Mills*.<sup>24</sup>

Furthermore, the Patent Act makes the decision of IPAB final and does not provide for any appeal against its decision<sup>25</sup>. Therefore in such situations the only remedy that a person enjoys is by way of special leave to appeal. Henceforth, the Court has very rightly entertained the special leave to appeal.

2. The newness of the process or product depends upon whether a new reactant has been added or the product formulated is significantly distinct from already known product. The persons in a relevant branch of science can only certify that the significant change has taken place. The significant change cannot be a minor change in the process or product but to such a standard that it bears distinguished distinctive features.
3. In this case the company should not have gone for the fresh product or process patent but should have gone for the patent of addition. The yardstick of determination of fresh product or process patent is more stricter than the yardstick for the determination of patent of addition.



---

22 AIR 1966 SC 1047

23 AIR 1968 SC 488

24 AIR 1968 SC 98

25 Chapter XIX, Ss. 116-117 H

## Supreme Court and rights of the Accused of Speedy Trial

*Prof. (Dr.) C. L Patel<sup>1</sup>*

“Justice delayed is justice denied.” This is a famous saying usually quoted in the common parlance of law. Equally popular is another adage “justice not only be done but it should also seem to be done.” these two saying are very important for an understanding of jurisprudence of a country with relation to administration of justice to citizens.

Right to speedy trial is contained in Article 9(3) of International Covenant on Civil and Political Rights (ICCPR). Article 9(3) provides that any one arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial powers and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that a person awaiting trial must be detained in custody but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.<sup>2</sup>

Now the traditional conception of administration of justice has undergone a radical change. It includes a positive content. Social justice is becoming an integral part of administration of justice. The Supreme Court has observed:

“The Concept of social justice is the yardstick to the justice administration system or the legal justice and as Roscoe Pound pointed out the greatest virtue of law is in its adaptability and flexibility and thus it would be otherwise an obligation for the law Courts also to apply the law depending upon the situation since the law is made for society and whatever is beneficial for the society, the endeavor of the law court would be administer justice having due regard in that direction.”<sup>3</sup>

There has been a gradual broadening of the view of the Supreme Court in the matter of civil liberties. With *Maneka Gandhi v. Union of India*,<sup>4</sup> a new trend has emerged. In this case the Supreme Court has interpreted Article 21 so as to have widest possible amplitude. Protection of Article 21 is well extended to under trials, prisoners and even to the convicts. It has been ruled that a prisoner, be he a convict, under-trial or a detenu, does not cease to be a human being. His conviction does

---

1 Professor Law Pt. Ravishankar Shukla University, Raipur (C.G)

2 Article 9(3) of International Covenant on Civil and Political Rights,1966.

3 Dr. B.N. Mani Tripathi(Jurisprudence and Legal Theory) P. 163, (2000) 6 SSC

4 *Maneka Gandhi V. Union of India*, AIR 1978 SC 597.

not reduce him into a non-person whose rights are subject to the whims of the prison administration, the Court said. Even when lodged in the jail, he continues to enjoy all his fundamental rights including the right to life. On being convicted of crime and deprived of their liberty in accordance with the procedure established by law, prisoners still retain the residue of constitutional rights.<sup>5</sup> After that the Court began to expand the frontiers of fundamentals rights and of natural justice through a variety of creative interpretations inspired by judicial activism. In the process, the judges rewrote many parts of the Constitution. For example, the right of life and personal liberty in Article 21 was converted de facto and de jure into a “due process” clause, contrary to the intention of the makers of the Constitution. This right has soon expanded to encompass many other rights. This has given rise to a new kind of prison jurisprudence, human right jurisprudence, Industrial and labour jurisprudence, environmental jurisprudence by creating new rights of the prisoners, bonded labours, protection of human rights, environmental protection, speedy trials, fair trial and fair investigation, right to free legal services, right to human dignity and right against torture have been made some of the component of the fundamental rights.

In the matter of speedy trial for the accused the Supreme Court has extended the frontier of Law with a view to do real and substantial justice in keeping with the spirit of the Constitution.

### **SPEEDY TRIAL:**

The “right to speedy trial” though not specifically enumerated as a fundamental right but the Court had interpreted it to be implicit in the broad sweep and content of Article 21.<sup>6</sup> Deprivation of personal liberty without ensuring speedy trial violates Article 21. The procedure prescribed by law for deprivation of life or personal liberty cannot be reasonable, fair or just, if it does not provide for a speedy trial of the accused. A speedy trial means reasonably expeditious trial. Keeping the under-trial prisoners in jail for period longer than what they would have been sentenced if convicted is regarded as violative of Article 21. Inordinate delay in bringing an accused to trial or in filing appeal against his acquittal without any fault of accused is also regarded as violative of Article 21.

In *Hussainara Khatoon v. Home Secretary, State of Bihar (I)*,<sup>7</sup> it was brought to the notice of the Supreme Court that an alarming large number of men, women,

---

5 State of A.P. V. Challa Ramkrishna, AIR 2000 SC 2083.

6 Moses Wilson V. Karluriba, AIR 2008 SC 279 and also Maneka Gandhi V. Union of India AIR 1978 SC 597.

7 AIR 1979 SC 1360.

children including, were kept in prisons for years awaiting trial in Courts of law. The offences with which they were charged were trivial and if proved would not warrant punishment for more than a few months, perhaps for a year or two. But, they were deprived of their freedom for periods ranging for three to ten years, without their trial having yet commenced. The Court took a serious note of the situation and observed that it was a crying shame on the judicial system which permitted incarceration of men and women for such long periods of time without trials. These persons were denied human rights and were languishing in jails for years for offences which perhaps they might ultimately be found not to have committed.

The Court referred to the sixth Amendment to the United States' Constitution, 1791, which provided "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial". It is thus a constitutionally guaranteed right in the United States.

In *Hussainara Khatoon v. Home Secretary, State of Bihar(II)*<sup>8</sup> the Court re-emphasized the expeditious review for withdrawal of cases against under-trials for more than two years.

In *Hussainara Khatoon v. Home Secretary, State of Bihar (III)*<sup>9</sup> The Court reiterated that the investigation must be completed within a time-bound programme in respect of under-trials and gave specific orders to be followed for quick disposal of cases of under-trials.

In another case, namely, *Hussainara Khatoon v. Home Secretary, State of Bihar, (IV)*<sup>10</sup> Bhagwati J., once again emphasized that the State cannot avoid its obligation to provide speedy trial to the accused by pleading financial or administrative inability. The State is under constitutional mandate to ensure speedy trial and whatever is necessary for this has to be done by the State. It is also the constitutional obligation of the Supreme Court, as the guardian of the fundamental rights of the people, as sentinel on the qui vive to enforce the fundamental right of the accused to speedy trial by issuing the necessary direction to the State which may include positive action, such as augmenting and strengthen the investigation machinery, setting up new court houses, providing of additional judges and other measures calculated to ensure speedy trial.

In *Hussainara Khatoon V. Home Secretary, State of Bihar (V)*,<sup>11</sup> the Court

---

8 (1980) 1 SCC 91.

9 AIR 1979 SC 1360.

10 AIR 1979 SC 1369.

11 AIR 1978 SC 1377.

considered the extent to which direction in *Hussainara (IV)* had been complied with, passed further directions and gave more time where necessary. In *Hussainara(VI)*, in the pending cases to ensure speedy trial, the Court requested further details from the High Court and directed to the State Government to file affidavit in reply. The sum and substance of the decisions in the *Husainara cases* is the recognition of the right to speedy trial, and the right to legal aid services under Article 21.

Since the recognition that right to speedy trial is fundamental right implicit in Article 21 in *Hussainara cases* a large number cases has come before the Supreme Court relating to delayed trial and it has consistently been held that persons whose trial have not commenced for a long time can move the Supreme Court for necessary action.<sup>12</sup>

However, it may be noted that infringement of the right to speedy trial can not be inferred merely from delay in police investigation. It will depend on the fact and circumstance of each case. Where having regard to the circumstance to the case. The court concludes that the delay in investigation is not as unfair as to warrant quasi of the proceeding the court may hold accordingly. the court may however issue direction in the case, *Raghvir singh v. State of Bihar*.<sup>13</sup> ,

In *A.R Antulay v. R.S Nayak*,<sup>14</sup> a constitution bench of five learned judges of Supreme Court dealt with the question of “The right to speedy trial” and laid down certain guidelines for the speedy trial of offences, which may be summarized as follows:

1. Fair, Just and Reasonable procedure implicit in article 21 creates a right in the accused to be tried speedily,
2. Right to speedy trial flowing from article 21 encompasses all the stages. Namely, the stage of investigation, inquiry, appeal, revision, and retrial.
3. The concern underlying the right to speedy trial from the point of view of accused are:
  - a) the period of remand and pre-conviction detention should be as short as possible. In other words, the accused should not be subjected to unnecessary or long incarceration prior to the conviction;

---

12 Mohd Salim Khan V. State of UP AIR 1982 SC 1096, Veena Sethi V. State of Bihar AIR 1982 SC 1470, Yogendra Kumar V. Delhi Administration (1982) 2 SCC 506, Shrinivas Pal V. Union Territory of Arunachal Pradesh AIR 1988 SC 1729, Madhu Mehta V. Union of India AIR 1989 SC 2299, State of Maharastra V. Champalal Punjaj Shal AIR 1981 SC 1675.

13 AIR 1987 SC 149.

14 AIR 1992 SC 1701.



- b) the worry, anxiety, expense and disturbance to the vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimum; and
  - c) undue delay may well result in impairment of ability of accused defend himself, whether on account of death, disappearance or non-availability of witnesses or otherwise.
4. Where the right to speedy trial is alleged to have been infringed the first question to be put and answered is who is responsible for the delay? Proceeding taken by either party in good faith, to vindicate their rights and interests, as perceived by them, cannot be treated as delaying tactics nor can the time taken in pursuing such proceedings be counted towards delay.
  5. While determining whether undue delay has occurred, one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the work load of the court concerned, prevailing local conditions and so on-what is called the systematic delays? In such matters, a realistic and practical approach, instead of pedantic one, should be adopted by the State including Judiciary as well.
  6. Each and every delay does not necessarily prejudices the accused. However, inordinately long delay may be taken as presumptive proof of prejudice. The prosecution should not be allowed to become a persecution. But, when does the prosecution become persecution, again, depends upon the fact of given case.
  7. An accused's plea of denial of speedy trial cannot be defeated by saying that the accused did at no time demand a speedy trial. Even in USA, the relevance of demand rule has been substantially watered down in barker [1972 (33) Law Ed 2d 101] and other succeeding cases.
  8. Ultimately, the court has to balance and weigh the several relevant factors – balancing test or balancing process' – and determine in each case whether the right to speedy trail has been denied in a given case.
  9. Ordinarily speaking, where the court come to the conclusion that right to speedy trial of an accused has been infringed, the charges or the conviction, as the case may be, shall be quashed. In a given case however, the court may make such other appropriate order, if the quashing of proceedings is not in the interest of justice.
  10. It is neither advisable nor practicable to fix anytime limit for trail of

offences. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay.

11. An objection based on denial of right of speedy trial and for relief on that account, should first be address to the High Court. Even if the High Court entertains such a plea, ordinarily, is should not stay the proceedings except in a case of grave and exceptional nature. Such proceedings in High Court must, however, be disposed of on a priority basis.

The Supreme Court examined the present case in the light of above principles. Many objections wee raised by the accused as well as the complainant at different stages thereby a lot of time was consumed. Thus the case filed in 1982 was still pending in 1991. On the consideration of the facts and circumstances of the case and applying the 'balancing test', the Full Bench concluded that it was not a fit case for quashing the criminal charges and the Supreme Court decided to direct the expeditious trial on a day-to-day basis. Thus the Apex Court dismissed the writ petition and directed the special judge designated for the case to take up the case on a priority basis and proceed with it day-to-day until it was concluded.<sup>15</sup>

A Constitution Bench of the Apex Court in *Kartar Singh v. State of Punjab*<sup>16</sup> explained that the right to a speedy trial was derivation from the provisions of Magna Carta, 1215 and this principle had also been incorporated into the Virginia Declaration of Rights of 1776 and from there into the Sixth Amendment of the U.S. Constitution.

In *Hussainara Khatoon v. Home Secretary, State of Bihar (VII)*,<sup>17</sup> the Supreme Court, holding that orders for the enforcement of the guidelines given in earlier cases,<sup>18</sup> could not be issued, made a request to the Chief Justices of the High Courts to undertake a review of such cases in their States and give appropriate directions where needed to ensure proper and effective implementation of the guidelines.

In *Common Cause, a Registered Society v. Union of India*,<sup>19</sup> holding that the very pendency of criminal proceeding for long periods by itself operated as an engine of oppression, the Supreme Court issued appropriate directions for the release on bail or the discharge of the accused persons and closure of such cases.

Reference may also be made to a more recent case, namely, *Raj Deo Sharma v.*

---

15 A.R. Antulay V. R.S. Nayak AIR 1992 SC 1735.

16 (1994) 3 SCC 569.

17 (1995) SCC 326.

18 A.R. Antulay V. R.S. Nayak AIR 1992 SC 1701.

19 AIR 1996 SC 1619. See also commomn cause, registered society Vs Union Of India AIR 1997 SC 1539.

*State of Bihar*<sup>20</sup> decided by three Judges' Bench of the Supreme Court. In this case the Supreme Court, after reiterating with the approval the propositions laid down in *A.R.Antulay* and *Common Cause* cases, issued additional guidelines, in respect of the time-limits and bars of limitation entailing termination of trial or proceedings.

In *Ramchandra Rao v. State of Karnataka*,<sup>21</sup> a Bench of seven Judges of the Supreme Court has overruled *Raj Deo Sharma and Common Cause* decisions, so far as the directions issued therein in respect of the time-limits or bars of limitation entailing termination of trial or proceedings by judicial verdict and reiterated with approval the propositions expounding the right to speedy trial, laid down as guidelines in *A.R.Antulay's case*. The Court observed that it was neither advisable, nor feasible, nor judicially permissible to draw or prescribe an outer limit for conclusion of all criminal proceedings.

It being the constitutional obligation of the State to dispense speedy justice, more so in the field of criminal law, the Court said paucity of funds or resources was no defence to denial of right to justice, emanating from Article 21, 19 and 14 and the preamble to the Constitution as also from the Directive Principles of State Policy.

Holding that inadequacy in the number of judges has adversely affected the delivery of justice, the Apex Court in *All India Judges Association v. Union of India*,<sup>22</sup> Issued directions for increase in Judge strength to 50 judges per 10 lakh people, in subordinate Courts at all levels.

Having noticed that people in India were simply disgusted with the state of affairs and were fast losing faith in the Judiciary because of the inordinate delay in disposal of cases, the Apex Court in *Pradeep Kumar Verma v. State of Bihar*,<sup>23</sup> required the authorities to do the needful in the matter urgently to ensure speedy disposal of cases, "before the situation goes totally out of control" and if the people's faith in the Judiciary was to remain.

In *Vakil Prasad Singh v. State of Bihar*,<sup>24</sup> is an interesting case wherein the Supreme Court granted reprieve to the accused as the prosecution slept for 17 years and did not provide any cogent reason for the delay in filing the charge sheet. The Supreme Court stopped further investigation as the delay was found to be clear violation of the constitutional guarantee of speedy investigation.

---

20 AIR 1998 SC 3281. See also *Raj deo Sharma V. State of Bihar* AIR 1999 SC 3524.

21 AIR 2002 SC 1856.

22 AIR 2002 SC 1752.

23 AIR 2007 SC 3057.

24 AIR 2009 SC 1822.

*While justice delayed is justice denied, justice withheld is even worse than that.* The Supreme Court in *Anil Rai v. state of Bihar*,<sup>25</sup> took a serious note of delay in delivery of judgments. The Court observed that any inordinate, unexplained and negligent delay in pronouncing the judgment by the High Court, infringed the right of appeal conferred upon the parties. Such a course was stated to be contrary to the maxim “actus curiae neminem gravabit”, that an act of the Court shall prejudice none

Though no time limit for delivery of a judgment by a High Court is provided under the law, nevertheless, such a delay between the hearing of the arguments and the delivery of judgment has been held to be highly undesirable. It tends to shake the confidence of the parties in the result of litigation. The apex Court thus issued binding direction on delivery of judgments by the High Court.

### **CONCLUSION AND SUGGESTIONS:**

There are two common adages regarding delivery of justice, one is, “justice delayed is justice denied”, and the other is, “justice not only be done but it should also be seen to be done”. The delays in disposal of justice by the Courts, particularly, in Indian administration of justice owe to different factors and reasons. The cumbersome procedure in criminal justice from the investigation of the case by the police and final disposal of it by the Courts is a hallmark of complicated procedure. Actually this is the outcome of the dictum, “in accordance with the procedure laid down by law”. It has its merits and demerits because the analogy that “let hundred criminals escape lest an innocent man should be punished” serves as a protective device for delays in dispensing with justice.

Bureaucrates, politicians, judges and even common have shown concern about the backlog of cases right from the lower courts to the apex courts in India. So far as the pendency of cases of civil nature are concerned as the cases defined in Section 9 of the Civil Procedure Code, 1908, the picture is very gloomy akin to criminal justice. It is to that due to delays, consciously or unconsciously by the judiciary have taken away the effect of relief and response that a common man desired and entitled for the same. Former Chief Justice Y.K Sabharwal, while delivering speech in the joint conference of Chief Justices of High Courts and Chief Ministers of the States held on 11<sup>th</sup> March, 2006 stated that a first problem that stairs us all is that of mounting arrears of cases resulting in inordinate delay in the dispensation of justice. He aptly remarked “our over loaded judicial system suffers from (i) manpower shortage, (ii) infrastructural constraints and (iii) procedural

delays". The huge arrears of pending cases is about four crores in Indian Courts including the Supreme Courts. The Hon'ble Judge has rightly defended to the judiciary with his assertion that though the judiciary has been held responsible for mounting arrears of court cases, it has neither its control on resources of funds nor any powers to create additional courts, appoint court staff or augment the infrastructure required by the courts.

It is alarming to note that some of the cases be delayed by the judiciary. For example, one tenancy case name as Girdhari Lal Gathani case was languishing in the court for 42 years, over which the Bench of Justices as Rajendra Babu and G.P Mathur of Supreme Court express "shock". The case of one Shamul was braggged for 39 years. In Rajani rape case the victim was raped at the age of five years and the judgement came after 17 years when she attained the age of 22 years.

Another area which invades the body- politic of judiciary is corruption. Senior advocates , Shanti Bhusan and Prashant Bhusan have openly alleged that about eight Supreme Court judges are corrupt. In different states the corruption charges have been leveled against the sitting judges of the High Courts, even impeachment have been brought on the floor of Parliament for unbecoming conduct of atleast two- three judges including Justice Ramaswamy of Supreme Court and Justice Sen of Calcutta High Court. Media time and again are reporting the cases of bribery and nepotism of judges of different high courts and lower judiciary as well. The cancer of corruption is eating the vital of administration of justice has been acknowledged by retired Supreme Court judges and even by present Chief Justice of India H.S Kapadia. Justice V.R Krishna Iyer had observed that judges must be free from graft, the nepotism, abuse of power and arrogance. They should be paradigm of clean personal life. Justice Sabharwal had admitted that " The topic of corruption is a burning issue in all spheres of public life. The judiciary is committed to continue cleansing itself. We have adopted a policy of " Zero tolerance" on the subject."

The obligations encompassing concept of liberty, equality, social justice, equity and fair play are being misplayed by the judiciary. In spite of innumerable drawbacks and omissions, still the judiciary command respect in India by the people, despite the fact that goals of justice as enshrined in the Preamble of Constitution of India have not been secured to the multitude of Indian even after 66 years of independence.

I agree with the report of the 230<sup>th</sup> Law Commission of India on judicial reforms which suggested that-

- (1) There should be full utilization of the Court working hours. Grant of

adjournment must be guided by the provisions of Order 17 of the Civil Procedure Code

- (2) The cases of similar nature may be clubbed.
- (3) Judgment must be delivered within a reasonable time as per direction issued by the Apex Court in case of *Anil Rai v. State of Bihar*<sup>26</sup>.
- (4) To reduce the staggering arrears of cases, the judiciary must curtail at least 10-15 days and working hours should be extended by at least half an hour everyday.
- (5) Lawyers must curtail prolix and repetitive arguments should be supplemented by written notes.
- (6) Judgments must be clear, decisive and in speaking order.
- (7) Lawyers should not resort to strike.

Suggestions- To reduce the backlog of cases and for speedy disposal, the following suggestions are advanced:

- (1) The cases of handicapped and senior citizens must be decided within one year after they are filed in the Court.
- (2) The vacancies in different High Courts and Lower Courts be filled up within six months from the ensuing date.
- (3) Disputes be resorted to by ADR process, Mobile Court and few Fast track Courts of adjudication.
- (4) Cause lists be made by use of computer automatic preparation process.
- (5) Evening and night courts be started.
- (6) Lok Adalat be arranged on every Sunday for speedy disposal of the cases based on mutual agreements.



# International Drug Trafficking and Terrorism - A Dangerous Mix

*Dr. Harmeet Singh Sandhu<sup>1</sup>*

*Kamaljeet Kaur<sup>2</sup>*

*If you quit drugs, you join the fight against terrorism.<sup>3</sup>*

*President George W. Bush.*

## INTRODUCTION

The global war on terror has changed. Today a new link between drug and terror has come into existence. State sponsorship of terrorism is declining. Terrorist groups increasingly need new sources of funds and the drug business fills this need perfectly. Drugs fuel terrorism and economically support the very organizations. The confluence of the war on Terror with the war on drugs has culminated in the war on narco-terror which is the most dangerous national security threat.<sup>4</sup> The international traffic in illicit drugs contributes to terrorist risk through at least five mechanisms : Supplying cash, creating chaos and instability, supporting corruption, providing and sustaining common infrastructures for illicit activity and competing for law enforcement and intelligence attention. Different drugs, different trafficking routes, and different organizations have different relationships to terrorist threats. Therefore it might be possible to improve domestic security by targeting drug law enforcement on those drugs, routes and organizations with the strongest known or potential links to terror. However doing so would require new analytic capacities and decision making strategies for all the agencies involved in drug law enforcement. Any terrorist threats exacerbated by the illicit drug markets might be reduced by shrinking the markets themselves, both in physical volume and financial revenue.<sup>5</sup> The drug demand reduction deserves a central place in policy thinking, in particular if the question is how to reduce the contribution. For reducing the supply and demand for drugs into the country the government deemed it necessary to exact domestic laws that would be stringent enough to deter the organised gangs of drug smugglers, that would allow

---

1 Assistant Professor, Department of Laws, GNDU Regional Campus, Jalandhar.

2 Assistant Professor, GHG Institute of Law for Women, Sidhwan Khurd, Ludhiana.

3 President George W. Bush, Remark made when signing the Drug-Free Communities Act on December 14, 2001.

4 Mark Kirk, "Congress Must Address Rising Narco-terrorism" *Roll Call*, 4 December 2006, p. 10.

5 Riley K. Jack, *Crack, Powder Cocaine and Heroin : Drug Purchase & Use Patterns in Six U.S. Cities*, Diane Publishing Co., Darby, U.S.A., 1997, P. 14.

concerned agencies to investigate and prosecute drug related offences, that would strengthen the existing cartel control over drug abuse and that would enable India to fulfil its obligations towards international treaties and conventions that it has signed against narcotic drugs and their trafficking.<sup>6</sup>

### CONCEPT OF NARCO - TERRORISM

Narco-terrorism is perceived as the involvement of terrorist organizations and insurgent groups in the trafficking of Narcotics. Narco-terrorism at its deadliest, in terrorist organizations and insurgent groups themselves trafficking in narcotics and using the wealth they obtain from such trafficking to exact economic, political and military pressure on the Governments of the countries in which they operate. Narco terrorism is a new and sinister aspect of the international terrorist phenomenon because its effects are insidious, persistent and more difficult than are the sporadic, violent outbursts of the armed assailant. The manufacture and delivery of narcotics is part of the terrorist portfolio for various reasons. The most obvious is that drugs are a source of revenue to support the general activities of terrorist organizations.<sup>7</sup> According to Napoleoni terrorism means use of terror tactics by the narco traffickers and drug lords to protect their illegal business. It also describes the alliance between drug lords and armed organisations. Both have interest in destabilizing governments a breaking down the established social order.<sup>8</sup>

Narco terrorism is a growing threat that has received increased attention over recent years. Originally defined in 1983 by Peruvian President Belaunde Terry, narco terrorism was used as a term to describe terrorist attacks on his country's drug enforcement police. In the United States the Drug Enforcement Agency defines narco-terrorism as the participation of groups or associated individuals in taxing, providing security for, otherwise aiding or abetting drug trafficking endeavours in an effort to further, or fund, terrorist activities. The events of 9/11 obviously called increased attention to terrorist organizations and consequently the concept of narco terrorism has been closely examined.<sup>9</sup> While first recognized as a threat in Latin America, narco-terrorism has wreaked havoc across the world. From the FARC in Colombia to the IRA in Ireland and the PKK in Turkey, the methods of

---

6 The *Narcotic Drugs and Psychotropic Substances Act, 1985*, Universal Law Publishers, New Delhi, 2012, pp. 1-2.

7 John Richard Thackrah, *Encyclopedia of Terrorism and Political Science*, Routledge and Kegan Paul Books, London, 1987, p. 164.

8 Available at english - safe - democracy org/causes/links - between - terrorism - and drug-trafficking-a-case of narco terrorism. html. accessed on 14 September, 2014.

9 Kimbulu Thachuk, *Transnational Threats : Smuggling and Trafficking in Arms, Drugs and Human Life*, Praeger Security, London, 2007, p. 26.



narco-terrorist are employed by various terrorist organizations and drug cartels. As globalization has allowed for the inter connectivity of world markets, it has also allowed for global trade in the illicit - market. As a result, ties have been forged drug various criminal groups in which drug trafficking is increasingly used to fund the operations of terrorist organizations and crime groups.<sup>10</sup>

## **POTENTIAL LINKS BETWEEN DRUG TRAFFICKING AND TERRORISM**

The end of the cold war brought to a close the bipolar ideological struggle between democracy and communism. It also affected changes in the nature of the international threat from terrorism. During the cold war, the main terrorist threat was political contrary in nature, generated by groups holding contrary, decolonial perspectives the states they attacked. Today, the basis of world terrorist activity is tied to organised crime and the narcotics trade. It is the process of drug cultivations processing, transportation and distribution which spawns a major part of the disturbing global criminal and political violence. Drug monies have been used to arm and finance diverse groups such as organized crime, insurgents, guerrillas, secessionists and urban terrorists.<sup>11</sup>

International trafficking in narcotic and psychotropic substances has generated huge amounts of capital for its initiators and organizers. These drug cartels and trafficking groups are organized and structured to function efficiently within national economics, as well as at the international level. The profits derived from their illegal activities are either integrated into the legal economy or are used in corrupt and criminal ways to enhance such activities. Powerful trafficking groups and their finances might come to have significant influence on politicians, the judicial system, the media and other sectors of society and might impose on the country their own laws including the buying of public opinion. The continuing propagation of non-medical use of drugs can be seen as being in the interest of such financially powerful trafficking groups. Such groups could expect that through the increased social acceptability of the non-medical use of drugs, drug abuse would grow and so would their profits.<sup>12</sup>

Drug trafficking in source countries, transit countries and consumer countries, including the United States could contribute to the problems of terror in at least five distinct ways :

---

10 Extracted from [www.tracc.gmu.edu/holmbug\\_narcoterrorism.pdf](http://www.tracc.gmu.edu/holmbug_narcoterrorism.pdf) on 12 September, 2014

11 Verinder Grover, *Encyclopedia of International Terrorism*, Deep & Deep Publications, New Delhi, 2002, p. 318.

12 United Nations Report of the International Narcotics Control Board, 1995, p. 1.

- Supplying cash for terrorist operations<sup>13</sup>
- Creating chaos in countries where drugs are produced, through which they pass, or in which they are sold at retail and consumed. Chaos sometimes deliberately cultivated by drug traffickers which may provide an environment conducive to terrorist activity.<sup>14</sup>
- Generating Corruption in law enforcement, military, and other governmental and civil - society institutions in ways that either built public support for terrorist linked groups or weaken the capacity of the society to combat terrorist organizations and actions;
- Providing services also useful for terrorist actions and movements of terrorist personnel and material and supporting a common infrastructure such as smuggling capabilities, illicit arms acquisition, money laundering or the production of false identification or other documents, capable of serving both drug trafficking and terrorist purposes.
- Competing for raw enforcement and intelligence attention.<sup>15</sup>

The accumulated power and wealth of the transnational drug industry erodes the democracy - building efforts by computing individuals and institutions essential to moving this process forward.<sup>16</sup> In the Western democracies, led by the US, Counter - narcotics has been integrated with counter - money laundering. Even then there are many aspects requiring immediate attention, for example, the developed countries have yet to demonstrate their will to fight terrorism as a part of the battle against narcotics.<sup>17</sup>

## **DRUG TRAFFICKING : MONEY FUNDS TERROR ACTS IN INDIA**

For the last three decades India has become a transit hub as well as a destination for heroin and hashish produced in the 'Golden Triangle' and the Golden crescent. Various psychotropic and pharmaceutical preparations and precursor chemicals produced domestically as well as in various parts of the world are also trafficked through Indian territory. The two-way illegal flow

---

13 United Nations office for Drug Control and Crime Prevention, *World Drug Report*, Oxford University Press, New York, 2000, pp. 55-59, p. 57.

14 Kevin G. Hall, "Military Corruption Days U.S. Drug-Fighting Efforts in Peru", *Seattle Times*, 24 April 2001, p. 48

15 R. Pear and P. Shenen, "Customs Switches Priority from Drugs to Terrorism", *New York Times*, October 10, 2001, P. 311.

16 Ministry of Home, Government of India, *Vora Committee Report*, 1995, p. 5.

17 *Supra* note, 9, p. 335.

of these drugs and chemicals not only violates India's borders, but also poses a significant threat to national security.<sup>18</sup> The nexus between drug traffickers, organised criminal networks and terrorists has created a force powerful enough to cause instability in the country. Money generated through drug trade has been used to fund various insurgent and terrorist movements. For instance, it has been estimated that money generated from the illegal sale of narcotics accounted for 15 percent of the finances of militant groups in Jammu and Kashmir. Similarly, Sikh militant groups in Punjab and Northeast insurgent groups like the Nationalist Socialist Council of Nagaland are known to channelise drugs into India to finance their operations. Besides, criminal syndicates engaged in drug trafficking like the Dawood Ibrahim gang have themselves resorted to terrorist acts in the past (the 1993 terrorist attacks in Mumbai) or have become deeply engaged in the business / logistics end of terrorism. Further, drug trafficking facilitates other organised criminal enterprises such as human trafficking and gun running, all of which use the same networks and routes to smuggle people, arms and contraband. To cite an example, the explosives used in the 1993 Mumbai terrorist attacks were smuggled into India using the same routes through which drugs and other contraband items were trafficked by the Dawood Gang. Even today, terrorist groups use these routes to source weapons and explosives across the borders.<sup>19</sup>

A nexus among Pakistan's inter services intelligence, Maoists and insurgent groups of North-East is using money earned from drug trafficking to fund terror activities in India. Major drug seizures on the India - Nepal border in the past four months have put a spotlight on this revenue generation strategy adopted by terror groups. In the last four months, custom officials have seized more than 10 kg of heroin worth Rs. 60 crore in international market from the India - Nepal border in Bihar's Araria district. Apart from this, 1000 kg of marijuana and four kg of charas were also seized in the same area. Many smugglers are former Maoists who facilitate the drug trade. The drugs being procured are from two blocks - the Golden triangle : Iran, Afghanistan and Iraq and the Golden Crescent : Myanmar, Thailand, Cambodia and Laos. Traditionally, India was only a transit route, but now the demand for various drugs is increasing within the country.<sup>20</sup> The largest volume of drugs entering the country continues to be smuggled in from the Golden crescent. In fact, US Government sources allege that since the time of the

---

18 Annual Report 2002 retrieved from <http://narcotics.india.nic.in/ANNUAL%20REPORT%202002%20PDF.Pdf> on 29 July 2014.

19 Jim Masselos, "The Bombay Riots of January 1993 : The Politics of Urban Conflagration", *South Asia*, 17(1), Special Issue, 1994, pp. 79-95, p. 81.

20 Abishek Bhalla, "Drug Money Funds Terror Acts in India", *India Today*, 12 September 2012, p. 6.

Gulf War, India's role in international drug trafficking from the Golden crescent - markedly expanded to pick up slack from disrupted land routes heading to Turkey.<sup>21</sup> In contrast to the unorganised drug activity of the North-East, Pakistan and Indian Traffickers have formed organised drug syndicate which facilitate the smooth conduct of their operations. The Indian land entry route favoured by drug traffickers is along the J & K, Punjab, Rajasthan and Gujarat sectors of the Indo-Pakistan border. The sea routes are also in frequent use. Comparative easy access of smugglers from the Golden crescent using sailing boats to remote landing points along the 7.694 km long and vulnerable coast - line around the entire Peninsular India, the Andaman & Nicobar Islands and Lakshadweep. Close links of smugglers and couriers from the Golden crescent countries with terrorists and subversive elements in India and the growing utilisation of these links for clandestine supply of funds, arms and ammunition and explosives to such anti-national elements. All major Indian cities have pockets inhabited by people of identical ethnic stock some of whom provide easy links for establishing conduits, storage facilities and scope for emergency, disposal of held up stocks. Pakistan's support to such ventures has empowered the drug syndicates to consolidate their linkages in the region. Nearly 70-75 percent of the seizures in heroin have their origin in the Golden Crescent.<sup>22</sup>

### **PUNJAB FIGHTING NEW TERRORISM : NARCO TERRORISM**

After the advent of Sikh militancy in the State of Punjab, large numbers of smugglers came out into the open to amass large amount of money by trafficking in weapons and ammunition needed by the terrorists. This took place with the full knowledge of the Pakistani government and the ISI. Indian terrorist headers belonging to different militant groups stationed themselves across the border in Pakistan to direct operations in India. Militant leaders like Wadhawa Singh Babbar and Wassan Singh Zaffarwal first utilised the services of Pakistani smugglers into Punjab Subsequently, these individuals began to recruit youth belonging to border villages who worked as couriers for both narcotics and weapon. Gradually, these youth joined the ranks of militants, and moved on from positions as mere couriers and petty border operators to become senior leaders. Buta Singh was one of these individuals. He began as a small time Indian opium trafficker, moved on to smuggling weapons for various militant sikh organisations, later joined the ranks of the Babbar Khalsa terrorist group, and eventually become one of its leaders.

---

21 David Westrate, "The Role of Law Enforcement", in Raphael F. Perl (ed.), *Drugs and Foreign Policy : A Critical Review*, Boulder, Colorado, 1994, p. 83.

22 Nicholas Dom, Karim Murji, Nigel South, *Traffickers : Drug Markets and Law Enforcement*, Routledge, London, 1992, p. 65.

Once people like Buta Singh had infiltrated Punjabi insurgent organisations. These smugglers - cum- terrorists continued their links with the narcotics trade, with considerable monetary returns.<sup>23</sup>

Punjab is presently in the middle of a big battle against a scourge which has wide ranging implications for the future drug and substance abuse. The battle which the Punjab Government had initiated early this year became necessary as it reached such an alarming proportion that an entire generation got affected with many in the younger lot, not knowing what the future had in store for them. An entire generation bore the brunt of terrorism in the 1980s and the early 1990s. Thousands lost their lives. Even as the Punjabis overcame their grief and fought terror head on, the deadly drug menace gripped the state, threatening the generation which followed that of the victims. People living in the border areas of the State bore the brunt of terrorism, now they are face to face with the narco terror, slowly but surely killing people. Drug abuse is no longer a secret in Punjab. Every body in the state knows some one who is into substance abuse and has done inseparable damage to himself. There are families where all the male members are addict and they work only to get their quota of the intoxicant, not to take care of their families. In border districts and cities like Amritsar, petty crime like chain or bag snatchings, way laying the pedestrians and robbing them are committed only to get some money to get the quota of drugs. These drug addicts and couriers are also in the bigger crime and it has sort of become a part of the parallel economy in these areas. In fact in 2014, not a single day passed when the Punjab Police or the BSF did not recover a huge quantity of poppy, opium, synthetic drugs and what not. The amount of drugs floating in Punjab is mind boggling so much so that police officials say that it was futile guessing it. The source of these drugs could be smuggling from Afghanistan by Pakistan, the inaccessible hills areas of Himachal Pradesh, some quantity from Nepal and also pilferage from the state controlled poppy farms in Uttar Pradesh and Madhya Pradesh. It is not surprising that Punjab has lost its sporting talent and no new sports persons are coming on the national stage from the State. Instead, Haryana has marched ahead and most of the sports persons from the northern region are not from Punjab as was the case a few years ago.

It is only now that Chief Minister Parkash Singh Badal has used his administrative experience to counter the drug menace and has sought help from all possible quarters to counter it. Better late than never. It is not only important to break the backbone of the drug cartel, arrest the big fish under the stringent

---

23 Ministry of Home, Government of India, *Vora Committee Report*, 1995, p. 6.

NDPS Act but also start a chain of temporary de-addiction centres. Weaning away the youth from drugs is a big task and for this the State Government will also have to look at. Creation of employment opportunities, creating infrastructure for recreational activities and sports, involving the society at large and launching a massive multi-pronged awareness. It is not easy but a beginning has been made and it was time, this was given the required momentum.<sup>24</sup> According to Punjab Deputy Chief Minister Sukhbir Singh Badal the Punjab State is a victim of narco terrorism and appealed the political parties to join. Not even a gram of any drug is produced in Punjab and it is either coming from across the border or from neighbouring state. Drugs make their way into India from across the border. Instead of supporting the Punjab Government on drug issue, some political parties are politicising the issue. Punjab is fighting a war against drugs not only saving the youth of the state, but youth of entire country. Drugs smuggled into Punjab from Pakistan or Afghanistan are not meant for Punjab only, but they are meant for supply in other parts of the country as well as other countries too. Commenting on awareness programmes of Shiromani Akali Dal about drugs it is said that serious conspiracy has been hatched to defame Punjab on drug issue and demanded that there was a great need to ensure greater vigilance at the international border to stop inflow of drugs in the state. There is need to impose complete bar on cultivation and sale of opium and poppy husk in Madhya Pradesh, Rajasthan and other states.<sup>25</sup>

A dangerous situation is emerging in this country wherein the divisive forces militant organisations, social organisations backed or infiltrated by the ISI are gaining a strangle hold on the administration and State machinery by virtue of its financial power engendered by drug money. If such a situation continues in such a vast country, plagued by unemployment and other evils it will destroy the very essence of the Indian social fabric to cause the ultimate destruction of this country. It is thus essential for us to rise above politics to examine the inadequacies of our system, to address them squarely and to take necessary action to retrieve the situation. There is requirement to launch integrated offensive against Narco terrorism to include central and state organisations as well as other public interest offices. It is also necessary to reconsider the legislated structures to deal with the newly emerging criminalisation which has permeated into a trans-state and transnational phenomenon. There is a need for empowering central agencies to launch investigation and prosecution in areas, which are a threat to national

---

24 Amitabh Shukla, Punjab's Battle Against Narco-terrorism, *The Pioneer*, 14 July 2014, p. 3.

25 Maneesh Chhibber, "SAD-BJP ties are in National Interest. We've always stood by BJP, Never put any condition", *Indian Express*, January 4, 2015, p. 8.

security. There is a need to develop a coordinated organisation for intelligence acquisition as also the enforcement agencies working together in an integrated manner to launch a full fledged attack on those involved in narcotic trade. Narco terrorism constitutes the biggest threat to National Security which must be combated urgently. For if we fail to do so soon, we may never be able to retrieve the situation.<sup>26</sup>

## **DRUG POLICY TO REDUCE TERRORIST THREAT**

Drug enforcement is generally understood to mean counter - trafficking or drug interdiction. A more effective approach to tackling drug trafficking is needed to reduce supply more efficiently and to free the over - stretched resources of national criminal justice system. The aim should be not only to assist and try individuals suspected of having committed drug related crimes, but also to disrupt the operations of entire drug trafficking gangs and eventually put them out of business. This can be done by targeting the organisers of such criminal groups for investigation and prosecution by enhancing international cooperation and by depriving drug traffickers of the proceeds of their crimes, which in turn limits their opportunities to reinvest and to finance corruption. The general approach that 'one man's terrorist is another man's freedom fighter' is ill-founded. The west has failed to recognise that actions by the Kashmiri militants are one of the causes of heroin supply in the US and Europe. The reports of the US State Department have clearly highlighted the illicit poppy cultivation in Jammu & Kashmir in the 1993 International Narcotics Control Strategy Report. The report, 'Patterns of Global Terrorism 1994' by the US State Department has brought out that training to Kashmiri terrorists is being imparted in 20 camps in Afghanistan. A number of Afghan and Pakistani nationals have been apprehended in J & K while indulging in terrorist activity. Most of the weapons seized in J & K are of Pakistani or Afghan origin. In spite of all the obvious evidence, it is find that western democracies. Ignoring terrorist activities in India. Such contradictions are in essence the true malady afflicting international response to narco-terrorism. International initiatives in counter narcotics must be based on sincerity. The fight against narco-terrorism cannot be hampered by other national interests of any country. The perception in some countries of the west, that terrorism does not bear a credible drug connection may be understandable in as much as the linkages may not be evident in their respective countries. However, it is due to the nexus of organised crime, terrorism, money laundering and drug trafficking that drugs

---

26 Retrieved from [www.bharat-raksha.com/Lancer/idr0007.htm](http://www.bharat-raksha.com/Lancer/idr0007.htm) on 11 November 2015.

from Afghanistan or Colombia reach the streets of the US.<sup>27</sup> To have true impact on the imported illicit drug supplies requires a global attack on the organizations, including the supporting of finances, transportation, raw-materials, chemicals, and corruption.<sup>28</sup> The aim should be to combat narco-terrorism in all its aspects. Thus, in keeping with requirements enforcement strategy should rest on these pillars:

## **POLITICAL WILL**

No action can yield results if not backed by strong political will. It must be complemented by strong diplomatic initiatives, viable economic alternatives for drug growing peasants, effective criminal justice systems in key countries and expanded use of relatively never approaches, such as remaining the profit from drug trafficking and controlling precursor, and essential chemicals. Drug law enforcement efforts will near be successful if constrained by national border. To be successful, it must be able to mount a multinational attack on trafficking organisations in every nation in which they operate. There can be no safe haven for drug profits and no protection due to drug-related corruption. Experience has taught us a hard lesson that real progress is not made until the political leadership of a nation perceives the threat of drugs to be real and of significant magnitude to warrant action, when weighed against the other national and international interests of that country.<sup>29</sup>

## **SHRINKING THE DRUG MARKETS**

The scale of the illicit drug markets is determined by demand, price and availability. The markets can be reduced by shrinking demand by increasing the retail prices of illicit drugs or by making drugs less available in ways other than raising prices. Shrinking demand, reducing availability and increasing price will all tend to reduce total physical and financial volume. More recent evidence suggests strongly that demand for illicit drugs is more than unit-elastic, so that a price increase tends to produce a more than off setting decrease in quantity purchased and thus a shrinkage in total revenues. The total number of users is much less important in determining drug volumes and revenues than the behaviour of a relatively small number of chronic, high dose drug takers. Most of that hard core group consists of people who are repeatedly assisted, not only for drug offenses but for a wide range of property, violent, and public - order offenses. Acting to reduce the population of hard-core group consists of people who are

---

27 Sudhir Sawant, *Steps Against Narco Terrorism in Asia*, Encyclopedia of International Terrorism, Deep & Deep Publications, New Delhi, 2002, p. 335.

28 Raphael F. Perl, *Drugs and Foreign Policy : A Critical Review*, West view Press, Colorado 2006, p. 43.

29 D. Joseph, *Red Cocaine : The Drugging of America and the West*, Edward Harley Limited, 1999, p. 156.



repeatedly arrested, not only for drug offenses but for a wide range of property, violent and public-order offenses. Acting to reduce the population of hard-core-user-offenders, through treatment, drug courts, testing and sanctions programs, may offer a better prospect for reducing the size of the drug markets, and thus potentially the contribution of drug trafficking to the terrorist threat.<sup>30</sup>

## **FLEXIBILITY**

It is important to recognise that formal, structural aspects are at best half the story of any organisation : the informal aspects, sometimes referred to as ‘occupational culture’, are just as important. The success of narco-terrorism depends upon deception. Modern technology has led to sophistication in operational methodologies of drug trafficking, terrorism and money laundering. Enforcement and legal systems must incorporate an ‘operational culture’ which should predominantly be flexible. Rules and regulations have to be interpreted in an acceptable manner avoiding dogmatism, but the essence must be to avoid the unacceptable which causes embarrassment area.<sup>31</sup>

## **CO-ORDINATION**

A truly coordinated attack on narco-terrorism is possible when we integrate our enforcement activity at the grass roots level. Coordination must start from the bottom, going to the top. It is only when officers of different agencies start operating together on common objectives that a relationship will develop that will inculcate a proper operating environment. The success of narco-terrorism is dependent on international and national linkages. The device of Mutual Legal Assistance Treaties has been used bilaterally by a number of countries. These have been successfully employed to enable quick extradition and prosecution. The MLATs should be based on a concept that crime committed in any country must not go unpunished.<sup>32</sup>

## **SOUND INTELLIGENCE**

Intelligence forms the most important element of enforcement. It is the only instrument available for breaking the criminal drug organisations. A new formal concept for intelligence sharing has also been developed, which is called the Joint Information Coordination Centre Programme. The formula for JICC is to collate and provide data for the police and military agencies in a country with special emphasis

30 Peter Reuter, Mark AR. Kleiman, *Risk and Prices : An Economic Analysis of Drug Enforcement*, University of Chicago Press, Chicago, 1986, pp. 301-306. p. 302.

31 David Westrate, *The Role of Law Enforcement*, West view Press, Boulder, Colorado, 1994, p. 81.

32 id.

on the movement of people, drugs, money and other support commodities. Targets identified should include trans-border trafficking networks, money launderers, support structures like precursor chemical manufacturing facilities, cultivating areas, to target the organizers, main distributors and financiers involved in drug trafficking.<sup>33</sup>

## COUNTER MONEY LAUNDERING

To have true impact on the imported illicit drug supplies requires a global attack on the organizations, including the supporting of finances transportation, raw materials, chemicals and corruption.<sup>34</sup> The association between drugs and money laundering has led to new types of financial policing. The money trail is not limited by geographical factors. It involves the global financial system. It follows that all counter measures would require global sanction. Action by UNDCP in this field has so far taken place mostly in such areas as providing advice and assistance regarding legislation against money laundering and assisting countries such as Colombia, Mauritius, Nigeria and Thailand in developing appropriate laws and legal infrastructure. In order to facilitate such assistance, UNDCP has developed model legislation on money laundering and confiscation Today's anti-money laundering policy - maker must have a commanding knowledge of financial markets and how money moves through them for legitimate purposes, which can disguise the illegitimate.<sup>35</sup>

## INTERNATIONAL COOPERATION

Narco-terrorism will have to be tackled with the combined power of all nations. Enforcement constrained by national borders will never be successful. The United States and the European Union have initiated action to develop an international movement against narcotics. Significantly, these countries have come up strongly on the money laundering aspect of drug enforcement. International action to wipe out money laundering fronts and safe havens would certainly cause tremendous deterrence to drug - trafficking activities. Distribution networks for drugs within a country do not require to be elaborate. They are loosely connected and dependent on a series of retail specialists required for trafficking, which is the cause of drugs on the streets, and which can be contained by elaborate international networking. Thus international cooperation is the starting point of drug enforcement.<sup>36</sup>

---

33 Ministry of Home, Government of India, *Vora Committee Report*, 1995, p. 5.

34 Melvyn Levitsky, *US Foreign Policy and International Narcotics Control : Challenges and Opportunities in the 1990s and Beyond*, Westview Press, Boulder, Colorado, 1994, p. 43.

35 Nicholas Dorn, *Traffickers*. Routledge, London, 1992, p. 65.

36 *Supra* note 16, p. 345.

## CONCLUSION

International trafficking in narcotic and psychotropic substances has generated huge amounts of capital for its initiations and organizers. These drug cartels and trafficking groups are organized and structured to function efficiently within national economics, as well as at the international level. The profits derived from their illegal activities are either integrated into the legal economy or are used in corrupt and criminal ways to enhance such activities.<sup>37</sup> A more effective approach to tackling drug trafficking is needed to reduce supply more efficiently and to free the over - stretched resources of national criminal justice systems. The aim should be not only to arrest and try individuals suspected of having committed drug related crimes, but also to disrupt the operations of entire drug trafficking gangs and eventually put them out of business. This can be done by targeting the organisers of such criminal groups for investigation and prosecution, by enhancing international cooperation and by depriving drug traffickers of the proceeds of their crimes, which in turn limits their opportunities to reinvest and to finance corruption.<sup>38</sup> Immediate steps are required to evolve international and regional structures to combat it effectively.



---

37 United Nations, *Report of the International Narcotics Control Board*, 1995, p. 1

38 William J. Casey, *Hydra of Carnage : International Linkages of Terrorism : The Witnesses Speak*, Lexington Books, Lexington, 1986, p. 10

# Higher Education in India: A Critical Analysis

*Dr Arun Kumar Singh<sup>1</sup>*

## I. Introduction

Education is prime factor for the development of society. It has been said that—“*Sahitya Sangeet Kala Vihinah Sakshat Pashuh Puchchh Vishanheenah*”. Education is one of the valuable assets which is very precious. In Sanskrit there is a *shloke* “*Na chaurharyamna raj haryam, nabhratribhajyamna cha bharikari. Vayayekritevardhataivenityamvidyadhanamsarvadhanampradhanam*”. The English meaning of which is, this is an asset which cannot be stolen by the thief nor can be escheated by king. It cannot be divisible among brothers as well as it has no weight. This is the only asset which is increased after spending. That is why it is said that education is the most valuable asset. But unfortunately the politics is involved in education. This may be elementary education or higher education.

There are various types of higher education prevailing in India. These are; humanity subjects, technical education, professional education etc. Now about 50 per cent of the higher education in India is imparted through private institutions, mostly unaided. Even some of the private institutions are getting financial support in the form of grants. Many of the Private universities are opened under the State Act. They are running as par with the Central / State Universities. Some of the autonomous colleges also got the status of Deemed Universities. These all are governed by various regulatory authorities such as UGC, AICTE and CSIR. MCI, BCI etc. But the question is, whether these controlling authorities are clear and honest to implement the provisions or apply judicious mind before making the provisions to regulate the system. The main objective of a higher education system is to add real value to human resources, and produce wealth creators and leaders in all fields. This paper tries to debunk some of the myths surrounding higher education. The aim of this paper is to discuss the higher education system both government and private, and highlight the provisions controlling the higher education especially of UGC and BCI. For this a comparative provisions of UGC regulation 2000 and 2006 has been mentioned. The paper also outlines the nature of crisis afflicting higher education and points out the challenges being faced by the higher education in India. Simultaneously, wherever it is required necessary, the Bar Council of India's rule has been mentioned to support the matter. In last the suggestions are mentioned which if incorporated will give fruitful result.

---

1 Assistant Professor, Department of Law, North East Hill University, Shilong, Meghalaya

## Issues Regarding Higher Education

The higher education system in India which is one of the largest systems of its kind in the world has many issues of concern at present, like financing and management, values and ethics, quality of higher education together with the assessment of institutions, controlling of Higher education and their accreditation. These issues are important for the country, as it is now engaged in the use of higher education as a powerful tool to build a knowledge-based information society of the 21st Century.<sup>2</sup> It is the dream of the country to be developed country by 2020. This can be achieved through getting proper higher education. That is why number of seats in each and every higher educational institution is increased. But simply increasing the seats in institution is not sufficient because it also creates problems especially regarding management, regulation, infrastructure and lack of equipments. The infrastructures for higher education are very old which is not up to the mark in present situation. But still they are being used and the authorities are overlooking it. India is already a country of the largest body of illiterates in the world. The private sector initiative in education sector has been a matter of great concern. Because of being highly populated country it is not possible for the state to make the higher education available for all. That is why there has been demand of private institutions. However; the private higher education has been under the controversy and debate in India.

Being welfare state, it is duty of the state to provide good education to his people. But practically it is not possible for the state to provide good education especially higher education to its entire people. So there is requirement of public private partnership to make the higher education available to maximum people of the country. Indian higher education system has undergone massive expansion in post-independent. Several Central Universities and institutions have been established to generate and disseminate knowledge with the intention of providing easy access to higher education to the common people of India. Most of the Universities are public institutions with powers to regulate academic activities on their campuses as well as in their areas of jurisdiction through the affiliating system. Since grant-in-aid to private colleges is becoming difficult, many governments universities have granted recognition/affiliation to unaided colleges and many universities have authorized new 'self-financing' courses even in government and aided colleges. Even then it was not suffice to provide higher

---

2 Higher Education in India: Issues, Concerns and New Directions, Recommendations of UGC Golden Jubilee Seminars- 2003, held at eleven universities in India, December, 2003, University Grants Commission New Delhi, at iii

education for all that is why the private higher education system was adopted. But the objective of establishing higher education institution is being failed especially private institutions who are working like certificate providing agencies. Not only are this, but maximum number of private institutions failure in other way also, because these institutions are diverted from their basic object of imparting knowledge to maximum number of people. They are busy in earning money by high amount of fee where as in other hand they are paying very less amount of fees to their teachers. Many of the teachers working in private institutions are not qualified to be teacher even then they are appointed and teaching there.

Another issue is regarding deregulatory mechanism of Autonomous institutions. Now many of them have become the deemed universities. Private funds as well as individuals play key roles in the cause of higher education. But in India the policies regarding education especially higher education is not up to the mark. The reason is that the policies which are made for the higher education are not properly implemented even the educational institutions funded by the Government. There may be fault from the side of regulatory authority also. Basically there are three regulatory authorities to regulate the higher education. They are UGC, AICTE and CSIR. Apart from these some other authorities such as BCI and MCI are also there to control the professional courses. These regulatory authorities at the time of making rules do not consider the ground level reality. They are not clear what system should be followed. The norms set by UGC regarding qualification for teachers are confusing. It is changing from time to time. Similarly, the norms which are set by the authority are not being properly followed. If the appointment is done violating such norms what action will be taken against appointing authority? It is not clear. Similarly the BCI which is also a regulatory authority of legal education is also not having firm and clear vision because few years back educational institutions received a notice from BCI that all the departments of the Universities and colleges running three years LL.B. course should stop it and change into five years BA LLB integrated course. But this was strongly opposed by some of the renowned and old universities which resulted the removal of compulsion of conversion of three years into five years and it has been made optional. Apart from this, the syllabus of law courses is continuously being changed, which is deteriorating the knowledge of law students. Another problem is the semester system. Bar Council of India has suggested teaching some of the core papers like Indian Penal Code, Jurisprudence etc. just in first semester, whereas political science should be taught in second semester and economics in third semester as prescribed by the Bar Council of India Rule, 2008. So, main law

papers are giving lesser weightage than the pre-law papers. What is the objective of the authority behind it is not clear? The law teachers are under the control of two authorities one is funding authorities i.e. UGC and the other is not the funding authority but simply controlling authority, that is BCI. For LL.B. the UGC as well as BCI norms will be followed whereas for LL.M courses there is no role of BCI and only the UGC norms will be followed. But there are many Law Schools who are not following the UGC norms they are having their own norms. So it can be said that legal education itself is in a dilemma. Not only this but also many of the law colleges are being run just only in two to three rooms and are not having proper infrastructure but are getting affiliation from the BCI.

So far as Ph.D. is concerned it has been made compulsory for Associate Professor and Professor in UGC Regulation, 2010<sup>3</sup> whereas it was not compulsory earlier, it had an alternative that was PhD or equal publication.<sup>4</sup> Since making it compulsory the quality of Ph.D. is deteriorating. The reason is that it has become compulsory to get PhD degree rather than focusing on good and quality research. Not only has this but the course works provision has also been made for Ph.D. Practically it creates a problem for the teachers who are not having PhD degree but for promotion they are bound to get the Ph.D. degree otherwise their promotion will not be done. However, to do Ph.D. they will have to take at least six months leave for completion of course work. Not only has this but it provided exemption from NET/SLET also.<sup>5</sup> That is why there is huge demand of Ph.D. And due to this Supervisors sometimes exploit the candidates. Therefore, for quality research and avoiding from exploitation it should not be made compulsory and the old

3 3.7.0 of the UGC Regulation 2010 makes the Ph.D. Degree compulsory for direct Appointment of Professors. It shall be a mandatory qualification for the appointment of Professors and for promotion as Professors.

3.8.0 of the UGC Regulation 2010 makes provision for the direct Appointment of Associate Professors. It states that the Ph.D. Degree shall be a mandatory qualification for all candidates to be appointed as Associate Professor through direct recruitment.

4 1.3.1 of the UGC Regulation 2010 states that for the direct appointment of Professor he should be an eminent scholar with published work of high quality, actively engaged in research, with 10 years of experience in postgraduate teaching, and/or experience in research at the University/National Level institutions, including experience of guiding research at doctoral level. Similarly regarding the appointments of Reader 1.3.2 Of the UGC Regulation 2000 says that the candidate should have Good academic record with a doctoral degree or equivalent published work.

5 3.3.1. of the UGC Regulation, 2010 provides that NET/SLET/SET shall remain the minimum eligibility condition for recruitment and appointment of Assistant Professors in Universities / Colleges / Institutions. Provided however, that candidates, who are or have been awarded a Ph.D. Degree in accordance with the University Grants Commission (Minimum Standards and Procedure for Award of Ph.D. Degree) Regulations, 2009, shall be exempted from the requirement of the minimum eligibility condition of NET/SLET/SET for recruitment and appointment of Assistant Professor or equivalent positions in Universities / Colleges / Institutions.

provision 'Ph.D. or equal publication' should be retained.<sup>6</sup> Another issue which is debatable is, if NET/SLET is compulsory what is the reason of giving exemption from NET/ SLET to those candidates who are the Ph.D. holders? It is also problems for the candidates who have completed NET/ SLET. Those candidates who have not qualified NET/SLET but have done Ph.D. are getting double benefit. In one hand they are getting exemption from NET/SLET, while on other hand they are getting increments of Ph.D. also as par to the candidates who are NET/ SLET qualified and then completed Ph.D. This should be avoided. Now the time has come to make clear cut policy, without being influenced with anything, to improve the quality of higher education. For this proper monitoring is required to be done so that the higher educational institutions in proper way.

### **Factors affecting Higher Education**

In welfare state it is the primary responsibility of the State to provide the quality higher education to its entire people at reasonable cost and state cannot deny from it. For this the extra amount is required whereas the investment in this area by the state is very less. India is the country where maximum people are from the medium, below medium or from lower section of the society. Many of them are not having position to provide proper facility to their offspring for getting quality higher education. Many students from these families are talented but due to lack of facilities they are deprived of showing their talent to the nation. So it should be assured that 'no talented person shall be denied access to higher education opportunities on the grounds of economic problem. For this one step can be welcomed that is public- private partnership. The industrialist should be invited to invest in this area with proper control of the government and for this they can be given tax benefits.

Lack of quality teachers is also an important factor to affect the higher education adversely. Therefore, good Faculty is must for any higher educational institution aspiring for quality. For this, it is high time that an Indian Higher Educational Service, along the lines of the IAS, is required to be formed. This has the advantage of quality control of the teaching faculty for higher education and prevention from nepotism in recruitment. Apart from the above, highly bureaucratized system with multiple controls and regulations exercised by Central and State Governments, statutory bodies (UGC, AICTE, BCI and others), university administration and local management also affects the liberty for the teachers. Simultaneously, the efficiency of fund utilization is very poor due to internal rigidities. If we compare

---

6 1.1.0, 1.2.0, 1.3.2 of the UGC Regulation 2000.



the salary of the teachers of higher education with other officers of central or state governments it is poor especially for the Assistant Professors. Therefore, higher education institutions are unable to attract qualified and trained teachers. Not only is this but there discrimination in recruitment of teachers also. In IIT, IIM etc. the newly appointed teachers are getting more salary than the teachers appointed in other institutions. Besides above, working condition in many institutions are not conducive to work and retention. As a result, a substantial proportion of high ranking students who could fill up such assignments prefer to work elsewhere or go abroad. In its recent move UGC has further damaged the pay and promotion prospects of college teachers by reducing promotional grades thereby creating more stagnation and frustration amongst college teachers.<sup>7</sup> So far as courses in higher education is concerned, many institutions are still offering outdated programmes with inflexible structures and contents while course content has been updated.<sup>8</sup> Higher education system requires carefully crafted courses in the arts and humanities which brings students into contact with the issues of gender, race ethnicity and cross cultural experience and understanding.<sup>9</sup> Unfortunately most of the universities and colleges are hardly retaining their focus on these courses and whenever these courses are still there, students are not seeking enrolment in them.<sup>10</sup> Also, the funding agencies what to talk of industries and private houses even the state players do not seem to be very enthusiastic or at least do not consider funding the courses on priority basis.<sup>11</sup>

## Conclusion and Suggestions

In India there are basically two agencies regulating Higher Education. University Grants Commission (UGC, 1956) and All India Council for Technical Education (AICTE, 1987). Both these institutions are under the Ministry of Education (now Ministry of Human Resource Development), which holds control on them. There is involvement of politics in the recruitment and no transparency is there. The higher education in India is facing with deteriorating conditions 'resulting from expansion and worsened by affiliation system and shrinking resources. Fund crunch is also a hindrance in the way of higher education. So, regular University-Industry interaction can rise from corporate sources. Simultaneously the curriculum should

---

7 Sanat Kaul, Higher Education in India: Seizing the Opportunity, Indian Council for Research on International Economic Relations, New Delhi, <http://www.icrier.org> visited on 23<sup>rd</sup> July, 2008

8 *ibid*

9 Prof. Moolchand Sharma, 'Democracy, Diversity and Higher Education' *NYAYA DEEP*, National Legal Service Authority, Vol IX Issue 2, April, 2008, p.37

10 *ibid*

11 *ibid*

be changed with the changing needs of the industry. It is also true that object of opening of private higher educational institution are diverted from their goal and the system has become commercialised. They are required of proper monitoring. India needs to have a proactive demand based policy towards higher education. Special attention is required regarding the need for financing of higher education for students, especially those coming from low income households. Policies of higher education should be designed to strengthen indigenous research agenda. Transparency in the functioning at all levels is required so that those committing wrong are deterred. Working facilities and workload of teachers should be as per the international norms. Teachers should be encouraged to attend various Conventions, Conferences, Seminars, and Workshops in their disciplines to update their subjects. There should be regular monitoring and evaluation of teaching and research in the Universities and other Institutions of higher learning for its effective functioning. The UGC Act,1956 is also required to be reviewed considering the new requirements and the challenges being faced by higher education. The financial support should be stepped-up. In last but not least the higher education service should be considered as public service.



# Role of Stock Exchange and Investor Protection in India: An Overview

Dr. Raghuvinder Singh<sup>1</sup>

Maneesh Yadav<sup>2</sup>

## **Abstract**

*Indian stock exchange plays a very important role in channelizing money from the investor to the industries and vice versa. Stock exchanges help in issuing securities, payment of dividend, redemption of securities, issuance of other financial instruments etc. Stock exchanges give reasonable, clear and well-organized securities market to the investors with other advance technique of securities trading. The major objectives behind the establishment of stock exchanges was to provide stock market access to investors from all over the country on one platform and working on the pattern of international financial markets.*

*With the growing stock trading techniques and changing regulatory atmosphere, it is necessary to evaluate the working of stock exchanges and regulatory framework of stock exchange. This paper examines the structure and working of stock exchanges and investor protection by stock exchanges. It also suggests measures to protect the interest of the investors.*

*Keywords:* SEBI, NSE, BSE, Listing agreement, clearing members

## **(1) Introduction**

In Indian capital market, stock exchange provides trading platform to mobilize capital from one person to another. In the Indian economic system corporate bodies are important role player to fetch capital for the advancement of the economy. It is not possible without the availability of a market place to convert securities into cash or vice versa. Stock exchanges provide market place where investor like institutional buyers and sellers trade into listed securities, bond etc. for money. Thus, the worth of a stock exchange is based on it steadiness to make available a forum, where investors can both buy and sell securities when they desire at fair spirited, monitored price. If investment were made risky by too wide fluctuations

---

1 Professor, Himachal Pradesh University Summer Hill, Shimla

2 Ph.D. Scholar, Himachal Pradesh University Summer Hill, Shimla

in share prices, savings would go into safer but unproductive investments like land and gold<sup>3</sup>. With the growth of the economy, capital ownership and acquisition by investors also increases in the market. With the growth of the market, stock exchange ability to facilitate the private savings into the market and productive investment of saving also increases on the greater scale. The efficiency of the stock exchange is to serve all kind of facilities also increases with the growth of economy.

Further, to understand the buying and selling process of the shares and other securities, the functioning of the stock exchange need to be understood in detail.

## **(2) Functions of stock exchange**

The stock exchange carries out the subsequent essential economic functions:

- a) Makes available a prepared market or platform for buying and selling of securities.
- b) Directs the flow of capital in the most profitable channels i.e. equity, mutual funds, bonds etc.
- c) Induces corporate enterprises to lift up their standard of performances, compliance and corporate governance
- d) Make and enforce bye-laws of the stock exchange
- e) Manage risk in securities transactions

In a developed capitalistic economy, the stock exchange provides the citadel of funds and the determining tool for economic development. It is pointed as an indispensable associate of the industrial system of an economy. Regardless, the structure of the secondary market, it provides huge capital to the corporate. Stock exchange represents the axle on which the fiscal structure of the capitalist system turns, the temple of values, the market of individual efforts and the market where man's courage, originality and labour are marketed<sup>4</sup>. There are two major stock exchanges in India namely National Stock Exchange and Bombay Stock Exchange.

## **(3) National Stock Exchange**

National Stock Exchange is in progress with the thought of an independent governing body not including any broker symbol. Thus, it ensures that the operators' interests are not allowed to govern the control of the stock exchange. It was set up in 1995 at a primary objective to reform the securities market through enhanced

---

3 R.K. Dixit, *Behaviour of share prices and investment in India* (1986) p. 27

4 R.K. Dixit, *Behaviour of Share Prices and Investment in India*, (1986) p. 28

technology and the beginning of best practices in management. Before the NSE establishment, stock trading on the stock exchanges in India used to take place through an open chorus of approval without the help of information technology such as price matching or recording of settled securities trades. Major lacuna was time consuming and unproductive trade and practice of physical trading imposed limits on trading volumes.

To prevent this, the NSE launched screen-based trading system (SBTS) where a member can punch into the computer the quantities of shares and the stock prices at which investor wants to execute the trade. The business deal is completed once the quotes punched by trading member finds a matching sale or buy quote from the counterparty. SBTS by electronic means matches the buyer and seller in an order-driven system or finds for the customer the excellent price accessible in a quote-driven system.

National Stock Exchange is one of the foremost-demutualised stock exchanges in the country. It is the place where the ownership and management of the exchange is completely alienated from the right to trade on it. National Stock Exchange is owned by a set of most important financial institutions, banks, insurance companies, financial intermediaries. It is managed by professionals, who do not directly or indirectly trade on the exchange. This has entirely eliminated any disagreement of attention and helped National Stock Exchange in insistently following policies and practices within a public interest framework<sup>5</sup>. It helps to construct the market more translucent, leading to increased investor confidence.

The electronic and online trading introduced by the National Stock Exchange has made manipulation difficult like an insider-trading, price rigging etc. It has enhanced liquidity and made the entire operation more transparent and well organized. The National Stock Exchange has formed a clearing corporation to make available legal counterparty guarantee to each trade thereby eliminating counter party risk. It is accountable for the settlement of market trades that took place during day hours. It is the legal counter-party to meet obligations of each brokerage firm and is answerable for removing counter party risk.

For the protection of the investor, The National Securities Clearing Corporation Ltd. (NSCCL) commenced its working in April 1996. Counter party risk is guaranteed through fine-tuned risk management systems by the NSCCL. It is a groundbreaking technique of on-line position of trade monitoring and automatic disablement.

---

5 National Stock Exchange -The Premier Stock Exchange of India, available at: <http://kannanpersonal.com/content/stock/nse/index.html> (Assessed on 01-05-2013)

National Stock Exchange in the capital market implements the principle of “novation”. Under the principle of novation, NSCCL is the counter party for every capital market trade. Due to this, default risk in the trade of the securities has been minimized. To maintain the guaranteed settlement of the securities, a “settlement guarantee fund” was formed.

A large settlement guarantee fund makes available a cushion for any outstanding trade risk related to the capital market. As a result, notwithstanding the truth that the everyday traded volumes on the National Stock Exchange run into heavy volumes, credit risk no more poses any trouble in the marketplace<sup>6</sup>.

The Bombay Stock Exchange and the National Stock Exchange are the major stock exchanges and controls the Indian capital market. Bombay Stock Exchange is the largest among all stock exchanges and the oldest in terms of operations. It held the dominant position in terms of business transacted and companies listed on it. The number of trade transacted on the National Stock Exchange has grown exponentially even since its establishment because of more transparent trading and settlement mechanisms and lower cost of transaction as compared to the Bombay Stock Exchange <sup>7</sup>.

#### **(4) National Stock Exchange’s Trading Mechanism : NEAT**

National Exchange for Automated Trading (NEAT) system was the first trading mechanism by the National Stock Exchange to provide nation-wide, anonymous, order-driven, screen-based trading system. Major feature of the NEAT system is that the trading member inputs the details of his order such as the quantities and prices of securities at which trading member wishes to trade.

NEAT based trading on National Stock Exchange has resulted in an extensive decrease in time spent by the investor on broker’s houses, cost and risk of trading error as well as transactional frauds. NEAT provides an equal right to use for all the investors. It permits a quick combination of price sensitive information into existing securities prices, as the market participants can see the current complete market on a concurrent basis on their online trading screen. Online trading mechanism increases informational effectiveness of the stock exchange and makes the market more translucent to the investor.

Additionally, the online trading system permits a greater number of market

---

6 <http://www.nSDL.co.in/downloadables/booklet-i.pdf>. (Assessed on 03-05-2013), Also, Guarantee, available at [http://www.nseindia.com/supra\\_global/content/nscl/guarantee.htm](http://www.nseindia.com/supra_global/content/nscl/guarantee.htm) (Assessed on 03-04-2014),

7 Harvinder Kaur, *Stock Market Volatility in India*, (2002) p. 9

participants, irrespective of their geographical locations, to trade with one another at the same time. The bookstores only limit orders, which are ordered to purchase or sell shares at a declared amount and declared cost, are executed only if the price amount conditions go equal. Therefore, the NEAT system provides an Open Electronic Consolidated Limit Order Book, which guarantees full secrecy by accepting orders, big or small, from members without illuminating their identity<sup>8</sup>. A perfect audit trail, which helps to decide disputes by logging in the trade execution process in total, is also provided by the exchange. The trading platform of the capital market or derivative segment of National Stock Exchange and Bombay Stock Exchange are accessed not only from the computer terminals, but also from the private computers of the investors through the internet and from the hand-held devices like iPad or mobiles through WAP<sup>9</sup>.

Securities and Exchange Board of India (SEBI) has permitted use of the internet as an order routing system for communicating the investors' orders to the exchanges through the registered stockbrokers. It is required for the brokers to obtain the authorization from their concern stock exchanges. In February 2000, National Stock Exchange became the first exchange in the country to provide web-based access to investors to trade directly on the Exchange followed by Bombay Stock Exchange in March 2001. The trading orders initiating from the private computers of investors were channeled through the internet to the trading terminals of the selected brokers and further to the stock exchange. After the exchange terminal matches these trading orders, the securities transaction is executed and the investor gets the verification in a straight line on their personal computers and SMS by the National Stock Exchange.

The Securities and Exchange Board of India has also allowed securities trading through wireless medium or Wireless Application Protocol (WAP) platform. The National Stock Exchange primarily operates two market segments:

- i. the wholesale debt market segment, where fixed income instruments such as government bonds, treasury bills, commercial papers, corporate debentures are traded among institutional investors and
- ii. the capital market segment, which facilitate trade in equities and retail trade in convertible and non-convertible debentures and hybrid instruments.

---

8 Chapter 3: Trading, available at: [www.nseindia.com/content/ncfm/CMDM\\_rev\\_Eng.pdf](http://www.nseindia.com/content/ncfm/CMDM_rev_Eng.pdf) (Assessed on 21-05-2013)

9 Capital Market Segment, available at: [http://www.nseindia.com/education/resources/download/fact2010\\_sec4.pdf](http://www.nseindia.com/education/resources/download/fact2010_sec4.pdf) (Assessed on 22-02-2014)

Trading in the debt market segment of scripts started in June 1994 and in the capital market segment in November 1994. The futures and options (F & O) started in the year 2000. The ownership and management of the NSE are alienated from its member's right to trade on the exchange. It is owned by the promoters and other financial institutions and not by its trading members.<sup>10</sup>

### **(5) Bombay Stock Exchange's Trading Mechanism (BOLT)**

The Indian capital market is in the continuous phase of change. The beginning of Over-The-Counter Exchange of India in 1993 escorted the concept and practice of screen based trading in India. Following the same pattern, the National Stock Exchange became ready in June 1994. As a result, the Bombay Stock Exchange was compelled to adopt an on-line trading mechanism through the BOLT system. At the present, Bombay Stock Exchange set up a BOLT system in various cities. All investors, including brokers and sub-brokers, have right to use to BOLT across the country. The final beneficiary of the whole work of technological advancement is the retail investor in other cities who, up until now, had to access to BOLT, without going through a chain of mediators.

### **(6) Legal framework of stock exchange**

In the Indian securities market, stock exchanges are governed by the Securities Contract (Regulation) Act, 1956. The Securities Contracts (Regulation) Act, 1956 manage overall trading methods and market practices for a variety of important matters including recognition of stock exchanges. It provides regulation relating to securities and provisions on the subject of listing of securities. The Act provides for unitary control and secured by allowing stock exchanges to operate only after they are recognized, their rules and bye-laws comply with the prescribed rules of the Government and the exchanges are ready to act in accordance with any conditions made compulsory by the Central Government etc. The Act controls hours of trade, fixes floors and ceilings on days transaction, sets down margin requirements for the trade, business in securities being done only under the authority of a license granted etc. The Government is also vested with powers to take over charge from governing bodies, when circumstance needs and in emergencies to postpone operations<sup>11</sup>.

Stock exchanges provide marketability and liquidity to the securities. It encourages investments in securities and assists corporate development. Stock

10 Tadashi Endo, *The Indian Securities Market, A Guide for Foreign & Domestic Investors*,(1998) p.114-115

11 D.Sakriya , *Sebi and Securities Market in India*, (2000), p 166-167



exchanges act as the most important branch of Indian capital market. They grant facility for trading in all categories of securities such as shares and bonds. It provides the machinery with which it is possible to evaluate the securities and predict the moving trends and directions in which investments of the investors flow. It assists the primary market by acquiring subscription for the new issues with the help of IPOs. The stock exchange in secondary market provides a well-regulated market for trading in existing securities, which have already been subscribed in the primary market. SEBI has decided that the stock exchanges shall send details of the transactions to the investors, by the end of trading day through SMS and E-mail alerts. Stock brokers shall ensure to the stock exchange that separate mobile number and E-mail address is uploaded for each client<sup>12</sup>.

### **(7) Acknowledgment of stock exchanges**

Under Section-2(f) of the Securities Contract (Regulation) Act 1956, “Recognition of Stock-Exchange” means:

*“a stock exchange which is for the time being recognized by Central government under Section 4 of the Act”<sup>13</sup>.*

Under Section-4 of the Securities Contract (Regulation), Act 1956, every grant of recognition to the stock exchange shall be in print in the Gazette of India and in the official Gazette of the State in which the main office of the stock exchange is situated and it shall have effect as from the date of its publication. It shall be either on a permanent basis or for such period not less than one year as may be prescribed in the recognition.

At present, the stock exchanges have nationwide terminals such as the National Stock Exchange of India Ltd. and Bombay Stock Exchange Ltd. They operate in equity as well as equity derivative segments and are providing an investor grievance redressal mechanism. In addition, SEBI has initiated steps to set-up arbitration facility by the stock exchanges at more centers after examining the data on complaints and arbitrations filed by investors from various regions<sup>14</sup>.

All securities transactions and settlements are within the bye-laws of the exchanges and the SEBI. Previously, it was necessary for the public limited companies to register their securities to the nearest stock exchange from the registered office. It was only to provide an opportunity to the local investor to

12 SEBI Circular No: CIR/MIRSD/15/2011 August 02, 2011

13 Section-2(f) of the Securities Contract (Regulation) Act 1956

14 SEBI Circular No: CIR/MRD/DSA/03/2012 dated January 20, 2012, SEBI Circular No: SMD/Policy/Cir-32/1997, SEBI Circular No: CIR/MIRSD/2/2012 February 15, 2012

trade in companies based in their locality or area. Now, position has been changed and every company is free to go to as many as stock exchanges to trade in their listed securities.

With the improved application of information technology, the trading platforms of all the stock exchanges in different securities are easy to get from everywhere in the nation through their trading terminals. However, the trading platform of National Stock Exchange and Bombay Stock Exchange is also accessible through internet and mobile devices with different applications. In a geologically extensive country like India, it has extensively expanded the reach of the exchanges to the doorsteps of every investor and assuaged the aspirations of people to have exchanges in their neighborhood<sup>15</sup>. The major objective behind the regulations of the stock exchange is to provide accessibility of all the categories of securities available to the investors. It will help the shareholders to easily buy and sell the shares in the market at the best price.

### **(8) Legal framework of listing of the securities**

The provision of listing of securities makes easy for the investor to purchase shares or other securities. Listing means the formal entrance of a security on the trading platform of a stock exchange. The provisions in the Companies Act, 1956, the Securities Contracts (Regulation) Act, 1956, The Securities Contracts (Regulation) Rules, 1957, the circulars and guidelines issued by Central Government and the Securities and Exchange Board of India, administer listing of securities on the domestic stock exchanges. In addition, Stock exchanges are governed by the rules, bye-laws and regulations of the concerned stock exchange and by the listing agreement entered into by the issuer and the stock exchange under SEBI listing guidelines, 2005.

The basic listing and other norms for listing of securities on the stock exchanges to trade and investment are consistent for all the exchanges. Domination of the exchanges within their allocated area, regional aspirations of the people and mandatory listing on the regional stock exchange resulted in a multiplicity of exchanges throughout the country. These norms are mentioned in the listing agreement entered into between the issuer company and the concerned stock exchange. The listing agreement prescribes a number of requirements to be complied with by the issuers for continued listing of securities and such compliance is checked by the exchanges. It also stipulates that the disclosures to be made by the

---

15 Dr. R.K. Mittal, V.K. Jain, *Capital Market* (2010), p.50. Also, available at: [www.nseindia.com/content/us/ismr2004ch4.pdf](http://www.nseindia.com/content/us/ismr2004ch4.pdf) (Assessed on 03-01-2014)

companies at the time of listing of securities and corporate governance practices to be followed by the issuer<sup>16</sup>.

The Securities and Exchange Board of India has been issued guidelines or circulars mentioning certain norms to be incorporated in the listing agreement and to be complied with by the companies in regular interval of time. Only listed security is accessible for trading on the stock exchange and the stock exchanges levy listing fees like initial fees and annual fees from the listed companies. Although, the initial fee is a fixed amount, the annual fee differs depending upon the size of the issuer company. Major stock exchanges like National Stock Exchange charges Rs. 7,500/- as initial fees for companies with a paid-up share or debenture capital of less than or equal to Rs. one crore. In addition, an annual listing fee is Rs. 4,200/- for companies with a paid-up share or debenture capital of more than Rs. 50 Crores. The annual listing fees are Rs. 70,000/- plus Rs. 1,400/- for every additional Rs. 5 Crores or part thereof. Different categories of fees are the major resource of profits for many exchanges. These kind of revenue collection helps to the stock exchange to provide better services to the shareholders<sup>17</sup>.

A company seeking a listing satisfies the stock exchange that at least 10% of the securities, subject to a minimum of 20 lakh securities, went to the public for subscription. The size of the net offer to the public (i.e. the offer price multiplied by the number of securities offered to the public, excluding reservations, firm allotment and promoter's contribution) was not less than Rs. 100 Crore, and the issue is made only through book building method with an allocation of 60% of the issue size to the qualified institutional buyers<sup>18</sup>. In the alternative, it is required to offer at least 25% of the securities to public. The company is also required to maintain the minimum level of non-promoter holding on a continuous basis<sup>19</sup>.

A listed company can delist its securities from non-regional stock exchanges after condition that an exit opportunity for holders of securities will be provided in the region where the concerned stock exchange is positioned. Delisting of securities by the stock exchange comes after the very stringent procedure of compliance. In case an issuer company is unsuccessful to meet the terms with the requirements, then trading of its security would be suspended for a specified

---

16 Clause 49 of listing agreement, 2005

17 Listing fee, available at : [www.nseindia.com/corporates/content/dpp\\_fee.htm](http://www.nseindia.com/corporates/content/dpp_fee.htm) (Assessed on 09-03-2014)

18 Requirement of Public Holding for Listing, available at: [finmin.nic.in/reports/Discussion%20Paper%20Public%20Holdings.html](http://finmin.nic.in/reports/Discussion%20Paper%20Public%20Holdings.html) ( Assessed on 01-01-2014)

19 Clause 40A of listing agreements, 2005

period of time or withdrawal or delisting<sup>20</sup>, in addition to penalties as prescribed in the Securities Contracts (Regulation) Act, 1956. The norms of the delisting are to protect the interest of the shareholders of the company.

## **(9) Conclusions and Suggestions**

Stock exchanges are playing key role in the stock trading mechanism and investor protection. In the growing economy of the country, stock exchanges modified their functioning as per market standards to protect the interest of the investor. In order to expedite the process of securities transfer from the account of the seller to buyer, stock exchanges provides the online trading mechanism. Also, settlement cycle of stock trade comes to T+2 period from T+3 period with the help of clearing members and other market participants.

In order to protect the interest of investor in the exchange dealings, every investor should only business with the registered intermediaries with the stock exchanges. It is also suggested to the investor to give clear instructions related to the trade to the concerned brokers. Every investor should demand contract note for every trade from the broker to verify the charge and the confirmation of the trade. Also, investor should make documentation of every trade executed by the broker on the behalf of the investor. In case of any grievance, investor should complaint to the compliance office of the concerned stock exchange and should also register their complaint with the SEBI.



# Critical Perspectives of Evidentiary Issues in Sexual Offences against Women: Realities of Adversarial Criminal Justice System and the Need for Reforms

Manoranjan Kumar<sup>1</sup>

## **Abstract**

*A number of substantive and procedural reforms have been made into the legal framework of our country in order to curb the growing menace of sexual offences and protect victim's interests. This article examines the functioning of the criminal justice system of our country in reference to sexual offences in general, with a critical perspective. This article also reviews issues pertaining to the perception of victim's credibility in the context of sexual offence related complaints. It analyses the factors that influence criminal justice personnel and make the system treat victims unresponsively. This article argues that reformed laws per se are unlikely to improve the underreporting phenomena or increase the conviction rate. The reformed legislative framework, however, does seek to curb the offence and provide meaningful protection for the victims of sexual offences.*

## **I. Introduction**

The pursuit for recognition, protection and enforcement of women's rights and interests in Indian society has been a prodigious task and witnessed many cataclysms. The conventional legal theories portray law as a neutral discipline and the erstwhile male dominated legal discourse ignores the vulnerable position of women in the society. Ever since its foundation the criminal law system, it is widely believed, has adopted the test of reasonable-man as the yardstick to be applied by the judge while appraising the evidence and adjudicating the guilt of the accused person. Since its evolution, the feminist jurisprudence has, however, made very strong and critical reaction against this utter disregard for the female perspectives in understanding, interpreting and applying the laws. Raymond Wacks rightly puts it, "...the role and function of the law, are not surprisingly, key questions in

---

1 Assistant Professor of Law, Chanakya National Law University, Patna.

feminist legal theory.”<sup>2</sup> In fact, the feminist jurisprudence has critically examined the inequalities found in several branches of substantive law and their focus is on injustice done to the women under those branches of law. A critical evaluation of the functioning and efficiency of the adversarial system of criminal justice in the context of female victims of sexual offences would be very pertinent. It is really unfortunate that Indian women suffer indignities in different form, from lewd remarks to eve-teasing, from molestation to rape. Though, offences against women and girls in India are committed in various forms including domestic violence, dowry deaths, sexual violence, trafficking *etc* besides other offences, this article confines to the study of victims of sexual offences. There is no denial that the adversarial system and its peculiar methods convert the justice delivery mechanism into a dilatory one. The adversarial criminal adjudicatory system has earned the notoriety of being largely ineffective at prosecuting offences. Sexual offence is no exception to this and even after extensive amendments in substantive and procedural laws relating to sexual offences, the criminal adjudicatory system of our country has failed miserably in responding to the needs of victims of such offences. It is widely believed that the adversarial system is not conducive to enhancing victims’ participatory rights and that much could be learnt from continental inquisitorial systems.<sup>3</sup> This article intends to examine and critically evaluate the functioning and efficiency of the criminal adjudicatory system including evidentiary norms generally in their application to the victims of sexual offences. This article also examines and explores women’s struggle against the male dominion in the adversarial system specifically in the context of victims of sexual offences.

## **II. Victims: Forgotten and Abandoned in the Criminal Justice System**

There is no place for violence in any civilised society at all, but when the appalling levels of violence against women or other marginalised or vulnerable section of the society are not only committed but they come to be increasingly tolerated as matter of routine affairs, the urgency for examining the efficiency of the justice delivery machinery and assessing the necessity for augmenting and overhauling the justice system becomes indispensable. Besides, under such circumstances it also becomes inexorable to address and introspect how, we as a society are responsible for the failure of the criminal justice system. The

---

2 Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* 299 (2009).

3 J Doak, *Victims’ Rights in Criminal Trials: Prospects for Participation* 32 *Journal of Law and Society* 307 (2005).

preliminary investigation that should be conducted in this regard is to find out whether the existing criminal justice system is functioning the way it is intended to function. The result of this investigation alone can suggest us what sort of remedies is to be adopted. How victims are treated within the criminal justice system has since long been an area of grave concern in the direction of such an investigation in the context of sexual offences. The plight of victims occupies a central place in the critique of the criminal justice system by both the Left and the Right.<sup>4</sup> In the past, the studies conducted by victim groups, supported by empirical research of academicians and agitation by the members of the civil society had caused the legislative wing of the state to act and respond towards some urgent needs of the victims such as counselling and victim support *etc.* However, our experience suggests that they have not been followed in letters and spirit and they prove to be inadequate.

In an adversarial criminal justice system, the victim of crime is almost entirely eliminated from an active role in the process. The victim has been defined as one who is quite “overshadowed”, the “forgotten” or “non-person” in the eyes of the professional participants.<sup>5</sup> The experience of the majority of the victims in the past has been that they have been forgotten or abandoned somewhere in the process and the entire system is frustrating. Earlier, only right available to victims of sexual offences was the procedural entitlement to stand as a witness and informant. Given the kind of insensitivity towards the victim on the part of each and every actor in the justice system, the social mindset of treating the victim as culprit, lack of victim support mechanism and dilatory adjudicatory machinery, it is not difficult to concede that the only possible outcome of the adversarial criminal justice system has essentially been the complete disenchantment and utter frustration of the victims of sexual offences from the judicial process. This frustration ultimately leads to people losing trust in the government’s ability to deliver justice and raises serious doubt about the capacity of the state to protect its people particularly marginalised and weaker sections of the society. As a result, majority of the victims of sexual assaults avoid engagement with the criminal justice system, as they perceive it as inappropriate to their needs or fearing further traumatising at the hands of adversarial legal process.<sup>6</sup>

---

4 Roger Douglas and Kathy Laster, *Victim Information and the Criminal Justice System: Adversarial or Technocratic Reform 1* (1994). <http://www.criminologyresearchcouncil.gov.au/reports/15-92-3.pdf>.

5 *Adversarial Criminal Justice System*, <http://www.lawteacher.net/criminal-law/essays/adversarial-criminal-justice-system.php> (last visited on May 15, 2014).

6 Studies and literature confirm that many victims of sexual violence do not report their experiences to the police.

### III. Appraising Recent Law Reforms

It is pertinent to mention here that the sexual offences law applied in Indian courts have their foundation in the English common law tradition. The problem is not that there is any dearth of statutory law. In fact, post *Mathura Rape case* criminal law amendments including the latest amendments in the criminal law, along with Supreme Court and High Court judgments have established a very strong legal framework that seeks to follow victim centric approach and victim-friendly procedures. In the wake of these law reforms, there have been some improvements in the sensitivity and response of the system towards the victim but there has not been any substantive improvement in the low conviction rates. Post *Mathura Rape Case* decision, India has witnessed multiple waves of rape law reforms, but their impact has so far been far from satisfactory. In a comparative perspective, researchers on the rape law reforms have questioned the effectiveness of such reforms in achieving either feminist or crime-control objectives.<sup>7</sup> Despite the multiple waves of reforms, numerous impediments to the successful prosecution of rape remain, hindering the eradication of most horrendous crime against women. Researchers believe that the most potent barrier is the law's adoption of, or at least willingness to tolerate, the many myths about rape that abound in society.<sup>8</sup>

The real problem persisting since beginning has been the peculiar male dominated and patriarchal social setup of our country which is entirely different from the English social and cultural setup. One can understand the inefficacy of these reforms by the illustration that the author furnishes here. The print and electronic media coverage of the civil society unrest throughout India that followed a gruesome gang rape in Delhi had besides increasing the awareness about the

---

7 During the 1970s and 1980s laws relating to rape were sought to be reformed. Four major reforms that typically occurred during this period: Changes to the definition of rape; elimination of the requirement that there should have been resistance; elimination of the need for corroboration; and the enactment of rape shield laws. Finding useful indicators to measure the impact of these reforms is complex and difficult, but at least in respect of the aims of reducing re-victimization of the complainant during the trial, encouraging reporting, and decreasing attrition, it seems that 'success' must be measured in very small and relative changes. The often minor and generally inconclusive nature of these shifts (where they have occurred at all) have led a number of commentators to question the effectiveness of such reforms in achieving either feminist or crime-control objectives. See Dee Smythe, *Moving Beyond 30 Years of Anglo-American Rape Law Reforms: Legal Representation for Victims of Sexual Offences* 18 S. Afr. J. Crim. Just. 167 (2005).

8 These myths include: women mean "yes" when they say "no"; women are "asking for it" when they wear provocative clothes, go to bars alone, or simply walk down the street at night; only virgins can be raped; the majority of women who are raped are promiscuous or have bad character etc. Even though these myths have been proved to be untrue, yet they continue to influence the way judges and other official and personnel perceive victims allegation that she has been raped. See Morrison Torrey, *When will We be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions* 24 U.C. Davis L. Rev. 1013, 1015 (1991).



legal regime, created an impression that there would be substantive deterrent impact upon the potential offenders and the sexual offence related crimes would subside. But ironically the incidents of rape increased manifold in the aftermath, instead of subsiding. Some argue that there has been merely a transient surge in reporting of such crimes as the victims have gathered courage in the wake of ongoing protests and demonstrations across the country. Be that as it may, but at least the offence of sexual violence has not subsided for sure. What could be the reasons that despite having a very strong legal framework as amended from time to time over the past 150 years, there has not been any substantive improvement at the operational level? The “Norms of Decision”, to use Eugen Ehrlich’ expression, has been distorted by the stake holders it appears and there is much divergence between what the legal framework directs and how it is actually being applied and followed by the concerned authorities. The legal system of our country which comprises of several substantive and procedural laws as well as evidentiary norms tuned on the adversarial model, often acts as a double-edged sword and compromises justice in the name of strict adherence of the procedural nitty-gritty.<sup>9</sup> Unfair and incomplete implementation of laws often results in serious impediment in achieving the objective of justice.

Sexual offences are the most underreported crimes in our society for reasons best known to everyone familiar with our patriarchal and male dominated social and cultural setup. It is due to this patriarchal setup that stalking, marital rape, acid attacks and disrobing of women have always been ignored by the society and not considered as acts of sexual assault, opines Vrinda Grover.<sup>10</sup> It is well established that sexual assault is widespread and its effect is devastating for the individual victims and their families, yet a number of victims of sexual assault never report the crime to the police. Sexual violence apart from being a dehumanizing act is an unlawful intrusion on the right of privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity. It degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience.<sup>11</sup> Sexual violence is the most brutal form of expression not only against the person of women but against the entire

---

9 Morrison Torrey rightly puts it as: “The legal treatment of rape seems to be structured to make it as difficult as possible to establish that any given man has raped any given woman.” See Morrison Torrey, *When will We be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions* 24 U.C. Davis L. Rev. 1013 (1991).

10 *Patriarchal Society Cause of Violence against Women*, The Hindu, (Banglore), May 18, 2013 also available at <http://www.thehindu.com/todays-paper/tp-national/patriarchal-society-cause-of-violence-against-women/article4726329.ece> (last visited on May 15 2014).

11 *State of H.P. v. Shree Kant Shekari*, (2005) SCC (Cri) 327.

society. As held by the Supreme Court in *Shri Bodhisattwa Gautam v. Miss Subhra Chakraborty*,<sup>12</sup> it destroys the entire psychology of a woman and pushes her into deep emotional crisis. Rape not only violates the victims privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. It is not merely a physical assault. It is often destruction of the whole personality of the victim.<sup>13</sup> Rape is a form of mass terrorism, for the victims of rape are chosen indiscriminately, but the propagandists for male supremacy broadcast that it is women who cause rape by being unchaste or in the wrong place at the wrong time—in essence, by behaving as though they were free.<sup>14</sup> Research across the world suggests that the reasons for non-reporting the sexual assault by a victim/survivor include *inter alia*:

- shame and embarrassment;
- fear of not being believed;
- fear of the legal process;
- fear of the perpetrator of the crime;
- victims may feel they have dealt with the assault themselves;
- victims may not consider the assault to be “real” crime, or serious enough to report to the police; and
- victims may feel police would not be able to do anything about it

A victim of the sexual assault suffers a tremendous sense of shame and the fear of being shunned by society and her near relatives including her husband. Instead of treating her with compassion and understanding as one who is injured victim of a crime, she is, more often than not, treated as sinner and shunned.<sup>15</sup> Ordinarily therefore, a woman or even a young child who is subjected to sex-violence, would always be slow and hesitant about disclosing her plight. A profound enumeration of the factors which would generally dissuade the victim from reporting the crime to the police can be found in *State of Maharashtra v. Chandraprakash Kewal Chand Jain*<sup>16</sup> as:

*“(1) A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident*

---

12 AIR 1996 SC 922.

13 Gurmit Singh v. State of Punjab, AIR 1996 SC 1393.

14 Susan Griffin, *Rape: The All American Crime* in Forcible Rape: The Crime the Victim, and the Offender 47, 66 (1977) cited in Morrison Torrey, *When will We be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions* 24 U.C. Davis L. Rev. 1013, 1014 (1991).

15 State of Maharashtra v. Chandraprakash Kewal Chand Jain, AIR 1990 SC 658.

16 AIR 1990 SC 658.

*which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracised by the society or being looked down by the society including by her own family members, relatives, friends and neighbours. (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable of an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being powered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman would also more often than not, want to avoid publicity on account of fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross examination by counsel for the culprit, and the risk of being disbelieved, acts as deterrent.”*

The criminal adjudicatory system of our country which is based on the adversarial model of criminal justice is the institution primarily responsible for dealing with sexual offences, yet this system is underused and largely ineffective at prosecuting cases. During the stage of trial in this adversarial system, victims feel their interests are subordinated to those of the accused. Victims have to undergo gruelling cross-examination and particularly in case of victims of sexual offences their perception of the procedure is that of second victimisation and devastating.<sup>17</sup> The adversarial system has no doubt provided a platform for victims to seek justice, yet at the same time in the name of procedural and evidentiary norms it disqualifies her claim in majority of the cases and ends up in her second

<sup>17</sup> Women who are raped continue to be embarrassed, doubted, and abused by the legal organizations that process them, a pattern referred to as a “second assault.” Joyce E. Williams & Karen A. Holmes, *The Second Assault* (Westport, Conn.: Greenwood Press, 1981) cited in Patricia Yancey Martin and R. Marlene Powell, *Accounting for the “Second Assault”*: *Legal Organizations’ Framing of Rape Victims* 19 *LAW & SOC. INQUIRY* 853 (1994).

victimisation. Though, it has always been a settled principle of criminal law that victim occupies a central place in the criminal adjudicatory system, amendments incorporated by the criminal Procedure Amendment Act, 2009 are the formal acknowledgement that victims of crime have a stake in the criminal prosecution. This becomes visible by the right conferred upon the victim to appoint an advocate to aid the prosecutor. The recognition of legal representation for rape victims seeks to strengthen victims' rights and will also serve to improve efficient and effective management of cases. It also recognises that although sexual offences are crimes against society, it is uniquely personal in nature also. The adversarial nature of the trial procedure in our country essentially treats the victims as the main state witness and therefore subjects them to gruelling and rigorous cross-examination by the defence lawyer charged with protecting the interests of the accused. The key barrier for victims of sexual offence within the adversarial system is the traumatic secondary victimisation of the victim during the trial at the hands of the defence lawyers who tactically adopts methods to harass, dissuade, discourage and frustrate the victim and thereby somehow impeach the credibility of the witness. Victims of sexual offences frequently report feeling harassed and badgered under cross-examination.<sup>18</sup> Given the nature of sexual offences, it is very difficult to gather independent evidence and incriminating materials against the accused except the testimony of the victim as the main witness. Under these circumstances, impeaching the credibility of the victim's testimony is the easiest way to demolish the prosecution's story and seek acquittal of the accused. The latest amendments into the criminal law have incorporated additional safeguards to protect the interests of the victims. Amendments have been made into the Indian Evidence Act, 1972 also. The actual functioning of the provisions must be scrutinised over a period of time. However, it is not only the gruelling cross-examination during the trial that adds to the miseries of the victim. Lack of access to information on the legal process, the conduct of the trial, the investigation and lack of proper counselling substantially adds to the trauma that victims of crimes experience.<sup>19</sup>

The implicit character assassination of a rape victim has devastating effect upon victim and impedes the delivery of justice. The presumption of innocence of the accused coupled with the strict burden of proof on the prosecution results

---

18 Jonathan Doak, *Victim's Rights in Criminal Trials: Prospects for Participation* 32 J.L. & Soc'y 294, 306 (2005).

19 Victims of rape have difficult decisions to make that will affect their lives and the lives of those close to them. Victims who are or have been in a relationship with their attacker may blame themselves or feel that agencies will blame them, and may well face wider difficulties such as

in frequent acquittal and few conviction of the accused even in the face of incriminating evidence from their victims. This low rate of conviction is in the eyes of many, one of the causes for increased rates of the cases of rape. According to the latest figures made available by National Crime Records Bureau, more than 24900 cases of rape were reported in 2012 and there was only a 23.3 per cent conviction rate in rape cases in India. The low conviction rates, insensitive treatment of victims and long delays in trial pose serious threat to the credibility of the institution.

Victims occupy a central place within the criminal justice system, but her position stands highly compromised due to *inter alia* the certain characteristics of adversarial system.<sup>20</sup> In the recent years violence against women has increased manifold and poses a major threat to Indian society and its institutions. What adds to the misery is that in majority of the cases the real perpetrators of the crime are people known to the victim. Law and legal system are the major tools for social transformation and by promoting righteousness and justice they ensure well being of the society. Extensive amendments have been made to sexual assault laws and procedures over the past few years and there has been increasing emphasis on responding to the needs of victims of sexual assault. However, unless these reforms are implemented at the operational level, the victims will continue to experience the adversarial criminal justice system as traumatising and re-victimising.

#### IV. Adversarial v. Inquisitorial System

The comparison between adversarial and inquisitorial systems cannot yield a conclusion with absolute truth that one is better or advantageous over the other. The two systems of criminal adjudicatory systems represent different views of the purpose of the law. Both systems have the fundamental common point namely seeking justice, however, while adversarial system focuses more on fair-play, for inquisitorial system, truth is the primary goal. It is widely believed that the two systems generally reach the same results. From the point of view of victim's right also, neither the adversarial nor the inquisitorial systems can be said to have

---

20 "Victim/Survivors are placed in a central yet compromised position with the criminal justice system and two interrelated aspects facilitate this. First, there is the nature of sexual assault – it regularly occurs in private, the victims themselves are often the only witness, there are generally long delays before disclosure, there is rarely any physical evidence and the case often centres on issues of credibility. Secondly, the entrenchment throughout society of misconceptions and stereotypes about victim/survivors (for example, that women and children routinely lie and fantasise about sexual assault, and that women are responsible for their own victimisation) infiltrates the justice system." Haley Clark, *What is the Justice System Willing to Offer? Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs* also available at <http://www.aifs.gov.au/institute/pubs/fm2010/fm85/fm85d.html> (last visited on May 16, 2013).

victim-centred approach.<sup>21</sup> Therefore, there is no concrete evidence to support the idea that inquisitorial system would be better for the victims of sexual offences. Many commentators also believe that there are few purely adversarial or purely inquisitorial systems anymore around the world due to slow convergence on procedural matters from amendments. One alarming development in the past few years has been that while more victims are coming forward to report the sexual offences and more people are being prosecuted for these offences, the conviction rates remain quite low. This is partly due to the high standard of proof namely 'beyond reasonable doubt' by putting the test of a reasonable man in the mind of the adjudicating authority. Some research indicates that pursuing prosecution *per se* harms victims.<sup>22</sup> As a result, the adversarial court system has failed to keep up to the expectations of many victims of sexual offences and consequently the adversarial system continues to deter many victims to come forward for reporting the crime and pursuing criminal proceedings against the culprits.

## V. Evidentiary Norms: A Critical Inquiry

Law of evidence and specific evidentiary norms occupy a very important place and play significant role in the legal process as they have essential bearing on cases pertaining to the offences of sexual assault. However, when viewed from the feminist perspective, the rules do not appear to be fair as they fail miserably to address the *de facto* inequality and existing discrimination against the women. Victim of sexual assault occupies a disadvantageous position from the very beginning and the rules of evidence of the adversarial system miserably fail to ensure substantive equality and non-discrimination for her in the judicial process. The difficulties and discrimination against the victim start the very moment and at the very initial stage she alleges the incident of sexual assault. The first actor in the criminal justice administration, namely, police do not appear to believe her version and so she has to convince the police first, that the sexual assault did take place and that it was without her consent. The police officers also believe that a high proportion of rape allegations are false and unfounded. Police officers' perception or belief is central to sexual assault investigation, given the typical absence of

---

21 Also available at <http://www.justice.govt.nz/policy/supporting-victims/taskforce-for-action-on-sexual-violence/documents/FINAL%20Alternative%20Models%20Background%20paper%20M.pdf> (last visited on May 12, 2014).

22 Researchers have found that women whose cases were prosecuted were less well off psychologically six months after the rape than were those whose cases were not prosecuted, attributing this result to the effects of an adversarial legal system that subjects rape victims to challenge and duress. See Patricia A. Cluss, Janice Boughton, Ellen Frank, Barbara Duffy Steward, & Deborah West, *The Rape Victim: Psychological Correlates of Participation in the Legal Process*, 10 *Crim. Just. & Behav.* 342 (1983) cited in Patricia Yancey Martin and R. Marlene Powell, *Accounting for the "Second Assault": Legal Organizations Framing of Rape Victims* 19 *Law & Soc. Inquiry* 853, 856 (1994).

extensive corroborative evidence.<sup>23</sup> From time to time media reports have brought to our knowledge that some officials mistreat rape victims and refuse to pursue investigation against the offenders or do it reluctantly and ineffectively. Then she has to be medically examined and then undergo a traumatising, embarrassing, humiliating and gruelling cross-examination in the court. In between, depending on her caste, status *etc.* she has to face and resist every sort of pressure dissuading her from seeking relief from the criminal justice administration. Often, due to police not acting swiftly and the accused roaming freely, she is threatened by the perpetrators that they would rape her again.<sup>24</sup> Another serious lacuna in the entire process which is witnessed is casual, callous and defective investigation by the police which more often than not, does not take proper care to seize the vital pieces of evidence like the clothes, undergarments *etc.* at all, or fail to seize them in time. Given the fact, that the (male) police officer does not appear to be convinced by the allegations made by the victim it is easy to understand why there is delayed and defective investigation giving ample time to the accused to destroy or conceal the material evidences.

The main evidentiary issues pertaining to the offence of rape include complaint, medical examination, consent, need for corroboration of victim's statement, character of the victim and other important questions. In fact the prime defence taken by the counsel for the accused entirely rests on delays in lodging FIRs, delay in medical examinations, material contradictions in statements made to the police and testimonies in court. On the basis of the principle that complaint by the victim is a part of same transaction,<sup>25</sup> while prompt lodging of complaint is regarded as a relevant fact confirming or corroborating the allegation of the victim, long delay in lodging the same is regarded as suspicious circumstance. The rule is based on the ancient requirement that the injured woman should make "hue and cry" as a preliminary to her "appeal of felony". One of the most common pleas taken by the defence counsel in cases pertaining to the offence of rape is that there was delay in lodging of F.I.R which renders the prosecution version unacceptable. In *Karnel Singh v. State of M.P.*,<sup>26</sup> regarding the plea taken by the appellant that there was considerable delay and sufficient time for tutoring and therefore prosecutrix's evidence could not be believed, Supreme Court held:

---

23 Jan Jordan, *Beyond Belief? Police, Rape and women's Credibility* 4 Criminal Justice 53 available at <http://www.d.umn.edu/cla/faculty/jhamlin/3925/4925HomeComputer/Rape%20myths/Police.pdf>.

24 Rape is an offence wherein the victim is intimidated with dire consequences both prior to as well as after the commission of the offence and often on the strength of this threat and intimidation she is compelled to submit to the lust of the perpetrator and also not to report the matter to anyone.

25 Section 8 of the Indian Evidence Act.

26 AIR 1995 SC 2472.

“The submission overlooks the fact that in India women are slow and hesitant to complain of such assaults and if the prosecutrix happens to be a married person she will not do anything without informing her husband. Merely because the complaint was lodged less than promptly does not raise the inference that the complaint was false. The reluctance to go to the police is because of society’s attitude towards such women; it casts doubt and shame upon her rather than comfort and sympathise with her. Therefore, delay in lodging complaints in such cases does not necessarily indicate that her version is false.”

Dealing with the question of delay in lodging the complaint, in *Tulshidas Kanolkar v. State of Goa*,<sup>27</sup> the Supreme Court has held:

“In any event, delay per se is not a mitigating circumstance for the accused when accusations of rape are involved. Delay in lodging first information report cannot be used as a ritualistic formula for discarding prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the Court is to only see whether it is satisfactory or not. In a case if the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor.”

In *Sri Narayan Saha v. State of Tripura*,<sup>28</sup> the Supreme Court observed that mere delay in lodging the FIR is really of no consequence, if the reason for the delay is explained. Despite catena of judicial pronouncements laying down the principles, inordinate delay in lodging the FIR by the victim has more often than not been pleaded by the defence counsel before the trial or appellate judges in order to get relief for the accused. In *Satpal Singh v. State of Haryana*,<sup>29</sup> wherein the FIR was lodged after about four months of the commission of the sexual offence, there was ample evidence on record to show that the complainant had gone to the police station the same day but he was told to come next day and the next day he was pressurised by the Panchayat who had intervened to compromise the case rather than moving to the investigating machinery. The Supreme Court relied upon the principle laid down in *Satyapal v. State of Haryana*,<sup>30</sup>:

---

27 2004 SCC (Cri) 44.

28 (2004) 7 SCC 775.

29 CRIMINAL APPEAL NO. 763 of 2008.

30 AIR 2009 SC 2190.



“However, no straight jacket formula can be laid down in this regard. In case of sexual offences, the criteria may be different altogether. As honour of the family is involved, its members have to decide whether to take the matter to the court or not. In such a fact-situation, near relations of the prosecutrix may take time as to what course of action should be adopted. Thus, delay is bound to occur. This Court has always taken judicial notice of the fact that ordinarily the family of the victim would not intend to get a stigma attached to the victim. Delay in lodging the First Information Report in a case of this nature is a normal phenomenon”

The court also reiterated the principle laid down in *State of Himachal Pradesh v. Prem Singh*,<sup>31</sup> :

“So far as the delay in lodging FIR is concerned, the delay in a case of sexual assault, cannot be equated with the case involving other offences. There are several factors which weigh in the mind of the prosecutrix and her family members before coming to the police station to lodge a complaint. In a tradition bound society prevalent in India, more particularly, rural areas, it would be quite unsafe to throw out the prosecution case merely on the ground that there is some delay in lodging FIR.”

Relying upon the aforesaid settled legal proposition, the court held that the delay in lodging FIR has been explained in the instant case.

Regarding burden of proof that the sexual intercourse was without consent, in *State of H.P. v. Shree Kant Shekari*,<sup>32</sup> the Supreme Court has observed that the question of consent is really a matter of defence by the accused and it was for him to place materials to show that there was consent.

Differentiating consent from submission, the Supreme Court has held:<sup>33</sup>

“There is a gulf of difference between consent and submission. Every consent involves a submission but the converse does not follow, and mere act of submission does not involve consent. An act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance or passive giving in when the faculty

31 AIR 2009 SC 1010.

32 (2005) SCC (Cri) 327

33 *Tulshidas Kanolkar v. State of Goa*, (2004) SCC (Cri) 44.

is either clouded by fear or vitiated by duress or impaired due to mental retardation or deficiency cannot be considered to be consent as understood in law. For constituting consent, there must be exercise of intelligence based on the knowledge of the significance and moral effect of the act.”

In *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*,<sup>34</sup> on the need for corroboration of victims’ testimony the Supreme Court has observed:

“In the Indian setting, refusal to act on the testimony of a victim of sexual assaults in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society.”

In *State of Maharashtra v. Chandraprakash Kewal Chand Jain*,<sup>35</sup> deliberating upon what the approach of the Court should be while evaluating the victim’s evidence in sexual violence cases, the Supreme court has observed:

“Is it essential that the evidence of the prosecutrix should be corroborated in material particulars before the Court bases a conviction on her testimony? Does the rule of prudence demand that in all cases save the rarest or rare the Court should look for corroboration before acting on the evidence of the prosecutrix? Let us see if the Evidence Act provides the clue. Under the said statute ‘Evidence’ means and includes all statements which the Court permits or requires to be made before it by witnesses, in relation to the matters of fact under inquiry. Under Section 59 all facts, except the contents of documents, may be proved by oral evidence. Section 118 then tells who may give oral evidence. According to that section all persons are competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Even in the case of an accomplice Section 133 provides that he shall be competent witness against an accused

---

34 (1983) 3 SCR 280.

35 AIR 1990 SC 658.

person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. However, illustration (b) to Section 114, which lays down a rule of practice, says that the Court 'may' presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. Thus, under Section 133, which lays down a rule of law, an accomplice is a competent witness and a conviction based solely on his uncorroborated evidence is not illegal although in view of Section 114, illustration (b) courts do not as a matter of practice do so and look for corroboration in material particulars. This is the conjoint effect of Section 133 and 114, illustration (b). A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the Court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no

hesitation in accepting her evidence. We have, therefore, no doubt in our minds that ordinarily the evidence of a prosecutrix who does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness.”

On the point of need for corroboration, in *Sri Narayan Saha v. State of Tripura*,<sup>36</sup> the Supreme Court held:

“A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Indian Evidence Act, 1872 nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in case of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lead assurance to her testimony short of corroboration required in the case of an accomplice....But if a prosecutrix is an adult and of full understanding the Court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose, that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.”

In *State of H.P. v. Shree Kant Shekari*,<sup>37</sup> the Supreme Court has observed:

“It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime.

---

36 (2004) 7 SCC 775.

37 (2005) SCC (Cri) 327.

There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is physical as well as psychological and emotional. However, if the court on facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony.”

A perusal of the above apex court decisions make the position crystal clear, that the notion that the testimony of a victim of sexual violence must ordinarily be corroborated in material particulars except in rarest of rare cases, is improper and unwarranted and therefore must be removed. To insist on corroboration except in rarest of rare cases would be grave injustice to the womanhood, as a victim of the lust of another could under no circumstance be equated with an accomplice to a crime.

Focus on the character of the victim is another persistent feature of rape trials which reflects the social attitude suggesting that women’s sexual reputation and chastity are indicators of their truthfulness and credibility. It is well established today that past sexual history cannot be used as evidence to impeach the credibility of the victim as it jeopardises the fair trial and is quite distressing for victim. Evidence about the victim’s sexual reputation is inadmissible. However, despite crystal clear evidentiary norms it appears that it is still being admitted.

## VI. Conclusion

The adversarial system is not entirely inadequate but it fails to satisfy many important goals of criminal adjudicatory system due to improper implementation of the laws on the part of various actors in the system and the failure of the authorities to analyse the factual and the legal position in the proper perspective. It would be inappropriate and misleading to suggest therefore, that existing criminal adjudicatory process addresses sexual offences in an effective way. Besides, the vast majority of sexual offences remain unreported for reasons *inter alia*, patriarchal setup of the society, lack of sensitivity and respect for woman, and lack of understanding of the substantive, procedural and adjective laws with due feminist perspective. Thus, the vast majority of the cases of sexual violence either never reaches the criminal justice system or where they reach, they never proceed far in the criminal adjudicatory process due to recalcitrant attitudes of police personnel and deeply rooted masculine norms within the criminal justice

institutions. There is a growing realisation therefore, for the urgent need to take appropriate measures for improving the response of the criminal adjudicatory system towards the victims of sexual violence. It is not that the legal system has not responded to the plight of the victims. In fact, the past four decades have witnessed massive reforms of the sexual offences related substantive and procedural laws, the latest amendments being less than one year, however, by and large they have proved to be ineffectual in improving the scenario. Though, a number of measures have been incorporated into the legal framework to strengthen victim's rights, still there are many points and stages throughout the criminal adjudicatory process starting from lodging the F.I.R and including trial, wherein victim's rights are blatantly infringed and violated. It would not be incorrect to say that to a great extent these law reforms have been routinely subverted by a legal culture that tends to discredit and disbelieve victim who alleges sexual assault. There is an urgent need for proactive and more sensitive criminal justice system which treats victims with dignity and compassion and ensures convictions in appropriate cases. The failure to do so is a failure of the State in fulfilling its obligation. The author is of the opinion that the criminal adjudicatory system must be revamped in order to ensure that

- Victims are provided adequate legal information in respect of the criminal justice system of our country in general and the concerned case in particular;
- Victims are informed about the decision making process of the court so that she is well prepared to undergo the rigorous judicial process;
- Effective psychological, financial, legal and emotional support is provided to the victims;
- Victims have a greater and meaningful participation in the criminal justice system and
- There be a permissible departure from the strict adherence to adversarial adjudicatory process in trials of sexual offences, whereby the courts play a proactive role in order to find the truth and do justice.

The mechanism to increase the existing state of victim's participation in the criminal justice process must also be explored to give victims more say in the judicial process. There is also a need to promote collaboration between the government authorities and civil society group which will be conducive for higher conviction rates and have deterrent effect on the potential perpetrators. Adequate special trainings must be provided to the police officers to enable them to effectively and properly investigate the sexual offences. Men's perception about the credibility of

rape complaints must not affect the psyche of the police officer investigating the crime. Finally, the author strongly believes that in the entire process victim should not be lost sight of, and there must be adequate and meaningful rehabilitation of the victim. While the economic rehabilitation can be secured by the state, psychological, emotional and social rehabilitation cannot be ensured unless we as a society are ready to change our mindset. Also, in order to promote and protect decency and morality it is very important to deal strictly with those who violate the societal norms and commit such heinous crime. In that direction, sexual violence against women must be declared the priority area for state efforts to combat crime. Though, the importance of the criminal adjudicatory system cannot be undermined, it has also to be acknowledged that sexual violence is a complex issue that cannot be addressed solely by legal framework and legislative measures.



# Banking Services in India and Consumer Protection

Dr. Renu Jamwal<sup>1</sup>

The law of consumer protection has come to meet the long felt necessity of protecting the common man from wrongs for which the remedy under the ordinary law for various reasons has become illusory. The importance of the Act lies in promoting the welfare of the society in as much as it attempts to remove the helplessness of a consumer which he faces against powerful business, described as a network of rackets or a society in which producers have secured power to rob the rest and the might of the public bodies which are degenerating into store houses of inaction where papers do not move from one desk to another as a matter of duty and responsibility but for extraneous considerations. The Act aims to protect the economic interest of the consumer as understood in the commercial sense as a purchaser of good and in the large sense of user of services.”<sup>2</sup>

One of the laudable features of the Act is that it provides relief to consumers, if they suffer loss or injury due to a deficiency of *services*. In all developed economies, the concept of *services* has assumed great importance. A modern society lives and thrives upon services of numerous kinds which have become indispensable for comfortable and orderly existence of human beings<sup>3</sup>.

Services which are included in the definition are banking, financing, insurance, transport, and supply of electrical or other energy, boarding or lodging or both, entertainment, amusement or the purveying of news or other information<sup>4</sup>.

Banking is specifically mentioned as *services* under the Consumer Protection Act. There has been a steady growth in the number of complaints filed against banks. Since finance is the life blood of a modern economy therefore banking system is the linchpin of any development strategy. Banking promotes saving by providing a wide variety of financial assets to general public<sup>5</sup>.

## Bank and Banking

Definition of banking may vary from country to country. According to Professor

---

1 Assistant Professor, The Law School, University of Jammu

2 Lucknow Development Authority v. M. K. Gupta, (1994)1 SCC243

3 Journal of Indian Law Institute, vol. 34:1, p.41 (1992)

4 Sec 2(1) (0) of Consumer Protection Act

5 Niti Bhasin, “Banking Developments in India 1947 to 2007” Growth, Reforms and Outlook, p.(viii)



Sayers, an authority on banking “Ordinary banking business consists of changing cash for bank deposits and bank deposits for cash, transferring bank deposit from one person or corporation to another, giving bank deposit in exchange for bills of exchange, government bonds and so forth. In modern banking professor Cairncross has defined bank as a financial intermediary or dealer in loans.

Definition of banking has undergone a sea change in several countries due to various changes in the socio-economic and political environment. A raft of changes is taking place which together are blurring the accepted definitions<sup>6</sup>. In ordinary parlance, banking is a business transaction of bank<sup>7</sup>.

Banking in India is venerable. Banking during ancient times was synonymous with money lending. The Manu Smriti speaks of deposits, pledges loans and interest rate. The indigenous banking had been organized in the Indian form of family<sup>8</sup>. The well developed financial system can be traced from Kautilya (Chanakya) “Arthashastra”. It has been described in it “all understanding depends upon finance” hence foremost attention shall be paid to the treasury<sup>9</sup>. During Muslim period the local financiers played the role of banker and the main credit instrument through which banking and transfer of funds was carried out was through the inland bills of exchange or Hundis, Indian bankers lent money, financed the rulers and trade, acted as the trader of the State and also as insurer of goods. The Jagat Sheth were the hereditary bankers and they played an important role in the finance of the country. Due to the arrival of English in India indigenous bankers began to wane although the East India Company successfully presented the establishment in India of banking on western lines for a considerable time, on the ground that the indigenous banking was more suited to be banking requirements of the country<sup>10</sup>.

The Indian banking system had gone through a series of crisis and consequent bank failures and thus its growth was quite slow during the first half of this century. But after independence, the Indian banking system recorded rapid progress<sup>11</sup>.

## Law of Banking

Negotiable Instrument Act 1881 is the law which governs the banking processing in India. A negotiable instrument means “a promissory note, bill

6 K.C. Gopalakrishnan, *Legal Economics International Dimensions of Economics and Law*, pp.147-148, 157

7 The Concise Oxford Dictionary

8 Unique Quintessence of Indian Economy, Ed. 2008, p.166

9 Unique Quintessence of General Studies, 15th Ed. 1994, p.1

10 Bhashyam and Adiga, *The Negotiable Instrument*, p.5

11 Ruddar Datt and K. P. M. Sundharam, *Indian Economy*, p.824

of exchange or cheque payable to either order or to bearer". There are other negotiable instruments also recognized by usage or custom of trade as government promissory, railway receipt and Shahjog Hundies, bearer bonds, bearer debentures, share certificates and postal orders etc.<sup>12</sup>. Negotiable instrument form the back bone today's complex commercial world. In our day to day life we find a negotiable instrument in some form or other exchanging hands<sup>13</sup>. Banking law is based on a contractual analysis of the relationship between the bank and the customer. In order to be a customer, some sort of an account is necessary with the bank. After the Negotiable Instrument Acts, certain rights and obligations are implied by the law into such relationship as:

1. When the bank account is in credit, the bank owes the balance to the customer and when the account is overdrawn, the customer owes the balance to the bank.
2. The bank is under obligation to honor customers cheque
3. The bank is under an obligation to maintain secrecy of the transaction unless the customer consents, there is a public duty to disclose, the bank's interest require it, or under compulsion of law.
4. The bank is not to close a customer's account without reasonable notice to the customer and the bank may not pay from the customer's account without a mandate from the customer.

However these implied contractual terms may be modified by express agreement between the customer and the bank<sup>14</sup>.

## **Banker and Customer**

In the Indian statutes no definition of banker and customer is found. However, the section 5 (b) states that banking means "the accepting for the purposes of lending or investment of deposits of money from public repayable on demand or otherwise and withdrawals by cheque, draft, cash or otherwise and banking company means any company which transacts business of banking in India"<sup>15</sup>. As there is no definition of customer in statutes so in order to understand the word customer we have to look in detail the relationship between a banker and a customer depending upon transactions and variety of services offered by the

---

12 Sec. 13 of Negotiable Instruments Act, 1882

13 12. R. K. Bangia, *Principles of Mercantile Law*, p.647

14 Bank: Facts, "Discussion Forum and Encyclopedia", pp.3-4

15 Sec. 5(b) and 5(d) of The Banking Regulation Act, 1949

banks and availed by the person. The banker and the customers are interlinked in the socio-economic revolution in which the country is passing. In a developing economy bankers have to play a vital role to serve the cause of consumer of banking facility. Banking system reflects a country's economic growth to a large extent<sup>16</sup>.

## **Banking Business**

The transactions which are entered between the banks and customer are:

1. Deposit transactions- It includes saving bank accounts, fixed deposits or term deposits or current accounts.
2. Loan transactions- Loan to bank customer are drawn on the funds deposited with the bank and yield interests which provide the profit for banking industry and the interest on saving accounts.
3. Services- Some of the major services utilized by the customer are:
  - a/ Collection of cheques and bills, inland and foreign
  - b/ Issue of bank drafts
  - c/ Mail / Telegraphic Transfers
  - d/ Traveler's cheque
  - e/ Letter of credit
  - f/ Acting as insurance agents/ Travel agents
  - g/ Collection of pensions
  - h/ Credit cards
  - i/ Teller facility
  - j/ Advisor to customer for personal investment
  - k/ Safe deposit lockers

However, the relationship between a banker and a customer is more complex and is usually governed by contract and other statutes dealing with the rights and obligations of the customer. A customer has a right to expect that the bank would follow his instructions in letter and spirit and where a customer instruct a bank to put certain money in to fixed deposits for maximum returns and banks fail to do so the same would constitute the basis for a claim against the bank<sup>17</sup>.

---

16 R K.Nayak, *Consumer Protection Laws*, XXIVSIL 427 (1988)

17 J. K. Chopra, *Unique Quintessence of Indian Economy*, Ed. 2008, p.166

## Deficiency in service

Any fault, imperfection, shortcoming or inadequacy in quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by person in pursuance of a contract otherwise in relation to any service is called deficiency in service<sup>18</sup>.

The growth of trade and services in the present global networking of business activities has also tremendously boosted the banking service. The major chunk of the banking activities is controlled by the nationalized banks and comparatively only a small segment of the banking business is in the private set up. Deficiency in the services of the bank is covered by the provisions of the Consumer Protection Act 1986<sup>19</sup>. However, the banking ombudsman scheme, 1995 which was notified by Reserve Bank of India is to provide for a system of redressal of grievances against banks. Any person whose grievance against the bank is not resolved to his satisfaction by that bank within a period of two months can approach the banking ombudsman if his complaint pertains to any matters specified in the scheme. As per the scheme, a customer can make a complaint against deficiency in bank services.

The grounds of the complaint are:

- a) Non- payment/ inordinate delay in the payment or collection of cheques, drafts / bills, etc;
- b) Non- acceptance without sufficient cause;
- c) Non- issue of drafts to customers and others;
- d) Non- adherence to prescribed working hours by branches;
- e) Failure to honour guarantee/ letter of credit commitments by banks;
- f) Claims in respect of unauthorized or fraudulent withdrawals from deposit accounts, etc;
- g) Complaints pertaining to the operations in any saving, current or any other account;
- h) Complaints from exporters in India
- i) Complaints from NRI having accounts in India

---

18 Sec. 2(1)(g) of Consumer Protection Act.

19 V. Balakrishna Eradi, Consumer Protection Jurisprudence, p.247

- J) Complaints pertaining to refusal to open deposit accounts with out any valid reasons
- k) Any other matters relating to violation of directives issued by RBI
- l) Complaints can be lodged concerning loans and advances<sup>20</sup>.

## Judicial Attitude

Banks provide or render service/facility to its customers or non-customers. Banking is a business transaction of a bank and customers of bank are consumers within the meaning of S.2 (1) (2) of the Consumer Protection Act<sup>21</sup>. In order to be a customer some sort of account is necessary with the bank, however, a consumer need not have an account as in the case of bank draft or credit card. The Banking institution since the dawn of freedom has been growing unprecedently<sup>22</sup>. Banking is one of the important services which has been expressly covered under the Consumer Protection Act, 1986. The purpose of express inclusion of banking in the definition of service is that any kind of disruption in such an important service sector can not only create hardship for consumer but also have severe economic repercussions on the nation. This fact has been recognized by court also and the remedy has been extended to any kind of deficiency in payment of interest on overdraft, charging of interest at leading rate, wharf age, demurrage, defect in demand draft, wrongful crediting of an amount, delay in crediting, improper maintenance of lockers, passing of forged cheques etc;<sup>23</sup>. In a large number of cases, banks have been pulled up for deficiency in service and compensation has been awarded to complainants by consumer courts. Some important cases are analyzed hereunder in *Central Bank of India v. M/S Grains & Gunny Agencies*<sup>24</sup>. The court defended the cause of consumers of banking facilities and made an advance towards consumerism. In *State Bank of India v. N. Raveendran Nair*<sup>25</sup>, the payment was refused to the persons because capacity under the person signing the draft was not mentioned. The Bank was held liable. In another landmark decision, the commission observed that delay on the part of the bank in payment of the amount of deposit on its premature encashment entitled a customer to claim compensation<sup>26</sup>.

20 The Hindu-Online edition of Indian National Newspaper, Banking Ombudsman Scheme 2002, dated November 8, 2004.

21 Avtar Singh, *Consumer Protection Law in India*.

22 R. K.Nayak, *Consumer Protection Law- Annual Survey of Indian Law*. Vol.25, 1989, p. 360

23 22. S. K. Verma and Afzal Wani, *A Treatise on consumer protection Laws; The Indian Laws Institute, New Delhi*, 2004, p.360

24 23. AIR 1989 MP 28

25 24. 11(1991) CPJ-25

26 *S. Nagabushan Rao v. Union Bank of India*, 1991 CPR197

In *K. B. Shetty v. P.N Bank, Goregoan (West)*<sup>27</sup>, the Commission stated that a customer places implicit faith in the bank as regard his money deposits or locker facilities. If due to the negligence of bank the precious ornaments of a customer in a locker are lost due to breaking open of the locker the very faith of customer is shaken.

In *Arjun Lal Aggarwal v. State Bank of India*<sup>28</sup>, the Bank failed to credit the account of the complainant expeditiously in order to enable him to receive the sum-sent as a wedding gift from UK by a relation. The wedding was fixed for 4-7-1991 and draft was cashed by SBI on 29<sup>th</sup> of May 1991 and the amount was credited almost four months after marriage. The State commission held that it was a patent deficiency in the service. The refusal of a Bank not to accept Rs.5/ note is also deficiency in service<sup>29</sup>. In *Punjab and Sind Bank v. Manpreet Singh*<sup>30</sup>, it has been held that the cheque facilities provided by a Bank to a consumer is a service for consideration and that dishonouring of a cheque when there is money in the account is deficiency in service. There is duty to honour cheque as long as there is balance or the amount of the cheque is within the limit of cash credit arrangement. A bank was held not liable for the dishonor of the customer's cheque because of insufficiency of funds<sup>31</sup>.

In *Bimal Chandra Grover v. Bank of India*<sup>32</sup>, Supreme Court held that client was a customer when he gets over draft facility from a Bank. Bank could not sell shares within reasonable time occasioning loss to client. Service rendered by bank is deficient. It is the duty of the bank to inform customer if cheque is returned. The customer should be informed quickly of the fact that the cheque given for collection has come back. This will enable the customer to persue his remedies. Where a cheque under collection was dishonoured and also lost in transit, the bank did not inform the customer of this fact. The National commission held the bank liable to pay compensation<sup>33</sup>. However, in *Akhil Bharatiya Grahak Panchayat v. Central Bank of India*<sup>34</sup>, it was held that it is not a deficient service on the part of a bank to charge simple interest when the loan stipulated compound interest and hiking of service charges is not a matter which can be examined by the Forum under the

---

27 1991 CPR 125

28 (111) 1994 CPR (1) 610 (Har)

29 *Gandhi Balakrishna v. Canara Bank*, 1995 (1) CPR 10

30 VIII 1994(2) CPR 627 (Punj.)

31 *Hadimba Creations v. State Bank of India*, (2003) 1 CRT 233(NC)

32 AIR 2000 SC 2181

33 *State Bank of India v. Rajinder Lal*, (2003) 4 CPJ 53(NC)

34 (1993) 2 CPR 307 Mah.

Act<sup>35</sup>. In *Corporation Bank and Anor v M/s Filmalaya Pvt. Ltd.*<sup>36</sup>, the complaint was filed for forged encashment of the cheques. The National Commission held that the encashment of such cheques was born out of gross negligence at best and collusion between the employees of the complainant and the officials of the bank and it was a clear case of deficiency in service by the bank.

In *Tufail Ahmad Shah v. J&K Bank*<sup>37</sup>, cheque which was sent for collection was lost in transit by courier service. The bank took due care and caution in sending the cheque. The bank was not held liable.

In case where a cheque book was issued to the imposter to encash the cheque and the bank failed twice to verify the signatures with specification signature of the complainant was held as a clear case of deficiency in service<sup>38</sup>.

In *Manager, Kerala State Cooperative Bank v. K.P.Suran*<sup>39</sup>, it was held that the sanctioning of loan is within the discretion of the bank. The respondent did not have any vested right of being provided the entire amount of loan applied for so there is no deficiency of service.

Maturity value on fixed deposit was not paid. It was held to be a deficiency in service and bank was liable to pay principle amount with interest and cost awarded<sup>40</sup>.

In *H.S.Arya and ors v. CEO, SBI International Card*<sup>41</sup>, the payment for educational fee denied through credit card inspite of sufficient credit limit, wrong advice was given by bank helpline was a deficiency in service, as harm caused to the professional life as the complainant could not go to U.S for examination to make career, hence direction was given to bank to pay Rs.96, 649.00 for examination fee and Rs.50, 000.00 for mental agony. In *Canara Bank V Sudhir Ahuja*<sup>42</sup> a cheque lost in transit and neither amount credited nor cheque returned.

The deficiencies in service were proved and bank was held liable to pay compensation. The cases cites above indicate that the machinery for the settlement of customer dispute is working in accordance with the sprit of the legislation and

35 *Consumer Action Group v. RBI*, (1995) 3 CPJ 256

36 (1992) 11 CPJ 482(NCDRC)

37 111(2003) CPJ 531

38 *Abdul Razak v. South India Bank Ltd*, 111(2003) CPJ 20

39 2004 (1) JRC 304

40 *Consumer Union, Kashmir Valley Finance and Investment Ltd.v. Kashmir ValleyFinance Investment Ltd.* IV(2003) CPJ 570 (JKSC)

41 2006 (2) JRC 474 (NC)

42 1 (2007) CPJ I (NC)

protecting the customer interest to the optimum possible. The cases cited above are few of the cases decided by the Supreme Court, National Commission and other residual agencies but from the above illustration cases it has become obvious that the case law on banking services has developed to cover many issues relevant to securing the benefit of the consumers in different ways, such an approach would help in improving the system of banking as well as extending more and more protection to consumers.

## **Conclusion**

Consumer protection law has significantly developed during the years. The law developed by consumer Dispute Redressal Agencies has been a source of rights and remedies in important consumer cases as banking, insurance, housing etc. The time taken for disposal of cases has been usually much more than the statutory period fixed by the Consumer Protection Act. To provide speedy justice is, therefore a goal yet to be achieved. The measure to attain the objective of speedier remedy to consumers should include the joint involvement of the voluntary organizations, manufacturers and suppliers and the service providers in the process of Consumer Protection. This can make possible reduction in the number of complaints and help in making the extra-judicial settlements of consumer disputes more effective<sup>43</sup>.

In India banking industry need regulatory measures in order to meet the growing need of the vast masses in rural and urban India. Banking industry has been making efforts to evolve new safer methods to meet the growing challenges emerging out of urbanization and industrialization. Bankers and customers are interlinked in the socio economic revolution through which country is passing. In a developing economy bankers have to play a vital role to serve the cause of consumers of banking facilities. Banking system reflects a country's economic growth to a large extent<sup>44</sup>.



---

43 Supra note at 22

44 R. K. Nayak, "Consumer Protection Law", XXIV ASIL 427(1988).



# ADVERTISEMENT BY LAWYERS: A CHANGING FACE OF LEGAL PROFESSION

Dr. Rajneesh Kumar Patel<sup>1</sup>

## **Abstract**

*Indian lawyers are barred from soliciting or advertising their profession considering the profession to be a noble one and such soliciting and advertising to be derogatory to that profession. Bar Council of India is of the opinion that legal profession is not a trade or business and hence, advocates should not be permitted to advertise their profession. On this fact some connoisseur argues that, the restriction imposed on advertisement is anti-competitive and contrary to the goals and purpose of competition policy, however other contended that, in the era of globalization shifting of legal profession into nature of trade shall hamper the mandates of professional ethics as well as concept of pro-bono-publico service. This is however matter-of-fact that, advertisement of legal profession has been a significant and extensively used tool of communication in most of the developed countries. So taking into account of continuous demand for advertisement right to the advocates and also after considering the position of other countries, the Bar Council of India has provided a limited relaxation in its earlier rule. No doubt wind of globalization brings some of the improvement in service sector, but it is not necessary that any rule which is working properly in any country shall be beneficial and perfect for others too.*

**Key Words:** Advertisement, Solicitation Lawyers, Globalization, Misconduct, Legal Profession, Business, Professional Ethics.

## **INTRODUCTION**

*Law is not a trade, not briefs, not merchandise, and so the heaven of commercial competition should not vulgarize the legal profession.* This finding of Mr. Justice Krishna Iyer is a clear sign of that, legal profession is one of the most honorable profession on this planet and it is a profession of great respect and dignity. To establish and maintain this dignity of the legal profession, Bar Council of India, which is statutory and regulatory authority of legal profession, has framed

---

<sup>1</sup> Associate Professor, Faculty of Law, B.H.U., Varanasi, India, Email: rajneeshpatel2010@gmail.com  
mob: 09473760774

standard of conduct and etiquette of the Bar.<sup>2</sup> It is important to note that these rules keep statutory force, binding and enforceable by law. So any deviation from elementary principles is liable to dealt with severely.

It will be relevant to strike a chord here that advertisement is a means of communication and essential building block of right to know. In India up to some extent this advertisement right is considered as fundamental right, but as per Bar Council of India Rules, Indian advocates are not permitted to claim any right of advertisement in any form. On the other hand, right to advertisement is allowed in most of the developed countries on the basis that, in globalized world it is right of each and every person to know about best lawyers in their native places and also abroad.

With the change of wind in every aspect of our life, legal profession is also changing its face and therefore the Bar Council of India, which has created a total ban on advertisement right of advocates, now itself has changed its earlier thinking as well as unbending rule up to some extent by allowing the Indian lawyers to advertise themselves and their profession on website.

This spinning approach of Bar Council of India has raises a number of ethical and legal issues in the field of legal profession, such as; what will be effect of this amendment on legal profession? Can legal profession be treated as a commercial activity? Even if advertising is permitted; whether it should be given only in limited extent? Should a distinction be made between litigation and transactional work? Is the advertisement right of advocates will convert the legal profession into bread-butter supply industry? Taking into account of nobility of the profession what kind of regulations should be there?

Against this background an attempt is made under this paper to discuss and examine the pros and cons of advertisement rights of legal professionals in India, in the light of above vagueness. Under this paper a comparative study of law relating to advertisement right of advocates prevailing in other countries has also made to draw the conclusion. The paper also highlights the nature and characteristic of legal profession and tries to analyze the effect of earlier and amended rule of Bar Council of India.

## **ATTRIBUTE OF LEGAL PROFESSION**

Living only for him is a self-centered character of men and struggling for

---

2 These rules have been made in exercise of its rule making power under section 49(1) (c) of Advocates Act, 1961.

others is a divine effort. On this basis legal profession may be considered as gracious, noble and dignified profession, because lawyers represents their clients in the court of law and thereby protect their interest against harms cause to them. Actually the relation between client and advocate is not only the relation of contract like, a shopkeeper and consumer, but it is a relation of trust and confidence too.

Therefore, after joining the legal profession an advocate comes under three types of obligations, such as:

1. Obligations to his clients to be faithful to him.
2. Obligation to the profession not to tarnish its name by any act or behavior.
3. Obligation to the court to be and to remain a dependable part of the machinery through which justice is administered.

The above three obligations indicated that, advocates are not merely the mouth piece of their clients but also an officer of the court. Similarly, the advocates are friends of their opponent side advocates. As *Daniel Webster* has rightly pointed out that “*lawyers on opposite sides of a case are like the two parts of shears, they cut what comes between them, but not each other*”

Being a member of legal fraternity it is the prime duty of advocates that they should always remember that, the fundamental aim of legal ethics is to maintain the honour and dignity of the profession. In this regard, under Section 35 of the Act, the State Bar Councils are empowered to initiate proceedings against an advocate for misconduct, either on a complaint or on its own motion. Likewise, the Bar Council of India under Section 36 can also initiate such proceeding and also has the power to withdraw such proceedings pending before any State Bar Council and inquire into such cases on its own.

It is noteworthy that the Act does not provide for withdrawal of complaint. A complaint once filed cannot be withdrawn and the process of inquiry once set in motion cannot be stopped. If State Bar Councils or Bar Council of India are satisfy that advocate have committed any professional or other misconduct, then either they can reprimand the advocate or can suspend his license of practice for certain period or can also struck off his name from the state roll.

As the legal profession is not a business but a profession, it has been created by the state for the public good. Consequently, the essence of the profession lies in the three things-

1. Organisation of its members for the performance of their function.

2. Maintenance of certain standards, intellectual and ethical for the dignity of the profession.
3. Subordination of pecuniary gains to efficient services.

Therefore, loyal support of its members in the maintenance of this tradition, respect of the courts and judges, faithfulness towards their clients, professional courtesy, co-operation and equal consideration to all members of the profession are the general characteristics, attributes and essential requirements of legal profession.

## **MEANING AND PURPOSE OF ADVERTISEMENT**

As the rationale of this paper is to discuss the impact of advertisement right on legal profession, it will be relevant to have a little focus on the meaning and purpose of advertisement. Essentially advertising means, spreading of information about the characteristics of the product or service to the customers with a view to sell the product and service or increase its sale volume. The word advertisement derives from a Latin word, *ad vertere*, which means “to turn toward”. So it not only invites the consumers to purchase goods and services, but also encourage them for that, with intention to acquire profit. According to the Oxford Dictionary, advertisement means, *to make generally or publicly known; describe publicly with a view to involving sales.*

In this sense advertising began when somebody had something to sell or provides his service and there was somebody else who wanted to buy that particular product or avail the services. This needs some form of communication between the two parties or between advertiser and the masses. This communication is treated as advertising. According to William J. Stanton, “Advertising consists of all the activities involves in presenting to a group, a non-personal, oral or visual, openly sponsored message regarding disseminated through one or more media and is paid for by an identified sponsor.”

Advertising can also be defined as, *paid dissemination of information for the purpose of selling or helping to sell commodities and services or of gaining acceptance of ideas that may cause people to think or act in a desired manner.*

This definition would cover many of organizations include business organizations, governments, professionals, financial institutions, educational institutions, social and cultural organizations, welfare groups, religious bodies and political parties.

A close analysis of the above definitions makes it clear that, advertising is not a free tool and the purpose is to motivate a desired action. It raises very simple questions that why does one advertise? What is the desired action that the advertiser wants? It could be just to create awareness in the consumer about a new product or service or there is any other purpose behind the advertisement? Before giving the answer of the above questions, it will be necessary to note here that there may be two types of advertisement, first commercial advertisement and second non-commercial advertisement or awareness making advertisements. The clear and only purpose of the non-commercial advertisement is to create awareness amongst general public, like *Jago grahak jago*, *Chhota pariwar sukhi pariwar*, *Bahu betian dur na jayen sauchalay ghar mey banwayen*, *Beti hai ghar ki shan na karo iska apman*, *Ham sab ney yah thana hai gandagi dur bhagana hai*, etc. Non-commercial advertisers who spend money to advertise items other than a consumer product or service include political parties, interest groups, religious organizations and governmental agencies. Nonprofit organizations may rely on free modes of persuasion, such as a public service announcement.

On the contrary, the only purpose of the commercial advertisements is to encourage more and more consumers for purchasing the desire goods or services. This type of advertisements covers a very wide range of activities, from identifying a product or service to reaching it to the consumer with the main objective of realizing profits. As the commercial advertisements are necessarily is paid advertisements so once again it proves the purpose of advertiser and by investing money in that advertisement actually he wants to seek profit by persuading the consumers.

It appears from the above discussion that profit making is the sole and only purpose of advertisements and that is the reason why it is not allowed in legal profession, as the legal profession is not a business or trade but a profession, which provides social service to general public and secures justice for all.

## **ADVERTISEMENT BY LAWYERS**

As discuss above that, the advertisement and soliciting by a lawyer may affect the dignity of legal profession therefore it has been prohibited in all legal system, whether totally or partially. This prohibition is ancient and is founded on the fact that originality advertising was done only by charlatans. The rule was probably embodied in the ethical canons of the roman bar association in the time of Caesar. It will be interesting to note here that, the prohibition against advertisement by lawyers has also found its origins in English law, which has permitted advertisement by lawyers after 1980.

However, advertisement in legal profession is considered as taboo conduct in India and advertising in any form by a member of the profession of law is and has been for ages considered as a reprehensible behavior.

Though, it is also a matter of fact that, after the Second World War the International Economic Order which emerged and encouraged free trade in goods, has changes the form and thinking about the trade. India was a founder signatory to the General Agreement on Tariffs and Trade and due to this reason as well as continues demand for allowing advertisement right to the lawyers; the Bar Council of India has finally allowed lawyers to advertise their services on the internet.

As the matter relating to advertisement by lawyers are worldwide issue so before discussing the position of India and approach of Indian judiciary, it will relevant to look into the position of other countries.

## **POSITION IN UNITED STATES OF AMERICA**

In United States of America, the position was fairly similar to that in India till 1977. There was a complete ban on advertising for legal professionals. This position took absolute U-turn after the decision of the U.S. Supreme Court, in the case of *Bates V. State Bar of Arizona*<sup>3</sup>. In the instant case, two attorneys have opened a law office intended to offer legal services to people. In beginning they fail to attract the clients, so they resolute that the only way their office could be viable were to advertise. Thereafter, they published an advertisement in news paper, describing the offer of legal service. They also published a table of fee for that purpose. This advertisement was a clear violation of Disciplinary Rule 2-101(B), incorporated in Rule 29(a) of the Supreme Court of Arizona<sup>4</sup>, but the Court held that, blanket prohibition of advertising in the legal profession was unconstitutional as a violation of the First Amendment of the Constitution.

It is submitted respectfully that, though after this decision in America, advertising in the legal profession became a constitutionally protected right but there is clear deference between advertisement and right to speech and expression, which should be taken into account carefully. Though, this case established a right for attorneys to advertise, but it did not discuss how this right could be restricted.

Again in *Zauderer V. Office of Disciplinary Counsel*<sup>5</sup>, an attorney submitted advertisement for publication in an Ohio newspaper that stated his willingness

---

3 433 U.S. 350.

4 17A Ariz. Rev. Stat., p. 26 (Supp. 1976).

5 471 U.S. 626 (1985).

to represent women who had been injured from using a specific contraceptive device; the advertisement included a drawing. It was argued that this type of targeted advertisement should be treated the same as an in-person solicitation. However, the Supreme Court held that the overreaching nature and the potential-for invasion of privacy found in in-person solicitation were not present when attorneys use targeted advertising. Specifically, it was held that, commercial speech that is not false or deceptive and does not concern unlawful activities may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest.

In *Gulf Oil Co v. Bernard*<sup>6</sup>, the U.S. Supreme Court went one step further, when observed that the trial court had abused its discretion in restraining the communications. It acknowledged that such communications created a potential for abuse, which provides a trial judge with both the duty and the broad authority to exercise control over class acting and to enter appropriate orders governing the conduct of counsel and parties. On the other hand, orders restraining communications with class members may as in the current case make it difficult for counsel and the class representatives effectively to represent the class.

*Shapiro v. Kentucky Bar Association*<sup>7</sup> developed the law on this issue. In the instant case an attorney applied to the state's Attorney Advertising Commission for approval of a letter he created for a targeted mailing advertisement. The Commission denied approval for the letter to be mailed because the letter was "precipitated by a specific event," which violated a Kentucky Supreme Court Rule. The Supreme Court determined the lower court was asking the wrong question when it made the observation that: such solicitation subjects the prospective client to pressure from a trained lawyer in a direct personal way. It is entirely possible that the potential client may feel overwhelmed by the basic situation which caused the need for the specific legal services and may have seriously impaired capacity for good judgment, sound reason and a natural protective self-interest. Such a condition is full of the possibility of undue influence, overreaching and intimidation. In the instant case, the Supreme Court has not explicitly extended First Amendment protection to legal advertising on radio and television, yet it is routinely allowed.

Therefore, in America right to advertisement is now constitutionally protected right of advocates and they can advertise their profession.

---

6 452 U.S. 89 (1981).

7 486 U.S. 466.

## POSITION IN ENGLAND

The provision banning advertisement by the advocates has its roots in Victorian notions of United Kingdom which considered each and every profession to be noble and stated that such a regulation is necessary in order to preserve the dignity and nobility of this profession, as, Mr. Justice Martin has observed that advertising is unprofessional conduct on part of the advocate. In his opinion, there is a leading distinction between professional men on one hand and those engaged in trade and business on the other. Keen competition at the bar is one of the main causes of lowering of professional ethics. It is a rule of etiquette in the legal profession that no attempt should be made to advertise oneself directly or indirectly. Such a course of action tends to lower the dignity of the profession and is undoubtedly akin to touting.

It is for this reason in England no Barrister was allowed to write to solicitors or even to brother practitioners on circuit, extolling his services, experience or ability to work. Advertisements of all forms were considered to be highly improper. Advertising by lawyers has been compared to touting.<sup>8</sup> Ever since the past the United Kingdom law was adhering to the strict prohibition and the age old rule against advertisement was all of a sudden done away. In England, advertising by solicitors is now regulated by Rule 2 of the Solicitors' Practice Rules 1990 under which the Solicitors can advertise their profession. The regulations include provisions against misleading or inaccurate publicity, unsolicited visits or telephone calls, prohibiting addresses to the court being distributed to the press or giving the same on websites, insistence as to clarity as to charges, the name of firm, etc.

The Law Society's Code for Advocacy, 2000 extends the Solicitors' Publicity Code 2001 to advocates and the same regulations regarding advertising apply to advocates as a result. In addition advocates should not advertise so as to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute, should not make comparison with or criticisms of other advocates, should not include statements about the advocate's success rate, should not indicate or imply any willingness to accept a brief, or any intention to restrict the persons from whom a brief may be accepted, and not to be so frequent or obtrusive as to cause justifiable annoyance to those to whom it is directed.

It is interesting to note here that, in England, the removal of restrictions on advertising was in fraction. Earlier, in England advertising was banned for

---

8 Advocates, Allaahbad, in the matter of, AIR 1934 All 1067.



professionals like lawyers. But later this ban is lifted. The Monopolies and Mergers Commission in 1970 and the review given by the Office of Fair Trading in 1986 pointed out at the advantages of letting the professionals advertise and the benefits availed by from relaxing such norms.<sup>9</sup> Ultimately the ban was lifted and the restrictions lowered and thus legal marketing and legal advertising became a reality in United Kingdom.

## POSITION IN OTHER COUNTRIES

The position in other developed countries is also quite clear. Advertising is allowed in most of the countries. In France, though the law is not liberal, it stands somewhere between Indian and English position. There is not a complete ban on advertising.<sup>10</sup> Also in Italy, the legal marketing has been legalized by the Bersani Decree of 2004 which was enforced in 2007.<sup>11</sup> This has been true for most of the European countries like Germany, Spain, etc. Legal Advertising is a reality everywhere.<sup>12</sup>

Besides countries in the West, Asian countries such as Hong Kong, Singapore and Malaysia have been progressively relaxing their regulations on legal advertising to adapt to global demands.<sup>13</sup> For instance, Malaysia's Legal Profession (Publicity) Rules, passed in 2001 is a simple yet comprehensive code that regulates advertisements in legal and non-legal directories, controls publication of journals, magazines, brochures and newsletters by lawyers and interviews in electronic and print media, bars publicity through clients and even includes a rule that regulates lawyers sending greeting cards on special occasions. In Hong Kong, lawyers are forbidden from advertising on television, radio and cinema. Though advertising in print is permissible, larger firms prefer alternative strategies such as engaging in aggressive client and public relations programmes and branding exercises. Even in Singapore the legal advertisements are allowed with certain restrictions.<sup>14</sup>

Thus, it is clear that most of the countries have adopted a liberal policy towards legal advertising and has allowed it to meet the global demands and compete with the other countries.

9 V K Aggarwal, "Professional Advertising: A comparative analysis in the changing milieu", 7th National Conference of Practising Company Secretaries

10 Legal\_Advertising [http:// en.wikipedia.org](http://en.wikipedia.org) (last visited on 2<sup>nd</sup> December 2014).

11 [www.legalmarketing.it](http://www.legalmarketing.it) (official legal marketing Italia website, last visited on 2<sup>nd</sup> December 2014).

12 Ibid.

13 Supra.

14 Ibid.

## POSITION IN INDIA

In India Section 4 of Advocates Act, 1961 constituted a Bar Council of India to regulate the legal profession as well as legal education. Pursuant to the functions of Bar Council of India under section 7 and its power to make rules under section 49 of the said Act, it has enacted the Bar Council of India Rules, 1965 which are binding on all the legal professionals in India. These rules have been justified on the grounds of public policy and dignity of profession. The judiciary has reinforced these principles, which can be reflected in words of Justice Krishna Iyer, when he noted, Law is not a trade, not briefs, not merchandise, and so the heaven of commercial competition should not vulgarize the legal profession.

In India prior to 2005, there was complete ban on advertising for lawyers. The Bar Council of India, pursuant to its functions mentioned under Section 7(1) (b) of the Advocates Act<sup>15</sup> read with its powers to make rules under Section 49(1) (c) has framed Rule 36 of the Bar Council of India Rules under Section IV of Chapter<sup>16</sup> of Part IV. Rule 36 provides that, *An advocate shall not solicit work or advertise, either directly or indirectly, whether by circulars, advertisements, touts, personal communications, interviews not warranted by personal relations, furnishing or inspiring newspaper comments or producing his photographs to be published in connection with cases in which he has been engaged or concerned. His sign-board or name-plate should be of a reasonable size. The sign-board or name-plate or stationery should not indicate that he is or has been President or Member of a Bar Council or of any Association or that he has been associated with any person or organization or with any particular cause or matter or that he specializes in any particular type of worker or that he has been a Judge or an Advocate General.*

By virtue of the above rule it is clear that, both direct and indirect advertising is prohibited. An advocate may not advertise his services through circulars, advertisements, touts, personal communication or interviews not warranted by personal relations. Similarly, the following forms of indirect advertising are prohibited:

1. by issuing circulars or election manifestos by a lawyer with his name, profession and address printed on the manifestos, thereby appealing to the members of the profession practicing in the lower courts who are in a position to recommend clients to counsel practicing in the high court.

---

15 Section 7: Functions of the Bar Council of India: (1) The functions of the Bar Council of India shall be – (b) to lay down standards of professional conduct and etiquette for advocates.

16 Section 49: General Powers of Bar Council of India to make rules: (1) The Bar Council of India may make rules for discharging its functions under this Act, and, in particular, such rules may prescribe – (c) the standards of professional conduct and etiquette to be observed by advocates.

2. Canvassing for votes by touring in the province or sending out his clerk or agents to the various districts, which must necessarily mean directly approaching advocates practicing in subordinate courts.

Further, the signboard and nameplate displayed by an advocate should be of a reasonable size. It should not refer to details of an affiliated by the advocate i.e. that he is or has been president or member of a bar council or of any association, or he has been a Judge or an Advocate-General, or that he specializes in a particular kind of work, or that he is or was associated with any person or organization or with any particular cause or matter.

Rule 36 also prohibits soliciting and touting. Solicitation is to endeavor to obtain by asking or pleading. It is a stronger and more concerted effort to get a client as compared to advertising and is delivered through direct in-person communication. Apart from advertising solicitation may involve amongst others things advertising, toutism, brief begging, brief snatching and ambulance chasing. Similarly toutism is another form of advertisement and important aspect of solicitation. Touts are persons who procure business in consideration of commission moving from legal practitioner.<sup>17</sup> In other professions it may be morally wrong to pay a percentage of benefit or payment otherwise to such touts but in the legal profession this is totally prohibited.<sup>18</sup> It is the tradition of the Bar that the lawyer should not seek business. The lawyer must not apply to others to weigh his capacity to attract clients. The issuing of circular letters or election manifestoes by an advocate with his name, profession and address printed thereon appealing to the members of his profession practicing in the lower court, who are in a position to recommend clients to counsel practicing in the High Court, is obviously an indirect means of advertisement.

The chief objective of the ban on advertising was to preserve the unique status and dignity attached to the noble profession of law.<sup>19</sup> The Indian judiciary has acknowledged the substance of this restriction in numerous cases. The Supreme Court of India observed in *Bar Council of India v. M. V. Dhabolkar*,<sup>20</sup> that the canons of ethics and propriety for the legal profession totally taboo conduct by way of soliciting, advertising, scrambling and other obnoxious practices.

Likewise, the Allahabad High Court observed that self advertising tends to lower the dignity of this honorable profession and is undoubtedly akin to touting.<sup>21</sup>

17 *K. Gururaja Chari*, *Advocacy and Professional Ethics*, 1<sup>st</sup> ed., Allahabad:Wadhwa and Co, 2000) at 59.

18 *Id.*

19 Harold G. Christense. *Advertising by Lawyers*. Utah L Rev 619. 619.634 (1978)

20 A.I.R. 1976 SC 242.

21 See, *Advocates*, Allahabad, In the matter of, AIR 1934 All. 1067.

The Bombay High Court in *Government Pleader V. S, a Pleader*<sup>22</sup> considered sending a postcard giving the address and description as an improper conduct by the Advocate. In the clear opinion of the court, advertising his profession is unprofessional conduct on the part of a professional man. The High Court of Madras went one step ahead in *S.K. Naicker V. Authorised Officer*<sup>23</sup> and held that writing of articles for publication in newspapers under his signature, where the writer describes himself as an advocate practicing in the court as a flagrant breach of professional etiquette.<sup>24</sup> This is as it ought to be because of the standard which the gentlemen of the profession have jealously developed and set up for themselves as befitting the honour, dignity and high position of the noble profession as rightly regarded as a kind of misconduct from the point of view of professional ethics.

However, each and every notice may not be considered as advertisement. In *J.N. Gupta V. D. C. Singhanian*<sup>25</sup> the respondent advocates had issued had issued two advertisements in a newspaper for the first time indicating their change of address to another place an account of fire in the building and for the second time for shifting back to the building which was their old office. Thereafter the Respondent made a publication in the International Bar Directory giving the names and addresses of their officers under the heading “Singhanian & Company” “Firms major cases”, and Representative clients.

The Court did not find any irregularity, much less any professional misconduct in making such publication in a newspaper, which was on account of extraordinary situation of fire in office which, required urgent intimation to their clients. The paper publication per se does not constitute any violation of the Bar Council of India Rules on professional conduct. As regards publication in International Bar Directory, the court held that publication in any manner either in National or International Bar Directory done with the purpose of giving information of addresses and telephone numbers of Advocates is permissible under the Bar Council Rules, however, here the lone purpose of the publications was to give publicity to the fact that Singhanian & Co. Have dealt with cases of importance and they have clients of eminence with a view to solicit more briefs and attract more clients. The court held that the publications made in the International Bar Directory under the heading “Singhanian & Company”, “Firms’s Major Cases” And Representatie Clients” are offending of Rule 36 of the Bar Council of India Rules of

---

22 AIR 1929 Bom. 335.

23 (1967) 80 Mad. LW 153 at 154.

24 See In the matter of A, an Advocate, AIR 1962 SC 1337; See also (Thirteen) Advooates, Allahabad, In the matter of, AIR 1934 All. 1067.

25 B.C.I. T.R. Case No. 38/1994.

“Standards of Professional Conduct and Etiquette” prohibiting advertisement in any manner of a person in the legal profession. Respondents were reprimanded u/s 35 (3) (B) of the Advocates Act, and Rs, 3,000/- were imposed as costs.

In *Vikas Deshpande V. Maharashtra State Bar Council*<sup>26</sup> the Supreme Court held that Appellant advocate soliciting brief from complainant death convicts by saying that he would not charge any fees from them and obtaining their signatures and thumb impressions on certain documents by misrepresentation on the basis of which power of attorney executed in his favour and in pursuance thereof selling their land fraudulently and misappropriating the sale proceeds on ground that it was settled with the complainants that they would pay his fees of Rs 50,000 for conducting their case amounted to grave professional misconduct. The Court held that the Punishment of removal of appellant's name from roll of State Bar Council under S. 35(3)(d) and imposition of costs of Rs 25,000 payable to heirs of the complainants (since deceased in execution of death sentence) justified. The court highlighted the need to take remedial steps to nip in the bud such kind of misconduct.

Thus, in India, the cumulative effect of the Advocates Act and the Rules of the Bar Council is that lawyers are prohibited to advertise their services. Lawyers may not solicit clients and cannot do anything that might influence the decision of a potential litigant from engaging one or the other lawyer. Even if a lawyer argues a case brilliantly, the newspapers may report the issue but the publication of the lawyer's name in the report is frowned upon.

## THE CONSTITUTIONAL VALIDITY OF THE BAN

The Rule 36 of Bar Council of India Rules, which prohibits advocates from advertising, has been a matter of serious debate before law courts. The rule has been challenged many times on the contention that it violates the right to speech and expression guaranteed under Article 19 of Constitution of India. Therefore a question always arises whether advertisement right is a fundamental right?

In the case of *Hamdard Dawakhana v. Union of India*,<sup>27</sup> the Supreme Court held that:

*“An advertisement is no doubt a form of speech but its true character is reflected by the object for the promotion of which it is employed. It assumes the attributes and elements of the activity under Article 19 (1)*

<sup>26</sup> (2003) 1 SCC 384.

<sup>27</sup> AIR 1960 SC 554; 1960 (2) SCR 671.

*which it seeks to aid by bringing it to the notice of the public. When it takes the form of a commercial advertisement which has an element of trade-or commerce it no longer falls within the concept of freedom of speech for the object is not propagation of ideas - social political or economic or furtherance of literature or human thought; but as in the present case the commendation of the efficacy, value and importance in treatment of particular diseases by certain drugs and medicines. In such a case, advertisement is a part of business even though as described by Mr. Munshi its creative part, and it was being used for the purpose of furthering the business of the petitioners and had no relationship with what may be called the essential concept of the freedom of speech. It cannot be said that the right to publish and distribute commercial advertisements advertising an individual's personal business is a part of freedom of speech guaranteed by the Constitution."*

In the view of the above decision, the commercial advertisement is not a part of freedom of speech and expression and thus ban on advertisement for advocates is justified to be falling within reasonable restriction as stated under A. 19(2). It will be relevant to remind here that, on the ground on which the United States Supreme Court<sup>28</sup> held this ban to be violative of Constitution is not available in the Indian scenario.

In the matter of *Phool Din and others*<sup>29</sup> it was held that a person is not a tout if he gives gratuitous advice to litigant to engage a particular lawyer, or gratuitously procures the employment of a lawyer. It is only when he charges remuneration from a lawyer for this purpose that he falls in the definition of tout. The Legal Practitioners Act prohibits a lawyer from accepting an employment through a tout and a citizen from engaging himself in the so-called profession of tourism. It is penal for a lawyer to accept an employment through a tout and for a citizen to act as a tout.

The Court further held that Article 19 (1) (g) of Constitution of India, does not give an unfettered right to practice "any profession" which a citizen may choose to adopt irrespective of the fact that engagement in such a profession is prohibited by law. It is subject to the provisions of Clause (6) of Article 129 which provides for imposition "in the interests of the general public reasonable restrictions' on that right.

---

28 *Bates V. State Bar of Arizona*, 433 U.S. 350.

29 A.I.R. 1952 All 491.

Now the question arise that rule 36 can be challenge on the basis of article 19 (1) g, which provides freedom to carry on trade or business? Actually, article 19 (1) (g) of the Constitution of India confers every citizen with the right to choose his own employment or to take up any trade or calling. This right is impregnated with an implied right for availing all the mechanisms and resources, including advertising for effective carrying of the trade or occupation. As per judicial decisions,<sup>30</sup> any restriction on this right would be unreasonable unless it is done in public interest.

Answer of the above question will be depend on the answer of another question that, whether legal profession falls under the category of trade or business? On this point judiciary of India keeps two contradictory approaches. Firstly, according to Justice Krishna Iyer, legal profession is such a noble profession that it cannot form a part of trade or business, but on the other hand the recent trend of the courts is to justifying this profession as a trade.

In *Tata Press Ltd. v. Mahanagar Telephone Ltd*<sup>31</sup> the Supreme Court observed that commercial speech is a part of the freedom of speech and expression guaranteed under Article 19 (1) (a) of the Indian Constitution.

The conclusion given in the above case is that commercial speech is entitled to the protection under Article 19. This conclusion of the apex court is a *reduciio ad absurdum* and an example of shade and uncritical adherence to American case laws. It is respectfully submitted that the conclusion given by Supreme Court was not a good law, because it says that commercial speech is entitled to the buffer of free speech and expression under the Constitution. Only that type of speeches should be constitutionally protected under freedom of speech and expression if it contributes to democratic governance and individual self-fulfillment. In an analysis of freedom of speech and expression, the diminution of advertising revenue can't be regarded as an infringement of the right under Article 19(1) (a). Commercial speech comes under lower speech category, which cannot be granted the status of freedom of speech and expression.

Prior to 1996, the legal profession was not the subject of consumer laws, as in the case of *K. Rangaswami V. Jaya Vittal*,<sup>32</sup> it was held that according to section 2(l) (o) of the Consumer protection Act, 1986, the service under the contract of “personal service” is excluded from the definition of the word ‘service’ and since the advocate and client relationship falls in this category it is automatically excluded from the definition of the service.

---

30 AIR 1996 Mad 427.

31 AIR 1995 SC 2438.

32 (1991) CPJ 688

Similarly in *Xavier Thoitakath V. Swe of Kerala*,<sup>33</sup> it was held that Rules framed under section 49(1) (c) of the Advocates Act, 1961 are wholesome provisions imposing reasonable restriction on the conduct of the members of the legal profession in the interest of general public and do not transgress the rights either under Article 14 or 19(1) of the Constitution. It cannot be disputed that un-curtailed freedom is no freedom at all.

However, on the other hands courts have also recognized 'Legal Service' as a 'service' rendered to the consumers and have held that lawyers are accountable to the clients in the cases of deficiency of services. In the case of *Srinath V. Union of India*,<sup>34</sup> the Madras High Court held that, in view of Section 3 of Consumer Protection Act, 1986 consumer redressal forums have jurisdiction to deal with claims against advocates. Section 2 (U) of the Competition Act, 2002 defines the term 'Service' along the lines of the Consumer Protection Act, 1986.

It will be interesting to note that, Mr. Justice Krishna Iyer, who describe the legal profession as noble one and rejected to say that legal profession may be trade or business, himself in the case of *Bangalore Water Supply and Sewerage Board V. A. Rajappa*,<sup>35</sup> held that legal profession is covered under the definition of the term Industry under the Industrial Disputes Act, 1947.

Though the decision of Bangalore Water was concern with entirely different matter, but this or that way, it gives an impression that legal profession may be trade. The above two decisions of the courts make a path to provide advertisement right to the legal professionals.

Beside the above contradictory approach taken by the judiciary, signature on GATS also becomes the presser for allowing the advertisement right to the Indian advocate. India is concern with World Trade Organization and is subjected to World Trade Organization laws. Thus, it could be concluded that legal services are becoming subject of trade related laws in India where consumerism and market forces are founding its adequate space.

On the basis of above reasons, the Bar Council of India has finally allowed lawyers to advertise their services on the internet. This decision was informed by the Bar Council of India to the Supreme Court after an affidavit was filed through its secretary Mr. S. Radhakrishnan. However, as decided in the case of *V.B. Joshi V. Union of India*<sup>36</sup> where this amendment was made in Rule 36, Section IV, only 5

---

33 (1995) 3 S.C.C. 1998.

34 AIR 1996 Mad 427.

35 AIR 1978 SC 969; 1978 LabIC 778.

36 The Hindu, 18 December 2008.



pieces of information can be advertised on the internet i.e. (1) name of the firm, (2) address, telephone numbers and email id, (3) (a) enrollment number, (b) date of enrollment, (c) name of State Bar Council where originally enrolled, (d) name of the State Bar Council on whose roll name stands currently and (e) name of the Bar Association of which the advocate is a member, (4) professional qualifications and academic qualifications and (5) areas of practice.

Here it is clarified by the Bar Council that, “Soliciting work or ‘advertise’ as used in this clause of the Code would not mean and include setting up of a website by an advocate or a law firm giving only basic information about the names and number of lawyers in a law firm, the contact details and areas of practice. Therefore, under the amended rule, advocates can mention in their chosen websites, their names, telephone numbers, e-mail ID, professional qualification and areas of specialization.

It is submitted with all due respect of Honorable Supreme Court and Bar Council of India, though, it is true that, effective and efficient notification of class action lawsuits, cost effective advertising, regular accessibility, promotion of the interests of the firm, easy accessibility of the members keeping current with the latest technology, and improving the image of advocates by educating the public are some of the advantages that a lawyer or law firm can get from having a website may be the chief advantages of this amendment, but the question is, whether there is any difference between advertisement on website and advertisement in news paper? Undoubtedly, except worldwide publicity and changing nature of web sites every legal Website is like a news paper advertisement. Therefore, one may conclude that right to advertisement on website may make a path for other types of advertisement.

What will be the real effect of the amended rule of Bar Council of India? though the answers of this questions is still in the womb of moment, which will show its consequence only with the span of time, but it should always be remember that there is clear difference between trade and profession, so unrestricted advertisement right to legal professionals, can't be granted on the cost of nobility of legal profession.

## **CHANGING FACE OF LEGAL PROFESSION AND REASON THEREOF**

Globalization brought about a revolution in international trade with increasing participation and involvement of countries and greater access to domestic economies. The implication of the same on the legal service sector has been proved in most of countries, both quantitative and qualitative.

World Trade Organization which is the successor of the General Agreement on Tariffs and Trade brought the services under multilateral trading system under the Uruguay Round Agreements launching. Inclusion of services into was a reflection of growing share of services in national economics world over. It was negotiated by the Governments themselves and set the framework agreement containing general rules and disciplines and the national schedules. Under this system, members have complete freedom to select which services to commit and while granting access a country may however limit the degree to which foreign services provider can operate in the market. The two accepts to General Agreement on Tariffs and Trade are-

- (i) Services provided to the public in the exercise of governmental authorities and,
- (ii) in the Air transport structure, traffic, rights.

Further, General Agreement on Tariffs and Trade provides for trade in services through four different modes.<sup>37</sup> The General Agreement on Tariffs and Trade schedules refer to each of these modes and all commitments are made accordingly.

- a) From the territory of one member into the territory of any other member.
- b) In the territory of one member to the service consumer of any other member.
- c) By a service supplier of one member, through commercial presence in the territory of any other member.
- d) By a service supplier of one member, through presence of natural persons of a member in the territory of any other member.

There are 12 sectors classified by General Agreement on Tariffs and Trade for which commitments may be made one of them is Business Services. Business Services is further divided into 6 types of services, which include professional services. The Professional service sector further divided into 11 services, which include Legal Services.

Most of the persons who are claiming that India is bound to provide advertisement right to the advocates only because of India is a founder signatory of General Agreement on Tariffs and Trade, they are forgetting the fact that, India has made only specific commitments in relating to engineering services and no commitments made in the legal services till the present.

---

<sup>37</sup> See, paragraph 2 of Article I.

Though, it is true that, emerging legal service sector is equally beneficial to all consumers of legal services, and in the age of consumerism and competition law, consumer's right to free and fair competition is paramount, but that cannot and should not be achieved on the cost of dignity of the legal profession. As in the case of, *in re Sanjiv Datta, Secretary, Ministry of Information and Broadcasting*<sup>38</sup>, the Supreme Court observed, some of the members of the profession have been adopting prospectively casual approach to the practice of the profession. They do not only amount to contempt of court but to the positive disservice to the litigants.

If this is the position, then it compels to remark that advertisement right to the advocates will also accelerate the problem. Not only this but the services available to consumers of India, are only by the domestic legal service providers. A big percentage of litigants of India have no connection with corporate activities. Most of the Indian advocates is also either not dealing the above matters or not concern with the subject. In this situation, ultimately only the foreign legal firms will take these benefits. It raises a question that how it can be granted to International Law firms, which have no right to practice in India, as per Bar Council of India Rules, 1965.

The other rationale is that in a country like India with its large illiterate population there is a possibility of unscrupulous lawyers exploiting the public. Further, in *Tata Yellow Pages case*<sup>39</sup> the court observed that advertising, if allowed, would reduce the cost of the goods. According to the court, there will be aggregate economic efficiency, which will help in reducing the cost of the goods and services. It is submitted that, this economic analysis may be true in case of consumer goods and services, but same is not true in lawyers' advertising, due to a worldwide established fact that in competitive economic model a seller advertises only when he expects huge returns. Hence, the advertising, will increase the cost of legal services, insisted the lowering the same.

## **ARGUMENTS IN THE FAVOUR OF ADVERTISEMENT RIGHT TO THE LAWYERS**

In the era of liberalization, globalization and privatization following arguments may be advanced in the favour of granting advertisement right to the advocates:

1. The total ban on advertising by lawyers in India has resulted in a situation

38 (1995) 3 S.C.C. 619.

39 AIR 1995 S.C. 2438.

where consumers cannot make an informed choice from the competitive market since the information relating to service is not available to them.

2. Restrictions on professional firms on the informing potential users on range of their services and potential causes further injury to the competition.
3. In India advocates are also prohibited from entering into partnership or any other arrangement for sharing remuneration with any person or legal practitioner who is not an advocate. Such a measure has hampered the delivery of services to the consumer and anticompetitive.
4. In India only natural person can practice law, as is evidenced by combined reading of Sections 24, 29, and 33 of Advocates Act and artificial body cannot act as a lawyer. Justification for such restriction is on public policy grounds and in particular to ensure professional responsibilities and liabilities. This legal service provider cannot be incorporated as a company and still continue in practice the profession of law in India, as per the provisions of Advocates Act, 1961.
5. The Requirement that Advocates enter into partnerships only with other Advocates has the effect of prohibiting partnerships with foreign firms. The effect to the provision is that partnerships cannot be entered into between Indian Lawyers and those of other countries. These restrictions on incorporation and size of partnerships, prohibition on entering into partnership with foreign firm and lawyers; have limited the size and growth of the profession as well as professionals and prevent them from being globally competitive.
6. The Lack of restrictions on partnerships across the world has given rise to firms with a member of partners. Immense law firms having wide controlling, regulating and functioning power nationally and internationally. In sharp contrast Indian firms are small and incapable of associating with legal experts firms other countries. This way Indian law firms are at disadvantage to law firms to others developed countries.

## **JUSTIFICATIONS FOR NOT ALLOWING ADVERTISEMENT RIGHT TO THE LAWYERS**

Following reasons may be advanced for not allowing the advertisement right to the lawyers:

1. Advocacy is a noble profession and advertisement will be allowed then

it would bring commercialization approach in the profession which will undermine the lawyers' sense of dignity and self-worth.

2. Advertising will erode the client's trust in his advocate, once the client perceives his advocate being driven more by profit motive rather than commitment to client's welfare.
3. The dignity and self respect will get diminished by way of advertising.
4. Marketing practices as one knows presents the truth, howsoever bitter, in a rosy light that may even enable unfair competition and market advantage thus affect the clients seeking justice. It thus would skew the prism and prevent persons from making informed choices.
5. Advertisement will no doubt increase the number of law suits. It would create a litigating society as in the United States and even before considered petty cases would be agitated and thus overburden the already burdened courts.
6. Advertising entails higher costs on marketing rather than acquiring better legal acumen. The costs of making choices would go up as the chances of a client getting misled would be higher in the blundering light of advertisements all around.
7. In the last but not least, it should be remember that, with the inadequate mechanism to regulate the legal profession, it will create more problem to regulate advertising by lawyers as India is the country with one of the largest number of lawyers in the world.

## **CONCLUSION**

From the above discussion, it is clear that, in India, the cumulative effect of the Advocates Act, the Rules of the Bar Council of India is that lawyers are prohibited to advertise their profession. Law is a noble profession so its status should be preserved. It is the quality of work which attracts the clients and not advertising or soliciting. The conduct of advocates who resort to brief begging and toutism is highly disprovable. It is true that there is a lot of competition at the bar and when there are so many advocates it is difficult to get noticed but it does not justify conduct such as ambulance chasing. The capital argument in favour of advertising is that it allows free flow of information and by this means consumer will be more informed. There will be aggregate economic efficiency, which will help in reducing the cost of the goods and services. It is submitted that this assumptions are fallacious because, when a consumer chooses in ignorance, it will not fruitful

to him. Hence, the advertising, will increase the cost of legal services, insisted the lowering the same. Therefore, *50% off this week if you want to sue your neighbor or pay for one case and the second will free*, may be the result of advertisement in legal profession. This could well be obvious outcome, if advertising by lawyers is allowed.

It also appears from the above discussion that advertisement is antithetical to legal professionalism and consumer interest. Advertising will instigate unnecessary competition, which could result in the fall of the highest traditions of profession of law. So, just because some countries have allowed the advertising to lawyers, it does not mean that India must also blindly follow them.

If a lawyer's motive is only to make profit, it will generate cut-throat competition, which could result in degenerate practices. This would be antithetical to the values of professionalism. A huge population of Indian litigants is lacking the expertise to judge the quality of the service offered. Advertisement possesses not only the element of information but also a type of influence, which could convince the client to bring his non-meritorious case before the lawyer to increase his business. This could result in low quality of service.

There may be in reality more effective and legitimate means of educating the public about legal rights and availability of lawyers. To sum up it is requested that Bar Council and State Bar Councils should itself inform the consumers for the availability of the legal services on its own respective website, insisted of providing this right to each and every advocates. Education and information given by these Bar Councils will be more fruitful than website or newspaper advertisements.



# Economic Empowerment of the Tribal Communities Through Traditional Knowledge— Problems and Prospects.

Dr. S.C. Roy<sup>1</sup>

## *Abstract*

*Education and wealth are the two wheels for the empowerment of any community. The education develops the cognitive faculty of mind which motivates to initiate new things and face new challenges for economic gain and further empowerment. The tribal communities are the lovers of nature, living close to the vicinity of hills and forests which are the store house of the flora and fauna. The Tribals have been living in such places where the basic facilities are quite unknown. Therefore they depend totally on the knowledge developed through observation of the flora and fauna. Thus they survive on the medicine which is found in the nature and protect themselves from various diseases. They also depend upon forest products. The Tribals know how to combat environmental hardships and earn sustainable livelihood. Their wisdom is reflected in their water harvesting techniques, developing irrigation channels, construction of cane bridges on hills, adaptation to desert life, utilisation of herbs and shrubs for medicinal purposes, meteorological assessment. The Tribals who were self-reliant and self-sufficient are now completely isolated and encircled with various problems—health, education, livelihood, security, social security, environmental pollution, potable drinking water due to opening of the tribal area with highways and industrialisation. On the one hand the policy makers think it modernisation of the tribal communities and creation of job opportunities for them. But it is a harsh truth that Tribals are not technically educated, thus not fit for the job. Ultimately they have to depend on their traditional sources of livelihood. Here it is a subject of great concern that industrialisation has made encroachment in their natural habitat and exploited their traditional knowledge. Thus the corporate world is becoming richer and richer leaving the Tribals in bewilderment, chaos and further creating the unfriendly tribal ambience. The trouble of the tribal does not end here, their displacement from their natural home due to compulsory acquisition of land for building coffer*

---

1 Associate Professor, Chanakya National Law University, Patna

*dams, roads, quarrying & mining operations and location of industries reservation of national parks. Thus they are losing their traditional abode which are the chief means of livelihood. Thus the Tribals are the victim of developmental process-industrialisation, infrastructure, i.e. Road, dams, mining, electricity projects, and exploitation of the traditional knowledge by the corporates. In this context, the paper seeks to study the way to empower the tribal communities through the protection of their traditional knowledge. But there is no documentation of their knowledge. It is not limited to the medicinal herbs rather their cultural heritage, tribal system of medicine, folk lore and dances which are being copied by the film industries. The constitutional protection and PESA provision are also the subject of investigation in this paper.*

**Key words**—Economic empowerment, Sustainable livelihood, Traditional knowledge.

## **INTRODUCTION**

Protections of the Traditional Knowledge of the local and indigenous communities seem to be one of the most contentious and complicated issue. The historical development of the protection of intellectual property in the wake of individual private property rights, pushed the traditional knowledge and the innovative practices outside the purview of the formal intellectual property protection regime. Millennium poses serious challenge to the legal community to set new legal standard for tackling the problem of protection of Traditional knowledge for the economic empowerment of the Tribals. Traditional Knowledge was treated as Knowledge in the public domains for free exploitation without showing any respect or concern for the effort taken by the communities to preserve and promote the same. The new technological developments, particularly in biotechnology, clearly demonstrate the significance and usefulness of traditional knowledge for the development of new product of commercial importance. Traditional knowledge (TK) associated with the biological resources is the knowledge about a country's biodiversity; the applied uses and applications of biological resources and the prevalent practices. TK has direct correlation with the biodiversity of the country. It is an intangible component of the resource itself. TK has the potential of being transformed into commercial opportunity, providing useful leads for development of products and processes. Hence, a share of benefits must accrue to creators and holders of TK .TK is valuable in global economy,



Important for biotechnology based industries and agriculture. Traditional societies depend on it for their food and healthcare needs, Important for conservation and sustainable development of environment and management of biodiversity, Food security of the country is linked to protection of TK. There is a need to enable tribal communities to harness TK for their economic upliftment and growth and fast mobility to the tribal societies. The TK is a knowledge developed by local and indigenous communities over time in response to the needs of their specific local environment. The World Intellectual Property Organization (WIPO) defines traditional knowledge as indigenous cultural and intellectual property, indigenous heritage, and customary heritage rights. The need to protect the traditional knowledge captured the attention of the international community only recently but the standard setting was left to the national governments. The absence of the international standards that causes serious negligence for the protection of the traditional knowledge and the benefits of new technology to the inhabitants of the locality, i.e. Tribals. It is the Tribals who have protected the herbs by protecting the forests and animals. But the TK that is a community property at present is exploited by the corporates without compensating anything to the Tribals. Even the culture they have developed, is utilised by the movie industries as a source in the public domain. But the TK is a knowledge which is learnt, experimented, protected and carried over from generations to generations with all reverence creates rights in the community for its personal use and commercial exploitation for livelihood and economic progress. But the fact is quite different. The biotechnology industry depends on the herbs and shrubs but the Tribals have no share in price of the raw material nor in the profit of the product. Further the electricity generated out of the hydel projects which use water of the springs donot supply the same to the Tribals. In this context, the mechanism REQUIRES TO BE DEVELOPED for tribal economic empowerment.

## **II. PATENTING OF THE TRADITIONAL KNOWLEDGE:**

It is a fact that there are around 100 million forest dwellers in India, most of them belong to tribal communities. They depend on both timber and non- timber forest produce. In turn, the forest dwellers have over the centuries gathered knowledge from the natural environment around their community. This community has in one sense been thankfully insulated from the ways of modern man and has carried on the traditions of their ancestors. As a whole, the forests and its dwellers give to India an abundant knowledge about the traditional value of various forest products. The way intellectual property rights have been designed in modern

commerce, traditional knowledge cannot be protected. For instance, traditional knowledge cannot be patented because such knowledge lacks inventive character, because of the inherent lack of novelty. Traditional knowledge is also often held collectively by communities, rather than by individual owners. This traditional knowledge is information that is transmitted from generation to generation generally within the community or within families or within the community in an oral form without any adequate documentation. This has caused traditional knowledge to be undervalued and marginalized. In fact, one of the fears in these communities is that if the knowledge were to be documented it would have been lost to the community by expropriation. In India, the Forest Act itself acknowledges this fact and provides a framework for documentation of such knowledge and the nature of evidence required for recognition of the rights of these communities in the intellectual property in respect of such knowledge. The provisions of the Biological Diversity Act 2002 and Forest Rights Act of 2006 both provide a shield for tribal traditional knowledge, by, on the one hand, respecting and protecting the knowledge of the local communities related to biodiversity and on the other, declaring that the intellectual property rights in such knowledge belongs primarily to members of the community collectively. In broad terms, patents can be defined as exclusive rights granted for an invention - either a product or a process - that offers a new technical solution to a specific problem. A patent implies the grant of a monopoly to an inventor who has used his knowledge and skills to produce a product or process which is new, involves an inventive step and is capable of industrial application. The TRIPS Agreement also has some provisions having limited application to the protection of Traditional Knowledge. The obligation to protect geographical indications can be used to protect traditional knowledge if associated with the indication used for production and sale of goods. It is made clear that a given quality, reputation or other characteristics of the goods essentially attributable to its geographical origin are to be considered in identifying the geographical indications for protection. Thus it may be possible for protection through geographical indication the traditional knowledge associated with goods. Disclosing traditional knowledge which forms part of an invention and of the state of the art or prior art will promote the progress of science by creating an incentive for the maintenance of traditional knowledge systems . This will happen by TK being widely and universally accepted within “western or modern innovation protection systems” and becoming a reference point within the regular operations of the international patent system. It will provide opportunities to the Tribals for economic exploitation along with the scientists. It will also stop the theft of the

traditional knowledge and the biotechnological industry will be benefited.

### **III. NATIONAL KNOWLEDGE COMMISSION AND T K.:**

The national knowledge commission in India has also showed its concern over the threat and danger on the TK. It has recommended to protect traditional knowledge and said – “Establish goals for conservation of natural resources: Natural populations of around 12% of the 6000 species of potentially medicinal plants are currently estimated to be under threat due to degradation and loss of habitats alongside unsustainable ways of harvesting and lack of cultivation. The problem of growing scarcity also leads to the danger of more counterfeit material being marketed. It is therefore necessary to support conservation and sustainable harvesting efforts in the forestry sector and cultivation in the agricultural sector. Direct support for conservation and cultivation as well as indirect methods through incentive policies should be pursued for nurturing these plant resources. The wild gene pool of India’s medicinal plants should be secured, via establishment of a nationwide network of 300 ‘Forest Gene Banks’ across the 10 bio-geographic regions of the country”. “Support primary healthcare in rural areas: With 70% of Indian population relying on traditional medicine for primary health care in the absence of adequate state primary health care, it becomes necessary to establish evidence-based guidelines for this informal-sector usage. A nation-wide network of ‘Home Herbal Garden’ and ‘Community Herbal Gardens’ (CHG) can be created to support the primary health care needs of rural communities for those plants and medications established as efficacious by evidence-based research.

The knowledge commission has proposed that a major re-branding exercise of Indian traditional medicine can ensure health revolution in India. Better branding of Indian traditional medicines can prove to be effective in well-designed clinical trials and can increase safe and effective healthcare options. Such proven medications can be integrated with the national healthcare system. Such evidence based, well-validated and uniquely Indian holistic healthcare system combinations must be marketed extensively globally. In order to achieve these goals as rapidly and efficiently as possible, the Government of India may consider establishing a National Mission on Traditional Health Knowledge (NMTHK), which would take up these tasks in an organized way. It should be a relatively small body in terms of its own infrastructure with powers to enable it to recommend targeted funding in identified areas. It should support initiatives at many different levels, including state and local levels, and coordinate with Ministries of Health, Science & Technology, Forestry, Agriculture, and Commerce as well as with the NGOs and

private sector. The Mission leader must be a person with high public credibility, have extensive knowledge and experience in the field with established managerial capabilities and experience of dealing with all the concerned stakeholders.

#### **IV. BIOPIRACY, TK AND THE TRIBALS**

One of the biggest threats to biodiversity and related traditional knowledge is ever-increasingly bio-prospecting activities on behalf of ethnobotanists, pharmaceutical companies and others who wish to profit from the rich biodiversity and traditional knowledge in indigenous territories. Current legal systems are inadequate, allowing for the bio piracy of biodiversity and traditional knowledge. As demand for commercialization of biodiversity and traditional knowledge increases at a rapid pace and as the world globalizes, the indigenous societies are being encroached upon faster than traditional knowledge can be protected. Their cultures and knowledge are being lost. In many parts of the world, the very existence of indigenous societies is under threat. The reason lies in the inadequacy of Legal System that address Traditional Knowledge. General issues relating to the protection of traditional knowledge and clash within systems all make traditional knowledge highly vulnerable to Bio-piracy. Several traditional plants and related knowledge in Asia, specifically India, have also been allegedly falsely patented by the US patent office, including: Neem', Haldi', pepper, Harar', Mustard, Basmati rice, Ginger, Castor, Jaramla', Karela 'and Jamun'. The African continent has too been plagued by bio piracy —with the case of West Africa's sweet genes and one of the most recent cases involving —'Hoodi' still unresolved. Some cases have been resolved but clearly demonstrate the problems with the intellectual property system. Traditional knowledge is generally associated with biological resources and is invariably an intangible component of such a biological resource. Traditional knowledge has the potential of being translated into commercial benefits by providing leads/clues for development of useful practices and processes for the benefit of mankind. The valuable leads/clues provided by TK save time, money and investment of modern biotech and other industries into any research and product development. Reasonably, we can say that a share of such benefits should accrue to the creators and/or holders of such Traditional Knowledge. Some countries have specific legislation protecting this kind of knowledge while some other countries feel their existing IPR regime protects such knowledge. As of now, India does not have a specific sui generis legislation to protect such TK and folklore but is in the process of developing such legislation.

In the recent past, there have been several cases of bio-piracy of TK from

India. First it was the patent on wound-healing properties of Haldi (turmeric); now patents have been obtained in other countries on hypoglycaemic properties of Karela (bitter gourd), brinjal, etc. An important criticism in this context relates to foreigners obtaining patents based on Indian biological materials without acknowledging the source of their Knowledge or sharing the benefits. There is also the view that the TRIPS Agreement is aiding the exploitation of biodiversity by privatizing biodiversity expressed in life forms and knowledge. The Neem, a legendary tree to India has been used as a bio pesticide and medicine in India for centuries... The European patent office (EPO) revoke in its entirety patent number 436257 which had been granted to the united states of American and the multinational corporation W.R. Grace for a fungicide derived from seed of the Neem tree. Secondly, Turmeric, in 1993, the US PTO granted the University of Mississippi Medical Centre patent rights over healing a wound by administering turmeric to a patient afflicted with a wound but again, Turmeric has been used for centuries in India. Indians grow up with a constant awareness of turmeric the tuber when dried keeps practically forever. The patent was eventually cancelled in 1998 after re-examination proceedings. But revealed to India and to indigenous societies around the world, again, how easy it was to falsely patent centuries-old traditional knowledge. Thirdly, Basmati Rice In 1997, the US patent office granted a patent in September 1997 to Rice Tec 'for a strain of Basmati rice, an aromatic rice grown in India and Pakistan for centuries. It violates both TRIPS and the CBD. Accordingly, the south Asia Commission on Economic and Social Policy, Rice Tec's patent also violated the CBD in not recognizing the sovereign rights of India and Pakistan over 'Basmati rice'. The basmati case demonstrates the problem as illustrated in TRIPS that patents are granted to biotechnological processes. Thus, even though basmati rice has been in South Asia for centuries, Rice Tec just altered it slightly through crossing with a Western strain of grain, and successfully claimed it was its own. Fourthly, 'Maca' In 2001 after the Viagra craze, two US companies patented extracts of the Andean plant, Maca which has traditionally been used to enhance fertility and sexual function. The patents were granted on the basis of unlocking mica's chemical secrets through advanced processes. .It has become clear, though narrating these few cases that IP laws cannot or are not being effectively applied to prevent the bio piracy of traditional knowledge. Traditional knowledge is being treated as a free input into research and commercial product development. When patents are falsely granted, equitable benefit sharing is not taking place either, while indigenous people remain subject to bio piracy and become ever more marginalized in the process. Recently amended patent law of ours contains

provisions for mandatory disclosure of source and geographical origin of the biological material used in the invention while applying for patents in India. Provisions have also been incorporated to include non-disclosure or wrongful disclosure of the same as grounds for opposition and for revocation of the patents, if granted. To protect Traditional knowledge from being patented, provisions have also been incorporated in the law to include anticipation of invention by available local knowledge including oral knowledge, as one of the grounds for opposition as also for revocation of patent. In order to further strengthen these provisions, a new provision has been added to exclude innovations which are basically traditional or aggregation or duplication of known properties of traditionally known component or components from being patented. Granting of patents in respect of traditional knowledge, concern that has been expressed in the discussion in the council for TRIPS is about the grant of patents or other IPRs covering traditional knowledge to persons other than the indigenous peoples or community who have originated the knowledge and legitimately controlled it. The view has been expressed that the granting to patents on traditional knowledge already in the public domain or without the consent of indigenous people and local communities amount to unauthorized appropriation of the knowledge. The Tribals are required to aware about the TK and train them for documentation so that they can be ensured for their livelihood.

## **V. EMPOWERMENT MECHANISM FOR THE TRIBALS:**

Traditional knowledge is being used without the authorization of the indigenous people or communities who have originated and legitimately controlled it and without proper sharing of the benefit that occurs from such use. It has been suggested that the starting point should be explored possibility for making more effective use of the exiting IPR system for protecting the traditional knowledge of indigenous people and local communities. It has been suggested that the best mechanism of protection of TK and provisions of livelihood to them would be through system based on bilateral contract between holder of traditional knowledge and persons or companies wishing to access and use the knowledge. Secondly, the applicant for patent that use traditional knowledge associated with genetic resources should be required to disclose the course or the origin of the source of the traditional knowledge in their patent applications. Thirdly, only a system of protection of traditional knowledge which provides 'proprietary rights' can ensure that market forces will be operative to generate fairness and equity. The Indian legislation for the Protection of Plant Varieties and Farmers

'Rights Act 2001, also acknowledge that the conservation, exploration, collection, characterization, evaluation of plant genetic resources for food and agriculture are essential to meet the goals of national food and nutritional security as also for sustainable development of agriculture for the present and future generations. It also acknowledges that the plant genetic resources for food and agriculture are the raw material indispensable for crop genetic improvement. The concept of effective benefit sharing arrangement between the provider and the recipient of the plant genetic resources forms an integral part of our Act. The protection provided to a plant variety bred by a breeder can be cancelled if there is an omission or wrongful disclosure of such information.

Indian Traditional Knowledge available to the USPTO – Patent examiners of the United States Patent and Trademark Office (USPTO) are now able to access the Database of Traditional Knowledge. Thanks to the Indian Government according its permission in November 2009, India's Council of Scientific and Industrial Research, and the Department of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homeopathy was credited with the development of the Traditional Knowledge & Digital Library (TKDL), which is a 30 million page searchable database of traditional knowledge translated from numerous languages such as Hindi, Sanskrit, Arabic, Persian, Urdu and Tamil into English, Japanese, French, German and Spanish. The EPO was allowed the use of the TKDL in February 2009. The Indian Department of Industrial Policy and Promotion (DIPP) and USPTO announced on the 23rd of November 2009 that they have entered into a MOU on comprehensive bilateral cooperation for IPR protection and enforcement. Under the terms of the MOU, the USPTO and DIPP will cooperate on a range of IPR issues, focusing on capacity building, human resource development, and raising public awareness of the importance of IPR. Protection of Traditional Knowledge in India by Patent: Legal Aspect

This UN Draft Declaration, in Article 29, specifically states that "Indigenous people are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property. They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts". A recent positive initiative is the drafting of a set of corporate guidelines for businesses that want to use native plants and traditional knowledge from indigenous communities to make commercial drugs. In April 2002 in The Hague, delegates of the UN Biodiversity Congress from 166

countries negotiated and adopted global guidelines during a two-week long U.N. sponsored CBD conference that was designed to encourage pharmaceutical companies to make responsible agreements with countries whose resources they use. The Cancun Declaration & Cusco Declaration on Access to Genetic Resources. In February 2002, Environmental Ministers from 12 countries met in Cancun, Mexico to discuss issues related to biodiversity in their countries, identifying a need to establish terms governing the granting of patents.

It has also been suggested that a requirement on patent applications to disclose in their applications any traditional knowledge used in the invention in question could help in the assessment of novelty and also assist countries with possible claims to examine the application and oppose the patent in time. The Geographical Indication of Goods (Registration and Protection) Act, 1999 passed by Parliament is another step taken by India. The Act primarily intends to protect the valuable geographical indications of our country. The protection under the Act is available only to the geographical indication registered under the Act and to the authorized users. The Act permits any association of persons or producers or any organization or authority established by law representing the interest of the producers of goods to register a geographical indication. It may be possible to argue that the holders of the traditional knowledge in goods produced and sold using geographical indication can register and protect their traditional knowledge under this law.

## **VI. CONCLUSION:**

The development and use of The traditional knowledge in the market economy can protect the rights of the Tribals, their exploitation, migration and dehumanisation due to joblessness. The exploitation of TK without their consent, may facilitate otherwise of exploitation of their knowledge without any rewards to them. It has been suggested that the development of database on traditional knowledge would help patent examiners discover relevant prior art so as to improve examination of patent application and prevent the grant of patents for subject matter that should not be patentable. Database would also help potential licensees in terms of searching for knowledge, innovations and parties. Various suggestions have been advanced in India to extend protection to knowledge, innovations and practices. These include documentation of TK; Registration and innovation patent system; and development of a sui generis system. It is sometimes believed that proper documentation of associated TK could help in checking bio-piracy. Documentation could be a double-edged sword. It is assumed that if the material/ knowledge are documented, it can be made available to patent examiners the world over so



that prior art in the case of inventions based on such materials/knowledge are/is readily available to them. It is also hoped that such documentation would facilitate tracing of indigenous communities with whom benefits of commercialization of such materials/knowledge has to be shared. The PESA Act 1996 also confirms the rights of the Tribals for their economic sustainability. The Tribals who have been living in the natural environment from ages have rights over entire ecosystem. They have rights because they have been protecting these resources from ages emotionally. But because of illiteracy and innocence, the corporates are taking away their TK for their commercial gain. They are now bewildered. More so the coffer dams and hydel projects are forcing them to migrate from their traditional home destroying their rich IP. Thus the rehabilitation of the Tribals at their natural abode along with COMMERCIAL EXPLOITATION with their consent, sharing the profits are the way to empower them. It is also essential to mention here that on the pattern of the 'Land Acquisition Act, there is requirement of 'Intellectual property Acquisition Act 'so that adequate compensation may be granted to the Tribals. Secondly, the rehabilitation of tribal should be along with the redevelopment of the lost vegetation. The Sarva Shiksha Aviyani has its own way to make the Tribals literate but along with literacy, the awareness for their rights is also required with political support to fight against the odds.

### References :

1. The patents Act 1970 as Amended in 2005.S.3 (d) recognises that mere discovery is not patentable. This protects the traditional knowledge of the Tribals`.
2. The Geographical indications of Goods (Registration and protection) Act 1999. The Ayurvedic practitioners use the plants ,leaves ,flowers for preparing medicines on the basis of the knowledge obtained from the Tribals without paying any thing. Even the fruits of geographical repute are being cultivated and sold without paying anything to the Tribals.
3. The Biodiversity Act 2002: The national and the state bio-diversity Authorities have been constituted for the monitoring of the use of any biodiversity for patenting. Any one aggrieved by the order of such authorities may appeal to national green tribunal.
4. The plant variety and farmers rights Act 2001.The Tribals have still using the traditional seeds which is the sources of research for Hybrid seeds, but they are not benefited. Even their skill in plant breeding is not recognised.

5. The forest rights Act 2006: S.6 of the Act provides rights to the gram Sabha for passing the resolution on all the rights .But they are helpless. Most of them are disunited by the allurements and threat of the corporate world.
6. Convention on biodiversity 1992 has been confirmed by India in 1994.The convention requires the states to take steps for protection and sustainable use of the world's diverse plants and animal species.
7. The Cancun summit 2010 does talk about reduction of carbon emission but without the help of the Tribals, plantation of trees and their protection and preservation, the AGENDA 21 cannot be achieved.
8. UN draft declaration on the Indigenous people u/Article 29.
9. The PESA Act 1996.This Act provides special rights to the Tribals but it is not being implemented.
10. The forest dwellers rights Act 2006. This provides economic rights to the forest dwellers within their vicinity.



# The Pursuit of Sustainable Development in India : An Analysis of National Strategies

Dr. Rinku Gupta<sup>1</sup>

## 1. Introduction

The idea of ‘sustainability’ has been a feature of international legal relations since 1893, when US asserted a right to ensure the legitimate and proper use of seals and to protect them, for the benefit of mankind, from wanton destruction.<sup>2</sup> However, the concept of sustainable development got prominence on the international agenda with the release of the report *Our Common Future* by the World Commission on Environment and Development (WCED), whereby the Commission tried to integrate environmental policies and development strategies, in order to create the foundation for a global partnership. The WCED was initiated by the General Assembly of the United Nations and in the year 1987, its report *Our Common Future*, was published.<sup>3</sup> Its roots were in the 1972 Stockholm Conference on the Human Environment, where the conflicts between environment and development were first acknowledged and in the 1980 World Conservation Strategy of the International Union for the Conservation of Nature, which argued for conservation as a means to assist development and specifically for the sustainable development and utilization of species, ecosystems, and resources. The *Brundtland Commission*, committed to the unity of environment and development, argued:

*The environment does not exist as a sphere separate from human actions, ambitions, and needs...“environment” is where we live; and “development” is what we all do in attempting to improve our lot within that abode. The two are inseparable.*<sup>4</sup>

The WCED’s brief definition of sustainable development as “the development that meets the need of the present without compromising the ability of future generations to meet their own needs”<sup>5</sup> is surely the standard definition when

1 Assistant Professor, The Law School, University of Jammu.

2 See, *Behring Sea Fur Seals Arbitration*, (1898) 1 *Moore’s Int. Arbitration Awards* 755; Although the tribunal rejected the argument, it did adopt regulations for the conduct of sealing which incorporated some of the elements of what is now recognized as a ‘sustainable’ approach to the use of natural resources.

3 World Commission on Environment and Development (WCED), *Our Common Future*, New York: Oxford University Press, 1987; The WCED was chaired by the then Prime Minister of Norway *Gro Harlem Brundtland*, thus earning the name the “*Brundtland Commission*.” The WCED’s membership was split between developed and developing countries.

4 *Ibid.*

5 *Ibid.*

judged by its widespread use and frequency of citation.

The concept of sustainable development contained within it two key elements:

1. The concept of 'needs', in particular, the essential needs of the world's poor, to which overriding priority should be given, and
2. The idea of 'limitations' imposed by the state of technology and social organization on the environment's ability to meet present and future needs.<sup>6</sup>

The 2002 World Summit on Sustainable Development marked a further expansion of the standard definition with the widely used three pillars of sustainable development: economic, social, and environmental. The Johannesburg Declaration created "a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development: economic development, social development an environmental protection, at local, national, regional and global levels."<sup>7</sup>

One of the successes of sustainable development has been its ability to serve as a grand compromise between those who are principally concerned with nature and environment, those who value economic development, and those who are dedicated to improving the human condition.

## 2. Key Environmental Challenges in India: A Profile

The key environmental challenges that India faces relate to the nexus of environmental degradation with poverty in its many dimensions, and economic growth. These challenges are intrinsically connected with the state of environmental resources, such as land, water, air, and their flora and fauna.<sup>8</sup>

Population is an important source of development, yet it is a major source of environmental degradation when it exceeds the threshold limits of the support systems. Unless the relationship between the multiplying population and the life support system can be stabilized, development programmes, howsoever, innovative are not likely to yield desired results. Population impacts on the environment primarily through the use of natural resources and production of wastes and is associated with environmental stresses like loss of biodiversity, air and water pollution and increased pressure on arable land.<sup>9</sup> From 238 million in

---

6 *Ibid.*

7 The Johannesburg Declaration on Sustainable Development, 2002; Online: [http://www.housing.gov.za/content/legislation\\_policies/johannesburg.htm](http://www.housing.gov.za/content/legislation_policies/johannesburg.htm)., visited on 10-jan-2015

8 *National Environmental Policy*, 2006, available at [www.envfor.nic.in](http://www.envfor.nic.in). visited on 15<sup>th</sup> jan.2015.

9. N.S.Jodha, "Common Property Resources and the Rural Poor", *Economic and Political Weekly*, 21(1986).

1901, India's population has soared to 1028 million in 2001, and is estimated to reach 1.26 billion in 2016. Its current population growth rate is 2 percent a year. The rate of urban growth has also increased from 1.9 percent in 1961-71 to over 2.1 percent at present (1991-2001).<sup>10</sup> Since the resource to population ratio is extremely low in India and other South Asian countries, there will be a general tendency by the people to exploit renewable sources, in order to survive.<sup>11</sup>

Poverty is said to be both cause and effect of environmental degradation. The vicious link between poverty and environment is an extremely complex phenomenon. Environmental degradation is a major causal factor in enhancing and perpetuating poverty, particularly among the rural poor, when such degradation impacts soil fertility, quantity and quality of water, air quality, forests, wildlife and fisheries. The dependence of the rural poor, in particular, tribal societies, on their natural resources, especially biodiversity, is self-evident. Women in particular face greater adverse impacts of degradation of natural resources, being directly responsible for their collection and use, but rarely for their management.

Speaking about the poverty-environment nexus at the UN Conference on Human Environment held in Stockholm in the year 1972, the then Prime Minister of India, Mrs. Indira Gandhi emphasized that the removal of poverty is an integral part of the goal of an environmental strategy for the world:<sup>12</sup>

*The concepts of interrelatedness, of a shared planet, of global citizenship, and of 'spaceship earth' cannot be restricted to environmental issues alone. They apply equally to the shared and inter-linked responsibilities of environmental protection and human development. History has led to vast inequalities, leaving almost three-fourths of the world's people living in less-developed countries and one-fifth below the poverty line. The long-term impact of past industrialization, exploitation and environmental damage cannot be wished away. It is only right that development in this new century be even more conscious of its long-term impact. The problems are complex and the choices difficult. Our common future can only be achieved with a better understanding of our common concerns and shared responsibilities.*

10 *The Citizen's Fifth Report*, The Centre for Science and Environment (CSE), 1999 and *Census of India, 2001*(provisional), Registrar General, India.

11 Shaikat Hassan, "Environmental Issues and Security in South Asia", 14 (1991), Adelphi Papers, 262 published by the International Institute for Strategic Studies, London.

12 See, India's representation at UNHCE, 1972; Available online: [www.envfor.nic.in](http://www.envfor.nic.in).visited on 25<sup>th</sup> jan.2015.

Acceleration in poverty alleviation is thus an imperative to break this link between poverty and the environment. Agenda 21, a document of seminal importance at the Earth Summit (UNCED, 1992) recognizes poverty as the foremost environmental key variable and calls upon the States to develop effective strategy for tackling the problems of poverty, development and environment simultaneously by focusing on resources, production and people.<sup>13</sup> Unsustainable consumption patterns, particularly in industrialized countries, also have serious adverse impacts on the environment, both local and global. The global impacts are largely manifest in developing countries, and further exacerbate poverty.<sup>14</sup>

Developing countries also face critical challenge of meeting their rapidly increasing demand for energy which results in environmental degradation. For instance, India ranks sixth in the world in terms of energy demand. Its economy is projected to grow seven to eight per cent over the next two decades, spurring a substantial increase in demand for oil to fuel land, sea, and air transportation. While India has significant reserves of coal, it is relatively poor in oil and gas resources. Its oil reserves amount to 0.5 per cent of the global reserves. The World Energy Outlook, published by the International Energy Agency (IEA), projects that India's dependence on oil imports will grow to 91.6 per cent by the year 2020, which would further lead to environmental degradation, unless managed sustainably.<sup>15</sup>

Further, due to uncontrolled urbanization, environmental degradation has been occurring very rapidly and causing shortages of housing, worsening of water quality, excessive air pollution, noise, dust and heat and problem of disposal of solid wastes and hazardous wastes. It is increasingly evident that poor environmental quality has adversely affected human health. Environmental factors are estimated as being responsible in some cases for nearly 20 percent of the burden of disease in India, and a number of environment-health factors are closely linked with dimensions of poverty (e.g. malnutrition, lack of access to clean energy and water). It is also evident that the environmental protection measures would be difficult to accomplish without extensive awareness raising, and education, on good practices with respect to public and private behaviour.<sup>16</sup>

### **3. Sustainable Development in India: Some Reflections**

#### *A. Planning Process : Balancing Environmental Concerns with*

---

13 Gurdip Singh, *Environmental Law in India*, 5 (2005).

14 *Asian Development Outlook*, 2005, online: [www.adb.org/documents/books/ado2005/default.asp](http://www.adb.org/documents/books/ado2005/default.asp), visited on 12 jan., 2015.

15 See, *State of Environment*, Report, 2009, available at [www.envfor.nic.in](http://www.envfor.nic.in) visited on 2<sup>nd</sup> feb.2015.

16 *Ibid*; See also, *National Environment Policy*, 2006; <http://www.envfor.nic.in>. visited on 2<sup>nd</sup> Dec 2014.

### *Developmental Goals*

Planning is an important steering instrument of India's democracy. It is based on an iterative process involving interaction between the centre, the state and the local bodies. Multiple stakeholders participate in the planning process.<sup>17</sup> The Five Year Plans played a dominating role in shaping various objectives of the government. Environment protection was one of such important objectives reflected in the objectives of Five Year Plans. In particular, the Sixth Five Year Plan (1980-85) saw the inclusion of an entire chapter on 'Environment and Development' that emphasized sound environmental and ecological principles in land use, agriculture, forestry, marine exploitation, mineral extraction, fisheries, energy production and human settlements.<sup>18</sup> The plan emphasized that the environment should form a crucial guiding dimension for development plans and programmes in each sector.<sup>19</sup> The Department of Environment under Government of India was also set up in pursuance of directions given by Tiwari Committee which was constituted to look into the administrative and legislative aspects of environmental protection.<sup>20</sup>

The basic approach adopted by the Seventh Five Year Plan (1985-90) emphasized on sustainable development in harmony with the environment. The Plan saw a more significant progress in environment and ecology and set up the 'Ganga Action Plan' to prevent the pollution of the river water of *Ganga* and to restore its purity. The Plan stressed on development that would benefit people, particularly the poor, by providing for their basic human needs and rising aspirations.<sup>21</sup>

The Eighth Five Year Plan (1992-97) gave an important place to the environment by moving it to the fourth category of subjects examined in the text. The Plan states that 'the causes for environmental degradation are many. The prevailing conditions of poverty and underdevelopment themselves create a situation where people are forced to live in squalor and further degrade their environment. On the other hand, the process

17 "India Case study: Analysis of National strategies for Sustainable Development", Online: <http://www.iisd.org>.visited on 10<sup>th</sup> Dec 2014.

18 Sixth Five Year Plan (1980-85), Planning Commission, Government of India, p.346; Online: <http://planningcommission.nic.in>.visited on 12<sup>th</sup> Dec.2014.

19 Ibid., Dwivedi, "India's Environmental Policies, Programmes and Stewardship, 549(1997).

20 Chhatrapati Singh, "Legal Policy for Environmental Protection" in P.Leelakrishnan (Ed.) *Law and Environment*, 27 (1992).

21 Seventh Five Year Plan, Planning Commission, Government of India, p.385; Online: <http://planningcommission.nic.in>.visited on 17<sup>th</sup> dec 2014 D.S. Senger, *Environmental Law*, 6 (2007).

of development itself may damage the environment, if not properly managed. In the final analysis, removal of poverty, generation of employment, raising the levels of education and increasing awareness of the people are crucial for protection of environment'.<sup>22</sup> The report of this plan considered the possibility of converting the Ganga Action Plan into the proposed National River Action plan during the plan period. The government also proposed to begin the Yamuna and Gomati Action Plan at the second stage of Ganga Action plan. The plan called for strengthening the functioning of Central as well as the State Pollution Control Boards and formulating comprehensive and realistic standards for environmental pollution, procedures and standards for assessing environmental damage and greater emphasis on public participation and encouraging public vigilance.<sup>23</sup>

The Ninth Five Year Plan (1997- 2002) explicitly recognized the synergy between environment, health and development and identified one of its core objectives the need for ensuring environmental sustainability of the development process through social mobilization and participation of people at all levels. The Plan speaks about the development of a shared vision and commitment to the national objectives and development strategy by inducing the various economic agents to function in a manner consistent with national objectives.<sup>24</sup> More importantly, the plan also recognizes the symbiotic relationship between the tribals and the forest and gives a special focus to the tribals and other weaker sections living in and around the forest.<sup>25</sup>

The Tenth Five Year Plan (2002-07) reviewed the achievements of the previous plans and prepared strategy to bring 25 percent of the country's area under forest/tree cover by the end of the plan and 33 percent by the end of the next plan period. For the development of forest area, the plan suggested certain initiatives to be taken which included laying emphasis on management and rejuvenation of natural forests.<sup>26</sup> The plan emphasized on the need to realign development priorities to take into

---

22 Eighth Five Year Plan (1992-97), Planning Commission, Government of India, p. 92.

23 *Ibid*; D.S. Senger, op.cit, p.6.

24 Ninth Five Year Plan (1997-2002), Planning Commission, Government of India, p. 951; Online: <http://planningcommission.nic.in>.visited on 20<sup>th</sup>Jan 2015.

25 *Ibid*.

26 Tenth Five Year Plan, 2002-07, Planning Commission, Government of India, p.1061; Online: <http://planningcommission.nic.in>.visited on 20<sup>th</sup> Jan 2015.



account ecological imperatives, including the protection of wild species, which sustain and enhance natural habitats.<sup>27</sup> In the chapter dealing with 'Forests and Environment' the Plan states:

*Sustainability is not an option but imperative. For a better world to live in, we need good air, pure water, nutritious food, healthy environment and greenery around us. Without sustainability, environmental deterioration and economic decline will be feeding on each other leading to poverty, pollution, poor health, political upheaval and unrest. The environment is not to be seen as a stand-alone concern. It cuts across all sectors of development. We need to tackle the environmental degradation in a holistic manner in order to ensure both economic and environmental sustainability. This is a most challenging task for the country and in particular for our planners and policy makers today.*<sup>28</sup>

As per the Eleventh Five Year Plan (2007-12), protection of the environment has to be a central part of any sustainable inclusive growth strategy, particularly when consciousness of the dangers of environmental degradation has increased greatly. According to this plan, 'population growth, urbanization and anthropogenic development employing energy intensive technologies have resulted in injecting a heavy load of pollutants into the environment and more recently the issue assumed special importance because of the accumulation of evidence of global warming and the associated climate change that it is likely to bring.<sup>29</sup> For integrating environmental concerns into planning and developmental activities across all the sectors, the plan envisages that at the district level, the scheme of *Paryavaran Vahinis*, or committees of concerned citizens, should be revived to serve as environmental watchdogs. Public hearing was also proposed to be made mandatory for the activities specified in the Environment Impact Assessment Notification.<sup>30</sup>

On October 2012, the Indian government approved India's 12<sup>th</sup> Five Year Plan for 2012–2017, drafted by the Planning Commission, which sets

---

27 *Ibid.*

28 *Ibid.*

29 Eleventh Five Year Plan, (2007-2012), Planning Commission, Government of India, p.191. Online: <http://planningcommission.nic.in>. visited on 25<sup>th</sup> Jan. 2015.

30 *Ibid.*

a target of 8.2% growth during that period. The Plan makes clear that high growth requires supporting growth in energy and that the Indian government must take steps to reduce the energy intensity of production processes and also to increase domestic energy supplies as quickly as possible. The Government of India has set up an Expert Group on Low Carbon Strategy for Inclusive Growth. The Group has been given the mandate to develop a roadmap for India for low carbon development. The Group's recommendations are a central part of India's 12<sup>th</sup> Five Year Plan. The Plan has received final approval from the National Development Council.<sup>31</sup>

### *B. Environmental Policy Framework*

With a zeal to protect the environment and natural resources, the government has promulgated various policies and strategies from time to time. The policy statements, in themselves, are not enforceable in a court of law. However, these statements represent a broad political consensus and amplify the duties of government contained in Part IV of the Constitution. In the hands of a creative judge, these policies may serve as an aid for interpreting environmental statutes or for spelling out the obligations of government agencies under environmental laws.<sup>32</sup>The "National Water Policy", 1987 was a landmark in as much as it constituted the first attempt to provide a general framework to carry forward reforms within the water sector. The policy lay emphasis on drinking water as the first priority in water allocation and calls for development and exploitation of the country's groundwater resources and emphasizes judicious and scientific resource management and conservation on the

---

31 Online: <http://planningcommission.nic.in.visited> on 25<sup>th</sup> Jan. 2015.

32 Environmental protection and improvement were explicitly incorporated in the Constitution by 42<sup>nd</sup> Amendment in 1976. Article 48A in the chapter of 'Directive Principles of State Policy', declares that: *The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of country.* Art. 51A (g) in 'Fundamental Duties' chapter provided a similar responsibility on every citizen as follows: *It shall be the duty of every citizen to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures.* Together, these provisions highlight the national consensus on the importance of environmental protection and improvement and lay the foundation for jurisprudence of environmental protection in India; See, C.M. Jariwala, "The Constitutional 42<sup>nd</sup> Amendment Act and the Environment" in S.C. Aggarwal (ed.) *Legal Control of Environmental Pollution*, 14 (1980); and S. Divan and A. Rosencranz, *Environmental Law and Policy in India*, 37(2001).

basis of common policies and strategies.<sup>33</sup>

The “National Forest Policy”, 1988 aims to ensure environmental stability and maintenance of ecological balance including atmospheric equilibrium which are vital for sustenance of all life forms, human, animal and plant’ and to look upon the forests as ‘national asset to be protected and enhanced for the well being of the people and the nation’.<sup>34</sup> The distinguishing feature of the Forest Policy has been towards a new environment oriented approach towards forests in comparison to the old revenue obsessed attitude. It emphasized the environmental protection and conservation of forests, and thus accorded highest priority to ensure environmental stability. The rights of the tribal people in the development of forests was also taken care of by the Policy which declared ‘to protect the rights and concessions enjoyed by the tribals and other poor people who live near the forest and whose life revolves around forests and to develop minor forest produce with a view to sustaining the tribal population and generating employment and income’.<sup>35</sup>

The “Policy Statement for Abatement of Pollution”, 1992 provides a comprehensive approach to integrate environmental and economic aspects in development planning.<sup>36</sup> The objective of the policy is to integrate environmental considerations into decision-making at all levels by making efforts to prevent pollution at source; encouraging, developing and applying the best available practicable technical solutions; ensuring that the polluter pays for the pollution and control arrangements; focusing protection on heavily polluted areas and river stretches; and involving the public in decision making.<sup>37</sup> The policy also seeks to develop an integrated overview and organizational structure for decentralized environment impact assessments and environmental law enforcement based on cooperation from local authorities. The Policy calls for raising consumer awareness and dissemination of information relating to environmental

---

33 See, National Water Policy, 2002; online: [www.envfor.nic.in](http://www.envfor.nic.in), visited on 12 Feb., 2015; See also, Philippe Cullet, *Water Law, Poverty, and Development*, 93(2009); and UNDP: Human Development Report, 2006: Beyond Scarcity: Power, Poverty and the Global Water Crisis; Online: [www.undp.org](http://www.undp.org), visited on 12<sup>th</sup> Feb 2015.

34 National Forest Policy, 1988; Online: [www.envfor.nic.in](http://www.envfor.nic.in), visited on 23 Jan, 2015; See also, P. Leelakrishnan, *Environmental Law in India*, 40(2008), visited on 12<sup>th</sup> Feb 2015.

35 *Ibid.*

36 See, Policy Statement for Abatement of Pollution, 1992, Online: [www.envfor.nic.in](http://www.envfor.nic.in), visited on 2011 Jan 2015.

37 *Ibid.*

friendliness of the products.<sup>38</sup>

The “National Conservation Strategy and the Policy Statement on Environment and Development”, 1992 makes judicious and sustainable use of country’s natural resources so as to meet the basic needs of the people. Conservation Strategy is stressed as the key element of the policy for sustainable development and the same is to serve as a management guide for integrating environmental concerns with developmental imperatives.<sup>39</sup> The primary purpose of the conservation strategy and the policy statement is to reinforce our traditional ethos and to build up a conservation society living in harmony with Nature and making prudent and efficient use of resources guided by the best available scientific knowledge. The policy further lays down priorities and strategies for action in the field of population control by making it a national mission for the next decade and by prescribing a comprehensive program, with strong political backing and appropriate socio-economic measures.<sup>40</sup>

The “Wildlife Conservation Strategy”, 2002 aims that the wildlife and forests shall be declared priority sector at the national level and law enforcement agencies must ensure that those in poaching illicit trade in wildlife products, destruction of their habitat, and such other illegal activities are given quick and deterrent punishment. The strategy emphasizes the dire need to fully tap the potential in wildlife tourism and at the same time take care that it does not have adverse impact in wildlife and protected areas.<sup>41</sup> Further, the strategy calls for protecting interests of the poor and tribals living around protected areas to be handled with sensitivity and with maximum participation of the affected people. They should have access to the minor forest produce as these means of generation for these people is crucial for maintaining symbiosis to take up a forestation and conservation in new areas.

The “National Environmental Policy”, 2006 seeks to extend the coverage provided by the aforesaid policies, and fill in gaps that still exist, in light of present knowledge and accumulated experience. It is based upon

---

38 Ibid. Para 4.16; See also, S. Divan and A. Rosencranz, *Environmental Law and Policy in India*, 35(2001).

39 See, National Conservation Strategy and the Policy Statement on Environment and Development, 1992; online: [www.envfor.nic.in](http://www.envfor.nic.in) visited on 20<sup>th</sup> Jan 2015.

40 Ibid; See also, “Population in Sustainable Development” at [www.populationenvironmentresearch.org](http://www.populationenvironmentresearch.org)., visited on 24 feb., 2015.

41 See, Wildlife Conservation Strategy, 2002 at [www.envfor.nic.in](http://www.envfor.nic.in) visited on 25<sup>th</sup> Jan 2015.

three foundational aspirations: human beings should be able to enjoy a decent quality of life; humanity should become capable of respecting the finiteness of the biosphere; and neither the aspiration for the good life, nor the recognition of biophysical limits should preclude the search for greater justice in the world.<sup>42</sup> Environment has been defined in terms of value as comprising all entities, natural or manmade, external to oneself, and their interrelationships, which provide value, now or perhaps in the future, to humankind. Environmental concerns relate to their degradation through actions of humans.<sup>43</sup> The dominant theme of NEP is that while conservation of environmental resources is necessary to secure livelihoods and well-being of all, the most secure basis for conservation is to ensure that people dependent on particular resources obtain better livelihoods from the fact of conservation, than from degradation of the resource. The policy also seeks to stimulate partnerships of different stakeholders, i.e. public agencies, local communities, academic and scientific institutions, the investment community, and international development partners, in harnessing their respective resources and strengths for environmental management. The NEP has evolved from the recognition that only such development is sustainable, which respects ecological constraints, and the imperatives of justice. It urges that the policy objectives and principles are to be realized by concrete actions in different areas relating to key environmental challenges.<sup>44</sup>

### C. *The Legal and Regulatory Framework*

The legislative bedrock of environmentalism is based on three laws: the Environment (Protection) Act 1986, the Forest (Conservation) Act 1980 and the Wildlife (Protection) Act 1972. These three flagship laws are comprehensive umbrella legislations that provide the government with the requisite authority to undertake all manner of conservation and protection.<sup>45</sup>

Inspired by the Stockholm Conference, 1972, the Water (Prevention and Control of Pollution) Act, 1974 (Water Act) was enacted for the purpose of

---

42 See, National Environmental Policy, 2006; Online: <http://www.envfor.nic.in.visited> on 25<sup>th</sup> Jan 2015.

43 Arvind Jasrotia, "Environmental Protection and Sustainable Development: Exploring the Dynamics of Ethics and Law", *Journal of Indian Law Institute*, Vol. 49, No.1, 30-59 (2007).

44 See, NEP, 2006.

45 For text of the laws, visit: [www.envfor.nic.in.visited](http://www.envfor.nic.in.visited) on 10<sup>th</sup> Feb 2015.

prevention and control of pollution, and for maintaining or restoring the wholesomeness of water.<sup>46</sup> The Water Act was enacted at the time when the country had already prepared itself to be a part of industrialization and urbanization. The need was keenly felt for the treatment of domestic and industrial effluents before they were discharged into rivers and streams. Pollution of streams, rivers and other watercourses reduced the availability of portable water. In addition, it caused deterioration in the quality of vegetation and other living creatures in water including destruction of fish population which had far-reaching consequences upon the economy.<sup>47</sup>

Under the Water Act, water pollution is comprehensively defined as ‘such contamination of water or such alteration of the physical, chemical or biological properties of water or such discharge of any sewage or trade effluent or of any other liquid, gaseous or solid substance into water (whether directly or indirectly) as may, or is likely to, create a nuisance or render such water harmful or injurious to public health or safety, or to domestic, commercial, industrial, agricultural or other legitimate uses or to the life and health of animals or plants or aquatic organisms’.<sup>48</sup> The Water Act provided for the institutionalization of pollution control machinery by establishing Boards for prevention and control of pollution of water.<sup>49</sup> These Boards were entitled to initiate proceedings against infringement of environmental law, without waiting for the affected people to launch legal action. The Water Cess Act, 1977, supplemented the Water Act by requiring specified industries to pay ‘cess’ on their water consumption, thereby, augmenting the resources of the central and state boards for prevention and control of water pollution.

With the passing of the Air (Prevention and Control of Pollution) Act, 1981, the need was felt for an integrated approach to pollution control.<sup>50</sup> The Water Pollution Control Boards were authorized to deal with air pollution as well, and became the Central Pollution Control Board (CPCB) and the

---

46 See, Preamble, Water (Prevention and Control of Pollution) Act, 1974.

47 See, generally, P. Leelakrishnan, *Environment Law in India*, 159 (2008); See also, P.B. Sahasranman, *Handbook of Environmental Law*, 138(2009); Gurdip Singh, *Environmental Law in India*, 207(2005).

48 Water (Prevention and Control of Pollution) Act, 1974, Section 2 (e).

49 *Ibid*, Section 3 and 4; See also, sections 16 and 17.

50 The Air Act was enacted in order to implement the decisions of UN Conference on Human Environment, 1972, using Article 253 on the Indian Constitution; See also, P. Leelakrishnan, *Environment Law in India*, 170 (2008); P.B. Sahasranman, *Handbook of Environmental Law*, 117 (2009); Gurdip Singh, *Environmental Law in India*, 267(2005).

State Pollution Control Boards (SPCBs). Procedurally, the Air Act follows the basic structure of the Water Act with a Central Board and State Boards administering a system of consent orders, monitoring activities, and enforcement through fines and criminal prosecutions.<sup>51</sup>

The Environment (Protection) Act, 1986 (EPA) was passed, to act as an umbrella legislation and was designed to provide a framework for Central Government co-ordination of the activities of various Central and State authorities established under previous laws such as Water and Air Act.<sup>52</sup> The EPA vests powers with the central government to take all measures to control pollution and protect the environment. The EPA identifies the MOEF as the apex policy making body in the field of environment protection. The MOEF acts through the CPCB and the SPCBs. The CPCB is a statutory organization and the nodal agency for pollution control. The EPA in 1986 and the amendments to the Air and Water Acts in 1987 and 1988 furthered the ambit of the Boards' functions. EPA is also an 'enabling law', which articulates the essential legislative policy on environment protection and delegates wide powers to the executive to enable bureaucrats to frame necessary rules and regulations. Since the time EPA entered the statute book, the Act has served to back a vast body of subordinate environmental legislation in India. The Environment (Protection) Rules, 1986 facilitate exercise of the powers conferred on the Boards by the Act.<sup>53</sup>

Another significant legislative attempt was made to fashion the doctrine of 'strict liability' into law relating to handling of hazardous substances. Public Liability Insurance Act, 1991(PLIA) is one such law that is enacted to

---

51 Section 16 of the Air Act has enumerated a list of functions to be discharged by the CPCB as follows: to improve the quality of air and to prevent, control or abate air pollution in the country and giving advice to the Central Government regarding the same; plan a nation-wide program for the prevention, control or abatement of air pollution; co-ordinate the activities of the State Boards and resolve disputes among them; provide technical assistance and guidance to the State Boards; carry out and sponsor investigations and research and training of persons; organise through mass media a comprehensive program regarding the prevention, control or abatement of air pollution; collect, compile and publish technical and statistical data relating to air pollution and the measures devised for its effective prevention, control or abatement; lay down standards for the quality of air; collect and disseminate information in respect of matters relating to air pollution, etc.; Section 17 of the Air Act enumerates the functions of the SPCB identical to those of the Central board with in the territory of the State.

52 See, Gazette of India, Extraordinary, Pt.II, Sec.2,dated 7-5-1986.

53 See generally; Upendra Baxi, "Environment Protection Act: An Agenda for Implementation" (1987), Shyam Divans and Armin Rosencranj, *Environmental Law and Policy in India*, 66 (2001); P. Leelakrishnan, *Environment Law in India*, 197 (2008); See also, P.B. Sahasranman, *Handbook of Environmental Law*, 17(2009); Gurdip Singh, *Environmental Law in India*, 124(2005); D.S. Sengar, *Environmental Law*, 43(2007).

provide immediate relief to persons affected by accident occurring while handling any hazardous substance. The PLIA provides for immediate relief through public liability insurance to victims of accidents occurring while handling any hazardous substance. The most significant feature of the Act is that it imposes liability to give relief on principles of 'no fault'. There is no burden on the claimant to plead and establish that the death, injury or damage in respect of a claim was due to a wrongful act, neglect or default of any person. If the death or injury or damage to property is caused to any person (other than a workman) as a result of an accident caused while handling hazardous substance, the owner shall be liable to give relief as specified in the Schedule of the Act, which provides the maximum quantum of relief that can be granted in each case.<sup>54</sup>

The enactment of 'National Green Tribunal Act', 2010 for effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and other incidental matters, has indeed been a welcome step. However, the functioning of the NGTA will be tested in times to come.<sup>55</sup>

Forests help in maintaining the ecological balance. In India, we consider our forests a unique national treasure. Forests are responsible for India's rich biodiversity – India is one of the 12 'mega diverse' countries in the world. Our forests hold within them unique wildlife, flora and fauna, and are also a source of sustainable livelihoods to over 200 million people in our country. The Forest (Conservation) Act, 1980 (FCA) was enacted to contain the large scale deforestation and to provide for the conservation of forests and for matters connected therewith or ancillary or incidental thereto. Restriction on the de-reservation of forests or use of forest land for non-forest purpose is the essence of FCA. The FCA enables the Central government to constitute a committee to advise the government with regard to the grant of approval and matters connected with the conservation of forests.<sup>56</sup>

---

54 Public Liability Insurance Act, 1991.

55 Visit, <http://www.envfor.nic.in>. visited on 15<sup>th</sup> Feb. 2015.

56 For text, visit, [www.envfor.nic.in](http://www.envfor.nic.in). visited on 20<sup>th</sup> Jan. 2015. See also, Shyam Divans and Armin Roscencranj, *Environmental Law and Policy in India*, 64 (2001); P. Leelakrishnan, *Environment Law in India*, 39 (2008); P.B. Sahasranman, *Handbook of Environmental Law*, 188 (2009); Gurdip Singh, *Environmental Law in India*, 332(2005); D.S. Sengar, *Environmental Law*, 5(2007).



The Biological Diversity Act, 2002 ( BDA) was enacted to provide for conservation of biological diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the use of biological resources, knowledge and for matters connected therewith or incidental thereto.<sup>57</sup> Biological Diversity has been defined in the Act to mean ‘the variability among living organisms from all sources and the ecological complexes of which they are part and includes diversity within species or between species and of ecosystems’<sup>58</sup> and ‘biological resources’ has been defined to mean ‘plants, animals and micro organisms or parts thereof, their genetic material and by-products (excluding value added products) with actual or potential use or value, but does not include human genetic material’.<sup>59</sup> The Act prohibits, certain persons, without previous approval of the National Biodiversity Authority (NBA), to obtain any biological resource occurring in India or knowledge associated thereto for research or for commercial utilization or for bio-survey and bio-utilisation.<sup>60</sup>

The BDA enjoins Central Government to develop national strategies, plans and programmes for conservation and sustainable use of biodiversity, issue directions to State Governments to take immediate ameliorative measures if it has the reasons to believe that any area rich in biological diversity is subject to abuse or neglect and, wherever appropriate, integrate the conservation and sustainable use of biodiversity into relevant sectoral, cross-sectoral plans, programmes and policies.<sup>61</sup> The Central Government is also required to take measures for the environmental impact assessment of projects and regulate, manage or control the risks associated with the use and release of living modified organisms resulting from biotechnology and endeavour to respect and protect knowledge of local people relating to biodiversity through measures such as registration and *sui generis* system as per the recommendation of the National Biodiversity Authority.<sup>62</sup> The Central Government has also

---

57 Act No.18 of 2003; The Act was passed pursuant to the United Nations Convention on Biological Diversity, 1992 to which India was a party; online: <http://www.envfro.nic.in> visited on 20<sup>th</sup> Jan.2015.

58 Biological Diversity Act, 2002, Section 2(b).

59 *Ibid.*, Section 2(c).

60 *Ibid.*, The BDA defines ‘Bio-survey’ and ‘Bio-utilization’ to mean survey or collection of species, sub-species, genes, components and extracts of biological resource for any purpose and includes characterization, inventorisation and bio-assay., See, Section 3(I), BDA.

61 *Ibid.* Section 36(1), (2) & (3).

62 *Ibid.*, Section 36(4) & (5).

been empowered to notify threatened species, prohibit or regulate their collection, and take steps to rehabilitate and preserve these species and also in consultation with the NBA designate institutions as Repositories under this Act for different categories of biological resources.<sup>63</sup>

The Wildlife (Protection) Act, 1972 (WLPA) was passed by the Parliament for the purpose of protecting, propagating or developing wildlife and its environment. The WLPA provides for the setting up of National Parks and Sanctuaries where wildlife can receive protection. It also provides for State Wildlife Advisory Boards, regulations for hunting wild animals and birds, trade in wild animals, animal products and trophies and penalties for violating the Act.<sup>64</sup> The 2002 amendment provides for the creation of two new types of reserves, i.e. Conservation reserves and Community reserves. Conservation reserve is an area owned by the state Governments adjacent to national parks and sanctuaries for protecting the landscape, seascape and habitat of fauna and flora, as well as their traditions, cultures and practices. The declaration of these two types of reserves would be managed on principles of sustainable utilization of forest produce. The members of the local communities would be involved in their management through management committees. The amendment also provides for the constitution of National Wildlife Board to take up measures for the promotion and development of wildlife and forest and shall be responsible for impact assessment of various projects and activities on wildlife and its habitat.<sup>65</sup> The authority to enforce the WLPA is given to the Chief Wildlife Warden who is subject to directions from the state government.

#### D. *Judicial Activism*

In the field of environmental activism in India, the Judiciary has assumed a pro-active role of public educator, policy maker, super-administrator and more generally, *amicus* environment. The development of environmental law is largely the story of India's judiciary responding to complaints of its citizens against environmental degradation and administrative sloth. The Judiciary has rightly assumed a pro-active role of public educator, policy

---

63 *Ibid*, Sections 38 & 39.

64 See, preamble, Wildlife (Protection) Act, 1972; See also, P. Leelakrishnan, *Environment Law in India*, 67 (2008); P. B. Sahasranaman, *Handbook of Environment Law*, 222 (2009).

65 WLPA, Section 5(A)-(C).

maker, super-administrator and more generally, *amicus* environment. The Indian judiciary many a times has taken recourse to environmental principles to overcome administrative indifferences and fix the lacunae in the existing legislation.<sup>66</sup> The judiciary has also sought the help of international laws and principles to reinforce, strength and widen the environmental jurisprudence in India. The International concept of 'sustainable development' is one such principle on which judiciary, especially the Supreme Court, has relied upon to sustain the growth of environmental jurisprudence. In fact, many environmental principles and remedies not covered by existing environmental legislations have been culled out from the sustainable development concept, for example, the Supreme Court has found out that intergenerational equity, use and conservation of natural resources, environmental protection, polluter pays principle, precautionary principle, obligation to assist and co-operate, eradication of poverty and financial assistance to the developing countries are some of the principles that have emerged out from the concept of sustainable development. The Indian judiciary for strengthening and supplementing the existing environmental legal regime has duly called in to rely upon the aforesaid principles of sustainable development.<sup>67</sup>

Further, the right to live in a clean and healthy environment as a fundamental right is a novel innovation by the higher judiciary in India. Over a period of time, this right has attained the status of a fundamental right zealously protected by the Constitution of the India. Right to life, being the most important of all human rights, implies the right to live without the deleterious invasion of pollution, environmental degradation and ecological imbalances. The Supreme Court strengthened Article 21 of the Constitution of India by recognizing several unarticulated liberties within its ambit. Specifically, the Court interpreted the right to life and personal liberty to include the right to a wholesome environment. In the evolution of environmental jurisprudence in India, the Courts have evolved new doctrines to cope with the menacing problem of environmental pollution and degradation and struck a right balance between development and

---

66 See, generally, S. Diwan and A. Rosencranj, *Environmental Law and Policy in India*, 1(2001); B.C. Nirmal, "Environmental Law", *Annual Survey of Indian Law*, Vol. XL, pp.591-617 (2004); P.Leelakrishnan, *Environmental Law in India*, 273(2008).

67 Arvind Jasrotia and Rinku Gupta, "Development of Environmental Jurisprudence in India: An Overview", *MDU Law Journal*, Vol. XIII, pp.56-78 (2008).

environment.<sup>68</sup>

#### 4. Concluding Observations

From a perusal of the aforementioned initiatives, it can be safely said that India has embarked upon an ambitious programme that reflects the importance of environment protection, conservation of natural resources and promotion of sustainable development. Over the years, together with spreading of environmental consciousness, there has been a change in the traditionally-held perception that there is a trade-off between environmental quality and economic growth as people have come to believe that the two are necessarily complementary. This momentum should be maintained by making constant endeavour to strengthen the policy and regulatory frameworks that govern the environment and forests as well as by promoting integration of environment and development concerns that will lead to the fulfillment of basic human needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future. □

---

68 See generally, *Municipal Council, Ratlam v. Verdichand*, AIR 1980 SC 1622 for greening the law of public nuisance; *Damodhar Rao v. S.O. Municipal Corporation Hyderabad*, AIR 1987 AP 171 and *M.C. Mehta v. Union of India*, AIR 2002 SC 1696 for upholding Fundamental Right to a clean and healthful environment; *Rural Litigation and Entitlement Kendra Dehradun v. State of UP*, AIR 1985 SC 652, *Indian Council for Enviro-Legal Action v. Union of India*, 1996 5 SCC 281 and *Narmada Bachao Andolan v. Union of India*, AIR 2000 SC 3751 for application of the concept of Sustainable Development; *T.N. Godavaraman Tirumulpad v. Union of India*, AIR 1997 SC 1228 for protection of Forests; *Consumer Education and Research Society v. Union of India*, (2002) 2 SC 599 and *K.M. Chinnappa v. Union of India*, AIR 2003 SC 724 for application of the principle of Inter-Generational Equity; *A.P. Pollution Control Board v. Prof. M.V. Nayudu*, AIR 1999 SC 812; *Indian Council for Enviro-Legal Action v. Union of India*, AIR 1996 SC 1446, *Vellore Citizens Welfare Forum v. Union of India*, AIR 1996 SC 2715 and *S. Jagannath v. Union of India*, AIR 1997 SC 811 for application of the Polluter Pays Principle, Precautionary Principle and concept of Sustainable Development; *MC Mehta v. Kamal Nath*, 1997 (1) SCC 388 for application of Public Trust Doctrine; *M.C. Mehta v. Union of India*, AIR 1987 SC 1086 for application of Absolute Liability Principle.

# Proposed Suggestion for Amendments under Negotiable Instrument Act, 1881

*R.N. Chaudhary*<sup>1</sup>

Negotiable instruments i.e. promissory notes, Bills of Exchange and cheques are instruments of credit and used as a means of payment as well. Out of these cheque has gained tremendous acceptance and importance in commercial and non commercial transactions. It is so widely accepted as a means of payment like money that we cannot think over money transactions without cheques. Nowadays cheque has become part and parcel of monetary system. It also has great impact on economic scenario of the country. It is said that negotiable instruments has acted as institution that oiled the wheels of trade and commerce which facilitated quick and prompt deals and transactions.

The law governing the negotiable instruments is contained in the Negotiable Instruments Act, 1881. This act is still applicable except with certain minor amendments.

But a very major and significant amendment was made in the year 1988 by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 w.e.f. 01-04-1989. The said act inserted sections 138 to 142 in the said Act. To make the amended provisions more effective the Act was further amended in the year 2002, inserting further sections 143 to 147.

By the Amended Act, 1988 a new chapter XVII was added under the heading “OF Penalties in case of Dishonour of Certain Cheques for insufficiency of Funds in the Accounts” i.e. making dishonour of cheques in cases of insufficiency of funds in the accounts of the drawer an offence.

## **The main objects and reasons of amending the provisions are:**

1. To encourage the culture of use of cheques and,
2. To enhance the credibility of the cheques in commercial transactions.

These provisions have brought revolutionary changes in the law of cheques. We can imagine the change by taking that before this amendment hardly a case used to come before any of the High Courts. But after the amendment courts have flooded with the cases relating to dishonour of cheques. Now we have leaving apart of High Courts there are catena of cases every month from the Supreme Court.

---

1 Ex. Head & Dean, Professor of Law get a Award Shikshakshree by U.P. Government

Though, this aspect is nebulous but developing very fast by new principles formulated by the courts. The Apex Court has established certain principles such as revalidation of stale cheques, deeming liability of drawer, deeming dishonour i.e. “stop payment”, “Account closed”, and successive presentment of cheques etc. These rulings have significantly enriched the subject, so they should be incorporated in the statute.

Digital Signature i.e., Debit Cards, Credit Cards, ATM, (Automated Teller Machine), E-cheque i.e., paperless cheque (through computer cheques), fishing of cheques, identifying of theft are some of the emerging issues of the cheques.

The fact of sheer pendency of a huge number of cases u/s 138 of the Negotiable Instrument Act has paralyzed the working of the criminal courts in the country, has been highlighted by the Indian Law Commission of India and recommending the establishment of Fast Track Courts (FTCs) to dispose of over 38 Lack Pending cases of bouncing of cheques.

Serious concern has also been expressed by Hon’ble former Chief Justice of India Justice K.G.Bal Krishanan as well as Hon’ble Former Chief Justice Shri P. Sathashivam of the Supreme Court on consuming valuable times of High Courts and the Supreme Court for adjudicating of dishonour of cheques, they have also advocated for FTCs for disposal of cases of dishonour of cheques.

The author has witnessed certain anomalies and fallacies in the Act, so he has suggested the following amendments in the Act<sup>2</sup>;

1- As to the term “payee” “holder” “holder in due course”: The related sections are 7,8,and 9 respectively as:

“payee”- The person named in the instrument to whom or to whose order the money is by the instrument directed to be paid, is called the “payee”.(S.7)

“holder”- The “holder” of a promissory note, bill of exchange or cheque means any person entitled in his own names to the possession thereof and to receive or recover the amount due thereon from the parties thereto.(S.8)

“holder in due course”- The “holder in due course” means any person who for consideration become the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or endorsee thereof, if payable to order.”(S.9)

(i) The “payee” and “holder in due course” has been put at par for the purpose of Sections 138 and 142 of the Act “holder” has been

---

2 R.N. Chaudhary : law relating to cheques, pp. 485, 486

expressed differently. It cannot be said that a payee cannot be the holder of the instrument, so payee should also be included within the definition of holder under section 8.

So far as a “payee” and a “holder” in general they are taken as same person. But a difference between the two is seen in the cases of bearer instruments (cheque) as well where it mentions no name of any specific person. For example:

A bearer cheque contains: “pay to ‘C’ or bearer”. Here ‘C’ will be payee as well as holder of the cheque. But where the cheque contains only, “pay to bearer” and suppose ‘C’ holds the cheque. Here ‘C’ will be called only ‘holder’ not the ‘payee’. This difference of ‘payee’ and ‘holder’ also apparent in case of order instrument. The person named in the order instrument for payment will be ‘payee’ as well as ‘holder’ of the cheque. But an ‘endorsee’ will be called only holder not ‘payee’ so also heirs of the payee will be called only ‘holders’.

- (ii)** This creates a doubt in the minds of others. There is no such doubt seen under common law because the definition of the holder includes payee as well. Section-2 of English Bill of Exchange Act, 1882 defines ‘holder’ as:

“Holder means the payee or endorsee of a bill or note who is in possession of it, or the bearer thereof.”

Thus, definition of ‘holder’ under Indian law is obscure and ambiguous where as definition under common law is simple and it also includes ‘payee’ and ‘endorsee’

Therefore, it is suggested that the definition of ‘holder’ under Section.8 of the Negotiable Instrument Act, 1881 should be rewritten on the pattern of English Bill Of Exchange Act, 1882.

This question has also been discussed by the Kerala High Court in *P.N. Gopinath v. Divdasan Kunju*<sup>3</sup> case.

- (iii)** There seems a fallacy in definition of ‘holder in due course’ as given, under Section 9 in respect of cheque. This need amendment in ‘holder in due course’ because this is very significant for the purpose of Ss. 138 and 142 of the Act.

Having in view of the definition given under Section 9; for becoming holder in

due course the following condition must be fulfilled;

- (a) The person concerned must have become, for consideration:
  - (i) The possessor of a cheque when it is payable to bearer; and
  - (ii) The payee or endorsee there of when it is payable to order.
- (b) That he became the holder of the instrument before the amount mentioned in it became payable; and
- (c) That he became the holder of the instrument without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.

The phrase used in the condition (b) “the amount... Become payable” is relevant here which constituted one of the essential condition to be a holder in due course. This condition is not applicable since a cheque by its nature always payable on demand. Thus, a cheque become payable immediately after the issue. The reason of this fallacy is obvious because Section 9 defines holder in due course in relation to promissory note, bill of exchange and cheque at one place together. There is fundamental difference between note and bill on one side and cheque on the other side. The former becomes payable when presented for payment i.e., payable only after maturity.

But in latter case i.e., as to cheque principle of maturity does not apply since it is payable immediately its date of issue. Thus, condition as above (b) does not apply to cheque. Therefore, strictly the provisions of section 9 there will be no holder in due course in case of cheques. In order to apply to make application of this condition an amendment in section is required as follows:

- (i) That the holder in due course should be defined separately:
  - (a) As to promissory note and bill of exchange, and
  - (b) As to cheques
- (ii) As to cheques it should be provided ‘after the validity period’ or ‘before became stale’ in place of ‘before the amount become payable’. It is also significant to note that the phrase ‘before dishonour’ will not be appropriate because cheque may be presented successively for payment irrespective of previous dishonour because successive presentment of cheque for payment before the validity period, till it is paid is permissible and lawful<sup>4</sup>.

---

4 R.N. Chaudhary : law relating to cheques, pp.79,85.



Therefore, an amendment is necessary under Section 9, the words 'before become stale' may be substituted to 'before the amount became payable' in case of cheque.

Further, following may be taken into consideration<sup>5</sup>.

The remedy under the act is available only to the "payee" or "holder in due course". It is evident by the perusal of Section 138(b), (c) and Section 142(a) of the Act. Section 138(b) says that "the payee or the holder in due course of the cheque, as may be makes a demand for the payment..." Section 138(c) says that the said amount of money to the payee or holder in due course of the cheque.

Section 142(a) says that "no court shall take cognizance of any offence punishable under Section 138 except upon a complaint in writing made by the payee or the holder in due course of the cheque".

Thus, 'holder' has no locus standi under Section 138 and Section 142 of the Act. But there seems ambiguity having in view the provisions of Section 118(a) and (g) as well as Section 139 of the Act.

Section 118(a) provides presumption as to consideration.

Section 118(g) says "until the contrary is proved presumption shall be made that the holder of the negotiable instrument is a holder in due course". Further section 139 provides that that it shall be presumed, unless the contrary is proved, the holder of the cheque received the cheque for the discharge, in whole or in part, of any debt or other liability.

The cumulative effect of Section 118(a), 118(g) and 139 is that holder may be considered as a holder in due course unless contrary is proved.

Keeping in view the above provisions my submission is that holder may also be given locus standi under section 138(b), 138(c) and Section 142(a) of the Act.

It is therefore, suggested that by suitable amendment 'holder' be inserted before "payee or holder in due course" under Section 138(b), 138(c) and 142(a) of the Act.

2. On reading of provision of Section 74 and 31 together a fallacy is apparent, in Section-74. According to author's view Section 74 is complete in itself,

---

5 Dr.S.L. Chaudhary: New Horizon to the Dishonour of Cheques.

which makes mandatory provision for presenting a cheque for payment within a reasonable time and this makes absolute duty on the holder to present the cheque for payment without ascertaining the fund position of the drawer in the bank unless there is a public notification regarding payment by the drawer or the drawee. Therefore, the opening words of Section 74 i.e., 'subject to the provision of Section 31' be deleted and it should be added in beginning of Section 31<sup>6</sup>.

The reason of such amendment is obvious that provisions of Section 74 are complete in itself and they are not subject to provisions of Section 31 whereas provisions of Section 31 are subject to provisions of Section 74.

- 3- The heading of Section 49 and 55 is the same i.e., 'conversion of endorsement in blank into endorsement in full', which creates anomaly in the minds of readers. The heading of Section 55 is having in view the contents of it. Thus, by amending the heading of Section 55 this anomaly will be removed<sup>7</sup>.

Dr.S.L.Chaudhary has also expressed the same view<sup>8</sup> and she has suggested that provisions of Section 49 and 55 be provided at one place as under:

Provisions of section 49 be provided as Section 49(1) and provisions of Section 55 as Section 49(2) and Section 55 be deleted by doing this the purpose of both Sections 49 and 55 will be fulfilled without harming contents and scope of the both sections.

4. As to duration of negotiation/endorsement of instruments:

Under Section 50 we find a fallacy as to duration of negotiation of instruments. Since Section 60 provides duration of promissory notes, bill of exchange and cheque together though being different as to maturity. A Cheque by its nature matures for payments from its dates of execution (writing or drawing) and therefore, to be paid at any times before it becomes stale (expiry of validity period i.e. 3 months). Whereas note and bill may become mature at the beginning if payable on demand or after maturity if payable otherwise on demand. There is rule of maturity of note and bill in the Act which does not apply to cheques.

Note and bill are valid after maturity or till payment subject to law of

---

6 R.N. Chaudhary : law relating to cheques, pp.155, 156

7 Ibid pp. 139, 485.

8 Dr.S.L. Chaudhary: New Horizon to the Dishonour of Cheques

limitation whereas a cheque is valid after its date drawing till its validity period i.e. 3 months and after 3 months it becomes stale. Under this contradictions if duration of negotiation of note, bill and cheque is provided together such fallacy will be obvious.

Therefore, there is need of separate provisions under Section 60 as to duration of negotiation for cheques<sup>9</sup>.

5. As to endorsement under Section 51- “who may negotiate”:

Section 51 is wrongly drafted because it says: “every sole maker, drawer, payee or all of endorsee or all of several joint makers, drawers, payee’s or endorsee may negotiate or indorse the same.”

The question is how a maker or drawer or all of several joint makers or drawers can endorse the instruments when instruments is in possession of the payee, holder or holder in due course? The maker/drawer is the creator of the instruments. Thus, it needs amendment in the Section 51 for removing the words ‘the maker, drawer and joint makers or drawers’.

The explanation to Section 51 deals with the principles of “negotiation back”. It provides:

*“Nothing in this Section enables a maker or drawer to indorse or negotiate unless he is in lawful possession or is holder thereof”. It means where maker/drawer of an instrument becomes lawful holder i.e. being endorse, then he can indorse but not as a maker or drawer.*

*Dr. Avtar Singh’s view also finds support of author’s suggestions. Ordinarily the maker of a note and drawer of a bill cannot indorse but if any of them has become the holder in his own right, he may indorse the instruments. In such situation we can properly term it ‘re-issuing of the instrument’<sup>10</sup>.*

The same anomaly has been expressed by Dr. S.L. Chaudhary.

6. As to death of the holder:

On the death of the drawer banks stop payment of cheques. Therefore, endorsement thereof will be of no effect. There is no specific provision as to this in the Act. So, specific provisions are needed to this effect.<sup>11</sup>

7. An anomaly has been surfaced in the view of the judgment of the Supreme

9 Ibid pp. 135, 486

10 Dr Avtar Singh: Law of Banking & Negotiable Instruments. P 251.

11 Ibid p. 486

Court in the light of the words used “of the said amount of money” occurring under section 138(b) of the Act. *In Suman Sethi v. Ajay K. Churiwal*<sup>12</sup> AIR 2000 SC 828 the Supreme Court held that notice of demand should not contain anything more or less than what is due under the cheque.

Therefore, in the light of the above judgment the words “of the amount of money of the cheque” be substituted in place “of the said amount of money”<sup>13</sup>. The same amendment has also been suggested by Dr. S.L. Chaudhary in her Ph.D. Thesis at page 453.

**8. Provisions of Section 60 creates wrong impression to the readers in following two ways:**

*Firstly*, the words “except by the maker, drawee or acceptor after maturity” give impression that negotiable instruments can be negotiated by the maker, drawee, acceptor after maturity. But how can it be?

*Secondly*, there is different rule of maturity of cheque from a note and bill. A cheque is at maturity for payment since the date of its issue whereas note and bill is at maturity from the date of its issue if made payable on demand like a cheque. But a note or a bill made payable otherwise than on demand is at maturity according to the provisions of Sections 22 to 25 of the Act. These provisions do not apply to cheques.

Thus, as to maturity there is a fundamental difference between cheque and note or bill. A cheque remains valid till the period of 3 months from the date of its issue. There after it becomes stale and cannot be negotiated.

I, therefore suggest following amendment in Section 60-

- (i) The words “except by the maker, drawee or acceptor after maturity” may be deleted from Section 60.
- (ii) A proviso may be added under Section 60 that a cheque may be negotiated during its validity period before payment or satisfaction.
- (iii) A proviso further be added that- ‘with the death of the drawer the right of endorsement of the holder will come to an end provided that the notice of death comes into the knowledge of the holder.’”

**9. There has been controversy as to the words used under clause (a) of Section 138 “the bank” for the purpose of presentment of cheque i.e., ‘collecting bank’**

---

12 A.I.R 2000 SC 828.

13 Ibid p. 486

or 'drawee bank' or 'both banks'. This controversy has now been resolved by the Supreme Court in a worth noted case *Shri Ishwar Alloy Steels V. Jayeswal NECO Ltd*<sup>14</sup>. AIR 2001 S.C.1161 'the bank' means 'drawee bank'.

In the view of the above decision of the Supreme Court clause (a) of Section 138 be amended as:

The words "the bank" be substituted with "drawee bank".

**10. The Act does not mention about 'stale cheque' and its revalidation.**

For the first time Supreme Court has held in *Veera Exports v. V.T. Kalavathy*<sup>15</sup> AIR 2002 S.C. 38, that a cheque which has become invalid because of the expiry of its validity period could be made valid by alteration of date by drawer. In the light of the above judgment it is therefore, suggested that the specific provision be made in by adding a new Section 17A after Section 17 as follows:

"A cheque becomes stale after the expiry of its validity period i.e. 3 months and such stale cheque can be revalidated by the drawer of the cheque".

**11. There is no provision under Section 138 of the Act as the repayment of the cheque amount to the payee or holder in due course.**

Section 138 only says that drawer be punished with imprisonment for a term which may extend to two years or with fine which may extend to twice of the amount of the cheque or with both. There is no provision of payment of cheque amount to the payee or holder in due course out of these fines. During the course of time it is experienced that the object of the act is not to punish the drawer but to correct him. Having this view the offence has been made compoundable.

Now the question is out of prosecution what does the complainant get?

Now say, only satisfaction of punishing him with imprisonment or fine or both. It is, therefore suggested that amendment in Section 138 is to be made by adding Explanation as follows:

*"Out of the fine amount pronounced by the court, the cheque amount shall be paid to the payee or holder in due course"*.

This amendment will be very significant as it will be inconsonance with the provision of Section 357 of the Code of the Criminal Procedure as well as judgment of the Supreme Court in a recent case of *Somnath Sarkar*

14 A.I.R 2001 SC 1161.

15 A.I.R 2002 SC 38.

*v. Utpal Basu*<sup>16</sup> wherein it has been ruled that the complainant should be compensated out of the fine so imposed on the drawer of the cheque under Section 138 of the Act. It should also be noted here that the Supreme Court in its earlier case of *R. Vijayan v. Baby*<sup>17</sup> has ruled that let there be amendment under Section 138 for the payment of compensation as there is no provision as to payment of compensation under Section 138. The complainant has to file a separate civil suit for payment of compensation. Thus, this amendment has been affirmed by the Supreme Court.

12. The cases of 'stop payment' and 'account closed' have been ruled by the Supreme Court in *NEPC Micon Ltd. v. Magma Leasing Ltd*<sup>18</sup>. As deemed dishonour. Thus, this may be specifically provided by amendment. It is, therefore, suggested that explanation be added under Section 138 as:

*“for the purpose of this section, dishonour of cheque due to ‘stop payment’ and ‘account closed’ be considered deemed dishonour”.*

13. The period within which the complaint under Section 142 must be filed within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138. This period of one month is short, so it may be increased to six months on the following two reasons:
  - (i) The drawer may get sufficient period for arranging payment of cheque amount and this will also minimize the cases before the court, and
  - (ii) One month for filing complaint is also short-period for filing complaint for the payee or holder in due course and if he fails to file complaint he will loose remedy under the Act. However, there is provision of condonation of delay on sufficient cause.
14. There has been found abuse of process of law by making false and frivolous complaints. To prevent such abuse stringent punishment be provided for frivolous and vexatious cases.

□

---

16 A.I.R 2014 SC 771

17 A.I.R 2012 SC 527

18 A.I.R 1999 SC 1952

# How Hindu Dharma Impacts on Justice Dispensation in India

Dr. Madhu Soodan Rajpurohit<sup>1</sup>

## **Abstract**

*Great and good men make the nation great, not the Parliament. Religion goes to the root of the matter. If it is right, all is right. Law, government politics are phases not the final way. The goal is beyond them. All great masters teach the same thing. Christ observed, the basis is not law, that morality and purity are the only strength.*

*Religion i.e. Dharma is inspired by ceaseless quest for truth which has many facets to release and free the soul from ceaseless cycle of birth and death to attain salvation. Dharma concerns to a broader range of human activities than law in the usual sense and includes ritual refinements, personal hygiene regimens, and modes of dress, in addition to court procedures, contract law, inheritance, and other more familiarly “legal” issues. In this respect, Hindu law reveals closer affinities to other religious legal systems, such as Islamic law and Jewish law.*

*The principles laid in the Indian Evidence Act are back bone for the churning of the truth in any kind of proceedings whether civil, criminal, constitutional or any other for justice dispensation in India. These principles are much based upon the principles laid by Maharshi Gautam, long back i.e prior to 600 B.C.in his “Nyay – Darshan” [Philosophy of Praman (to know the real truth)] –one of the basic book of Hindu Religion, its Philosophy and Jurisprudence.*

*Almost in all countries the family law/personal laws and the most customary laws are governed by the concerned religious practices. Dharma concerns both religious and legal duties and attempts to separate these two concerns within the Hindu tradition have been widely criticized. According to Rocher, the British implemented a distinction between the religious and legal rules found in Dharmasāstra and thereby separated dharma into the English categories of law and religion for the purposes of colonial administration.*

---

1 Principal, Government Law College, Sirohi, Rajasthan, India. [Affiliated to MLS University, Udaipur].

*Hindu law in its current usage refers to the system of personal laws (i.e., marriage, adoption, inheritance) applied to Hindus, especially in India. Modern Hindu law is thus a part of the law of India established by the Constitution of India.*

*Prior to Indian Independence in 1947, Hindu law formed part of the British colonial legal system and was formally established as such in 1772 by the then Governor – General Warren Hastings who declared in his Plan for the Administration of Justice. The substance of Hindu law implemented by the British was derived from early translations of Sanskrit texts known as Dharmaśāstra, the treatises (śāstra) on religious and legal duty (Dharma). The British, however, mistook the Dharmaśāstra as codes of law and failed to acknowledge that these Sanskrit texts were not used as statements of positive law until they chose to do so. Rather, Dharmaśāstra carries what may be called a jurisprudence, i.e., a theoretical manifestation upon practical law, but not a statement of the law of the land as such. Another sense of Hindu law, then, is the legal system described and imagined in Dharmaśāstra texts.*

## INTRODUCTION

I have discussed through this paper the impact and function of *Hindu Dharma* on justice dispensation in India in different ages with present context. I discussed the concept of State, Dharma, Religion, Justice, Law etc with various judgments of Courts, texts & verses of Epic, *Dharmaśāstra*, and Vedas; and the use of them for enacting the legislation as well as justice dispensation in India i.e *Bharat*.

The man travelled a long path to reach today. He has witnessed innumerable moments which turned him into hunting stage to the present so called modern civilized stage. At the beginning, the man was at hunting stage and was concerned only up to his hunger and to fulfill it by way of hunting.

Later, the second stage came with the discovery of fire. But up to that stage, there was no concept of property and no concept of State.

In both the stages man was a nomad and was dynamic in nature.

The third stage started with knowledge of agriculture, which made man static. It created the need for hoarding of grain, which introduces the concept of property. As soon as the concept of property came, it came with the evils related to it as well. And as a consequence, the concept of State came into existence.



## 1. State & Dharm (Religion)

There are two extreme views on the concept of State in western world , i.e. First – according to *Hegal* ‘State is march of God on earth’; whereas Secondly – according to *St. Augustine* – ‘State is an institution of sin’.

*Rawls* theory advocates Capitalism, which justifies utilitarian principles. According to *Bentham’s* view – Man seeks his own pleasure. Communism and Marxism are against Capitalism, but in practice they minimize the individual importance. Fascism overpowers an individual in the name of State.

It is also said that ‘Religion is cradle of human civilization’ God is father. We all are children of God. We all are equal. Why do we fight? Why do we misappropriate?

Human welfare is the real end of life.

Hindu’s believe in “वसुधैव कुटुम्बकम्” “*Vasudhaiva Kutumbkam*” means the whole earth is a family.

If we go back to the history of religion, it stresses faith rather than reason. With the passage of time, it created evils in the society and gave sanctions to wrong practices; *eg.*, castism, child marriages, *Sati Pratha. etc.*

Dharma regulates rights and duties of every individual in order to ensure peace and happiness for all, by harmonizing the interests of individuals and the society.

परित्यजेदर्थ कामौ यौ स्यातां धर्म वर्जितौ ।  
धर्म चाप्यसुरवोदकं लोक विक्रुष्ट मैव च ।<sup>2</sup>

“*Parityajedarthkaamou Yo Syatan Dharmavarjitou.*  
*Dharmam Chapyasukhodrkam Lokvikrustamev cha..*”<sup>3</sup>

“Reject wealth/money and desires which are contrary to Dharma. Reject also such rules of dharma obedience to which leads unhappiness of a few or which cause public resentment.”<sup>4</sup>

Later, State became hostile to religion. Religion was confined to religious practices and became a matter of faith and pure worship which resulted fairness in achieving social purposes. Religion stood against state with the advancement of science and technology, which resulted in lessening the influence and lost its hold on the society gradually.

<sup>2</sup> Manu Smriti –IV, 176

<sup>3</sup> Manu Smriti –IV, 176

<sup>4</sup> Manu Smriti –IV, 176

On the other hand, State, in spite of all its growth and development, in spite of all its developed structure and methods of control, failed to satisfy the heart and soul of human being and at times became oppressive and unjust.

Religion on the whole appeals to human soul and gives man the glimpse of ultimate of truth of life.

The process of human journey lies in reformation of religion without losing sight of its basic value which is ultimate satisfaction of human soul and realization of the ultimate truth which is necessary for fulfillment of human life.

Human culture and civilization with its material advancement and progress fails to satisfy human soul, therefore, man feels dissatisfied and disquieted and frustrated and also a vacuum.

Perforce, human culture and civilization feels the necessity of implementing basic ideals of religion which emerge as the basic human values of life – *i.e.* They are universal brotherhood, welfare and happiness of human being, respect and recognition of human personality as an end and not as a means and ultimate aim for welfare.

Therefore, religion represents the basic human values of human life, but because of various difficulties and handicaps it does not sufficiently realize that it needs the aid of political structure and advance the technology and scientific progress to realize the them ,and to achieve the aim of ultimate human welfare.

Therefore we cannot discard religion in toto, nor we can accept all the religious dogma and theological speculations without giving them a practical test and usefulness for fulfillment of human demands and satisfaction of human desires and also secure the successful survival of human race on this globe. Ultimately harmony of religion, culture, politics and sociology is necessary for the welfare of the people.

## **2. What is Justice.**

Justice is truth in action. How to implement truth in life or realization of truth? What is truth?—may be questions in life. This ideal is difficult to attain. Then what in life becomes the legal or technical justice, which is nothing but a failure of justice in large manner.

According to western history, Jewish first time gave concept of one God, and that god is Just God according to him. From their concept of Justice came into existence. They believed that law is command of God, and therefore, the concept

to do justice - the Retributory theory of punishment, i.e ‘Tit for tat’, was prevalent. But this concept was cruel and proved to be costly to the society by losing some of the jewels of the society for the petty accidental acts. Then came Deterrent theory, which was based on personal fear rather than justice. Later, birth of Christ – known as son of God – gave concept of ‘Love thy neighbour’ (Love your neighbour). And as a result, by the passage of time the arch comes from Retributory theory to Reformatory theory of punishment for doing justice.

Salmond says, “Justice is the end and Law is the means”. Justice is nothing but expression of truth in need and truth indeed”. Real truth is the ultimate truth of human life, which ultimately leads to human welfare, therefore all legal ideals and aims, political missions must ultimately lead to human welfare which is expressed in action as service of society, service of human beings and achievement of spiritual welfare.

The ultimate end of justice according to Hindu Dharma is “*Sat, Chit and Anand*” i.e. Truth, Consciousness and Welfare.

Justice we want to implement through law or through other means which assists or helps law.

### 3. What is Law?

*Mahatma Gandhi* said that law is that which conscience says.

According to Indian concept *Rit* (order) and *Sat* (truth/existence) comes together. Law without truth is useless; and truth without law carries no meaning.

Law does not merely oblige, it is obligatory.<sup>5</sup>

#### ***However, There are limitations of law:-***

1. Law is rough and ready measure. It cannot go into details, because it has the general for/ nature. It is made for all human being without looking into individual. Since every individual has unique characteristic and behavior, and therefore there must be separate treatment for individual.
2. Law anticipates situations and prescribes remedies, which leads to its failure; because all the times situation do not arise according to anticipated circumstances.
3. Law is static, while society is dynamic and changing. So every time we have to change law according to need and exigencies of the society.

<sup>5</sup> As what Prof. Upendra Baxi, expressed his view in ‘Teacher’s Training Programme-2008’ held at National Law University, Jodhpur, Rajasthan, India from 27<sup>th</sup> – 29<sup>th</sup> Dec, 2008.

Because law is an expression of words, and words cease to change inspite of all developed science of interpretation which resulted into failure of justice, which is inevitable at large level

4. Law is method of external control, it cannot go into minds of man, therefore, it has been said that the mind cannot be tried by a judge. All investigation and trials are confined to external symptoms and evidences.

And morality, real justice and aim of human welfare, law is bound to fail.

5. (Indian) Evidence ACT, 1872 is the basic document, which is based on the enquiry and the knowledge of real facts, but in spite of this real truth is unattainable. Therefore it depends on the probability, presumption and suppositions, which again vitiate the inquiry into truth of the matter.

#### 4. Dharma and Religion

It is difficult to define the concept of Dharma because it disowns – or transcends – distinctions that seem essential to American and Western world, and because it is based upon beliefs that are strange to them as they are familiar to the us *Hindus* and *Hinustanis* i.e. Indians. The word itself is used in several widely different senses, even in a work with one consistent style like code of Manu. The most general sense is provided by its roots, *dhr*, which signifies the action of maintaining, sustaining, or supporting and which has produced *fre* in Latin (*fretus*, depending upon, daring to) and *fir* (*firmus*, strong in physical and moral senses, whence solid, hard, durable).<sup>6</sup> *Dharma* is what is firm and durable, what sustains and maintains, what hinders fainting and falling.<sup>7</sup>

Applied to the universe, *Dharma* signifies the eternal laws which maintain the world. Dharma is so called because it protects (*Dhāranāt*) everything; *Dharma* maintains everything that has been created. *Dharma* is thus that very principle which can be maintain the universe.<sup>8</sup> This sense is related to very ancient conception which the Hindus shared with the Iranins, according to which the world is not product of a fortuitous concourse of elements, but is ruled by certain norms and sustained by an order necessary to its preservation. This order is an objective one, inherent in the very nature of things; and the gods are only its guardians.<sup>9</sup>

6 A. Ernout and A. Meillet, “*Dictionnaire étymologique de la langue latine*” (Paris, 1932), s.v. *firmus* and *fretus*.

7 Lingat, Robert, “*The Classical Law of India*”, Oxford University Press, Oxford India Paperbacks, Second Impression 1999, p. 3.

8 *Mahabharat*, Śāntiparv, 109, 59.

9 P. Masson-Oursel, “*Esquisse d’une histoire de la philosophie indienne*”, (Paris. 1923), 35-6 Cf L. Renou, *L’Inde classique*, ss. 1152-53.

धृतिः क्षमा दमोऽस्तेयं शौचमिन्द्रियनिग्रहः।

धीर्विद्या सत्यमक्रोधो दशकं धर्मलक्षणम् ॥<sup>10</sup>

*“Contentment, forgiveness, forbearance, non-attachment to worldly matters, non-avarice, purity, control or subjugation of senses, spiritual knowledge, truthfulness and being devoid of anger are the ten specific attributes of Dharma”.*<sup>11</sup>

अहिंसा सत्यमस्तेयं शैचमिन्द्रियनिग्रहः।

एतंसामासिकं धर्मम् चातुवर्ण्येऽब्रवीन्मनुः ॥<sup>12</sup>

*“Not indulging in violence against any one, truthfulness, non-stealing and not acquiring any wealth through immoral/illegal methods, control of senses and cleanliness of mind and body i.e., conformity in thought, word, and deed [Trikarana Shudhi] are the five rules of Dharma to be followed by all”.*<sup>13</sup>

Following of each one of the rules of Dharma is of utmost importance for securing peace and happiness and to avoid causing of civil or criminal injury to others. The first and the foremost rule is ‘Ahimsa’ [Non-violence] which means not inflicting mental or physical injury on fellow human beings. The second is to be truthful and honest in speech and action.

The third is the most important one which directs that one should not acquire money or wealth by illegitimate methods. The fourth one should be conformity with the thought in the mind, the words spoken and the action performed and the last one is control of senses by restraining them from indulging in wrongful action.

The real asset of man is his conduct and conformity with “Dharma”, which alone survives after his death and which one should leave for his children, other members of family and the nation as well as advised in manusmriti.

Encyclopedia of Britannica<sup>14</sup>, describes “Dharma” as under :-

“Dharma, Sanskrit DHARMA, Pali DHARMA, key concept with multiple meanings in Hinduism, Buddhism and Jainism

In Hinduism, Dharma is the religious and moral law governing individual conduct as one of the four ends of life, to be followed according to one’s class, status

10 Manu – Smriti- Ch-VI – 92.

11 Manu – Smriti- Ch-VI – 92.

12 Manu – Smriti- Ch-X – 63.

13 Manu – Smriti- Ch-X – 63.

14 Volume 4, Page 56.

and station in life. It constitutes the subject matter of dharmasutras, religious manuals that are the earliest sources of hindu law and in the course of time have been extended into lengthy compilations of law, the Dharmashastras.

In Buddhism, Dharma is the doctrine, the universal truth, common to all individuals at all times, proclaimed by Buddha. "Dharma", the Buddha and the Sangha (community of believers) make up the "*tri ratna*" or "three jewels" [" बुद्धम् शरणं गच्छामि । धम्मम् शरणं गच्छामि । संघम् शरणं गच्छामि ।। " *Budhdham Sharnam Gachchhami; Shagham Sharnam Gachchhami; Dhammam Sharnam Gachchhami*]; the primary statement of Buddhist belief.

Dharma is compendious term for all righteous code of conduct in every sphere of human activity which is meant to ensure peace, harmony and happiness to the entire humanity. It is not religion as wrongly translated into English. Religion is only a mode of worship of God by those who believe in God. There are numerous religions which have their own method of prayer or worship. Religion divides humanity, but, Dharma unites humanity. It applies to all human beings irrespective to their religion, including those who do not believe in God and consequently who do not belong to any religion.

There is no prefix "*Hindu*" to word "*Dharma*". It came to be added only after the word "*Hindu*" was given to the dwellers of Indus Valley, by foreign invaders and the country came to be called as Hindustan. Therefore Hindu dharma only means Dharma originated in our land that came to be originated in our land which came to be called Hindustan ie. Bharat, in the course of history and not religion.<sup>15</sup>

*Mr. Chidambra Kulakrni*, in *Hindu Dharma* said "*Dharma*" is that which holds society together. It is the honey that binds together all human beings and all creations. It is, therefore, basis of the wide universe. It, therefore, regulates all life, all activity. Indeed, it is the property of things animate and inanimate. Its scope and implication are unlimited. It denotes, justice, duty, right, law, code of honor, moral obligation and several virtues, a life of Dharma is a life of faith, discipline, dedication and harmony. Thus it furnishes, the proper perspective for life and culture. Dharma is the constitution of the Hindu society."

In Buddhist metaphysics, the term in the plural (*Dharmas*) is used to describe the inter related elements that make up the empirical world.

In Jaina philosophy, Dharma, in addition to be commonly understood as

---

15 Justice M Rama Jois, "*Ancient Indian Law- Eternal Values in Manusmriti*", Universal Law Publishing Co. Pvt. Ltd., 2002 Edition, p. 22.

moral virtue, also had the meaning - unique of Jainism- of an eternal “substance” (“*Dravya*”).

In *SR Bommai*'s<sup>16</sup> Case Supreme Court of India held..

*“... Democracy stands for freedom of conscience and belief, tolerance, mutual faiths, diverse creed, castes and cultures, secularism is the bastion to build fraternity and amity with dignity of person as its constitutional policy. It allows diverse faiths to flourish and make it a norm for tolerance and mutual respect between various sections of the people and to integrate them with dignity and fulfillment of cravings from self – realization of religious beliefs with larger national loyalty and progress. Rule of Law has been chosen as an instrument for social adjustment in the event of clash of interests, in a free society, law interacts between competing claims and continuing process to establish order with stability. Law should not only reflect social and religious resilience but has also to provide a lead by holding forth the norms for continuity for its orderly march towards and ideal egalitarian social order envisioned in the Preamble of the Constitution (of India). The culture of law, in the Indian Democratic Republic should be on Secular lines. A balance therefore has to be struck to ensure an atmosphere of full faith and confidence.*

## 5. Dharma & Law

The Supreme Court of India in *A.S. Narayana Deekshitulu v. State of Andhra Pradesh*'s<sup>17</sup> case held that:—

*“though Dharma is a word of wide meaning as to cover the rules concerning all matters such as spiritual, moral and personal as also civil, criminal and constitutional law, it gives the precise meaning depending upon the context in which it is used..... When ‘Dharma’ is used in the context of duties of the individual and powers of King (the State), it means constitutional law (“Rajdharmā”) Likewise when it is said that Dharma Rajya is necessary for the peace and prosperity of the people and for establishing an egalitarian society, the word Dharma, in the context of the word Rajya only means “Law” and Dharmarajya means “rule of Law” and not “rule of religion” or theocratic state.*

16 AIR 1994 SC 1918, para 114 at p. 2013.

17 *A.S. Narayana Deekshitulu v. State of Andhra Pradesh*, AIR 1996 SC 1765.

*Dharma in the context of legal and constitutional history, onlllly means, “Vyavhara Dharma” and “Rajdharna” evolved by society through the ages which is binding both on the King (the Ruler”) and the People (“the Ruled”).*

Justice and mercy, reward and punishment, are not to be indiscriminately exercised by Kings at their whims and fancies.<sup>18</sup>

The Vedas (or ‘Shriti’)<sup>19</sup> say “ Law is the King of Kings, far more powerful and rigid than they; nothing can be mightier than law, by whose aid as by that of the highest monarch, even the weak may prevail over the strong”<sup>20</sup>.

Supreme Court of India elaborately considered the significance of the word ‘Dharma’ in the context of the right of the state to project its powers regulating the administration of the religious institutions under law. Supreme Court held that “From that perspective, this Court is concerned with the concepts of Hindu Religion and Dharma. Very often one can discern and sense political and economic motives for maintaining status quo in relation to religious forms masquerading it as religious faith and rituals bereft of substantial religious experience. As sure, philosophers do not regard this as religion at all. They do not hesitate to say that this is politics or economic masquerading as a religion. A very careful distinction, therefore, is required to be drawn between real and unreal religion at any stage in the development and preservation of religion as protected by the Constitution. Within religion, there is an interpretation of reality and unreality which is completely different experience can take place only when free autonomy is afforded to an individual and worship of the infinite is made simpler, direct commission, the cornerstone of human system. Religion is personal to the individual. Greater the law bringing an individual closer to this freedom, the higher is its laudable and idealistic purpose. Therefore, in order that religion becomes mature internally with the human personality, it is essential that mature self – enjoy must be combined with conscious knowledge. Religious symbols

---

18 Kishkindha Kandam – Ramayana by Valmiki, [17 – 30].

19 Veda is also called ‘*Shruti*’. It consists of 4 parts – (1) Samhita (or Mantra), (2) Brahmanas, (3) Aranyaks, and (4) Upanishad. The Samhita consists of the Rigveda, the Samveda, the Yajurveda, and the Atharvaveda. Of these, the most important Samhita is the Rigveda. The Samveda is simply Rigveda set to music (though there are a few ‘Richas’ which are different). Two third of Yajurveda consists of ‘Richas’ from the Rigveda (the rest are texts relating to certain rituals). The Atharvaveda was at one time not even regarded as Veda, and Veda was then called ‘Trayi Vidya’ consisting of Rig, Sam and Yajur Vedas. Later on, however, the Atharvaveda was also accepted as Veda. – per Justice Markendey Katju, views expressed in his speech delivered at Bangalore at the inaugural fuction on a seminar on Purva *Mimāmsā* Darshan held on 9<sup>th</sup> February, 2002.

20 Satpath Brahman 14.4, 2.23 – Bradaranyaka Upanishad 1 – 4 – 14.



can be contra – distinguished from scientific symbols there can be repetition of dogmatism and conviction of ignorance. True religion reaching up to full reality of all knowledge, belief in God as the unity of the whole.

It was further held<sup>21</sup> that ‘Dharma’ is that which is indicated by the Vedas as conducive to the highest good, which sustains and ensures progress and welfare of all in this world and eternal bliss in the other world. The Dharma is promulgated in the form of commands. Therefore, Dharma embraces every type of righteous conduct covering every aspect of life essential for the sustenance and welfare of the individual and the society and includes those rules which guide and enable those who believe in God and heaven to attain Moksha (eternal Bliss). Rules of Dharma are meant to regulate the individual conduct, in such a way as to restrict the rights, liberty, interest and desires of an individual as regards all matters to the extent necessary in the interest of other individuals, i.e. the society and at the same time making it obligatory for the society to safeguard and protect the individual in all respects through its social and political institutions. Shortly put, Dharma regulates the mutual obligations of individual and the society. Therefore, it was stressed that protection of Dharma was in the interest of both the individual and the society. A ‘state of Dharma’ was required to be always, maintained for peaceful co – existence and prosperity of all.

The word ‘Dharma’ or ‘Hindu Dharma’ denotes upholding, supporting, nourishing that which upholds, nourishes or supports the stability of the society, maintaining social order and general well – being and progress of mankind; whatever conduces to the fulfillment of these objects is Dharma, it is Hindu Dharma and ultimately “*Sarva Dharma Sambhav*”.<sup>22</sup>

## 6. Why Dharma is Regarded Supreme ?

*Mahanarayana Upanishad* has given a very enlightening answer to the question Why Dharma is regarded as supreme in the following words : -

धर्मण पापमपनुदति ।

तस्माद्धर्मं परमं वदन्ति ॥

“*Dharmen Paapampanudati.*

*Tasmadhadarmam paramam vadanti ..*

“Dharma destroys sinful thoughts. Therefore, Dharma is supreme.”

21 *A.S. Narayana Deekshitulu's case*, AIR 1996 SC 1765, para 12.

22 *A.S. Narayana Deekshitulu's case*, AIR 1996 SC 1765, para 81.

Manu – Smriti<sup>23</sup> has said :

श्रुतिस्मृत्युदितं धर्ममनुतिष्ठन्हि मानवः।  
इह कीर्तिमवाप्नोति प्रेत्य चानुत्तमं सुखम् ॥<sup>24</sup>

*“A man who conforms to the rules of Dharma in his day to day life, not only gains fame in this World, but also attains eternal bliss after death.”*

*Sarvajna Narayana* in his classical work “Hitopadesh” [Wordly wisdom] has in his inimitable style indicated that observance of Dharma is the distinction between human beings and animal and has said thus :

आहारनिद्रा भय मैथुनं च सामान्यमेतत्पशुभिर्नराणाम्।  
धर्मो हि तेषामधिको विषेषो धर्मेण हीनाः पशुभिः समाना ॥ 25 ॥

*“Aahaarnidra Bhayamaithunan Cha Samanyametatpashubhirnaranaam.*

*Dharmo hi teshamdhiko vishesho dharmen heenaah pashubhi samaanaa..”*

“Consumption of food, sleeping, fear and sexual enjoyment are the common attributes of both man and animals. But the special attribute of man is his capacity to obey the rules of Dharma. Bereft of Dharma, man is no better than or is equal to, animal.”

The ancient Indian Legal Philosophy is a treasure house containing peerless gems in the form of legal concepts and jurisprudential theories, and it is a pity that no attempt has ever been made to make use of them in moulding or shaping the prevalent theories adumbrated by western thinkers to suit our genius and culture.<sup>25</sup>

If a man, through good *Samskara* and performs good deeds, cultivates fine thoughts in his mind, he up-thrust himself. He rises as high as he much he flirts with and executes the good thoughts. Consequently he falls as low as he works much on iniquitous thought and pamper in evil deeds. Therefore, realizing that in the final stage of life the exclusive and alone friend of an individual who survives is Dharma, every individual should conform to Dharma in every arena of his activity.

This is the only sure way of securing real success and real happiness in life. It is for this reason, in Bharatiya Culture, Dharma is given the supreme position.

---

23 Manu – Samriti, Ch-II, 9.

24 Manu – Samriti, Ch-II, 9

25 S.K.Purohit, “Ancient Indian Legal Philosophy – Its relevance to Contemporary Jurisprudential Thought”, Deep & Deep Publication, New Delhi, 1994, p. xi.

Thus, Dharma is the ultimate authority and the Rulers, then the Kings and now under the present system the Legislature, the Executive and Judiciary, occupy the penultimate authority and therefore have to function within the four corners of Dharma, which under the present system include the Constitution and the laws.<sup>26</sup>

This ancient belief is reflected in the immemorial slogan:

यतो धर्मस्तयो जयः।

*“Ultimate victory is always for Dharma”*

This slogan is very rightly incorporated in the emblem of the Supreme Court of Bharat (India)<sup>27</sup>.

*“VICTORY IS ALWAYS FOR DHARMA”*

## 7. Indian Scenario :

The Indian law has never been static as has been made to appear by some of the western jurists, chief amongst them being Sir Henry Maine, who characterized it as of a static character and under priestly domination. But he forget to see that “Throughout the middle ages, the study and development of law in Europe was exclusive privilege of clergy”<sup>28</sup>. Roscoe Pound contradicts, in his book ‘Jurisprudence’<sup>29</sup> (Vol. III, p.445), the study advanced by Henry Maine and maintains that growth of law is still possible if it is expanded by sages in sacred or quasi – sacred writings as was done in India. Where Hindu writers fashioned usage or the texts to their idea of ‘Right’.

Indian Jurisprudence originated in a theory of sovereignty which could boldly be asserted as the earliest of its kind based on social contract, a form of government, republican in the truest sense of the term, where the people had the unquestionable right to revolt against a tyrannical King. In Kautilya’s ‘*Arthshastra*’, mention has been made of a unique example of a King paying a fine for doing injustice. This secular example emerges from the notion that the King was the fountain of justice and that all Dharma emerged from the King. The King was the emblem of Law as if law was deified in the King. To some extent, in a limited sense, the English maxim that ‘King can do no wrong’ did not find applicability with the Kautilyan King.

26 Justice M Rama Jois , “*Ancient Indian Law- Eternal Values in Manusmriti*”, Universal Law Publishing Co. Pvt. Ltd., 2002 Edition, p.132-133.

27 Justice M Rama Jois , “*Ancient Indian Law- Eternal Values in Manusmriti*”, Universal Law Publishing Co. Pvt. Ltd., 2002 Edition, pp. 133.

28 S.K.Purohit, “*Ancient Indian Legal Philosophy – Its relevance to Contemporary Jurisprudential Thought*”, Deep & Deep Publication, New Delhi, 1994, pp. xiv – xv.

29 Roscoe Pound, ‘*Jurisprudence*’, Vol. III, p.445.

The impact of this old Hindu jurisprudential concept can be seen in the decisions<sup>30</sup> delivered during English rule, just after it and the present situation of being dilution of the English concept of “King can do no wrong”, however the doctrine is still adhere to and the courts applied it in a liberal manner and interpret ‘sovereign’ narrowly, which can be seen by going through the judgments from *P&O Steam Navigation Co. v. Secretary of State of India*<sup>31</sup>; *State of Rajasthan v. Vidyawati*<sup>32</sup>; *Kasturi Lal Raliaran Jain V. State of U.P.*<sup>33</sup>, in which Gajendragadkar, C.J., held “if a tortuous act is committed by a public servant and it gives rise to a claim for damages, the question to ask is – was the tortuous act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on, the delegation of sovereign powers of the State to such public servant? If the answer is in affirmative, the action for damages or loss caused by such tortuous act will not lie”, but if the answer is negative, an action for damages will lie. In *Maneka Gandhi v. Union of India*<sup>34</sup> the Supreme Court had made it clear that Articles 14, 19, 21 and 22 are not mutually exclusive and they strengthen each other and therefore a law depriving a person of his right to life and personal liberty must stand not only to the test of Art. 21 but also to the test of Articles 14 and 19; and as a result the traditional classification arrest, detention which were generally regarded as sovereign function and as a result the State or Government would not be liable for the loss suffered by a person on account of undue detention or imprisonment by its employees, were now held to be liable for this wrong done in the later judgments. *Khatari v. State of Bihar*<sup>35</sup> certain prisoners were blinded by the police, the Court held that State is liable to pay compensation to the prisoners so blinded by the police; *Rudal Shah v. State of Bihar*<sup>36</sup> is the most celebrated case where the Hon’ble S.C. directed the state to pay compensation of Rs 35,000 to Rudal Sah who was kept in jail for 14 years even after his acquittal on the ground of insanity and held that it is violation of Article 21 done by the State

---

30 See *P&O Steam Navigation Co. v. Secretary of State of India*, 5 Bom HCR App. 1; *State of Rajasthan v. Vidyawati*, AIR 1962 SC 933; *Kasturi Lal Raliaran Jain V. State of U.P.*, AIR 1965 SC 1039; *Maneka Gandhi v. Union of India*, AIR 1978 SC 597; *Khatari v. State of Bihar*, AIR 1981 SC 928; *Rudal Shah v. State of Bihar*, AIR 1983 SC 1086; *Bhim Sing v. State of J&K*, AIR (1985) 4 SCC 677; *Sebastian M.Hongray v. UOI*, AIR 1984 SC 1026; *Saheli v. Commissioner of Police*, AIR 1990 SC 494; *People’s Union for Democratic Rights v. State of Bihar*, AIR 1987 SC 355; *Kumari v. State of T.N.*, AIR 1992 SC 2069; *N.Nagendra Rao & Co. v. State of U.P.*, AIR 1994 SC 26661.

31 5 Bom HCR App. 1.

32 AIR 1962 SC 933.

33 AIR 1965 SC 1039.

34 AIR 1978 SC 597.

35 AIR 1981 SC 928.

36 AIR 1983 SC 1086.

of Bihar.; *Bhim Singh v. State of J&K*<sup>37</sup> is another important case where Bhim Singh an MLA was arrested by the police only to prevent him to attend the Legislative Assembly, the Hon'ble Court not only entertained the writ petition of his wife but also awarded the compensation of Rs 50,000 to be paid by the state.; *Sebastian M.Hongray v. UOI*<sup>38</sup> the Supreme Court issued the writ of *Habeas Corpus* requiring the government to produce the two persons who were taken to the Military Camp by jawans of the Army but the Government failed to produce them before the Court as they had met unnatural death, on this Court taking into account the mental operation, agony etc. to the wives of the said two persons directed the State to pay one lakh rupees to each of the said women ; *Saheli v. Commissioner of Police*<sup>39</sup> case was the issue of brutal use of force and misuse of authority by the police outside the police station, is a landmark case where the son of Kamlesh Kumari died due to ill treatment by a S.I. of Delhi Police, the Hon'ble S.C. directed the Delhi Adm. to pay the compensation of Rs 75,000.; *People's Union for Democratic Rights v. State of Bihar*<sup>40</sup>; *Kumari v. State of T.N.*<sup>41</sup>; *N.Nagendra Rao & Co. v. State of U.P.*<sup>42</sup>.

It is to be noted that compensation by the State for the action of its official was evolved by the Hon'ble Court against the doctrine of English law: "King can do no Wrong" and clearly stated in the case of *Nilabati Behra v State of Orissa* that doctrine of sovereign immunity is only applicable in the case of tortious act of government servant and not where there is violation of fundamental rights and hence in a way stated that in criminal matters (of course if there is violation of fundamental rights) this doctrine is not applicable.

Ultimately in *N.Nagendra Rao & Co. v. State of U.P.*<sup>43</sup>, Supreme Court held, that if a citizen suffers any damages due to the negligent act of the officers of the State, the State would be liable to pay compensation for it and it cannot avoid this liability on the ground of sovereign immunity. The Court has made it clear that State is not above law<sup>44</sup> (which can be understood in the light of the Hindu jurisprudence as discussed earlier). No legal system can place the State above law as it is unjust for a citizen to be deprived of his property illegally by negligent act of the State's officers without any remedy. The Supreme Court, has made it clear, by

---

37 AIR (1985) 4 SCC 677.

38 AIR 1984 SC 1026.

39 AIR 1990 SC 494.

40 AIR 1987 SC 355.

41 AIR 1992 SC 2069.

42 AIR 1994 SC 26661.

43 AIR 1994 SC 26661

44 Which can be understood in the light of Hindu Jurisprudence as discussed earlier.

following the principles OF Dharma or Hindu Jurisprudence as discussed earlier and put it in sophisticated manner with the touch of modern demand by saying that modern social thinking of the progressive societies and judicial approach is to do away with archaic State protection and place the State or the Government at par with any other juristic legal entity.

The ancient Indian Jurisprudence recognized no rights of a King to Govern which is disclosed by following :-

जटा सा दुष्ठा प्रकृतिष चतुर्न्तो प्यनात्मावन्  
हन्येतेवा प्रकृतिर्भिर यति वा दिवास्तम् वशम् ।।

*“Jata sa dustha – pradritish Chaturanto - pyanatmavan  
Hanyate va prakritibhir yati va divatham Vasham.”*

“A King of evil nature and vicious habit will, though an emperor, either be killed by his own subjects or subdued by his enemies.”

These provisions indicate two things – First, the King’s right to govern was subject to good conduct; he had no absolute rights or powers. Secondly, they imply that sovereignty was founded on the principle of social contract. If the King violated the traditional pact he forfeited his kinship.

The modern jurists are making frantic efforts to find out the rightfulness and wrongfulness and wrongfulness of an act and to construct such theories of punishment which may help them in checking the growing criminality all over the world. The writers of “*Dharmaśāstra*” considered this fully and we find that wrong in the early Vedic thought is a disorder or deviation from a straight (right) course. Whatever is evil is an evil of deviation and the duty towards law is the ideal of life or “*Dharma*”.

It is said that it is the duty of the State to maintain law and order, which it does through the means of law.

The concept of ‘*Danda*’ , as preservation of order, in a political society, was the main principle which the ancients used with advantage. This has been put succinctly as : ‘*Rit*’ orders life by nature; ‘*Dharma*’ by imposing duty; and ‘*Danda*’ by exerting force, i.e., by awarding punishment.

### 7.1 “*Rit*” :

The modern idea of law that took birth in Indian mind is that of ‘*Rit*’ as ‘Order’. This ‘order’ is inclusive of physical as well as legal, social, moral, and ritualistica ones. More than that, it is also the order of ideas and

signifies the very concept of idea or from by which alone comprehension or cognition can be possible of thoughts and actions.

The first cosmological creations were the twins of 'Rit' and 'Satya'. From ethico – legal point of view 'Rit' is law and 'Satya' is truth. But from the point of view of reality, 'Rit' is order and 'Satya' is existence (*Satta*).<sup>45</sup>

Both are the aspects of reality. Thus order and existence go together. They sanctify each other and are the warp and woof of Indian civilization and culture.

Because of the concept of *Rit*, as omnipresence and comprehension of complete cosmos, it has been called 'Crude Presursor' of *Vedantic Brahman* – the epitome of Indian Philosophy.

In its primary or physical sense *Rit* is the path of Zodiac with which apparent motions of 'Devas' (luminaries) are confined and which is dotted by *Nakshtras*. The *Devas* are said to be born in *Rit* and are governed by it.<sup>46</sup> From this primary and physical sense, the meaning of *Rit* as an ordering principle of universe extends to human life in society, in its normative and secondary sense it is understood as ethical, religious, legal and social order.<sup>47</sup>

In ancient Indian Legal Theory there is no law – maker. Law in its essence is not the command of the King or the sovereign. Ontologically, *Rit* is not even the creations of Gods, as Gods are said to be created afterwards. Gods are only the keepers or guardians of law. *Agni*, declares law; *Brahspati* is the son of law; *Usha* (dawn) obeys law. Indian thought, from its earliest stages, expresses the idea of the "Supremacy of Law".

Indian thinking about law starts from concept of *Rit*. It is said in *Rig –Veda* that Divinity manifests itself through splendor and through law.<sup>48</sup> The all pervading being is born of eternal law and is enternal law itself.<sup>49</sup> In its literal meaning *Rit* is the course of things.<sup>50</sup>

45 See Abinash Chandra Bose, "The Call of the Vedas", 2<sup>nd</sup> Edition, 1960, p.41. [Refereed in S.K.Purohit, "Ancient Indian Legal Philosophy – Its relevance to Contemporary Jurisprudential Thought", Deep & Deep Publication, New Delhi, 1994, p. 18.]

46 Radha Krishnan, "Source Book of Indian Philosophy", p. 27.

47 S.K.Purohit, "Ancient Indian Legal Philosophy – Its relevance to Contemporary Jurisprudential Thought", Deep & Deep Publication, New Delhi, 1994, p. 19.

48 Rig Veda VII – 190 (3-4).

49 Rig Veda – 4 – 40 – 5.

50 Radha Krishnan, "Source Book of Indian Philosophy", p. 27.

'Rit' also means 'proper' or 'right', a derivative of *Rit*, means literally straight and thus implies straight or right conduct as against 'crooked' or tortuous path of life. In old English it is "*Riht*"; in German "*Recht*", and in Latin "*Rectus*".<sup>51</sup> It is surprising that even French "*Droit*" and Italian "*Diritto*" we find an echo of the sound of "*Rit*". *Rit* becomes expression of order, organisation and system of every type of social life.

## 7.2 Impact of Hindu Dharma on Making of Legislation in India

The impact of Hindu Dharma can be seen in the drafts of various legislations in India including the Constitution of India. Some of them<sup>52</sup> can be seen as under :-

### 7.2.1 Constitution of India –

The verse given in *Vyasa Smriti* can be esteemed a rule alike to Article 13 of the Constitution of India, which declares that if any law enacted by the Legislature is found to be violative of the fundamental rights, it shall be void and the courts are entitled to make such declaration. It reads:

#### ARTICLE 13

- (1) *Laws inconsistent with or in derogation of the fundamental rights.-(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.*
- (2) *The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.*

*Vyasa Smriti*<sup>53</sup> reads:

श्रुतिस्मृतिपुराणानां विरोधो यत्र दृश्यते ।  
तत्र श्रौतं प्रमाणन्तु तयोर्द्वेषे स्मृतिर्त्विरा ॥<sup>54</sup>

*Whenever it is found that there is conflict between any provision contained in the Vedas, and the provisions in Smriti, Purana custom, etc., then what is declared in the Vedas alone shall prevail.*

51 A.L.Bhasham – "*The Wonder that was India*", Rupa & Co. P.B., 1967, pp. 238 – 39.

52 See for more details, Justice M Rama Jois, "*Ancient Indian Law- Eternal Values in Manusmriti*", Universal Law Publishing Co. Pvt. Ltd., 2002 Edition, Chapter 12.

53 *Vyasa Smriti* (1-V-4).

54 *Vyasa Smriti* (1-V-4).



For example, Charter of Equality [*Samanata lekUkrk*] is found incorporated in the *Rigveda*, the most ancient of the Vedas, and also in the *Atharvaveda*.

Rigveda-Mandala-5, Sukta-60, Mantra-5 says:

अज्येष्ठासो अकनिष्ठास एते ।

सं भ्रातरो वावृधुः सौभगाय ॥<sup>55</sup>

*“No one is superior [ajyestasaha] or inferior [akanishthasaha]. All are brothers [bhrataraha]. All should strive for the interest of all and should progress collectively [sowbhagaya sam va vridhuhu].”*

Rigveda-Mandala-10, Sukta-191, Mantra-4 says:

समानी व आकूतिः समान हृदयानि वः ।

समानमस्तु वो मनो यथा वः सुसहासति ॥<sup>56</sup>

*“Let there be oneness in your resolutions, hearts and minds. Let the strength to live with mutual cooperation be firm in you all.”*

Atharvanaveda & Samjnanai Sukta:

समानी प्रपा सह वोन्नभागः ।

समाने योक्त्रे सह वो युनज्मि ।

आराः नाभिमिवाभितः ॥

*“All have equal rights in articles of food and water*

*The yoke of the chariot of life is placed equally on the shoulders of all.”*

All should live together with harmony supporting one another like the spokes of a wheel of the chariot connecting its rim and the hub.

These Vedic provisions forcefully declare equality among human beings. The last of them impresses that just as no spoke of a wheel is superior to the other, no individual can claim to be, or regarded as, superior to others.

Article 1 of the Universal Declaration of Human Rights declared on 10th December, 1948 by United Nations, reads thus:

*“All human beings are born free and equal in dignity and rights. They*

---

55 Rigveda-Mandala-5, Sukta-60, Mantra-5

56 Rigveda-Mandala-10, Sukta-191, Mantra-4

*are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”*

A comparison of this with the verses in *Rigveda* quoted above (supra) would show that both are substantially similar.

In conformity with the Charter of Equality in the Vedas, in the Chapter of *Rajadharma*, *Manu Smriti* has laid down the doctrine of equality and a direction to the State to treat all equally, has been incorporated.<sup>57</sup> The verse reads:

यथा सर्वाणि भूतानि धरा धारयते समम् ।

तथा सर्वाणि भूतानि बिभ्रतः पार्थिवं व्रतम् ॥<sup>58</sup>

*The King [Ruler] should support all his subjects without any discrimination, in the same manner as the earth support all living beings.*

This is an emphatic declaration. Just as mother earth gives equal protection to all irrespective of religion or caste of individuals, it is obligatory for the State to give equal protection to all.<sup>59</sup> This verse is equal to Article 14 of the Constitution of India, which mandates the State not to deny to any person equality before law and equal protection of the laws, which lets in even non-citizens and which is the first and foremost fundamental right and which is described as a part of basic structure of the Constitution, which cannot be amended even by the Parliament as declared by the Supreme Court of India in the case of *Keshavanada Bharati v. Union of India*.<sup>60</sup>

Therefore, any provision in any of the Smritis including *Manu Smriti* or any custom or usage such as untouchability and that an untouchable is prevented from using a well for drawing water, are patently violative of the Charter of Equality declared in the Vedas and now included in Article 14 and therefore liable to be rejected as opposed to “*Dharma*” which is intended to ensure equality. Further,

---

57 Justice M Rama Jois , “*Ancient Indian Law- Eternal Values in Manusmriti*”, Universal Law Publishing Co. Pvt. Ltd., 2002 Edition, pp. xi - xiii.

58 *Manu - Smriti- Ch- IX – 311*

59 Justice M Rama Jois , “*Ancient Indian Law- Eternal Values in Manusmriti*”, Universal Law Publishing Co. Pvt. Ltd., 2002 Edition, p. xiv.

60 AIR 1973 SC 1461



*An agreement which has been entered into contrary to law or to the settled usage can have no legal force though it is proved. [Manu VIII-164]*

*Medhatithi* commenting on this rule gives illustrations of transactions which are opposed to law: (a) Sale of wife and children by a person is unlawful, (b) Giving away ancestral property as gift by a person who has children is unlawful.

The principle is similar to sections 23 and 24 of the Indian Contract Act.<sup>63</sup>

### 7.2.3 Family Law –

The enactments of the legislature declaring or altering rules of Hindu Law have now become an additional source.

Legislations made after independence was also based on the prevalent Hindu law. It was just codification of the existing law at that time. In 1955 and 1956 the four statutes<sup>64</sup> viz – Hindu Marriage Act, 1955; Hindu Succession Act, 1956; Hindu Adoption and Maintenance Act, 1956; Hindu Minority and Guardianship Act, 1956 formed, the so-called Hindu Code, by the Parliament of India at New Delhi.

However, the Hindu law which has been legislated later, which was mostly based on the *Shastric* (Old) Hindu law and principles with addition/subtraction of some concepts like divorce, absolute property right to women, monogamy, etc.

### 7.2.4 Evidence Act –

Who can be a witness [*sakshinah*]:

The fundamental rule regarding the admissibility of oral evidence is stated in the Smritis.

समक्षदर्शनात्साक्ष्यं श्रवणाञ्चैव सिद्ध्यति ।।<sup>65</sup>

*“Evidence of what had actually been seen or heard by a person is admissible.”*<sup>66</sup>

*Medhatithi*, while commenting on this Verse says:

---

63 Quoted by Justice M Rama Jois , “Ancient Indian Law- Eternal Values in Manusmriti”, Universal Law Publishing Co. Pvt. Ltd., 2002 Edition, p. 67.

64 The four statutes are :- Hindu Marriage Act, 1955; Hindu Succession Act, 1956; Hindu Adoption and Maintenance Act, 1956; Hindu Minority and Guardianship Act, 1956.

65 Manu – Smriti, Ch-VIII – 74.

66 Manu – Smriti, Ch-VIII – 74.

समक्षदर्शनात्साक्षादनुभावच्छ्रवणाच्च समक्षशब्दानुशङ्गा कर्तव्यः।  
यत्कुतश्चिदेकेन श्रूयते ततोन्येन तत्परंपराश्रुतं तेन परंपराश्रावि न साक्षि ॥

The expression '*Samaksha Darshana*' means direct seeing, perceiving or hearing. When a person who hears another saying that he had heard, comes forward to give evidence before the court, such an evidence is called 'hearsay evidence' and that is no legal evidence. This is similar to section 60 of the Evidence Act.<sup>67</sup>

### 7.3 Sources of Hindu Dharma or Law and its impact on Justice Dispensation in India.

Though Hindu Law to-day is judge-made law, apart from the codification of some of its branches, it does not detract from the values of *Yajnavalkya Smriti* and *Vijnaneshvara's* commentary on it.<sup>68</sup> Supreme Court has observed in case of *Luhar Amritlal v. Doshi Jayantilal*<sup>69</sup>, that the judicial decisions have become part and parcel of Hindu law as is administered to-day and when there is an exposition of the text in a judgment of the Privy Council it is not necessary to decide the question afresh with reference to conflicting texts. Judicial precedents however cannot give jurisdiction to Courts to change the law as laid down in the text of Hindu Law.<sup>70</sup>

The Sources of Hindu Dharma, according to *Manu*, are –

वेदः स्मृतिः सदाचारः स्वस्य च प्रियमात्मनः।  
एतच्चतुर्विधं प्राहुः साक्षाद्धर्मस्य लक्षणम् ॥ 71

*“The Vedas, the smritis, a continued or established course of good conduct and those which are agreeable to the conscience [Priyamamatmanaha] are the four definite sources of Dharma.”*<sup>72</sup>

The Sources<sup>73</sup> of Hindu Dharma or law are:

**(1)Shrutis**<sup>74</sup> – means which has been heard, is in theory the primary and paramount source of Hindu Law and is believed to be the language of

67 Quoted by Justice M Rama Jois , “*Ancient Indian Law- Eternal Values in Manusmriti*”, Universal Law Publishing Co. Pvt. Ltd., 2002 Edition, 75.

68 *Surjitlal v. Commissioner of Income Tax*, 1976 (2) SCR 164.

69 1960 (3) SCR 842 : AIR 1960 SC 964.

70 *Milan Kumar v. Puran Sashi*, AIR 1974 Cal 380.

71 *Manu – Smriti*, Ch-II – 12.

72 *Manu – Smriti*, Ch-II – 12.

73 Mayne’s “*Hindu Law & Usage*”, Bharat Law House, New Delhi, 15<sup>th</sup> Edition, p. 15.

74 However, Justice Markendey Katzu doesnot consider *Shruti* (Veda) as the origination of Hindu Law. He considered th Smritis e.g. *Manu Smriti*, *Yajnavalkya Smriti*, the smritis of Vishnu, Narad, Parashar, Apastamba, Vashista, etc. originated the Hindu Law. – See K.L.Sarkar’s “*Mimansa Rules of Interpretation*”, Modern Law Publications, 2<sup>nd</sup> Edition, 2003, p. 7.

divine Revelation. By the term *Shruti*, the four Vedas, viz. the *Rig*, the *Yajus*, the *Sama* and the *Atharva*, along with their respective *Branabas* are meant.<sup>75</sup> The *Shruti*, however, has little, or no legal value. It contains no statement of law as such, though its statements of facts are occasionally referred to in *Smritis* and the *Commentaries* as conclusive evidence of legal usage. The *Veda* contains passages alluding to *Brahma*, *Asur*, and *Gandharva* forms of marriage, to the necessity for a son, to the *Kshetraja*, the *Dattaka*, and the son of the appointed daughter, to partition amongst sons and to exclusion of women from inheritance.<sup>76</sup>

**(2) Smrities Or Dharma Shastra** – Rules, as distinct from instances of conduct are, for the first time, embodied in the *Smritis*. The *Smritis* (what is recollected or remembered) are of human origin and refer to what is supposed to have been in the memory of the sages who were the repositories of revelation. They are the *Dharma-Shastras*.<sup>77</sup>

**Puranas** – The *Itihas* and *Purana* are some times included in the term ‘*Smriti*’ in its most comprehensive sense and “reckoned as a supplement to the scripture, and as such, constitute a fifth *Veda*”.<sup>78</sup>

**(3) Dharma Sutras** – The Brahmins whose duty it was to study and recite the Vedas divided into various *Sakhas* i.e. branches. Owing to the adoption of different readings and interpretations, sects or schools for the different recensions of the same *Veda* were formed, headed by distinguished teachers who taught from such recensions.<sup>79</sup> To facilitate their teachings, they framed ‘*Sutras*’ or stings of rules chiefly in prose, which formed rather a *memoria technica* by which the substance of the oral lessons might be recalled, than a regular treatise on the subject. Every department of Vedas had its own ‘*Sutras*’.

**(4) Mimansa or Mīmāṃsā** – The word ‘*Mīmāṃsā*’ *Mīmāṃsā* means enquiry of investigation. There are six classical systems of Indian Philosophy – viz. *Nyaya*, *Vaisheshik*, *Sankhya*, *Yoga*, *Purva Mīmāṃsā* and *Uttar Mīmāṃsā*. *Purva Mīmāṃsā* is often called ‘*Mīmāṃsā*’. It is to be distinguished from *Uttar Mīmāṃsā* which is also called ‘*Vedanta*’. The *Mīmāṃsā* system was

---

75 *Shurjitlal v. Commissioner of Income Tax*, 1976 (2) SCR 164.

76 P.V.Kane, “*History of Dharmasastra*”, Vol. I, 4 to 7.

77 Visvarapu and Vijnanesvara on *Yajn.* 1,7, say that *Smriti* and *Dharma-Shastras* are synonymous. See also *Bulusu’s case* (1899) 26 IA 113, 131 : AIR 1922 Mad 398.

78 Per Mahmood, J., in *Ganga Sahai v. Lekhraj Singh*, (1887) 9 All 273, 289. See also Jha, Dr. Ganganath, “*Hindu Law in its Sources*”, Vol. I [1930], p.29.

79 See Maxmullar’s letter to Morley, 1 *Marley’s Digest*, 2 Vols, Calcutta [1850], Introduction 196.

created in connection with the *Yajna*. It is therefore ritualistic and deals with *Karmaknda*.<sup>80</sup>

Originally the rules of *Mīmāmsā* were developed to help in understanding of those *Shruti* texts which were ‘obscure, uncertain, and conflicting’.<sup>81</sup> The question has sometimes been debated whether the ‘*Mīmāmsā* Rules of Interpretation’ which undoubtedly apply to the exposition of Vedas should be applied in the interpretation the Smritis texts as well. They are in theory no doubt applicable and have in practice been so applied by all the commentators.<sup>82</sup>

The *Mīmāmsā* principles of interpretation<sup>83</sup> were first laid by *Jaimini* in his ‘*Sutras*’<sup>84</sup>, about 500 B.C. that they are very ancient is proved by the fact that they are referred to in many Smritis, which themselves are very old. The *Mīmāmsā* principles distinguish between obligatory rules and non – obligatory statements. The main obligatory rule is called a *Vidhi* (or *Nishedha*, if it is in negative form). *Vidhis* are of four types – (i) *Utpatti Vidhi*, or a substantive injunction (e.g. ‘perform the agnihotra’), (ii) *Viniyoga Vidhi*, or applicatory rules (e.g. ‘with curdled milk perform the agnihotra’), (iii) *Prayog Vidhi*, or rules of procedure, and (iv) *Adhikara Vidhi* (rules regarding rights and personal competence). Apart from these *vidhis* proper (mentioned above) there are certain quasi – *vidhis* called *Niyams* and *Parishankhyas*.<sup>85</sup>

There judiciary in India applies the *Mīmāmsā* Rules of Interpretations for the dispensation of justice in India. Supreme Court of India in *U.P.Bhoodan Yagna Samiti v. Brij Kishore*<sup>86</sup>, applied the ‘*The Linga Princile*’ (also called *Lakshana artha*) or the suggestive power of words or expressions, where the words ‘landless persons’ were held to refer to landless peasants only and not to landless businessmen. In *Mīmāmsā* it is illustrated by the

80 Views of Justice Markendey Katzu – See K.L.Sarkar’s “*Mimansa Rules of Interpretation*”, Modern Law Publications, 2<sup>nd</sup> Edition, 2003, p.3.

81 S.K.Purohit, “*Ancient Indian Legal Philosophy – Its relevance to Contemporary JurisprudentialThought*”, Deep & Deep Publication, New Delhi, 1994, p. 120.

82 Jolly, Dr. Julius, “*Law and Custom*”, authorized translation by Bata Krishna Ghosh [1928], p. 96.

83 K.L.Sarkar’s “*Mimansa Rules of Interpretation*”, Modern Law Publications, 2<sup>nd</sup> Edition, 2003 is one of the best book on the subject.

84 In fact the Mimansa rules of interpretation existed even before Jaimini, since Jaimini himself has referred to 8 Acharyas on the topic in his ‘*Purvapaksha*’.

85 K.L.Sarkar’s “*Mimansa Rules of Interpretation*”, Modern Law Publications, 2<sup>nd</sup> Edition, 2003, p.7.

86 AIR 1988 SC 2239.

'*Barhi Nyaya*'.<sup>87</sup> Justice Markendey Katzu has applied the *Mīmāmsā* rules of Interpretation in his judgments<sup>88</sup> namely – *Sardar Mohd. Ansar Khan v. State of U.P.*<sup>89</sup>; *Udai Shanker Singh V. Branch Manager*<sup>90</sup>; in *Mahabir Prasad Dwivedi v. State of U.P.*<sup>91</sup> the '*Anushanga*' principle of *Mīmāmsā* was used. In *Tribhuvannath Misra v. D.I.O.S.*<sup>92</sup>, the '*Samanjasya*' principle (principle of harmonious construction) was used.

**(5) Commentaries and the Digests on above** – All that works which come under the head of Smritis agree in this – that they claim, and are admitted to possess, as independent authority. While the authority of the percepts contained in the Smritis is beyond dispute, but their meaning is open to various interpretations, and has been, and is the subject of much dispute, which must be determined by ordinary process of reason.<sup>93</sup> These commentaries are used many a time by the Courts in various judgments for justice dispensation, especially in Hindu Law.

**(6) Customs and Usages** – Custom is transcendent law<sup>94</sup>. In fact commentaries are evidence of customs which formed the law<sup>95</sup>. The Smritis and digests were largely based upon customary laws. On matters not covered by Smritis and commentaries, usage supplements the law laid down in them. Even where a custom exists in derogation of the law laid down in Smritis, it is nonetheless a source of law governing the Hindus. The Smritis repeatedly insist that customs must be enforced and that they either override or supplement the Smiriti rules. The courts and legislature have also given the fullest effect to the customs. The judicial

---

87 Justice Markendey Katzu quoted it in his speech delivered at Banglore at the inaugural function on a seminar on Purva Mimansa Darshan on 9<sup>th</sup> Feb, 2002 organized by the Project of History of Indian Science, Philosophy and Darshan. For details see K.L.Sarkar's "*Mimansa Rules of Interpretation*", Modern Law Publications, 2<sup>nd</sup> Edition, 2003.

88 As expressed by Justice Markendey Katzu in his speech delivered at Banglore at the inaugural function on a seminar on Purva Mimansa Darshan on 9<sup>th</sup> Feb, 2002 organized by the Project of History of Indian Science, Philosophy and Darshan. For details see K.L.Sarkar's "*Mimansa Rules of Interpretation*", Modern Law Publications, 2<sup>nd</sup> Edition, 2003, pp 3 – 15.

89 1995 Lab IC 1217 (All). See also K.L.Sarkar's "*Mimansa Rules of Interpretation*", Modern Law Publications, 2<sup>nd</sup> Edition, 2003, p. 325.

90 1998 (2) All CJ 1364. See also K.L.Sarkar's "*Mimansa Rules of Interpretation*", Modern Law Publications, 2<sup>nd</sup> Edition, 2003, p. 328.

91 AIR 1992 All 351.

92 Writ Petition no. 17554 of 1990, decided on 30-3-1992. See also K.L.Sarkar's "*Mimansa Rules of Interpretation*", Modern Law Publications, 2<sup>nd</sup> Edition, 2003, p. 348.

93 Sri Basulu's case (1899) 26 IA 113, 131 : AIR 1922 Mad 398.

94 *Deivanani v. Chidambaram Chettiar (RM)*, AIR 1954 Mad. 657

95 *Anjubai v. Hemachandra Rao*, AIR 1960 MP 382; *Kasturi v. Chiranjitlal*, AIR 1960 MP 446; *A. Jagdarao v. Baba Rao Irbaji*, 1983 HLR 446.



committee in the *Ramnad* case said “under the Hindu system of law, clear proof of usage will outweigh the written text of law.”<sup>96</sup> All the Acts which provide for the administration of the law dictate a similar adherence to usage, unless it is contrary to justice, equity and good conscience<sup>97</sup>.

However, almost all the authors mentioned that ‘Good Custom’, the way good people live; “*Sa-āchāra*”, the customs of the good, or “*Śiṣṭā-chāra*”, the custom of those who have undergone instruction, is the source of *Dharma*.<sup>98</sup>

Manuals of customary law, in accordance with the *Riwaji-i-am* (customs in common) have been issued by authority for each district and stand on much the same footing as the original itself<sup>99</sup>.

#### 7.4 During Foreign Rule

Many realized that the Hindu law was the oldest continuous system of law, and that its materials were, in their richness and diversity, superior to Roman law, while the longevity of its institutions altogether exceeded anything which any other system could proffer.<sup>100</sup>

The Indian subcontinent ground itself furnished (or perhaps, better, encumbered) with three main types of Hindu Law at the end of the Second World war. In affairs of family law, the law governing religious endowments and charities and some other topics, almost all Hindus amounting to a population of about four hundred millions were ruled by a system avowedly derived from the “*Dharma-śāstra*”, “the science of righteousness”, the ancient indigenous holy law of India. The few exceptions among the Hindus were – chiefly those who, in British India, had married under Special Marriage Act, and those who, in French India, had “renounced” their religious law in favour of the civil law of France. In the forms in which it was administered it was called “Hindu Law”.

96 As sited in: Mayne’s, *Treatise on Hindu Law and Usage* (Bharat Law House New Delhi, 15<sup>th</sup> Edn. 2003) p 48

97 As sited in: Mayne’s, *Treatise on Hindu Law and Usage* (Bharat Law House New Delhi, 15<sup>th</sup> Edn. 2003) p 48; Also, *Harihar Prasad v. Balmikiprasad* AIR 1975 SC 733; *Nazir Singh v. Keher Singh* 62 Punj LR 692.

98 Lingat, Robert, “*The Classical Law of India*”, Oxford India Paperbacks, 2<sup>nd</sup> Impression, 1999, p. 14

99 *Vaishno Ditti v. Rameshri* (1928) 55 IA 407, 421; *Saligram v. Mt Maya* AIR 1955 SC 266. ; Also, Steel’s “*Law of Caste and Tribes in Dekhan*”; C.L. Tuppre’s “*Punjab Customary Law*” (1981); C. Boulnois and W.H. Rattigan’s” *Notes on the Customary Law of Punjab*”; Also, *Gopal Singh v. Ujagar Singh*, 1955 SCR 86; *Dayasingh v. Dhankuer* AIR 1974 SC 665; *Balwinder Singh v. Gurpal Kaur* AIR 1985 Delhi 14

100 Derrett, J.Duncan M., expressed in the translator’s preface written for Lingat, Robert, “*The Classical Law of India*”, Oxford India Paperbacks, 2<sup>nd</sup> Edn, 1999, page vii.

In the area known as British India, which was ruled by Britain through the Viceroy, this “Hindu Law” had developed under the aegis of Common law and Equity, modified occasionally by statutes, not all of which were clearly understood or put into practice by the public at large, into a system known since the 1920’s by the pejorative but accurate name of “Anglo – Hindu Law”. The Courts constantly referred themselves to the *Dharma-sāstra* texts, but subject to a method which had been gradually devised during British rule. They also referred to previous decisions of the High Courts and the Privy Council.<sup>101</sup>

In the French possession another system was in force, which can be called “Frenco – Hindu Law”. Characteristically, the French took considerable interest in the system, intellectually as well as practically, and there is a respectable bibliography, in which the name of L.Sorg *Dharma-sāstra* figures prominently and honourably.<sup>102</sup>

In Portuguese territories the legislation of Portugal made a substantial but uneven impact upon the indigenous laws. The tangled web of law (not unmarked by Goans who had adjusted themselves to resulting chaos) awaited the skilled and authoritative treatment of the celebrated Portuguese jurist, *Luis da Cunha Goncalves*, himself born in Goa. To this day Franco – Hindu Law and Luso – Hindu Law, as it is call the personal law in force in the former Portuguese possessions, must be taken into account.<sup>103</sup>

In the rest of the parts of India, which were not subject to direct foreign rule, the so called Native or Princely States ruled by Indian ruler under British para-mountcy, other adaptations of Hindu Law were in vogue. In some States little Codes of their own fashioning obtained and to some limited extent still obtain as law.

During the long period of foreign rule Indian jurists and public men, some of them were trained wholly or partly in Europe, gave voice to proper application of *Dharma-sāstra*, which was soothing to the fellow countrymen. Because a country which was force to follow the western jurisprudence as accepted rule of law; and was projected from England to India.

---

101 Derrett, J.Duncan M., expressed in the translator’s preface written for Lingat, Robert, “*The Classical Law of India*”, oxford India Paperbacks, 2<sup>nd</sup> Edn, 1999, page v.

102 Derrett, J.Duncan M., expressed in the translator’s preface written for Lingat, Robert, “*The Classical Law of India*”, oxford India Paperbacks, 2<sup>nd</sup> Edn, 1999, page v.

103 Derrett, J.Duncan M., expressed in the translator’s preface written for Lingat, Robert, “*The Classical Law of India*”, oxford India Paperbacks, 2<sup>nd</sup> Edn, 1999, page v.

Many scholars have put their efforts, viz. *P.V.Kāne*<sup>104</sup>, *K.P.Jayaswal*, *Dr. Radhakrishnan*<sup>105</sup>, *Abinash Chandra Bose*<sup>106</sup>, *Dr. S.K.Purohit*<sup>107</sup>, etc. to establish the excellencies of *Dharma-śāstra*, which proved that Indians were fully capable of administering law to themselves before foreign rule to be inevitable.

This may not be taken as *Dharma-śāstra* the only law, in modern sense, but also all the law which India had before the arrival of Muslims.

This gratifying notion tended to lead imperceptibly to an assumption that the *Dharma-śāstra* was not only law, in modern sense, but also (at least for practical purposes) all the law which India had before the intrusion of the Muslims.

## 8. Conclusion

It is very much apparent by going through the various judicial pronouncements and commentaries made thereon by various jurists, judges, scholars and philosophers having varying and diverse viewpoints, all cused together and accentuating the conviction that the Hindu Dharma has a definite impact on Justice Dispensation in India.



104 P.V.Kane, "*History of Dharma-śāstra*", mammoth and upstanding encyclopaedia work.

105 Radha Krishnan, "*Source Book of Indian Philosophy*".

106 Abinash Chandra Bose, "*The Call of the Vedas*", 2<sup>nd</sup> Edition, 1960.

107 S.K.Purohit, "*Ancient Indian Legal Philosophy – Its relevance to Contemporary Jurisprudential Thought*", Deep & Deep Publication, New Delhi, 1994.

# Decriminalization of Homosexuals – Time to Change

Dr. G. Shaber Ali\*

*“They dare to dream... for an identity... for being able to marry and live with those they love... for society to realize that good parenting has nothing to do with sexual orientation... for the workplace to be free of bias and discrimination”<sup>1</sup>.*

## INTRODUCTION

Societies all over the world are changing permanently. The lifestyle of majority of the persons differs considerably from that of previous generations. This difference we can observe even in respect of family law. Old traditional rules are confronted with new facts and circumstances and are therefore under pressure to be modified by the courts or legislators<sup>2</sup>.

The reactions of the family laws of various countries concerning the new developments in our societies often differ considerably. As a reaction to the increasing number of persons living together permanently in a same-sex relationship some countries have developed special rules on cohabitation and registration, others have introduced a legal institutions referred to as a registered partnership which creates a new civil status and a number of countries have even created the institution of same-sex marriage. Still other countries have not enacted any new legislation in this field. Nevertheless, in several places, the introduction of a new civil status or at least new legislation on the formalization of same-sex relations is under discussion. On the other hand, other countries are reluctant to change their family law in order to facilitate the formalization of same-sex relations.<sup>3</sup>

## Concept of Homosexuals

People living in same relationship are given different nomenclature like Lesbians, Gays, Bisexual and Transgender, (LGBT). These kinds of people are normally known as homosexuals. Homosexuality as a sexual identity refers to as a gay or lesbian person. In a narrow sense, gay refers to male homosexuality, but

---

1 \*Associate Professor, Head of the Department, LL.M., & Research Coordinator, V.M.Salgaocar College of Law, Panaji, Goa. <http://health.indiatimes.com/articleshow/505603.cms> visited on 20.02.14

2 Gerard-René de Groot, “Private International Law Aspects Relating to Homosexual Couples”, *Electronic Journal of Comparative Law*, Vol. 11.3, (December 2007), <http://www.ejcl.org>, visited on 01.04.2014

3 *Ibid*

it often is used in its broadest sense, especially in media headlines and reports, to refer to homosexuality in general. Lesbian, however, always denotes female homosexuality.

Homosexuality has been a feature of human culture since earliest history. Generally and mostly in *ancient Greece*, certain forms of erotic attraction and sexual pleasure between males were often an ingrained, accepted part of the cultural norm. Particular sexual activities (such as *anal sex* in some cultures, or oral sex in others), however, were disapproved of, even as other aspects were accepted and admired. In cultures under the sway of *Abrahamic religions*, the *law* and the *church* established *sodomy* as a transgression against divine law, a “*crime against nature*” practiced by choice, and subject to severe penalties, up to *capital punishment*, often inflicted by means of fire so as to purify the unholy action. The condemnation of penetrative sex between males, however, predates Christian belief, as it was frequent in ancient Greece, whence the theme of action ‘against nature’ traceable to Plato<sup>4</sup>.

In the course of time during 20<sup>th</sup> Century, homosexuality became a subject of considerable study and debate in Western societies, especially after the modern *gay rights movement* began in 1969. It was viewed by authorities as a *pathology* or *mental illness* to be cured, homosexuality is now more often investigated as part of a larger impetus to understand the *biology, psychology, politics, genetics, history* and cultural variations of sexual practice and identity. The *legal and social status* of people who engage in homosexual acts or identify as *gay* or *lesbian* varies enormously across the world, and in some places remains hotly contested in political and religious debate<sup>5</sup>.

The term *homosocial* is now used to describe single-sex contexts that are not specifically sexual. There is also a word referring to same-sex love, *homophile*. Other terms include *men who have sex with men* or *MSM* (used in the medical community when specifically discussing sexual activity), *homoerotic* (referring to works of art), *heteroflexible* (referring to a person who identifies as heterosexual, but occasionally engages in same-sex sexual activities), and *metro sexual* (referring to a non-gay man with stereotypically gay tastes in food, fashion, and design).<sup>6</sup>

Homosexuality as a *sexual orientation* refers to “an enduring pattern of or disposition to experience sexual, affectional, or romantic attractions primarily to”

4 Plato in *The Laws* (Book VIII at.841 edition of Stephan’s) at.340, edition of Penguin Books, 1972.

5 <http://en.wikipedia.org/wiki/Homosexuality> visited on 20.10.2014

6 *Ibid*

people of the same sex; “it also refers to an individual’s sense of personal and social identity based on those attractions, behaviors expressing them, and membership in a community of others who share them.” The exact proportion of the population that is homosexual is difficult to estimate reliably, but studies place it at 2–7%. It is distinguished from a *bisexual* or *heterosexual* orientation.<sup>7</sup>

Societal attitudes towards same-sex relationships vary over time and place, from expecting all males to engage in same-sex relationships, to casual integration, through acceptance, to seeing the practice as a minor sin, repressing it through law enforcement and judicial mechanisms, and to proscribing it under penalty of death.

Homosexuality has globally traveled a long way over the past several decades from criminality, immorality, sickness, and, finally to an alternative life-style. South Africa was the first country to constitutionally safeguard the rights of homosexuals in 1994. The first country to legalize same-sex marriages was the *Netherlands* (2001), while the first marriages were performed in the Amsterdam city hall on the 1<sup>st</sup> April, 2001. At present, same-sex marriages are legalized in *Belgium, Canada, Spain, New Zealand* and several countries in the West also follow similar laws.<sup>8</sup> Further some Commonwealth countries have shown that progress can be made, regardless of historical antipathies. Homo sexuality was decriminalized in The Bahamas (1991), Australia (1997), South Africa (1998), Vanuatu (2007), and Fiji (2010)<sup>9</sup>. Let us verify the position of homosexuals in India.

## Constitutional Perspective

Constitution of India incorporated various fundamental rights to the citizens of India. Fundamental rights are incorporated under Part III of the constitution. The term citizens include homosexuals. As a result homosexuals challenged their rights to live together and right to privacy as violative of Part III of the constitution. The most important rights that violate the rights of homosexuals are Art.14<sup>10</sup> of the Constitution which provides equality before law. The intention of this Article is that every person is equal in the eye of the law. Then why homosexuals are not treated equally with heterosexuals? This Article provides us equal protection of laws and says that the basis of the classification must have a rational or reasonable nexus with the object sought to be achieved by the legislation. However, in

---

7 Ibid

8 Ibid

9 Times of India (Daily News Paper), Mumbai, 13<sup>th</sup> December 2013

10 Art. 14 of the Indian Constitution: Equality before Law -The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

criminalizing homosexuality in Sec. 377<sup>11</sup> of Indian Penal Code, 1860 (IPC) the classification between natural sex and unnatural sex is that those sexual activities that are performed for procreation are natural and those that are not performed for procreation are unnatural. Thence, it labels all forms of non-procreative sexual acts as unnatural. The object that sought to be achieved by the legislation through this provision is to create a public code of sexual morality but this object does not have a reasonable and rational nexus with the classification of natural and unnatural sex.

The unreasonable classification in this provision is based on the fact that the main aim of any sexual activity is procreation. This classification seems to be unreasonable in present scenario as it took place in 1860 when any sexual activity that was not meant for procreation was considered a sin. At that time there was no concept of individuality. Individuals were attached with their caste, society, religion etc. They were not independent. Now the individuals become more independent and rational. For them, procreation is not the main aim of sexual activities. Moreover, homosexual activity can never be termed as unnatural. Modern understandings of psychiatry and psychology, no longer view homosexuality as a disease or a disorder. Thus, the very objective of the section is facile, unscientific and based upon prejudice alone. Therefore, Sec. 377, which criminalizes homosexuality relying on the unreasonable classification based on the procreation, is an absolute violation of this Article.

Art. 15<sup>12</sup> say that there shall be no discrimination based on sex. The intention of this Article is that no person shall be subject to any disability, liability, restriction or condition on the ground of sex or gender. Moreover, Sec.377 criminalizes the sexual relationship between two person of same sex i.e. homosexuals. Thus, this provision of IPC discriminates against the homosexuals because of their sexuality and therefore constitutes discrimination based on sexual orientation.

Art. 21<sup>13</sup> of our Constitution prohibit the state from interfering with the private personal activities and personal liberty of the individual. The term personal liberty is a compendious term to include within itself all the varieties of rights that goes

11 Sec. 377 of Indian Penal Code, 1860: Unnatural Offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

12 Art. 15 of the Indian Constitution: **Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth-** (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

13 Art. 21 of Indian Constitution: No person shall be deprived of his life and personal liberty except according to the procedure established by law

to make up the 'personal liberties' of a person. It would include the privacy and sanctity of a person's home as well as the dignity of the individual. According to the Supreme Court of USA in *Lawrence v. Texas*<sup>14</sup> liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining of sex. The central idea behind the concept of personal liberty and privacy is that the quest of happiness of the individual must be fulfilled. Homosexual conduct is a very personal conduct and they do it for the sake of happiness. It is just a way of pursuit of happiness, a way to achieve sexual happiness or desire. This Article also says that a State can deprive any person from his personal liberty and privacy according to the procedure established by law. Therefore, someone can say that Sec.377 can restrict homosexuals from their personal liberty and privacy. But in *Maneka Gandhi's* case, it has been held that the State can deprive any person only then the procedure is fair or reasonable. The procedure in Art.21 must be right, just and fair and not arbitrary, fanciful or oppressive, otherwise, it would be no procedure at all and the requirement of Art.21 would not be satisfied. This provision of IPC is an arbitrary, unfair and unreasonable provision because it criminalizes homosexuals because of their infertility or unproductiveness that gives a very narrow sense of classification between homosexuals and heterosexuals. Thus, by criminalizing homosexuality in Sec.377, it restricts them to enjoy their right to personal liberty and privacy given in Art.21 and this procedure is arbitrary, unfair and unreasonable, therefore it is not a procedure at all.

The meaning and content of Fundamental Rights guaranteed in the Constitution are of sufficient amplitude to encompass all the facets of gender equality including same sex relationship. Moreover, Sec.377 criminalizes same sex relationship. Thus, this provision is not consistent with the Fundamental Rights and according to Art.13 of our constitution, which says that those laws, which are inconsistent with Fundamental Rights, must be void. Hence Sec.377 of IPC is unconstitutional and void, because this Section violates right privacy which is embodied under Art. 21 of the Constitution. This section covers various offences like buggery, sodomy and bestiality. It also deals with homo sexual that is sex between men and men, women and women, sex with children. The whole section is not void; only one part of this section is void and after applying the doctrine of severability this provision of IPC must be amended to decriminalize sexual minorities. Part of the section which deals with sex with children and animals should be retained. The other part of the section deals with sexual minority, this part need to be amended or deleted to protect their interest.



## Judicial Trend and Homo Sexuality

The court during the hearing on homo sexuality had pulled up the government for speaking in two voices on the issue as the Union Home Ministry suggested not decriminalise gay sex on moral grounds while the Health Ministry proposed to abolish the penal provision which carries a punishment of up to life imprisonment for such acts.

The question which the judiciary has struggled with since 1860 is to determine what exactly ‘carnal intercourse against the order of nature’ with inter alia human beings. Any act of carnal intercourse clearly against the order of nature.<sup>15</sup> The meaning of Sec. 377 in 1884 was restricted to anal sex, by 1935 it was broadened to include oral sex<sup>16</sup> and the judgments in contemporary India have broadened it to also include thigh sex.<sup>17</sup>

If we are to search for a principle which holds together these various sex acts prohibited by Sec. 377, it was laid down as early as 1935. The Court in *Khanu v. Emperor*<sup>18</sup> laid down that, “the natural object of sexual intercourse is that there should be the possibility of conception of human beings, which in the case of *coitus per os* [oral intercourse] is impossible”.

*This idea of sex without the possibility of conception has been used by the judiciary over the last 150 years to characterize homosexuality as a ‘perversion’, ‘despicable specimen of humanity’, ‘abhorrent crime’, ‘result of a perverse mind’ and ‘abhorred by civilized society’.* As per the judicial interpretation both acts of consensual sex as well as acts of sexual assault, under its catch all category of ‘carnal intercourse against the order of nature’. It is also important to note that technically speaking, Sec. 377 does not prohibit homosexuality or criminalize homosexuals as a class but targets instead sexual acts. However the fact that these sexual acts are commonly associated with only homosexuals has made homosexuals far more vulnerable to prosecution under the law than heterosexuals.

The judicial understanding of Sec. 377 has never been impacted by the Indian Constitution. Right since 1860 through almost 63 years of the Indian Constitution, the judiciary continues to follow the colonial justices of the *Khanu era* in characterizing homosexuals as ‘despicable specimens of humanity’. The right to

15 *Khandu v. Emperor* AIR 1934 Lah.261 – carnal intercourse with a bullock through nose is an unnatural offence punishable under Sec. 377 of IPC, 1860

16 *Lohana Vasntla Devchand v. The State* AIR 1968 Guj 252 – entry of male genital organ in to the orifice of the mouth of victim falls under Sec. 377 of IPC, 1860

17 *State of Kerala v. Kundumkara Govindan and Another* 1969 CrLJ 818

18 AIR 1925 Sind. 286

equality, the right to dignity or the right to expression have never been seen fit to apply to lesbians, gay, bisexuals, transgender or others whose sexuality does not conform to the heterosexual mainstream.

The judicial understanding of Sec. 377 only legitimizes and reinforces state power to persecute and harass those of an alternative sexual orientation or gender identity. This enormous power in the hands of the state to enforce its vision of morality finds frightening expression in the form of arbitrary and brutal state action.

The validity of Sec. 377 of IPC, 1860 was debated before the Delhi High Court. The debate came in *Naz Foundation v. Govt. of N.C.T. of Delhi*,<sup>19</sup> the petitioners belongs to gay rights NGOs, they seek to “read down” Sec. 377, so that it does not apply to sexual acts between consenting adults, while still being used to protect minors and non-consenting adults. On 20<sup>th</sup> July 2009 the Delhi High Court held that Sec. 377 of IPC, 1860 was violative of Art. 21, 14 and 15 of the Indian Constitution, insofar as it criminalized consensual sexual acts of adults in private. Those private, consensual sexual relations are protected under the right to liberty under Article 21 under the privacy and dignity claim. It was further pleaded that Section 377 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 IPC insofar as it criminalises consensual, non-procreative sexual relations is unreasonable and arbitrary and therefore violative of Article 14.

Following the High Court judgment, 15 Special Leave Petitions (SLPs) were filed before the Supreme Court of India against the decision on behalf of mostly faith based and religious groups from all parts of India. In *Suresh Kumar Koushal and others v. Naz Foundation (India) Trust and others*,<sup>20</sup> the Apex Court in India dealt a cruel blow to lakhs of homosexuals, many of whom had started living together after the Delhi High Court decriminalized same sex relationship, by making it a crime again, even if it is consensual and done between adults in private. The bench of Justices Singhvi and S J Mukhopadhaya reversed the Delhi HC’s 2009 verdict and held that the 150-year-old Sec. 377, criminalizing gay sex, “does not suffer from the vice of unconstitutionality”. The judgment would turn the clock back, and was being viewed in India and globally as a retrograde step. The possibility of police harassment of homosexuals could no longer be ruled out. Further the bench held that “In the light of plain meaning and legislative history of the section, we hold

---

19 2010 Cr LJ 94, 2<sup>nd</sup> July 2009 Delhi HC

20 Civil Appeal No. 10972 of 2013 (Arising out of SLP © No.15436 of 2009) (2014) 1 SCC 1

that Sec. 377 IPC would apply irrespective of age and consent.” It added that the section does not discriminate any group with a particular sexual preference, a stand that was diametrically opposite to that by the Delhi HC.

Once again the Supreme Court in *National Legal Services Authority v. Union of India & Others*<sup>21</sup> has refused to speak on the constitutionality of Sec. 377 of IPC, 1860. This case would demonstrate that Section 377, though associated with specific sexual acts, highlighted certain identities, including Hijras and was used as an instrument of harassment and physical abuse against Hijras and transgender persons. A Division Bench of the Apex Court held that in these cases we concerned with altogether a different issue pertaining to the constitutional and other legal rights of the transgender community and their gender identity and sexual orientation. In a landmark judgment, the Supreme Court created the “third gender” status for hijras or transgender. Earlier, they were forced to write male or female against their gender. The SC asked the Centre to treat transgender as socially and economically backward. The apex court said that transgender will be allowed admission in educational institutions and given employment on the basis that they belonged to the third gender category. This is for the first time that the third gender has got a formal recognition. The third gender people will be considered as OBCs. The Court also said States and Centre will devise social welfare schemes for third gender community and run a public awareness campaigns to erase social stigma.

Though the Supreme Court gave special status and identity to transgender community, the court refused to decriminalize sexual minorities.

From above Supreme Court judgments it is very clear that Sec. 377 of IPC, 1860 does not violate Art. 14, 15 and 21 of the Indian Constitution, hence Sec. 377 is valid.

## **Social Attitude**

The reason behind the development of homosexual behaviour is genetics and random environmental factors as per the scientific journal. Overall, genetics accounted for around 35 per cent of the differences between men in homosexual behaviour and other individual-specific environmental factors (that is, not societal attitudes, family or parenting, which are shared by twins) accounted for around 64 per cent. As regards women, genetics explained roughly 18 per cent of the variation in same-sex behaviour, non-shared environment roughly 64 per cent and shared factors, or the family environment, explained 16 per cent. Based on

---

21 15<sup>th</sup> April, 2014

their observations, the researchers came to the conclusion that genetic influences are important but, modest, and that non-shared environmental factors, which may include factors operating during foetal development, dominate.<sup>22</sup>

Sexual minority is not a disease but it is genetic disorder. A person may suffer with this by birth or psychological thoughts/feelings. There is a need to counseling to change the psychological attitude of the person who involved in same sex. Gay sex is completely clueless about the issue. One knows of people who do not even believe in the existence of any category other than heterosexuals. The conflict between the home sexual and hetero sexual is a reflection of the lack of proper knowledge about the plight of homosexuals. The views presented in the recent past reflect a fear of homosexuality on the one hand and abhorrence of it on the other. The legal battle is only one of the concerns of homosexuals. There are many more related demands like the freedom to practice one's sexual preferences without fear of social ostracism. Such issues are often neglected in the big picture. Only those who are deeply involved with the cause understand the complexity of such a debate.<sup>23</sup>

There needs to be more awareness about the issue. The ignorance needs to be addressed and one should stop taking stand on the basis of incomplete information. Homosexuality is not a devil that the society needs to fight against. Instead, the society needs to understand it before denouncing it as something criminal. The debate needs to go farther and involve those whose rights are at stake.

A concern to the forefront only to an extent, but it is not a holistic representation of the issue. While many countries have made gay sex and homosexual marriages legal, India is still pondering over the issue. Freedom of individuals to a private life does not seem to be on the agenda of any side though that is the most important aspect of this controversy. It is the homosexuals who come out with their views clearly, as evident in the recent gay parades. This freedom is itself curbed by an archaic law which seems to be losing ground in a modern society. Indian citizens still seem to be stuck with the nineteenth century British concept of sexuality based on the sexual mores of that time.

Sec. 377 IPC, 1860 is based upon traditional Judeo-Christian moral and ethical standards which conceive of sex in purely functional terms, i.e., for the purpose of procreation only. Any non-procreative sexual activity is thus viewed as being "against the order of nature". The submission is that the legislation criminalising

---

22 <http://www.merineews.com/catFull.jsp?articleID=136751> dt 20.10.08

23 <http://www.merineews.com/catFull.jsp?articleID=143401> visited on 20.10.08

consensual oral and anal sex is outdated and has no place in modern society.<sup>24</sup>

Criminalisation creates a culture of silence and intolerance in society and perpetuates stigma and discrimination against homosexuals. Homosexual persons are reluctant to reveal their orientation to their family. Those who have revealed their orientation are faced with shock, denial and rejection and some are even pressurised through abuse and marriage to cure themselves. They are subjected to conversion therapies such as electro-convulsive therapy although homosexuality is no longer considered a disease or a mental disorder but an alternate variant of human sexuality and an immutable characteristic which cannot be changed.<sup>25</sup>

### **Problems in Legalization**

The real danger of Sec. 377 lies in the fact that it permeates different social settings including the medical establishment, media, family, and the state. Thus it becomes a part of ordinary conversations and ultimately a part of the very social fabric in workplaces, families, hospitals and the popular press. This helps to create an environment where violence against queer people gains a semblance of legal acceptability. Sec. 377 expresses deep societal repugnance towards unexpected people and provides the fig leaf of legitimacy for the harassment of queer people by families, friends, the medical establishment and other official institutions.

Homosexuality for protecting children from sexual abuse is a reason put forward by the Home ministry. That is a valid concern keeping in view the large number of child abuse cases reported every year. But people need to understand that this fight is for consensual sex among adults. By equating homosexuality with child abuse a confusion of categories is being created. It is like equating homosexuality with perversity without taking into account the fact that it is a practice going on among many adults all over the world. It is not a psychological disorder but a matter of personal choice. As long as it does not intrude into someone else's privacy and does not lead to any inconvenience for the citizens, it should not be considered a crime.

In India there exists sufficient documentary, archaeological and anthropological evidences to suggest that same sex ties especially among men, were not only culturally, but dignified and revered by attributing similar traits to religious deities. The homoerotic carvings among the erotic carvings on the Hindu temples of Khajuraho in Konark and Puri, and on the great Buddhist monument

---

24 Supra note. 19

25 Supra note. 20

at Borabordur in Indonesia are well known. Indian kings also tended to have a number of boys in their harems.<sup>26</sup>

Having grown up in conservative India, where sexuality is generally a bog taboo, and repeatedly informed by our elders that homo sexuality is abnormal, and disgusting. Homo sexuality has existed throughout human history, all across the world. It has nothing to do with east, west, north or south or any other arbitrary distinction.

Homosexuality between adults is no longer an offense in England, West Germany, Norway and several other western countries provided it is not done in a public place. In India it is, however punishable under Sec. 377 of Indian Penal Code, 1860.<sup>27</sup>

The effect on actions by authorities right from the medical profession to the National Human Rights Commission should be seriously studied to grasp how Sec. 377 has functioned as cultural signifier for the ‘unacceptability’ of homosexuality.

Similarly the social intolerance fostered by the legal regime of Sec. 377, results in the situation wherein lesbian couple after lesbian couple feel they have no option but to commit suicide when faced with the dire reality of the Indian norm of compulsory marriage.

The above factors are not satisfactory to criminalize homo sexual attitude under Sec. 377 of IPC, 1860. Every citizen in our country is having a fundamental right to equality, live with dignity, and right to privacy. Central or State government’s have no right to violate fundamental rights guaranteed to citizens of India. It is their duty to protect and preserve these rights.

## Conclusions

Societies all over the world are permanently changing. The lifestyle of many persons differs considerably from that of previous generations. In many countries this also has consequences in respect of family law. Old traditional rules are confronted with new facts and circumstances and are therefore under pressure to be modified by the courts or legislators.<sup>28</sup>

Societal attitudes towards same-sex relationships vary over time and place, from expecting all males to engage in same-sex relationships, to casual integration,

---

26 Lakhawat Manish, “Same Sex Relationship Time for Legal Recognition in India” <http://www.legalservicesindia.com/articles/ssrel.htm> visited on 20.10.2014

27 Paranjape N.V, *Criminology and Penology* (Central Law Publications, Allahabad, 13<sup>th</sup> Ed. 2007) at 160

28 *Supra* note. 2

through acceptance, to seeing the practice as a minor sin, repressing it through law enforcement and judicial mechanisms, and to proscribing it under penalty of death. Sexual minority in India, are fighting for their social and legal acceptance. Some people are infavour and majorities are against legal recognition for gay sex.

Law Commission in its 172<sup>nd</sup> Report had recommended for the deletion of Section 377 and pleaded that notwithstanding the recent prosecutorial use of Section 377 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 and MSM and sexual minorities generally underground which cripples HIV/AIDS prevention methods.<sup>29</sup>

The most important task is to educate the public and raise public awareness about sexual minorities. Sexual minorities need the support of the national and state government, which need to take a secular, long term outlook and invest the necessary resources. They deserve one of the most important fundamental right that is right to equality. Equality and human rights are not exclusively western principles. Sexual minorities deserve to be treated with dignity and respect. India being one of the most important democratic countries, we should extend equal protection and freedom to all citizens including sexual minority. To achieve equality the responsibility is on the law makers to amend Sec. 377 of IPC, 1860 to decriminalise homosexuals, there is no need to delete this section.



---

29 Supra note. 20

# Changing Law on Rape : A Critical Evaluation

*Dr. Manu Sharma*<sup>1</sup>

## INTRODUCTION

Law is an instrument of change. It keeps on changing with changing time to meet the needs of society. If it changes for additional betterment, it becomes an indicator of advancement of society and when it changes to fulfill the very basic requirement of society which the existing law failed to achieve, it becomes an indicator of degradation of society.

Indian society has become a bold example of brutalism against woman. Increasing cases of sexual assault and rape against women and even against small girls has been increasing which has sent shock waves across the country. The substantive and procedural laws such as Indian Penal Code, Indian Evidence Act etc are already loaded with provisions dealing with offence of rape. But inspite of all this the cases of rape are mounting day by day. It was Delhi Rape Case (16<sup>th</sup> December 2012) which has brought a kind of revolution among masses and there was an outcry for changing the law on rape.

## MEANING OF RAPE

The word “*rape*” is derived from Latin Term “*rapio*” which means “*to seize*”<sup>2</sup>. Thus rape literally means a forcible seizure and that is essential feature of offense. In common parlance, it means intercourse with a woman without her consent by force, fraud or fear.<sup>3</sup>

As per *Butterworth’s Australian Legal Dictionary*, “rape is an offence at common law of having carnal knowledge of a woman without her consent.”<sup>4</sup>

As per *Halsbury’s Law of England*, “It is not necessary to prove the completion of sexual intercourse by the emission of seeds; intercourse is deemed complete upon proof of penetration only. If penetration cannot be satisfactorily proved, the defendant may be convicted of attempted rape, if intention is not proved he may be convicted of indecent assault.”<sup>5</sup>

---

1 Faculty Member, APG University, Shimla Himanchal

2 PSA Pillai, *Criminal Law*, 9<sup>th</sup> Edition (2000) p.720.

3 Ibid

4 *Butterworth concise Australian Legal Dictionary* (1998) p.365

5 *Halsbury’s Law of England*, 4<sup>th</sup> Edition (1996) p.1228



## STATUTORY DEFINITION OF RAPE-SECTION 375, INDIAN PENAL CODE<sup>6</sup>

As per section 375 of Indian Panel Code, a man is said to commit “rape” if he has sexual intercourse with a woman under following six circumstances.

- i) Against her will.
- ii) Without her consent<sup>7</sup>.
- iii) With her consent, when her consent has been obtained by putting her or any person whom she is interested in fear of death or of hurt.
- iv) With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
- v) With her consent, when at the time of giving consent, by reason of unsoundness of mind or intoxication or the administration by him or by another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
- vi) With or without her consent when she is below the age of sixteen years.<sup>8</sup>

As per explanation to this section penetration is sufficient to constitute intercourse for the offence of rape.<sup>9</sup> So, section 375 requires two things, first is sexual intercourse by man with a woman and second the sexual intercourse must be done under the six circumstances mentioned in the section.

### ***Reasons for amendment in existing Laws:***

All offences are heinous in nature but offense of rape is considered as most heinous because it not only physically impairs the victim but affects the victim emotionally and psychologically. It is a dark reality that such offences against women have become a part of Indian society. No place is left where such crimes are not committed - household, schools, colleges, public transport etc. Such incidents become headline of newspapers and T.V. channels for sometimes and then vanish from the memory of public and administration. It is the brutal Delhi gang rape case<sup>10</sup> that has aroused anger among common man and brought a wave of change.

Beside this there is a constitutional mandate to protect women from such kind of brutality. *Preamble* to Indian Constitution guarantees social, economic and

6 Rape defined under 375, IPC before the Criminal Law (Amendment) Act, 2013

7 The word ‘will’ implies that faculty of reasoning power of mind. Every act done against will is obviously ‘without the consent’ but every act ‘without consent is not against will’. H.S. Gour, Penal Laws of India, vol. iv (2000) p3611

8 See section 375, IPC, 1860

9 Ibid

10 A brutal gang rape of a young woman in the heart of nation’s capital committed in a public transport in the late evening hours of December 16, 2012. (Indian Today, 14 January 2013)

political justice to all its citizens and equality of status and of opportunity.

*Chapter III of Constitution* deals with certain fundamental rights such as right to equality<sup>11</sup> which prohibits gender discrimination. *Article 21* provides that no one shall be deprived of his life and personal liberty except procedure established by law.<sup>12</sup> Procedure by which these precious things can be interfered must be just, fair and reasonable.<sup>13</sup> Hence if life and personal liberty is interfered by illegal ways, it is the duty of state to provide justice to the person.

*Chapter IV-A* of the constitution which deals with fundamental duties provides that it shall be the duty of every citizen to renounce the practices derogatory to the dignity of women.<sup>14</sup>

Thus right to be protected from sexual offences is a constitutional mandate and it is the duty of all its citizens including women and children for their proper growth and development. However administration is failing continuously in fulfilling this mandate badly. For this reason there must be amendments in existing substantive and procedural laws.

In 1983 after *Mathura's case*<sup>15</sup> almost the same situation was there. Rape law had undergone extensive amendments in the year 1983. Important amendments were also introduced to Indian Penal Code, Indian Evidence Acts which are as following:-

- i) Section 376 A punishes sexual intercourse with wife without her consent by a judicially separated husband.<sup>16</sup>
- ii) Section 376 B punishes sexual intercourse by a public servant with woman in his custody.<sup>17</sup>
- iii) Section 376 C punishes sexual intercourse by superintendent of Jail, Remand House etc with inmates in such institution.<sup>18</sup>
- iv) Section 376 D punishes sexual intercourse by any member of management or staff of a hospital with any women in that hospital.<sup>19</sup>
- v) Section 114 A inserted in Indian Evidence Act which draws a conclusive presumption as to the absence of consent of woman in case of prosecution of rape under section 376 (2) (a), (b), (c), (d), (e), and (g) of IPC shifting burden of proof of innocence on accused.<sup>20</sup>

---

11 See article 14 of Indian Constitution, 1950.

12 See article 21 of Indian Constitution, 1950.

13 *Maneka Gandhi v. Union of India* AIR 1978 SC.

14 Article 51-A (e), Chapter IV-A, constitution of India, 1950.

15 *Tukaram v. State of Maharashtra* AIR 1979 SC 185.

16 See section 376A of Indian Penal Code, 1860.

17 See section 376B of Indian Penal Code, 1860.

18 See section 376C of Indian Penal Code, 1860.

19 See section 376D of Indian Penal Code, 1860.

20 See section 114A of Indian Evidence Act, 1872.

- vi) Section 228-A is inserted under IPC which prohibits disclosure of identity of victims in rape cases.<sup>21</sup>
- vii) An amendment is made in section 327<sup>22</sup> of Cr. P. C. which provides for trial in camera of rape cases or an offence under section 376 A to D and prohibits the publication of trial procedure in such cases without prior approval of the court.<sup>23</sup>  
But these provisions are proved to be insufficient in present scenario. The time has come to have a deterrent law on rape.

### ***Justice J.S. Verma Committee and its Recommendations:***

Due to simmering public anger Government of India constituted Justice J.S. Verma committee to suggest changes in existing law to control sexual offenses.<sup>24</sup> The committee consists of three members - J.S. Verma; former Chief Justice of India, Leila Seth; former Chief Justice of Himachal Pradesh and Gopal Subramaniam; former Solicitor General of India.<sup>25</sup>

The committee has invited suggestions from various sections of society such as women's group, human rights organizations, advocates, NGO's etc. As a result committee has received thousands of suggestion.<sup>26</sup>

### **Recommendations of the Committee**

- i) The equality of women being integral to constitution, its denial is a sacrilege and a constitutional violation. Sustained constitutional violation means that governance is not accordance with constitution.<sup>27</sup>
- ii) The manner in which the rights of women can be recognized can only be manifested when they have full access to justice and when rule of law can be upheld in their favour. The proposed criminal law amendment act 2012 should be modified as suggested and to secure public confidence.<sup>28</sup>
- iii) As far as sentence is concerned, presently section 376 of Indian Penal provides for punishment of either description for a term which shall not be less than seven years but may extended for life or for a term which may extend to ten years. The Committee has recommended in criminal Law amendment bill 2012, the minimum sentence should be enhanced to 10 years with maximum punishment being life imprisonment.<sup>29</sup>

21 See section 228 of Indian Penal Code, 1860.

22 See section 327 of Criminal Procedure Code, 1973.

23 K. D. Gaur, The Indian Penal Code (2008) p.586.

24 India Today (January 14, 2013) p.28.

25 Ibid.

26 Ibid.

27 Report of the J.S. Verma Committee (January 23, 2013) p.415.

28 Ibid.

29 Life imprisonment cannot be equivalent to imprisonment for 14 or 20 years and it actually means imprisonment for whole natural life of the convict. (State of U.P. v. Sanjay Kumar (2012)8 SCC 537).

- iv) Presently law on Capital punishment is based on ‘rarest of rare case’ doctrine.<sup>30</sup> The committee is also agreed with present law that death be given only rarest cases.
- v) Any officer who fails to register a case of rape reported to him or attempts to abort its investigation commits an offence which shall be punishable as prescribed.<sup>31</sup>
- vi) The judiciary has primary responsibility of enforcing fundamental rights through constitutional remedies. Judiciary may take suo motu cognizance of such issues being deeply concerned with Supreme Court and High Courts.
- vii) The committee recommended the creation of a new constitutional authority akin to the comptroller and auditor General for education, non-discrimination in respect of women and children.<sup>32</sup>

### ***The criminal Law (Amendment) Act, 2013***

On the basis of recommendations of Justice Verma Committee, Parliament enacted the criminal Law (Amendment) Act, 2013.<sup>33</sup> Following amendments are made by this act relating to offence of rape:

- i) A new section 166A is inserted which deals with public servant disobeying direction under law section 166-A (c) provides that where any public servant fails to record any information given to him under section 154 (I) of Cr.P.C., 1973 in relation to cognizable offence punishable under section 376, 376A, 376B, 376C, 376D and 376E shall be punishable with rigorous imprisonment for a term not less than six months but which may extend to two years and shall also be liable to fine.<sup>34</sup>
- ii) Section 166B is inserted which provides for punishment with imprisonment up to one year and fine in case of non-treatment of victim by any incharge of hospital wherever public or private.<sup>35</sup>
- iii) Under Section 375 of IPC clause (a) to (d) are inserted which defines four acts by a man which amounts to rape. Previously six circumstances are there for the commission of offence of rape. Now one more circumstance is added that is when woman is unable to communicate consent.<sup>36</sup>

---

30 ‘Rarest of rare case’ doctrine is created by Supreme Court of India in *Bachhan Sing v. State of Punjab* (1980) 2 SCC 684.

31 *Supra* note 26 at p. 416.

32 *Id* at p.423.

33 Received the assent of President and published in Gazette of India on 2-4-2013.

34 See section 166A of Indian Penal Code, 1860.

35 See section 166B of Indian Penal Code, 1860.

36 See section 375 of Indian Penal Code, 1860.

Further a new explanation is inserted, “Explanation 2” which provides for the meaning of consent. Consent means an unequivocal voluntary agreement. When women by words, gestures or any form of verbal or non-verbal communication, communicates, willingness to participate in specific sexual act. It further provides that a woman who does not physically resist to the act penetration shall not by the reason only of that fact, be regarded as consenting to sexual activity.<sup>37</sup>

A new exception is also inserted in section 375 that is a medical procedure or intervention shall not constitute rape.<sup>38</sup>

- iv) Section 376 (I) provides for punishment for rape that is rigorous punishment of either description for a term which shall not be less than 7 years but which may extend to imprisonment for life and also liable to fine.

Section 376 (2) provides for grave punishment that is rigorous imprisonment not less than 10 years but which may extend to imprisonment for life in case like rape committed by police officer within limits of police station, staff of jail, remand house, by manager or staff of hospital, by guardian or teacher.<sup>39</sup>

- v) Section 376-A substituted by new section which provides for punishment of rigorous imprisonment not less than 20 years but may extend to life imprisonment for causing death or resulting persistent vegetative state of victim.<sup>40</sup>
- vi) Section 376-B provides for punishment of imprisonment which shall not be less than two years but which may extend to seven years and fine for sexual intercourse by husband upon his wife during separation.<sup>41</sup>
- vii) Section 376-C makes sexual intercourse by a person in authority a punishable offence with imprisonment which shall not be less that five years but may extend to ten years.<sup>42</sup>
- viii) Section 376-D provides for punishment in gang rape with rigorous imprisonment which shall not be less than twenty years but which may extend to life imprisonment.<sup>43</sup>

---

37 Ibid.

38 Ibid.

39 See section 376 of Indian Panel Code, 1860.

40 See section 376-A of Indian Panel Code, 1890.

41 40. See section 376-B of Indian Panel code 1890.

42 See section 376-C of Indian Panel code 1890.

43 See section 376-D of Indian Panel code 1890.

- ix) Section 376-E provides for punishment for repeat offenders under section 376 or section 376 A to D with imprisonment for remainder of person's natural life or with death.<sup>44</sup>
- x) An amendment has been made under section 154 (I) of Cr. P. C. which provides that information given woman against whom an offence under 376, 376-A to 376-E has been committed then such information shall be recorded by a woman police.<sup>45</sup>
- xi) Amendment is also made under section 161 of Cr. P. C. which provides for that statement of a woman against whom an offence is committed under section 376, 376A to 376E shall be recorded by a woman police officer.<sup>46</sup>
- xii) A new section is inserted that is section 198 A that provides for cognizance of offence punishable under section 376B of IPC shall be taken only upon prima facie satisfaction of facts which constitute offence and upon the complaint filed by wife against husband.<sup>47</sup>
- xiii) An amendment is made under section 309 of Cr. P. C. when the inquiry or trial relates to offence under section 376 or section 376A to 376D of IPC as far as possible it be completed within two months from date of filing of charge sheet.<sup>48</sup>
- xiv) Section 357-C is inserted which makes it mandatory for all hospitals whatever public or private to provide first aid to the victim of offence covered under section 376 or section 376A to E IPC and shall immediately inform the police of such incident.<sup>49</sup>
- xv) Section 53-A is inserted in Indian Evidence Act 1872 which makes evidence of character or previous sexual experience not relevant in prosecution for an offence under section 376 and section 376A to 376E.<sup>50</sup>
- xvi) Section 146 f Indian Evidence Act provides that in prosecution for an offence under section 376 or 376A to 376E of IPC, where the question of consent is in issue, it shall not be permissible to adduce evidence or to put questions in cross-examination of victim as to general immoral character or previous sexual experience.<sup>51</sup>

---

44 See section 376-D of Indian Penal code 1890.

45 See section 154 of Cr. P. C. 1973.

46 45. See section 161 of Cr. P. C. 1973.

47 See section 154 of Cr. P. C. 1973.

48 See section 309 of Cr. P. C. 1973.

49 See section 357-C of Cr. P. C. 1973.

50 See section 53-A of Indian Evidence Act, 1872.

51 See section 146 of Indian Evidence Act, 1872.

## Law on Rape a settled down by Judiciary

The first case which needs mention is *Tukaram v. State of Maharashtra*.<sup>52</sup> In this case 18 years old Harijan girl was called to police station on an abduction report filed by her brother at police station. When the girl and her family members were about to leave the police station, Mathura was kept back at police station in late night hours and was raped by a constable, Ganpat and then another constable Tukaram also tried to rape her but failed to do so. The session Judge acquitted accused on the ground of tacit consent from the charge of rape. Bombay High Court reversed the judgment and found Ganpat guilty of rape and Tukaram guilty of molesting the woman.<sup>53</sup>

Bombay High Court made a fine distinction between “*consent*” and “*passive submission*” and held mere passive or helpless surrender of body and its resignation to other’s lust induced by threats or fear cannot be equated with ‘desire’ or ‘will’ or ‘consent’.

But supreme Court again reversed the judgment on the ground of absence of any fear of death or hurt.

Supreme Court’s judgment was criticized by various jurists, social scientists etc. This judgment result is in Criminal Law (Amendment) Act, 1983.

Another landmark case which needs mention in *State of Pubjab v. Gurmit Singh*.<sup>54</sup> In this case Supreme Court while expressing anguish on lack of sensitivity among lower courts in handling rape cases laid down following guidelines:

- i) Delay in lodging FIR is not material when properly examined.
- ii) Testimony of prosecutrix in cases of sexual assault is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the court should find no difficulty in convicting accused on prosecutrix testimony alone.
- iii) Trial of sexual offences should be in camera and invariably by a lady judge whenever available.
- iv) The court must restrain making observation that probably the prosecutrix is a lady of loose moral character.
- v) The court is under obligation to see that prosecutrix is not unnecessarily harassed and humiliated in cross-examinations in case of rape trial.

<sup>52</sup> AIR 1979 SC 185

<sup>53</sup> Ibid.

<sup>54</sup> AIR 1996 SC 1393.

In case *Sri Bodhisattwa Gautam v. Shubra Chakraborty*<sup>55</sup>, Supreme Court made observation on Criminal Law Amendment Act, 1983. Supreme Court is of opinion that even though section 114A enables a court to raise a presumption woman when victim of offence of rape is has not consented to the offence but the situation has hardly improved. A large number of women still fail to report rapes to police because they fear embarrassing and insensitive treatment by police, doctors, law enforcement personnel etc. This fear has to be allayed from the minds of women for fair and speedy trial.

The case *Bantu @ Naresh Giri v. State of M.P.*<sup>56</sup> deals with rape and murder of 6 years old child. The accused was 22 years. There was nothing on record to indicate that appellant was having any criminal record not it can be said that he will be great danger to society at large. The Court observed that act is heinous and requires to be condemned but it cannot be said that it is rarest of rare case. So, court commute death sentence to an imprisonment for life.

Court further held for awarding death penalty, there are two different compartments, one being “aggravating circumstances” while the other being the “mitigating circumstances”. The court has to consider the cumulative effect of both these aspects while deciding death penalty.

In *Koppula Venkartrao v. State of Andhra Pradesh*<sup>57</sup> Supreme Court while making difference between rape and attempt to rape observed that the sine qua non of the offence of rape is penetration and not ejaculation. Ejaculations without penetration constitute an attempt to commit rape and not actual rape. The definition of rape as contained in section 375 IPC refers to sexual intercourse and explanation appended to this section provides that penetration is sufficient to constitute sexual intercourse necessary to the offence of rape. Intercourse means sexual connection.

In case of *Ramanaresh and other v. state of chhattisgarh*<sup>58</sup> SC while deciding the quantum of punishment held gang rape followed by death of victim is heinous crime but does not fall under rarest of rare case. Evidence in this case shows that death of deceased was accidental and not intentional.

Court further held while deciding whether death penalty be awarded or not following principles are to be applied:

---

55 1996 SCC (I) 490.

56 2001 (4) RCC 614 (SC).

57 (2004) 3 SCC 602.

58 (2012) SL CrLJ 1898.



- a) Court has to apply test, if it was rarest of rare case.
- b) In the opinion of court, imposition of any other punishment would be completely inadequate and would not meet ends of justice.
- c) Life imprisonment is rule and death sentence is an exception.
- d) The option to impose sentence of imprisonment of life cannot cautiously exercised having regard to the nature and circumstances of the crime and all relevant considerations.
- e) Method and manner in which crime was committed and circumstances leading to commission or such heinous crime.

## **Conclusion**

The criminal amendment Act, 2013 is a result of public opinion. Infact it is a fine example that how public opinion affects the law. The act is mainly based on the recommendations of Justice Verma Committee. The initial purpose of committee is to have a deterrent law on rape but merely enhancing punishment from seven to ten years or by expanding the meaning of rape by adding one or more clauses hardly makes any difference. It does not make law deterrent as even after these amendments there is no decrease in cases of rape. T.V. channels and newspapers are still loaded with news of rape cases. The way to control sexual offences against women is not only to have a stern law but also to educate the man to respect women and to treat them at equal par with man and such things cannot be enforced by law but are to be learned in families, schools and colleges. So, unless we change our patriarchal thinking, law can hardly help us.

## **Suggestions**

- i) Increasing punishment can have little deterrent effect but if there is provision of compensation to the victim it can have strong deterrent affect. Victim should be compensated adequately for life by the accused.
- ii) Police reforms should be made in such a way as to make them more human towards rape cases.
- iii) Societal altitude should be changed. Instead of outcasting victim, society should be sympathetic towards victim.





## **Prof. Rakesh Verma**

*(A Distinguished Member of Chotanagpur Law Journal  
Advisory Board)*

Prof. Rakesh Verma has been an alumni of Banaras Hindu University. He joined the Chotanagpur Law College, Ranchi under Ranchi University, Ranchi as a Lecturer in the year 1982 and became the Principal of this premier institution in the year 1995-96. During his teaching and administrative years, 03 candidates have been awarded with Ph.D. degree under his supervision.

Prof. Verma has great expertise in the field of legal teaching, research as well as administration of the oldest institution imparting legal education in the state of Jharkhand. He has immensely contributed to develop and maintain the good academic atmosphere in this college.

Prof. Rakesh Verma has joined the Patna Law College, Patna as a Principal on 1st April, 2004. There also he has immensely contributed in the field of educational administration. He is a member of so many selection committees. He has also authored a book on Administrative Law. Several of his research paper have been published in National/International Journals. Approximately 15 to 20 candidates have been awarded Ph.D. degree under his supervision till date.

He is associated closely with Chotanagpur Law Journal Advisory Board and has been editing discreetly and minutely and has contributed greatly to growth of our journal.

The Chotanagpur Law Journal - Editorial Board is obliged for his contribution.

**From the Desk of  
EDITORIAL TEAM JOURNAL**

**Statement of Particulars Under Section 19D (b) of the Press & Registration of Book Act Read with Rule 8 of the Registration of Newspaper (Central) Rules, 1956**

**FORM IV**

1.	Place of Publication	Chotanagpur Law College, Namkum, Ranchi, Jharkhand
2.	Periodicity of its Publication	Bi-Annual
3.	Printer's Name & Address	Speedo Print, Kokar, Ranchi
4.	Publisher's Name, Address & Nationality	Prof. R. K. Walia Principal, Chotanagpur Law College, Namkum, Ranchi, Jharkhand
5.	Editor's Name Address & Nationality	Dr. P. K. Chaturvedi, Executive Editor Asstt. Professor, Chotanagpur Law College, Namkum, Ranchi, Jharkhand, India
6.	Name and address of individual who own the papers and or shareholder holding More than one percent of the total capital	Chotanagpur Law College, Namkum, Ranchi, Jharkhand

I, P. K. Chaturvedi hereby declare that the particulars given are true to the best of my knowledge and belief. Edited and Published by Chotanagpur Law College, Ranchi, Jharkhand



“ धर्मो विश्वस्य जगतः प्रतिष्ठा।  
लौके धर्मिष्ठं प्रजा उपसर्पन्ति।  
धर्मेण पापमपनुद्धति।  
धर्मे सर्व प्रतिष्ठितम्।  
तस्माद्धर्म परमं वदन्ति। ”

ESTD. 1954

RANCHI



## CHOTANAGPUR LAW COLLEGE

Nyay Vihar Campus, Namkum, Tata Road, NH-33, Ranchi, Jharkhand

Phone : 0651-2205877, 2261050

Email : [info@cnlawcollege.org](mailto:info@cnlawcollege.org) • Website : [www.cnlawcollege.org](http://www.cnlawcollege.org)