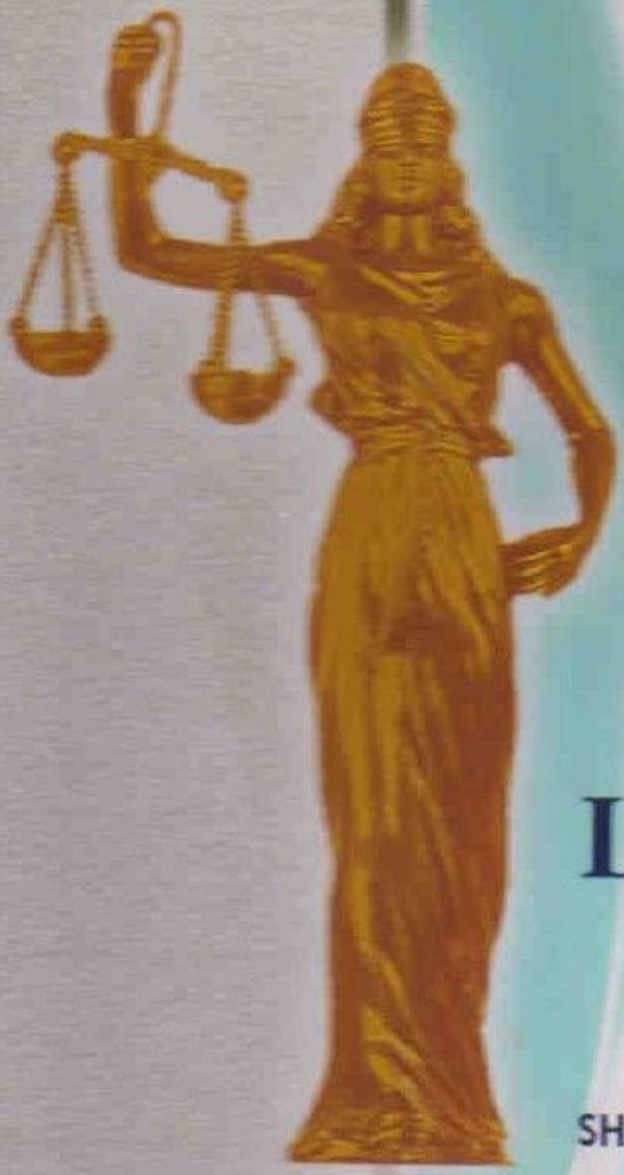

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LEGAL Opus

ISSUE NO. : 8 OCTOBER 2013

SHRI DHARMASTHALA MANJUNATHESHWARA
LAW COLLEGE & CENTRE FOR
POST GRADUATE STUDIES & RESEARCH IN LAW

(NAAC RE-ACCREDITED "A")
MANGALORE - 575 003

PH : 0824-2494360 FAX : 0284-2492636
email : sdmlaw@gmail.com web : www.sdmlc.org

"Ruby - Jubilee Year"

SPONSORED BY :
SHRI DHARMASTHALA MANJUNATHESHWARA
EDUCATIONAL SOCIETY (R.), UJIRE, D.K.

LEGAL OPUS

(RUBY JUBILEE EDITION)

2013 – 14

Issue 8 October 2013

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MANGALORE-575 003

Patron-in Chief

Dr. D. Veerendra Heggade

Dharmadhikari, Dharmasthala

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It may be noted that the authors are responsible for their views expressed in their writing and they may not necessarily reflect the views of the Editor.

Editorial

"Legal opus" an annual Journal is a prestigious Journal of our post Graduate department and centre for Research in law The journal explores the inherent talents of both students and staff and also it contains articles from legal luminaries exposing the various dimensions of law and a ocean of knowledge is presented in a systematic manner for the ease of legal fraternity.

Knowledge and wisdom are like two faces of the same coin. They are the product of long incessant mental activity undertaken by academicians, Advocates and students. The era of Liberalization, privatization and globalization believes in creation of knowledge by analyzing, deliberating as well as improving existing knowledge without fore going the past treasure of knowledge. So, the past, present and future are always continuous.

I am glad to have undertaken the responsibility of bringing out this edition on the auspicious occasion of completion of forty yeurs of meuningful existence of this prestigious Institution. It is indeed an honour to enclose the valuable messages of our patrons and well wishers and also the reminiscences of our Law college.

I know that Journal do not contain messages and reminiscences but as the institution is celebrating Ruby Jubilee, it is appropriate to give a glimpse of this great institution and the support given by the Magnetic personality Dr. D. Veerendra Heggade.

Dr. B. K. Ravindra

Editor in Chief

About Our Patron-in-Chief

The Dharmadhikari of Dharmasthata, Shri Veerendra Heggade is a multi-faceted personality who combines in him, many roles. He is the head of a religious institution that draws millions of people. He is a dispenser of Justice whose word is law. He is the upholder of a tradition that spans centuries. But what may be more important to society at large is his rote as an educationist with a vision.

Shri Heggade, as the President of the Society, has been the guiding spirit and the driving force behind the institutions. Since the time he took over this responsibility, he has given the Society a new sense of direction and brought about a throbbing vitality that has seen the institutions flourish. His vision of an educational model that blends the best of tradition and modernity has proved to be the most appropriate one for our culture and times. The personal interest that he displays, despite his varied duties, sees him not only provide the broad guidelines but also look into the smallest matter that could effect the quality of education.

Shri Heggade has always believed that education is not an end in itself. The more important question after a course or vocational training is whether the student will be gainfully employed after it. It is this thought process which has seen him lay emphasis on practical training and the right values. He has in continuation of this process, also deeply involved himself in projects for rural development where alumni of the institutions can use their education. In order to create the spirit of independence, he has stressed the need for and created opportunities for self employment.

It is pertinent to mention here that Dharmasthala is known for four dhanas, i.e. Anna Dhana, Vastra dhana, Vidhya dhana and Nyaya dhana. An outcome of Nyayadhana is the establishment of S.D.M. Law College & Centre for P.G. Studies in law. It is the first institution to be Re-accredited by NAAC with "A" and now it is 40 years old.

S.D.M. Law College & Centre for P.G. Studies in law has from last 40 years turning out many legal Luminaries who are occupying prominent positions in the society. The institution has drawn inspiration from the blessings of Lord Manjunatha Swamy and the unstinted support of Dr. Veerendra Heggadeji.

Dr. B. K. Ravindra
Principal & Chairman
S.D.M. Law College &
Centre for P.G. Studies in Law, Mangalore

SUSTAINED EFFORTS

Prof. C. S. Patil, Dean, KSLU and Director KSLU's Law School, Hubli.

SDM chain of educational institutions have carved out a niche for themselves in society; SDM Law College, Mangalore has become iconic in that region of Karnataka by providing quality legal education. With the change of guard in 2004, a new period of innovation started in the institution. With new curricular requirements in the form of clinical courses, practical courses and extension activities, competing elite law institutions at urban centres, decision on the part of students to acquire quality education were challenging o the incumbent of the office of Principal in every law college. Having taken the cudgels of the institution Dr. B.K. Ravindra has provided an able leadership to the institution. The institution has scaled academic heights under his stewardship.

At SDM, commitment to cause and devotion to duty appears to be the punch line. The institution has committed band of teachers with hard working and task master principal. In establishing and maintaining academic standards, he leads by example. Despite the busy schedule he has time to publish research articles and participate in seminars and symposia as a resource person.

Dr. Ravindra B. K. has posted many landmarks on the timeline of SDM law college over a period of ten years. SDM National Moot Court competition is successfully organised every year. By now it has acquired national fame and is attracting best of the law colleges. He has organised a number of seminars, workshops and symposia on theme of social relevance providing an opportunity to youngsters and elders alike to express their ideas and opinions. It is to be noted that organising seminars relating to legal education is close to his heart. His most important and everlasting contribution which only few institutions in the country have accomplished is in the form of "Legal Opus" journal. Any person associated with publishing a periodical will appreciate how difficult and challenging the task is both in terms of maintaining quality and periodicity. This task, Dr.Ravindra has successfully accomplished and has placed ten volumes of Legal Opus on the shelves of law libraries. This has earned him accolades from quarters. He has strengthened the extension arm of the institution by airing legal aid and legal literacy programmes through an exclusive FM radio. The latest addition to the list of milestones is establishing of Law Lab, which is appreciated by men of eminence in the field of law.

Dr. Ravindra B. K. is known to be critical about his colleagues which is altruistic in fact. He creates wonderful opportunities for his colleagues to interact with experts, conducts in house orientation programmes apart from encouraging them to take up research activities.

The discipline at the institution is enviable and the students are well behaved and motivated. The training in the institution starts with an orientation for the freshers and progressively develops as they move into higher classes. The accomplishment of the students are also myriad. During the past decade the institution has strengthened 5 year LL.B. Programme and has started LL.M. Programme and Ph.D. Programmes. No surprise that the institution is accredited at A grade by NAAC. All credit to the leader, Dr.Ravindra B. K., who has produced more leaders in his colleagues and students. I wish him well on completion of eventful ten years as Principal of this illustrious college.

RAJ BHAVAN
BANGALORE
No.171 MSG 2013
3rd October 2013

MESSAGE

I am extremely happy to note that SHRI DHARMASTHALA MANJUNATHESHWARA LAW COLLEGE AND CENTRE FOk POST GRADUATE STUDIES AND RESEARCH IN LAW, MANGALORE, has been publishing usAnnual Law Journal and on entering 40 years of its purposeful existence, is celebrating ..RUBY JUBILEE" shortly and bringing out a Special Issue entitled "Legal Opus" commemorating the event, which will be of great help to our legal fraternity.

I send my felicitations & best wishes to the Organ isers, Management, Teaching Faculty, Researchers, Editorial Team and Students for a grand success of the Event.

(H.R.BHARDWAJ)

Message

Dear Dr. Ravindra

I am glad to know that every year you are coming out with a Journal for Post Graduate Department titled "Legal Opus" containing articles by legal luminaries. This year the Legal Opus appears to be something special because of Ruby Jubilee Celebrations and I am really proud for your commitment in enhancing the quality of legal education. I am convinced that this Journal will be of immense use to Lawyers, Judges, Academicians and students. I congratulate the faculty and yourself for this thoughtful academic exercise.

May Lord Manjunathaswamy Blessy.

Dr. D. Veerendra Heggade
Dharmadhikari
Dharmasthala

T. B. JAYACHANDRA
Minister for Law, Justice and Human Rights, Parliamentary Affairs & Legislation, Animal Husbandry and
Tumkur District In-charge

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Bangalore - 560001

No.UHRPA&LAHM/2138/2013

Message

Dated: 08.10.2013.

I am glad to know that the SDM Law College and PG Studies and Research in Law is entering the 40th year of its existence and on this occas ion a special issue " Legal Opus" is being brought out. It is interesting to know that this Law journal is brought out in association with ISBN. I wish the Ruby Jubi lee of the Institution to find the great success also I wish the Law journal to contain articles written by legal luminaries which will help the students and practitioners.

(T.B.Jayachandra)

To,
Principal,
Sri Dharmastala Manjunatheswra
Law College, Mangalore-575-003.

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October 10, 2013

MESSAGE

It gives me Immense pleasure to note that Sri Dharmasthal Manjunatheshwara Law College and Centre for P.G. Studies and Research in Law, Manglaore, has been serving the society, since last 40 years. It has also been bringing out a Law Journal which has been evoking too good response fromstudents and legal profe ssionals. It is a befitting gesture to bring out 'Legal Opus' as part of celebrations. I take thi s opportunity to convey my profound joy and happiness to the management and the editorial board who have been actively pursuing to accomplish their goals and vision.

I wish this initiative, all the success.

T.R. Subramnya

(T.R. Subramnya)

LEGAL OPUS

Issue 8 October 2013

Articles: Page No.

REMINISCENCES

(1973-74 to 2013-14)

RUBY JUBILEE CELEBRATIONS

S.D.M. Law College and Centre for Post Graduate Studies and Research in Law

SDME Society (R), Ujire manages 40 educational institutions of diverse nature is headed by the Padmabhushana Awardee Dr. D. Veerendra Heggade, Dharmadhikari of Shri Kshethra Dharmasthala. Under his visionary leadership, Sri Dharmasthala Manjunatheshwara Law College and Centre for Post Graduate Studies in Law was established way back in 1974,to promote the noble virtue of Shri Kshethra Dharmasthala "*Nyayadana*" i.e. imparting justice to the needy. The College has a motto "*Dharmo Rakshathi Rakshithah*" meaning 'Dharma protects those who protect it'.

The Management of the College under the visionary leadership of Revered Dr. D. V. Heggade and consisting of Vice-Presidents, Secretaries and members, formulates and implements schemes and policies and provides necessary facilities for imparting quality legal education. The unique mode of governance of SDM Institutions is based on mutual trust, transparency and decentralization with accountability at every level of administration. During the planning of various developmental activities there is free flow of ideas and sharing of thoughts ensuring involvement, functional efficiency and qualitative growth. Due to this, the law college has successfully accomplished its vision and mission and brought about a transformational and effective system of legal education in D.K. District, a district which has made a unique contribution to the country's cultural heritage, economic advancement and legal tradition. Presently the law college has undertaken multifarious activities over a period of 40 years since its inception and also achieved B^{++} grade in the first accreditation by the NAAC and "A" Grade in the Reaccreditations 2012.

To be in tune with the emerging needs of the society, we went for the NAAC Re-accreditation. The NAAC committee visited our college and I am proud that we are re-accredited with "A" Grade. This is perhaps the only law college to be re- accredited with "A" Grade.

IQAC

It is a pride in reporting that the NAAC has agreed to sponsor a workshop in our college.

The IQAC constituted under the Chairmanship of the Principal carried out streamlining and improving various systems and procedure. The Committee under the leadership of Dr. Tharanath has conducted several programmes for maintaining the quality parameters in the college.

A faculty orientation programme was conducted on 5th & 6th of July 2013. The objective of the programme was to enrich the faculty with skills required for collaborative and cohesive teaching.

Every year we conduct a day long orientation programme for the freshers who join 5 years LLB and 3 years LL.B. The orientation to the students is done by inviting judges, lawyers and academicians who have carved out an identity in their profession. In the year 2012-13 Sri. R.V..Patil, Judge Senior Division and Senior advocate Sri. Shankar Bhat of Mangalore Bar were invited to address the students on the topics Career Opportunities in Law and Skills of Advocacy.

Students role in Police Department

Sri Abhishek Goyal, IPS, the Superintendent of Police, D.K. District delivered a talk on the administration of Criminal Justice System in India. He highlighted the inherent weaknesses in the system and sought the co-operation of our college in strengthening the hands of the police. Students have enthusiastically taken up his proposal to intern at his office and the police department in Mangalore is for the first time, taking our students to various taluk headquarters for an interaction with the police there.

The institution redefines its vision from time to time to be in tune with the changing regional and national needs without compromising on the founders' perspectives. The redefined vision of the institution is **'Legal Empowerment for Ethical Society'.**

MOU of Directorate of Distance Education of Kuvempu University with Law College

The smooth functioning and the vision orientation of the institution are ensured through the **Internal Quality Assurance Cell** which has **21 committees** entrusted with multiple yet distinct tasks. The positive and constructive suggestions made by the members of these committees and also the recommendations of the various bodies of the University / Govt. and NAAC have augmented the institutional academic initiatives such as the introduction of **Post Graduate Degree, Diploma and Certificate Programmes and establishment of Distance Education Study Centre under the auspices of Kuvempu University, Shimoga enrolling more than 650 students is adjudged by the University as the Best Study Centre.** To enhance skill development, short term courses and add-on courses have been designed and offered. Keeping in mind the recommendations of IQAC and NAAC and also the interest of the learners and the contemporary needs, the college offers **one Post Graduation Course, two Post Graduate Diploma Courses and one Certificate Course** with wide range of combinations and 4 optional subjects along with its two regular Under Graduate Courses. The students have the option of taking up parallel learning through add-on courses. An opportunity is also provided for enhancing their knowledge base by taking up certain certificate courses offered by Kuvempu University.

Certificate Courses

We conduct a number of Certificate Courses to enhance the knowledge of Students like certificate course in **Human Resource Management, Cyber-Law, Medical Laws** etc. which is well received by the students.

Students are encouraged to take up on-the-job training, summer internship programmes in Law firms and Advocates' Chambers and internship at Non-Governmental organizations such as Centre for Civil Society, and institutions such as Reserve Bank of India, nationalized banks and private banks. The prison, factory and police station visits provide practical exposure of the law in action. Value education component is integrated in the curricular and extra curricular activities of the institution. **Social equity, national development and Information and Communication Technology (ICT)** are the major considerations while designing the curriculums and conduct of various activities. ICT is optimally used in the whole process of teaching, learning and evaluation. Some of the ICT enabled facilities include well furnished **audio-visual room, law library and browsing centre. Continuous evaluation system** is adopted to keep the students academically focused.

Research Centre recognized by Karnataka State Law University:

S.D.M. Law and Post Graduate Studies in Law has been recognized as **Research Centre in Law by Karnataka State Law University**, At present 6 students are doing their research under the guidance of our principal Dr. B.K. Ravindra and two are doing their research under Dr. P.D. Sebastian.

The institution has developed a feedback system to ensure academic excellence in tune with its vision. The information about the institution is made known to the stakeholders through the prospectus, college website **www.sdmlc.org,** Departmental Journal (Legal Opus), Law News, bulletin board and advertisements. The admission procedure of the college is transparent and in conformity with university and government rules. The reservation policy of the government is followed in admission and the economically and socially backward are given special incentives and necessary support after admission.

Academic supportive Programme

Additional teaching supports are provided through **remedial classes, mentorship and add on courses.** P.G. students are given the recognition of **student faculty** and opportunities to organize co-curricular activities. Students are given maximum opportunity to participate in the academic process through the Moot Courts, mock trails, client interviews, ADR techniques, student seminars, projects, quizzes, field visits, group discussions and other curricular activities. Teachers are encouraged to participate in the **faculty development programmes** to keep abreast of the latest developments in the subject. Teachers are given maximum opportunity to participate in the university, state and national level academic seminars and conferences. It is the institutional practice to organize academic events regularly with external and internal funding. In **the last five years 20 National / State level seminars/ conferences/ workshops** have been organized dealing with contemporary legal topics such as Legal Education, Information Technology and Intellectual Property Law etc.

Though research was encouraged and appreciated in the institution right from its inception, during the last five years greater thrust is given to it by providing additional facilities such as upgraded library with additional information sources. Research has been integrated in the institutional academic system and efforts are being made to establish a Research Centre in the college. It is gratifying to note that **40%** of the faculty have either completed or registered for Ph.D. **and two staff members are eligible to be research guides and evaluators.** In the last five years two research theses have been completed and twelve research articles and two books have been published by members of the faculty.

Project Work:

To make the students inquisitive and develop self learning skills, compulsory **student research project** at Post Graduate level is introduced through which **76 projects have been completed in the last 5 years.** The visible impact of this initiative is that our students get selected every year for summer research projects in the reputed Law firms such as Cariappa & Co., Fox Mondol, Link Legal, Holla and Holla etc and success of this is coupled with the fact that some of these law firms have absorbed our students after completion of their internship with them.

The teachers provide **honorary consultancy service** in their area of specialization. Consultancy services are provided to non governmental organizations, industries and legal aid beneficiaries. The Institution has established a very good rapport with the neighbouring colleges and keeps sharing its best practices with them. A number of teachers have been nominated or selected to the higher bodies of the university such as the Dean of Law, Chairman and members of BOE and BOS of Mangalore, Mysore, Kannur (Kerala), Karnataka University (Dharwad) and KSLU (Hubli), School of Social Work, Roshni Nilaya, Mangalore and as NSS Nodal officers.

Community service is considered as an **institutional social responsibility**. NSS, Rotaract Club, Youth Red Cross and Human Rights Cell undertake extension activities in their areas of expertise. The institution maintains a close and healthy linkage with government, the local bar, judiciary and non-government and other service organizations, through which useful programmes are being undertaken within and outside the campus. **'Help us to help them'** is a distinct programme of NSS to extend help to people undergoing agonies of natural calamities where many districts have been covered which were worst affected due to nature's fury.

Law College with the touch of tradition and Modernity:

The college building is located in the heart of Mangalore City at Kodialbail. Incremental additions are made to its infrastructure to cater to the increasing needs. There are **15 well ventilated classrooms, 02 staff rooms, well designed library and one Law Laboratory**. Twenty four hour power supply is ensured **by a generator. A rest room for girls is** provided in the same building. Drinking water facility is provided at important corners through **4 water coolers and water purifiers.** All the basic amenities like **canteen, stationery stores, bank, post office, printing facilities and ATM are available near the campus.** The entire infrastructure is maintained through a team of maintenance staff. The optimal utilization of the infrastructure is ensured.

Modernised Library :

The spacious and well designed **library is housed in centre of the building.** Two reading halls, a reference section and a research wing provide ample reading space. Library has a rich collection of **22,078 books. 36 journals, 2 online legal data bases** and 37 **magazines** are subscribed. In addition, the library has access to SDM CBM Library, American Library, Chennai, Mangalore University Library and Karnataka State University Law Library. There is provision for digital learning resources such as CDs. The library is **partially computerized**. Open access system is adopted for reference books. User-Orientation training at the beginning of the academic year and the service minded approach of the library staff make the library a preferred learning resource centre. **Library is kept open between 8.00 a.m. and 7.30 p.m.** on all the working days and 9.00 a.m. to 12.00 noon on holidays. The facility of the library is extended to the employees of the sister institutions, members of local Bar, judges, distance education students and the general public. Reference books are issued to the students for overnight reference to ensure optimal use. **Fifteen different services** are extended by the library for the benefit of the library users. To meet the ICT needs of the students, the college has established **a computer lab** and a **browsing centre** having leaseline connectivity with **Wi-Fi facility.**

Outstation students are provided with accommodation in **nearby hostels with which the college has established a memorandum of understanding.** Care **is taken to ensure that** hostels have **generator, boiler and recreational facilities.** The counselor pays periodic visits to the hostels to attend to the needs of the students. The institution has an independent hostel for men with all modern facility.

Academic Excellence :

The institution has taken all care to provide a **learning ambience. The academic performance of the college has been exceptional with several ranks and distinctions.** During the last 37 years the institution has more than **73 ranks** with **24 ranks** in the last five years. To make the students competent and truly professional, the institution has established a **Legal Aid Cell, Moot Court Society, Law lab and Literary Club.** The success of Legal Aid is proved with 7 camps and 1501 cases being addressed over the last 5 years. The **Career Guidance** Centre of the college promotes career guidance, counseling and campus placement which enhance competency building activities.

S.D.M. Law College was identified by the Ghent University, Belgium to conduct International Conference on **"Rethinking Religion in Law" 22 stalwarts in the legal field** were the resource persons and 450 were the delegates for the conference. The conference consisted of brain storming sessions for 5 days and it was a blend of harmony of different religions and law.

Collaboration of S.D.M. Law College with National Law School of Indian University, Bangalore and National Academy of Legal Studies And Research, Hyderabad:

S.D.M. Law College has been selected as a partner institution with National Law School of India University for an ambitious project connected with the Environmental Law sponsored by Centre for Environmental Educational Research and Advocacy. We have successfully conducted National level workshop on Coastal Eco - system Management. Again we have the privilege of holding a 21 days National level Refresher Course on curriculum planning on Environmental Law.

We have a collaborative arrangement with NLSAR, Hyderabad required Alternative Dispute Resolution where the study of Dispute resolution adopted by Dharmasthala is researched by the Research Scholars of both the institutions.

Practical Training: Law in books and Law in Action – Innovative Method

Court Visits and Chamber Visits :

As a necessary part of Practical Training, every student is required to work under a practicing Lawyer and to visit courts throughout the Academic year . In the beginning of the year each student is allotted to a Lawyer's chamber. He is expected to take the consent of the concerned Lawyer, the consent letter should be submitted to the college before he begins attending the chamber. The student is expected to make proper entries regarding his work in the office, in his chamber Diary , signed by the concerned lawyer which shall be verified by the Lecturer.

Students will be divided into different groups. Each group will have to attend the courts on days specified in a week. Their presence throughout the day will be insisted. They are expected to maintain a Court Diary which should reflect their observations and attempt made by the students to follow certain specific cases. Their work will be supervised by the concerned Advocate and the Lecturers in charge.

Apart from this the students are expected to follow three different cases which are at three different stages like a) from presentation of plaint till issues b) from issues to trail and c) from trial to Judgement. If it is a criminal case a) from appearence(F.I.R) to trial and b) trial to judgement. All the materials relating to these different stages must be collected and maintained in three independent files. The case must be followed until the end of the Academic year or till the case ends, whichever is earlier.

Apart from necessary entries in the files the students should write relevant sections on the left hand page. The case files must be maintained as per the format given in Appendix- I, students must be regular to courts , and also to chamber and also argument diary.

Every student is expected to maintain a movement Diary, recording the timing of his presence in college courts and Lawyers chamber.

Mock Trial :

The students will be divided into groups. Each group should present a Mock Trial which is a replica of the entire proceedings in a court of Law. The participation in this forms is a part of Practical Training and Internal assessment.

Moot Court :

Every student shall argue at least one case in the Moot court. Every case shall be presented by 2 students, one on each side. Each student shall be given 30 minutes to present his arguments. This performance will be examined by Board of Examiners consisting of teaching staff of the college and Advocates. Further each student will also sit as a judge. He has to submit the written Judgment within two days.

Students will be divided into various groups. A full time lecturer will be incharge of each group to supervise and verify the concerned students regarding the practical training at every stage. All the records will be submitted to the incharge lecturer once in a week.

Every student shall keep a record in which a summary of all Moot courts conducted during the academic year shall be written by him and should be submitted regularly to the Lecturer in charge. The record shall be submitted to the Principal before First week of March through the concerned lecturer.

Moot Court Society :

The Moot Court Society of our college is performing a number of Moot Courts to give a Practical touch to the theoretical knowledge. The college started a National Level Moot Court Competition, then switched on to Dual Moot Court Competition, then to Triple Moot Court Competition and lastly All in all Moot Court Competition and very recently a National Level Law Fest with innovative Competition was conducted.

Apart from this the Moot Court Society conducts Client interviewing, counseling and ADR competitions both at the State and National Level.

Participation in Legal Aid Clinic :

Students of the LL.B course may be associated with Legal Aid clinics. The college shall adopt a village for this purpose and allow the students to locate and study the problems. The clinical work also includes preparation of materials for legal literacy programmes, Literacy campaigns and participation of students in legal aid camps . Every students shall maintain a diary of the work he has done in connection with the legal aid clinic, which shall be counter signed by the Lecturer in charge.

Writing Assignments :

Every student shall write at least 2 assignments in a year on topics like critical comments on recent cases, study of proposed or existing legislation, exposition of legal concepts etc and record the Guest Lectures arranged by the college from time to time.

Assessment :

Assessment will be made jointly by the full time lecturers and the concerned Lawyer. The assessment will be done by a periodical Viva-Voce examination on the basis of the record of work prepared by the student.

Seminar :

Every student shall prepare a paper on a topic of his/her choice, which should be approved by the concerned lecturer and same will be presented before the audience on a specified day. The presentation and discussion shall not exceed 30 minutes.

Book Exhibition :

Every year it is customary in our college to exhibit both old and new books by arranging a book exhibition at the library.

Apart from this, a Law-Lab is established to explain to the students both law in books and law in action. It is open to general public also and the law lab has received high appreciation by all concerned authorities and general public including the press and media.

Seminars And Workshops :

Ms. Ambika Bhat and Mr. Arjun Satish were adjudged best parliamentarians in the State Level Debate held at Christ University.

Ms. Wafa Sultana, Ms. Sahana Hegde and Ms. Ezeigbo Benita were adjudged as Best Speakers by NUALS, Cochin and won the First Place.

From the year 2004—2013 a number of National Seminars and workshops are conducted in collaboration with KILPAR, NGO's, and NLSIU. The total number of Seminars conducted till now is 36. In the year 2012 an International Conference was conducted in collaboration with Ghent University, Belgium.

Law Lab :

S.D.M. Law college established a Law Lab to give a Practical Orientation of the subjects taught in the classes. The Law Lab contains all documents concerning various subjects like Drafting, Banking, Company Law, Consumer Protection Petition, Bail Application, Gift deed, Mortgage, Lease, Sale etc. and all such old judgments right from the Privy Council till date which is worth seeing to acquire knowledge.

Sports & Games :

Our college showed admirable achievements in sports and games. In keeping up the tradition of SDM Law College our students set various records under the leadership and guidance of our dynamic Physical Director Mr. Shashiprasad.

Our men's and women teams participated in the KSLU Inter Collegiate Volley Ball Tournament, held at H.C.E.S Law College, Gadag. The men's team secured first place and women's team reached semifinals.

Asif, Chethan, Sudhamani and Apoorva were selected to represent KSLU.

The college men's team participated and secured II Place in the inter collegiate Kabbadi tournament held at Vidhyavardhaka Law College, Mysore. Mohammad Asif and Umarul Farook were selected to represent the University.

Our men's badminton team won the first place in KSLU inter collegiate shuttle badminton tournament conducted by JSS Sakri Law College, Dharwad. Mr. Anish

Krishna was selected to represent the University.

KSLU inter collegiate athletic meet was held at R.N. Shetty stadium, Dharwad. Our college men's' and women's' team were the overall champions.

Mr. Akash Rao won the gold medal in 100 mts race, Long Jump and Triple Jump. He was awarded with Rs. 50,000/- cash for breaking the University record in 100mts.

Ms. Sheethal Mendon won the Gold Medal in 100mts race, 200mts and 400 mts respectively. She was awarded with a cash prize of Rs.25,000/- for creating a new University record.

Mr. Cimil C.K. won the Gold Medal in High Jump and also Rs.5000 cash for creating a new record. He also won Silver Medal in Long Jump and Triple Jump.

Mr. Umrul Farook won the Silver Medal in shot put.

Ms. Sudhamani Won The Silver Medal In Javelin Throw.

Guest Lectures :

- Prakash Shah spoke on Limitations on Freedom of Religion.
- Prof. S.N. Balagangadhar, Professor in Comparative Science of Cultures, Ghent University, Belgium delivered a lecture on Religion and Law.
- Dr. Veerendra Heggade, Dharmadhikari of Dharmasthala delivered a talk on the different aspects of Dharma.
- Ms. Shammi of Manipal School of Social Work gave a talk on violence against women.
- Sri. Siddartha, Patent Attorney spoke on Patent Filing and Procedure.
- Sri. Girish of Salgaocar College, Goa spoke on Administrative Liability.

Apart from this to motivate the students a number of Lectures like 'A day with a Lawyer', 'A day with the Judge' career development for Law Students, Lecturers and exercises on personality development and Communication skills are conducted.

- From the year 2004-2013 – 64 eminent speakers have visiting the institution and delivered Lectures on various aspects of law

Yakshotsava :

The very purpose of this programme is to inculcate Moral values, imbibe argumentative skills and induct skills of advocacy and common sense this is the 21st time that SDM Law College successfully conducting Mangalore University Level Inter Collegiate Yakshagana Competition. The college has received a good applause from general public, press and the media for disseminating ethical knowledge in young minds.

LL.M Programme :

Our P.G. Department is brining out a Journal every year termed as Legal Opus. The Journal is very much appreciated by the legal fraternity as it contains articles of current relevance written by students, Academicians, Judges and Lawyers and has been allotted ISBN number.

Seminars and Workshops are routine for LLM students and they are trained by taking classes for LLB students.

Every year the senior LLM students give a welcome gesture to freshers and the juniors give a send of party to the seniors at the end of the term and this is being done to maintain cordial relations among the students.

Legal Opus :

Even Since the inception of LL.M Programme the P.G. Department of Law comes out with a very standard Law Journal termed as 'Legal Opus' containing Legal Articles from student, Academician, Judges, Lawyers etc. The Journal has on ISBN number and applauded by many Judges and academicians for containing articles with research bent of mind.

The annual calendar of events of the institution is meticulously planned well in advance and made available to the students through the college calendar. The college website **www.sdmlc.org** also provides necessary information to the students. The results of the term end examinations are announced through the website. The students are given timely information about the various scholarships and other facilities. Students can avail of National Merit Scholarship, Beedi Workers Scholarship, special government scholarships for students of the Scheduled Castes and Schedule Tribes and scholarship through **PTA. Endowment prizes have been instituted and are awarded to academically brilliant students.**

The college has a strong alumni association with which a healthy rapport has been built up by networking. Interactions are arranged with successful alumni to motivate and orient the students about career planning. A **Silver Jubilee Endowment Lecture** has been initiated with generous donations from the old students which allows the present students to benefit from lectures by eminent Legal Luminaries. The Alumni have organized 5 endowment lectures till date and the speakers were legal stalwarts consisting of judges of Supreme Court and eminent legal personalities.

Ample opportunities for extra-curricular activities are provided through various student associations. **Yakshostava an inter-collegiate** competition **has been organized by the college for the last 20 years.** It is a competition to display a folk art practiced in Coastal Karnataka. Students are encouraged to involve themselves in the activities of the college. **Sports Club** is established through the financial support of the management in order to nurture the sports talents. **Outstanding sportsmen are provided with incentives such as fee concessions, dearness and traveling allowances, coaching facilities and other incentives which have enabled them to excel at the state and national levels.** The departmental magazine titled *Legal Opus*, **Law News, wall magazine**, the **college magazine and NSS Manual** "*Chiguru*" provide opportunities to the staff and students to sharpening the art of expression. Legal Opus has within a short period of five years earned the reputation of being one of the best Legal Journals in the State of Karnataka.

Legal Aid :

The concept of Legal Aid is considered to be a very significant area under the Indian Constitution. So the responsibility of participating in this activity by the Law colleges, was considered as necessary and relevant. Because of the back ground of Dharmasthala we could adopt a novel way of conducting Legal Aid at various places. A meticulous system has been developed by the college over the years and today we have been functioning to the satisfaction of ourselves as well as the poor and the needy. The students are properly trained to collect the data from the villages identified by the institution and on a convenient day the camp is conducted with the help of Legal Services Authority, NGO's and Revenue officials. The overwhelming response has given us a lot of confidence to involve ourselves in this area of social activity coupled with an intention to expose the students to social realities from the year q986 to 2013 we have heard and settled amicably 1056 cases of different types and most of them are revenue cases

N.S.S. :

The National Service Scheme has become an important part of higher education today. The advantage of being an N. S. S. volunteer is manifold, namely acquiring communication skills, individual development, social responsibility etc. Our vision was to utilise this Co-curricular activity for the benefit of professional training in law. The need to sensitize the students to the compelling demands of the common man was being materialised by attempts through this scheme. We are proud to say that the unit proved its worth by being a leading group in the entire University. This was proved by our students successfully securing the first place continuously for three years, when the Youth festival was being conducted by the Mangalore University. The Indira Award for N.S.S. and Rajiv Gandhi Award were first bagged by our students who are now occupying important position in the society and we were the winners of National Youth Festival.

Blood Donation :

Our college has been conducting blood donation camps for the last 10 years and has won the recognition of being the college donating the highest units of blood in the entire University more than once.

A team of students headed by Miss Shashikala who was a lecturer of our college won the Second Place at the International level for a project titled by them "towards equal justice agricultural works woman - proposals for Law reforms based on studies conducted in D.K."

Old Students Association :

The old students of our college are nothing but the Ambassadors of our institution. In this 40 years we have seen a good number of students occupying important positions in life, it may be Advocary, Judicial bureaucracy, politics, journalists, legal advisors to MNC, Judge Advocates, Company Secretaries, Chartered Accountants, professors etc. and our Alumne have formed associations both in India and Abroad.

In the year 2011 14 of our old students were recruted as Civil Judges(Jr. Division) and in the year 2013, 15 of our students were recurted by the Judiciary as civil Judges(Jr. Division) and the 19 rank holder in Judicial exams is our college.

Conclusion:

When we go back to the day of the birth of the institution and from the Decennial year to Silver Jubilee and then to Ruby Jubilee, its found that the institution has progressed very fast with the leadership of three principal's namely founder Principal Prof. N.J. Kadamba, Prof. A. Rajendra Shetty and Dr. B.K. Ravindra. Its really a pleasure to see that thought provoking and amazing development in every field of academic and co-curricular activities. One should really be proud, happy and hold his head high because of the achievements of the Staff and Students. Everyone who is a part of this institution should be grateful to Lord Manjunathaswamy for showering his blessings on us and to the guidance of the Towering and Magnetic personality of this Institution. Dr.D.Veerendra Heggade who is totally committed, responsible and responsive to all our needs and let us remembers on this occasion every staff teaching and non-teaching who have contributed their might for the progress of the Institution.

We should quote the words of Mr. Warner Menski who was a resource person to our International Conference on "Rethinking of Religion in Law" after his return to his homeland Germany, writes about our college:

"Greetings, This is to thank you for providing me an excellent opportunity to participate in the International Conference on Rethinking Religion in India. I complement you for organizing such a mammoth event so meticulously. Everything was perfect. Every delegate was well received and well attended. It was team work, well thought of and perfectly implemented. By organizing such a scholarly activity you have enhanced the prestige of not only your institution but also of Mangalore".

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PERSONS WITH DISABILITIES (EQUAL OPPORTUNITIES, PROTECTION OF RIGHTS AND FULL PARTICIPATION) ACT 1995 VIS-A-VIS HUMAN RIGHTS

Dr. B. K. RAVINDRA*

INTRODUCTION

The principle of equality is the greatest contemporary thoughts. It is the pillar on which all human rights are built. Human right becomes meaningless without equality. But yet among human beings there are full of inequalities and discriminations[1]. The greatest discrimination created is by nature on those persons who are disabled[2]. The disabled persons who suffer from such inequalities consquenteey suffer from both physical and mental agony. The disabled are the victims of God and Nature and not the one created by men or society on socio-economic-political basis. The blind, the deaf, mentally retarded, impaired are the unfortunate people[3].

History reveals the fact that the disabled persons were able to achieve and carve out an identity of their own and gave something precious to the subsequent generations. The prime among them are Franklin Roosevelt, Fridakolho, Beethoven, Helen Keller who could vibrate the humanity through their ingenuity in the field of art, science etc.

It is estimated that 10% of the world population suffer from some type of disability. As a result another 25 % of the population are affected either directly or indirectly[4].

The principle of equality practiced by society and adumberated by the Indian constitution should consider these persons as human beings and treat them on par with others in the society. So, it is necessary that there should be a special law for the protection of their rights and contemporary society should recognize this right with respect and not out of compassion.

The present paper would concentrate on five issues i.e. Human right perspective on disability wherein attempts are made to trace the shift to the right based perspective on disability, and nature and significance of such a shift, secondly an overview of the persons with disabilities (equal opportunities, protection of rights and full participation) Act 1995, thirdly the Rights of the Disabled, Fourthly to critically evaluate the act, fifthly judicial attitude and lastly to come out with appropriate conclusion and suggestion.

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1. Lalit D. Naiker Law relating to Human rights, * 2004 P. No. 630
2. Ibid
3. Ibid
4. Ibid

Issue No. 1 :

World today is fast changing and the approach towards the disabled is also changing. Advancement in science and technology and health care laws, awareness of rights and the emergence of people with disability, displaying skills and knowledge to improve their lives are some of the factors which have enabled us to give a rethinking over the effectiveness of India disability law.

Persons with disabilities are entitled to exercise their civil, political, social, economic and cultural rights on an equal basis with others under all international treaties. The full participation of persons with disabilities benefits society as their individual contributions enrich all spheres of life.

The principle of equality addressed by the International Human Rights Law is the foundation of the rights of the individuals with disabilities. In order to strengthen the rights of the disabled persons, contemporary international law has recognized the need for all states to incorporate human rights standards into their national legislation.

Today human rights movement has categorically shifted the attention of policy makers from doing mere charitable service to vigorously protect the basic rights of human dignity and self respect. In the present period the disabled are viewed as individuals with a wide range of abilities and each one of them are capable of exhibiting their abilities and talents in a number of areas like transport, art, architecture, education etc.

Over the years disabled persons have passively accepted whatever was made available to them by actively asserting their strength and never compromised their self respect and confidence for the sake of concessions or to get the sympathy of the state.

The United Nations charter affirms the essentiality of "a universal respect for, and observance of human rights and fundamental freedoms for all without distinction...."[5]

The rights of the individuals with disabilities are grounded on human rights frame work which is based on the United Nations charter, the Universal Declaration of Human rights[6], International Covenants on Human Rights and related human rights instruments.

United Nations in the first decade promoted welfare perspective for disabled persons. Concern for the disabled was expressed in the establishment of mechanisms and the development of programmes suitable for dealing with disability issues. United Nation starting with the promotion of the rights of the people with disabilities, concentrated more on the disability prevention and rehabilitations.

In 1940's and 1950's, the United Nations focused on promoting the rights of persons with physical disabilities through a range of social welfare approaches. In the 1960's initiatives within the disability community, coupled with the adoption of the International covenant on civil and political rights[7] and the international covenant on economic, social and cultural right[8] resulted in a fundamental re-evaluation of the rights of individuals with disabilities.

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5 Signed in San Fransico on 26th June, 1945 and entered into force on 24th October 1945.

6 Adopted by General Resolution 217 A (111) on 10th December, 1948.

7 Adopted by general Assembly Resolution 2000 (XXI) of 16 December 1966 entered the force or 23rd March 1976 in accordance with article 49.

The focus of the United Nations on disability issues shifted in 1950's from a welfare perspective to one of social welfare. 1960's demanded for a fuller participation by disabled persons in an integrated society. Operational activities in the field of disability changed through implementation of various United Nations programme.

In 1990's emphasis was on the concept of Human right for disabled persons which was internationally accepted and the international concern for disabilities was well addressed with declaration on the rights of mentally retarded persons [9], the declaration of the rights of the disabled person [10] and by proclamation of 1981 as the international year for disabled persons[11]

2. Overview of the Act Persons with Disabilities (Equal opportunities, protect of rights and full participation) Act 1995.

The parliament of India by the passing persons with Disability Act 1991 has created history by enabling disabled to set into various sectors like education, vocational training, travel in public transport and mobility schemes for environment and integrated living, information and conservation strategies, independence and dignity.[12]

The Act imposes a responsibility on the society to make adjustments with the disabled to overcome there psychological, practical and social hurdles. The Act also places the disabled people to be in par with other citizens of India in respect of education, vocational training and employment. Protection of the rights of the disabled was a long pending issue which has been effectively tackled by the government by passing an appropriate law, where the role of the NGO's working in this field, the media and the members of the parliament deserves special congratulations.

Persons with disabilities Act, 1995 offers guideline to make suitable policies for the disabled. The main being the Act gives statutory recognition to the policy of three percent reservation in all group 'C' and 'D' post and has extended the reservation to group 'A' and 'B' posts also. Further the Act declares that the state shall progressively ensure that every child with disability has access to free education until the age of 18 years.

The Act has several provisions to ensure equal opportunities, protection of rights and full participation of disabled people in the main stream activities. But it is submitted that, the state by merely passing laws cannot shirk from the responsibility, as it is the duty of the state to create a barrier free environment for them, remove any discrimination against them which prevents them from sharing the development benefits, counteract any abuse or exploitation, lay down strategies for comprehensive development of programmes and services and for the equalization of opportunities.

It is also submitted that the intentions of the Act can well be implemented by constituting co-ordination committees at the centre and state levels comprising of

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[9] Adopted by general general Resolution 2200 A (XXI) of 16 December 1966 entered into free on 23rd January 1976 in accordance with policy 27.

[10] Adopted by general Assembly resolution 2816 (XXVI) of 1 1971.

[11] Adopted by the general society * 3447 (XXX) of 9th December 1975

[12] Adopted by general Assembly Resolution 31/123 of 16th December 1976.

[13] Saurabh Jain "Effectiveness of the India disability law in the enforce Human rights" - AIR Journal Nov. 12).

Welfare Minister as chairman and officials of the departments, NGO's actively involved and eminent people with disabilities as members of the committee to monitor the progress of law in action. For them to realize the intentions of law, disabled people willing to take part in consultative exercises with the planners and providers of service and goods, must be identified, supplied with information on the range of services available to chalk out new action to deal with disability issues.

The Indian Disability Law treats disability as civil rights rather than a health and welfare issue. The law recognizes that the primary issue facing disabled people is their exclusion from the mainstream activities of the society and hence the emphasis on law is on full integration and participation. It is discrimination and not impairment that disables people.

3. Rights of the Disabled Persons:

1. The disabled person shall enjoy all the rights contained in this Declaration without distinction or discrimination on the basis of race, colour, sex, language, religion, political or other opinions, national or social origin, state of health, birth or any other situation applying either to the disabled person himself or herself or to his or her family.

2. The disabled persons have inherent rights to respect and dignity and irrespective of the origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow citizens which implies the right to enjoy a decent life, as normal and full as possible.

3. Disabled persons have the same civil and political rights as other human beings.

4. Disabled persons are entitled to the measures designed to enable them to become as self-reliant as possible.

5. Disabled persons have the right to medical, psychological and functional treatment, including prosthetic and orthotic appliances to medical and social rehabilitation, education, vocational training and rehabilitation aid, counselling, placement services and other services which will enable them to develop their capabilities and skills to the maximum and will hasten the process of their social integration or reintegration.

6. Disabled persons have the right to economic and social security, including the right, according to their capabilities to secure and retain employment or to engage in a useful, productive and remunerative occupation and to join trade unions.

7. Disabled persons are entitled to have their special needs taken into consideration at all stages of economic and social planning.

8. Disabled persons have the right to live with their families or with foster parents and to participate in all social, creative or recreational activities.

9. Disabled persons shall be protected against all exploitation and treatment of a discriminatory, abusive or degrading nature.

10. Disabled persons shall be able to avail themselves of qualified legal aid when such aid proves indispensable for the protection of their persons and property. If

judicial proceedings are instituted against them, the legal procedure applied shall take their physical and mental condition fully into account.)

4. Judicial Response

The judicial attitude towards disabled has shifted to right based perspective and it can be evidenced with the help of a few illustrious cases.

In Javed Abidiulason of India[13] the petitioner's grievance was that there was lack of facilities like providing aisle chair and ambulift by the Indian Airlines. The petitioner contended that it was a social obligation of the airlines to provide these minimum facilities to permit easy access to the disabled persons, particularly to those who are orthapaedically handicapped and suffer from locomotors disability. The reply of the respondents was very sad as they took the defence that providing ambulift at major airports would be a costly affair. But, later on during the hearing of the case the respondents filed affidavit indicating that the major airports were going to be provided with ambulift and aisle chairs and then aircraft can be utilized by disabled persons. Further, the major grievance of the petitioner was that the Indian airlines was not giving any concession to such disabled persons for their movement by air even though such concession are being given to only blind persons, who are also disabled persons under the Act. It was observed by the court that those suffering from locomotor disability to the extent of 80% and above would be entitled to the concession from the Indian Airlines for traveling by air within the country at the same rate as has been given to those suffering from blindness on their furnishing the necessary certificate from the chief district medical officer to the effect that the persons concerned is suffering from the disability to the extent of 80%.

In Chanchala v/s State of Mysore[14] : The Supreme Court tried to extend the equitable principle of preferential treatment under article 15 (4) to the persons with disability to bring them with in the main stream by giving them equal opportunity in the field of education.

In National Federation of Blinds up Branch Vs State of U. P.[14a] the question to be decided before Allahabad High Court was, whether the Lucknow development authority while giving preference to allotment of plots and houses to blinds and other handicapped persons, should also accord in the rates of the land?

The Court referred to section 43 of the Persons with Disabilities (equal opportunities protection of rights and full participation) Act 1995 which provides for scheme for preferential treatment of land for certain purpose. The Court ordered the respondent not only to give preference in the allotment of land and houses to disabled persons, but also to provide concessional rates to the disabled persons.

While pronouncing the Judgement it was observed, "Rehabilitation means the restoration of the disabled to the fullest physical, mental, social, vocational and economic usefulness of which the person is capable" . In other words rehabilitation is

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[13] AIR 1999 Sc 512

[14] Ibid

[14a] AIR 2005 Allahabad 258

a goal oriented programme which aims at enabling an impaired person an optimum mental or social functional level, which follows basically three aspects, physical rehabilitation, vocational rehabilitation and psychological rehabilitation of the disabled.

The court also further observed that, "The only solution of the disability problem, which a handicapped person faces, could be their psycho- social and economic integration and proper placement which will enable them to stand on their own dignity and decency"

5. Critical Evaluation of National and State policies including the Disabilities Act.

There is no dearth of legal and constitutional provisions for persons with disabilities .Equality for all is guaranteed under Article 14, 16 and 21 of the constitution of India.[15] as well as under Article 41,46 and 47[16] of the Directive principles of state policy and the constitution 93rd Amendment Act.[17]

The legislative frame work for people disabilities is provided by the Rehabilitation council of India, the people with Disabilities[18](PWD)Act, and National Trust for the welfare of persons with Autism, cerebral Palsy, Mental Retardation and Multiple Disabilities.

The PWD Act provides for reservation of 3% of funds in all poverty alleviation schemes, 3% of seats in educational institutions and 3% of Job vacancies for the disabled.

But the main lacune is that all these policies and programme are not easily accessible and more over it is difficult to avail the benefit of these policies because of bureaucratic lethargy and intransigence.

The World Health Organization in its international classification of improvement, disabilities and handicap makes a distinction between the three.[19]

Section 2(i) of the Persons with Disabilities (equal opportunities protection of rights and full participation) ACT, 1995 states, disability means, blindness, low vision, leprosycurel, hearing impairment, locomoto disability, mental retardation and mental illness.

But the definition does not recognize the international classification given by the WHO. It also seems that the Act has tried to cover every kind of disability under action 2(i), but the term disability is viewed in a very narrow sense. Moreover when we view the disability aspect in developed countries, we find the rate of disability is

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[15] Extension of Equality clause: Equality before law and Equal protection before law, equal opportunity in the field of public Employment and Right to lift and liberty.

[16] Duty to raise the standard of living and improvement of health

[17] Promotion of educational and economic interacts of weaker sections.

[18] people with Disabilities here after it will be mentioned as PWD.

[19] Impairment: any loss or abnormality of psychological or physiological or anatonical structure or function disability is a restriction or lack of ability to pe form on a activity in the manner or within. The range considered normal for a human being Handicap, is a disadvantage for given individual resulting from an impairment or disability, just limits or prevents the fulfillment of a role which is normal for that individual.

high compared to developing countries.[20] The reason being disability is viewed in much broader sense. The example "People with internal disorder conditions are also considered as disabled, where disability is not very visible[21]

At this juncture it is submitted that the salient features of both U. S and Indian laws are similar. Both provide for education, employment, affirmative action, full participation, non discrimination and research and man power development. But the difficulty in India is lack of implementation of the law. United state has successfully implemented the legislation of 1990 and has been able to bring substantial difference in the quality of life of disabled. Moreover developed countries are looking at disability as a social issue and not as a medical one. But in India disability is viewed as a stigma.

Section 44 of the India Act very clearly states that " Establishments in the transport sector shall within the limits of their economic capacity and development for the benefit of persons with disabilities take a special measure to adopt rail compartments, vessels, aircraft and waiting rooms in such alway as to permit easy access and adopt toilets in rail compartments vessels aircraft ,and waiting rooms in such a way as to permit the wheelchair users to use them conveniently".

Indian Authorities are yet take measures for the proper implementation of law. Authorities concerned are taking undue advantage of the term "within the limits of their economic capacity" They are using this term as a defense to shield themselves for their nonchalant and lethargic attitude .Hence it is submitted that a dead line must be fixed for the authorities to comply with the provisions of the law and any failure to comply could be termed as discrimination and dereliction of duty.

The watch dog system under the Indian Act has proved to be a failure but not in United states, the reason being very few facilities are provided to the offices and these they remain ineffective.

The Indian Disabilities Act requires compliance with affirmative action programmes by all agencies that receive governmental assistance. All governmental contracts should contain a clause saying that the contractor should comply with affirmative action. If the authorities determine that clause has not been ensured then sanctions like cancellation of licenses and debarring from all future contract is a must.

Educational Institutions receiving aid from the government should reserve 3% of seats for disabled. Preferential treatment in land allocation, house allotments must be given. However, there is no pressure for compliance with any of these affirmation action programms and much needs to be done. Education and Aids are fundamental rights which cannot be denied. Procedures and technical issues should not be an obstacle in their progress. The disabled should be actively involved in planning,

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[20] 4% of India's Population is disabled.

18% Australia is disabled.

United Kingdom 14.2% is disabled.

In united state of America 9% is disabled.

[21] Persons with one leg, one kidney or severe heart ailment etc & even diabetic are mentioned under the disability law.

lobbying and campaigning. Hellen Keller was blind but she was the guiding star in helping the visually impaired.

6. Suggestions and conclusions:

Lack of information is a major barrier to the progress of the disabled people. It is essential to disseminate information about disabilities to change negative attitude towards the disabled in society at large. It is also necessary to ensure that disabled people and those who work with them know and can take advantage of reservation in Jobs, education and poverty alleviation programmer.

Secondly building a network for self advocacy is also crucial. United voices make a greater impact, in for example, influencing legislators, protecting the rights of the disabled and sharing information. The Orissa based group Swabhiman believes that advocacy and awareness are the strongest tools available to change the way the society perceives disabled people.

Thirdly, disabled people and groups themselves must be encouraged to take leadership roles in influencing public-opinion and policies. All too often decisions are taken and policies are framed for the disabled without consulting the disabled themselves.

Lastly, when we see section 2(1) (A) time and again, the guarantee of equality by the statute is incomplete without amending the constitution appropriately to extend constitutional assurance of equality to persons with disabilities under the Act. Interestingly while this question of special provisions has been addressed to some extent in the persons with disabilities Act, and the guarantee of equal access to public employment is a constitutional guarantee, critical concerns have slipped through the crevices. The first is the question of political representation. Clearly disability rights groups can set up candidates, but cannot win election. As long as the constituency remains unrepresented, the concern will only be peripheral. The definition of special provisions needs to be extended to a more broad based policy on affirmative action that includes proportional representation politics. The second problem has to do with the entire range of judicial services, which is after all one form of public employment. What will be the position of our justice delivery machinery if it debars persons with disabilities from entry, which is the hope for full blooded -equality?

1. Protective laws have been passed by the government for the physically, mentally and socially handicapped groups. Legislative measures providing for social security, social defence and social upliftment have been adopted. A meaningful attempt was made in the meeting held at Beijing from 1st to 5th December, 1992 and declared the decade for disabled from 1993. The meeting was held with the object to concentrate mainly on two aspects —*firstly*, to provide an opportunity for full participation of the disabled persons in various walks of life, which could be intended to enable them fully in terms of imparting them general and technical education, in order to equip them with competence and capacity so that they may be in a position to compete with other people. In terms of ability for giving needed output to the employer so that there may not be any inhibition may not operate in the mind of employer due to which he

may not directly or indirectly avoid absorbing disabled people from the inception stage till they are fully trained and well educated for the purpose of getting employment. Secondly, disabled people are generally considered to be a liability by the family members, due to which they fail to get equal opportunities for the purpose of obtaining higher education or attaining vocational qualifications. The problem becomes very acute in the context of modern day society in which the concept of joint family is increasingly phasing out not only in urban areas but in rural areas as well. The concept of nuclear family instead is dominant for the last one decade and this tendency is gaining ground with the advent of time. In this context, it becomes imperative to ensure equality for the disabled people in comparison to the other people. It is more pertinent to achieve the desired target in the Asian and Pacific region on account of socio-economic constraints which have more adverse effect in comparison to the affluent societies of Western and European countries.

In furtherance of the objectives stated in the Beijing Declaration, the Government of India took necessary measures to enact a suitable legislation to achieve the above said target. Consequently, an enactment namely, the persons with disabilities (Equal opportunities, Protection of Rights and Full Participation) Act, was enacted by the Parliament in the year *1995*, which came into force in February 1996. The Act seems to be exhaustive and suitably worded, in consonance with its object and purpose. But unfortunately the implementation process has been very slow, which could be easily gathered from the consequential outcome.

3. It becomes imperative to focus attention on the basic factor responsible for the improper implementation process in vogue so far. There could be no two opinions that the concerned governments, namely, the central as well as the state governments have miserably failed to evolve action plans and other programmes for achieving the desired results. At the same time, it will not be correct to say that nothing has been done for implementing the needed programmes to accomplish the desired goals mentioned in the Act. After having cursory glance over the intended scheme, we find that different schools have been set-up for the blind, mentally retarded children and other disabled persons. The government has also provided the facility of special education for the disabled children. But it is high time to evolve result oriented approach. The experience gained so far for implementing various schemes has indicated in clear terms that the machinery created under the Act by involving government departments and the NGOs has not been in a position to implement such a scheme in a desired manner, for which active involvement of the public has been lacking, which is the most relevant aspect. At the first instance, it is imperative to frame a basic suitable policy, so as to ensure the involvement of the government machinery at the state, regional and district level. For this purpose secretary of the department of social welfare should organise meetings in which commissioner of each region and deputy commissioner of each district should participate, with an aim to frame policies to provide equal opportunities to the disabled in respect of their education, employment and insurance as well as admissibility of social security and social welfare schemes for their benefit.

Efforts should be made to assimilate them in the main stream. For this purpose various ways and means should be devised to minimise the disparity between disabled persons and normal one. It will be possible to do so firstly by providing proper education and meaningful training respectively to the persons with disability and secondly, to provide them suitable job. In order to protect their interests in a best possible manner, it is essential to identify the jobs wherein they will be in a position to work conveniently and give optimum output or in other words maintain required efficiency as compared to the normal persons. It is needless to mention that an equal opportunity in all respects is to be provided to the disabled persons from every point of view, initially in terms of providing requisite and proper educational opportunities and later on suitable employment opportunities. Rather it is also to be ensured that they should be in a position to enjoy avenues in terms of getting promotion at par with the other employees, whenever it becomes due. It is very necessary to make the concerned employer feel that he is not suffering any loss by engaging disabled persons in his establishement and for that purpose they should be in a position to give optimal output. However, it is not so easy to accomplish desired goals, but constant efforts and endeavour made for the purpose of equipping the disabled persons with requisite education and training is certainly bound to bring them to that level. For this purpose, the government would be required to set up special schools as well as training centres at least in each district whose number can be increased.

Extension of social security benefits to persons with disability is another important area, which needs immediate attention. In most of the cases, they are neglected by members of the family on account of financial constraints, the head of the family is not in a position to meet with their basic requirements. So it is imperative that some stipend should be paid to them while they are getting education or undergoing training and unemployment allowance should be paid to them till they are absorbed in some gainful employment. A scheme in the form of social security or social insurance should also be introduced to provide supplementary benefits to them, so that financial security is enjoyed by them as well as their dependents. The concept of 'social security' is multi-dimensional in its broader perspective. It also includes within its ambit different measures taken by various agencies, viz, the government, the religious and charitable institutions, the NUO's, the private agencies etc., in order to provide socio-economic and legal security to the citizens of a country including the disabled persons, in case of centingency to which they are exposed. It is desirable that the governmental as well as non-governmental organizations (NGO5) should focus attention on these areas and proper research should be conducted so as to serve the cause of disabled persons who otherwise continued to be neglected, particularly in developing countries where the number of such persons account for 80% of the total disabled persons in the world.

Lack of awareness and proper training on the part of parents of disabled children has been another important factor, which has prevented the concerned quarters to protect requisite interests of such children. Consequently, electronic and print media should be used to educate the parents of such children about their special needs.

Efforts should also be made through the media to prevent certain kinds of disabilities which are not genetic, viz., polio, deafness (arising out of noises), blindness (due to nutrition problems) etc. It is need of the time that basic policies should be framed for the aforesaid purpose on short-term as well on long-term basis, for ensuring effective implementation process in a well effective and systematic manner. The budget should be ear-marked exclusively for the disabled and maximum funds should be allocated to the NGOs and grant should be given to each NGO after appraisal of preceding performance. The department of social welfare of the central government as well as of concerned state government should monitor functioning of NGO's exclusively created for this purpose. Identification of children with disability is a starting point followed by providing proper infrastructure for their education in special schools as well as in general schools for bringing disabled children at par in terms of their output with other children.

According to section 66(1) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, the appropriate government and local authorities shall take steps for the rehabilitation of all persons with disabilities. Furthermore, according to sub-clause (2) of section 66, the government shall grant financial assistance to the NGO's. But despite this enactment, the central as well as state governments have failed to give effect to these provisions. NGO's should come forward to give suggestions for amending the provisions of the Act by making representations on the basis of their experience to the government.

To quote Anjlee Agarval[22]

"Design features that make for easier access for proper lighting, clear signage, broad doorways, level surfaces, orientation and mobility clues and information techniques, to name a few. Designing these features when buildings or outside spaces are in the planning stage adds nothing to the cost. Even incorporating them at a later stage adds just 1%, to the total cost. "The Design for All" concept helps all people with reduced mobility such as senior citizens, families with young children, pregnant women and people with temporary ailments as well as wheel chair users, the visually and hearing impaired"

Non discrimination in all spheres lies at the heart of the constitution of India. The Persons with Disabilities Act envisages equal opportunities and full participation to persons with disabilities. Yet disabled people continue to be excluded and marginalized. So the changes are need,

- attitude of the society towards the disabled.
- Incorporating a right approach into policy making, rather than a charity or welfare approach.
- Compulsory barrier free approach access to all buildings, spaces and transport.
- Consulting disabled people when formulating policies and legislation is the need of the hour.

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[22] Executive Director, sanarthy a national center for promotion of Barrier Free environment for people with disabilities,

Conclusion:

One should know that disabled persons are also entitled for certain inherent rights and we should treat them with dignity. They have all the fundamental rights enshrined by the constitution of India to lead a decent, normal and dignified life.

The disabled people are not people with non- abilities. They are people with different abilities and thus they have a right to be seen as people with their uniqueness and not to be labeled as handicapped. It is high time that society should treat them not as helpless persons forced into a life of confinement.

The human right perspective on disability is to create a barrier free environment for persons with disabilities and integrate persons with disabilities into the social main stream. Violation of the fundamental rights is directly inconsistent with the standard rules on equalization of opportunities for persons with disabilities and also an infringement of human rights. We should all know that disabled person is a potential working force adding wealth to the economy of the country.

Let me conclude my paper saying that the rights of persons with disabilities must be at the center of policy making not just with respect to development, but also with respect to Justice, equity and good conscience.

ADVOCACY- TRUE ESSENCE

P. RANJAN RAO *

The profession of law is one of the oldest and noblest of the professions in the world. Some of the world's greatest leaders like Abraham Lincoln, Mahatma Gandhi, Martin Luther King were all lawyers by profession. The current president of the U.S.A. Barrack Obama is also lawyer by profession.

The profession of law is akin to the profession of medicine or even of teaching as it is human-centric. A lawyer deals with the legal problems faced by his clients and develops an inexplicable bond with them, over a period of time.

There is often a feeling, though wrong, that law, like politics, is the last refuge of the scoundrel. It is often pursued as the last option by someone who is unsuccessful in getting into any other profession. Unfortunately, this is an erroneous belief or perception. Like medicine, *the profession of law is the most honourable or noblest profession, provided, one's heart is in it.*

There is a wrong perception that lawyers are basically dishonest, votaries of untruth and side with crooks or wrong-doers. This, again, is a wrong perception. To be a successful lawyer it is not necessary to be dishonest or indulge in falsehood. ***Mahatma*** Gandhi, never defended his client when he was in the wrong; he would rather advise his clients to accept the truth and if required, to settle the dispute amicably. In his auto-biography ***"My experiments with truth"***, he says that by adhering to truthfulness in the case put forth or defended by him, many presumed that he would lose many clients. On the contrary, he says because of his reputation of adhering to the truth, sinners never dared to engage him as their lawyer and he did not suffer pecuniarily. "

There is this popular quote attributed to late ***Abraham Lincoln,*** the immortal President of U.S.A. who fought for the independence of American African and to banish slavery." I quote *"There is a vague popular belief that lawyers are necessarily dishonest. Let no young man chosing the law for a calling for a moment yield to this popular belief: resolve to be honest at all events, and if in your own judgement, you cannot be an honest lawyer, resolve to be honest without being a lawyer's choose some other occupation rather than one, in choosing of which you do, in advance, consent to be a knave."*

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It is often well said, I quote "the law may fall into disrepute but lawyers do not, unless they themselves create circumstances in which they can become disreputable".

"A knife in the hand of a surgeon saves the life but in the hand of a murderer deprives the life. The problem, hence, is not in the knife but in the handler.

While an honest lawyer may take recourse to laws to defend the truth, a dishonest lawyer may do so to defend evil. But there is no compulsion to be dishonest.

Honesty is a natural human trait; dishonesty requires effort. Intelligence may be genetic but honesty can be inherent. Ultimately, as the forlorn Cassius, reeling under the tyranny of Julius Ceaser remarked to Brutus, *"Men at sometimes are masters of their fate the fault, dear Brutus, is not in our stars but in ourselves but that we are underlings".*

Hence, at the end of the day, to be or not to be an honest lawyers is in one's own hands and not in stars or in genes. Always resolve to be an honest, albeit unsuccessful lawyer, than be a dishonest yet successful lawyer.

Lawyers deal with law. Law pervades every walk of life. While, Doctors deal with the physical/mental health as lawyers deal with social health. *Social unrest caused due to the bad implementation of laws or dispensation of justice can have more harmful effects than a deadly disease.*

Law can also be an instrument of social change. Hence, good and efficiant lawyers can play a very effective role in bringing about social changes. In India's struggle for independence, lawyers like Mahatma Gandhi, Motilal Nehru, Jawaharlal,Nehru and Sardhar Vallabhai Patel played a very vital role. B.R.Ambedkar, the father of Indian Constitution, was also a great lawyer.

When Pakistan reeled under the tyranny of the now deposed President Prrvez Musharaff, who had sacked the Chief Justice of Pakistan, because, certain verdicts went against him, it is the Pakistan Bar which led the protest march against the dictator, at great risk to their lives.

No doubt, lawyers of the present era make not be as playing as effective a role in society or in the affairs of nation or fight for human rights as their predecessors did. But that does not rob the profession of its great majesty.

The often-asked question is how to become a successful lawyer ? Before becoming one, one should ponder over what exactly is the definition of "success". "Success" is often pursued in terms of accumulation of wealth or possessing as much material things or comforts as one can. Economic prosperity is not the ultimate goal in life. It is well said, I quote,

"Money can buy you a pillow, but not sleep".
Money can buy you cosmetics but not beauty.
Money can buy you books but not knowledge.
Money can buy you medicines but not health.
Money can buy you material things but not happiness.
Money can buy you friends but not God."

The profession of law is never a bed of roses. Sometimes, there may not be even *a bed.* To reach the top of the ladder in legal profession, *one requires perseverance, determination and a heart of steel.* There can be innumerable set backs, failures and disappointments. Regardless and mindless of the same, one should keep marching ahead till the goal is reached.

It is said that, in the profession of law, for the first few years one keeps working and working without earning and after a few years, one still keeps working hard and earns something but soon a stage comes when one earns and earns, may be even without working.

A young person joining the Bar should concentrate more on acquiring knowledge, than earning. He should be after learning and not lucre. One can be rest assured that if one works sincerely and honestly, money and material things will come in his way.

Learning is a constant consort of a great lawyer . Next to a doctor and perhaps a teacher, a good lawyer is an eternal learner. J.B. Kania, one of the illustrious Judges of the Supreme Court of India at the advance age of 92 years ***declared " I am still learning"*** his bright eyes glistening.

A young professional lawyer should develop an appetite for reading right from the first day of his profession. What one has learnt in law college is only a drop in the ocean of learning. In fact, you start understanding law better and more when you practice. A lawyer apart from keeping abreast of laws and decisions and writings on law, should also expand his horizon by reading literary works, mainly biographies. A good knowledge of psychology will be of great help.

A young lawyer also learns a lot by observing the seniors in the field. It is said, I quote "*At the Bar, a young lawyer learns much simply by osmosis. Scientifically, osmosis is a diffusion of a ligament through a porous barrier. But learning the law by Osmosis is simply learning with other lawyers (seniors to you) and imbibing what they say and do.*"

Apprenticeship with a knowledgeable senior lawyer is a must for any budding lawyer who dreams of a becoming a great lawyer himself. The tendency of branching off too early in the profession for earning a few more pennies may satisfy a short-term goal. But without a solid foundation in law and practice, such persons are bound to crumble as they advance in their career. *The lives of great lawyers show the impact of their seniors over their lives and career.*

Communication skills especially command over the language is a great boon to a lawyer. Communication is an art. *How much to say and what not to say are extremely important.* Advocacy does play a role in winning or losing a case. Fali S. Nariman, once said, I quote *"It is an illusion that great cases are won or lost because of their inherent strength or weakness – Advocacy plays a part ."*

Last but not the least, a good lawyer should be true to his salt. The client who entrusts a case to a lawyer virtually worships him like god. A lawyer should never commit a breach of that faith. He should put his best efforts and conduct the case in

righteous manner, irrespective of the ultimate verdict.

A lawyer should have total commitment to his client and the cause of client.

Total commitment to the cause of the client is true hallmark of a great lawyer. It is said, I quote *"Once Sardar Vallabha Bhai Patel was arguing in a British Court trying to save an Indian freedom-fighter, accused of treason, likely to go to gallows. When the argument was half-way through, he received a chit and after reading it for a moment, his face turned pale, yet, he continued his arguments. The Judge finally, passed a verdict of a acquittal. However, out of curiosity, he asked Sardar Patel as to whether anything was amiss, to which, he told the Judge. "Sir I have just now received information that my wife is no more."* The Judge then asked Patel solicitously as to why he did not stop the arguments and take leave of the court immediately. To that Sardar Patel replied "Sir, one life is gone but I wanted to save one more." Those are the instances which show the level of commitment which great lawyers have exhibited.

A true lawyer, it is said has to satisfy the, "Five C". test, i.e,. a) *his obligation towards his client, towards his colleagues, towards the courts, towards the community and towards conscience (GOD).*

As per the Bar Council of India "An Advocate shall at all times conduct himself in a manner befitting his status as an officer of the court, a privileged member of the community, and a gentleman, bearing in mind that what may be lawful and moral for a person who is not a member of the bar or for a member of the bar in his non-professional capacity, still be improper for an Advocate."

Justice V.R. Krishna Iyer, the great jurist lawyer and the humane Judge of Apex Court of India and true champion of the down-trodden, once remarked, I quote, *"An Advocate has a prior and perfected retainer on behalf of the truth and justice. He can never be discharged from this primary and permanent retainer. The vital role of a lawyer depends upon his probity and professional life style. The central function of the legal profession is to promote the administration of justice. The Bar cannot behave with doubtful scruples or strive to thrive on litigation. If the independent judiciary is the pillar of democracy, then, the Bar is the foundation of that independent judiciary".* And that, in my opion, sums up the true essence of advocacy.

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RELIGIOUS BASIS OF CASTE SYSTEM IN INDIA*

DR. K. R. AITHAL**

Indian society has been described as compartmental and highly stratified, consisting of a variety of groups having distinct identity and diverse life styles. These groups are generally called castes but the term caste is not an indigenous Indian term it is a graft via English.[1] The founding fathers of the Indian Constitution have argued that India must have a 'Socio-Economic revolution' resulting in fundamental alterations in the structure of the Indian society and this would necessarily mean complete dismantling of the caste system.[2] Several members of the Constituent Assembly expressed the hope that the new Constitution would help bring about radical reorganization of society and would in particular strike at the roots of caste system.[3] Accordingly, the Constitution contains many provisions relating to social reform and to the abolition of existing social inequalities associated with the caste system.

However, the recent debate regarding inclusion of caste in the 2011census has raised issues about whether caste still matters in India.[4] While caste affiliations remain ubiquitous in modern India with surname, marriage arrangements, dress and food habits often characterizing caste distinction, the extent to which caste defines the fundamental structure of social stratification has been a subject of contentious debate.[5] It is often argued that Hindu religion has imposed caste system; contemporary Indian society is reinforcing it in various forms resulting in the caste losing its religious base. Now, our caste is becoming a socio-political construct rather than a product of religious past. In this context an attempt is made in this paper to show that Hindu religion is not really the basis of caste system and it is socio-economic and political factors that sustain caste system in modern India be it caste based reservation or caste census.

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[1] Annu Thakkar, " The origins of Caste system in India." available at: http:// digital commons.iwu.edu/rev/vol 3/iss ¼ , visited on 15.11.12.

[2] Scott Grinsell "Caste and the problem of social Reform in Indian equality law", 35 *Yale Journal of International law, p.199*

[3] *Ibid*, at p.201

[4] Sonalde Desai and Ameresh Dubey, " Caste in 21st century India: Competing narratives", 46 *EPW* 41

[5] *Ibid.*

[6] *Supra* n.1 at 2

(i) What is Caste?

The word caste was introduced by Portuguese seafarers who traded mainly on the west coast of India in 16th and 17th centuries. It was taken from the Portuguese word "Casta" meaning "Species" or "Breeds" of animals or plants and "tribes", "races", "clans" or "lineages" among men.[6] Modern writers on sociology have defined caste as a collection of families or group of families, claiming a common dissent from a mythical ancestor, human or divine, professing to follow the same hereditary calling; and regarded by those who are competent to give an opinion as forming a single homogeneous community.[7] Caste is also an endogamous and hereditary subdivision of an ethnic unit occupying a position of superior or inferior rank of social esteem in comparison with other such sub divisions.[8] Caste system is a classification of people into four hierarchically ranked broad castes called *Varnas*, whose Sanskrit equivalent is *Jati*. *Jati* is composed of a group of people deriving its livelihood primarily from a specific occupation.[9] However it is sometimes asserted that *jati* is based on color of the skin.[10] And it has also been argued that the *Varna* system is based on gunas and karmas of the individuals and has nothing to do with birth or heredity.[11]

Origins of Caste System in India:

There are religious and biological theories as to the origin of castes. According to the Rig-Veda caste system or *Varna* has religious origin.[12] However biological theories argue that it is based on colour of the skin. *Varna* system provided chaturvarnas or four castes but some anthropologists argued that there were tripartite divisions into Brahmins, non-Brahmin and untouchables in much of South India.[13] Untouchables are often referred to as outcastes and there is a persistent tendency for foreign observers to describe them as people who are not members of any caste.[14]

Impact of Caste system on Modern India:

The result of Caste system was the emergenc of untouchables who suffer from certain social disabilities. Generally they suffer from (i) denial or restriction of access to public facilities, such as wells, schools, roads, post offices and courts, (ii) denial or restriction of access to temples,(iii) exclusions from any honorable and profitable employment and relegation to dirty or menial jobs,(iv)) residential segregation,(v) denial of access to services such as those provided by barbers/ laundry men/ restaurants/ shops and the like,(vi) restrictions on lifestyles especially use of goods indicating

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[7] Hutton S.H, CASTE IN INDIA: ITS NATURE, FUNCTIONS AND ORIGINS (1963: Bombay: OUP), p.11

[8] Vellassery, Sebastain; CASTEISM AND HUMAN RIGHTS: TOWARDS AN ONTOLOGY OF THE SOCIAL ORDER, (Singapore, Marshall Cavendish, 2005), p.18

[9] Betelle, Andre; _CASTE, CLASS AND POWER (Berkeley: University of California, 1965), p.21

[10] Lehri R.K, Caste system in Hinduism" as quoted in Maneli Deshpande , History of the caste system and its impact on India today" http://digital commons.col ply.edun/cgi visited on 15.11.2012.

[11] *Ibid*

[12] S.V.KETKAR, HISTORY OF CASTE IN INDIA, (BOMBAY: ORIENT LONGAM 1988), P.8

[13] Marc Galanter, COMPETING EQUALITIES, (Delhi: Oxford University Press, 1984), p.8

[14] *Id* at 11.

comfort and luxury and ,(vii)) restrictions on movement and a host of others.[15]

British rule while introducing liberal education started highlighting the plight of the untouchables and of the lower castes. British raj with the help of Christian machineries established schools, hospitals and other social service institutions. Initially the benefits were cornered by the upper castes but later the British introduced affirmative action in favor of untouchables with rehabilitation of criminal tribes.[16] At the same time the British administration in the name of ameliorating the conditions of untouchables encouraged the Christian machinery to convert lower caste people. For the purpose of affirmative action it introduced caste census during early twentieth century.[17] At the same time the freedom movement started opposing caste census but a dalit movement emerged alongside resulting in the dalit cry for special treatment culminating in reservation system. British administration encouraged caste conferences and liberally doled out funds to caste based educational institutions and organizations. Initially, upper caste Brahmins organized in various sub castes and received the benefits of modern education.[18]

Along with the freedom movement, Mahatma Gandhi introduced a social movement to eradicate untouchability and to improve the living conditions of untouchables. At the same time certain dalit leaders like Dr. B.R.Ambedkar and others emerged and they, while joining the freedom movement, pressed for special treatment of dalits. At the same time the British Administration arbitrarily designated several groups as untouchables through badly conducted government surveys with the primary intention of dividing Hindu society, wherein some semblance of unity or cohesion was visible on account of the freedom movement.[19]

The freedom movement, along with the demand for independence advocated the abolition of untouchability and caste system. This culminated in the enactment of several provisions in the Constitution aimed at abolition of untouchability and various other forms of social discriminations.

Social disabilities to Political Privileges: The Constitution introduced various provisions aimed at social reform and abolition of existing social inequalities associated with the caste system. Article 14 states that the "State shall not deny to any person equality before the law or equal protection of the laws within the territory of India". Article 15 prohibits discrimination on the basis of religion, race, caste, sex or place of birth. Article 17 abolishes untouchability and makes enforcement of any disability arising from it, an offence punishable according to law. Apart from the above it also introduced through Article 15 (4), 16(4) and 335 a system of reservations in educational and employment opportunities. These policies of affirmative actions or positive discrimination institutionalized caste based reservation contrary to the constitutional commitment in Article 15(2) which prohibits discrimination only on the ground of

[15] *Id* at 16.

[16] *Id* at 21

[17] *Supra* n.4 at 43

[18] *Ibid.*

[19] *Supra*.n,10

caste. [20] Hence it is alleged that Independent India replaced caste based disabilities with caste based political privileges which is one of the most serious objections against the current reservation policy.

Caste Today: Caste consciousness in Indian society is steadily decreasing in the era of globalization where more and more opportunities are created and distributed without caste considerations. However, at the same time identity politics, caste based reservations and distribution of political largesse is reinforcing caste in the society. [21] There is an attempt to reinforce the caste system though caste census is apparently justified on the ground of welfare of untouchables and marginalized social groups. It has been argued that the electoral process and the media are taking active part in promoting casteism for political patronage and to acquire political power. The role of caste is highly visible in our political process.

Conclusions: The issues raised in this paper appear to be not in conformity with the opinion prevailing in Indian society. Firstly it is here asserted that contemporary casteism is not based on Hindu conception of *Varna*[22] and it is a socio-political construction introduced during British Raj. The post independent political and economic forces transformed caste based disabilities into political privileges. This transformation has generated caste conflict and atrocities whereby weaker sections have become increasingly vulnerable to the violence perpetrated by politically dominant caste groups. The result is that on the one hand some members belonging to the backward class enjoy unjust privileges, while others belonging to the same class are subject to hatred and violence.

Secondly, caste based privileges are reinforcing caste consciousness among upper caste Hindus and other so called castes in the middle of the social hierarchy. These middle level caste groups are increasingly claiming backward class status, while earlier lower caste people want to move upwards in the social hierarchy.

Thirdly, the articulations of human prejudice and hate through caste has resulted in re emergence of caste panchayats which are blamed for modern forms of crimes like honor killing.

Fourthly, political legitimization of caste through various types of affirmative action and reservation policy are ignoring meritocracy and are blamed for corruption and inefficiency in governance.

Lastly, ever increasing violence during elections and consequent criminalization of society and polity can also be attributed to caste politics. While the Constitution provides for abolition of caste system, the political process is reinforcing it whereby one can easily say that what is legally, morally and constitutionally prohibited is actively promoted by the political process.

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[20] *Supra* n,.2 at 205

[21] *Supra* n,.9 at 35

[22] *Supra* n, 12

CONTROL OF MINORITY AND NON MINORITY EDUCATIONAL INSTITUTONS - A CONSTITUTIONAL CONUNDRUM

Dr. George Joseph*

Introduction

The Constitution of India protects the cultural and educational rights of the minorities[1] and in particular, the right to establish and administer educational institutions of their choice[2]. All citizens have the right to run educational institutions as an occupation subject to reasonable restrictions[3]. The Directive Principles increase the state's responsibility to promote, inter alia, the educational interests of the weaker sections and in particular, those of the scheduled castes and scheduled tribes[4]. To enable the state to make special provisions for the educational advancement of the backward classes and the scheduled castes and scheduled tribes, the Constitution was amended twice. By the First Amendment, provisions were made to create an exception to the rules of non discrimination in Art15(1) and Art29(2). By the Ninety Third Amendment, provisions wrer made[6] for reservation of seats in private educational institutions other than minority institutions. Right to education, at least at the level of primary education has been recognized as a fundamental right comprised in Art 21[7] and Art 21A has been added, recognizing as fundamental right the education up to the primary and secondary stages[8]. To give effect to Art 21A the Right to Education Act 2009 has been passed. In the light of the above provisions and developments, this paper is intended to examine certain problems that have developed in the control by the government into minority and non-minority educational institutions.

Basis of restrictions on minority institutions

The right given to the minorities under Art 30 is not expressly made subject to any

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1. Art.29
2. Art.30
3. Art 19 (i) (g) and 19 (6)
4. Art 46
5. Art 15 (4)
6. Art 15(5)
7. J.P.v State of A.P
8. Eighty Sixth Amendment (from 12.12.2012)
9. The Right of children to free Compulsory Education Act, 2009 (25 of 2009)

restrictions. Rejecting an argument that it is absolute, the Supreme Court observed in Kerala Education Bill[10] that the right to administer does not include the right to "mal-administer". So all restrictions to make an effective vehicle to achieve the purpose of the minority can be imposed by the government. This view has been repeated in later cases also. But this paternalism is open to doubt-should not the minority be allowed to decide what is its interest, particularly when the right is to "establish and administer educational institutions of their choice." If there is a difference of opinion in this matter between the government and the minority, obviously the government's view will prevail and the minorities right could be in peril.

It is to be remembered that minorities are citizens of the state. The right to establish educational institutions will come under the right "to practice any profession to carry on any occupation, trade or business" guaranteed under Article19 (1)(g). It has been held that establishing educational institutions, which was once classed as a charity, is now an occupation, if not a business. So, reasonable restrictions envisaged in Art19(g) would apply to minority institutions, subject to such restrictions not cutting down the scope of the right given by the Article 30. So there cannot be any objection into general regulations to secure fairness and transparency or admission according to merit being imposed on all institutions including minority institutions. In T.M.A Pai Foundation v. State of Karnataka[11], Kripal C.J. while considering the scope of restrictions on minority institutions correctly observed as follows: ".....In Sidhajbhaj case it was laid down that regulations made in the interest of efficiency on instructions, discipline, help, sanitation, morality or public order could be imposed. If this is so, it is difficult to appreciate how government can be prevented from framing regulations that are in national interest...Any regulations framed in the national interest must necessarily apply to all educational institutions whether run by the majority or minority. Such a limitation must necessarily be read into Art 30.The right under Art.30(1) cannot be such as to override the national interest or prevent the government from framing regulations in that behalf[12].The above statement correctly lays down the law but the repeated reference to national interest gives an impression that minority rights are threatening national interest which is not hte case.

The right given to the minorities is not a right, but only a protection or privilege.

Based on certain observations made by the Supreme Court in St. Stephens College v. University of Delhi[13], Lahoti C.J. in his judgment in P.A. Inamdar v State of Maharashtra[14] while discussing the nature of the right conferred by Article 29 and Article 30 observed: "The nature and contents of this articles stands (sic) more than clarified and reconciled inter se as also with other articles if only we understand that these two articles are intended to confer protection on minorities rather than rights as such. In St. Stephen's, their lordships clearly held (vide para 28) that article 30(1) is a

10. 1958 SC 956
11. (2002) SCC 481
12. ibid p563
13. (1992) 1 SCC 558
14. (2005)6 SCC 537

protective measure only" and further said (vide para(9) that Article 30(1) implied certain "privilege". Article 29 and 30 can be better understood and utilized if read as a protection and/or a privilege of minority rather than an abstract right[15]"

It is some what doubtful how the understanding that the minority right is increased by describing it as a protection or privilege rather than a right. All fundamental rights are in the nature of protection of the interest of the citizens by imposing limitations or state actions. They confer immunities to citizens by imposing disabilities (by denying power) on state agencies. If the limits are exceeded by the State action can be taken up in judicial review and relief can be obtained. The right to establish an educational institution under article 19(1)(g) is a liberty (or privilege or freedom) and if this restriction on this freedom is unreasonable, the action of the state can be challenged. In like fashion, the minorities rights to run educational institutions of their choice is a freedom, the curtailment of which can be taken to the judiciary. Of course, in imposing limitations on the freedom of the minorities, compared to those under article 19(1)(g) on citizens in general, the right given under Article 30 to establish and administrator institutions of their choice will have to kept to in mind. To this extent, the freedom of the minorities will be a little more than those under general category. It will be clear that to describe the minorities rights as not a right but only as a protection or privilege infact reduces its strength. It conveys an impression that the minorities have something less than what others have. However it must be admitted that this misdescription has not stood in the way of judiciary liberally safeguarding the rights of the minorities.

Reconciliation between article 29 (2) to Article 30

It appears that great confusion has been caused by the failure to properly understand the meaning of Article 29(2) and of striking a balance between Article 29(2) and Article 30(1). So it is proposed to examine these aspects in some detail.

Article 29 : Protection of the interest of the minorities: (1) Any section of the citizens residing in the territory of the India or on any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same. (2) No citizen shall be denied admission into any educational institution maintained by the state or receiving aid out of state funds on grounds only of religion, race, caste languages or any of them.

Article 30 : Right of the minorities to establish and administer educational Institutions

(1) All minorities whether based on religion or language shall have the right to establish and administer educational institutions of their choice. (1A) ********** (2) **********.The question is can a minority institution receiving aid from the state confine its admission to students belonging the minority communities or is it bound, in accordance Article 29 (2) to admit any citizens (not belonging to the minorities) seeking admission? If the latter is the correct position, to what extent should such admission be made? Two factors would seem to be in support of the later view.

15. ibid p592 para 100

The first is an amendment made in the Constituent Assembly to an earlier version of Article 29(2). Article 23 (2) in the Draft of the Constitution was as follows. (2) no minority whether based on religion, community or language shall be discriminated against in regard to the admission of any person belonging to such minority to any educational institution maintained by the state[16]. An amendment made by Thakur Das Bhargava changed the above provision as "No citizen shall be denied admission into any educational institution maintained by the state or receiving aid out of state funds on grounds only religion, race, caste, languages or any of them." As a justification of the amendments, Bhargava said it was his aim "to extend the right of admission to educational institutions to all citizens whether they belong to majority or minority so that no unwarranted impression of the majority being discriminated against was created[17]".This amendment was accepted by the Constituent Assembly. The result has been that the attempt that started with the intention of protecting minority rights came to an end and Article 29(2) is literally read as a restriction of the minority rights protected under Article 30(1). The right of admission implied in "institution of their choice" in Article 30(1) would also seem to lose much of its meaning. In trying to reconcile the apparently conflicting provisions of Article 29(2) and Article 30(1), a literal approach has been adopted, and by and large, it has been held that the freedom of the minorities to establish and administer institutions of their choice is, if state aid is accepted, limited by the citizens right to get admission.

The Sprinkling Theory

The question of determining the scope of Article 29 (2) vis-a- vis Article 30(1) came up before the Supreme Court for the first time in Kerala Education Bill[18]. This was an advisory opinion under Article 143 touching the constitutional validity of various provisions of Kerala Education Bill. In his opinion Das C.J. repelling an argument on behalf of the government of Kerala that as soon as the minority institutions admitted non minority students, it will lose its minority character and observed that "to say that an institution which receives aid on account of it being a minority educational institution, must not refuse to admit any member of any other community only on the grounds mentioned Article 29(2) and then to say that as soon such institutions admits such an outsider, it will cease to be a minority institution, is tantamount to saying that minority institutions, will not as minority institution, be entitled to any aid. The real import of Article 29(2) and Article 30(1) seems to us to be that they contemplate a minority institution with a sprinkling of the outsiders (emphasis added) admitted to it. By admitting a non member into it the minority institution does not shed its character and does not cease to be minority institution[19]".

This theory seems to have been adopted in all subsequent discussions with weightage for Article 29(2). Thus a reference to the sprinkling theory can be seen in

16. Shiv Rao, The Framing of India's Constitutions" A study; Second Edition, Universal Publishing company (2004) p273.
17. ibid P277 An earlier version, as Article 18 was almost under same terms. See ibid P 273
18. AIR 1958 SC 956
19. Ibid at p973 (para 22)

P.A. Inamdar v. State of Maharashtra[20], the decision of the seven judge bench constituted to resolve conflicts between Pai Foundation[21] and Islamic Academy[22] in relation to the question whether a minority institution receiving aid from the government is compelled to admit others in terms of Article 29(2) and if so, would lose its minority character. Lahoti C.J. referring to Kerala Education Bill, said, "The apparent conflict was resolved by the judges employing a beautiful expression. They said Article 29(2) and 30(1) read together clearly contemplate a minority institution with a "sprinkling of outsiders" admitted into it.[23] Fully accepting the reconciliation effected by sprinkling theory, and in an attempt to give some sort of primacy to Article 29(2) over Article 30(1), the judges then refer to the observations in St. Stephens that minority right is not a right but a protection or privilege,[24] the fallacy of which has been dealt with earlier.

In the light of various decisions like St. Stephen's, Pai Foundation etc, the present position seems to be that the sprinkling can go up to 50 percent of non minority students. But occasionally one can find a slightly different perception that minority institutions though receiving aid should also be allowed first to admit students to the full extent of their requirements (not limited to 50 percent) and then only can be compelled to admit others. Thus in his judgement in Pai Foundation case Quadri J observed : ".... In my view to create inroads into the constitutional protection granted to minority educational institutions by forcing the students of dominant groups of the choice of the state or agency of the state for admission in such institutions in preference to the choice of minority educational institutions will amount to a clear violation of the right specially granted under Article 30(1) of the Constitution and will turn the fundamental right into a promise of unreality[25].

In Pai Foundation's case after a valuable analysis of the provisions, Ruma Pal J held ".....the right to admit minority students to a minority educational institution is an integral part of Article 30(1). To say that Article 29(2) prevails over Article 30(1) would be to infringe and to a large extent wipe out this right. There would be no distinction between minority educational institutions and other institutions and rights under Article 30(1) would be rendered wholly inoperational. It is no answer to say that the rights of unaided minority institutions would remain touched because Article 29 (2) does not relate to unaided institutions at all. Whereas if one reads article 29(2) as subject to Article 30(1), then effect can be given to both, as it is the latter approach which is to be followed in the interpretation of constitutional provisions. In other words as long as the minority educational institution is being run for the benefit of

20. (2005) 6 SCC 537
21. T.M.A. Paid Foundation Vs. State of Karnataka (2002) 8 SCC 481
22. Islamic Academy of Education Vs. State of Karnataka (2003) 6 SCC 697
23. Ibid P591 (para 98)
24. Ibid P592 (para 98)
25. Op. Cit in 21 P 647

Quadri J. in his judgement also went into history of the passage of article 29 (2) in the Constituent Assembly which encourages one to think that on a proper interpretation "no citizen' in article 29 (2) should be restricted to no citizen of a minority

and catering to the needs of the members of minority community under article 30(1), article 29(2) would not apply. But once the minority educational institution travels beyond the needs in the sense of requirements of the its own community, at that stage it is no longer exercising the rights of admission granted under article 30(1). To put it differently, whereas the right of admission given under Article 30(1) is to that extent removed and the institution is bound to admit students for the balance in keeping with the provisions of Article 29(2)[26]. The views of Quadri and Ruma Pal J are eminently reasonable and in keeping with the constitutional objective of protecting minority educational rights and deserve to be accepted as basic rule for the reconciliation of minority and nonminority rights.

Another and perhaps the more basic way for a reconciliation is to interpret "no citizen" in Article 29 (2) as "no citizen belonging to a minority." This will remove the existing conflict and to secure better the position of the minority by ensuring that they can not be denied admission in other institutions on the ground that they have separate institutions. But it may seem to be a revolt against the letter of the law, particularly when the amendment is said to have been introduced to remove the fears of non minority community for giving admission in all state aided institutions including minority institutions. Such interpretation would seem to be perfectly justified in view of the following. Firstly it is obvious that the intention of the constitution is to protect minority rights. Reading "no citizen' in article 29(2) as referring to all the citizens of the country and as not restricted to citizens of the minority group creates a conflict. Accepted interpretational rules permit the reconciliation of such conflicts. According to Durga Das Basu, "Once it is conceded that intention of the legislation has to be gathered not only from the provisions of the statutes itself, but also from the object of the legislation, the court may have to make an enquiry behind the text of the statute. When words are capable of two meaning they should be construed purposively, in order to give effect to manifest the intention of the legislation.[27]" Secondly, every clause of the statute should be construed with reference to the context and other clauses of the Act, so far as possible, to make consistent enactment of the whole statue[28]. Thirdly, according to Maxwell, general words admit of restrains to suit the legislation in question. They are to be restricted to the fitness of the matter[29]. Thus the Act which authorize "every inhabitant" of a Parish to inspect rates under a penalty of refusal was restricted to inhabitants other than Church Wardens who are also inhabitants, as the object of the Act was to give information about rates to those who had no previous access to them and Church Wardens had previous access[30]. Fourthly, in his judgment in Pai Foundation case, Quadri J, has pointed out that speeches made in the Constituent Assembly are not admissible in interpreting the provisions.[31] He has also noted that there is nothing specific in the debates to suggest that Article

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26. Pai Foundation Case op. Cit n 21 P663

27. D.D. Basu, commentaries in the Constitution of India, 8th edition (2007) Vol. 1 p 186

28. Ibid p187, quoting from Candian Sugar Refining Company V. R (1898) A.C. 234 p241

29. Maxwell interpretation of statutes 12th edition p 86

30. ibid p 87

29(2) was intended to cut down the rights conferred by clauses (1)&(2) of Article 30 of the Constitution[32] .So there seems to a be very good case for ignoring the speech of Thokur Das Vargava[33] and starting from the wording of article 29(2) and restricting "no citizen" therein to minority citizens as has been suggested as above. Once Article 31 is liberated from Article 29(2), the minority can use the seats to the extent of its requirements and bring the remaining seats to a pool controlled by the state.

How to find out minorities eligible for the protection

The purpose of the Constitution in protecting the minority is to preserve the immense diversity that has developed in India as a result of the great tolerance of Indian civilization. There are religious, linguistic and cultural minorities. Under Article 29 "any section of the citizens residing in the territory of India or any part thereof has the right to conserve the distinctiveness. The words in Article 30 "All minorities whether based on religious or languages" are to indicate the section of citizens referred to Article29.Two questions to be considered are whether the citizens have distinctiveness and whether they are resident in India. The need for deciding the unit for determining the minority for claiming protection against the legislation applicable in that unit would seem to be unnecessary. So the decision in Pai Foundation case is that, since states have been recognized on a linguistic basis, states should be the unit for determining the minority[34] would seem to be beside the point. The term minority has been used to refer to any citizen having distinct characteristics. Whether it is within India and whether it has the distinct characteristic can be verified by competent authority sanctioning the institution. In the National Commission for Minority Educational Institution Act, 2004 (2 of 2005) the central government is empowered to notify, vide Section 2(f), a minority for the purpose of higher educational institutions. Similar statutory provisions could be made for institutions at lower levels.

Control of Minority Institutions

The present position regarding control of minority institutions as a result of the interpretation of constitutional provisions and of the relevant statutes is that minority institutions not receiving aid but only seeking recognition have freedom in all matter except those for getting recognition. (even here the choice factor in Article 31(1) cannot be bartered away for recognition) For those receiving aid there is an obligation to admit upto 50 per cent of non minority student at the instance of the government. Whether these students will have to pay "Government fees" is not very clear. It may be a matter of understanding between the government and the minority management. Fees would be fixed in a transparent way, as laid down in the Pai Foundation taking into account all reasonable requirement and reasonable surplus. There would be no capitation fees. Fees fixed will be subject to state control and judicial review. Every institution can have its own fee structure. Admissions would be on merit in all quotas

31. Op-cit, n 21 p 639
32. ibid P 639) para 2989)
33. See Ante P.
34. Op-cit n 21. P552 (para 75 & 76)

(i.e inter se merit), selection would be made on the basis of common entrance test held by government or by the associations of the institutions or even by the particular institutions concerned. Until statutory provisions are made regarding the authority to oversee fee structure and admissions, such authority should be constituted, as clarified in Inamdar, as a temporary measure in exercise of the executive authority. Subject to the above, minority institutions can exercise autonomy in all other matters, like selection of Principal, other staff etc. According to the suggestion made in this matter earlier, even in institutions receiving aid, the imposition of quota for non minority students is untenable. The minority should be made to utilize the seats even upto 100 per cent and what remains after satisfying its needs should be open to others.

Control of Non minority institutions

After the decision of 11 judge Bench in the T.M.A. Pai Foundation v. State of Karnataka[35] (as clarified in Islamic Academy and Inamdar) the following may be taken as the scope of State Control on non minority Institutions. Institutions receiving state aid should be ready for being fully controlled under Article 19(g) with regard to admission, fees, protection of interest of teachers and other staff, student etc. With regard to institutions not receiving aid from government, a lesser control would be there. Their need for greater autonomy is to be recognized. Seats of such institutions cannot be reserved to effectuate the reservation policy of the government. In both types there would be no capitation fees. These restrictions would prima facie seem to be reasonable. A question as to how far autonomy should be granted to all educational institutions would remain unanswered.

Conclusion

Minority institutions, whether unaided or aided on non discriminatory basis, should be allowed to admit the students of their community to all the seats if needed, uninfluenced by Article 29(2). The fee structure should be fixed separately for each institution whether of minority or non minority category. It should take into account all financial needs and a reasonable margin of surplus. While fixing the fee, a percentage of free seats for the weaker sections can be provided in each institution. The cost of these would get merged in the total expenditure and would be absorbed in fees. This is in addition to what some minority institutions may provide as free seats for the students of their community. Every institutions can be made to estimate in advance the seats that would remain to be surrendered to the government. In the case of student admitted to such seats against the government pool, the government should pay to the institution the fees calculated at the rates fixed for the institution. The fees fixed under the supervision of a nominated authority should be subject to judicial review. Admission should also be supervised by state authority subject to judicial review to ensure that meritis the basis of selection. Relaxation could be provided in favour of particular categories. It is not desirable that educational authorities should be brought under the jurisdiction of ordinary civil courts. A system of educational tribunals should be established which could in turn be controlled by the High Courts

35. (2002) 8 SCC 481

and Supreme Court. Such tribunal should also hear grievances of the staff. The Educational Tribunal Bill 2010, has been introduced which covers some aspects but a more comprehensive system of decesion making may be needed. Since education is now in the Concurrent List, the union government should pass comprehensive Educational Act covering all aspects and the needed state diversity could be accommodated by authorizing the state to frame rules or allowing the state to pass separate legislation not inconsistent with union legislation.

It is necessary to keep in mind the need for autonomy in education, whether it is minority sector, or the public sector or any other sector. The need for expansion of education can never be realized through public sector. Therefore it is necessary to encourage the private sector. The Right to Education Act, 2009 has only taken up education of the children upto 14 years as a fundamental right. Unless great encouragement and freedom are given to the private sector, higher education and professional education will remain stunted in the public sector. It would seem that the control of non minority and minority institutions can be to the same extent that the number and choice should be allowed to minority students. In all other matters nothing prevents the government from giving the same freedom to nonminority institutions also. Such a liberal and progressive approach only will help the attainment of quality and quantity in education in India.

ISSUES RELATING TO MIGRATION AND PROTECTION OF REFUGEES IN INDIA IN THE GLOBALIZED CONTEXT

DR. ARUNDHATI KULKARNI*

Introduction

Globalization is aimed at placing the world under a unitary economic framework of free market capitalism. It is noted that money and goods move freely but people may not. A distinction is made between proactive and reactive migrants, recognizing that this is a continuum not a dichotomy. The global system is characterized by extreme inequality, as measured by GDP per head and by the Human Development Index. The majority of armed conflicts occur in poorest countries, which are also the source of most political refugees. Environmental crises also precipitate population displacement. Developing countries carry the main burden of refugee protection. Asylum seekers in industrialized regions are a small proportion of those needing protection world-wide[1].

The globalized system is based upon certain principles which require certain constants. Those constants include a monetized system based on import and export dependency or interdependency and demands and increasing levels of consumption for continued growth. Loss of jobs, displacement from agriculture, and poverty drive people from their home countries to countries of historic or contemporary economic ties. In many developing countries, refugees are denied basic rights, often due to a sheer lack of resources. Xenophobia and intolerance towards foreigners and in particular towards refugees and asylum-seekers have also increased in recent years and contribute to a hostile local environment in which reduced standards of treatment are tolerated or even seen as acceptable.[2]

Who are Refugees?

Refugees and asylum seekers must be distinguished from migrants. According to the Convention Relating to the Status of Refugees, 1951a refugee is a person who flees across an international border because of a well founded fear of being persecuted

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1 Anthony H. Richmond, Globalization and the Refugee Crisis, http://pi.library.yorku.ca/dspace/bitstream/handle/10315/2596/CRS%20Working%20Paper%201.pdf

2 C. D. de Jong, 'The Legal Framework: The Convention relating to the Status of Refugees and the Development of Law Half a Century Later, 10 IJRL 688, p- 691, (1998).

3 Article 1A(2) of the Refugee Convention defines a refugee as a person who, "...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

in his country of origin on account of race, religion, nationality, membership of a particular social group, or political opinion[3]. Therefore, refugees and asylum seekers are externally displaced people who have a well-founded fear of persecution in their countries of origin and hence cannot return. Refugees and asylum seekers share their well-founded fear of persecution with internally displaced people (IDPs) who, although they have not crossed an international border, also cannot return to their homes. Migrants, on the other hand, cross international borders in search of better socioeconomic conditions and so do not possess a well-founded fear of persecution upon return. This article is only concerned with the protection of refugees and asylum seekers in India.

Categorization of Refugees

Refugees can be divided in to following three categories:

Economic Refugees - Populations displaced by economic forces largely from processes of globalization, or infrastructure changes of same.

Resource Refugees - Populations displaced either by resource scarcity or by conflict over those resources.

Climate Refugees - Populations displaced by impacts of climate change – flooding, inundation, drought, failed water supply, disease related to temperature changes.

The classification of the status of persons and populations has significant ramifications, and the rapidly changing political environment only complicates this. Those people displaced within their own nations are not refugees under the legal definition. Instead, they are Internally Displaced Persons (IDPs). These people may move from rural to urban areas which add to another set of problems or they may be forced into another territory or even aid camps.

India's Refugee Policy

The juridical basis of the international obligations to protect refugees, namely, non-refoulement including non-rejection at the frontier, non-return, non-expulsion or non-extradition and the minimum standard of treatment are traced in international conventions and customary law. The only treaty regime having near universal effect pertaining to refugees is the 1951 Refugee Convention and its 1967 Protocol on the Status of Refugees which is the magna carta of refugee law. Since India has not yet ratified or acceded to this regime its legal obligation to protect refugees is traced mainly in customary international law.

India never had a clear policy as to whom to grant refugee status. On the question of admission and non-refoulement, however, the Indian attitude is rather bleak. Even though India accepted the principle of non-refoulement as including non-rejection at the frontier under the "Bangkok Principles 1966", it did not observe that principle in

[3] Article 1A(2) of the Refugee Convention defines a refugee as a person who, "...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

its practice. Ignoring the fact that refugees leave their homes suddenly due to threats to their life and liberty, and by the nature of their flight they are unable to get the necessary travel documents from their home States, India deals with the question of admission of refugees and their stay until they are officially accorded refugee status, under legislations which deal with foreigners who voluntarily leave their homes in normal circumstances.

The chief legislation for the regulation of foreigners is the Foreigners Act, 1946 which deals with the matters of "entry of foreigners in India, their presence therein and their departure there from". Paragraph 3(1) of the Foreigners Order, 1948[4] lays down the power to grant or refuse permission to a foreigner to enter India, in the following terms:

"No foreigner shall enter India—

(a) otherwise than at such port or other place of entry on the borders of India as a Registration Officer having Jurisdiction at that port or place may appoint in this behalf; either for foreigners generally or any specified class or description of foreigners, or

(b) without leave of the civil authorities having jurisdiction at such port or place."

This provision lays down a general obligation that no foreigner should enter India without the authorization of the authority having jurisdiction over such entry points. It is mainly intended to deal with illegal entrants and infiltrators. In case of persons who do not fulfill certain conditions of entry, the sub-para 2 of the Para 3 of the Order authorizes the civil authority to refuse the leave to enter India. The main condition is that unless exempted, every foreigner should be in possession of a valid passport or visa to enter India[5].

As observed earlier, if refugees contravene any of these provisions they are liable to prosecution and thereby to the deportation proceedings. The practice shows that when the courts were approached by many Afghans, Iranians and Burmese against whom the Government of India initiated deportation proceedings under Sections 3 and 14 of the Foreigners Act, 1946 for their illegal entry into India, courts responded positively by accepting their plea that if they were returned they would face threats to their life and liberty and India had a long tradition of extending protection to many refugees. In the fitness of things, the courts have initially stayed the deportation proceedings.

As for the minimum standard of treatment of refugees, India has undertaken an obligation by ratifying the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights to accord an equal treatment to all non-citizens with its citizens wherever possible. India is presently a member of the Executive Committee of the UNHCR and it entails the responsibility to abide by international standards on the treatment of refugees.

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[4] The Foreigners Order, 1948 is made by the Central Government in the exercise of the powers conferred by section 3 of the Foreigners Act, 1946.

[5] Para 3(2) (a) of the Foreigners Order, 1948, read with Rule 3 of the Passport (Entry into India) Rules, 1950

Human Rights and Refugee Law Interface

The refugee protection regime has its origins in general principles of human rights. The inclusion of 'the right to seek and to enjoy asylum from persecution' in Article 14 of the UDHR alongside unanimously agreed human rights and fundamental freedoms squarely places IRL within the human rights paradigm. Moreover, reference in the Preamble to the 1951 Convention to the 1945 UN Charter, the UDHR and the principle that human beings shall enjoy fundamental rights and freedoms without discrimination confirms that IRL was not intended to be seen in isolation from IHRL. The Preamble further notes that the UN has 'manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms'. There is, however, no specific reference to asylum or refugees in the UN Charter itself. Arguably such issues were considered to be subsumed within the wider discussion on human rights and fundamental freedoms at the time.

It could hardly have been an oversight given the post-World War II environment and the large-scale refugee flows which amongst other factors, precipitated the creation of the UN. The inclusion of Article 14 in the first declaration on the 'human rights and fundamental freedoms', as referred to in the UN Charter, supports this analysis. The subsequent drafting of a separate treaty on refugees was a pragmatic response to the reality surrounding Europe after World War II. It in no way removes the issue of refugees outside the realm of human rights. At a minimum, Article 14 places the right to seek and to enjoy asylum within the human rights paradigm and represents unanimous acceptance by States of its fundamental importance.

The Vienna Declaration on Human Rights and Programme of Action similarly reaffirmed the right to seek and to enjoy asylum in 1993. While States were adamant that there should be no right to asylum in the International Covenant on Civil and Political Rights (ICCPR), it is argued that, whatever the intentions of the States parties at the time, the right to seek and enjoy asylum is implicit in the very existence of the 1951 Convention.[6] The right to a nationality in Article 15 of the UDHR was also not transferred to the ICCPR, except in relation to children.[7] Moreover, regional instruments have clearly located the right to asylum within IHRL and the UN General Assembly has consistently called on States to respect the rights of refugees. Human rights treaty monitoring mechanisms have not distinguished between refugees, asylum-seekers or other individuals alleging an infringement of human rights on the territory of a State party. In fact, refugees and asylum-seekers are increasingly resorting to human rights mechanisms in the absence of a complementary apparatus under the 1951 Convention and/or its 1967 Protocol. Furthermore, EXCOM in 1997 'reiterated the obligation to treat asylum-seekers and refugees in accordance with applicable human rights and refugee law standards as set out in relevant international instruments'.[8] Most recently,

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6 Vienna Declaration and Programme of Action, UN World Conference on Human Rights, 1993, UN doc. A/CONF. 157/23, 12 July 1993, para. 23

7 Art. 24(3).

8 Executive Committee Conclusion No. 82(XLVIII) on 'Safeguarding Asylum', 1997, para. (d)(vi). See, also, EXCOM Conclusions Nos. 19(XXXI) of 1980, para. (c); 22(XXXII) of 1981, para. B; and 36(XXXVI) of 1985, para. (f).

States parties to the 1951 Convention and its 1967 Protocol reaffirmed their commitment to 'respect the rights and freedoms of refugees' in a Declaration in December 2001.[9]

Conceptually, therefore, IRL and IHRL form part of the same legal scheme and tradition. At first glance, this may not appear to be a major revelation. However, the isolation of IRL from developing human rights norms and institutions has meant that refugees and asylum-seekers have not always had recourse to the full range of rights to which they are entitled. While the 1951 Convention incorporates a collection of important rights, it is in no way comprehensive. Moreover, IHRL is especially relevant with respect to non-State-parties to the 1951 Convention and/or the 1967 Protocol that are otherwise parties to various human rights instruments, as well as its role in developing international customary rules that apply to all States.

Rights Conferred on the Refugees under various International Conventions.

Prohibition of the forced return of a refugee is called *non-refoulement* and is one of the most fundamental principles in international refugee law. This principle is laid out in Article 33 of the Convention Relating to the Status of Refugees, which says that no state 'shall expel or return ('refouler' in French) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'[10]

Some countries detain asylum seekers upon arrival, during the asylum process or while waiting for deportation (*refoulement*). Asylum seekers may have already suffered imprisonment and torture in the country from which they have fled. Therefore, the consequences of detention may be particularly serious, causing severe emotional and psychological stress. Article 31 of the Refugee Convention says that refugees should not be penalized for having entered a country illegally if they have come directly from a place where they were in danger and have made themselves known to the authorities. Therefore, asylum seekers should not be detained for being in possession of forged identity papers or for destroying identity or travel documents.

Articles 12 - 30 of the Refugee Convention set out the rights which individuals are entitled to once they have been recognised as Convention refugees. All refugees must be granted identity papers and travel documents that allow them to travel outside the country. Refugees must receive the same treatment as nationals of the receiving country with regard to the following rights:

- Free exercise of religion and religious education;
- Free access to the courts, including legal assistance;
- Access to elementary education;
- Access to public relief and assistance;
- Protection provided by social security;
- Protection of intellectual property, such as inventions and trade names;

[9] Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol, para 2

[10] http://www.hrea.org/erc/Library/hrdocs/refugees/1951-convention.html

- Protection of literary, artistic and scientific work;
- Equal treatment by taxing authorities;

Refugees must receive the most favourable treatment provided to nationals of a foreign country with regard to the following rights:

- The right to belong to trade unions;
- The right to belong to other non-political non-profit organizations;
- The right to engage in wage-earning employment

Refugees must receive the most favourable treatment if possible, which must be at least as favourable to that accorded to aliens generally in the same circumstances, with regard to the following rights:

- The right to own property;
- The right to practice a profession;
- The right to self-employment;
- Access to housing;
- Access to higher education;

The Right to Seek Asylum

The origins of the right to seek and to enjoy asylum from persecution in other countries can be traced back to the 'right of sanctuary' in ancient Greece, imperial Rome and early Christian civilization.[11] Its modern equivalent was recognized by States in the form of Article 14 of the UDHR. Notably, initial drafting proposals that incorporated a correlative obligation 'to grant asylum' were not accepted.[12] Based on enduring principles of State sovereignty, the right to grant asylum remains a right of the State'. In today's climate of heightened security concerns, arguments revolving around State sovereignty are gaining renewed vigour as the ultimate right of States to patrol their borders and to reject asylum-seekers at their frontiers.

The 1967 Declaration on Territorial Asylum, the outcome of various failed attempts to agree a binding treaty, reiterates that the granting of asylum is an 'exercise of State sovereignty', yet it reaffirms that the discretion of States in this regard is curtailed by the insertion of Article 3(1). This clause reads: 'No person entitled to invoke Article 14 of the UDHR shall be subjected to such measures as rejection at the frontier or, if he or she has already entered the territory in which he or she seeks asylum, expulsion or compulsory return to any State where he [or she] may be subjected to persecution'. While States retain, and jealously guard, the right to admit or to exclude aliens from

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[11] R.K. Goldman and S.M. Martin, 'International Legal Standards Relating to the Rights of Aliens and Refugees and United States Immigration Law', (1983) 5(3) HRQ 302, at 309-310.

[12] R. Plender and N. Mole, 'Beyond the Geneva Convention: constructing a de facto right of asylum from international human rights instruments', in F. Nicholson and P. Twomey (eds.), Refugee Rights and Realities: Evolving International Concepts and Regimes, (Cambridge University Press, 1999) 81, at 81. Cf. OAS Convention, which provides in Art. 22(9) the right 'to seek and be granted asylum in a foreign country', and Art. 12.3 of the African Charter, which states: 'Every individual shall have the right when persecuted to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions.'

their territory, 'the notions of entry and presence are not the "very essence" of state sovereignty'. In fact, as far as the question of sovereignty and the institution of asylum are concerned, the latter has more often been analyzed from the point of view that the act of receiving refugees should not be seen as an interference with the refugee-producing country's sovereignty, as opposed to an interference with the host State's ability to admit non-nationals. Granting asylum in this sense is a 'lawful exercise of territorial sovereignty, not to be regarded by any State as an unfriendly act'.

In spite of these long-held and re-emerging arguments on State sovereignty, some commentators assert that, although there is no right to be 'granted' asylum de jure, there may exist an implied right to asylum de facto[13] or, at the very least, a right to apply for it.

The right to seek asylum was reinforced by the inclusion of a specific prohibition on refoulement in the 1951 Convention, including non-rejection at the frontier. This prohibition has been buttressed by IHRL, in particular Article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment 'CAT'. It is now largely agreed that the right against refoulement forms part of customary international law. In addition, Articles 1 and 33 read together place a duty on States parties to grant, at a minimum, access to asylum procedures for the purpose of refugee status determination. Access to asylum procedures is also debatably an implied right under the 1951 Convention (although such procedures are not necessary to accord refugee protection), and is an accepted part of State practice. It has been asserted that without appropriate asylum procedures, obligations of non-refoulement, including rejection at the frontier, could be infringed.

The right to seek asylum is assisted by Article 13(2) of the UDHR, as reconfirmed in Article 12(2) of the ICCPR, which provides that 'Everyone has the right to leave any country, including his own ...' The right to leave any country and the right to seek asylum are two sides of the same coin in the refugee context. Although Article 13(2) of the UDHR does not mention a right 'to enter any country',[14] it would make a nonsense of the 1951 Convention if this was not intended, at least for the purposes of refugee status determination, especially where an individual has reached a country's territory, such as its territorial seas or a waiting zone in an international airport. Furthermore, Article 32 of the 1951 Convention prevents expulsion of a recognised refugee 'save on grounds of national security or public order'. Article 13 of the ICCPR also refers to expulsion of aliens, although it 'regulates only the procedure and not the substantive grounds for expulsion'. In particular, it provides aliens with full opportunity to pursue remedies against expulsion, which may only be suspended for 'compelling reasons of national security'.

The Right to Enjoy Asylum

Apart from offering a definition of a 'refugee' in Article 1, the 1951 Convention

[13] T. Einarsen, 'The European Convention on Human Rights and the Notion of an Implied Right to de facto Asylum', 2 IJRL 361 (1990) and R. Plender and N. Mole at 364

[14] L. Henkin, 'An Agenda for the Next Century: The Myth and Mantra of State Sovereignty', (1994) Virginia J. Int'l L. 115. p. 116.

enumerates a range of rights owed to refugees in Articles 3 to 34. The 1951 Convention and/or its 1967 Protocol 'clarify the minimum standards implicit in the application of Article 14 of the Universal Declaration ...' In line with the object and purpose of the 1951 Convention, by virtue of a positive refugee status determination under Article 1A(2), States are bound to grant to refugees minimum standards of treatment contained therein. By doing so, a framework for the treatment of refugees and asylum-seekers in host countries has developed and the right to enjoy asylum has been transformed from an initially vague concept of temporary admission or stay to one requiring host States to adhere to particular practices.

The replacement of a right 'to be granted' asylum with a right 'to enjoy' asylum changed the tone and ramifications of the provision. In contrast to the right to seek asylum, the right to enjoy asylum suggests at a minimum a right 'to benefit from' asylum. While a State is not obligated to grant asylum, an individual, once admitted to the territory, is entitled 'to enjoy' it. According to a UN report, 'asylum' consists of several elements: to admit a person to the territory of a State, to allow the person to remain there, to refuse to expel, to refuse to extradite and not to prosecute, punish or otherwise restrict the person's liberty.

While there is no doubt that the 1951 Convention is the 'foundation of the international system of refugee protection' and that it remains relevant over fifty years after its adoption, it is not the sole repository of rights applicable to refugees and asylum-seekers. The rights enumerated in the 1951 Convention are limited guarantees for refugees and asylum-seekers and are not the range of rights available to them under IHRL. It ought to be acknowledged, however, that the 1951 Convention pre-dates the human rights covenants of the 1960s and incorporated a range of rights that have been further enhanced by developments in human rights law. The 1951 Convention covers a number of civil and political, as well as economic, social and cultural, rights. Specifically, it includes rights related to freedom of religion (Art. 3), property (Art. 13), artistic rights and industrial property (Art. 14), association (Art. 15), access to courts (Art. 16), wage-earning employment (Art. 17), self-employment (Art. 18), recognition of professional diplomas (Art. 19), and welfare, social security and education (Arts. 20 to 24).

According to the UNHCR, the gradations of treatment allowed by the Convention serve as a useful yardstick in the context of defining reception standards for asylum-seekers. At a minimum, the 1951 Convention provisions that are not linked to lawful stay or residence would apply to asylum-seekers in so far as they relate to humane treatment and respect for basic human rights'. Most other rights are contingent upon status as a refugee. Given the declaratory nature of refugee status, they may also apply to asylum-seekers, although this is not fully accepted by States. IHRL, in contrast, embodies a large number of rights relevant to refugees, including rights not mentioned in the 1951 Convention.[15]

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[15] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Geneva, 1979, re-edited Jan. 1992), para. 28.

Durable solutions to the Refugee Problem

To take the above analysis to its logical conclusion, it would be an over-sight not to mention briefly the clear link between standards of treatment in host countries for refugees and asylum-seekers and the realisation of durable solutions, including particularly, opportunities for local integration. At the time of the drafting of the 1951 Convention, there was widespread recognition by States that local integration was a real solution to the plight of refugees.[16] In fact, historically, local integration was the preferred durable solution and repatriation was actively discouraged, as most of the refugees originated from communist countries. The emphasis on voluntary repatriation as the 'primary' solution only arose at the end of the Cold War.[17]

Moreover, assimilation and naturalization are mentioned in Article 34 of the 1951 Convention and although framed in discretionary language, calling on States as far as possible to facilitate the assimilation and naturalization of refugees, they represent the natural end point of long-term stay in the country of asylum.[18] The granting of citizenship is the final, not the only, form of local integration. In fact, it is the formalisation of the local integration solution. The right to family life and the right to work, for example, are also part of the local integration continuum. UNHCR has recently separated this process into 'self-reliance' and 'local integration', with the latter being the 'end product of a multifaceted and ongoing process, of which the former is one part'. The General Assembly has acknowledged that 'the promotion of fundamental human rights is essential to the achievement of self-sufficiency and family security for refugees, as well as to the process of re-establishing the dignity of the human person and realizing durable solutions to refugee problems'. Whether there is a right to a durable solution is another important issue, yet it is outside the parameters of this discussion. What is relevant to this analysis is the potential for the provisions of both the 1951 Convention and relevant international human rights instruments to give content and meaning to the concept of local integration, an important, albeit indirect, component of Article 14(1) of the UDHR.

Conclusion

Now is the time for a progressive development of a global approach to the refugee problem, an approach which takes due cognizance of the basic human rights of refugees and interests of the asylum countries and the international community, and secures the cooperation of all parties in seeking a solution to the problem. Given the close link between refugees and human rights, international human rights standards are powerful ammunitions for enhancing and complementing the existing refugee protection regime and giving it proper orientation and direction.

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[16] G. Coles, 'Voluntary Repatriation: A Background Study' (UNHCR, Geneva, 1985); G. Loescher, 'UNHCR at Fifty: Refugee Protection and World Politics', in N. Steiner, M. Gibney and G. Loescher (eds.), Problems of Protection: The UNHCR, Refugees, and Human Rights, (Routledge, New York, 2003) 3, p. 9.

[17] B.S. Chimni, 'The Meaning of Words and the Role of UNHCR in Voluntary Repatriation' 5 IJRL 442-459 (1993).

[18] UNHCR, 'Local Integration', para. 5.

It is important to regard migration and forced displacement issues, not as a threat but as an opportunity and challenge. More work is needed to shift away from the negativity surrounding migration and refugee protection today and ensure that the valuable aspects of migration come to the fore and influence positive international refugee protection in line with fundamental humanitarian values.

There is no doubt that the 1951 Refugee Convention retains its 'central place in the international refugee protection regime', as acknowledged by States parties in the Declaration in December 2001. Yet it is similarly clear that the 1951 Convention does not cover many rights nor deal with the range of issues faced by forcibly displaced persons today. IRL suffers from the fact that it is seen as a 'compromise between the state imperative of migration control and humanitarian concerns'. Its lack of a complaints procedure and the failure of the UNHCR to activate its supervisory role in new and dynamic ways such as through state reporting requirements, have meant that the supervision of the rights of individual refugees under IRL has fallen behind the momentum of IHRL.

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PATIENTS WIN PATENT WAR : NOVARTIS AG V. UNION OF INDIA

SANDHYA H. V.*

Under TRIPs agreement, WTO members have to enforce product patents for agrochemicals and pharmaceutical compounds. About 50 developing countries, including India had not complied with this requirement during the Uruguay Round of GATT negotiations. The much awaited and debated patents Amendment was finally passed in Parliament in March 2005. This Third Amendment to the Indian Patents Act 1970 brought India in the line with the TRIPs agreement.

Omission of product patents for agrochemicals and pharmaceuticals was our strength. This had contributed to widespread growth of generic pharmaceutical industries, thus making available medicines to the public at very low cost. The Indian domestic pharmaceutical industry grew strong, highly competitive and a big supplier of medicines and drugs at affordable prices to the common man because of a regulatory system focusing only on process patents along with a rigid price control. India developed into a world class generics industry. In fact in 2002, India was the world's largest producer of generic drugs in terms of volume.[1] Introduction of product patent along with the new regulations will cause significant changes in the Indian IPR industry. Product patent regime will be particularly favorable to the players already developed and well-equipped in terms of scientific and technical resources. Therefore the main concern was about the fate of our pharmaceutical industry and consequent cost escalation of medicines when we allowed product patent from January 1st 2005.

The 'New Use' Exclusion

Section 3(d) of the Patents Act, 1970 excluded a "new use for a known substance" from the ambit of 'invention'. The 2005 Act has expanded on this exception by providing that "*the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance*" would not be patentable. It then states that salts, esters, ethers, polymorphs, metabolites, etc. shall be considered as the same substance unless they "*differ significantly in properties with regard to efficacy*".

The introduction of a new definition for the term 'substance' through the explanation above would make for some nuanced interpretative battles. At what point would a showing of increased efficacy change a 'new form' of an existing substance to a new

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1 http://www.ideas.rpec.org/p/nbr/nberwo/10159.html last visited on 22 May, 2013.

substance altogether?

In order to answer this question, one has to first address the issue of what exactly the term 'efficacy' means. Would this term be construed in a manner similar to how a drug approval agency would construe it?

It is interesting to note in this connection that this provision in the 2005 Act, which finds no parallel in any other patent legislation in the world, has been copied from a European Directive dealing with drug safety regulation.

As one can well appreciate blindly transposing a provision that operates within the context of a drug regulatory regime to a patent regime can pose problems. For one, it makes it more likely that the term 'efficacy' would be construed in a drug-regulatory sense - consequently, the requirement would be a difficult one for most patent applicants to satisfy. Pharmaceutical companies generally file patent applications at the initial stage of discovery of a drug; it is only much later in the development process that clinical studies (phase III) are conducted to gather information pertaining to the therapeutic efficacy of the drug. The requirement of information on 'efficacy' at the stage of filing a patent application is therefore an onerous one.[2]

If, on the other hand, the term 'efficacy' were to be construed in a liberal manner to include even a general hint of an added advantage in using the new form, it is possible that a good number of formulations would qualify as new substances upon the showing of an increased efficacy.

The amended section 3(d) appears to be limited to only new forms that demonstrate an increase in known efficacy. It does not, therefore, apply to a case where the new form is found to have a completely different use (and not just an increased efficacy vis-à-vis the known use). If the intention behind this provision is to heighten the obviousness standard and weed out frivolous and fairly obvious patents, this seems a rather illogical result, as a new use for a new form is certainly more inventive than a mere showing of an increase in known efficacy.[3]

NOVARTIS AG V. UNION OF INDIA

When the pharmaceutical company Novartis challenged the rejection of its patent application for the leukemia drug Glivec in *Novartis AG v. Union of India*,[4] it became the first major legal challenge to India's newly amended patent law. In 2005, India purportedly made the final changes required to bring its intellectual property laws in compliance with the Trade-Related Aspects of Intellectual Property Rights (TRIPs), the World Trade Organization's (WTO) minimum standards for intellectual property protection, but its patent law is still fraught with a number of controversial provisions. The ability of pharmaceutical companies such as Novartis to secure patent protection

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2 "The task of proving efficacy is much more difficult, expensive, and time-consuming than the task of proving safety."The Independent Institute,History of FDA Regulation: 1902-Present, http://www.fdareview.org/history.shtml last visited on 20 May 2013.

3 Shamnad Basheer, "India's Tryst with TRIPS: The Patents (Amendment) Act, 2005", *The Indian Journal of Law and Technology*, Vol. 1, 2005, p. 23-25.

4 *Novartis AG v. Union of India*, (2007) 4 MADRAS L.J. 1153, http://www.scribd.com/doc/456550/High-Court-order-Novartis-Union-of-India last visited on 22 May, 2013.

in India not only is important in creating incentives for pharmaceutical research, but also greatly affects the Indian generic drug industry, and therefore the price of medicine available to patients. India is the world's second most populous country and the second fastest growing major economy, but has 70% of its population living on less than $2 per day, making Novartis AG of paramount importance.

Glivec is used for the treatment of chronic myeloid leukemia (CML), a disease that afflicts nearly 5,000 new patients in the United States each year. Studies have shown that Glivec, which targets specific cancer proteins, is almost ten times more effective than traditional interferon therapy. In 1993, Novartis filed patents worldwide for the active molecule imatinib. Novartis did not patent imatinib in India because the 1970 Act did not allow patenting of pharmaceutical products at that time. After India's entry into the WTO in 1995, Novartis filed a "mailbox" patent application in the Madras Patent Office for imatinib mesylate, a beta crystalline form of the free base imatinib. In 2002, Novartis started its Glivec donation program in India to provide Gleevec to patients who were unable to afford the medicine, but halted that program after Indian drug manufacturers began to produce a generic version of Gleevec. In 2003, the Patent Office granted Novartis Exclusive Marketing Rights (EMR) in India, which allowed Novartis to enjoin generic Glivec manufacturers and raise the price of Gleevec almost ten-fold. When the Glivec mailbox application came up for examination in 2006, some commentators suspected that the application was fast-tracked due to controversies over the donation program and the steep rise in price. In January 2006, the Madras Patent Office refused to grant Novartis a patent for imatinib mesylate. The first major ground for rejection was that because imatinib mesylate was a salt form of the free base imatinib, and Novartis claimed all pharmaceutical salt forms of imatinib in its 1993 patents, the Indian application therefore lacked novelty and inventiveness. The second major ground for rejection was based on Section 3(d) of the 2005 Amendment, which required that new forms of a known substance could only be patented as a product if they demonstrated "enhanced efficacy." Although Novartis disclosed information that imatinib mesylate had a 30% increase in bioavailability (the percentage of the drug absorbed into the bloodstream) as compared with imatinib, the Patent Office found this insufficient to meet the "enhanced efficacy" requirement of Section 3(d).[5]

In May 2006, Novartis petition in the Madras High Court was opposed by the Indian Government, the Patent Office, several Indian generic drug manufacturers and an Indian public interest group. Novartis claimed that the Patent Controller erred in rejecting the Glivec patent application, that Section 3(d) was not compliant with TRIPs, and that Section 3(d) was vague, ambiguous and in violation of Article 14 of the Constitution of India because it was discriminatory against Novartis. The case was bifurcated between the Madras High Court and the Intellectual Property Appellate Board (IPAB). The challenges on TRIPs compliance and constitutionality of Section 3(d) were heard by the Madras High Court, which issued a judgment against Novartis

[5] Linda L Lee, "Trials And TRIPS-Ulations: Indian Patent Law and Novartis AG V. Union of India", http://www.btlj.org/data/articles/23_1/281-313.pdf last visited on 20 May 2013.

on August 8, 2007. IPAB rejected the claim, but gave certain findings favourable to the company.

The Madras High Court entertained three issues: First, whether courts in India have jurisdiction to review if Section 3(d) of the 2005 Amendment is compliant with Article 27 of TRIPs, and alternatively, whether courts in India can grant declaratory relief that Section 3(d) is not compliant with TRIPs. Second, if courts do have jurisdiction, whether Section 3(d) complies with Article 27 of TRIPs. Third, whether Section 3(d) violates Article 14 of the Constitution of India because it is vague, arbitrary and confers uncontrolled discretion to the Patent Controller.[6]

1. Jurisdiction: The Madras High Court held that it did not have jurisdiction to decide a case concerning the compliance of a domestic Indian law with an international treaty. In support of its arguments, Novartis relied on a case from the United Kingdom, *Equal Opportunities Commission & another v. Secretary of State for Employment,* in which the court held that British courts had jurisdiction to decide a case concerning the compatibility of a British law with the European Community Law. The Madras High Court distinguished the facts of the Novartis dispute with those under Equal Opportunities Commission, because the European Community Law had been "domesticated" as the domestic law of England through the European Communities Act, whereas the Indian government had not "domesticated" TRIPs. Furthermore, the Madras High Court asserted that the nature of an international treaty is contractual, and accordingly contains provisions for dispute settlement. Since Article 64 of TRIPs expressly provides that disputes should be taken to the Dispute Settlement Body of the WTO, the Madras High Court held that Novartis should seek to enforce TRIPs though that mechanism and not an Indian court. Concerning the alternative argument of granting of declaratory relief, the Madras High Court asserted that courts have broad discretionary power to grant declaratory relief under Article 32 of the Constitution of India. The court held, however, that declaratory relief should not be given where it would serve no useful purpose to the petitioner. Because Novartis could not compel the Indian parliament to enact or amend a law even if Novartis were to get a declaration that Section 3(d) was noncompliant with TRIPs, the court held that Novartis was not entitled to declaratory relief.

2. Compliance with TRIPs: As the Madras High Court held that it did not have jurisdiction to decide whether a domestic law violated an international treaty, it refused to decide whether Section 3(d) is compliant with TRIPs. Nevertheless, the court opined that TRIPs allows flexibility for the individual needs and situations of every member country. In complying with the TRIPs obligations, India has a constitutional duty to provide good health care to its citizens, including giving them access to affordable drugs. Thus, the court opined that the validity of Section 3(d) should be analyzed with consideration of its objectives of preventing ever-greening and making generic drugs available.

3. Constitutionality: The court held that Section 3(d) did not violate Article 14 of

6 *Ibid*, p. 300.

the Constitution of India and was not vague or arbitrary, and did not confer uncontrolled discretion to the Patent Controller. The court rejected Novartis's arguments that Section 3(d), which denies patents to new uses of known substances unless the patentee can show "enhancement of the known efficacy" or "differing significantly in properties with regard to efficacy," was ambiguous and unclear. While these two phrases are not explicitly defined, the court held that it was common practice for the legislature to use general language and leave the courts to interpret the language based on the context and facts of each case. Moreover, the court held that Novartis was a sophisticated party who had the technological expertise to comprehend the enhanced efficacy requirement.[7]

The court also rejected Novartis's argument that Section 3(d) was arbitrarily enacted. Novartis argued that the actual amended Section 3(d) was not the same as the one originally proposed to the Parliament, which made no mention of an efficacy requirement, and was substituted in the current form of Section 3(d) without explanation. The court held that Section 3(d) was not arbitrarily enacted, referring to the parliamentary debates leading to the 2005 Amendment. The debates revealed that there was widespread fear that the earlier proposed amendments would deny Indian citizens of access to affordable medicines and open up the possibility of ever-greening. Thus, the court found that the legislature did not arbitrarily enact Section 3(d) in its final form.

Finally, the court held that Section 3(d) did not confer unlimited discretionary power to the Patent Controller and was not discriminatory. The court emphasized that discretionary power did not necessarily mean that it would be discriminatory. The Patent Controller's discretionary power under Section 3(d) in deciding whether a known substance has enhanced efficacy did not automatically lead to an arbitrary exercise of discretionary power or discrimination against Novartis. Furthermore, the court opined that the judiciary should be more deferential to the legislature in the field of economic regulation. As the Patent Act was designed to encourage the economic interests of India, the courts should be especially cautious before overruling the legislature.[8]

The Hon'ble High Court of Madras, on the issue of compliance of section 3(d) of the Indian Patent Act 2005, with Article 27 of the TRIPs Agreement, decided mainly on the jurisdictional issue and said that it lacked jurisdiction to entertain the issue. Court relied on using a 'contractual' approach and concluded on the basis of general principle, which states that 'non-compliance with an international obligation does not provide private parties with the right to challenge a domestic statue unless the international instrument expressly grants such right'. The TRIPs Agreement in this regard grants right only to member states.

The Court further mentioned that the WTO's Dispute Settlement Understanding provides the exclusive remedy and a comprehensive dispute mechanism for violation of TRIPs Agreement. The High Court looked into various previous decisions in case

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7 *Ibid*, p. 301-302.

8 M.D. Nair, "TRIPS and Access to Affordable Drugs", *Journal of Intellectual Property Rights*, Vol. 17, July 2012, p.312.

of conflict between the international law and municipal law and decided that municipal law prevails in such conflict. Moreover, in India, international treaties are not directly enforceable.

But the decision leaves crucial a question before the Court unanswered. It is a well-founded decision both on the understanding of settling the claims under the TRIPs Agreement and also in the light of the precedents relating to the place of international law in the Indian legal regime.

It also rejected the second contention of Novartis regarding the unguided power granted to the Patent Controller by the impugned provision. While deciding on the issue the Court upheld that section 3(d) is neither vague nor arbitrary and therefore is not violative of Article 14 of the Indian Constitution. The Court also studied the requirements placed on the Patent Controller by the impugned provisions..

The whole argument of Novartis to hold section 3 (d) vague and arbitrary rested on the fact that, since the term 'efficacy' was undefined, the term 'enhanced efficacy' was ambiguous. The Court is right in its decision because undefined terms cannot essentially be deciphered as lack of guidance to the patent controller. In fact, the explanation in section 3(d) provides as to what constitutes 'enhanced efficacy'. The Court also pointed out that intention of the provision is clear and simple- for a patent to be granted it must be shown that the substance discovered has a 'better therapeutic effect'. Therefore, the Court concluded that the patent controller could competently determine the issue and the enhancement of a drug could also be most definitely determined.

Although the Court dismissed the petition, it acknowledged that the wording of section 3(d) is not perfect and it may still create interpretive problems and may lead to unintended results. However, it must be kept in mind that in this case the Court did not consider the broad question of dealing with the merits of section 3(d) but focused on the narrow issue whether it is was vague or arbitrary to the extent that it would satisfy an Article 14 challenge. Before dismissing the petition the Court made certain important observation and mentioned that the Amendment Act intended (i) preventing ever-greening; (ii) to provide easy access to the denizens of this country for life saving drugs; and (iii) to help Governments discharge their constitutional obligation of providing health care to their citizens.[9]

On August 2009, Novartis approached the Supreme Court of India. In a major blow to the Swiss pharma giant Novartis, the Supreme Court on Monday, April 1st, 2013, rejected its plea for a patent on cancer drug Glivec. The verdict is expected to pave the way for Indian firms to provide affordable drugs to lakhs of cancer patients.

Ending a seven –year legal battle by Novartis to have exclusive right for manufacturing Glivec, and to restrain Indian firms from making generic medicine, the apex court held that there was no new invention and no new substance used in the drug prescribed for treating blood, skin and other cancers.[10]

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[9] Archana A.Jatkar, "The Indian Patent (Amendment) Act, 2005 and the Novaris Case", *TRADE LAW BRIEF*, No. 3, 2008, p. 2-3.

[10] *THE TIMES OF INDIA*, Tuesday, April 2, 2013, p. 1.

The judgment allows suppliers to continue making generic copies of Swiss firm Novartis' Glivec, which has been shown to fight chronic blood cancer effectively. While the Novartis drug costs Rs 1,20,000 or US $ 2,400 per month per patient, while generic versions are available at a cost of Rs 8,000 (US $ 160) to Rs 12,000 (US $ 240) per month, with doctors often advising patients to take it lifelong, the ruling would be a relief to some 300,000 patients in India currently taking the drug.

A bench of Supreme Court Justices Aftab Alam and Ranjana Desai said: "*We firmly reject the appellant's case that Imatinib Mesylate is a new product and the outcome of an invention beyond the Zimmermann (original) patent*". The Bench said that the patent application contains a "*clear and unambiguous averment*" that all the therapeutic qualities of the modified form, for which the patent was applied, "*are possessed*' by the original version.

The court held that patents can be granted only for medicines that are truly new and innovative. For new forms and new uses of existing medicines, patent applicants should prove improved efficacy. The court said that the Patents (Amendment) Act, 2005 established that the "*mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance" is not an invention* – for the purpose of patenting.[11]

Observers say that the Court's judgment sets a precedent against the practice of "evergreening" – a strategy through which drug manufacturers introduce modifications of drugs to extend the five-year patents on them. They say that other "evergreening" patent applications could be rejected citing this judgment, helping to keep many life-saving drugs out of the patent regime and pushing down costs. Pfizer and Roche are fighting for similar patents on their Cancer and Hepatitis C drugs. Thus ruling is bad news for them.

On the otherhand, it is a big boost to Indian generic drug suppliers and a big positive for generic manufacturers, patients and consumers and certainly a negative for multi-national pharma companies as the ruling sets a precedent against the practice of drug companies extending patents by introducing small modifications of old drugs. India exports $10 billion worth of generic drugs. Indian drug giants such as Dr. Reddy's share was up 2.64. percent at Rs. 1,813, Cipla rose 2,63 percent to Rs. 389.0, Natco jumped as much as 10.72 percent to Rs. 475.05 and Ranbaxy rose 2.77 percent to a high of Rs. 452.7 rupees. Novartis shares slumped 6.8 percent to Rs. 558.10 at the Bombay Stock Exchange – its lowest since January 2012 – after the ruling, before recovering marginally to Rs. 572.95.12

Conclusion

The Supreme Court order rejecting a plea to grant patent protection for Glivec is a landmark. It will greatly strengthen the quest for access to affordable medicines in India. The decision affirms the idea that a patent regime loses its social relevance when a drug is priced beyond the reach of the vast majority of a country's people.

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[11] *THE HINDU*, Tuesday, April 02, 2013, p. 1.

[12] *Ibid*, p. 10.

That pharmaceutical companies employ high pricing to limit the number of beneficiaries of "blockbuster" patented molecules and even older "evergreened" medicines is an irony, because making additional copies of a drug is not expensive. On the other hand, cost control and dispensing of essential medications in government-run health facilities is affected, because many States have no centralized procurement system. It is unsurprising, therefore, that less than 10 percent of medicines sold in India are under patent, while the vast majority are branded generics. The court order should prompt producers of patented drugs to move towards liberal licensing and low cost manufacture in India. It is a matter of concern that at least a dozen pharmaceutical innovations used in the treatment of cancer, HIV/AIDS, and Hepatitis B and C are not affordable to even the upper middle classes, and impossible to access for the poor.

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PREVENTION OF RAPE: UNCOVERING THE JIGSAW WITHIN THE PANDORA'S BOX

RAKSHITH B. V.*

Abstract

Much has been said about the measures to prevent rape, following the ghastly and despicable incident in Delhi on December 16, 2012.This incident highlighted the pervasiveness of rape and focused on the need to bring about effective methods to reduce its frequency.In the course of the deliberations that followed, the most talked about means for preventing the occurrence of rape was to increase the punishment meted out to the perpetrator of the act. The inclusion of death penalty in Section 376 of the Indian Penal Code was also demanded.This plea is based on the deterrent model of punishment.However, the problem is that rape control misperceives prosecutions with prevention. There is but little evidence to show that punishment acts as a deterrent. Moreover, only a small number of rapists are ever punished.

It has to be accepted that rape poses a series of predicaments for the criminal justice system. In order to make attempts to diminish the frequency of the same, the act of rape has to be viewed not just as a crime. In addition to the angle of crime, it has to be looked at through the social, psychological and even the political lens. Rape has to be observed as a political issue, since its aim is to keep women powerless, while reinforcing the status quo of masculine domination.Therefore to address the problem, rape has to first be observed in this light, and necessary steps have to be takenthereafter. Rape prevention must focus on eliminating the conditions in society which make women easy targets for rape.

Keywords: *Rape, Prevention, Punishment, Deterrence, Reformation.*

Introduction

The end of 2012 brought into sharp focus the continuing predominance of rape in our society. The Delhi incident acted as an eye-opener to the fact that, just like the victim of the act, the countless cases of rape in our societyare also overpowered and silenced, leaving wounded bodies and battered souls. It is perhaps this fact that led the Chief Justice of our Supreme Court to note that rape was not only a physical barbarism, but afflicted the very soul of the victim[1].

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1 Chief Justice Altamas Kabir in his letter to the Chief Justices of High Courts dated 5.01.2013.

As one American researcher has said, "short of homicide, it [rape] is the ultimate violation of self"[2]. In order to guarantee the constitutional assurance of gender equality within the social order as well as life with dignity, necessary steps have to be taken to prevent instances of rape, since these are contrary to constitutional and egalitarian principles.

While it is of utmost importance to come up with steps to prevent the incidents of rape, we must accept at the outset the fact that its absolute prevention would certainly be an illusion. What, therefore, society can do is to make attempts to reduce the frequency of its occurrence. In order to do so, it is first necessary to dispel our preconceptions and myths about the issue. Only by analysing the different contours of this gruesome act can we come up with ways to prevent it.

The most important issue, therefore, is to analyse the act of rape itself.To truly understand and analyse the laws relating to rape and other sexual offences, identify the glaring loopholes if any and deliberate on the desired changes in the law, we need to treat rape as an act against the entire society and not solely against women victims. Only by doing so will we be in a position to find answers to curb the same.The first step would be to observe rape as not just a penal violation.Tuning out the intended pun, rape has its seeds sown long before the actual act. The perpetrator's social and psychological history plays a major role in the same.It is the result of a certain mind-set of some erring persons who cultivate anerroneous perception towards women during their socialization process. Any talk of punishment must first visit this angle.

There is no doubt that changes are required in the legal structure in order to prevent incidents of rape. However, this has to be carefully done, since rape often poses a jumble to the criminal justice system. There has been much talk about changes required in the laws concerning rape; about how an increase in punishment can help curb the problem by acting as a deterrent.Before bringing about such changes, it is first important to understand the effectiveness of the deterrent model of punishment. What is unfortunate is that while it comes to rape control, prosecution is often confused with prevention. The deterrent model cannot attempt to solve entirely the problem at hand.

It has also to be noted that rape is not just a problem that can change through law, but more importantly, with a change in attitudes. And this can be brought about not just by deterring perpetrators of the act, but by reforming them. The act of rape has to be regarded not just as a crime, but also as a societal or political dysfunction and the same can be attributed to several factors. Thus, rehabilitation or reformation ought to be the primary goal of punishment.

While it is accepted that rape has to be treated as a gender-neutral issue, this paper analyses the reasons for the perpetration of the act against women in particular, and the steps to be taken for its prevention.

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[2] Byron R. White, quoted in the *Guide to American Law*, at p.383.

1. The Punishment-Prevention Paradox

In the past few weeks, while the escalated prevalence of rape in our society has been attributed to a host of factors, accurate as well as politically motivated, it has highlighted the inadequacy of our criminal justice system to deal with the problem. It suggests that the present structure is engulfed in lacunae which posea serious threat to the development of not just women, but the entire society.This suggests a breach of the rule of law, which is the very foundation of our society. Hence, the need of the hour is to dissect our criminal justice system, examine its loopholes and make necessary changes.However, in doing so,the effect of a myriad factors that influence the same have also to be carefully evaluated.

Public opinion has been that instances of rape can be prevented by aggravating the punishment. There have been increased demands to make amendments in Section 376 of the Indian Penal Code. This has been backed up by the Committee on Amendments to Criminal Law as well. Thisstress has surfaced because recourse to the law is considered as significant and inevitable. This is because of the idea that constructing a law around an occurrence proves that 'it matters', since law ensures the delivery of rights through the justice system. Law is considered as the principal legitimating discourse.The idea is that legal criminalisation will ensure that the practice is delegitimised by society. Such an act of constructing a law around an issue, with increased punishment is meant to discourage the general population from doing such acts. However, it is seen that despite several attempts to take a tough stand against rape through legislation, the growing trend of rapes has not seen a downward turn. It is an accepted fact that the recorded cases of rape form the mere tip of the iceberg, since even today a large number of cases go unreported.This gives us a need to evaluate whether there exists an actual co-relation between punishment and prevention.

The criminal justice system, which comprises not just legislation, functions with its networkof police, courts and prisons. It aims towards the reformation of society and maintenance of law and order. The system works by ensuring that rights of people are upheld and those who disregard the rights of others are prevented from doing so. While the systems in place in different societies in furtherance of this vary,as also the underlying philosophies behind the same, the practice of imprisonment of offenders suggests deterrent values.

1.1. The Application of the Deterrent Model

The deterrence theory is appealing due to its inherent intuitive character[3] . It can be described as the hot-stove phenomenon. While growing up, we are taught that if we touch the top of a hot stove, the result would be a seared hand. So, we restrain from touching hot stoves. We are, as a result, "deterred." The same is the logic that relates punishment to crimes. Through punishment, an understanding is created that committing crime is like a hot stove. People would, thus, refrain from doing the same.The result of breaking the law would be that one would be seared right away.

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[3] Daniel S. Nagin, Scaring Offenders Straight, accessed from http://www.sagepub.com/upm-data/40354_4.pdf, accessed on January 05, 2013 at 16:42.

The proponents of the deterrent theory of punishment are of the opinion that if punishment and crime were interlinked in this way, then offenders would resist from touching the stove a second time. The resultant effect would be that,having observed the offender, the general public would be deterred from touching the stove, lest their hand be seared.

Although the criminal justice system provides for some deterrent effect on the whole, the question to be asked from the point of view of policy development is whether any additional deterrent benefits can be achieved by enhanced sanctions or an increased likelihood of being apprehended. It is almost universally agreed that such additional deterrent benefits can be achieved by an increase in the *certainty* of punishment, as compared to its *severity*.With regard to the severity of punishment, its influence on behaviour works in a way that the potential offender weighs the consequences of his acts and comes to the conclusion that the consequences of punishment are too severe.

Relying on the two variables, certainty and severity, the proponents of the criminal deterrence model of utility maximisation state that a decrease in crime is seen when the likelihood of conviction or severity of punishment increases. Certainty of conviction, as a result, plays a bigger role in deterring crime than severity of punishment. As noted by two theorists, "[s]everity only has a deterrent impact when the certainty level is high enough to make severity salient.[4]"

It must also be noted that, while certainty and severity are important, left to themselves, they cannot achieve the object at hand. In the deterrence model, actions are restrained with the 'threat' of punishment.For such threat to be effective, the same has to be credible as well as communicated. In order for credibility to be attained, the ability of the system to apprehend and convict offenders has to be beyond any doubt. An increase in the number as well as the efficiency of the law enforcement personnel raises the objective probability of apprehension.Swift and efficient implementation methods will also increase the credibility of threats in persons who have personally experienced arrest.

Media reports indicate that following the Delhi incident on January 16, 2012, the chief- accused rapist had assured his fellow-perpetrators that there was no need to worry, since nothing would happen[5]. This is not uncommon in India, where most of the cases go unreported. It is also common, owing to the very nature of the offence and the stigma attached therein, that there is reluctance to report the case, more so if the perpetrator is rich or powerful.

The want of faith of the general population in the justice delivery system can also be blamed for the under-reporting of rape cases. Added to this, there are a multitude of cases that are not registered, despite being reported. Even if a case has been registered

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[4] *See, e.g.*, Antunes &. Hunt,*The Deterrent Impact of Criminal Sanctions: Some Implications for Criminal Justice Policy*, 51 J. URBAN L. 145. 161 (1973).

[5] Ruchira Gupta, *Challenging India's Rape Culture*, The Hindu, January 10, 2013, accessed from http://www.thehindu.com/opinion/op-ed/challenging-indias-rape-culture/article4294223.ece, last accessed on January 15, 2013 at 19:20.

and the investigation has begun, the female victims are often shy and embarrassed to respond to the delicate inquiries by male investigating officers. The result is that the truth remains buried behind the wounded bodies and battered souls of the victims. In India, although many rape cases are charge sheeted, a large number of these cases ultimately end in acquittal[6]. The reasons for the high acquittal rate in rape cases are several, primary among them being prolonged investigations, non-availability of witnesses, callous attitude of the investigating officers etc.

The problem lies, therefore, in the fact that legislations are passedwithout the much needed focus of implementing their spirit. The deterrent model will remain ineffective unless a proper implementation mechanism is put into place. However, another question that needs to be analysed is whether the deterrent model will alone suffice.

Even with an efficient deterrent model in place, the goal of rape prevention cannot be fully realised. The reason for that lies in the way we approach this act. Rape is often seen as just another crime.Public opinion is that rape signifies gender terrorism, for which dysfunctional masculinity is to be blamed and the same can be corrected by punishment.The reality is far from this notion. Just like any human behaviour cannot be attributed to a single cause, so also rape cannot be considered to solely be the result of dysfunctional masculinity. Although the reasons for rape cannot be generalised,it is important to note that several societal and political factors often contribute to the act. Without understanding and analysing the same, an efficient mechanism for the prevention of rape cannot be put into place. It is for this reason that Justice Verma commented in the Report, "Correction of the societal mindset of its gender bias depends more on social norms, and not merely on legal sanction. The deficiency in this behalf has to be overcome by the leaders in the society aided by the necessary systemic changes in education and societal behaviour[7]".

2. Analysing the contours of rape

The need to develop techniques to prevent rape has been felt now more than ever, in order to reduce the susceptibility of women. For this we first need to evaluate the causes of the same more deeply so that we will be able to move towards some collective action. Only by understanding the sociology of rape can we effectually work towards the prevention of the same. Its underlying reasons and causes have to be defined, inspected and resolved or else rape will continue to prevail. The focus must be on eliminating the societal conditions which make women vulnerable.

Our social norms are such that men and boys face pressure to convey a sense of power. The result is that when they feel vulnerable or upset, their gut reaction generally involves a display of power, even if it suggests violent or abusive conduct.Men, therefore, rape as a result of inbuilt anger and in order to dominate as well as humiliate.The element of violence supersedes the element of sex, in an act of rape.

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[6] The statistics of the National Crime Record Bureau suggest that in 2011, while the rate of charge-sheeting for rape was 98.3%, the conviction rate was a mere 26.4%.

[7] Justice J. S. Verma in paragraph 5 of the Preface to the Report of the Committee on Amendments to Criminal Law, which submitted its Report to the Government on January 23, 2013

Since time immemorial men and women have been habituated to accept as well as adopt separate roles. While the woman has been conditioned to be docile and submissive, her male counterpart is expected to be aggressive, which is deemed to be a 'masculine' trait. A host of attitudes, values as well as behaviours have been considered 'proper' for both sexes.Such conditioning is unceasingly as well as relentlessly fostered and strengthened by not just the popular media and cultural attitudes, but also to a large extent by the educational system. The media has continuously encouraged specific gender-based outlooks, manners as well as values. It imparts an entire list of actions that trigger rape. Moreover, training within the society about the different and 'proper' roles to be adopted by men and women trains the female sex to be victims and the male sex to be aggressors. The increased prevalence of rape can be attributed to the imbalance of power between the two sexes. Even today women arecompelled to assume a subservient relationship to men. Considering this equation between the sexes, the high incidence of rape must come as no surprise, since it implies a reasonable extension of such equation.

This process of gender differentiation starts at a very young age, even in children's play, wherein ideas of appropriateness are instilled in young minds. It also aims to differentiate, albeit subtly, girls and boys and also creates a scenario wherein their experiences remain largely cryptic to each other. Boys and girls are raised differently, as a result of which the former is led to believe that their bodies house unchallenged power and violence, whereas the latter are made involuntary custodians of traditional values and honour. Society makes it the duty of the male sex to safeguard this honour and in the process clandestinely gives them control over the other sex.As a result, 'power and entitlement' are acquired through the socialisation processes and later naturalised, rather than vice versa[8].

Women are vulnerable to rape as a result of this twisted relationship equation with men. The belief as well as attitude that separate persons into classes on the basis of sex and justifiesthe superiority of one sex can be referred to as sexism. Even in today's time the position that the female sex occupies in society is relatively powerless. As a result, the situation that is created is that the advantages they are offered are often few and far between. The benefits enjoyed by men are a firm part of the patriarchal system of which we form a part. Rape is an act wherein the male sex attempts to maintain such patriarchy by perpetrating the threat of violence. This is the political essence in an act of rape.

3. Bringing about an effective Rape Prevention Model

Keeping in mind this holistic analysis of rape, an effective model needs to be developed so as to prevent the increased occurrence of rape. Mere attempts at victim as well as rapist control will not be effective. Victim control aims at teaching women to escape rape, but the same does not reduce the threat of rape. Moreover, it is not possible to altogether escape or avoid rape, regardless of the precautions taken. On the contrary it creates an adverse situation wherein it holds the victim partly responsible for her rape.

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[8] *Ibid.*, at page 384

First of all, protection of as well as aid to victims of rape are of utmost importance. As long as the stigma attached to rape is not dispelled and the callous attitude of the police continues, reporting of rape is going to continue at a dismal rate[9]. The threat of punishment and consequently deterrence will work only when the process of dissemination of justice begins. If the victim is silenced, the process cannot be set into motion.

On the part of the investigating authorities, the investigation of rape must be commenced immediately on obtaining information about the same. This will ensure that the real facts are ascertained and the offenders are not afforded any time to escape or to manipulate the evidence available in their favour. Any attempt on the part of policemen who evade arresting offenders against whom evidence has been secured has to be strongly discouraged. Such attempts have to be met with serious consequences. Strict enforcing mechanism will mean that the cases have to be investigated within a stipulated time frame by police officers who have been specially trained to carry out investigations of such a nature. Police officers who fail to complete such investigations with the stipulated time must be made answerable for the same.

In addition to this, there is a need to impart specialised training to police officers, especially those at the grassroot level in matters concerning sexual crime. The aim of such training should be to provide, primarily, greater expertise in dealing with the effects of rape, which would go a long way in making them more capable to identify as well as carry out investigations in a persistent manner.

Police functionaries of higher levels must also be appropriately trained with regard to all matters pertaining to policy decisions concerning handling of not just sexual offenders, but also appropriately treating victims of such crime.

Secondly,as the act is not just a crime, but is more of an assertion of power,mere assurance of punishment will not deter the perpetrator. The perpetrator is not just a 'criminal', but one who holds an erroneous perception about the power equation between the sexes.Thus, as long as he does not untangle this twisted knot in his mind, he is not going to stop observing women as someone on whom power can be asserted.This brings in a need to reform the perpetrator, rather than to punish him.It is important to develop measures which would involve the rehabilitation and reformation of men who are addicted to sexual violence as well as to dominating women. Of particular importance is education which needs to stress on the fact that a woman has nothing short of a right to consent irrespective of her behaviour. This would also involve the dispelling of common, yet dangerous myths and beliefs surrounding sexual victimization, victims and perpetrators.

Although the Committee on Amendments to Criminal Law has recognised the broader contours of rape, it has failed to realise that we cannot stop rape until and unless we stop the rapist.The rapist can be effectively stopped only by vanquishing the obscure ideas relating to sex and violence that he houses. Reformation of the

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[9] The Committee on Amendments to Criminal Law has acknowledged the fact that complaints of rape are not taken seriously by male police officers, owing to the patriarchal structure of our society.

rapist has to be seriously taken as a policy initiative by the Government, so as to completely realise the objectives of the criminal justice system.

The Committee has also devised a unique solution by suggesting that street vending should be encouraged to make the bus stops and footpaths safe for communities and pedestrians, in addition to providing street food for the common man[10] .However, it has to be noted that such an environment would merely ensure a feigned sense of security, if any. What women need is security and equality in the true sense of the terms.

Any strategy designed to eliminate the vulnerability of women to rape will have to involve an alteration in the power equation concerning men and women. It is not possible to bring an end to the vulnerability of women by mere individual change; it will be possible only if and when it is accompanied by a social change. Of prime importance in this regard will be to dispel the idea of superiority of the male sex. Therefore, prima facie, rape has to be seen as a political issue, since it aims to keep women in a position sans power and since it reinforces male domination as the status quo.

Women are not in need of sympathy or empathy. What they need is the simple realisation of the guarantee of equality given in the Constitution. They need to be ensured general human rights as well as the Constitutional protection of living freely and with dignity. For this to be fully realised, the fundamental societal attitude about paternalism needs to be discarded. It has to be understood, beyond any shade of doubt, that women are equal. Judgments of trials in which women are involved are often draped with sympathetic considerations. Equality can never come out of an idea of sympathy. The same goes with justice. The right to justice is a fundamental right under our Constitution and must not be earned out of a sympathy having regard to the social malaise which exists in society[11] .

It is therefore clear that revamping the police and the criminal justice system will only partly help achieve the ultimate objective. The bigger battle is to bring about a change in the power equation between men and women; to infuse a culture of masculinity which discards notions of suppression. In order for improvement to be made, the first step would involve acknowledging the fact that the problem lies with not just the police or the courts or even the government. The problem lies in us.

3.1. We all need to change

There is a dire need to make an alteration in the socialisation of women. The female sex is conventionally trained in such a way that they become both physically as well as emotionally unequipped to effectively act in response to danger. Such training starts at a very early age. Owing to the belief that boys and girls possess differences in physical and muscular development as well as stamina, they are often channelled into predetermined activities, considered to suit such development. The result of this is that, once adults, females find it difficult to determine the resistance of their own

[10] Supra 7, at page 421

[11] Ibid., at page 91

body to injury, as well as their own strength and ability. In these circumstances, imparting self-defence techniques in schools would go a long way in making women more confident in protecting themselves. It would reducethe vulnerability of women. The emotional guidance that women receive from early on also has a major role to play in determining their ability to defend themselves effectively.

In addition, owing to the socialisation of women, they tend to develop an aversion towards violence. It has to be understood that being a violent person is different from appropriately dealing with violence in an assertive manner. Under the present circumstances, women are seldom, if ever, encouraged to learn the skills to oppose violent assaults against their person in a befitting manner. The idea still persists that a girl or woman needs a man to defend her!

The isolation of women from each other also contributes to the vulnerability of women. Women are generally socialised to treat each other as competition, which leads to mistrust. There is an urgent need to adopt collective strategies in order to eliminate rape. Competition as well as mistrust would certainly hamper any attempt of collective planning among women. It is important for women to see other women as resources of aid and try to work together in order to reduce the vulnerability of womankind. Women must absolutely refrain from blaming themselves for the conditioning which has resulted in such isolation.

It is common to find women psychologically distancing themselves from issue of sexual violence as well as rape and from embracing the attitude that rape was a plight that awaited 'immoral' women.Isolation within a particular community is also common. Women seldom understand and see other women as resources. This is unfortunate because this resource can help reinforce confidence in women and also help quell and dispel the notion about women being the weaker and vulnerable sex.

There are several factors that underline the idea that a woman belongs within the four walls of a home. What happens as a result of this is that women are often dislodged from the mainstream of public action as well as decision making. It is of prime importance to understand and utilise the power of numbers if the problem of isolation is to be dealt with effectively. Women would then be encouraged to foster ad-hoc committees, confrontation associations as well as support structures. The result of sharing common experiences can help develop enhanced reactions to rape, including effective defences.Groups dedicated to raising consciousness about such issues can contribute significantly towards recognizing as well as overcoming sexist attitudes.Only by evaluating common problems can women come to count on each other and appreciate the usefulness of their combined strength. The most important result of such action will be that the stigma attached to rape, from the victim's perspective will be dispelled, which will ensure that victims will be in a position to report cases, which will ensure that the certainty of punishment will be significantly increased. And if this happens, men will stop seeing women as easy targets.

If we aim to create a truly democratic society; one which ensures complete gender equality, it is of utmost important to identify the right to equal participation of all

persons, irrespective of gender, in all spheres of society. A society which claims to ensure legal, economic, political, as well as social equality for women and girls must completely abandon the idea that women as well as children, largely girls, can be treated as commodities, irrespective of place, caste or class.

If we wish to progress in the true sense of the term, we need to make urgent efforts to guarantee a scenario wherein women and girls can live lives free;without so much as the fear of any form of male violence, including rape. Along with public education programmes, campaigns to raise awareness, and victim assistance, what legislation must do is to lay down a zero tolerance policy for not just rape but all types of sexual violence against women. It is necessary to realise that without the demand of man for and use of women and girls for sexual exploitation, it would not be possible for the rape culture thrive and develop.

The task to reduce the instances of rape requires a wide perspective as well as a will to act in a diverse array of policy areas. It also needs the participation and cooperation of a multitude of public as well as private actors, above and beyond a series of mechanisms within the justice system to tackle all sexual violence.

3.2. Community Based Programmes

In order to make an attempt to bring about a shift in the attitude of the public towards rape,advertisements can be included portraying the ill effects of rape, focusing on the impact it has on the victim. Neighbourhood dramas as well as street shows arranged by NGOs have been drawing the attention of the public towards the importance of recognizing prospective sex offenders and are helping take steps to prevent them from committing such offences. Several NGOs are taking the initiative of arranging sex educational programmes in schools so as to help create awareness among the school children. This will go a long way in dispelling a sense of taboo surrounding rape and will ensure that social communication about the same is maintained.

The more the issue is brought out into the open, by way of such community based programmes, the more will it help in overcoming the prejudices surrounding the same. This will go a long way in helping change how society perceives this act.

3.3. Education

Aristotle hasstressed on the significance of 'education of citizens in the spirit of the Constitution' by saying, "The greatest of all means...for ensuring the stability of Constitutions—but which is nowadays generally neglected—is the education of citizens in the spirit of the Constitution...[12]" What Aristotle said so many years ago hold good even today. There is no substitute for a good education.

A case in point is the decrease in the incidents of rape in the United States. Statistics derived from the authoritative National Crime Victimization Survey conducted by the United States Justice Department suggest show the incidence fell from 2.8 per

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[12] Aristotle, Politics, ed. R. F. Stalley, trans. Ernest Barker (Oxford, 1998), quoted in the Report of the Committee on Amendment to Criminal Law at page 6.

1,000 in 1979 to 0.4 per 1,000 in 2004[13]. The survey was designed to capture rape cases which do not make it into the criminal justice system. What we can learn from the same is that the decline in rape in the United States is a result of several factors, including effective policing, which acted as a deterrent. However, the bigger reason was that steps were taken to both politically as well as culturally infuse the message that when a woman says no, she means no.

Such education does not start and end in a classroom. It would mean culturally transforming the mind-set of society, for which the social media also has a big role to play. The reach of the social media on society is growing now, more than ever. So is its influence.The optimum use of the same can be made to send across the message that women have to be treated with respect.

Conclusion

It is important to note that rape is not a problem exclusively to be dealt with by the police or criminal justice system of a country. As a matter of fact, rape is the outcome of a specific mind-set of certain erring individuals who foster an erroneous perception towards women in their socialization process. Strict law enforcement measures will certainly aid in controlling such behaviour and activities in a society. However, we cannot expect such measures to achieve magical results, unless such legal measures are accompanied with extra-legal preventive programmes of a wide range. A host of programmes have to be developed with the mutual co-operation and assistance of different social players, including governmental organizations, organizations working for the development of the community, research institutes, etc. in tandem with the police as well as other law enforcement authorities.

From another angle altogether, albeit equally important, we need to understand that, in order to succeed in our campaign against rape as well as all forms of sexual exploitation, the conditions - political, social as well as economic- under which girls and women live have to be improved. This can be done by initiating measures for development, such as reducing poverty, sustainable development, and social programs whose focus would be women among others.

The effort to reduce the incidents of rape requires a wide perspective as well as a determination to bring about significant changes in a number of policy areas. Added to this, the participation and collaboration of a wide range of both public and private actors will be necessary. Rape has to be looked at from a different perspective. Measures concerning protection of as well as assistance to the victims of this gruesome act must also be effectively developed and implemented. There is a need to rehabilitate men who are addicted to sexual violence and the domination of women.

We cannot rest until every girl feels protected in a crowd at any time or until no woman has to answer as to why she is out at any hour of the day or night.

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[13] Praveen Swami, The danger to women lurks within us, THE HINDU, December 27, 2012, accessed from http://www.thehindu.com/opinion/lead/the-danger-to-women-lurks-within-us/article4242142.ece, last accessed on January 14, 2013 at 12:42.

CARBON CREDIT- A BURNING BUSINESS ISSUE

SAHANA HEGDE *

Abstract:

Carbon market is the brain child of the Kyoto Protocol for controlling green house gas emissions. This market has become the fastest growing financial market in the world. This market is mainly operated by Clean Development Mechanism (CDM), which allows carbon credit earnings and carbon trading between countries and companies, establishing carbon credit exchange in the business world. As the first commitment period of the Kyoto Protocol in 2012 has completed, it is important to take stock of global scenario of the carbon business and is achievement level.

"I felt my lungs inflate with the onrush of scenery-air, mountains, trees, people. I thought, "This is what it is to be happy."

- Sylvia Plath, *The Bell Jar*

Our earth is undoubtedly warming. This warming is largely the result of emissions of carbon dioxide and other Greenhouse Gases (GHG's) from human activities including industrial processes, fossil fuel combustion, and changes in land use, such as deforestation etc. Addressing climate change is not a simple task. To protect ourselves, our economy, and our land from the adverse effects of climate change, we must reduce emissions of carbon dioxide and other green house gases. To achieve this goal the concept of Clean Development Mechanism (CDM) has come into vogue as a part of Kyoto Protocol.

The burning of fossil fuels is a major source of greenhouse gas emissions, [1] especially for power, cement, steel, textile, fertilizer and other industries which rely entirely on fossil fuels (coal, oil, natural gas and electricity derived from coal). The concept of carbon credits came into existence as a result of the need for controlling emissions. The IPCC (Intergovernmental Panel for Climate Change) [2] has observed that:

Policies that provide a real or implicit price of carbon could create incentives for producers and consumers to significantly invest in low-GHG products, technologies and processes. Such policies could include economic instruments, government funding and regulation, while noting that a tradable permit is one of the policy instruments that is shown to be environmentally effective in the industrial sector,

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[1] "Basic Information Climate Change" U.S. EPA 2011

[2] en.wikipedia.org, visited on September 3, 2013

as long as there are reasonable levels of predictability over the initial allocation mechanism and long-term price. The objective is the "stabilization of greenhouse gases in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."

The Kyoto Protocol is an International Agreement linked to the United Nations Framework Convention on Climate Change, which commits its parties by setting internationally binding emission targets. Recognizing that developing countries are principally responsible for the current high levels GHG emissions in the atmosphere as a result of more than 150 years of industrial activity, the Protocol places a heavier burden on the developed nations under the principle of "common but differentiated responsibilities."

The Kyoto Protocol was adopted in Kyoto Japan on 11 December 1997and entered into force on 16 February 2005.The detailed rules for the implementation of the Protocol were adopted at COP 7 IN Marrakesh, Morocco in 2001 and are referred as the "Marrakesh Accords" . It is an agreement among 170 odd countries and the mechanisms were subsequently agreed upon through the Marrakesh Accords. The mechanism adopted was similar to the successful US Acid Rain Program to reduce some pollutants. Its first commitment started in 2008 and ended in 2012.

The Agreement came into force on February 16,2005, under which industrialized countries will reduce their collective emissions of greenhouse gases by 5.2% compared to the year 1990.The aim is to lower all emissions of six greenhouse gases -carbon dioxide, methane , nitrous oxide ,sulfur hexafluoride ,HFC's(Hydrofluro carbon), and PFC's-calculated as an average over the five year period of 2008-2012.National Targets range from 8% reductions for the European Union and some others to 7% for the US, 6% for Japan, 0% for Russia and permitted 8% increase for Australia and 10% for Iceland.

Carbon credits are certificates issued to countries that reduce their emission of GHG (greenhouse gases) which cause global warming. Carbon Credits are measured in units of certified emission reductions (CER's). Each CER is equivalent to one metric ton of carbon dioxide reduction. Its rate stood at 22 Euros in April, fell to below 7 Euros, before stabilizing at 12-13 Euros. Under IET (International Emissions Trading) mechanism, countries can trade in the international carbon credit market. Countries with surplus credits can sell the same to countries with quantified emission limitations and reduction commitments under the Kyoto Protocol. Developed Countries that have exceeded the levels can either cut down emissions or borrow or buy carbon credits from developing countries.

The UNFCC divides countries into two main groups[3] : A total of 41 industrialized countries are currently listed in the Convention's Annex-I, including the relatively wealthy industrialized countries that were members of the Organization for Economic Co-operation and Development (OECD), in 1992, plus countries with economies in transition (EITs), including the Russian Federation, the Baltic States and several Central

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3 http://www.nswai.com, visited on September 3, 2013

and Eastern European States. The OECD members of Annex-I (not the EITs) are also listed in the Convention's Annex-II. There are currently 24 such Annex parties. All other countries not listed in the Convention's Annexes, mostly the developing countries, are known as non- Annex-I countries. They are currently 145 in number.

Annex I countries such as United States of America, United Kingdom, Japan, New Zealand, Canada, Australia, Austria, Spain, Germany, France etc have agreed to reduce their emissions (specially carbon dioxide) to target levels below their 1990 emission levels. If they cannot do so they must buy emission credits from developing countries or invest in conservation. Countries like United States of America, United Kingdom, Canada, New Zealand, Australia, Austria, Japan, Spain etc are also included in Annex-II.

Developing Countries (non-Annex-I) such as India, Bangladesh, Sri Lanka, China, Brazil, Kenya, Kuwait, Malaysia, Philippines, Saudi Arabia, Singapore, UAE, South Africa etc have no immediate restrictions under the UNFCCC. This serves three purposes:

a) Avoids restriction on growth because pollution is strongly linked to industrial growth & developing economies can potentially grow very fast.

b) It means that they cannot sell emission credits to industrialized countries to permit those nations to over pollute.

c) They get money and technology from developed countries in Annex-II.

A carbon credit is a generic term for any tradable certificate or permit submitting the right to emit one tone of carbon dioxide or the mass of another GHG with a carbon dioxide equivalent to one tone of carbon dioxide. Carbon credits and Carbon markets are a component of national and international attempts to mitigate growth in greenhouse concentrations. One carbon credit is equal to one metric ton of carbon dioxide or in some markets carbon dioxide equivalent gases. Carbon trading is an application of emission trading approach. GHG's are capped and then markets are used to allocate the emissions among the regulated sources.

The goal is to allow market mechanisms to drive industrial and commercial processes in the direction of low emissions or less carbon intensive approaches than those used when there is no cost to emitting greenhouse gases or carbon dioxide into the atmosphere. Since GHG mitigation projects have been utilized to create credit, this source can be used to finance carbon reduction schemes between trading partners and around the world.

I. Kyoto's 'Flexible Mechanisms':

A tradable credit can be an emission allowance or an assigned amount unit which was originally allocated or auctioned by the national administrators of a Kyoto compliant cap-&-trade scheme, or it can be an offset of emissions. Such offsetting and mitigating activities can occur in any developing country which has ratified the Kyoto Protocol and has a national agreement in place to validate its carbon project through one of the UNFCCC's approved mechanisms. Once approved these are termed as Certified Emission Reductions, or CER's. The Protocol allows these projects to be constructed and credited in advance of the Kyoto trading period.

The Kyoto Protocol provides for three mechanisms that enable countries or operators in developed countries to acquire greenhouse gas reduction credits.[4]

1. Under Joint Implementation (JI), a developed country with relatively high costs of domestic greenhouse gas reduction would set up a project in another developed country.

2. Under the Clean Development Mechanism (CDM), a developed country can sponsor a greenhouse gas reduction project in a developing country where the cost of the greenhouse gas reduction project activities is usually much lower, but the atmospheric effect is globally equivalent. The developed country would be given credit for meeting its emission targets, while the developing country would receive the capital investment and clean technology or beneficial change in land use.

3. Under International Emissions Trading (EIT), countries can trade in the international carbon credit market to cover their shortfall in the Assigned amount units. Countries with surplus units can sell them to countries that are exceeding their emission targets under Annex B of the Kyoto Protocol.

These carbon credit projects can be created by a national government or by an operator within the country. In reality, most of the transactions are not performed by national governments directly, but by operators who have been set quotas by their country.

II. What is the Clean Development Mechanism?[5]

The CDM allows emission reduction projects in developing countries to earn certified emission reductions (CER's), each equivalent to one tone of CO2. These CER's can be traded and sold, and used by industrialized countries to meet a part of their emission reduction targets under the Kyoto Protocol.

The mechanism stimulates sustainable development and emission reductions, while giving industrialized countries some flexibility in how they meet their emission reduction limitation targets.

The CDM is the main source of the UNFCCC Adaptation Fund, which was established to finance adaptation projects and programs in developing country parties to the Kyoto Protocol that are particularly vulnerable to the adverse effects of climate change. The Adaptation Fund is financed by a 2% levy on CER's issued by the CDM.

III. India And Carbon Credits

Analyzing the Indian Scenario:

India being a developing country has no emission targets to be followed. However, she can enter into CDM projects. As mentioned earlier, industries like cement, steel, power, textile, fertilizer etc emit green houses gases as an outcome of burning fossil fuels. Companies investing in Windmill, Bio-gas, Bio-diesel, and Co-generation are

4 en.wikipedia.org, visited on September 3, 2013

5 http://www.unfccc.com, visited on September 5, 2013

the ones that will generate Carbon Credits for selling to developed nations. Polluting industries, which are trying to reduce emissions and in turn earn carbon credits and make money include steel, power generation, cement, fertilizers, waste disposal units, plantation companies, sugar companies, chemical plants and municipal corporations.

Delhi Metro Rail Corporation (DMRC):

A must mention project is The Delhi Metro Rail Corporation (DMRC)[6] : It has become the first rail project in the world to earn carbon credits because of using regenerative braking system in its rolling stock. DMRC has earned the carbon credits by using regenerative braking system in its trains that reduces 30% electricity consumption.

Whenever a train applies regenerative braking system, the released kinetic energy starts a machine known as converter-inverter that acts as an electricity generator, which supplies electrical energy back to the Over Head Electricity (OHE) lines. This regenerated electrical energy that is supplied back to the OHE that is used by other accelerating trains in the same service line. DMRC can now claim 400,000 CERs for a 10-year crediting period beginning December 2007 when the project was registered by the UNFCCC. This translates to Rs 1.2 crore per year for 10 years. India has the highest number of CDM projects registered and supplies the second highest number of Certified Emission Reduction units. Hence, India is already a strong supplier of Carbon Credits and can improve on it.

An excerpt from the Times of India: [7]

Metro earns Rs 47 crore carbon credit points

NEW DELHI: The next time you travel by the Metro, pat yourself on the back. Thanks to the shift in commuter preference, Delhi Metro has become the first such railway project in the world to get carbon credits from the United Nations for helping in reduction of greenhouse emissions.

The certification, as part of the UN's Clean Development Mechanism (CDM) under the Kyoto Protocol, says the Delhi Metro Rail Corporation (DMRC) has helped in reduction in emission of harmful gases into the city's atmosphere. In the process, it has earned carbon credits worth about Rs 47 crore annually for the next seven years. "With the increase in number of passengers, this figure shall increase," said a DMRC spokesperson.

The feat has been possible with more people using the Metro, and thus taking other types of polluting vehicles off roads. According to the UN, Delhi Metro has helped in reducing pollution levels in the city by 6.3 lakh tones every year, thereby helping in mitigating impacts of global warming. "Today, about 18 lakh people travel by Delhi Metro that is completely non-polluting and environment-friendly. But for the Metro, these people would have travelled by cars, buses, two/three wheelers, which would have resulted in GHG emission," the statement says. GHG gases include carbon dioxide, carbon monoxide, nitrogen oxide, particulate matter and others.

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[6] http://www.onlinecarbonfinance.com, visited on September 4, 2013

[7] http://www.timesofindia.com, visited on September 4, 2013

This is the second CDM project of Delhi Metro to be registered with the UN body in the last three years. Metro's first CDM project was on regenerative braking - a technique for reducing power consumption.

"Every passenger who chooses to use Metro instead of car/bus contributes in reduction in emissions to the extent of approximately 100gm of carbon dioxide for every trip of 10km and, therefore, becomes party to the reduction in global warming," said the spokesperson.

According to figures by DMRC, more than 91 thousand vehicles have been removed from Delhi's roads because of Delhi Metro.

IV Benefits For India

By switching to Clean Development Mechanism Projects, India has a lot to gain from Carbon Credits:

a) It will gain in terms of advanced technological improvements and related foreign investments.

b) It will contribute to the underlying theme of green house gas reduction by adopting alternative sources of energy

c) Indian companies can make profits by selling the CERs to the developed countries to meet their emission targets.

Trading Of CER'S:

- As a welcome scenario, India now has two Commodity exchanges trading in Carbon Credits. This means that Indian Companies can now get a better trading platform and price for CERs generated.
- Multi Commodity Exchange (MCX), India's largest commodity exchange, has launched futures trading in carbon credits. The initiative makes it Asia's first-ever commodity exchange and among the select few along with the Chicago Climate Exchange (CCE) and the European Climate Exchange to offer trades in carbon credits. The Indian exchange also expects its tie-up with CCX which will enable Indian firms to get better prices for their carbon credits and better integrate the Indian market with the global markets to foster best practices in emissions trading.
- On 11th April 2008, National Commodity and Derivatives Exchange (NCDEX) also has started futures contract in Carbon Trading for delivery in December 2008.

Financing support in India:

Carbon Credits projects require huge capital investment. Realizing the importance of carbon credits in India,

- The World Bank has entered into an agreement with Infrastructure Development Finance Company (IDFC), wherein IDFC will handle carbon finance operations in the country for various carbon finance facilities.
- The agreement initially earmarks a $10-million aid in World Bank-managed carbon finance to IDFC-financed projects that meet all the required eligibility and due diligence standards.

- IDBI has set up a dedicated Carbon Credit desk, which provides all the services in the area of Clean Development Mechanism/Carbon Credit (CDM).
- In order to achieve this objective, IDBI has entered into formal arrangements with multi-lateral agencies and buyers of carbon credits like IFC, Washington, KfW, Germany and Sumitomo Corporation, Japan and reputed domestic technical experts like MITCON.
- HDFC Bank has signed an agreement with Cantor CO2E India Private Ltd and MITCON Consultancy Services Limited (MITCON) for providing carbon credit services. As part of the agreement, HDFC Bank will work with the two companies on awareness building, identifying and registering Clean Development Mechanism (CDM) and facilitating the buy or sell of carbon credits in the global market.

India and China are likely to emerge as the biggest sellers and Europe is going to be the biggest buyer of carbon credits. There is a great opportunity awaiting India in carbon trading which is estimated to go up to $100 billion dollars. In the new regime, the country could emerge as one of the largest beneficiaries accounting to 25 percent of the total world carbon trade, says a recent World Bank report. The countries like US, Germany, Japan and China are likely to be the biggest buyers of Carbon credits which are beneficial to India to a great extent.

V Conclusion and Suggestions :

The Kyoto mechanism is the only internationally agreed mechanism for regulating carbon credit activities, and, crucially, includes checks for additionality and overall effectiveness. Its supporting organization, the UNFCCC, is the only organization with a global mandate on the overall effectiveness of emission control systems, although enforcement of decisions relies on national co-operation. The Kyoto trading period only applies for five years between 2008 and 2012. The first phase of the EU ETS system started before then, and is expected to continue in a third phase afterwards, and may co-ordinate with whatever is internationally agreed upon but there is general uncertainty as to what will be agreed upon in Post-Kyoto Protocol negotiations on greenhouse gas emissions. As business investment often operates over decades, this adds risk and uncertainty to their plans. As several countries responsible for a large proportion of global emissions (notably USA, India and China) have avoided mandatory caps, this also means that businesses in capped countries may perceive themselves to be working at a competitive disadvantage against those in uncapped countries as they are now paying for their carbon costs directly.

A key concept behind the cap and trade system is that national quotas should be chosen to represent genuine and meaningful reductions in national output of emissions. However, governments of capped countries may seek to unilaterally weaken their commitments, as evidenced by the 2006 and 2007 National Allocation Plans for several countries in the EU ETS, which were submitted late and then were initially rejected by the European Commission for being too lax.[8]

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[8] http://www.reuters.com, visited on September 12, 2013

Although reduction of CO2 levels may be in doubt, there is one thing that is not in doubt: carbon caps will limit access to the necessities of life and will greatly increase the cost of those necessities. Every industry that burns fossil fuels will have an additional cost added: the cost of obtaining carbon permits - by being the highest bidder. Those costs, plus profit margins, will be passed on to the consumer. Fossil alternatives, such as wind power and bio-fuels, will be only marginally lower in price: it is IPCC-imposed fossil fuel scarcity that will set the price in each market segment, as we already see with world grain prices. All of this will encourage speculative investment in futures markets, which will increase prices still further - and this is already happening with global food prices.

Undoubtedly, carbon credit is definitely a very lucrative and an ingenious prospect for both the purchasing and selling countries but, ultimately it is the environment which is paying the price as the GHG emitting countries cause environmental degradation by polluting it. A balance is immediately essential because a breath of fresh air is essentially required for the present as well as the future generation. Therefore, stricter and penal laws must be imposed on the buying and selling of carbon credits. Researchers and environmentalists need to devote more of their time to find substitutes for carbon emitting fuels currently being used so that the environment does not undergo any more damage. Awareness must be generated amongst the common folk as to where their actions will ultimately lead. Agitations in the beginning with full force and spirit and then doing nothing about it will ultimately give zero results. If this does happen, then we are in deep trouble...

EXPLOITATION OF DALITS AND LEGISLATIVE PROTECTION

–AN ANALYSIS

SMT. S. R. MANJULA*

1. Introduction

India is the World's largest democracy, the second fastest growing economy and the second most populated country. India has managed to convince the World's diplomatic community of its status and has become one of the leading voices in the United Nations, which was reflected in the UN Human Rights Councils Elections. For Centuries, dalits have been victims of gross human rights violations. In fact, dalits have been considered the most degraded, downtrodden, exploited and the least educated in Indian society for various reasons. They are considered to be '*untouchable*' because upper caste people considered their touch to be polluted and unclean. The caste hierarchy has excluded these people from the caste system and therefore they are branded as *"outcaste"*.[1]

The word "Dalit" comes from the Marathi language, and it means' ground", "suppressed", "crushed", or broken to pieces". It was first used by Jyotirao Phule in the 19th Century, in the context of the oppression faced by the erstwhile' untouchable" castes of the twice-born Hindus. According to Victor Premasagar, the term Dalit, expresses their weakness, poverty and humiliation at the hands of the upper castes in Indian society. Mohandas Gandhi coined the word Harijan, translated roughly as "children of God", to identify the former untouchables. The terms 'Scheduled Castes and Scheduled Tribes are the official terms used in Indian government documents to identify former 'untouchables" and tribes.Adi Dravida, Adi Karnataka and Adi Andhra, are words used in the State of Tamil Nadu, Karnataka and Andhra Pradesh, respectively, to identify people of former untouchable castes in official documents. The word 'Adi', denotes the aboriginal inhabitants of the land.[2]

2. The concept of untouchability emerged through ages

Hindu society was governed by the four- fold Varna system of Brahamana, Kshatriya, Vaisya and Sudra.The vast proportion of people known as 'panchamas' or 'exterior antyajas' fell outside the purview of Varna system. They have been called as untouchables for a long period in the history of India.[3] Hindu social organization was

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[1] The Journal- *Poltical and Economic Weekly* Vol.8, 2009, p.15.

[2] *Ibid.*

[3] M.R.Gangadhar, *Scheduled Caste Population*,(2005),: Mohit Publications, New Delhi p. 25.

traditionally divided into two substrata, known respectively as 'Dwija' and 'Ekaja'. The Dwija comprises three higher varnas- the Brahman, the Kshatriya and the Vaishya but the Ekaja or sudhra consists of the lower castes that are meant to serve the Dwijas and are thus placed lower in the social order. The whole system was known as chaturvarna vyavastha or four- fold division of society in which a large chunk of people belonging to a number of other castes do not find their place within this schematic structure. They are therefore, called Panchama or Chandala, Avarna, Antyaja etc.[4] Caste gives its directions for recognition, acceptance, consecration and sacramental dedication and vice versa, of a human being on his appearance in this world. It has its laws for social and religious rights, privileges and occupation, for instructing, training and educating, for obligation, duty, and practice, for divine recognition etc.[5] Dalits cannot touch the utensils, clothes and water of the upper castes. They cannot worship in the temples of the upper castes. They are not treated as men but as chattels.[6]

The word *Caste'* comes from the Portuguese word *'casta'*, signifying breed, race, or kind'. The Portuguese of the eleventh century applied the term indiscriminately to the various social and occupational groups found in the subcontinent and it has since continued. On the one hand the term is used to describe in the broadest sense the total system of stratification of society in India. Scheduled Castes are the ex-untouchables who continue to follow the Hindu faith. The term Scheduled Castes was first incorporated into the Government of India Act of 1935.The purpose of classification of castes as Scheduled Castes is to safeguard the interests of those who suffer from caste discrimination and to provide for them special concessions to help them to catch up with the rest of the population in the process of development.[7] The expression 'Scheduled Castes" was first coined by the Simon Commission and incorporated in the Government of India Act of 1935. Untill then they were known as untouchables, depressed classes or exterior castes.

In rural India Scheduled Castes constitute distinct Caste groups with specific cultural, occupational and religious characteristics. About 90% of the Scheduled Castes population lives in rural areas and they constitute 15% of the population of India. These people were backward in all respects due to their mainly rural background, illiteracy, dependence on agricultural labour, or other occupations with low earnings and due to injustice, exploitation and oppression they have been suffering from others for centuries.[8] These depressed sections of society have been suffering from social disabilities which lead to their exploitation by the upper caste masses, in the form of the untouchability, atrocity, and bonded labour system. The genesis of atrocities against the Scheduled Caste lies in the traditional theory of Varna system and in their low

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4 Dr. R.P.Mohanty, *Dalits Development and Change An Empirical Study*,(2003), Discovery Publishing House,New Delhi, p.1.

5 Prof. Ramesh Chandra, *Identity and Genesis of Caste System in India*,(2005) Delhi: Kalpaz Publications, p.30.

6 J.K.Chopra, *Indian History*,(2008) New Delhi :Unique Publishers, p.82.

7 Victor Sunderaj, *Scheduled Castes of Rural India, Problems and Prospective*, New Delhi: A.P.H. Publishing Corporation, 2000, p.38.

8 Victor Sunderaj, *Scheduled Castes of Rural India: Problems and Prospects*, (2000),New Delhi: A.P.H Publishing Corporation, p-40.

economic status. One of the reasons for Dalit atrocities is that, their claim to rights to ownership of land or cultivating it on their own. The lack of basic facilities essential to dalit livelihood areas is another form of atrocity the dalits from which dalits suffer. Only a few people who commit inhuman cruelty upon these groups are dealt and tried in the court of law. The reason for their escape from the court is that the Scheduled castes are economically weak and suffer from non co- operation from upper caste members in proveing the case before the court.

The untouchable castes make up about 1/7 of the population of India. In rural areas, untouchables live in separate hamlets, spatially segregated from the higher castes. Ritually they are still, in most places, denied access to the village priests and village temples, but occupationally, they perform the most' onerous' tasks in the village economic system.[9]

Untouchability in India is intimately and organically associated with the institution of Caste. It led to the notion of pollution sanctified by religion and codified by the Brahmanical discriminative laws. Ultimately it resulted in the institutionalization of "Caste hierarchy and untouchability" giving it socio-religious and legal approval. Untouchables were not allowed to enter the houses of the higher castes. However they were allowed to work as labourers during construction, repair or storing of grains etc. These untouchable castes were systematically listed in the 1931 census of India. They were officially defined as depressed castes in 1932.This term was later replaced by the term' Scheduled castes" based on the classification of the Government.[10]

3. Genesis of Dalit exploitation

Fundamentally, the genesis of dalit exploitation took birth in the rural setup of the country's social environment. The rural dalit have grown up in a social order that was and is extremely cruel and inhuman. The discrimination of dalits at rural areas can be seen in the following areas. They are as follows.

1. Village Panchayats, Co-operative Schools and Temples.
2. Saloons, Laundry, Shopping unit and public places like hotels etc.
3. Dining, private places like house entry.
4. Relationship between master and servant.

The dalits children at schools in rural areas could not participate in any function along with upper caste students. In many parts of Karnataka the dalits children were prohibited to enter the temples. The using of common wells are another area where the Scheduled Caste and the Hindus confront each others.[11] According to the 1991 census ther were 138 million persons belonging to Scheduled caste constituting 15.8% of the total population of the country. They are agricultural laborers, share croppers or self cultivators. Nearly 13% of the scheduled caste households are landless. And among those who own land, a vast majority nearly 86% are small and marginal farmers.[12]

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[9] Bhupen Chaudhary, *Indian Caste System, Essence and Reality*,(2006), New Delhi : Global Vision Publishing House, p-.29.

[10] M.R.Gangadhar, *Scheduled Caste Population*,(2005), New Delhi; Mohit Publications, p.26.

[11] Udaiveer and Bharat Singh, vol.1,(2004), New Delhi :Reference Publications, p.03.

Among bonded labourers over 20 lakhs of them were scheduled caste.They are bonded against the debt incurred for marriage and or for day to day expenses. Some of these bonded labourers work for the same master for several years or even for life.

The Dalit over the years, have been subjected to several forms of social disabilities. Till today, untouchability continued unabated so long as the idea of purity and impurity continued to work in the minds of the caste Hindus. It is argued that all men are born equal; the social reality is that not all men are born equal. The practice of casteism, untouchability and discrimination continues to infect as well as inflict upon the social order and human collectivity.[13] The dichotomy of purity and pollution continues to cast its baleful shadow on the Dalits and deprive them of their dignified human existence. At different points of history, such impure castes have been designated as untouchables; harijans, depressed classes, Scheduled Castes and dalit. Hence the practice of caste system violated their human right, dehumanized their existence, discriminated them, segregated their location, deprived of their dignity, robbed them of their basic conditions of human existence and trammeled their freedom of progress.

4. Discriminated Communities

The population of Scheduled caste is comprise about 16.23% as per the 2001 census, but their proportion among those living in poverty is much larger. Most of them were illiterate; they also suffer from exploitation and social discrimination as a result of their economic backwardness.[14] The dalit constitute 49% of landless agricultural laborers, 25% are cultivators mostly in the category of small and marginal farmers. Almost all primary leather workers and most of the weavers in the western parts of India belong to the scheduled castes population. The common features seen in caste and analogous systems of discrimination across India include the following;[15]

1. Physical segregation
2. Social segregation, including prohibition of inter caste marriages
3. Assignment of traditional occupations, often being occupations associated with death or filth, coupled with restrictions on occupational mobility.
4. Pervasive debt bondage due to poor remuneration for lower caste occupations.
5. High levels of illiteracy, poverty and landlessness as compared to so called higher castes.
6. Impunity for perpetrator of crime against low caste communities
7. Use of degrading language to describe low caste communities, based on notions of purity and pollution, exploitation of women on the basis of sex, class and caste.

Most often the Dalits are victimized, killed, gang raped; their houses were burnt to theground during the times of political unrest. Every day different types of atrocities, arson. Mass attacks, gang rapes fill the pages of every news papers. Most of the menial

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[12] Rajkumar, *Essays on Dalits*,(2003), New Delhi : Discovery Publishing House, p-115.

[13] Dr.R.M.Sarkar, Dalits in India: Past and Present,(2006), New Delhi: Serials Publishers, p. 43.

[14] Prem.K.Shindhe, *Dalits and Human Rights*, vol.3, New Delhi: Isha Publications, p. 61.

jobs are even being delegated to the Dalit, such as removing of dead animals, sweeping streets, removing human waste with their bare head, practicing of Jogini, Marhangi,bonded labour etc.Even today in many villages tea is served in separate glasses, water is poured into the hands of dalits while the upper enjoy a glass of water to drink with.Barbars deny to shave them and the washer men deny to wash their cloths.

5. Religious exploitation

During the British period the various duties of the village which were imposed on the Mahars continued even during colonial rule. In the Bombay Presidency Town of the British India the Mahars had to perform a number of duties as inferior hereditary officers to the various government departments, irrigation, revenue, education, police and local self government. The Mahars were to be called upon to render their services at any time of day and night. In return to their services they had two sources of livelihood like, a piece of main land and the Baluta (grains from the peasants).That is why Dr. Babasaheb Ambedkar described the watan system as an atrocious and barbarous system.[16]

The untouchables were not admitted to the public places such as watering places, wells and Dharamshalas. It is widened from the resolution passed in the Bombay Legislative Council, it was mentioned that in the year 1927 in the city of Bombay, the depressed class children were given separate pots for drinking water. The doors of the Hindu temples were closed to the untouchables is a widely known fact. The famous temple entry agitations which were led under the leadership of untouchables at Nasik, Amravati and Poona in Maharashtra, and also under the leadership of Mahatma Gandhi at Guruvayur in Kerala are the sufficient examples to suggest that the untouchables had to suffer from such disability.

In the year 1929, Dr.Ambedkar had gave an account of the socio- economic disabilities of the untouchables of the times, that, the untouchables could not enter the police, the Army and the Navy as their touch was causing pollution, the professions like trade and industry were closed to them, they were not free to dress and live in hut, they might not wear better cloths than the high caste Hindus. And they could not take the bridegroom on a horse in procession through the main street of the villages; of an untouchable was a victim of the majority tyranny of the upper caste people in the society.

6. Economic Deprivation

In the State of Maharastra, the Shudras can have no right to own property. He was not permitted to acquire wealth. Kautilya mentioned regarding the means of livelihood of Shudras, they had two sources of livelihood, like service of twice born castes and their own professions like artisans dancers actors etc. Shudras were always associated with the removal of dead animals, street sweeping and cremation of corpses. They

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[15] Shyamlal, K. S.Saxena, *Ambedkar and Nation Building*,(1998) Jaipur: Rawat Publications, p.249.

[16] M.C.Raj Jyothi, *Dalitocracy, the Theory and Praxis of Dalit Politics*,(2007),Tumkur: Ambedkar Resource Center, Karnataka, p.3.

were employed as agricultural labourers and slaves. Hence it is clear that the shudras economic life was degraded to the lowest position.

The recent massacre of four Dalit at Dhonde ka pura village in Dholpur district of Rajasthan was carried out in an old pervading atmosphere of terror unleashed by the forward caste men to grab the land and houses of Jatav and Koli communities. The brutal murders were the result of an intense caste rivalry rampant in the dacoit-infested district.A fact finding team of the centre for Dalit Rights(CDR) which visited the village over the week end was found that, the families of the victims in a state of shock and an absolute lack of remorse among the dominant Gujjars.Eight members of the Gujjar community accompanied by three Rajputs allegedly committed the murders. The 11 murderers two of whom have been arrested while others are absconding allegedly mutilated the bodies of victims after gunning them down.[17]

According to eye witness accounts recorded by the team, the killers beheaded the bodies and chopped of their arms and legs.Then they went to a nearby temple shouting slogans and firing in the air.The CDR (Centre for Dalit Rights) Chairperson P.L.Mimroth, who led the 10 member team, told reporters in Jaipur that the Gujjars and Rajputs killed the four members of Jatav Community on the pretext of taking revenge for the alleged murder of one Rajbahadur Thakur of Revai village on two years ago.Thakur's body was dumped in the farm of Ratanlal Jatav to implicate him in the crime.Mr.Mimroth said that the majority of Jatavs and Kolis had fled from Dhonde Ka Pura village over the past few years and their immovable properties grabbed by dominant Gujjars.Ratanlal's nfamily was among the 3 Jatav household still surviving in the village and the murderers wanted to drive them out. The fact finding team found the role of police suspicious as they hurriedly conducted autopsy on the bodies of the deceased on the spot and forced the next of their kin to cremate them together.

The above incidence shows that, the exploitation of Dalits in rural India is still a continuous process although that available law is not in a position to protect the Dalits including the Police authority.

7. Disabilities in Civil Life

A Shudras had no right of sitting conversing or going along the road with twice-born men and if he does so he should receive corporal punishment. The common wells are another area where the Scheduled castes and the caste Hindus confront each other. In some villages the Scheduled Castes have their own wells. But in summer season their wells get dry. Caste Hindus do not allow them to draw water from any well located in their areas.A severe punishment is laid down to the shudras on the violation of the rules of the shastras. If a shudras abused a Brahimin by using his name he was punished by inserting in his mouth a red hot iron bar.For preaching a Brahamin a shudra was punishable with pouring oil down his throat and ears.[18]

The Chairman of All India Confederation of Scheduled castes and Scheduled tribes organizations Udit Raj told to 9th session of United Nations Human Rights Council at Geneva September 9-17th 2008 that,' atrocities, untouchability, wages, bonded labour,

[17] *The Journal Legal News and Views*, vol.22, N 9 September 2008, p.29.

[18] Udaiveer and Bhagat Singh, *Encyclopedia of Dalits*, p.119.

child labour, landlessness, illiteracy, inequality of opportunities, manual scavenging are still the order of the day in the life of Dalits.Indian Ntional Bureau of Crime Report 2006, said that 27070 crimes has bees committed against dalits but many go unreported. The 13 dalits are murdered every week, dalits home are burnt every minute, 6 dalits abducted, 3 daltis women raped every day, 11 dalits beaton daily, the crime committed against a dalit every 18 minutes. Literacy rate of dalits remain abysmal that ifs 54.69&. The enrolment of Dalits in graduate education is 8.37% as against 91.63 of other 37.8% children had to sit separately while eating in mid day meals sponsored by the government schools.[19]

From the reports of the Commissioner for scheduled castes and scheduled tribes shows the existence of untouchability in the society even today. There are some common forms of untouchability which are being observed not only in villages but in towns and cities also. Generally the higher caste persons neither receive nor eat cooked food given by the persons from the lowest caste persons. It has been the common experience to the scheduled castes persons that they have been denied rented accommodation not only in villages but in cities also. They were not allowed to sit in the same cot with high caste persons or in presence of the higher caste Hindus.

8. Wages, Bondage and Atrocities

As mentioned earleier, the Dalits have been the providers of labour which created the ancient Indian agricultural civilization that has been continued to these days. Members of these castes and tribes were denied the right of owning land to force the dalit to remain permanently tied down as agricultural and other labour system. The practice of caste system had been devised to destroy their morale and capacity to organize resistance.Many of the cases of atrocities arises from agricultural wage issues. If the dalit agricultural labourers demanding not the statutory minimum wages which are low by objective standards but something between them and their prevalent wages then the atrocities were committed against them.

Land plays an important role in rural economy; It is a source of political power. But the dalits were denied by the upper caste Hindus the right to own property I the form of land. This attitude of the upper caste Hindus was found in the laws of Manu. According to Manu the shudras had only to drudge in service and must remain Adhana, without any property. The sudras could not require, hold or possess any property. Manu further says out of 7 ways,i.e., seva is recognized for the sudras.[20]

9. The Dalit Human Rights Situation

The existence of human beings is not like an animal existence. The human beings required more protection than the animal in the society. For many centuries the Indian caste system was also to operate as a perfect instrument to keep the untouchable castes and plains tribes under subjugation as providers of labour for agriculture and other purposes.[21] Over one sixth of India's population, some 170 million people live in a precarious existence shunned by much of Indian society because of their rank as

[19] Journal Dalit Voice, Editor Rajashekar Bangalore, Vol.27, 2008 16-31.

[20] Mamta Rajawat, *Development of Dalits*, New Delhi: Anmol Publications Pvt Ltd, 2005. p.67.

untouchable or Dalit like really means broken people at the bottom of India's caste system. Dalits are discriminated and denied access to land and basic resources, forced to work in degrading conditions, and routinely abused at the hands of police and dominant caste groups that enjoy the states protection.

The protection of human rights of each and every individual is a global phenomenon originated through the international conventions on human rights. Indian history and culture too has an ugly and inhuman part so far as violation of human rights are concerned. It has witnessing atrocities in the institutionalized form on the weaker sections called the Scheduled Castes and Scheduled Tribes, known as Dalits or Shudras, backed by socio- religious sanctions. The main reason for these people to be degraded is the religious dogma of Karma and Dharma. This was a convenient dogma for the upper caste to keep the lower castes under control. The dogma emphasized that by observing Dharma, they would get salvation and benefit in the next birth. This emphasis on individual salvation led the shudras to be submissive, quiescent and passive. The only Dharma of the shudras was to serve the upper castes.[22] Broadly, human rights are grouped into four categories. Each category has a special function in the societal structure.

1. Civil Rights : These are civil in nature aimed at protecting liberty, physical and moral integrity of the person. Rights such as right to life, freedom from slavery, servitude, forced labour, freedom from torture, freedom from arbitrary arrest and detention, right to fair trial, right to privacy, right to free speech, right to worship etc. These rights can be enforced by ensuring equality and due process of law.

2. Political rights: The political rights provide a link between the Government and the governed. Rights such as freedom of opinion and expression, right to peaceful assembly, right to associate, right to take part in the conduct of public affairs, right to have access to public service are included in this group

3. Economic and social rights: These rights assume positive duties on the part of Government. The right to work, free choice of employment, just and favourable conditions of work, right to join and form trade unions, right to strike, right to social security, right to rest and leisure, right to food, clothing, shelter, housing, medical , social services, right to education etc.

4.Cultural rights: Freedom of thought, freedom to take part in cultural life, right to benefit from scientific progress, right to creative activity, to benefit from international contacts and co-operation in scientific and cultural fields etc.

The above human rights only for the upper caste people and not for the Dalits. These people were denied the human rights enjoyment. They have no freedom in the society to lead their life in peaceful way. Most of the human rights of the Dalits were takan away by the upper caste people in order to keep these people under their control.

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21 Udaiveer and Bhagat Singh, *Encyclopedia of Dalit*,(2004) vol.3, New Delhi :Reference Press, p. 283.

22 L.D. Naikar, *The Law Relating to Human Rights*,(2004) Bangalore :Puliani and Puliani, p. 584.

The following illustration will shows that the human rights of Dalits were violated by the upper caste people. Every hour two dalits are assaulted, every day three dalit women are raped, every day two dalit houses are burnt, and two dalits are murdered.

On 26th October 1993 in the village of Jaisinghpur District of Orissa, in a search operation the police gang raped several SC women, ransacked houses and looted property. In Karnataka State 4,299 cases of atrocities has been registered but only 40 members were punished and the total number of cases in 2006-1,276 and in 2007-1,157, and in 2008-1,426,cases were committed against the dalits In 2009 440 cases were registered.[23]

10. India's laws dealing with Caste and Untouchability

The Constitution of India has provided a programme for transformation and reconstruction of Dalits Society which is based on inequality into a egalitarian Society. Before the legislation of the *Scheduled Castes & Scheduled Tribes (Prevention of Atrocities)Act, 1989,*several legislative Acts[24] were passed with the intention of abolishing '*Untouchability*' and removing barriers of discrimination that hinder the socio-economic development of the Scheduled Castes and Scheduled Tribes. Since its inception, our Constitution in Article 17 of the Fundamental Rights abolishes untouchability and forbids its practice in any form.[25]

India is welfare State committed to the protection of rights of the each and every category of people without discrimination on the basis of caste sex etc. A good number of legislations have been enacted to do away with different kinds of discriminations against the weaker section and to provide them protection. In order to protect the welfare of the Dalits India enacted so many Laws which ensures a minimum human dignity to the dalits in the civilized society.[26]

Scheduled Cast & Scheduled Tribes(Prevention of Atrocities

The Act provides protections to the SCs and STs from various kinds of atrocities. These protections may, broadly, be divided into following categories:

- Protection from social disabilities.

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[23] Reported in Vijaya Karnataka News Paper on 18th July 2009.

[24] Untouchability (Offences) Act, 1955 and Protection of Civil Rights Act, 1976

[25] It reads that,' the enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law'.

[26]
1. Caste Disabilities Removal Act 1850
2. Constitution(Scheduled Castes) Order, 1950
3. Constitution(scheduled castes) Order (Amendment) Act,1990
4. Protection of civil rights act 1955 also called asUntouchability Offences Act of 1955
5. Protection of Civil rights rules,1977
6. Protection of Human Rights Act,1993
7. National Commission for Backward Classes Act, 1993.
8. National Commission for Scheduled Castes Rules,2004
9. Scheduled Caste and Scheduled Tribes Orders(Amendment)Act,1956
10. Bonded Labour Abolition Act 1976.
11. Prohibition of child Labour Act, 1986.

- Protection from personal atrocities.
- Protection from atrocities affecting properties.
- Protection from malicious prosecution.
- Protection from political disabilities.
- Protection from economic exploitation.

In other words the members of SCs and STs are provided right of access to certain places and to use customary passage[27] and to get water from any spring, reservoir or any other source.

The members of SCs and STs have been provided some special protections to save them from different kinds of atrocities. These protections are ,

- Protection from atrocities affecting body.
- Protection from atrocities affecting reputation.

In protections from atrocities aganist bodies, we may list the following.

- Protection against forceful drinking or eating of inedible or obnoxious substance.[28]
- Protection against stripping.[29 8]
- Protection against outrage of modesty.[29]
- Protection against sexual exploitation.
- Protection against injury or annoyance.

5.2. India's laws dealing with Caste and Untouchability

In *Raju Vs. State of Madhya Pradesh,*[30] it was held that an act suggestive of sex to a woman amounts to outraging her modesty. In case of *State of Punjab Vs. Major Singh*[31] it was observed that the essence of a women's modesty is her sex. The modesty of an adult female is writ large on her body. Young or old, intelligent or imbecile, awake or sleeping, the woman possesses modesty capable of being outraged.

The woman belonging to a Scheduled Caste or Scheduled Tribe has right to earn her livelihood without any exploitation. Nobody can exploit her sexually. If any person who is in a position to dominate the will of such woman exploit her sexually, then he is liable for punishment. This protection was given to them by clause (xii) of Section 3(1) of the Act. It says that, whoever, not being a member of a Scheduled Caste or a

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[26] Section 3 (1) (xiv) of the Act, says that, Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, denies a member of a Scheduled Caste or a Scheduled Tribe any customary right of passage to a place of public resort or obstructs such member so as to prevent him from using or having access to a place of public resort to which other members of public or any section thereof have a right to use or access to shall be punishable with imprisonment for a term, which shall not be less than six months but which may extend to five years and with fine.

[27] Section 3(1) (xiii) of the Scheduled Caste and Scheduled Tribe(Prevention of Atrocities) Act of 1989.

[28] Section 3 (i) of the Act.

[29] Section 3 (iii) of the Act.

[30] Section 3 (xi) of the Act.

[31] 1987 (2) CRIMES 270.

[32] A.I.R.1967 S.C. 63 AT 68.

Scheduled Tribe, being in a position to dominate the will of a woman belonging to a Scheduled Caste or a Scheduled Tribe uses that position to exploit her sexually to which she would not have otherwise agreed, shall be punishable with imprisonment for a term, which shall not be less than six months but which may extend to five years and with fine.

In case of *Gujula Satyanarayana Reddy Vs. State of Andhra Pradesh*,[33] it was held by the Andhra Pradesh High Court that in order to attract section 3 (1) (xii) of the Act the upper caste man should be in a position to dominate the will of a woman belonging to Scheduled Caste or Scheduled Tribe and he should use the position to exploit her sexually to which she would not have otherwise agreed. In this case, the complainant being a tribal woman was going for coolie work to the field of the accused who belonged to Reddy caste. He exploited her sexually. It was held that he was certainly in a position to dominate the will of the woman. He also used his position to exploit her sexually assuring that he would marry her. It was further held that all the requirements of the section were made out in the case.

In case of *Thana Ram vs. State of Rajasthan,* [34] the appellant was convicted under section 376 IPC and section 3(1) (xi) of the Act as he was found guilty of committing rape of a major girl aged 5 years belonging to Meghwal community of SC. The Rajasthan High Court upheld his conviction and also held that the non-examination of prosecutrix aged 5-6 years, who had not developed the faculty of understanding, was not fatal to the prosecution case.

In case of *M.C Prasannan vs. State*,[35] the accused, a class teacher, used to commit sexual intercourse with the victim, a student with the assurance of marrying her. The matter was reported to the police several months after the commission of sexual intercourse and only after pregnancy was shown. The accused was prosecuted and convicted under section 376 of IPC and section 3(1) (xii) of the Act. The Calcutta High Court, however, acquitted the accused by giving benefit of doubt, observing inter alia that victim willingly and with full consent had sexual intercourse with accused; it was not established that victim was minor; there was no question of exploitation or dominating will of victim; and FIR was lodged after more than 3 months by a stranger to the case.

11. Conclusion

Thus atrocities against Dalit community are a continuning phenomenon. The removal pf untouchability through law is a myth. It has appeared in the news paper that Suresh Manighi a Dalit labourer was allegedly held captive and thrashed for 6 days in Nalanda by an upper caste man, Abhay Singh after the former refused to work in the latter's fields in Bihar. Dalits do not have any rights and privileges, but only duties to be performed for the benefit of upper castes. There is close relationship between poverty and exploitation. Poor people are dependent upon the upper castes for their livelihood

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[33] 1997 CRI.L.J.948.

[34] 1996 CRI.L.J.502.

[35] 1999 CRI.L.J.998.

and survival. The areas of exploitation are like agriculture, construction, tea gardens, factory, mines etc. It was formed in the State of Karnataka that 4,299 cases of atrocities have been registered but only 40 accused were punished. The number of cases were 1,276 in 2006, 1,157 in 2007 and 1,426 in 2008 and 440 cases in 2009.

According to the National Human Rights Commission of India (National Commission for SC & ST Annual Report, New Delhi,2000), more than 62,000 human rights violations are recorded annually. On an average, two dalits are assaulted every hour, 3 dalit women and children are raped, 2 dalits are murdered and at least 2 dalits are tortured or burned every day. A Scheduled caste and Scheduled Tribes have yet not developed a strategy for change and have continued to remain ritually and economically lower in status and psychologically depressed.Thus there is a need of proper implementation of the law relating to these communities.

Legal Regulation ofBusiness Competition and Corporate Governance

SANTHOSH KUMAR A.*

This study is an attempt to analyse the legal regulation of business competition and corporate governance issues in India. In more precise terms, the paper studies the law onanti-competition and monopolizing tendencies of the firms and consequences of violation thereof. The study alsoshows why competition law compliance is a crucial part of the corporate governance.

Introduction

All parties to corporate governance have an interest, whether direct or indirect, in market performance of the corporation. Customers are concerned with the certainty of goods and services, and possible continued trading relationships. Many parties may also be concerned with corporate social performance. In a narrow definition corporate governance could be confined to the basic functions of transparency, legal compliances and ethics. Recently, it is recognised that governance is a process of evolution which encompasses total re-engineering of the organisation embedding in the intentions of enterprise profit growth, shareholder wealth maximization and customer satisfaction[1]. These goals necessitate effective market management, organisational solutions for total legal and ethical compliances. This study is an attempt to analyse the legal regulation of business competition and corporate governance issues in India. In more precise terms, the paper studies the law on anti-competition and monopolizing tendencies of the firms and consequences of violation thereof. The study also shows why competition law compliance is a crucial part of the corporate governance.

The issues in corporate governance like corporate independence, disclosures, transparency, etc. are affected by the prevailing market competition.In a way competition can act as alternative governance because it compels corporates to act in a manner that maximizes the wealth of the stakeholders.[2] It is true that when the competition is high in the industry, automatically it reduces managerial slack. However, one should consider that the success of competition can also be a governing tool.

The challenging task of corporate governance is to control external stakeholders and their exercise over the organisation. Examples include:

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1 OECD Guideline on Corporate Governance of State owned Enterprises, OECD 2005, p. 37-41

2 Goergen, Marc, International Corporate Governance, Prentice Hall, Harlow, January 2012, p.6

- Competition
- Debt covenants
- Demand for and assessment of Performance information
- Government regulations
- Managerial labour market
- Media pressure
- Takeovers

Among these competition has first level importance. Needless to say that pre-requisite for good competition is trade. Philip Harwood, the journalist theologian defined trade as "mutual relief of wants by exchange of superfluities"[3]. He remarked "free trade" as opposed to "trade". Indeed, it is specifically this coincidence of commercial self-interest and social benefit that offers the most potent argument for free trade. The perfect competition in market exists if buyers and sellers have complete knowledge of all transactions within the market[4]. There are two schools of thought in relation to competition. One approach is to have totally free and unfettered competition in the belief that there will be no unfair practices. The other approach is to assert that the process of free competition should be supported by regulations that preclude any attempt at subversion of free trade and competition. The draw back with unregulated free markets is that in certain circumstances it could be of greater benefit to the owner of a monopoly to temporarily withhold goods from market in order to extract a higher price which is detrimental for the consumers. Earlier the economist believed inregulating the price, which was unsuccessful as market is governed by market forces.[5] i.e. demand and supply.

In other words no single person or business has the power to dictate the terms on which the exchange of goods and services takes place. Truly, market results have become impersonal. It is inarguable that competition is good for the consumer as it raises the bar for the market players and forces them to provide better services, deliver better goods, and give more value for money.

The Competitive markets are ones in which many firms operate. These firms have limited ability to increase prices above market price. Information is widely available to producers and consumers. There is easy entry and exit of firms. There are limited externalities. There is adequate infrastructure. Contracts can be enforced and intellectual property rights protected. 'Competition' is an evasive term and is understood differently in different context. However, in the corporate world, the term is generally understood as a process whereby the economic enterprises compete with each other to secure customer, their competitors, sometimes to eliminate the rivals[6]. Competition amongst enterprises is divided into following two categories- Price-competition and Non-price competition. The economic enterprises adopt two ways to outcompete other competitors,

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3 Suresh T. Vishwanathan, Law &Practice of Competition Act, 2002, Bharath Law House, New Delhi, First Edi. 2003, p.1-2

4 The antitrust laws of the United States of America, a study of competition enforced law, A.D. Neale, Cambridge university press, p. 4-19

5 Supra note1

6 Competition Regulation in India: Context and History, April 2009, Manupatra, P. 2-3,

i.e. (i) fair and (ii) unfair. The competition is fair where two enterprises adopt fair means such as production of fair goods or services, investment in research and development, etc. The competition is unfair where an enterprise adopt restrictive trade practices such as predatory pricing, exclusive dealing, resale- price maintenance and forming a cartel because such practices have an appreciable adverse effect on competition[7].

Unfair Business Practices

Unfortunately, it is observed, that ideal circumstances in the modern market are rare. Instead, markets are often controlled by large firms or by some form of collusion rather than innovative and pursue efficiencies; these firms find it easier to abuse their dominant position. The result is poor or overpriced products and services. The consumer loses, and development suffers.Microsoft case reveals the same story[8]. Lord Denning observed "people who combine together to keep up prices do not shout it from the house tops. They keep it quiet. They make their own arrangement in the cellar where no one can see. They will not put anything into writing nor even into words. A nod or wink will do..." [9]

Today, what constitutes an unfair act varies with the context of the business, the action being examined and the facts of the individual case. The most familiar example of unfair competition is trade mark infringement. Another common form of unfair competition is misappropriation. This involves the unauthorized use of an intangible assets not protected by trade mark or copyright laws. Other deceptive trade practices, unauthorized substitution of one brand of goods for another, use of confidential information by former employee to solicit customer, theft of trade secrets, trade label and false representation of products or services.[10] To put an end such mischief Antitrust or Competition Act was evolved and later enacted.

Brief History

Competition as an economic and legal factor had its origin in early century. The earliest surviving example of modern competition law's ancestors appears in the Lex Julia de Annona, enacted during the Roman Republic around 50 BC.http://en.wikipedia.org/wiki/History_of_competition_law - cite_note-0#cite_note-0 To protect the corn trade, heavy fines were imposed on anyone directly, deliberately and insidiously stopping supply ships[11]. Under Diocletian, in 301 AD an Edict on maximum prices established a death penalty for anyone violating a tariff system, for example by buying up, concealing or contriving the scarcity of everyday goods. The history continues even after US'Antitrust laws.[12] Two of the most famous trusts were U.S.

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7 Connotations used in Indian Competition Act, 2002

8 www.competition-commission-india.nic.in/.../Abuse%20of%20Dominant.pdf , visited on 23-02-2012

9 R.R. T.A. vs. W.H. Smith and Son Ltd. & others , L.R. p.122

10 The outlines of antitrust, Oxford Economic law journal, Sept 2009, p. 21

11 www.websters-dictionary-online.org/dictionary.asp?...of...

12 A.D. Neale, The Antitrust Laws, Cambridge University Press, Second Edi., 1960(Sherman & Claytons Act)

Steel and Standard Oil[13]; they were monopolies that controlled the supply of their product—as well as the price. With one company controlling an entire industry, there was no competition, and smaller businesses and people had no choices about from whom to buy. Prices went through the roof, and quality didn't have to be a priority. This caused hardship and threatened the new American prosperity. While the rich, trust-owning businessmen got richer and richer, the public got angry and demanded the government take action. The Sherman Act, 1890 followed by The Clayton Act, 1914 were the early legislations enacted with view to rein in such menace. European Community Competition Law, 1957, Australian Trade Practices Act, 1974 (TPA) and today more than 100 nations have enacted the legislations in the same line. In India, the Monopolistic and Restrictive Trade Practices (MRTP) Act, 1969 was in force prior to the enactment of "Competition Act, 2002".

The Competition Act has clear provisions like prohibition of anti-competitive agreements; prohibition of abuse of dominance; regulation of combinations (acquisitions, mergers, and amalgamations of certain size); establishment of Competition Commission of India[14] (ICC). (See Appendix 1) Paper may not discuss such practices and confine to the stringent penal provisions of the Act to edging corporate governance issues.

Consequences of violation

The ICC can pass following orders in case of anti-competitive agreements and abuse of dominance.[15]

- During the course of enquiry, the Commission can grant interim relief restraining a party from continuing with anti-competitive agreement or abuse of dominant position
- To impose a penalty of not more than 10% of turn-over of the enterprises and in case of cartel - 3 times of the amount of profit made out of cartel or 10% of turnover of all the enterprises whichever is higher.
- After the enquiry, the Commission may direct a delinquent enterprise to discontinue and not to re-enter anti-competitive agreement or abuse the dominant position
- To award compensation
- To modify agreement
- To recommend to the Central Govt. for division of enterprise in case it enjoys dominant position.

The orders the Commission in case of combinations may be[16]:

- It shall approve the combination if no appreciable adverse effect on competition is found.

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[13] United states v. Addyston pipe and steel company, 1898, Standard oil company of New Jersey v. United States, 1911

[14] The Competition Act, 2002, Chapter II& III, Sec.3-7

[15] See appendix I & II

[16] Chapter IVV, powers & Functionsofcommission, sec.18-S.38

- It shall disapprove of combination in case of appreciable adverse effect on competition.
- May propose suitable modification as accepted by parties.

In case of combination the threshold limits are[17] -

- For acquisition & For merger/amalgamation–
- Combined assets of the firms more than Rs.1000 crores or turnover more than Rs.3000 crores (these limits are US$ 500 million and 1500 million in case one of the firms is situated outside India).
- The limits are more than Rs.4000 crores or Rs.12000 croresand US$ 2 billion and 6 billion in case acquirer is a group in India or outside India respectively.

Accordingly, firm proposing to enter into a combination, may at its option, notifies the Commission in the specified form disclosing the details of the proposed combination within 7 days of such proposal.The CCI has the discretion to impose a lesser penalty in case of a cartel offence in case vital disclosures are made by a leniency applicant.

Where commission imposes a monetary penalty and the person fails to comply with the order, the commission, if it of that view, may make a reference to the concerned income-tax authority for recovery of that penalty as tax due under the income tax act and the person against whom the penalty has been imposed shall be deemed to be an assessed in default.[18].

Some Cases

The Competition Commission of India has imposed Rs.1 crore ($220,000) fine on Kingfisher Airlines for not providing sufficient information in the CCI's investigation of the airline's alliance with Jet Airways.According to section 43 of the Competition Act 2002 if any person fails to comply with the CCI's powers to request information and in certain other cases, the CCI may levy a fine which may extend to Rs.1 Lakh per day of such continuing failure up to a maximum of Rs.1 crore[19].

The CCI passed the 113-page order on 25 May 2011, directing the film producers to cease future anti-competitive practices and to pay an aggregate penalty of Rs.27 lakh for having violated sections 3 and 4 of the Competition Act 2002[20].

Another case was filed under section 19(1)(a) of the Competition Act, 2002 by M/s RajarhatWelfare Association and ShriRajendraKumar Vidhawan on 04.03.2011 againstM/s DLF Commercial Complexes Ltd.[21] and others alleging, *inter alia*, abuse of dominant position in contraventionof the provisions of section 4 of the Act.Thecommission's director general has held that India's largest property developer, DLF Ltd, has been violating norms and imposing unfair conditions on house buyers in Gurgaon, and sought action against the company.

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17 S.O.479(E), 480(E), 481(E), 482 (E) Date of Notification 4th day of March, 2011

18 Chapter IV, powers & Functions of commission, sec.18-S.38

19 http://www.cci.gov.in/images/media/completed/cartel_report1_20080812115152.pdf

20 Supra note1

21 M/s Rajarhat Welfare Association &Anr.Informantsv.DLF Commercial Complexes Ltd. &Ors.

Corporate governance andcompetition compliance by enterprises

It can be inferred from the above discussion that there is need for well formulated and adequate compliance strategy to address the business realities faced by the enterprise concerned. As timeworn dictum reminds 'care and vigilance is better than consequences'. The enterprise must be in position to evaluate its situation in the market-whether it is a dominant player, going by the definition in the Act. A dominant enterprises needs to be particularly cautious about its behaviour in the market as the law explicitly prohibits certain types of behaviour by dominant enterprise. The law also recognises group dominance[22].

Compliance implies active efforts on the part of an enterprise to comply with the provisions of the Act, i.e. the Competition Act 2002 and all rules, regulations & orders made thereunder.The enterprise may have to take certain necessary and concrete steps to ensure that, knowingly or unknowingly it does not infringe the provisions of the Act. It is clear that, non-compliance can be very costly for enterprises. The chances of conviction are, therefore, high for non-compliant enterprises[23]. The Competition Commission of India is empowered with adequate powers of investigation and decision[24]. The consequent cost to the enterprise may be one or more of the following:

- Drain of resources in handling competition law infringement cases
- Loss of business as potential customers / investors / joint venturists may repel
- Damage to reputation that has been built at very high cost

Issues may arise in following some of the areas:

- Direct and indirect price fixing, including resale price maintenance
- Dominant companies while dealing with customer and suppliers
- Handling customer's and supplier's and compliant
- Legitimate handling, exchange and dissemination of confidential, commercial and sensitive information
- Proper conduct of meeting with competitors and other stakeholders, i.e. process of negotiating agreements with competitors, participation in association meetings, etc.

It is also important to keep a record of all agreements signed by the company and assess for the compatibility. If the agreement is declared as null and void by the commission, it may be very costly for the enterprise. The agreement shall be reviewed from competition angle periodically. Compliance programme may be preferable than legal treatise for the employees who look after the work on day-to-day basis and may not be legally trained. The custom made for each enterprise and an 'on shelf' program is very likely to serve the purpose.

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22 Sec.4(2)(1)(a)-(d),The Competition Act, 2002

23 Philip CollinsChairman, Office of Fair Trading, Competition Law and Corporate accountability speech, Annual Accountability Conference,9 December 2011

24 Sec.29 &31,The Competition Act, 2002

The benefit of competition compliance includes following:

- Prevent violation of law
- Inculcates a culture of compliance throughout the organization
- Encourage good corporate citizenship
- Provides enterprises with a competitive advantage by enabling them to detect any violation at an early stage and take corrective measures to their advantage
- Assists enterprises to enhance reputation and build goodwill. Enterprises that contravene the provisions of the Act may suffer damage to their reputation, damaging years of careful marketing and brand development.
- Establishes enterprises as having social conscience, economic ethics and national interest at heart (philosophy of corporate social responsibility)
- Helps avoid fines or mitigate the level of the fine potentially void agreements can be avoided. Hence, avoid potential action for compensation
- Helps increased awareness on competition law among Employees

The eagerness, support and commitment of senior management must be is required for its implementation. Every dominant enterprise should make it a point to educate its employees to carefully avoid the particular type of behavior.

Efforts &suggestions

As is apparent from the press (reported cases), a breach of the competition laws has become one of the most serious risks that companies can face. The nature of competition law is such that possible violations could occur at almost every level of the company. Further, to the regular business person certain competition law contraventions are not immediately apparent, as other corporate offences might be. Both these factors increase the risk of competition law offences being committed throughout a company, with the perpetrator and the company being blissfully unaware of the possible consequence.

Each company's competition risk profile will vary in accordance with its size, number of employees and the nature of its business, calling for different measures to mitigate related risks. Enterprises are advised to ensure following programme[25] to represent best practices, remains relevant, comprehensive and effective.

- To identify the employees and divisions that are likely to be exposed to competition la risk, i.e. those doing sales and marketing; anyone having direct contact with competitors those engaged in setting up and operation of distribution arrangement, strategy dealing with combination
- Setting out effective competition policy which is in simple and plain language
- Seeking written undertaking from employees to conduct their business dealings
- Formulating 'best practice' norms as code of conduct in every enterprise
- Designating member to take charge on the program as Compliance officer
- Linkage between Compliance policy and enterprise human resource(HR) policy to

[25] A quick guide is published as part of the Competition Advocacy and Awareness programme of the Competition Commission of India (the Commission), Advocacy booklet-09

attract more serious and prompt compliance

- Compliance can also be built into existing staff appraisal procedures
- To liaise marketing(sales, distribution, procurement) with legal department for competition review
- Compliance programme may also be included in system of audit (documents and e-mails of each and every employee) etc.

Periodic evaluation of Compliance Programme is suggested to keep it relevant. The process may include evaluation of individual employees' knowledge of law, policy and procedures. Adherence to compliance policy is part of the corporate governance. The managerial challenges in these directions are new and needs to be discussed extensively. Companies would be well advised to firm up on competition risk management sooner rather than later. However, 'one-size fits all' approach tocompliance can't be trueand compliance can't simply be a 'box-ticking' exercise[26] .Competition Advocacy is also to be undertaken by businesses to ensure that enterprises are aware of the provisions of this Act and remain in compliance with it. Competition law should be treated in the same way as managing any other business orfinancial risk. It is to be noted that competition law compliance can and ought to be a crucial part ofcorporate governance and corporate accountability.

Developments contained in the Competition Amendment Bill (B31D-2008) have emphasised the importance of complying with competition law as part of corporate governance and risk management[27] . Ministry of Corporate Affairs has set up a National Foundation for Corporate Governance (NFCG) in association with Confederation of Indian Industries, ICAI and ICSI, as a not-for-profit trust. It provides a platform to deliberate on issues relating to good corporate governance, to sensitise corporate leaders on importance of good corporate governance practices as well as facilitate exchange of experiences and ideas amongst corporate leaders, policy makers, regulators, law enforcing agencies and non- government organizations.

In a world of increasing competition, unfair and restrictive practice, and eroding values, it may hardly ever be recognised in the corporate circles that Enterprise Wide Governance has a positive and prominent role to perform. Business barons fail to recognise the importance of re-engaging the enterprise governance way, so that the corporate ethos is given a vent to express itself. The tardy progress of the industry in particular and the economy in general could be traced to the single major cause of loss of corporate credibility due to lack of vigilance and pro-activeness.

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Competition Act, 2002

Notification dated

11 May, 2011 notified the Competition Commission of India (Procedure in regard to the transaction of business relating to combination) Regulations, 2011 (No 3)

Appendix-I

THE COMPETITION ACT 2002		
SECTION	PROHIBITION	NATURE OF ACTIVITY
SEC.3	ANTI COMPETITION AGREEMENTS	
	An anti-competitive agreement is an agreement having appreciable adverse effect on competition. Anti-competitive agreements include	• agreement to limit production & supply • agreement to allocate markets • agreement to fix price • bid rigging or collusive bidding • conditional purchase/sale (tie-in arrangement) • exclusive supply/distribution arrangement • resale price maintenance • Refusal to deal
Sec.3(1)	"Appreciable adverse effect on competition" ("AAEC") within India. Factors to determine appreciable adverse effect on competition	▪ Creating barriers for new entrants in the market or driving existing competitors out of the market ▪ Foreclosing competition by hindering entry into the market ▪ Providing benefits to consumers ▪ Improving production or distribution of goods or provision of services ▪ Promoting technical, scientific and economic development.
The horizontal Agreements between those enterprises which are at the same stage of production, services, etc. includes collusive agreements		The vertical agreements Agreements between those enterprises which are at the different stages of production, distribution, etc.

• Directly or indirectly determines purchase or sale prices • Limits or controls production, supply, markets, technical development, investment or provision of services • Shares the market or source production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or in any other similar way • Directly or indirectly results in bid rigging or collusive bidding.	▪ Tie-in arrangement ▪ Exclusive supply agreement ▪ Exclusive distribution agreement ▪ Refusal to deal ▪ Resale price maintenance

Section 4	Abuse of Dominance	
	Factors	Practices
	▪ Market share, size and resources of the enterprise; ▪ Size and importance of the competitors; ▪ Economic power of the enterprise, including commercial advantages over competitors; ▪ Dependence of consumers of the enterprise; ▪ Monopoly or dominant position acquired as a result of any statute or by being a Government company or a public sector undertaking or otherwise; ▪ Entry barriers like regulatory barriers, high capital cost of entry, marketing entry barriers, technical entry barriers, etc; ▪ Countervailing buying power; ▪ Market structure and size of market; ▪ Vertical integration of the enterprises or sale or service network of such enterprises;	▪ directly or indirectly imposing unfair or discriminatory conditions in the purchase or sale of goods and services; ▪ restricting the technical or scientific development relating to goods or services to the prejudice of consumers; ▪ indulging in practice(s) resulting in denial of market access; ▪ making conclusions of contracts subject to acceptance by other parties, which have no connection with the subject of such contracts; ▪ using dominant position in one relevant market in order to enter into another market

Sec.5	Combinations Regulation
	▪ Actual and potential competition through imports ▪ Extent of entry barriers into the market ▪ Level of combination in the market ▪ Degree of countervailing power in the market ▪ Possibility of the combination to significantly and substantially increase prices or profits ▪ Extent of effective competition likely to sustain in a market ▪ Availability of substitutes before and after the combination ▪ Market share of the parties to the combination individually and as a combination ▪ Possibility of the combination to remove the vigorous and effective competitor or competition in the market ▪ Nature and extent of vertical integration in the market ▪ Nature and extent of innovation

Appendix-II

A transaction attracts the combination provisions of the Competition Act only if the combined size of acquiring and an acquired enterprise, upon completion of the transaction, meets the following thresholds:

		ASSETS		TURNOVER	
In India	No Group	INR 1,500 Crores (approximately USD 330 million)		INR 4,500 Crores (approximately USD 1 billion)	
	Group	INR 6,000 Crores (approximately USD 1,320 million)		INR 18,000 Crores(approximately USD 4 billion)	
In India or outside		ASSETS		TURNOVER	
		Total	*India*	*Total*	*India*
	No Group	USD 750 million	INR 750 Crores (approximately USD 165 million)	USD 2.25 billion	INR 2,250 Crores (approximately USD 500 million)
	Group	USD 3 billion	INR 750 Crores (approximately USD 165 million)	USD 9 billion	INR 2,250 Crores (approximately USD 500 million)

LEGAL STATUS OF BCCI UNDER ARTICLE 12 OF THE INDIAN CONSTITUION

DR. M. SURESH BENJAMIN*
& SANU RANI PAUL**

Cricket is not merely a game in India. With the new version of Cricket i.e. Indian Premiere League, India emerged as a global power at the International level. Incidental to this is the growing economic and political power of BCCI, which is the sole authority to regulate and control the game of Cricket in India. BCCI though performs an important public function, is not yet recognized as an "instrumentality of state" within the expression "other authorities" under the Article 12 by the Indian judiciary. The author claims that applying traditional tests to find out instrumentalities of State is no longer accurate in the era of globalization. When State performs its important public functions through private actors, the appropriate test to be applied is 'Public Functions Test' and such other relevant test on a factual consideration. In order to establish this view instances from U.S. has been drawn out.

Key Words: *Board of Control of Cricket in India, Globalization, Indian Premiere League, State Action, Public Functions Test*

Introduction

In the era of globalization when the power is given to private bodies within the state the enforcement of Constitutional Rights is a matter of concern. Political theories underlying globalization rested on the contention that reduction of law to state law is unsustainable and therefore it posited multitude sources of law by non-state actors and private actors. The germinating factors behind this idea of thought emerged with Washington Consensus which sowed the seeds of Economic Neo-liberalism worldwide.[1] With neo-liberalism the concept of 'global economy' emerged which is characterized by global production and global markets for goods, services and finance.[2] With globalization Sports is now a global phenomenon affected by the emergence of a world media system, especially television and corporate capitalism. In the contemporary world sports has become a business for the corporate world and the consumers are the global audiences.

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[1] In fact the concept of Neo-liberal state underlying globalization took its shape on the New Right philosophy emerged in Thatcherite England in the 1970's and Reagan governments in U.S.A in 1980's. It was emerged as an attack on Keynesian Welfare State and has become a global phenomenon since the "Washington Consensus". The Thatcherism and Raeganism type of governance pushed the State into the very basic functional role of role of security, law and order maintenance, and protection of weaker sections. A. ADONIS AND T. HAMES, *Economic Policy* in A Conservative Revolution? The Thatcher-reagan Decade in Perspective (1994)

[2] Gavin W. Anderson, Constitutional Rights after Globalisation 7 (2005)

Besides, globalization of sports has shifted the focus of legal regulation increasingly onto certain international and national sports federations which controls and governs international sport. They have their own rulebooks and constitutions, often catered to their own convenience. They take decisions that can have profound effects on the careers of players and that have important economic consequence. They are autonomous organizations and are independent of national governments.[3] When it comes to cricket it is International Cricket Conference and Board of Control of Cricket in India[4] which occupies these positions. ICC regulates International Cricket whereas BCCI regulates cricket in India at all levels.[5]

Cricket originated in England during 1300 as an aristocratic pastime and it was embraced by Indians during the colonial period.[6] In India the game acquired popularity mainly because it helped in the socialization process as it allowed the commoner to mingle with the aristocrats and for both to meet their master i.e. the Englishmen as equals on the field of play.[7] Imperial Cricket Conference, the then ICC was formed in 1909 and it was viewed as an appendage of British Colonial State[8]. With the entry of Indian team into ICC and eventually to international cricket, BCCI was formed with the support of the elites.[9] Initially it was functioning as an unregistered association and in 1940 it got registered under the Societies Registration Act of 1860. Later with the enactment of Tamil Nadu Registration Act, 1975 BCCI came to be registered under it.

Cricket as a sport attracts the attention of a vast majority of population in India. It has deep implications for the notions of Indian-ness and national identity.[10]

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3 Ken Foster, Is there a Global Sports Law? 2 Entertainment Law 1 (2010), (May 22, 2013) http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume2/number1/foster.pdf,

4 Hereinafter called as ICC and BCCI respectively

5 At the grass-root level, national level, international level and it also regulates private cricket i.e. Indian Premiere League. See BCCI Regulations 2.1

6 The game was deliberately exported to the colonies as part of colonizing policy of transferring British moral code from the messengers of empire to the local population. Parsis who were good at embracing British tradition took interest in Cricket and formed cricket clubs from the year 1848 and subsequently Madras and Culcutta cricket clubs were formed and the game was widely played between Britishers and Indians. Narottam Puri, *Sports v. Cricket*, 9 INDIA INTERNATIONAL CENTRE QUARTERLY 146-154 (1982), Somshankar Rai, *The Wood Magic: Cricket in India- A Post- Colonial Benediction*, 25 THE INTERNATIONAL JOURNAL OF HISTORY OF SPORTS 1637-1653 (2008)

7 PURI, *ibid* at 145-146

8 Until 1965 ICC retained its old name and it was the policy of the ICC to admit only Commonwealth countries as members. Jason Kaufman and Orlando Patterson, *Cross-National Diffusion: The Global Spread of Cricket*, 70 AMERICAN SOCIOLOGICAL REVIEW 85 (2005)

9 BCCI was formed at Delhi with the initiation of A.S. deMellow and support of Maharaja of Patiala in 1927. During those times cricket was a well administered sport in India and was funded mainly by the *Nawabs, Maharajas,* Princes who were at the helm of administration of cricket and they set a noble tradition of managing the game in India. Puri *supra* note 6, at 152

10 Boria Majumdar, *Soaps, serials and the CPI (M), Cricket beet them all: Cricket and Television in the Cotemporary India,* 11 SPORT IN SOCIETY 570-582 (2008)

11 CHRIS RUMFORD AND STEPHEN WAGG., CRICKET AND GLOBALISATION (2010); The success is marked by the fact that in a short span of three years the **first franchise based Twenty 20 cricket has grown into one of the world sports'** foremost properties. Shakya Mitra, *India's Foray into World's Sports Business* 13 SPORT IN SOCIETY 1314-1333 (2010)

Internationally and nationally the wide popularity for the game have exemplified in the recent years because of the success of Indian Premier League introduced by BCCI in 2008.[11] Internationally IPL is marked as the rise of the non-Western nations primarily India. This changing scenario has also shifted the control and regulation of cricket from ICC TO BCCI.[12] Even then BCCI runs cricket as a private venture least accountable towards the public, players and with no transparency. Now BCCI is an unruly horse wielding enormous power economically as well as politically and enjoys monopoly status in every sense. Simultaneously BCCI could be compared to Black Hole which would eventually bring cricket to nothingness due to the prevailing corruption and irregularities within.[13]

India's Globalised Cricket Regime – the Indian Premier League

IPL was the brainchild of Lalit Modi, unveiled in the year 2008 in lines with the European Premier League. It was the first franchisee based Twenty 20 cricket competition. It was created at a time when cricket started losing its popularity after World Cup 2007 when India could not even make it upto the final ten teams. Lalit Modi, the protagonist of IPL foresaw that IPL would be a great success taking into account the emerging Indian economy and the multibillion population of India. With IPL cricket became a media enterprise-corporatized and catered to fit the needs of sponsors, media corporations and other stakeholders rather than the fans that are also sold as consumers in the commodification process of cricket.[14]

The major breakthrough in cricket in India was the opening up of market and liberalization policies of Narasimha Rao government in 1991.[15] It eventually had put an end to the monopoly of state run Doordarshan in broadcasting the game. This deregulation and subsequent entry of ESPN, Zee sports etc made cricket a global media event having high television rating point.[16] In fact it is "Perfect Television Sport" as called by Appadurai.[17] IPL is a mix masala of all the things which people of emerging India keep close to their heart viz; Bollywood, corporate culture and finally cricket – the defacto national game of India. Cheerleaders and film stars added new colour to the game and with the new schedule cricket became a "mega one-day soap opera" starring cricketers and film stars.[18]

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[12] Amit Gupta, *The Globalization of Sports, the Rise of Non-Western Nations, and the Impact on International Sporting Events*, 26 THE INTERNATIONAL JOURNAL OF THE HISTORY OF SPORTS 1779-1790 (2009), Amit Gupta, *India and the IPL: Cricket's Globalized Empire*, 98 THE ROUND TABLE 201-211 (2009)

[13] P. Sainath, *BCCI: Billionaires Control Cricket in India*, The Hindu, Jan. 17, 2012

[14] SHAKYA MITRA, *supra* note 11

[15] M. K. Raghavendra, *Paan Singh Tomar- the Nation and the Sportsperson*, 28 ECONOMIC AND POLITICAL WEEKLY 20-22 (2012)

[16] The commercial success of the game could be gauged from the fact that in 2008, the IPL captured 9.5% of the Indian television market compared to soap operas and reality shows that made up 5% of the market reflecting the affection of South Asians for the game. David Rowe and Callum Gilmour, *Global Sport: Where Wembley meets Bollywood Boulevard*, 23 CONTIUUM: JOURNAL OF MEDIA AND CULTURAL STUDIES 178 (2009)

[17] JASON, *supra* note 8, at 90

[18] Vikram Bedi, *India Cricket as Synecdoche for Our Times*, 41 ECONOMIC AND POLITICAL WEEKLY 2520-2522 (2006)

The cricket -Bollywood nexus is a neo-liberal mechanism to market entertainment products and celebrities which produces increased profits by captivating televised audiences through the appeal of cricket and Bollywood.[19] The game became a vehicle through which increasingly global and also national commercial brands are launched and maintained particularly, Bollywood stars as brand ambassadors.[20] This new Hegemonic Sports Culture[21] dominated by cricket in India is intrinsically related to the forces of capitalism. Capital societies heavily depend on cultural products, including sports as they are directly linked to the performance of economy by providing new avenues for growth, dynamism, profit and control. By converting sporting events (not only cricket) into a spectacle, major corporations compete for profits, growth and control over the market.[22]

Deregulation without any mechanism for enforcement in the globalized free market era has in fact lead to the weakening of state and incidental to it is the social acceptance of corruption.[23] Cricket and IPL is no exception to it. Indian cricket has a long tradition in match fixing and betting, With IPL even BCCI officials came to be involved in corruption, thereby tainting the old reputation of cricket as "gentlemen's game".[24] Government is giving tax exemption to BCCI, writing-off its debts, also leases and stadiums are given at a cheaper rate for the game but at the same time subsidies to the poor are savaged and this is a clear negation of the social justice principles embodied under the Indian Constitution.[25]

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[19] Azmat Rasul and Jennifer M. Proffitt, *Bollywood and the Indian Premier League (IPL): The Political Economy of Bollywood's New Blockbuster*, 21 ASIAN JOURNAL OF COMMUNICATION 373-388 (2012) (India, being an emerging economic power with a large middle class, has assumed a unique position among cricket playing nations in large part due to the millions of spectators willing to spend money not only on attending matches but also on tourism, shopping, and other consumerist practices following the neoliberal economic policies of the Indian government.) Also see AMIT GUPTA, *supra* note 12

[20] AZMAT et. al. supra note 19, at 380, (Even *Lagaan*, which marked a new awakening in the Indian cinema combined nationalism with cricket and was widely acclaimed for its professionalism besides promoting cricket in rural areas.) M. K. RAGHAVENDRA, *supra* note 15; Florian Stadtler, *Cultural Connections: Lagaan and its audience Responses*, 26 THIRD WORLD QUARTERLY 517-524 (2005)

[21] A hege-monic sports culture is one that "dominates a country's emotional attachments" Markovits, Andrei S., *et al.*, *Offside: Soccer and American Exceptionalism*, (2001) as cited in JASON, *supra* note 8, at p. 84

[22] AZMAT et. al, *supra* note 19, at 375; also see Nalin Mehta et al., *Bombay Sport Exchange: cricket, globalization and the Future*, 12 SPORT IN SOCIETY. 694-707 (2009)

[23] M.K. RAGHAVENDRA, *supra* note 15, Prabaht Patnaik, *Ways of Neo-liberalism*, Frontline, Dec. 15, 2012 at 6

[24] Amit Gupta, *The IPL and India's Dominations of Global Cricket*, 14 SPORT IN SOCIETY. 1323 (2011), *ED probes Money Laundering complaints against IPL*, The Hindu, Aug. 30, 2012, at Editorial

[25] P. Sainath, *How to feed your billionaires*, The Hindu, April 17, 2010, Also see Karan Thaper, *IPL has made cricket just business: MS Gill*, CNN-IBN, available at http://ibnlive.in.com/news/ipl-has-made-cricket-just-business-ms-gill/112266-5-24.html (May 22, 2013); (Also government is giving a blind eye to the organised black market dealing in betting on India and the betting in cricket is often organised by the mafia that abets and aids the *fidayeen* funds.) See Aditya Sondhi, *The Legal Status of BCCI, Unwarranted Ad-Hocism, Constitutional Hurdles and the Pressing Need for a Cricket Legislation*. 22 MANUPATRA 1-13 (2010)

The game of cricket is now part of the entire polity and the politicians also here to share the burden for the downfall of cricket.[26] It does not matter which party they belongs to it is all about money making,[27] as rightly noted by Susan Strange "economic globalization signals supremacy or triumph of the market over the nation-state and of economics over politics."[28] Economic globalization coupled with political globalization[29] has made BCCI enormous power wielding machinery both nationally and internationally, enjoying an economy scale that could be equal to a small nation.[30] Existing situation within BCCI demands transparency in administration and integrity on the part of officials and furthermore a legislation to regulate its affairs.[31]

Equally important is ensuring 'fairness' and 'good faith' in the activities of BCCI by subjecting it to the process of judicial review under Article 32 and 226 of the Indian Constitution, and also to make it an instrumentality of the State under Article 12. Courts' supervisory jurisdiction helps to ensure that private bodies like BCCI do not abuse their power and do not act arbitrarily, capriciously, unreasonably or unfairly. Litigation and the possibility of litigation can play a useful regulatory role.[32] And this requires introspection into the judicial stand on BCCI as 'State' under Article 12.

Legal Status of BCCI

The question regarding legal status of BCCI under Article 12 came before various cases viz; *Mohinder Amarnath & othrs. v. BCCI,*[33] *Ajay Jadeja v. Union of India & others*[34] *and Rahul Mehra And Anr. v. Union Of India*[35] before the Delhi High Court. The other decisions are by the Supreme Court: *BCCI v. Netaji Cricket Club and Ors.*[36], *Zee.Telefilms Ltd & Anr v. Union India & Ors.*[37] and *A.C. Muthiah v. BCCI & Anr.*[38]

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[26] AM, *Culcutta Diary*, 35 ECONOMIC AND POLITICAL WEEKLY 3374-3375 (2000)

[27] SAINATH, *supra* note 25

[28] Susan Strange, *The Retreat of the State: the Diffusion of Power in the World Economy* (1996) as cited in Nilüfer Karacasulu Göksel. "Globalization and the State" available at http://sam.gov.tr/wp-content/uploads/2012/02/1.-NiluferKaracasuluGoksel.pdf (May 22, 2013)

[29] (Political Globalization is interpreted as "the shifting reach of political power, authority and forms of rule", it is characterizes with increasing influence of international organizations, non-state actors, national pressure groups into the international arena.) David Held and A. McGrew, *The End of the Old Order*, 24 REVIEW OF INTERNATIONAL STUDIES 219-243 (1998) as cited in *ibid* at 6

[30] The 2013 Pepsi Indian Premier League Player Auction, held in Chennai on Feb 3, 2013, saw 37 players being bought for a whooping sum of USD 11.89 million. http://www.iplt20.com/news/2013/more-news/2491/2013-ipl-player-auction-at-a-glance, (May 22, 2013)

[31] (But when discussions on making BCCI under the purview of the National Sports Authority Bill, 2011 came up, there had been strong oppositions from the ministers holding positions in the BCCI and they vehemently opposed government regulation in the activities of BCCI.) A. G. Noorani, *Wail of Zamindars*, FRONTLINE, Sep. 24, 2011

[32] Ajay Jadeja'v. Uniion of India 95 (2002) DLT 14, 2002 (61) DRJ 639 [*Ajay Jadejas'* case]

[33] CW.NO.632/89

[34] *Ibid* note 33

[35] (2005) 4 Comp.LJ 268 Del, 114 (2004) DLT 323 [*Rahul Mehra's* case]

[36] (2005) 4 SCC 741[*Netaji's* Case]. Per Santosh Hegde J. and S.B. Sinha J.

[37] (2005) 4 SCC 649, [*Zee Telefilms* case] (Santhosh Heggde J. and Sinha J. who were the authors of *Netaji case* split over the status of BCCI and majority in the words of Santhosh Heggde J. held BCCI as not a 'State" under Article 12.)

[38] (2011) 6 SCC 617 [*Muthiah's* case]

In *Mohinder Amarnath's case* BCCI was held not to be an instrumentality of State whereas in *Ajay Jadejas' case* writ petition against BCCI was held to be maintainable by Delhi High Court. But decision in Ajay Jadeja's case was held as not a precedent subsequently in *Rahul Mehra Case*[39] and it was affirmatively held that writ against BCCI is maintainable although Court declined to express any opinion regarding status of BCCI as an instrumentality of the State.[40]

Subsequently in *Netajis' case* Supreme Court upheld the monopoly status of BCCI and further held that having regard to the enormity of power exercised by it, the Board is bound to follow the doctrine of 'fairness' and 'good faith' in all its activities and further held that having regard to the fact that it has to fulfill the hopes and aspirations of millions, it has a duty to act reasonably and it cannot act arbitrarily, whimsically or capriciously. As the Board controls the profession of cricket, its actions are required to be judged and viewed by higher standards."[41]

In *Zee Telefilms case* Apex Court elaborately discussed about the position of BCCI as an instrumentality of State under Article 12. Court squarely applied the test in *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*[42] and held that since BCCI is not financially, functionally and administratively controlled by government cumulatively, it cannot be held as a State and thus writ petition under Article 12 is not maintainable. Later in *Muthiahs' Case* Supreme Court reaffirmed the decision in *Zee Telefilms Case* and it was held categorically that BCCI is a private autonomous body and its actions have to be judged only like any other similar authority exercising public functions. The Court also rejected the claim that every entity regulating the fundamental rights under Article 19 (1) (g) is a 'State' within the meaning of Article 12.[43] It was held that the functions of the Board do not amount to public functions. In view of this decision observations made by Sinha in *Netajis Case* stands no longer as good law.[44]

Supreme Court has held in *Zee Telefilms Case* that in cases involving violation of fundamental rights the petitioner has to establish as a pre-requisite that the Board is a State for invoking Article 32 and that unless this is done the petitioner cannot allege that the Board violates fundamental rights and therefore it is a State within Article

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[39] (Since petition filed by Ajay Jadeja was withdrawn by him as he agreed to have the matter settled by an Arbitrator, court ordered the decision to be treated not as a precedent in another case of whatsoever nature.) *Supra* note 33, para. 4

[40] (The decision was made by virtue of the monopoly nature of BCCI in regulating and controlling the game of cricket and the nature of the duties and functions performed by it. According to the Court the words "any person or authority" used in Article 226 may cover any other person or body performing public duty.) Para 20.

[41] *Supra* note 36, at para 80 and 81

[42] (2002) 5 SCC 111 at 40 [*Pradeep Kumar Biswas* Case] the question was whether CSIR is a State or not under Article 12.

[43] (Court denied the claim of the petitioners that the functions of the Board amount to public functions. as the State/Union has not chosen the Board to carry out the duties and as it is not legally authorized by it carry out those functions under any law or agreement and that instead it has voluntarily chosen to perform those functions under its own guidelines which makes it an autonomous body.) *Supra* note 37, at para 28

[44] *Ibid* para 34

12.[45] Thus according to the Court it is only in situations involving 'State Action' that the fundamental Rights can be enforced. In the era of globalization this vertical approach of Fundamental Rights is no longer accurate because now economic and political power are increasingly given to private actors too.[46] In this situation judiciary has a potent role in protecting and upholding the fundamental rights under the Constitution. But as far as enforcement of fundamental rights against private or non-state actors is concerned our judiciary is constrained in a set of narrow doctrines evolved from time to time.[47] In the present scenario an innovative and liberal approach in tune with the spirit and fundamental values of the constitution is the need of the hour.[48]

Relevance of Public Functions Test in the era of Globalization

So far there have been two ways in which judiciary has responded to the call of Globalization as far as interpretation of the term "other authorities" under Article 12 is concerned.[49] The first approach of judiciary can be seen in the majority decision in *Sukhdev Singh v. Bhagatram*[50] whereas the second view is embedded in Mathew J.'s opinion in the same case.[51] The first approach culminated into the decision in *Pradeep Kumar's Case* whereas the second one partially lead to the view of minority decision in *Zee Telefilm's Case.*

It was Mathew J. in his concurring opinion in *Sukhdev Singh's case* who propounded Public Functions Test as a criterion to find out instrumentalities of state under the expression 'other authorities' within Article 12.[52] Public Functions Test lays down that when the functions performed by private bodies could be identified with state functions, they would become State Actors in relation to the public functions performed by them.

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[45] *Ibid* para 28; (A similar approach by the judiciary can be seen in the case of Zoroastrian Coop. Housing Society Ltd. V. District Registrar, Coop. Societies (Urban), (2005) 5 SCC 632 wherein the issue was whether bye-law of housing society contravened public policy under Section 4 of the local act under which it was established in so much it was inconsistent with Article 15 of the Constitution and Supreme Court declined to apply constitutional principles to the bye-laws.)

[46] V.N. SHUKLA, CONSTITUTION OF INDIA 20 (10th edn. 2003)

[47] Rajasthan Electricity Board v. Mohan Lal AIR 1967 SC 1857, Sukhdev Singh v. Bhagath Ram AIR 1975 SC 1331, R. D. Shetty v. International Airport Authority AIR 1979 SC 1628, Pradeep Kumar Biswas v. Indian Institute of Chemical Biology (2002) 5 SCC 111.

[48] Sanu Rani Paul, *Need for Horizontal Application of Fundamental Rights in the Era of Globalisation*, 2 CHRIST UNI. LAW J. 81-96 (2012), Ashish Chugh, *Fundamental Rights: Vertical or Horizontal?*, 7 SCC (J) 9 (2005)

[49] CONSTITUTION OF INDIA ART. 12 (Definition of State: "In this part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India")

[50] AIR 1975 SC 1331 [*Sukhdev Singh's* case] (The question that arose for consideration in this case was whether statutory corporations such as the Oil and Natural Gas Corporation, Life Insurance Corporation and the Finance Corporation would fall within the definition of State under Article 12.)

[51] He observed that the test to determine whether an entity would satisfy the requirements of Article 12 can be stated as thus - (a) finding of state financial support together with an unusual *degree of control* over the management and policies of the body may lead to an inference that the body is a State entity; (b) another important indicator is discharging of important *public function* with state support being an irrelevant consideration (c) a corporation is an *agency or instrumentality of the government* for carrying on a business for the benefit of the public.

Subsequently in *M.C. Mehta v. Union of India*[53] Supreme Court of India encountered the question whether a private entity discharging important public functions can be a State. Bhagwati J., though expressed his intention to include private authorities under State left the matter undecided on grounds of laxity of time[54] but in spite of this the case remains important as the Court observed that the American doctrine of State Action might be applicable in India, and therefore, all the functions of a body judged as "State" need not be public functions.[55]

Regarding BCCI, starting from *Mohinder Amarnaths' Case* the public functions performed by BCCI was put into limelight. In *Ajay Jadejas' Case* Delhi High Court held that the function like selecting team is a public function and the same has been reiterated by Supreme Court *in Rahul Mehras Case*.[56] Later in *Netajis Case* also Apex Court reaffirmed this view and imposed upon BCCI the duty to act fairly and reasonably in the manner of conducting elections.

Subsequently in *Zee Telefilms Case* there had been a detailed discussion on the public functions performed by BCCI and it was observed by the Minority Bench that a body discharging public functions and exercising monopoly power would be an authority under Article 12. BCCI exercises functions like controlling and regulating the game of cricket. It has final say in the matters of selection and disqualification of players, umpires and others connected with the game touching upon their right to freedom of speech and occupation. It makes law on the subject which is essentially a state function in terms of Entry 33 of the Seventh Schedule[57] to the Constitution;[58] it

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52 (Opinion of Mathew J. can be taken into consideration in this regard, "Another factor which might be considered is whether the operation is an important public function. The combination of state aid and the furnishing of an important public service may result in a conclusion that the operation should be classified as a state agency. If a given function is of such public importance and so closely related to governmental functions as to be classified as a government agency, then even the presence or absence of state financial aid might be irrelevant in making a finding of state action. If the function does not fall within such a description, then mere addition of state money would not influence the conclusion.") *Ibid* note 51, at para 98

53 AIR 1987 SC 1086 [*M.C. Mehta Case*] (The question that arose in *MC Mehta's case* was whether victims of a gas leak from a private chemical and fertilizer plant could sue for compensation under Article 32 of the Constitution.)

54 It must be noted that the matter was left undecided by the Court in spite of the fact that the activity of producing chemicals and fertilizers is deemed by the State to be an industry of vital public interest, whose public import necessitates that the activity should be ultimately carried out by the State itself. In fact Chemicals and Fertilizers industries are placed in the First Schedule as Items 19 and 18 respectively, which according to the objectives of the Policy Resolutions. The Industries (Development and Regulation) Act of 1951 and Section 2 of the same to be controlled by the Union in public interest.

55 This view was later upheld by the minority in the *Zee Televisions case* by Sinha J.

56 ("When the Government stands by and lets a body like BCCI assume the prerogative of being a sole representative of India for cricket by permitting BCCI to choose the team for India for appearance in events like the World Cup, then it necessarily imbues BCCI with the public functions, at least in or far as the selection of the team to represent India and India's representation in International Cricket, and regulation of Cricket in India is concerned.") *Supra* note 32, para 15.

57 CONSTITUTION OF INDIA Entry 33 of the Seventh Schedule: ("Theatres and dramatic performances; cinemas subject to the provisions of entry 60 of List I; sports, entertainments and amusements.")

58 *Supra* note 37, para 173

thus acquires status of monopoly.[59]

It must also be noted that with the coming of IPL the powers of BCCI has extended by leaps and bounds. It is the sole body which regulates television and broadcasting rights which also involves the rights of the viewers to witness the match on television and other visual media.[60] It has powers relating to awarding of franchises, endorsements, distribution of prize money, selection of players, their disqualification etc. BCCI thus enjoys unbridled monopoly power. But it is not bound by any effective provisions of law or regulations or control by the government, also it is not bound to act fairly and reasonably within the meaning of Article 14 of the Constitution. According to minority view, performance of a public function in the context of constitution would be to allow an entity to perform as an authority under Article 12 which makes it subject to constitutional discipline of fundamental rights. Except in the case of disciplinary measures, the Board has not made any rule to act fairly or reasonably.[61]

Position in U.S.A.

In US corporations or associations private in character, but dealing with public rights have already been held subject to constitutional standards by applying various tests.[62] Public Functions test implies that "when one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created."[63] According to this doctrine "when private individuals or groups are endowed by the state with powers or functions governmental in nature, they become agencies or instrumentalities of the State."[64] Later in 1974 Court held that in order to attract the doctrine of State Action, the functions carried out by the

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[59] (It (BCCI) has, thus, enormous power wields great influence over the entire field of cricket. In sum, the control of the Board over the sport of competitive cricket is deep and pervasive, nay complete. Its monopoly status is undisputed.), *supra* note 37, para. 227 and 229

[60] As held by the Court in Secretary, Ministry of Information & Broadcasting, Government of India and Others v. Cricket Association of Bengal and Others (1995) 2 SCC 161 at para 75, ("the game of cricket involves the right of the telecaster and that of the viewers. The right to telecast sporting event will therefore also include the right to educate and inform the present and the prospective sportsmen interested in the particular game and also to inform and entertain the lovers of the game.)

[61] *Supra* note 37, para 142, also see Ramana Dayaram Shetty v. International Airport Authority (1979) 3 SCC 499 at 503

[62] JOHN E. NOWAK, RONALD D. ROTUNDA, *ET. AL.*, CONSTITUTIONAL LAW, 497-525 (1983) In United States of America a public body would answer the description of a state actor if one or the other tests laid down therein is satisfied on a factual consideration and therefore the cumulative effect of all or some of tests is not required to be taken into consideration. *Supra* note 37, para 124

[63] Hale C.J. in Munn v. Illinois 94 U.S. 113 (1877) (Further in *Civil Rights Case* 109U.S.3(1883) Harlan J. in his dissenting opinion observed that railroad carriers and inn keepers performed important public functions and were akin to public servants. Therefore, the protection afforded by the Thirteenth Amendment would be applicable against them. Interestingly, in analyzing the case of places of public amusement, he found that Congress could enforce the rights of blacks in relation to public accommodations, facilities and public conveyances since discriminations in those "public" or a "quasi-public" function was a continuing badge of servitude.)

[64] Evans v. Newton (1966) 382 U.S. 296

Corporation must be 'public function closely related to the governmental functions.'[65]

In U.S. Public functions doctrine became stronger with the decision in *Marsh v. Alabama,*[66] wherein the question arose was whether a private township could prevent a person from distributing religious literature i.e.; applicability of the first and fourteenth amendments to the conduct of the corporation that owned the town. The majority opinion delivered by Black J. was premised on the notion that the more an owner opens up his property for use by the public in general for his advantage, the more do his rights become circumscribed by the statutory and Constitutional rights of those who use it. Interestingly, the Court opined that even in cases where the State had merely acquiesced to an entity performing an important public function, the entity would be subject to Constitutional standards.

Another test which is applied by the Court is 'Entanglement Test'. In *Brentwood Academy v. Tennessee Secondary School Athletic Association*[67] Court held that sport-association can be sued as a state actor because its actions and history have been "entangled" with state action. The Court acknowledged that the analysis of whether state action existed was a "necessarily fact-bound inquiry" and noted that state action may be found only where there is "such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself".[68] Following the judgment, in *Communities for Equity V. Michigan High School Athletic Association*[69] US Supreme Court held that Michigan High School Athletic Association is a 'state actor' and thus is subject to the Equal Protection Clause of the Fourteenth Amendment.

If these principles are squarely applied to bodies like BCCI it would become an instrumentality of State under Article 12. The traditional principles are inappropriate to meet the ends of justice in cases like BCCI. As opined by the minority bench in *Zee Telefilms case* "the traditional tests of a body controlled financially, functionally and administratively by the Government as is laid down in *Pradeep Kumar Biswas* would have application only when the body is created by the State itself for different purposes but incorporated under the Companies Act or the Societies Registration Act. Those tests may not be applicable in a case where the body like the Board (BCCI) was established as a private body long time back."[70]

Earlier there had been instances like *Netaji case* and *Central Inland Water Transport Corporation v. Brojonath Ganguly*[71] wherein Court translated public law norm of

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[65] Jackson v. M.E. Co. (1974) 419 U.S. 345

[66] 326 U.S. 501 (1946)

[67] 531 US 288; (The question was whether the actions of an interscholastic sport-association that regulated sports among Tennessee schools could be regarded as a state actor for First Amendment and Due Process purposes. The Court stated that TSSAA's "nominally private character... is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings.")

[68] *Supra* note 37, para. 123.

[69] 377 F3d 504; (This case posed a question regarding the application of the state action doctrine of the Fourteenth Amendment to a state high school athletic association that sets rules for athletic programs throughout the State of Michigan.)

[70] *Supra* note 37, para. 173.

[71] (1986) 3 SCC 156

anti-arbitrariness contained in Article 14 into private law norm of public policy as required under Section 23 of the Contract Act.[72] Similar was the dictum of Saghir Ahmad, J. in awarding compensation to a rape victim for the violation of her right to live life with dignity under Article 21, independent of any constructive causal link with the State authorities.[73] There are similar instances in environmental pollution cases.[74] But judicial activism regarding horizontal application of fundamental rights is halted and is not found as a welcome trend by Indian judiciary.[75]

Conclusion

The vertical application of fundamental rights is based on the theory of 'Classical Liberalism' which emphasizes on the preservation of the private sphere against coercive State intrusion.[76] With the foray of neo-liberalization governmental policies like deregulation, privatization, disinvestment etc. has whittled down the extent of state power. As a result of neo-liberalization private actors can infringe the fundamental rights of the people. This state of affairs poses a challenge to the rights constitutionalism as to whether it can protect the freedom and autonomy of the individuals in the age of globalization. An apt solution to this is subjecting the private actors to constitutional limits by expanding the definition of "State" under Article 12.[77] Only then the aims and aspirations of Constitution makers can be realised to the fullest extent possible. As Holmes put it "A word in the Constitution is not crystal clear, transparent and unchanging; in the more important interpretative parts, the constitutional words are the skins of living thoughts which change with the times and as society changes."[78]

Suggestions

Lord Denning recognized many years ago that domestic bodies like the Stock Exchange, the Jockey Club, the Football Association and major trade union have "quite as much power as statutory bodies and that they can make or mar a man by their

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[72] UDAI RAJ UDAI, FUNDAMENTAL RIGHTS AND THEIR ENFORCEMENT 714 (2011)

[73] Bodhisattwa Gautam v. Subra Chakraborty, (1996) 1 SCC 490 at 499; Ashish Chugh, *supra* note 48; also see 'X' v. Hospital 'Z' 1998 (8) SCC 296, Vishaka v. State of Rajasthan AIR 1997 SC 3011; V.N. SHUKLA, *supra* note 46

[74] M.C. Mehta v. Union of India, (1987) 1 SCC 395 at 419, Indian Council for Enviro-Legal Action v. Union of India, (1996) 3 SCC 212 at 238, M.C. Mehta v. Kamal Nath 2000 (6) SCC 213

[75] Hina Doon, *The Doctrine of State Action - Politics of Lawmaking: A Comparison of US & Indian Constitutional Law*, 5 NALSAR STU. LAW REV. 1-16 (2009); (to Anderson, two developments in particular have resulted in (some) constitution lawyers no longer treating private power as a peripheral issue: the extent to which, as result of the reconfiguration of the state, private actors are now deeply involved in the performance of traditional state function, and the political concern over the exercise of private power, and the extent to which this threatens rights constitutionalism's goals of protecting freedom and autonomy), GAVIN W. ANDERSON, *supra* note 2

[76] Ashish, *supra* note 74 (In the liberal philosophy of the moderns the most rational form of organization was one that gave priority to individual freedom and that was to be delivered through the modern state upon which political and legal sovereignty is located. It is this power which makes the state as the supreme source of laws and guarantees protection of individuals from capricious interference with their liberty.) *Id.* at p. 5

[77] GAVIN, *ibid* at p. 9, V. N. SHUKLA, *supra* note 74, at p. 20

[78] ARTHUR SELWYN MILLER, SOCIAL CHANGE AND FUNDAMENTAL LAW: AMERICA'S EVOLVING CONSTITUTION 349 (1979)

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68 *Supra* note 37, para. 123.

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[78] ARTHUR SELWYN MILLER, SOCIAL CHANGE AND FUNDAMENTAL LAW: AMERICA'S EVOLVING CONSTITUTION 349 (1979)

decisions.[79] Similar is the case of BCCI. It is quite true that BCCI is an autonomous body having its own rules and regulations and it do not take any financial aid from the government. But that does not belittle the importance of the public functions and duties performed by it. Besides there is state encouragement for the game directly as well as indirectly which gives it a 'state-like' identity. Taking this into account BCCI can be held as an instrumentality of State under Article 12 of the Indian Constitution. As recommended by National Commission on the Review of the Working of the Constitution amendment to Article 12 of the Constitution must be carried out in order to include private non-state entities like BCCI which discharge important quasi governmental or important public functions, which have repercussions on the life and welfare of the community under the definition of 'State'. Moreover the 'public policy' with regard to BCCI should not be limited to BCCI Rules and Regulations and Societies Registration Act rather it has to be judged in the light of constitutional provisions also.

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[79] Breen v. Amalgamated Engineering Union (1972) 2 Q.B. 175, 190

IMPACT OF GLOBAL WARMING ON BIO-DIVERSITY IN INDIA

SAVITA L. PATIL *

I. INTRODUCTION

India is rich in biological diversity. Both animals and plants are found in a wide variety of habitats which range from the wet tropical rain forests of the very heavy rainfall zone to the thorny forests of the desert zone and the mixed moderate forests of the hills. Biodiversity plays a significant and valuable role in maintaining the stability in the existence of organisms in the biosphere.[1]

The term 'biodiversity' encompasses the variety of all life on earth. It is identified as the variability among living organisms and the ecological complexes of which they are part, including diversity within and between species and ecosystems.

In its narrowest sense this term refers to the number of species on the planet, and also diversity can be defined as the number of different items and their relative frequency. For Biological diversity[2] , these items are organized at many levels, ranging from complete ecosystems to the chemical structures that are the molecular basis of heredity.[3]

The process of development which although meant for human happiness have become responsible for the disasters particularly in the context of ecology and environment.[4]

Environmental and developmental issues are intimately connected. Most environmental issues are related to either the interaction between human population and natural resources, that is, those caused by taking resources from the environment or putting waste products into the environment (natural resource consumption) or factors associated with the sheer growth in human populations.[5]

The global environmental problems are the direct or indirect consequence of local

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1 N Satish Gowda, "Biodiversity: Measures to Conservation and its Effectiveness", Kar.L.J, 2010(1), p.68

2 Section 2(b) of Biological Diversity Act, 2002: "Biological diversity" means 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 eco-systems;

3 N Satish Gowda, Supra note 1, p.69

4 Dr. Subhash Chandra Singh, "Global Dimensions of Ecological Crisis: The Discourse of Sustainable Use of the Earth Planet", Vol-30, IBR, Pp. 391-392

5 M S Rathore, "Environment and development: Areas of Conflict and Convergence", Environment and development, edited by M S Rathore, Jaipur and New Delhi: Rawat Publications, 1996, P. 18.

and individual actions. Man's desire, propensity and capability to achieve "development" has led to environmental problems such as global warming, greenhouse gas effect, climate change, ozone layer depletion, acid rain, sea level rising and loss of biological diversity on the planet.[6]

Some of the anthropogenically induced processes like deforestation is contributing substantially to the increasing atmospheric concentration of carbon dioxide resulting in global warming which will have an impact on the global climate adversely leading to extensive loss of biodiversity.[7]

Biological diversity has direct consumptive value in food, agriculture, medicine, industry and has aesthetic and recreational value. It also maintains ecological balance and continues evolutionary process. Thus, there is a need to protect biological diversity.

There have been several international treaties and pacts relating to it, the latest and most comprehensive being the Convention of Biological Diversity (CBD) and the United Nations Framework Convention on Climate Change (UNFCCC). Both these Conventions are complementary to each other; the measures adopted therein reinforce each other. India is committed to contributing towards achieving three objectives of the CBD as well as close monitoring of the greenhouse gases (GHGs) level. India is an active participant in all international conventions and has been positively responding to her commitments.

The treaties oblige the ratifying countries to curb emissions and protect biodiversity, and to move towards the sustainable use of biological resources and to ensure that benefits from such use are shared equitably across local, regional, national and global societies. India ratified these conventions and has come up with a National Action Plan on Climate Change (NAPCC) in June 2008 and has enacted The Biological Diversity Act, 2002.

II. CAUSES AND EFFECTS OF GLOBAL WARMING

Environmental degradation has emerged as a major global concern for human survival. With the advent of science and technology and with the invention and application of modern scientific equipment and rapid industrialization there is an increase in green house gases. As a result of this, the earth's temperature is increasing and posing a threat to humanity.[8]

Human activities are substantially increasing atmospheric concentration of greenhouse gases like carbon dioxide, methane, nitrous oxide, chlorofluorocarbons (CFCs) and water vapor which have the capacity to significantly warm the climate. These gases are transparent to incoming short-wave radiation, but they block outgoing long-wave radiation, leading to an increase in both surface radiation and surface

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6 Ali Mehdi, 'Climate Change and Biodiversity: India's Perspective and Legal Framework, JILI, Vol. 52:3 & 4, p. 343

7 Bo R. Doos, "Environmental Issues Requiring International Action", Environmental Protection and International Law, edited by W. Lang, H Neuhold and K Zemanek, Graham & Trotman Ltd, London, 1995, P. 54

8 Dr. Sukanta K Nanda, "Environmental Law", Allahabad : Central Law Publications, I Edition, 2007,P. 326

temperature. These increases in turn, it is hypothesized, lead to changes in climate. Concentrations of the greenhouse gases are so named because they act like the panes of glass in a greenhouse.

Greenhouse gases are released by the burning of fossil fuels, land clearing and agriculture, etc. and lead to an increase in the greenhouse effect. Thus man made, or anthropogenic, emissions of greenhouse gases will enhance the greenhouse effect, resulting on average in an additional warming of the earth's surface, or "Global Warming". This leeds to what is called "Climate Change".[9]

The green house effect plays a crucial role in maintaining a life-sustaining environment on the earth. If there was no green house effect in our atmosphere, the situation would be something different. The temperature of the earth is determined by the amount of incoming solar radiation that reaches and heats the surface. The green house gases in the atmosphere allow the sun's ultraviolet radiation to penetrate and warm the earth and they absorb the infrared energy that radiates back in to the atmosphere. By blocking the escape of this radiation, these gases effectively form a blanket around the earth.[10]

But an increase in global temperatures can in turn cause other changes, including a rising sea levels and changes in the amount and pattern of precipitation. These changes may increase the frequency and intensity of extreme weather events, such as floods, droughts, heat waves, hurricanes, and tornados. Other consequences include higher or lower agricultural yields, glacial retreat, reduced summer stream flows, species extinctions and increase in the ranges of disease vectors[11] which will have serious effects on humans and other mammals.

Ecosystems, with their specific flora and fauna, are especially vulnerable to negative impact from global warming. Climate change could alter species composition and dominance, resulting in ecosystem level changes. Some species, which are currently classified as "critically endangered", could become extinct with a quarter of the species estimated to be at the risk of extinction. The most fundamental effects of climate change are intensification and disruption of the water cycle. Intensification of the water cycle will produce severe droughts in some places and floods in others.

The impacts of climate change will be additional to the current threats to forest ecosystems and biodiversity, further increasing their vulnerability.

III. CONSERVATION OF BIODIVERSITY

Conservation of biodiversity has gained worldwide momentum. 'Biodiversity' is defined as the variability among living organisms and the ecological complexes of which they are part, including diversity within and between species and ecosystems. Biodiversity manifests at species, genetic and ecosystem levels. It has also been defined as "the variety and variability among living organisms and the ecological complexes in which they occur." It is said that this concept encompasses three types of diversity:

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9 "The Greenhouse Effect; Facts and Figures", Climate Change, UNEP, Industry and Environment, January-March, 1994, p.4.

10 Dr. Sukanta K Nanda, Supra note 8, P. 326

11 http://en.wikipedia.org/wiki/global-warming, visited on 29th Jan 2013.

"genetic diversity", which is the genetic variability among individuals within a single species breeding population; "species diversity" which is the number and variety of species within a single ecological community; and "ecosystem diversity", which is the number of ecosystems within a larger geographical unit such as a country.[12]

The reasons for conserving nature and biodiversity are essentially threefold. First, biodiversity provides an actual and potential source of biological resources (including food, pharmaceutical, and other material values which support fisheries, soil condition, and parks). Secondly, biodiversity contributes to the maintenance of the biosphere in a condition which supports human and other life. Thirdly, biodiversity is worth maintaining for non-scientific reasons of ethical and aesthetic value.[13]

Biodiversity maintains the ecological balance and continues the evolutionary process. The indirect ecosystem services provided through biodiversity are photosynthesis, pollination, transpiration, chemical cycling, nutrient cycling, soil maintenance, climate regulation, air, water system management, and waste treatment.[14] The depletion of biodiversity also leads to extinguishment of certain species, so it has become necessary to take steps to conserve and protect it.

Even from the economic point of view preservation of biodiversity is very important. It has potential to yield money and food. If high yielding crop varieties become extinct and if new high yielding varieties are not invented, poor countries which invariably suffer from poor management of their biological diversity, will suffer from food crisis. Besides being of economic importance, the preservation of biodiversity can also be used for profit making by using it for commercial purposes, particularly by developing and giving importance to eco-tourism. Thus the recreational value of such conservation can be better utilized. So, there is a need to maintain a balance between environment and conservation of the natural resources.[15]

Iin this connection, the United Nations Environment Programme (UNEP) took the load role and requested the States to examine the possibility of developing on conservator an international legal regime of a comprehensive nature. An *ad hoc* working group of experts was constituted to discuss the matters relating to biological diversity. After a series of meetings and discussions which included expression of divergent views, an International Convention on Biodiversity was held at Nairobi in May 1992, which was later presented in the Rio Conference for approval. The Rio Conference, besides the Rio Declaration adopted two international conventions and the Convention on the Biological diversity was one.

The Convention on Biological Diversity is first of its kind, which is a comprehensive and binding agreement covering the use and conservation of biodiversity. For this purpose, the convention needed the co-operation of all countries. This requires the countries to develop and implement strategies for sustainable use and protection of

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12 Dr. Sukanta K Nanda, Supra note 8, P. 338-339

13 Philippe Sands QC, "Principles of International Environmental Law", Cambridge University Press, U K, second Edition, P. 500.

14 N Satish Gowda, Supra note 1, p.70

15 Dr. Sukanta K Nanda, Supra note 8, P. 340

biodiversity. It provides a forum for continuing international dialogue on bio-diversity related issues through the annual conference of the parties meeting.[16]

The convention in its Preamble speaks about the consciousness of the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components. It affirms that the conservation of biological diversity is a common concern of human kind and the States have sovereign rights over their own biological resources and also the States are responsible for conserving their biological diversity and for using their biological resources in a sustainable manner.[17]

This convention is an international legal instrument for the Conservation and sustainable use of Biological Diversity taking into account "the need to share cost and benefits between developed and developing countries and the ways and means to support innovation by local people."

Thus, in pursuant to the United Nations Convention on Biological Diversity, 1992 India has enacted The Biological Diversity Act, 2002.

IV. IMPACT OF GLOBAL WARMING ON BIO-DIVERSITY IN INDIA

Threats to biodiversity come from several sources. Tropical deforestation is readily cited as the main issue, but serious threats are also posed by the destruction of temperate forests, wetland and coral reefs. Human activity contributes to the destruction of nature and the loss of biodiversity through direct activities (hunting, collection and persecution) and indirect activities (habitat destruction and modification from industrial, agricultural and other activities).[18]

India covers about 2.5% of the world's land area and accounts for 7.8% of the recorded species of the world including 45,500 plants and 91,200 animals in only 70% of the area surveyed. India is one of the 17 mega diverse countries and houses world's two of the diversity hotspots, namely eastern Himalaya and Western Ghats. Major threat to such biodiversity rich regions is due to disproportionate destruction of forest and even climate change negatively affects forests including biodiversity wiping out the species.[19]

Thus, the rich biodiversity of India is under severe threat owing to habitat destruction, degradation, fragmentation over-exploitation of resources and global warming. Increasing the speed of economic growth without exhausting the resources and at the same time fulfilling the basic needs of a large growing population is one of the great challenges facing India.[20]

A changing global climate resulting in global warming threatens the species and ecosystems. The distribution of species (biogeography) is largely determined by climate, as is the distribution of ecosystems and plant vegetation zones (biomes).

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[16] Ibid

[17] Ibid

[18] Philippe Sands QC, Supra note 13, p.499.

[19] Ali Mehdi, Supra note 6, p. 352.

[20] M.S. Rathore, Supra note 5, P. 20.

Thus, the loss of biodiversity is another major environmental crisis. The growing population and mismanagement of forest habitats, especially flora and fauna cause gradual loss and destruction of forest ecosystem. India is the number 12 in plant rich country in the world. The Botanical Survey of India estimated 45,000 plant species in our country out of which nearly 1500 plant species were found to be on the verge of extinction.[21]

Deforestation due to human activity leads to mass extinction of various species having specific food and habitat needs. Habitat fragmentation is a further aspect of habitat loss that often goes unrecognized. The forest, meadow, or other habitat that remains is generally in small, isolated bits rather than in large, intact units. For the future, habitat loss, degradation, and fragmentation combined are the single most important factor in the projected extinction crisis.

Extinction is a natural process. Species have disappeared and new ones have evolved to take their place over the long geological history of the earth. The World Conservation Monitoring Centre has recorded that 533 animal species (mostly vertebrates) and 384 plant species (mostly flowering plants) have become extinct since the year 1600. More species have gone extinct from the islands than from mainland or the oceans.[22]

Though economic and political features of the developed countries are mainly responsible for global environmental problems; the developing world should not be oblivious to its own environmental degradation. In India, developmental policies have resulted in degraded soil, depletion of water tables, increased floods, desertification, water logging and salinity, pollution of water and air, loss of biodiversity, etc.[23]

The rate of species and habitat loss has not been precisely quantified. It has been estimated that continued loss at the current rate would destroy up to 15 per cent of the earth's species over the next twenty-five years, with twenty to seventy five species per day being condemned by 2040. The loss of habitat to farm land, rangelands and human and industrial settlement since pre-agricultural times appears to be equally dramatic. It has been estimated that most habitats have been reduced to less than half their pre-agricultural extent, and the past two or three decades have led to serious loss: Habitat loss is not the only threat to biodiversity. Other threats include: over-exploitation of plant and animal species; water, soil and air pollution; and industrial agriculture and forestry. Ozone depletion and climate change are expected to bring additional threats.[24]

The preamble to the U N Framework on Climate Change acknowledges that change in the earth's climate and its adverse effects are a common concern of humankind. It has expressed concern that human activities have been substantially increasing the

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21 "Man-Environment Relationship", Civil Services Chronicle, IAS 2012 Value Edition-3, p. 31

22 "Ecological Systems: Threats and Measures", Civil Services Chronicle, IAS 2012 Value Edition-3, p. 26.

23 Vijay S Vyas and V Ratna Reddy, "Environmental Policies and Policy Implementation in India: An Assessment", Environment and development, edited by M S Rathore, Jaipur and New Delhi: Rawat Publications, 1996, Pp. 169-170.

24 Philippe Sands QC, Supra note 13, p.500.

atmospheric concentrations of greenhouse gases, these increases enhance the natural greenhouse effect and that will ultimately result in additional warming of the earth's surface and atmosphere inflicting adverse impacts on the natural ecosystem and humankind. Approximately 20-30 per cent of plants and animals assessed so far are feared to be at the risk of extinction if increase in global average temperature exceeds 1.5 to 2.5 °C. The impact of climate change is multiple and long term involving sea level rise & temperature increase, forcing changes in biodiversity and the basic capabilities of the future generation.

V. MEANS AND METHODS OF MITIGATING ADVERSE EFFECT

The ways, in which human beings have changed and are changing the face of the earth and the human role in the natural processes and systems have drawn the attention not only of natural scientists but also of social scientists as well as of planners and policy makers.[26]

Traditional efforts at custodial management have generally not been successful and the average rate of species extinction has continued to increase. Reasons cited for the lack of success include the fact that the boundaries of protected areas often follow a political rather than an ecological course; that many such areas are too small to be effective; and that conflicts frequently arise with local communities who see the establishment of such areas as a limitation on their right to economic and other development. The reasons may vary from region to region.

Many international environmental agreements regulate specific habitats, species or species types. They fall into eight basic categories which have as their primary purpose the conservation and enhancement of : wetlands, forests, plants, soil and land, marine living resources, birds, land animals, and migratory species. In addition, three agreements specifically address cultural and other heritage, including the heritage of nature and natural resources.[27]

The Inter governmental Panel on Climate Change (IPCC) says that even if global emissions could be held at current level - an ambitious goal, considering present trends in energy use - the concentration of carbon dioxide in the atmosphere would not stabilize for several hundred years which may continue to adversely affect the biodiversity[28]

The Rio Declaration

The United Nations Conference on Environment and Development (UNCED) took place in 1992 in Rio de Janeiro, Brazil. Government officials from 178 countries and between 20,000 and 30,000 individuals from governments, non governmental organizations and the media participated in this event to discuss solutions for global problems such as poverty, war and the growing gap between industrialized and developing countries. It emphasized that economic and social progress depends

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[26] Ali Mehdi, Supra note 6, p. 345

[27] Supra note 22, p. 29

[27] Philippe Sands QC, Supra note 13, p.543

[28] Dr. Sukanta K Nanda, Supra note 8, P. 328

critically on the preservation of the natural resource base with effective measures to prevent environmental degradation.[29]

A set of 27 principles designed to commit governments to ensure environmental protection and responsible development and intended to be an Environmental Bill of Rights. Rio 1992 gave a good impulse to the further development of international environmental law. Six conventions came out of Rio 1992 some of which have been converted into the next and more decisive phase, namely protocols, from which point they would become ratified in their respective countries.

The United Nations Framework Convention on Climate Change:

This is an international agreement aimed at the stabilization of atmospheric concentrations of global greenhouse gases to prevent dangerous climate change as a result of, anthropogenic greenhouse gas emissions. The objective of the treaty is to "stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."[30]

The treaty itself sets no binding limits on greenhouse gas emissions for individual countries and contains no enforcement mechanisms. Five years after the adoption of the UNFCCC, on 11 December 1997, governments took a further step forward and adopted the landmark Kyoto Protocol.

Kyoto Protocol to the United Nations Frame-work Convention on Climate Change, 1997: In 1995 several nations agreed that voluntary reductions in so called greenhouse gases were not working. The group set a deadline - namely the Kyoto Conference - to establish legally binding targets for reducing emissions in carbon dioxide, methane and nitrous oxide. Therefore a conference was held at Kyoto on climate change on December 1, 1997 to review the progress made in five years from UNFCCC 1992 and to formulate plans and fix strategies and objectives for the future.

The parties to the UN Framework Convention on Climate Change, in pursuit of the ultimate objective, as stated in Article 2 of the Convention agreed to fulfil the obligations contained in the Convention through the Kyoto Protocol.

India has undertaken numerous response measures that are contributing to the objectives of the United Nations Framework Convention on Climate Change and has announced a National Action Plan on Climate Change in June, 2008. The NAPCC is coordinated by the Ministry of Environment and Forests and implemented through the nodal Ministries and is aimed at advancing relevant actions in specific sectors/ areas. Eight national missions in the areas of solar energy, enhanced energy efficiency, sustainable agriculture, sustainable habitat, water, Himalayan ecosystem, increasing the forest cover and strategic knowledge for climate change form the core of NAPCC. The NAPCC consists of several targets on climate change issues and addresses the urgent and critical concerns of the country in curbing global warming.

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29 "Addressing the Challenges through Conventions", Civil Services Chronicle, IAS 2012 Value Edition-3, p. 76

30 http://en.wikipedia.org/wiki/United_Nations_Framework_Convention_on_Climate_Change visited on 29th September 2012.

Convention on Biological Diversity

Another Convention is the United Nations Convention on Biological Diversity including the Cartagena Protocol on Bio-safety which is an international agreement to conserve biological species, genetic resources, habitats and ecosystems; to ensure the sustainable use of biological materials; and to provide for the fair and equitable sharing of benefits derived from genetic resources.

The Convention on Biological Diversity is an international legally-binding treaty with three main goals: conservation of biodiversity; sustainable use of biodiversity and fair and equitable sharing of the benefits arising from the use of genetic resources. Its overall objective is to encourage actions which will lead to a sustainable future. The conservation of biodiversity is a common concern of humankind. The Convention on Biological Diversity covers biodiversity at all levels: ecosystems, species and genetic resources.

It consists of two main protocols:

- **The Cartagena Protocol** on Bio-safety to the Convention on Biological Diversity is an international treaty governing the movements of living modified organisms (LMOs) resulting from modern biotechnology from one country to another. It was adopted on 29 January 2000 as a supplementary agreement to the Convention on Biological Diversity and entered into force on 11 September 2003.
- **The Nagoya Protocol** on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity is an international agreement which aims at sharing the benefits arising from the utilization of genetic resources in a fair and equitable way, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable use of its components. It was adopted by the Conference of the Parties to the Convention on Biological Diversity at its tenth meeting on 29 October 2010 in Nagoya, Japan.[31]

To give effect to CBD and to attain the objectives of the Convention, the Biological Diversity Act, 2002 was enacted by the Parliament in India in the year 2002. India is one of the few countries to have enacted such a legislation which primarily aims at giving effect to the provisions of CBD that is conservation of biological diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of utilization of genetic resources and regulates access to biological resources and associated traditional knowledge. The Act provides for a three – tier regulatory authorities at the level of centre, state and down to the local bodies for effective enforcement and regulating the activities in biodiversity rich areas by casting duties on the government to adopt measures to conserve diversity in living organisms.

Legal efforts to stabilize today's atmospheric concentration will not prevent additional green house warming of the atmosphere. It could moderate the pace and

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[31] Supra note 31, p. 79

magnitude of such warming. Stabilization at higher carbon dioxide levels expected to lead to greater warming.[32]

Legal efforts to address loss of biodiversity will therefore have to focus not only on the species and habitats which might be considered as requiring priority action, but also on these root causes if they are to have any long-term effects. Underlying these root causes are defective rules of national and international law, including modern land laws which are 'generally incompatible with the few remaining community property systems'; environmentally destructive subsidies; an international trading system which creates pressures to build national economies based on comparative advantage; and inadequate property rights which fail to provide incentives for conservation.[33]

VI. CONCLUSION

Loss of biodiversity, deforestation and soil erosion directly or indirectly affect all of us. Biological diversity has direct consumptive value in food, agriculture, medicine and industry. It also has aesthetic and recreational value and it maintains ecological balance and continues evolutionary processes. Thus, in this lies the need to protect biological diversity.

The threats to biodiversity come from a multitude of sources, requiring a comprehensive approach to regulation of a broad range of human activities which present greater regulatory challenges to international law than any other environmental issue. The conservation of biodiversity illustrates clearly the range of difficulties which exist in developing and applying rules of international law to resources which frequently do not respect national boundaries or are found in areas beyond national jurisdiction, and which require full consideration to be given to the social, cultural, ecological and economic values which different people place on different species.

The UNFCCC and the CBD are the only two conventions which have the potential to combat climate change and protect all species in any habitat in the world. The conference of the parties of both Conventions have become important international fora for addressing conservation issues, and developing new regulations and instruments, and has a wide range of global perspectives to the national and local ones.

The threefold objective of the CBD spells are 'the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.

The linkages between climate change and biodiversity being very fragile can only be maintained by taking precautionary measures through appropriate law and strict adherence to such Law.

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32 Dr. Sukanta K Nanda, Supra note 8, p. 329

33 Philippe Sands QC, Supra note 13, p.500

PROTECTION OF TRADITIONAL KNOWLEDGE: NEED FOR A SUI-GENERIS SYSTEM OF LAW

GOWRI B. CHANAL*

I. INTRODUCTION

Today, proection of intellectual property is characterised by the fact that it is extremely well developed in certain areas while other areas have been largely left aside. The focus of existing intellectual property protection frameworks is on what are deemed to be the most advanced fields of technological enquiry and to provides incentives for certain forms of technological innovations. This system nevertheless has a corollary that other forms of knowledge are generally deemed unworthy of legal protection. In recent years, the dichotomy between protectable knowledge and other knowledge has become increasingly sensitive in view of the fact that what is protectable knowledge always builds on some pre-existing knowledge. There are in fact two main categories of problems that need to be addressed. Firstly, intellectual property protection does not, in principle, apply to knowledge which is in the public domain. This implies that all knowledge which is shared even between a few people in one given location is generally deemed to be in the public domain. Secondly, intellectual property rights frameworks are ill-equipped to reward innovations that are not in fields which are deemed to be the most advanced and sophisticated. This tends to belittle the contribution that non-high technology innovations can make to sustainable development, in particular in rural settings. The focus of traditional knowledge stems from the recognition that existing intellectual property rights frameworks are neither capable of rewarding innovations at the local level nor of providing incentives for conserving existing knowledge.[1]

Traditional knowledge is nothing but the inheritance of ideas from generation to generation. Traditional knowledge can be found in various fields like food, use of natural resources, medicines etc. They are in the form of a song, a story, dance, techniques, beliefs, practices, rituals, mores etc. They have also been an essence of survival for certain communities.[2]

It is always said that the knowledge is valuable only when shared but as far as traditional knowledge is concerned, the concept of sharing has caused and is causing threat to the very knowledge and the knowledge holders or creators. Knowledge is

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1 Philippe Callet, "*Intellectual Protection Rights and Sustainable Development*", (New Delhi: Lexis Nexis Butterworths), 2005, pp. 287,288

2 Savitha S., "*Protection of Traditional Knowledge-A Cause for Concern*", edt, by C.B.Raju, "Intellectual Property Rights", (New Delhi: Serials Publications, 2007), p. 211

transmitted by various methods like traditional practices and also by oral culture. The threat is claiming monopoly rights over such knowledge. In ancient times, the ideas were exchanged and propagated without expecting anything in return. One generation passed them on to the next generation in return for a pledge that they would be used for the benefit of the society and not adversely. Knowledge was free and precious in ancient days. But that is not the case today; there is interference from various regimes, which are trying to monopolise the traditional and the indigenous and to slay its very essence.[3] The sudden need to protect traditional knowledge has are seen because there is a global threat to such traditional and indigenous knowledge, which was for a very long time not a matter of concern at all. The adverse use of intellectual property right is the cause for it. Traditional knowledge is considered as a part of IPR and there are a lot of people who are claiming monopoly right over such knowledge ignoring the very base of such knowledge i.e., local people with such knowledge.[4]

II. MEANING AND DEFINITION OF TRADITIONAL KNOWLEDGE

There is no agreed definition for "traditional knowledge". WIPO, in its fact finding mission report, uses the term "traditional knowledge" to refer to " ... tradition based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields."[5]

WIPO also suggests that the terms "traditional knowledge" and "indigenous knowledge" could be interchangeable.[6] All indigenous knowledge is traditional knowledge but all traditional knowledge is not indigenous knowledge[7]. Traditional knowledge is widely known as a valuable attribute of biological diversity and is one of the important sources of sustainable development in most of the developing countries.[8] Traditional knowledge is a cumulative body of knowledge, know-how, practices and representations. They are maintained and developed by people with long histories of interaction with their natural environment. Traditional knowledge provides the basis for local level decision-making about many fundamental aspects of day-to-day life.[9]

The Convention on Biological Diversity (CBD) on the other hand, refers to

3 *Ibid*, pp. 211,212

4 *Ibid*

5 Balavanth Subhash Kalaskar, "*Traditional Knowledge and Sui-Generis System of Law*", Kar.L.J., 2010(4), p. 82

6 *Ibid*

7 Indigenous knowledge is the knowledge that people in a given community has developed over time, and continues to develop. It is based on experience, often tested over centuries of use, adapted to local culture and environment, dynamic and changing. It may be related to a common practice seen in communities that are indigenous to a specific area or the focus might be on the long history of the practices, in which case it is often called 'traditional knowledge'.

8 K.Venkataraman and S.Swarna Latha, "*Intellectual Property Rights, Traditional Knowledge and Biodiversity of India*", Vol. 13, JIPR, July 2008, pp. 327, 328

9 Some examples of traditional knowledge are use of tulsi for cough, use of turmeric to heal wounds, use of neem as a pesticide and as a cosmetic, Hoodia Cacus eaten by the people of Kalahari Desert in Southern Africa to fend off hunger and thirst.

indigenous people's knowledge, innovations and practices to highlight the intellectual effort of indigenous and local communities as they relate to biodiversity conservation and sustainable use.[10]

III. NATURE OF TRADITIONAL KNOWLEDGE

Traditional knowledge has been developed in many fields and is still evolving. It is technology or know-how capable of providing sustainable solutions to many modern day problems. One important and widely acknowledged aspect about traditional knowledge is that it implies static or necessarily old knowledge. Instead traditional knowledge is often dynamic and adaptive to changing cultural patterns and a wide range of external influences including occupation of indigenous people's lands, market pressures over certain resources, resettlement etc., and traditional knowledge often flows in oral forms and is not codified in writing or in systematised forms (i.e., books or databases).[11] Traditional knowledge has two features which are important in the context of IPRs. One, it is often collective in nature and is therefore considered a common resource of the entire community, not belonging to any single individual knowledge within the community. Two, the development of traditional knowledge, covering all aspects of life, is linked to the subsistence and livelihoods of the people who are part of this eco-system.[12]

IV. IMPORTANCE OF TRADITIONAL KNOWLEDGE

Traditional knowledge is the intellectual accretion of a community's attainment and experience over the ages. Isolating of it from the community's fold and allowing its commercialisation to the detriment of community's interests is infliction of injustice. That the community which caressed and developed indigenous knowledge of medicinal plants, biodiversity, oral traditions and visual arts should have exclusive right in the harnessing of such knowledge for the benefit of the community rather than becoming the victim of illicit exploitation by others is the thrust of international norms developed during the last two decades. This is a part of human rights development and the fruit of collective action of indigenous people's initiative.[13]

Traditional knowledge is developed through ILO Convention, Earth Declaration (1992), Mataatua Declaration (1993) and Convention on Biological Diversity. Traditional knowledge of indigenous community is protected through human rights norms, law of confidential information and law relating to Scheduled Areas in India. Another development in the area of traditional knowledge is exclusion of its patentability under the Patent Act, 1970.[14] In view of the serious abuses by patenting of indigenous medicines like neem, turmeric, quinine, smokebush and jar amla, this

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[10] *Supra Note* 5

[11] *Ibid*

[12] Rajshree Chandra, *"Intellectual Property Rights: Excluding other Rights of other people"*, Economic and Political Weekly, Vol. XLIV, No.31, p. 89

[13] Prof.[Dr.] P. Ishwara Bhat, *"Historical Evolution and Developments of Intellectual Property Rights: A Focus on Some Themes"*, Kare Law Journal, Nov. 2005, p. 29

[14] Sec.3 of the Patent Act, 1970 deals with "What are not inventions". Sec.3 (p) states, "An invention which in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components".

development is in the right direction.[15] Traditional knowledge in today's context is a very important resource for modern industries engaged in pharmaceuticals, cosmetics, agro-chemicals etc. To some extent they are the very essence of survival of indigenous people.[16]

The importance of traditional knowledge can be perceived by looking at somesimple facts: 85 % to 90% of the basic livelihood needs of the world's poor (more than half of the world's population, including indigenous and local communities) are based on direct use of biological resources (and related traditional knowledge) for food, medicine, shelter, transport, etc.; over 1.4 billion poor farmers rely on farm saved seeds and local plant breeding techniques as their primary source of seed; 57 % of the top 150 brand name drugs prescribed during a six month period in 1993, contained at least one major active compound derived or patterned on compounds from biological diversity and of the 35 plant derived drugs included in the top 150 best selling drugs, 94% contained at least one compound with proven use in traditional medicinal practices by indigenous and local communities. Areas of high concentration of biodiversity and the location of indigenous and local communities often coincide and evidence a pattern of close interrelation between nature, man and knowledge. Communities conserve, maintain, enhance and, in many instances, act as guardians of natural and biological resources.[17]

On the other hand, the importance of traditional knowledge also reflects itself in other ways. Modern technologies, including biotechnology, which manipulate, use, adapt or transform biological resources, often use either directly or indirectly, indigenous knowledge at some point during product research and development processes. Whether using ethno botanical information found in scientific literature or databases or through direct consultation and interaction with indigenous people, traditional knowledge serves an important purpose as a valuable input directing and orienting research activities of universities and companies particularly during initial stages of research. Sectors which have benefited from these inputs include: food, beverages, pharmaceuticals, chemicals, horticulture, agriculture and cosmetics.[18]

Traditional knowledge is mainly of a practical nature, particularly in such fields as agriculture, fisheries, health, horticulture and forestry. There is a growing appreciation of the value of traditional knowledge. This knowledge is valuable not only to those who depend on it in their daily lives, but to modern industry and agriculture as well. Many widely used products, such as plant- based medicines and cosmetics, are derived from traditional knowledge. Other valuable products based on traditional knowledge include agriculture and non-wood forest products as well as handicrafts. [19]

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15 *Supra Note* 13

16 *Supra Note* 2, p. 215

17 *Supra Note* 5, p. 83

18 *Ibid*

19 Madikonda Raju and Dokuparthi Shailaja, "*Traditional Knowledge Systems for Agricultural Sustaniability in Andhra Pradesh*", Vol. II, Issue 12, Orient Journal of Law and Social Sciences, Nov. 2008, p. 57

V. NEED FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE

Legal protection to traditional knowledge and the local community who possess such traditional knowledge is the need of the hour, thus avoiding its exploitation. There have been attempts to bring them under the legal umbrella. The role of intellectual property system in protecting the traditional knowledge is an idea perceived of late. Intellectual property rights should ensure that the rights of the holders of such knowledge are safeguarded and protected. The western world has worked and developed on traditional knowledge and invented medicines, cosmetics and other products and economically exploited the same but they have not compensated the holders of such knowledge in any manner. Such misappropriation of knowledge is also referred to as 'Biopiracy'.[20] It is nothing but larceny of traditional knowledge. To cite an instance of misappropriation, Turmeric *(Curcuma longa Linn)* and Neem *(Azadirachta indica A. Juss)* were traditional medicines used by our ancestors, but they were exploited and patented by some transnational companies. In these cases, invalid patents were issued because the patent examiners were not aware of the relevant traditional knowledge. Fortunately India was able to revoke the patents on these traditional medicinal plants due to submission of the record.[21]

For the following reasons traditional knowledge has to be protected:

1. to improve the lives of the holders and communities
2. to benefit national economies
3. to prevent 'biopiracy'
4. to protect the property rights of indigenous people
5. to protect human rights.[22]

VI. PATENTING OF TRADITIONAL KNOWLEDGE

To get a patent, the product or process must pass three criteria viz., novelty, inventive step and utility.

1. Novelty: The legal norms evolved to protect the new knowledge have a significant bearing on the manner in which the western system looked at science and scientific developments. In almost all cases the information related to traditional knowledge is in the public domain. Firstly, the novelty is almost lost inasmuch as the common public is aware of the invention and it is in use, i.e., prior knowledge and prior use of the invention. Secondly, the novelty is lost due to prior publication. Since the invention is already documented and available to the public for examination irrespective of whether it is read by the public or not.[23]

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[20] Action Group on Erosion, Technology and Concentration (ETC) defines 'Biopiracy' as "the appropriation of the knowledge and genetic resources of framing and indigenous communities by individuals or institutions seeking exclusive monopoly control (usually patents and plant breeder's rights) over these resources and knowledge".

[21] Other examples of bio-piracy of traditional knowledge are Basmati Rice *(Oryza sativa Linn)*, Hoodia *(Hoodia gordonii (Masson) Sweet ex Decne)*, etc.

[22] *Supra Note* 5, p. 83

[23] Kiran M. Nadagoudar, *"International Legal Regime Relating to Protection of Traditional Knowledge: An Analysis"*, Kar.L.J., 2005(5), p. 37

2. Inventive Step: One of the significant features of traditional knowledge is the fact of being passed on to the present generation by the previous one. This gives the prima facie impression that the present custodians of this knowledge are not the creators but only the successors in interest of the earlier creators. It is thus obvious that the present claimants have not contributed any independent thought, ingenuity or skill to establish a valid patent claim. In this context existing traditional knowledge will remain as a prior art rather than a new art for patent protection.[24]

3. Utility: One of the positive aspects of traditional knowledge is its use to the society.[25] It is only that knowledge that is found to be of social use that has been passed on to the next generation. It is the proven success of the information that qualifies for its long existence and use in the society as traditional knowledge. It can be said that traditional knowledge cannot fulfil the requirements of patents. So the patent system is of little use for the protection of the traditional knowledge from unauthorised use.[26]

The existing IPR regime is oriented towards the protection of an individual creator whereas in traditional knowledge it is difficult to identify the person who has created or developed it. So, it vests in the community or a group of persons. This aspect also forms the concept of traditional knowledge alien to the existing IPR regime. Thus, the concept of 'novelty', 'non-obvious' or 'inventive step' and 'utility', originality and fixation etc., which are used to find out the items that are protected through the formal intellectual property system are absent here. Hence, traditional knowledge and the products based on it have been kept outside the scope of the formal intellectual property system.[27]

VII. INTERNATIONAL INITIATIVES FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE

The following are some of the important developments that have occurred of late in the international level for protection of the traditional knowledge and safeguarding the rights of the holders of such traditional knowledge.

1. WIPO/UNESCO Model Provisions: Perhaps the first attempt perhaps for the protection of traditional knowledge was made by WIPO/UNESCO by adopting "Model Provisions" in 1982 for national laws on the protection of expressions of folklore. The provisions were developed to address concerns regarding illicit exploitation of expressions of folklore and several countries utilised these Model Provisions to enact national legal framework for providing such protection. Subsequently, in 1984 a group of experts, jointly convened by WIPO and UNESCO also recognised the need for international protection of expressions of folklore, in particular, with regard to the rapidly increasing and uncontrolled use of such expressions by usess of modern technology. Again, in 1997, the WIPO-UNESCO World Forum on the Protection of Folklore also recognised the need for new international standards for the legal

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24 N.S. Gopalakrishanan, *"Impact of Patent System on Traditional Knowledge"*, C.U.L.R., 1998, p. 227

25 *Ibid*

26 *Supra Note* 23

27 *Ibid*, pp. 38,39

protection of folklore. Pursuant to the recommendations of the world Forum, four Regional Consultations were organised by WIPO-UNESCO in 1999 to identify needs and issues, as well as proposals for future work, relating to expressions of folklore.[28] WIPO has brought traditional knowledge and intellectual property rights under the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore constituted in 2000.[29]

2. Convention on Biological Diversity (CBD), 1992: The provisions in the Convention to recognise and respect traditional knowledge of the local and indigenous communities in the genetic materials and share the benefit derived out of its use seem to be the first express international commitment. The Convention focuses on the preservation, protection and maintenance of knowledge, innovations and practices of the indigenous and local communities who symbolise the actual lifestyle relevant for the conservation and sustainable use of biological resources and encourage their wider application with the approval and involvement of the local and indigenous communities and by mutual agreement.[30] However, even in this Convention, the ownership of traditional knowledge was not addressed. Many countries are yet to bring out legislation to give effect to the provisions of the Convention.[31]

3. TRIPS Agreement (1994): 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 to protect through geographical indication the traditional knowledge associated with goods.[32]

4. Agenda 21: Agenda 21 calls upon governments and other institutions to provide a helping hand to the indigenous people in recognising and fostering traditional methods and knowledge.[33] It recognises the role of indigenous people in environmental management and development with their traditional knowledge and practices.[34]

5. International Labour Organisation (ILO): The ILO Convention on Indigenous and Tribal Peoples' is one of the major international treaties devoted to addressing indigenous peoples' rights. It focuses on the indigenous peoples' desire to control their own institutions and economic development as well as maintain their separate

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[28] S.K. Tripathi, *"Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore: International, Regional and National Perspectives, Trends and Strategies"*, JIPR, Vol. 8. Nov 2003, p. 470

[29] *Supra Note* 2, p. 218

[30] Art. 8(j) of the Convention on Biological Diversity, 1992

[31] *Supra Note* 28, pp. 470, 471

[32] *Ibid*, p. 471

[33] A.K.Kantroo, *"Protection of Traditional Knowledge"*, Vol. 36, No. 1 & 2, Indian Socio-Legal journal, p. 123

[34] Principle 22 of the main document that came out of the 1992 Earth Summit in Rio de Janeiro

customs and beliefs. This Convention, which says a lot about legal standards for indigenous rights, fails to protect the IPR of indigenous people.[35]

6. The International Treaty on Plant Genetic Resources for Food and Agriculture (2001): The right to equitably participate in sharing benefits arising from the utilisation of plant genetic resources for food and agriculture, the International Treaty on Plant Genetic Resources for Food and Agriculture was adopted by the thirty-first session of the conference of the Food and Agriculture Organisation (FAO) on November 3, 2001. The objectives of this treaty are the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use. The treaty is in harmony with the Convention on Biological Diversity for sustainable agriculture and food security.[36]

7. United Nations Draft Declaration on the Rights of the Indigenous People: The Commission on Human Rights of the UN has established an open-ended, inter session working group to elaborate a draft UN Declaration on the Rights of indigenous people.[37]

8. United Nations Development Programme (UNDP) and IBRD or the World Bank: The UNDP and IBRD have launched various programmes to promote indigenous peoples' development and also to ensure that such programmes recognise the rights of the indigenous people.[38]

9. United Nations Conference on Trade and Development (UNCTAD): There have been a lot of deliberations and discussions with respect to protection of traditional knowledge. UNCTAD has also deliberated on the protection of the rights of both the custodians and developers of traditional knowledge.[39]

10. Bonn Guidelines[40] : These are another important breakthrough in the sustainable use of genetic resources and the sharing of benefits for the use of traditional knowledge associated with it.[41] To access the genetic resources, consent of the local community needs to be sought. This would ensure that there is no exploitation of genetic resources. The communities also have a right to equitable benefit sharing whereby they are compensated for the use of the resources. It may be monetary or non-monetary.[42]

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35 *Supra Note* 23, p. 39

36 *Ibid*, p. 42

37 *Supra Note* 2, p. 218

38 *Ibid*, p. 219

39 *Ibid*

40 Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilisation (2002) adopted by the Conference of Parties (CoP) to the Convention on Biological Diversity

41 *Supra Note* 28, p. 472

42 *Supra Note* 2, p. 217

VIII. NATIONAL INITIATIVES FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE

At the national levels too, there have been initiatives to protect traditional knowledge. Countries like India have tried to address the matter of traditional knowledge protection, through facilitating changes in their patent and biodiversity laws, besides attempting to put in place sui generis systems for protecting traditional knowledge.

1. The Biological Diversity Act, 2002: The Indian Legislature, keeping in mind the benefit that is due to the local community, enacted the Biodiversity Act in the year 2002 (hereinafter referred to as the Act, 2002). An enabling provision was included in the Act for protecting traditional knowledge. The Act provides for protection of knowledge of local people relating to biodiversity through measures such as registration of such knowledge, and development of a sui generis system.[43]

Sec. 6 provides that any person seeking any kind of intellectual property right on research based upon biological resources or knowledge obtained from India; need to obtain prior approval of the National Biodiversity Authority (NBA). Sec. 19 and 21 stipulate prior approval of the NBA before accessing biological resource or knowledge.[44] While granting approval, NBA imposes certain terms and conditions, which ensure equitable sharing of benefits. One of the important functions of NBA is to take steps to oppose the grant of intellectual property rights in any country outside India on any biological resource obtained from India or knowledge associated with such biological resources.[45] The Act provides for the Biodiversity Management Committees to undertake chronicling of knowledge relating to biological diversity.[46]

2. The Patents (Amendment) Act, 2002: Patent law contains provisions for mandatory disclosure of source and geographical origin of the biological material used in the invention while applying for patents in India.[47] Provisions have also been incorporated to include non-disclosure or wrongful disclosure of the same as grounds for opposition and for revocation of the patent, 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 inventions, which are basically traditional knowledge or aggregation or duplication of known properties of traditionally known component or components from being patented.[48]

In the WTO forum on TRIPs, five modes of traditional knowledge protection have been advocated. The first mode involves use of existing IPR laws to protect traditional

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[43] Sec.36(5) of the Act, 2002

[44] This provision was inserted to ensure evenhanded sharing of benefits arising from the use of biological resources and the associated knowledge.

[45] Sec.18(4) of the Act, 2002

[46] Sec.41 of the Act, 2002

[47] *Ibid*, p. 220

[48] *Supra Note* 28, pp. 473,474

knowledge through facilitating changes in the former. The second one involves disclosure requirements which require an innovator to disclose utilisation of traditional knowledge in a patent application, besides producing evidence of having obtained prior informed consent from the competent authority in the country of origin of traditional knowledge and evidence or having entered into appropriate benefit-sharing arrangements with the community or entity concerned. The third mode involves institution of a stand alone sui generis system for the protection of traditional knowledge. The fourth mode involves use of contract laws based on bilateral agreements on a case by case method for protecting traditional knowledge. The fifth mode involves use of environmental legislations such as biodiversity legislations for building provisions for traditional knowledge protection. While the first mode clearly involves a defensive approach to traditional knowledge protection, the remaining four tracks carry elements of proactive protection that entail benefit sharing.[49]

There are attempts in various countries to form digital libraries on traditional knowledge. These libraries would have a database on the prevailing traditional knowledge available in the public domain. They are the systematic arrangement of information pertaining to traditional knowledge. The information is drawn from the public domain and then the database is created. As it is known that one of the criteria for granting patent is 'novelty', if there is a patent claim for an invention it is easier to track the existing knowledge and reject or accept the application for patent based on the available information in the database of the libraries. This would avoid granting of unwarranted patents.[50] India's pioneering efforts to develop a unique Traditional Knowledge Digital Library (TKDL) has been accepted as a model for prior art search by many patent offices around the world. The use of such an authentic database will hopefully eliminate patenting activities in the area of traditional knowledge, traditional medicines etc.[51]

IX. SUI-GENERIS LAW FOR PROTECTION OF TRADITIONAL KNOWLEDGE

Protection by such sui-generis[52] rights has been considered as an option to protect traditional knowledge. It is necessary that the protection modalities have to be through a novel 'sui-generis' system which should cover (i) a definition of subject matter for protection (ii) extent of rights to exclude others from unauthorised use (iii) methods of deriving benefits when traditional knowledge leads to commercial products (iv) conservation strategies to ensure sustainability (v) registration of title holders of traditional knowledge (vi) material transfer agreements and (vii) duration of protection.[53]

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49 A Damodaran, *"Traditional Knowledge, Intellectual Property Rights and Biodiversity Conservation: Critical Issues and Key Challenges"*, Vol. 13, JIPR, Sept. 2008, p.510

50 Savith S., *Supra Note* 2, p. 220

51 M.D.Nair, *"TRIPs, WTO and IPR: Protection of Bioresources and Traditional Knowledge"*, Vol. 16, JIPR, Jan 2011, p. 36

52 Sui-generis literally it means "of its own kind". It is the modification of some of the features of intellectual property so as to properly accommodate the special characteristics of its subjects matter and the specific policy needs which led to the establishment of a different system.

53 *Supra note* 51, p. 37

The proposed sui generis model for the protection of traditional knowledge and traditional cultural expressions is tentatively titled 'The Traditional Knowledge (Protection and Regulation to Access) Bill 2009. The Bill is divided into 9 chapters structured in such a manner that it defines commonly used terms, identifies right and duties of traditional community, accessor, Traditional Knowledge Authority and provides procedure for enforcement of a law.[54]

X. CONCLUSION AND SUGGESTIONS

The Convention on Biological Diversity and the International Treaty on Plant Genetic Resources for Food and Agriculture have highlighted the need to promote and preserve traditional knowledge and the efforts of these conventions is worthy of appreciation in providing appropriate financial and other benefits to the holders of the knowledge, including the sharing of the monetary and other benefits of commercialisation. These are a starting point for the development of international rules governing the protection of traditional knowledge.

It is unfortunate that TRIPs has not made any attempts to protect traditional knowledge. TRIPs need to work for the protection of such traditional knowledge and avoid illegal access and endorse benefit sharing. It has to re-look at some of its provisions and make suitable amendments to protect the vulnerable from exploitation. WIPO should endeavour with the co-operation of other international and regional organisations in ensuring a comprehensive approach to find the most appropriate mechanism to give adequate international legal protection to traditional knowledge and should bring final and universally acceptable solutions for the protection and promotion of traditional knowledge.

The diverse definitions of traditional knowledge have complicated the process of providing adequate protection to traditional knowledge. A universal definition of traditional knowledge should be given utmost priority, as this is the foundation for the protection of traditional knowledge. The existing IPR system does not provide adequate protection to traditional knowledge and sui generis law is vital for adequate protection of traditional knowledge. It has to be conceived both at the national and international levels. The sui generis system should ensure the protection of the rights of the creators or holders of traditional knowledge and also guarantee that they get a fair share for letting others use their knowledge and develop products which would fetch such companies a share in it.

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[54] Sunita K. Sreedharan, "*Bridging the Time and Tide-Traditional Knowledge in the 21st Century*", Vol. 15, JIPR, March 2010, pp. 149,150

TOWARDS GENDER JUSTICE

DR. RATNA R. BHARAMGOUDAR *

I. Introduction

Millions of women all over the world live in conditions of deprivation and attacks against their fundamental human rights for no other reason than that they are women. Abuses against women are relentless, systematic and widely tolerated if not explicitly condoned. Discrimination and violence against women are global and social epidemics. Gender based discrimination represents the ugly face of society. This is a very ancient problem and women have remained as victims of inequality and injustice. Despite significant efforts by the United Nations towards improving the status of women throughout the world, and "the equal rights of men and women" being enshrined in the preamble of the United Nations Charter, despite all developed countries and about half of the developing countries having adopted legislation or Constitutional provisions to ensure women's equity, it continues to elude the vast majority of women. In India, the Constitution guarantees women not only equal rights and privileges with men but also provides the State to make special provisions for welfare of women, but, in practice discrimination persists. However, the intensification of the women's rights movements all over the world and particularly the inclusion of women's rights in the Charter of Human Rights at the global level reflected in the passing of the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) has doubtlessly helped in bringing gender issues from peripheral to the centre-stage, and gender justice has become, a recent concern of the law. The anomaly now is being openly questioned and the underlying discrimination is being seriously challenged. As human development moves centre stage in the global development debate, gender equality and gender equity are emerging as major challenges. The words of the Constitution are open textured and the Judges acting as interpreters of the Constitution have to sustain the spirit of the Constitution under the changing circumstances and provide those expressions with new meanings. The judiciary in India has played a significant role in protecting the rights of women and providing justice. This paper makes a discussion on the development of International regime towards gender justice. It also examines the gender justice reflections in the Constitution of India and the response of the judiciary towards gender justice.

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II. Gender Justice – The International Regime

Ever since it's founding in 1945, the United Nations has been instrumental in improving the status of women by spearheading change and raising awareness of their situation throughout the world. "The equal rights of men and women" is enshrined in the preamble of the United Nations Charter, which has legally established gender equality as a fundamental human right for the first time in history.[1] The legal concept of gender equality is also enshrined in the 1948 Universal Declaration of Human Rights (UDHR).[2] The very first Article of the UDHR states that all human beings are born free and equal in dignity and rights.[3] The word 'human-beings' include within its range women, as much as men, it is this equality in dignity and rights for all human beings, which is the foundation of human rights. This is also the foundation for securing justice to women whether it is social, economic, political or legal.

Yet discrimination against women, entrenched in deep-rooted cultural beliefs and traditional practices, persist throughout much of the world. In order to draw attention to these obstacles and catalyse a swifter change in women's status, the United Nations declared 1975 as International Women's Year. It also convened the 1975 World Conference of the International Women's Year, the first Global Conference ever held on women. The 1975 Conference produced the first World Plan of Action for the advancement of women. Appreciating the growing global importance of women's issues, the United Nations General Assembly then proclaimed 1976-1985 as the "United Nations Decade for Women: Equality, Development and Peace". Described as the "start of an international effort to right the wrongs of history", the combination of the Year and the Decade succeeded in putting women's concerns – in particular gender equality, in full integration in the development process and the promotion of peace – firmly on the global agenda.[4]

The next milestone on the road to women's equality was the adoption of the Convention on the Elimination of All Forms of Discrimination against Women by the United Nations General Assembly in 1979. Sometimes described as a women's Bill of Rights, the Convention commits governments to take all "appropriate measures ... to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men".[5] To mark the end of the Decade in 1985, the World Conference was held to Review and Appraise the Achievements of the United Nations and all participating governments adopted by consensus the Nairobi Forward-Looking Strategies for the Advancement of Women to the year 2000, a blueprint for women's future in all realms of life.[6]

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1 United Nations, *Women, Challenges To The Year* 2000, New York: United Nations, 1991, p.1.

2 *Universal Declaration of Human Rights*, G.A.Res 2317 (III), U.N. GAOR, 3d Sess, U.N. Doc A/810 (1948).

3 *Ibid.*, Art.1.

4 United Nations, *supra* note 1.

5 *Ibid.*, p.1-2.

6 See *The Nairobi Forward-Looking Strategies for Advancement of Women, Third World Conference on Women*, G.A., Res 161, U.N. GADR, 49th Sess, U.N. Doc.A/RES/49/161 (1995).

The next important international document on gender justice is the Vienna Declaration adopted by the World Conference on Human Rights in 1993. The Vienna Declaration enjoins full and equal enjoyment by women of all human rights. It prescribes this to be a priority for governments and for the United Nations. In particular, the World Conference on Human Rights has stressed the importance of working towards elimination of violence against women in public and private life, elimination of all forms of sexual harassment, exploitation and trafficking in women, elimination of gender bias in the administration of justice and eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism.[7] The Beijing Declaration once again focussed world attention on the prevailing discrimination against women in the world polity and formulated steps for its removal.[8]

III. Gender Justice - Reflections in the Constitution of India

The Indian Constitution mentions the terms, equality, dignity, and liberty in its Preamble[9] and provides for their structure in its detailed provisions of Fundamental Rights, Directive Principles of the State Policy and Fundamental Duties. Article 14 confers on men and women equal rights and opportunities in the political, economic and social spheres. Article 15 prohibits discrimination against any citizen on the grounds of religion, race, caste, sex etc. Article 15 (3) makes a special provision enabling the State to make affirmative discrimination in favour of women. Article 16 provides for equality of opportunity in matters of public appointments for all citizens. Article 21 provides for right to life and personal liberty.[10] Article 39 (a) lays down that the State shall direct its policy towards securing all citizens, men and women, equally, the right to means of livelihood, while Art.39(c) ensures equal pay for equal work. Article 42 directs the State to make provisions for ensuring just and humane conditions of work and maternity relief. [11] Above all, the Constitution imposes a fundamental duty on every citizen through Art.51 (A) (e) to renounce the practices derogatory to the dignity of women.[12] The Constitution also mandates through Art.51(c) that the State should foster respect for international law. [13] India is a party to several international instruments including the most significant of the instruments dealing with women, the Convention on the Elimination of all Forms of Discrimination against Women, which addresses the question of equality in a dynamic way and is an attempt to achieve substantive equality and not just formal equality.

Though the Constitution grant perfect equality and rehabilitate woman and provide her all the legal opportunities, powers and capacities to become a person in

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[7] See *Vienna Declaration and Programme of Action, World Conference on Human Rights*, U.N.Doc. A/CONF. 157/24 (1993).

[8] See *Beijing Declaration and Platform for Action, Fourth World Conference on Women*, U.N. Doc A/ CONF. 177/20 (1995).

[9] For details, see *Preamble, Constitution of India.*

[10] For details, see *Fundamental Rights, Constitution of India.*

[11] For details, see *Directive Principles of State Policy, Constitution of India.*

[12] see, *Fundamental Duties, Constitution of India.*

[13] *Supra* note 11.

law, much remains still to be done to concretise and establish her equality in details and in facts of individual and social life.[14] A bare legal equality is not adequate when women face serious discrimination socially by reason of attitudes, customs, traditions and in obtaining employment, in succeeding in a career or in any other economic or political activity.[15] The equity towards women is more important than the quantitative equality. Further the principle of equality is more negative in putting restraints upon legislators against enactment of laws discriminating against women and less positive in coming to the aid of women in special cases. Thus, it neither gives much positive help to woman nor does improve her lot, which is full of many perpetrating injustices of individual and social circumstances. Therefore, the equity of consideration and conscientious interpretation is needed to level up the status of woman, which depends upon the healthy judicial intuition and interpretation as well as on manifest legislative intent to and engineering skill to accomplish the task. Though the Constitution mandates gender justice but its real efficacy lies in its live and dynamic interpretation of the facts and circumstances of individual cases and precedents to co-ordinate the freedom, protection and non-discrimination for the welfare of woman.[16]

IV. Gender Justice - Judicial Response

The intensification of the women's rights movements all over the world and particularly the inclusion of women's rights in the Charter of Human Rights at the global level reflected in the passing of the CEDAW has doubtlessly helped in bringing gender issues from peripheral to the centre stage and gender justice has become a recent concern of the law.[17] The power of judicial review is of great importance. The Judges acting as interpreters of the Constitution have to sustain the spirit of Constitution under the changing circumstances. The words of the Constitution such as "equality before the law" or "dignity of individual" or "personal liberty" are open textured and the Courts have to provide them the continuity of life and expression. The Constitutional Court, which has to act as the custodian and guarantor of the fundamental rights, has to improvise those expressions with new meanings, which the changing social, economic and political circumstances warrant.[18] According to Frankfurter:[19]

"Constitutional guarantees of individual freedoms are not static but are expressions of basic human values. They transcend day-to-day shifts in majority wishes and hence require redefinition from time to time to meet narrowly recognised if not narrowly created human needs".

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[14] Dr.R.N.Sharma, "Constitutional Protection to Women and Judicial Response", in Dr.Shams, Shamsuddin., (ed.), Women, Law and Social Change, (New Delhi: Ashish Publishing House, 1991) p.283.

[15] *Report of Colloquium on Justice for Women Empowerment Through Law*, Lawyers Collective, Women's Rights Initiative, (New Delhi: Butterworths, 2000), p.32.

[16] Dr.Sharma, *supra* note 14, p.284.

[17] S.P.Sathe, "Gender, Constitution and the Court", in Dhanda, Amita., and Parashar, Archana., (eds.,), Engendering Law, (Lucknow: Eastern Book Company, 1999), p.117.

[18] *Ibid.*, p.119.

[19] Felix Frankfurter, Mr. Justice Holmes and the Supreme Court, Harvard University Press, Cambridge, Massachusetts, 1938, p.8.

The judiciary has played a significant role of protecting the right to equality, dignity and liberty of women. It is interesting to see that the different interpretation of the principle have come-in being due to its application to different subject matters related to women. The judiciary to certain extent has taken a lead in securing justice to women.

Right to Equality

Although the Constitution came into force in 1950, provisions discriminating against women employees continued to haunt the civil service rules of the central and state governments. In *C.B.Muthamma v. Union of India*,[20] the validity of rule 8(2) of the Indian Foreign Service (Conduct and Discipline) Rules 1961,requiring a woman member to marry only after obtaining the prior permission of the government and entitled the government to require a married woman member to resign if it was satisfied that the domestic commitments were likely to come in the way of efficient discharge of her duties was challenged by a senior member of the Indian Foreign Service. The Supreme Court struck down the above rules on the ground that they violated the fundamental right of women employees to equal treatment in matters of public employment. Justice Krishna Iyer, agonised over such discrimination observed:[21]

"That our founding faith enshrined in Articles 14 and 16 should have been tragically ignored *vis-a-vis* half of India's humanity, viz., our women, is a sad reflection on the distance between Constitution in the book and law in action".

In *Air India v. Nargesh Meerza*,[22] the Court had to grapple with the problem of gender discrimination posed in the challenge to statutory regulations made by Air India, which imposed these disabilities on air hostesses: (a) they were not allowed to marry within four year from the date to their entry into service (b) their services were terminated on their first pregnancy and (c) the age of retirement of air hostesses was 35 years, extendable to 45 years at the option of the Managing Director as against the retirement age of air flight pursers (men) at the age of 55 or 58 years.

Air India being a public sector concern was expected to show greater defence to the principles underlying the Constitution. Obviously, the above provisions were not only discriminatory against women but they smacked of male chauvinism. Why should Air India object to an air hostess's marriage before the age of 23 years?. The age of marriage prescribed under the Child Marriage Restraint Act 1929 for girls is 18 years. Why should it be 23 years for the air hostesses? Why should an air hostess resign after becoming pregnant and why should she retire at age of 35? All these issues were related to her physical charms as a woman. When these requirements were challenged as being against the principle of equality, Air India has to cook up some defence. They contended that the requirements were warranted by the population policy of the State.[23]

The Court in striking down the second and third disability ruled that, "the termination of services of an air hostess under such circumstances is not only a callous and cruel

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[20] (1979) 4 SCC 260.

[21] *Ibid.*, p.262.

[22] AIR 1981 SC 1829.

[23] Sathe, *supra* note 17, p.125-126.

act but an open insult to Indian womanhood, grossly unethical, utter selfishness at the cost of all human values and manifestly unreasonable and arbitrary".[24]

In *Dattatray Motiram v. State of Bombay*,[25] Bombay Municipal Borough Act, 1925 providing for reservation of seats for women in the election to the Municipality was challenged on the ground that, Article 15(3) must be read to mean that, only those special provisions for women are permissible which do not result in discrimination against men. The Court while rejecting this argument observed that if that was the object of enacting Article 15(3), then Article 15(3) need not have been enacted at all as a proviso to Article 15(1). Therefore, as a result of the joint operation of Article 15(1) and 15(3), the State may discriminate in favour of women against men, but it may not discriminate in favour of men against women. The Court pointed out that even today women are more backward then men. It is the duty of the State to raise the position of women to that of men. It would be very difficult for women to be elected if there was no reservation in their favour and government may well take the view that women are necessary in local authorities before they decide any question relating to them.

Though the Constitution ensures equal pay for equal work for both men and women and Parliament has enacted Equal Remuneration Act 1976, women are paid less than their male counterparts for the same work on a common belief that women are physical weak. The decision on this point was delivered by the Supreme Court in *M/s Mackinnon Mechkanize and Co. Ltd v. Audrey D'casta*.[26] In this case the company was paying lady stenographers less remuneration than the remuneration paid to male stenographers, which was challenged. It was argued on behalf of the company that the different in pay scales was due to settlement between the company and the union of the workers. The Court pointed out that the settlement cannot be a ground of discrimination in matter of payment of wages. Then it was argued that the company is not in a position to pay equal remuneration to all. The Court while rejecting this argument observed that the applicability of the Act does not depend upon the financial ability of the management and directed the company to pay equal remuneration. This is considered to be a landmark decision in which the Supreme Court observed that violation of the provisions of Equal Remuneration Act, 1976 results in the violation of right to equality enshrined in Article 14 of the Constitution.

Right to Privacy and Dignity under Article 21

In *Neera Mathur v. LIC*,[27] the Supreme Court recognised that the women's right to privacy as an important aspect of personal liberty guaranteed in Article 21 of Constitution. Neera was appointed by the Life Insurance Corporation without the knowledge that she was pregnant. After joining her post she applied for maternity leave, on coming bank, she was served with termination notice on the ground that she had not supplied them with information, which had been sought through a questionnaire. In the Supreme Court the judges were flabbergasted to learn that the questionnaire

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[24] *Supra* note 22, p.1851.

[25] AIR 1953 Bombay 311.

[26] AIR 1987 SC 1281.

[27] (1992)1 SCC 286.

sought information about the dates of the menstrual periods and the past pregnancies. The Supreme Court said that such probes amounted to invasion of the privacy of a person and therefore could not be made. The right to personal liberty guaranteed by Article 21 of the Constitution included the right to privacy and here the women's right to privacy was recognised. The Court observed that such information could be sought where it would be relevant for the purpose, for instance, for selling insurance cover but not for selecting a person for employment. Privacy as an aspect of personal liberty was recognised by the Court many years ago[28] but the significant aspect of this decision was the recognition of women's right to privacy in respect of information regarding her reproductive functions.

In *Goutam Kundu v. State of West Bengal*[29] the Supreme Court categorically strengthened women's right to dignity and liberty. The appellant had deserted his wife and his child suspecting the paternity of the child. On wife filing a petition for maintenance under section 125 of the Code of Criminal Procedure the Magistrate ordered a sum of Rs.300 per month for the wife and Rs.200 per month for the child. Against this order the appellant filed an application to the Court demanding that the child be subjected to a blood test for determining her paternity. The Court observed that a child born of a married woman is deemed to be legitimate unless the contrary is proved and laid down the following principles in this regard: (1) that Courts in India cannot order a blood test as a matter of course; (2) applications for subjecting a child to blood test made in order to have a roving inquiry cannot be entertained (3) there must be a strong *prima facie* case for suspecting the fatherhood of a child which can be established only by proving non-access; (4) the Court must carefully examine as to what would be the consequences of ordering a blood test; whether it would have the effect of branding a child as a illegitimate and the mother as an unchaste woman. The Court held that such demand for subjecting the child to a blood test was contrary to the right to personal liberty guaranteed by Article 21 of the Constitution.

Bodhisattva Gautam v. Subhra Chakraborty[30] is an instance of judicial activism which is totally new and very revolutionary. The accused had entered into a false marriage with a woman and she became pregnant. He made her undergo an abortion and repeated the same again. When she asked him to maintain her, he disowned her on the ground that there was no marriage. He was prosecuted under sections 312, 420, 493, 496 and 498-A of the Indian Penal Code 1860. The Court whilst referring the appellant's requests to quash the prosecution also expatiated on the rape law. The Court ruled that rape was not merely an offence under the Penal Code, it is a crime against basic human right and is also violative of the victims must cherished of the Fundamental Rights, namely, the Right to life contained in Article 21 and is a violation of a woman's right to live with dignity and personal freedom. The Supreme Court further held that a Court trying a case for rape had jurisdiction to award even interim compensation during the pendency of the trial and ordered the accused to pay the victim a sum of Rs.1000 every month as interim compensation until the case was

[28] *Khark Singh v. State of U.P.*, AIR 1963 SC 1295.

[29] (1993)3 SCC 418.

[30] (1996)1 SCC 490.

decided and also the arrears of interim compensation from the date on which the complaint was filed.[31]

Another instance of judicial activism is the case of *Vishakha v. State of Rajasthan.*[32] In this case a public interest petition was filed by a women's organisation seeking judicial intervention to combat sexual harassment of working women, to fill the vacuum, which the legislator had not cared to do. The Supreme Court observed that the threat of sexual harassment prevented a woman from pursuing her career and thereby violated her right to carry on occupation guaranteed by the Constitution and also amounted to discrimination under Article 14 and denial of the right to live with dignity guaranteed by Article 21 of the Constitution. Disregarding the positivist theory of requirement of incorporation of a treaty into the national law through a specific legislation, the Court held that in view of the fact that CEDAW had been ratified in India, the CEDAW had become the law of India, and issued directions to operate until suitable legislation is enacted by Parliament against sexual harassment of working woman. This is the most recent advance of the decisional law.[33] Thus the Court has relied on international instruments not only in interpreting legislation, but also recognise these instruments as facet of the fundamental rights guaranteed under the Constitution.

V. Conclusion

The judiciary has performed a constructive and creative role in interpreting laws and enactments related to woman in this regard. It has insisted upon looking to the principle of substantial justice by examining discriminatory provisions in the light of peculiar facts and circumstances of the case and has rendered decisions, which advanced the progress of the law towards gender justice. The judiciary by articulating gender equality and gender justice within the framework of the Constitution has reconstituted the fundamental rights guaranteed in it in the context of women's experience and concerns which has resulted in the meaningful expansion of those rights. Thus the fundamental rights have been engendered by mainstreaming women's rights into them, which in turn has helped in women's empowerment and towards gender justice gender justice.

But much more needs to be done. In fact, what has been achieved is little as compared to what needs to be achieved. Normative law may reflect all progressive ideas but social practice and attitudes continue to be patriarchal. Today as we stand at the threshold of the 21st century, we are still unable to boast of a society where there is total gender equality or gender equity. Until recently, the question of gender equality or gender equity was merely a topic of theoretical discussion. Things are changing but rather slowly. It is sad but unfortunately true that a woman has, even in her own home, been given a rather subordinate role to play. Her major concern is expected to be catering to the comforts of the family as a dutiful daughter, loving mother, and obedient daughter-in-law and faithful submissive wife. She is perhaps everything except a human being on par with her counterpart – the man. She has same feelings, aspirations,

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[31] *Ibid.*

[32] (1997)6 SCC 241.

[33] *Ibid.*

emotions, sense of satisfaction and frustration as her counterpart, but the society has made her dependent either on father, husband or son. To usher in gender equity it must change. The attitude of the society must change - mere existence of legislations will not help- the laws must be implemented with sincerity. Laws are not enough to combat the evil. A wider social movement of educating women of their rights, to conquer the menace, is what is needed, more particularly in rural areas where women are still largely uneducated and less aware of their rights and fall an easy prey to their exploitation. The role of judiciary, under the circumstances assumes greater importance and the judiciary have dealt with such cases in a more realistic manner. With a view to convert the gender justice from *dejure to defacto*, educating the female would play an important role. So long as there is disparity between the male and female in education levels the difference between the position of men and women would continue to exist impeding the practical reality of gender justice.

THE INTER-STATE WATER DISPUTE

JEEBITA YENDREMBAM *

Abstract:

The interstate river water dispute is a current running issue in our country. It has been one of the fastest growing problems leading to several conflicting situations between the states. Several negotiations and legal machineries have come into the picture for settling the confusion prevailing. The Inter State Water Dispute Act (ISWD) which was passed in the year 1956 gives clear cut procedures for settling the chaotic condition. Even the National Water Policy was adopted for the settlement procedure. This present paper attempts to study the efforts of the fruitfulness of the steps taken in this regard.

"We never know the worth of water till the well is dry"

-Thomas Fuller

India is a land where every individual finds diverse cultures and traditions. Indeed it is a nation which franchises the well-known saying "unity in diversity". India is covered by water on three sides of its boundaries and on one side by land. Hence, the term peninsular is applicable to our nation. Water is an essential substance of survival for every human being and is an essential elixir of life. Surprisingly, over the last few decades there have been unresolved interstate water disputes which have resulted in chaotic situations between the States. Undoubtedly, the quantity and the allocation are not in the hands of man. Despite, the present fact, the nature of every individual to exaggerate has led to the unresolved water conflict between the States.

Large parts of India have already become water stressed. Rapid growth in demand for water due to population growth, urbanization and changing lifestyle pose serious challenges to water security. As large areas of India are relatively arid, mechanisms for allocating scarce water are critically important to the welfare of the nation's citizens. Because India is a federal democracy, and because rivers cross state boundaries, constructing efficient and equitable mechanisms for allocating river flows has long been an important legal and constitutional issue. Numerous inter-state river-water disputes have erupted since independence. Inter-state water disputes continue to fester.

I. HISTORY:

The Cauvery dispute between the States of Karnataka and Tamil Nadu [1] has caused frequent civic unrest and involved violence. The dispute has its history in the

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beginning of the 19th century with evidence of initial communication between the Madras and Mysore States about water sharing in the 1800s. Much later, a concern raised by Madras (under British direct rule) 1870 against the Mysore Princely State's (under indirect rule) proposed irrigation works resulted in an agreement in 1892.

The Griffin arbitration (1913-1914 & the agreement of 1924) were necessary to resolve the dispute between the States when Mysore and Madras simultaneously proposed projects on either site around 1910. Mysore proposed to build a dam at Kannambadi village (later known as Krishnarajasagar [KRS] Dam, also known as Mysore-Cauvery project at that time; Madras proposed another dam at Mettur (also known as Madras-Cauvery project). Madras refused consent arguing that the Mysore project would affect its Mettur project. The Griffin arbitration by the Government of India as per the 1892 agreement, denied prescriptive rights status to the claims made by Madras. Madras refused to accept the Griffin award and made another representation to the Government of India, which led to another long cycle of negotiations. These negotiations were finally concluded with the 1924 agreement. The agreement had the following provisions:

i) Madras gave its consent to the Krishnarajasagar dam;

ii) Mysore agreed to regulate KRS dam discharge as per a set of rules; and,

iii) It specified limits to future irrigation development on both sides.

This agreement, to be effective for the next 50 years, left an ambiguity about the future validity of the 1892 agreement. This ambiguity and the set of rules became sources of contention in the later years.

The legislative framework of the Constitution [2] related to water is based on Entry 17 of the State List, Entry 56 in the Union List and Article 262 of the Constitution. These are:

a) Entry 17 in List II (State List) in Schedule VII

"Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of Entry 56 of List-I.

b) Entry 56 of List I (Union List):

Regulation and development of inter-state rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

c) Article 262

It explicitly grants parliament the right to legislate over the matters in Entry 56, and also gives it primacy over the Supreme Court.

The first provision [3] makes water a state subject, but it is qualified by Entry 56 in the Union List. This listing of water in the State List has given the predominant role to the States in managing water resources. It is argued that the lack of uniform policy and synergy between the States led to the emergence and recurrence of interstate water disputes. This led to the belief that shifting water to the Union List would provide a greater role to the Center, which in turn could bring the necessary synergy.

Entry 17 of the State List is subject to Entry 56 of the Union List. In an extensive critique of this view, Iyer argues that the Center has never exercised its powers under the Entry 56 and always allowed States to take the larger responsibility. This willful abdication by the Center led to an understanding that the States have exclusive power to manage water resources. The emphasis in Entry 56 to public interest extends to the scope of Center's involvement to matters where one State's actions affect another State in a harmful manner. This applies even when a river flows entirely within a State's boundary, but with impacts in other States.

Article 262 explicitly grants parliament the right to legislate over the matters in Entry 56, and also gives it primacy over the Supreme Court. As documented by Iyer (1994), parliament has not made much use of Entry 56. Various River Authorities have been proposed, but not legislated or established as bodies vested with powers of management. Instead, river boards with only advisory powers have been created.

II. PRESENT SCENARIO:

The current situation deals with the chaos between both the States Karnataka and Tamil Nadu having exactly opposite approaches towards sharing water. Between 1968 and 1990, 26 meetings [4] were held at the ministerial level. But no consensus has been reached and settled between both the States sharing water. The Cauvery Water Dispute tribunal was constituted on June 2, 1990 under the ISWD Act, 1956.

There has been a basic difference between Tamil Nadu on the one hand and the central government and Karnataka on the other in their approach towards sharing of Cauvery waters. The government of Tamil Nadu argued that since Karnataka was constructing the Kabini, Hemavathi, Harangi, Swarnavathi dams on the river Cauvery and was expanding the ayacuts (irrigation works), Karnataka was unilaterally diminishing the supply of waters to Tamil Nadu, and adversely affecting the prescriptive rights of the already acquired and existing ayacuts. The government of Tamil Nadu also maintained that the Karnataka government had failed to implement the terms of the 1892 and 1924 Agreements relating to the use, distribution and control of the Cauvery waters. Tamil Nadu asserts that the entitlements of the 1924 Agreement are permanent. Only those clauses that deal with utilization of surplus water for further extension of irrigation in Karnataka and Tamil Nadu, beyond what was contemplated inthe 1924 Agreement can be changed. In contrast, Karnataka questions the validity ofthe 1924 Agreement. According to the Karnataka government, the Cauvery water issue must be viewed from an angle that emphasizes equity and regional balance in fuure sharing arrangements.

There are several reasons why the negotiations of 1968-1990 failed to bring about a consensus.

1) There was a divergence of interest between Karnataka and Tamil Nadu on the question of pursuing negotiations. Karnataka was interested in prolonging the negotiations and thwarting the reference to a tribunal, in order to gain time to complete its new projects.

2) The Cauvery issue became intensely politicized in the 1970s and 1980s. The respective governments in the two states were run by different political parties. Active bipartisan politics in both states made an ultimate solution more difficult.

3) Between 1968 and 1990, there were three chief ministers in Karnataka belonging to three different political parties, while in Tamil Nadu, there were four chief ministers belonging to two parties. There were two long periods of President's Rule in Tamil Nadu. At the Center, there were six changes of Prime Minister, spanning four political parties and eight different Union Ministers of irrigation. So, consecutive occasions were rare when the same set of ministers from the same state and the Center met each other.

4) The ministerial meetings were held at regular intervals, but no attempt was made to generate technical options to the sharing of Cauvery waters. Expert engineers were not able to work together for a common solution; rather they got involved in party politics.

However, in another parallel development [5], a different set of political actors contributed to scale-fixing of the conflict at a different scale and attempted the mitigation of the conflict. Some civic society actors from either side organized multi-stakeholder dialogue outside the formal scope and spaces of adjudication. Farmers associations from Karnataka and Tamil Nadu along with other civic society actors came together to engage in site visits and dialogues to dissipate tenacious relations between the two sides.

The Cauvery Dispute Tribunal gave its final award in 5 February, 2007. According to its verdict, Tamil Nadu gets 419 billion ft^3 (12 km^3) of Cauvery water while Karnataka gets 270 billion ft^3 (7.6 km^3). The actual release of water by Karnataka to Tamil Nadu is to be 192 billion ft^3(5.4 km^3) annually. Tamil Nadu and Karnataka, unhappy with the decision, filed a revision petition before the tribunal seeking a review.

On 19 September 2012[6], Prime Minister Manmohan Singh, who is also the Chairman of the Cauvery River Authority, directed Karnataka to release 9,000 cusecs of Cauvery water to Tamil Nadu at Biligundlu (the border) daily. But Karnataka felt that this was impractical due to the drought conditions prevailing because of the failed monsoon. Karnataka then walked out of the high level meeting as a sign of protest. On 21 September, Karnataka filed a petition before the Cauvery River Authority seeking review of its 19 September ruling.

On 24 September 2012, Tamil Nadu's Chief Minister directed the officials to immediately file a petition in the Supreme Court seeking a direction to Karnataka to release Tamil Nadu its due share of water.

Immediately, the Supreme Court slammed the Karnataka government for failing to comply with the directive of the Cauvery River Authority. Left with no other opton, Karnataka started releasing water. This led to wide protests and violence in Karnaaka.

In the month of October, the Karnataka government filed a review petition before the Supreme Court seeking a stay on its order directing it to release 9,000 cusecs of Cauvery water everyday to Tamil Nadu.

Several Kannada organizations, under the banner of "Kannada Okkoota", called a Karnataka bandh (close down) on 6 October in protest against the Cauvery water release. In the meantime, the Supreme Court of India announced the release of 9,000 cusecs has to be continued and it is up to the Cauvery River Authority's head, the Prime Minister, as a responsible person, to ensure this happened. The Prime Minister ruled out a review of the Cauvery River Authority's decision, rejecting the plea by both the Congress and Bharatiya Janata Party leaders from Karnataka. Within a few hours, Karnataka stopped release of Cauvery water to Tamil Nadu.

Later on Tamil Nadu's chief minister directed authorities to immediately file a contempt petition against the Karnataka government for flouting the verdict of the Supreme Court by unilaterally stopping the release of water to Tamil Nadu. Tamil Nadu made a fresh plea in the Supreme Court, reiterating its demand for appropriate directions to be issued to Karnataka to make good the shortfall of 48 tmcft of water as per the distress sharing formula.

In the month of November, the Cauvery Monitoring Committee directed the Karnataka government to release 4.81 tmcft to Tamil Nadu. The Supreme Court directed Karnataka to release 10,000 cusecs of water to Tamil Nadu. The court asked the union government to indicate the time frame within which the final decision of the Cauvery Water Dispute Tribunal, which was given in February 2007, was to be notified. This decision was given in the view of saving the standing crops of both the states.

On 20 February 2013, based on the directions of the Supreme Court, the Indian Government has notified the final award of the Cauvery Water Disputes Tribunal (CWDT) on sharing the waters of the Cauvery system among the basin States of Karnataka, Tamil Nadu, and other States (Kerala and Union territory of Pondicherry).

In response to the Special Leave Petition (SLP) lodged by Tamil Nadu earlier, the Supreme Court on 10 May 2013issued an interim direction to the Government of India (GoI) to establish a temporary Supervisory Committee to implement the Cauvery tribunal order till the constitution of "Cauvery Management Board" as stated in the tribunal order. Despite all the efforts and pulls and pushes being done by the various Committees established and legal luminaries fighting the cases for the respective States, no conclusion has been drawn and nothing has yet been established for a permanent remedy.

III. INEFFECTIVE LEGAL INSTRUMENTS AND INSTITUTIONS:

There are two legislations [7] directly relevant: the Interstate Water Disputes Act 195 (later amended in 2002) and the River Boards Act 1956. Both these acts were introduced along with the State's Reorganization Act of 1956. The two Acts are in response to corresponding provisions in the Constitution. To regulate and develop interstate rivers as in Entry 56 in the Union List, the River Boards Act 1956 (RBA) was enacted. The Interstate Water Disputes Act 1956 (ISDA) was in response to Article 262 which stipulates that the Parliament should make necessary laws to adjudicate disptes between States over interstate waters.

The deeply centralized nature of the Indian state with strong Center and subservient States in 1950s could be a reason for assuming that advisory Central institutions like the Boards could be effective. This certainly changed after the onset of coalition politics in 1990s. The shift in power politics led to stronger States and a rather weak and amenable Center - at least from the context of water resource development and management. Efficacy of laws and legislations are subjective to historical context, which makes a case for their periodical review. The National Commission for Review of Working of Constitution (NCRWC) in its measure termed RBA Act a "dead letter" and recommended repealing of RBA and replacing it with a more comprehensive legislation .The RBA and the ISDA appear independent to each other even though these two, along with the States Reorganization Act of 1956, emerged out of a single historic moment - the reorganization of States.

On the other hand, ISDA was drafted in response to Article 262, which carries an exception to the original jurisdiction of Supreme Court under Article 131. Interstate water disputes are to be governed exclusively by provisions of Article 262. Hence the two Acts are independent and follow their respective constitutional provisions and their intent: RBA for Entry 56 and ISDA for Article 262.

These problems however fall into the category of institutional and governance failures. Even then, legal scholars like Fali Nariman suggest overreaching solutions like repealing the ISDA in its entirety and bringing interstate water disputes under the Supreme Court's jurisdiction. The NCRWC report (2002) too recommends the same. However, there must be a reason why framers of the Constitution thought it was necessary to treat water disputes separately from other interstate disputes.

IV. NATIONAL WATER POLICY GUIDELINES FOR WATER DISTRIBUTION AMONGST STATES:

The National Water Policy was adopted by the National Water Resources Council of India in 1987[8]. At the time of adoption of the policy, the Council had taken note of the necessity for formulating guidelines for water sharing/distribution of inter-State rivers amongst the States. The National Water Board constituted by the National Water Resources Council has also indicated the need for such guidelines. Subsequently a the time of revision of Policy as "National Water Policy-2002" National Water Resources Council during its Fifth Meeting held on 1st April, 2002, substituted the words 'Sharing/Distribution' in place of the word allocated.

The broad objective governing the sharing / distribution of water is: Developing the waters of inter-State rivers for the betterment of the population of the co- basin States/Union Territories such that developments are not detrimental to the interests of one another and are guided by national perspective. The sharing/distribution of the water amongst co-basin States would be in the form of a right to utilize the water. In this process, in consultation with the co-basin States, the Centre would take care of the water sharing/distributions required in the national interest. Any State affected adversely due to such sharing/distribution would be adequately compensated by alternative means.

V. DISPUTE SETTLEMENT PROCEDURES:

The Inter-State Water Disputes Act seems to provide fairly clear procedures for handling disputes. Constitutionally and legislatively, Indian inter-state river dispute settlement procedures involve either of two processes: negotiations and compulsory legal adjudication [9]. Furthermore, there is room for voluntary processes such as mediation, conciliation and voluntary arbitration, often by the prime minister or other members of the central government. Such processes do not foreclose arbitration or adjudication on specific areas of conflicts that remain unresolved after mediation and conciliation. Professor Guhan (Harvard Law School) suggests that "mediation and conciliation do not have enough scope in resolving water disputes, and that adjudication inevitably leads to adversarial positions and maximal claims".

On the other hand, legal adjudication under the ISWD Act is a non-voluntary, imposed procedure, but it, or some similar externally imposed procedure, may be necessary in situations where the dispute is conflictual in nature, and not over sharing the potential gains of a mutually beneficial exchange. The real issue in such cases is setting up adjudicatory processes or institutions that all parties can agree ex ante to be bound by ex post; in these cases, focusing on voluntary negotiations may be somewhat misguided.

Delays :

Extreme delays have been a very costly feature of the process of resolving inter-state water disputes in India. There have been three components or dimensions of delay.

1) There has been extreme delay in constituting tribunals. Under Section 4 of the ISWD Act, the Union government is required to set up a tribunal only when it is satisfied that the dispute cannot be settled by negotiations. The Center can thus indefinitely withhold the decision to set up a tribunal on the ground that it is not yet satisfied that negotiations have failed
2) Tribunals have taken long periods of time to give their awards. Such delays may be attributed to two factors: first, the time taken for assembling facts and hearing arguments and second, abortive attempts to bring about solutions at a political level, which delayed the functioning of constituted tribunals.
3) There have been delays in notifying the orders of tribunals in the Government of India's official gazette; this has resulted in delays and uncertainty in enforcement. These delays naturally tend to complicate the dispute settlement process.

Enforcement :

In the Cauvery dispute, the Karnataka government sought to nullify the tribunal's interim order through an ordinance. Though the Supreme Court pronounced that the ordinance was unconstitutional, the Karnataka government showed no inclination to implement the tribunal's interim order, until a compromise was reached through political negotiations behind closed doors. The Sarkaria Commission was of the view that in order to make tribunal awards binding and effectively enforceable, the ISWD

Act should be amended to give these awards the same sanction as an order or decree of the Supreme Court. However, as noted in Section 5[1], tribunals seem to have this force in theory: the problem is of penalties to be imposed for non compliance. We suggested that the solution would require decoupling water disputes from more general problems of Indian federalism and center-state relations. This brings us to a discussion of alternative institutions.

VI. SARKARIA COMMISSION:

Sarkaria Commission was set up in June 1983 by the central government of India [10]. The Sarkaria Commission's Charter was to examine the relationship and balance of power between state and central governments in the country and suggest changes within the framework of Constitution of India. It is generally observed that the Tribunals set up for resolving inter-State issues take considerable time to give decision/ awards. The Sarkaria Commission on center-state relations (Government of India, 1988) devoted an entire chapter to the problem, and made a series of recommendations. They are:

[1]*Section 5. Adjudication of water disputes.*

(1) When a Tribunal has been constituted under section 4, the Central Government shall, subject to the prohibition contained in section 8, refer the water dispute and any matter appearing to be connected with, or relevant to, the water dispute to the Tribunal for adjudication.

(2) The Tribunal shall investigate the matters referred to it and foward to the Central Government a report setting out the facts as found by it and giving its decision on the matters referred to it.

(3) If, upon consideration of the decision of the Tribunal, the Central Government or any State Government is of opinion that anything therein contained requires explanation or that guidance is needed upon any point not originally referred to the Tribunal, the Central Government or the State Government, as the case may be, may, within three months from the date of the decision, again refer the matter to the Tribunal for further consideration; and on such reference, the Tribunal may forward to the Central Government a further report giving such explanation or guidance as it deems fit and in such a case, the decision of the Tribunal shall be deemed to be modified accordingly.

(4) 2[If the members of the Tribunal differ in opinion on any point, the point shall be decided according to the opinion of the majority.]

1) Once an application under Section 3 of the Inter-State River Water Disputes Act (1956) is received from a State, it should be mandatory for the Union Government to constitute a Tribunal within a period not exceeding one year from the date of receipt of the application of any disputant State. The Inter- State River Water Disputes Act may be suitably amended for this purpose.

2) The Inter-State Water Disputes Act should be amended to empower the Union Government to appoint a Tribunal, suo-moto, if necessary, when it is satisfied that such a dispute exists in fact.

3) There should be a Data Bank and information system at the national level and adequate machinery should be set up for this purpose at the earliest. There should also be a provision in the Inter-State Water Disputes Act that States shall be required to give necessary data for which purpose the Tribunal may be vested with powers of a court.

4) The inter-State Water Disputes Act should be amended to ensure that the award of a Tribunal becomes effective within five years from the date of constitution of a Tribunal. If, however, for some reason, a Tribunal feels that the five year period has to be extended, the Union Government may on a reference made by the Tribunal extend its term.

5) The Inter-State Water Disputes Act, 1956 should be amended so that a Tribunal's award has the same force and sanction behind it as an order or decree of the Supreme Court to make a Tribunal's award really binding.

These five recommendations were considered by the erstwhile Sub-Committee of the Inter-State Council. The Sub-Committee accepted four out of five recommendations. The remaining one recommendation of Sarkaria Commission's Report was accepted with a minor modification. The time frame specified for constituting a Tribunal by the Union Govt. was increased from one year to two years. Taking into account the views of the State Governments and that of the Ministry of Water Resources, the Inter-State Council Secretariat prepared a consensus paper on the recommendations of Sarkaria Commission.

VII. CONCLUSION AND SUGGESTIONS :

Despite the innumerable legal instruments being present and negotiations being done, no conclusion has yet been drawn and it is not been possible to find a permanent remedy to the problem persisting. In summary, current Indian water-dispute settlement mechanisms are ambiguous. A cooperative bargaining framework suggests that water can be shared efficiently, with compensating transfers as necessary, if initial water rights are well-defined and if institutions to facilitate and implement cooperative agreements are in place. Besides, delay in the dimension of agreement over water can encourage inefficient, non-cooperative investments in dams, irrigation, etc.

In a developing country like India, interstate river water disputes must be resolved quickly so that water resources could be utilized and harnessed properly for economic development. In the current conflict situation, which seems very relevant for inter-state disputes, a search for negotiation may be futile, and quick movement to arbitration or adjudication may be more efficient. However, not only is this process slow, but unfortunately effective binding arbitration does not exist.

It will be more efficient if these impacts can be reduced by a more effective design of mechanisms for negotiating such disputes. One of the measures could be to declare all the major rivers as national property and national schemes under the central assistance should be launched for the development of their total command area with partial involvement of the concerned states. Additionally, it will be more efficient if there is a national water commission independent of daily political pressures, a

federated structure incorporating river basin authorities and water user associations and fixed time periods for negotiation and adjudication.

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RE-CONCENTRATING ON LEGAL EDUCATION IN INDIA : AN ANALYSIS

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HISTORICALLY, LEGAL education was imparted in India in law departments of universities where courses were taught as three-year programmes after under-graduation resulting in the award of an LLB degree. Legal education and its importance to establish a rule of law society did not receive any serious priority or attention in these universities, although due to the sheer motivation of students themselves the departments were successful in producing many of the brightest lawyers and some of the best academics in the country. Over the years, there has been a considerable degeneration of academic standards within these law departments with little scope for innovation in the design of courses, development of appropriate teaching modules, formulation of research agenda including undertaking of research projects, and also the promotion of advocacy in lawyering. The departments also suffered from lack of independence and institutional autonomy as they were within the university system whose priorities did not always match. As a result, the ability to attract serious students with a passionate commitment to study law in all its ramifications dramatically reduced culminating in institutionalised mediocrity in law faculties across the country.

There is no doubt that the establishment of the national law schools starting with the National Law School of India University (NLSIU) in Bangalore successfully challenged this institutionalised mediocrity and succeeded in attracting serious students to the study of law. In fact, the study of law has received better attention among high school leavers in the country with the introduction of five-year integrated programmes. This has brought up new issues relating to pedagogy and approach to undergraduate studies for imparting legal education for high school leavers. The national law schools that have been established in Bangalore, Hyderabad, Kolkata, Bhopal, and Jodhpur have all contributed in their own ways toward promoting excellence in legal education and research, particularly by attracting some of the brightest students to consider law as a preferred career option. But where these schools face significant challenges is in attracting faculty members who are top researchers in the field of law and can combine sound teaching methods with established track records of research. The lack of researchers in law and absence of due emphasis on research and publications in the existing law schools have led to the absence of an intellectually vibrant environment.

Research can contribute significantly toward improvement in teaching and, more importantly, addressing numerous challenges relating to law and justice. If one were

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to look at the faculty profile of the world's top law schools, one will find that there is great emphasis on research and publications among academics. Besides teaching, they contribute in significant ways by initiating and developing research projects in cutting edge areas, by professional contributions to international organisations, law firms and corporations, and by playing an important role in government policy formulation and promoting civil society activism. Law schools and academics in India need to go a long way in developing an institutional culture that promotes and encourages research that has the capacity to foster many positive changes in society at large.

Following are some of the challenges facing legal education in the country:

Physical infrastructure and financial resources :

The law schools in India have to recognise that there is a need for creating sound physical infrastructure. There should be more funds for this and for developing research projects and other initiatives to encourage faculty members. Generally, the infrastructure of the national law schools is better than what exists in the law departments of traditional universities. Improvement in infrastructure should be across the board, including in universities which still produce most of the law graduates. University campuses should be places that can inspire students and the faculty so that they are involved in reflecting upon the various problems that confront society. Academic freedom to think and contribute cannot be ensured if universities lack the necessary physical infrastructure and financial resources.

Need for developing philanthropic initiatives:

Philanthropy in legal education is rare. It by and large remains a state-sponsored endeavour or an unimpressive commercial enterprise devoid of high academic standards. There is an urgent need for encouraging philanthropic initiatives in promoting excellence in legal education and research in the country. Recently, the National Knowledge Commission (NKC) constituted by the Union Government in 2005 submitted its first annual report. Legal education was one of the focus areas; among the different issues considered as part of the NKC's consultations with law academics and practitioners were "methods of attracting and retaining talented faculty" and "developing a serious research tradition that is globally competitive." The NKC report noted the following with regard to philanthropic contributions: "It is clear that we have not exploited this potential. In fact the proportion of such contributions in total expenditure on higher education has declined from more than 12 per cent in the 1950s to less than three per cent in [the] 1990s..." Philanthropy in legal education is essential for its growth and development. Every effort ought to be made by all stakeholders, including the law schools, the bar, the bench, the law firms and corporations for promoting philanthropic initiatives in legal education and research.

Hiring good teachers and researchers:

There is a need to fundamentally re-examine the context of legal education in the country. The present system does not sufficiently recognise the key problem with

regard to legal education — lack of faculty members who are good teachers as well as sound researchers. There is need to identify talent among young lawyers so that they can be encouraged to consider academia as a career option. There is no doubt that poor financial incentives discourage many young and brilliant lawyers from considering a career in academia. It is important to address this issue as well. But there could be other factors where improvements and changes are feasible: such as career development opportunities within the law schools; development of research infrastructure including the resources to organise and participate in national and international conferences, and undertake serious research; a harmonious environment that fosters mutual respect; governance of the law schools in a transparent fashion; and, above all, faith in the leadership of the institution that excellence will not only be promoted as a general policy, but affirmative efforts will be taken to encourage and support excellence.

Globalisation and the changing dimensions of the Indian economy and polity have thrown up new challenges of governance. Rule of law in all its dimensions remains the single most important challenge the country is facing. The criminal and civil justice systems are under severe stress. The role of law schools in imparting legal education and developing lawyers who are rational thinkers and social engineers is central to the future of legal education and the development of a knowledge economy in India. This can be done only if the law schools are able to attract some of the best and the brightest lawyers to make a lifelong commitment to teaching, learning, and research so that they are able to inspire generations of students to work towards establishing a rule of law society in India.

Today, legal education has to meet not only the requirements of the bar and the new needs of trade, commerce and industry but also the requirements of globalization. New subjects with international dimensions have come into legal education. With multibillion-dollar investments in the growing economies, the business activities have grown manifold. This in turn has created more opportunities for lawyers in general.

In the changed scenario, the additional roles envisaged are that of policy planner, business advisor, negotiator among interest groups, expert in articulation and communication of ideas, mediator, lobbyist, law reformer, etc. These roles demand specialised knowledge and skills not ordinarily available in the existing profession. The five-year integrated programme of legal education is a modest response to these challenges as perceived in the 1980s well before the end of Cold War and advent of market-oriented globalisation. The lawyer of tomorrow must be comfortable to interact with other professions on an equal footing and be able to consume scientific and technical knowledge. In other words, along with social science subjects, the law curriculum for the future must provide integrated knowledge of a whole range of physical and natural science subjects on which legal policies are now being formulated.

The image of a lawyer in society as well as the self-image of the profession is not what it ought to have been given the diverse roles as stipulated above. It is here that the legal education has to take its lesson on value addition. Justice must become central to the law curriculum and community-based learning must give the desired value orientation in the making of a lawyer. To give a recent example, one can say

that the young law students who went to the earthquake affected districts of Gujarat seeking to carry legal services to the victims came back with impressions and experiences which would no doubt influence their professional life and shape their approach to justice. The idea being canvassed here is that professional education will have to be imbued with a spirit of social service and there is no better way of inculcating it except to expose them while studying law to real life experiences crying out for justice. The politics of legal education and the economics of legal practice should be subjected to academic scrutiny if the profession has to be saved from the practitioners themselves!

The legal education granted at the law schools should be streamlined from the conventional to the contemporary needs of the legal profession. The quality of Legal education has a direct impact on the prestige of the Legal Profession. We must, therefore, identify the areas of default and initiate corrective action to repair the damage. Unless pragmatic steps are undertaken without loss of time, Legal Education will suffer and consequently the country's justice delivery system will stand diluted. A concerted action on the part of bar, the Bench and the law teachers is called for to improve the deteriorating standard of Legal education. We have to equip ourselves better so that we will not only keep pace with the current developments but also meet the demands of the future.

Justice A. M. Ahmadi had said and I quote, ".... We have waited long enough to repair the cracks in the legal education system of this country and it is high time that we rise from arm-chairs and start the repair work in right earnest".

To conclude, India being a common law country has an advantage of having a legal system which is similar to many other countries of the world. As a consequence, firms from other countries visit the top law schools to handpick talent. Legal education is an investment, which if wisely made will produce most beneficial results for the nation and accelerate the pace of development. Legal Education is essentially a multi-disciplined, multi-purpose education which can develop the human resources and idealism needed to strengthen the legal system ....A lawyer, a product of such education would be able to contribute to national development and social change in a much more constructive manner.

Revisiting Constitutional Measures for Child Laborer's

DR. D. C. NANJUNDA *

Abstract

Indian Constitution both in the Directive Principle of State Polices and in the Fundamental Rights has laid down that state is obligated to frame policies for the welfare of her citizens including the children. A child must be given enough scope to come up in healthy environment in the interest of the nation and dignity and no citizen will be forced by economic necessity to enter avocation unsuitable to their age or strength. Since childhood plays an important role in shaping the future of that child and there by the development of the concerned country there should be enough provisions in all the constitutional measures to protect children from various possible exploitations Over the years, however, global consciousness about the seriousness of the problem has created Govt. and several NGOs who are working towards the welfare of these children. The Constitution of India is also committed to the protection and promotion of the welfare considerations over the economic ones. It was not surprising therefore, that a series of Committees and Commissions have been appointed by the Govt. of India, either specifically on the question of child labour condition in general, which give us insights into the problem and suggestions to alleviate it. This article is based on the review of secondary literature to relook in to constitutional measures for the child laborers.

Key words: *Child labour, Constitution, Legislations, Article*

Child labour: The problem of child labour is the curse for humanity. The problem is concerned with the children whose childhood is lost and they live in poverty. .It is the problem of those children who instead of playing and studying bear the responsibility of eradicating poverty of their family, being themselves in the tremendous poverty. The prevalence of child labour is the most striking issue in human resources development now-a-days. Those lovely and innocent children are not only engaged hard and hazardous works but they become prey of sexual abuses too. Actually the most general definition of child labour reads as 'children working in their age between 5-14 years of age' (Naresh, 2001).

Interpreting Constitutional Rights for Children.

The Supreme Court has held that when it comes to uphold or guaranteeing

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Fundamental Rights and that rights are not be seen in isolation but as a bundle of rights to fulfill the mandate outlined in the Preamble of our Constitution. The Supreme Court again has held that "paramount among rights is the right to life and that right to life includes the right to livelihood and the right to live in dignity and security". Denial of survival and development, freedom of expression causing harm of neglect and exploitation of children in any form is a violation of the right to live with dignity and the right of protection against exploitations. Employment of children thus violates the essence of Article 21.

The Constitution especially prohibits employment of children below fourteen years. Children below the age of 14 years as per the Article 24 cannot be employed in any factory or mine or any other hazardous works. But the Constitution of India has not attempted to outline what is hazardous and what is non-hazardous to the children. It is known act that what is hazardous for an able bodied adult cannot be the barometer for deciding what is hazardous for the child. It is for this reason that Article 24 did not stop with factories and mines but said "or engaged in any other hazardous employment." So according to the Constitution of India all forms of work by children below the age of 14 years is hazardous. This is now supplemented by the recent 93rdConstitutional (Singh, 2004).

Amendment Act that guarantees the free and compulsory education as a fundamental right for all children between 6 to 14 years of the age in the country. Children have fundamental rights under Article 45 to have basic education and to be brought up in a healthy manner. If the child is denied elementary education because of the need to work for survival for social and familial it is a hazard. Article 45 and the Supreme Court judgment clearly explains that every child is not merely expected, but is a duty, to be educated. Similarly any work under taken by a child that results in exploitation and material abandonment is a hazards one. The industrial definition of hazardous in the Factories Act and other labour laws cannot be the basis of deciding what is hazardous for a child and what is not.

Non-discrimination (among children) is one of the most important guarantees provided in Article 14, wherein the State is bound not to deny any child equality before the law or equal protection of laws. Since millions of children are being discriminated and exploited, the Constitution makers have revealed Article 14 with Article 24 (Prohibiting Employment) and Article 15 (3), where the State is empowered to make any special law for the welfare of the children. Central to these articles is the Article21 on fundamental rights whereby no person (read also children) shall be deprived of his life or personal liberty. And any form of employment of children amounts to forced labour or bonded labour is a violation of Article 21 and Article 23.

Being a democratic country, India has also provide protection of children in its constitution against child labour to regulate the minimum age of employment, hours of work and physical conditions at working place. The constitution of India has given protection to children in two ways. Through Fundamental Rights and Directive Principal of State Policy and through some legislations (Ramanthan, 2000).

The following articles are noteworthy to mention;

- Article 15(3)- provision to enact laws to protect women and child.
- Article21- protection of life and personal liberty
- Article 23- right against exploitations and ban on traffic in human beings and forced labour.
- Article 24- prohibition on the employment of children in factories-etc. This article states "No children below 14 years shall be employed to work in factory or mines or in any other hazardous jobs."This is the most important and vital article regarding child labour in India.
- Article 39(e) obligation of the states tosafeguard the health of the children.
- Article 39(b) and (e) states that during the tender age, children should not be abused and that they should not be forced by economic necessity to enter avocations unsuited to their age or strength.
- Article 39(f) proclaims that the children are given opportunities and facilities to develop in a healthy manner in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. Article 45 is a supplementary to the Article number 24 on the ground that when the child is not be employed before the age of 14 years he /she should be in educational field. Also this article instructs the states to provide free and compulsory education for children up to 14 years of age (Tripati,2003).

The constitution contains other provisions, guaranteeing that a child must be given an opportunity and facility to be brought up in a healthy manner. Article 39 (e) mandates that the tender age of children is not abused and those citizens are not forced by economic necessity to enter avocations unsuited to their age or strength. Article 39 (f) ensure childhood and all-round development of children. It states that "Children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and thatchildhood and youth are protected against exploitation and against moral and material abondment". Thus, several Articles must be read and understood along with Article have 14. 15(3), 21, 23, 24, 39 (e) and 45.

Child Labour and Welfare Legislations

In every society, old tradition customary norms and values create difficulty in adopting new changes for development and growth of its members. So, reformation in relating is tochange its old system and to meet the needs for their welfare and development. Long ago, child labour was not a social problem, but with the change in social understanding, child labour needed legislative protection against the exploitations and for their proper growth and development. In India present structure of labour legislations was originally developed in the British period. In 1875, colonial government had appointed a committee to suggest the necessity of legislations to protect young children and women. Committee also felt that it is one of the principal duties of the State to guard and promote the well being of her citizens (Mohanty, 2002).

1. The Factories Act 1881

The Factories Act of India was passed in 1881. It defined a child as a person below the age of 12 years and prohibited the employment of children below the age of 7 years. The Act of 1891 raised the minimum age of employment of children from 9 years to 14 and maximum of two-day holiday in a weak. The minimum age of employment was raised to 12 years in 1905.

2. The Children (Pledging of Labour) Act, 1923

This act defines child means a person who is under the age of 15 years. This act prohibits to go in for an agreement to pledge the labour of children and the employment of children whose labour has been pledged.

3. The Minimum Wage Act-1948

This act makes provision in fixing minimum rate of wages in certain employments which have been specified by appropriate governament in the Schedule of the Act.

4. Employment of Children Act –1938

It regulates the admission of children to certain industrial employments. No child who has not completed his fifteenth year shall be employed or permitted to work in any occupation connected with the transport of passengers, goods or mails by a Railway or connected with a Port authority within the limits of any port. Further, no child who has completed his fifteenth year but has not completed his eighteenth year may be employed on any day, unless the periods of work are so fixed as to allow an interval of rest for at least 12 consecutive hours, seven of which must fall between 10 p.m. and 7 a.m.

5. The Indian Factories Act-1948

This Act defines an adolescent as a person who has completed his eighteenth year and a child as a person who has not completed his fifteenth year. No person who has not completed his fourteenth year may be allowed to work on any factory. The hours of work of children should be limited to 4 1/2hours per day and must be spread over on shift only and not more than 5 hours' duration. A child should not work in any factory on any day on which he has already been working in another factory. According to this Act the employer has to maintain a register of child workers and the periods of work have to be notified.

6. The Plantation Labour Act -1952

This Act applies to all tea, coffee, rubber and Cinchona plantations. Children under 12 years of age shall not work in any plantation. No child worker shall be employed except between the hours 6 a.m. and 7 p.m. with due permission of the concerned State government. No child or adolescent may work in a plantation the employer is in possession of a certificate offitness given certifying surgeon and the worker himself carries a token giving to such certificate.

7. The Mines Act-1952

Under this Act, no child under 15 years of age may be employed in mines. No child may be allowed to be present underground excavation where mining operations are carried out. He however, be given half an hour's rest after every 4-½ hours work. An adolescent may be employed in any operation on the above ground provided that

he shall not be required to work more than fixed hours.

8. The Merchant Shipping Acy-1958

This act prohibits employment of children less than 15 years in a ship or sea related activities. This act is not of much importance today

9. The Motor Transport Workers Act-1961

This Act prohibits employment of persons less than 14 years of age in any capacity in the motor transport undertaking. It covers every motor transport undertakings across the county.

10. The Apprentices Act-1961

This act lays down that a person shall not be qualified for being engaged as an apprentice to undergo apprenticeship training in any recognized trade unless he is not less then 14 years of age.

11. The Beedi and Cigar Workers Act-1966

This Act prohibits the employment of children below 14 years of age in all industrial premises where in any manufacturing process connected with making of beedi and cigarette.

12. Shop and Establishment Act. -1948

This Act prohibit the employment of children in shops, commercial establishments, restaurants, hotels etc The age of children varies from 12 to 15. In India, many labour Acts have fixed the minimum age for employment. But, the definition of a child in terms of age differs from Act to Act: The Factories Act prohibits employment of children below the age of 14 years in factories. The limit in Mines Act is 15 years whereas it is 12 years in Plantation Labour Act.

Conclusion : Law only will not solve the problem. It can be said that a country's full commitment to the total abolition of child labour should be judged not merely on the basis of official pronouncements but on whether the child labour objective is consciously considered in the already mentioned policy implications. More over practical action and standard setting will have to be combined with legislature's policies, which address the root causes of child labour as identified by this study. The policy package suggested in this study offers very thought provoking, more realistic and sober view of the challenges faced in the genuine success of time bound programmes for the elimination of child labour. Unless and until findings of various studies are taken into account, there is a real risk of laws being dominated by hasty, adhoc, often negative short term responses to dealing with a phenomenon which also requires substantial action on core issues having clear long term significance.

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Dr. B. K. Ravindra
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