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Editorial

It gives me an immense pleasure to present to the readers the second issue of ***"Kashmir Journal of Legal Studies"***. "Given the continuous and unforeseen developments in science and technology and its attendant impact on legal panorama, scholarly writings linking the two assume greater importance. The present issue provides a good number of articles on diverse themes of seminal importance, good enough to elicit purposeful debate of far reaching significance.

The scholarly article of Prof. S.K. Verma, *TRIPS Mandate on public Health* deals with the implications of Doha Declaration for poor and developing countries of the world. It has validly focussed on india's role in the given circumstances as the major supplier of generic medicines to least developed countries and the scope to implement the paragraph 6 of Doha Declaration.

The article by Prof. M. Afzal wani on *Understanding Right to Development as Envisaged by the Constitution of India* is an illuminating exercise to focus on right-based dimension of constitutional guarantees. The author contends that the contextual exposition of rights *in the light of* United Nations Declaration on Right to Development, 1986 , would be of great benefit to policy makers and academics by opening a right-based window, for policy making, as well as, research, teaching and general literacy.

Prof. Sehgal has exhaustively dealt with *United Nations Peace Keeping Role in Afghanistan.* The author's analysis of the subject is based on his practical experience, as an International Provincial Field coordinator in Afghanistan under the aegis of United Nations Assistance Mission in Afghanistan. The author in his study has dealt with the role and validity of the Peace keeping Mission initiated by the United Nations which finally was responsible for making the Presidential Election plan in Afghanistan.

The article *on Sociology of Law: Theoretical propositions and Empirical Realities Related to Child Labour* by Prof. B. A. Dabla revolves round an interesting theme. While drawing a relationship between sociology and Law, the author maintains that both contribute to the theoretical and realistic understanding of social-legal phenomena as

the existing reality, especially discernible in the modern social legislation. In the opinion of the author, the Act prohibiting child labour if taken to its logical end, can develop consciousness, resolve and commitment, to negate and eradicate the most damaging problem faced by children.

Mr. Mukesh Kumar Malvia in his study *Alternate Dispute Resolution; Perspectives in India* maintains that access to justice and free legal service are of prime necessity in a democratic state like India. The author is of the view that for the benefits of ADR mechanisms to materialize, it is necessary that it is seen as an integral input to judicial reform, simultaneously with revival and strengthening of traditional system of dispute resolution.

The article *Applicability of Trademark Law to Cyberspace* by Gul Afroz Jan is an attempt to analyse the nature of conflict between trademark law and domain name system, types of the disputes which arise because of such conflict and jurisdictional problems of cyberspace. The author in her study maintains that the well-known principles applicable to trademark law do not fit in cyberspace and disputes in virtual space cannot be solved by traditional trademark laws of the real space.

Prof. G.Q. Mir in his write-up maintains that Government employees in India have no right to strike is, endorsed by the Supreme Court. Although their right to demonstration has been recognized as a fundamental right, yet it is not clear whether they can exercise this right during the working hours.

The note on *Regulating Obscenity: With Special Reference to Cyber Pornography is* a nice analysis of obscenity in cyber world, the legal provisions for regulating it, and the judicial decision fixing its contours. The study highlights the need for a new law and the loopholes in the present law with possible remedies.

Constitutional Dialectics of Presidential Rule by Iftikhar Hussian has highlighted the paradox of use/misuse of Article 356 in India. The author maintains that resort to this provision was to be made in the rarest of rare cases but, at times, it has been used for extraneous considerations. In the opinion of the author the intervention of the Supreme Court in the

spate of misused application of this Article for umpteen times seems, to have turned the tide from blatant misuse to judicious use, which needs to be emulated by the executive.

Domestic violence and Media with special Reference to Kashmir by Afsana Rashid has unfurled the ugly face of domestic violence prevalent here. The author has discussed how the Law accompanied by social action forces can fetch marvelous result in fighting the menace of domestic violence.

Firdous Ahmad in his note on Redefining *the Concept of Security in the Age of Globalization* has made an in-depth analysis of the paradigm shift in security perception from a purely military sophistication during the cold war, to non-military threats of post-cold war period spawned by globalization.

The note on *Criminal Liability and Medical Negligence: An Indian Perspective* by Asma Rehman is aimed at highlighting the doctor's liability in case of his failure to perform professional work. The author contends that in India a number of cases of medical negligence are reported every year and the state of Jammu and Kashmir is not an exception to this. The Judges often rely on expert opinion for deciding the issues relating to medical negligence. In the opinion of the author, efforts should be made to introduce some objective criteria to determine the medical negligence so that no guilty professional escapes from the law.

Ms Rehana Shawl in her study *Right to Life Versus Capital Punishment: A constitutional perspective* has dealt with some pertinent issues of capital punishment and her focus of study is how far the present law relating to capital punishment answers the need of the time and whether its scope needs to be extended, curtailed or it should be abolished altogether.

Mr Burhan Majid in his scholarly research paper *Sale Promotion Schemes under Consumer Protection Act, 1986: need for a consistent judicial approach* provides: how Sale Promotion Schemes have just become the norm of the modern day business but quite susceptible to consumer harm. The author fairly examines the menace of unfairness, in holding of games, contests, lotteries, and similar such schemes for

promoting sale and service, in the context of India's transition to economic liberalization.

The third part of the journal is a case comment on *DMDK v. Election Commission of India (2012) 7 SCC 340* by Fareed Ahmad Rafiqi. The author has critically examined the judgement and is of the view that although the majority decision is based on the well-grounded precedents and is a reasoned decision, yet the minority decision in this case seems to be more convincing. The author concludes that the operation of Election Symbol Order 1968 , denying a symbol to a political party on the basis of its poor performance in an election, cannot be countenanced under the freedom of expression guaranteed under Constitution of India.

The last part of the journal deals with the two reviews of the previous issue of *Kashmir journal of Legal Studies*

The editorial committee is extremely thankful to all the contributors for writing the research papers for publication in this peer reviewed journal. However, the committee has decided that the forthcoming issues will be the *refereed journals*.

The editorial committee requests all readers to offer their valuable and critical comments for improving the quality of the journal as the beacon of legal scholarship.

I am in particular thankful to Dr. Fareed Ahmad Rafiqi, Assistant editor and Associate Professor, Department of Law University of Kashmir, for editing the manuscripts and ensuring the timely publication of the present issue.

I am also thankful to Ms. Sumaya Qadri, part-time lecturer, Kashmir law College, for helping to bring out this journal in a presentable form.

I am grateful to the Salasar Imaging Systems, Delhi for printing the Journal with meticulous care.

In the end I place on record the appreciation for all the trustees in particular Mr. Altaf Ahmad Bazaz, Patron, for showing keen interest in all academic pursuits, including the publication of the Journal.

A.S. Bhat

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Case Comment

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TRIPS Mandate on Public Health

S K. Verma*

1. INTRODUCTION

After the coming into force of the Agreement on Trade-Related Intellectual Property Rights (TRIPS) on the January 1, 1995, the international intellectual property system has radically transformed from permissive to a prescriptive regime. By narrowing the scope for differentiation within national patent policies, it has adversely impacted the attainment of social goals by sharply curtailing traditional capacity of nations in supplying of public goods, such as health care and nutrition by making medicines and other essential products expensive.

By strengthening the international level of patent protection, TRIPS has impacted significantly the access to life saving pharmaceuticals in developing countries, especially on poor countries with insufficient or no pharmaceutical manufacturing capacities and are afflicted with pandemics. Further, due to introduction of product patents in pharmaceuticals in many countries, like India, from January 1, 2005, many countries that were until now dependant on the importation of life-saving drugs at low prices are feared to be deprived of them. In other words, TRIPS intensified the problem of access to essential medicines at affordable prices in the developing countries. According to World Health Organization (WHO), one out of three on Earth lacks access to essential medicines.[1] Approximately 3 million people died from HIV/AIDS in 2001, 2.3 million of these deaths occurred in Sub-Saharan Africa. Nearly 1.7 million people worldwide died from tuberculosis in the same year and there had been as many as 10.2 million new cases in 2005.[2] About six million people in the developing world living with

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1 WHO Bulletin (2004), p. 61, "The World Medicines Situation" WHO/EDM/PAR/2004.5

2 WHO Commission on Macroeconomics and Health. See Integrating Intellectual Property Rights and Development Policy", Report of the

HIV/AIDS need access to treatment now.[3] It is common knowledge that most of these deaths are preventable, that the life saving drugs do exist, and the problem lies in the inaccessibility of these drugs primarily for patients in poor countries afflicted with these diseases.

The steps taken by some of the countries afflicted with these epidemics by resorting to compulsory licenses to import generic copies of the patented drugs have met with strong opposition from developed countries and pharmaceutical companies. The US trade pressure on South Africa and Thailand in 1997 galvanized criticism of TRIPS[4] and laid the basis for the adoption of the Doha Declaration on the TRIPS Agreement and Public Health[5] at the WTO Ministerial Meeting in Doha in 2001.

The Declaration was followed by the Implementing Decision on its Paragraph 6 of 30 August 2003[6]. The Declaration and Decision are related to national health emergencies, viz., HIV/AIDS, TB, Malaria and other epidemics. To make this decision as a part of the TRIPS

Commission on Intellectual Property (Sep. 2002), available at http://www.iprcommission.org/documents/final_report.htm at 1.

3 Of an estimated 40 million people living with HIV/AIDS globally, approximately 95% live in developing countries ('Treating 3 million by 2005: Making it happen – the WHO strategy' (World Health Organization: Geneva, 2003) at 3), see also Edwin Cameron, 'Patents and Public Health: Principle, Politics and Paradox', Inaugural British Academy Law Lecture held at the University of Edinburgh, 19 October 2004, available at http://www.law.ed.ac.uk/script/newscript/home.htm.

4 See Susan K. Sell, 'TRIPs and the Access to Medicines Campaign' (2002) 20 Wis. Int'l L.J. 498-509 at 500.

5 *Declaration on the TRIPS Agreement and Public Health*, WTO Res. WT/MIN(01)/DEC/2, 4th Sess., Ministerial Conference, 20 November 2001,vailableat<www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_TRIPs_e.doc>

6 *Implementation of Paragraph 6 of the Doha declaration on the TRIPS Agreement and Public Health,* WTO Doc. WT/L/540 and Corr.1, 1 Sep. 2003available at http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm Decision is also referred ''waiver" on public health

Agreement, the WTO members on 6 December 2005 approved changes to the TRIPS Agreement in the form of Article *31bis* making permanent the decision on patents and public health.[7] The amendment will become part of the TRIPS, after being adopted by two-third of its members.

The adoption of the Doha Declaration, the Waiver Decision of 30 August 2003 and the Article 31*bis* Protocol of amendment, reflects international consensus on the true balance TRIPS strikes in patent protection. Article 31*bis* has been adopted to address the problem with Article 31 (on compulsory licenses) of the TRIPS , which allows a country to issue a compulsory license that only covers drugs made—and predominantly used—within the country's borders. This is an insurmountable obstacle for many poor countries, which have no or insufficient manufacturing capacity in the pharmaceutical sector.

The new rules under the Declaration and Article 31*bis* (also called as Para 6 System), however, have raised few pertinent questions, viz., whether the nations with no or insufficient manufacturing capacity benefit after the system becomes operative? Will they be able to rely on imports of needed drugs from other countries? These questions are particularly significant in the context that most of developing countries have switched over to product patents from January 1, 2005, thereby reducing the scope for generics and making access to cheaper drugs more difficult. The problem of access to drugs has further been aggravated by TRIPS-plus agreements concluded by developed countries with developing countries seeking higher levels of IPR protection than that provided in the TRIPS Agreement and also imposing restriction on the importation of generics or issuance of compulsory licenses.

This article examines the Doha Declaration, the Decision of 2003 and Article 31*bis*, followed by an account of the implementation by

7 Implementation of paragraph 11 of the General Council Decision of 30 August 2003 on the implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health [the "Decision"], WTO Doc. IP/C/41**,** 6 December 2005.

countries of the Decision/Article 31*bis*, wherein the case of India has been taken up specifically as India has remained a major supplier of generics in poor countries. As concluding remarks, it attempts to look into the viable solution to paragraph 6 problem of Doha Declaration in case the Decision and TRIPS amendment does not work.

2. Doha Declaration – the Context

The impact of TRIPS was beginning to be felt by developing countries, particularly in Africa and other less developed countries in the late 1990s, just as the devastating effect of the HIV/AIDS pandemic deepened. Prices of life-saving medicines were no longer within the reach of the people even as they became more urgently indispensable to preserve lives. Efforts made by certain developing countries, like Thailand, Brazil and South Africa during this period, to ensure access to medicines for their people by invoking the flexibility provisions of the TRIPS Agreement were opposed by pharmaceutical companies.[8] South Africa and Brazil came under pressure for introducing or maintaining legal provisions concerning compulsory licensing in their patent laws that were considered incompatible with WTO by the USA and EU.

The Brazilian patent law under Article 68 permits the use of compulsory licensing. A threat by the Brazilian government to invoke this law to ensure access to HIV/AIDS medications for its citizens led to the filing of a petition by the United States before the WTO panel opposing the action of the Brazilian government. This petition was later withdrawn, by which time the Brazilian government through its threat, had forced pharmaceutical companies to reduce prices of patented HIV/AIDS drugs in that country.[9] In the case of South Africa, 39 pharmaceutical companies instituted a court case against the South African government for enacting a new patent law in 1997,[10] which

8 It is however to be noted that less than 5% medicines of WHO's essential drugs list are protected by patents; patent protection for HIV/AIDS exists in just over 20% of 53 African nations with no patents whatsoever in 13 countries.

9 See Joint Communication of Brazil- United States, June 25, 2001.

10 See Medicines and Related Substances Control Amendment Act No. 90

allowed parallel importation, compulsory licensing and price regulations of medicines in the wake of the HIV/AIDS pandemic in the country.[11] The pharmaceutical companies, backed by the United States, alleged that the new law contravened the TRIPS Agreement and the Constitution of South Africa 1996. However, under pressure from civil society groups and non-governmental organizations (NGOs) across the globe, the pharmaceutical companies withdrew the case in 2001. The lack of access to medicines in Africa and other less developed countries and the resulting public health crises caught widespread international attention.[12] In 2001, the United Nations General Assembly in its Special Session on HIV/AIDS, adopted the Declaration of Commitment.[13] In the same year, the African leaders adopted the Abuja Declaration on HIV/ AIDS and

(1997)..

11 *Pharmaceutical Manufacturers' Association of South Africa* v. *President of the Republic of South Africa*, Case No. 4183/98 (filed 18 February 1998) (HC), available at http://www.fordham.edu/law/faculty/patterson/tech&hr/materials/phamace.txt.

12 See Access to Medication in the Context of Pandemics Such as HIV/AIDS, Tuberculosis and Malaria, Commission on Human Rights Res. 2004/26, UN Doc. E/CN.4/2004/127 (April 16, 2004), *available at* http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2004-26.doc. For discussions of TRIPS developments in relation to access to medicines, see generally UNCTAD-ICTSD, *Negotiation Health: Intellectual Property and Access to Medicines* (Pedro Roffe et al. eds., 2006); Frederick M. Abbott, "The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health", 99 Am. J. Int'l. L. 317 (2005), Ebenezer Durojaye, "Compulsory Licensing and Access to Medicines in Post Doha Era; What Hope for Africa?", LV Netherlands Int'l Law Review (NILR) 33-71, at 41 (2008).

13 UN Declaration of Commitment on HIV/AIDS, 25-27 June 2001, UN GAOR, 26th Special Session, Res. 33/2001.

other related diseases.[14] The issue of access to medicines was also taken up by the World Health Organization, and in 2001 its Assembly addressed the need to evaluate the impact of TRIPS Agreement on access to drugs, local manufacturing capacity and development of new drugs.[15] As a run up to the Doha Ministerial Meeting, upon the request of the African Group, the Council for TRIPS agreed to deal specifically with the relationship between the TRIPS Agreement and Public Health.[16]

It is evident from the close look at the TRIPS Agreement that a proper balancing between the rights of the IP owner and social objectives of the TRIPS Agreement are evident from Articles 7 & 8 of the Agreement, and its "regulatory exceptions" (in Articles 6, 31 and 40), and the appropriate scope of IP protection raise numerous issues. These provisions provide sufficient flexibility to TRIPS Members to address the health needs. Article 6 relates to exhaustion of IP rights and leaves the issue of parallel imports open to the countries. Under Article 31, members may grant compulsory licenses for lack of or insufficiency of working of an invention, to remedy anti-competitive practice, for cases of emergency, government use and on other public interest grounds. Article 40 aims at curtailing the abuses of IPRs in contractual licenses. Art. 30 empower the Members to curtail the exclusive rights of the patentee, including the right to produce and export patented drug under compulsory licenses issued in the importing country. In national

14 African Summit on HIV/AIDS, Tuberculosis and other Related Infectious Diseases, Abuja-Nigeria, 24-27 April 2001, OAU/SPS/ABUJA/3.)

15 Resolutions WHA54.10 and WHA54.11, WHO website: <C:/Documents and Settings/Owner/Desktop/WHO> Doha Declaration on the TRIPS Agreement and Public Health.

16 For the background in the adoption of the Doha Declaration, see Carlos M. Correa, *Implications of the Doha Declaration on the TRIPS Agreement and Public Health* (WHO, 2002). WHO Doc. WHO/EDM/PAR/2002.3, pp. 1-3, available at <http://www.who.int/medicines/areas/policy/WHO-EDM-PAR-2002.3.pdf>.

emergencies, countries can adopt a range of other measures to improve access to medicines in line with Articles 7 and 8 of TRIPS.

The fact, however, remains that many developing countries lacks even the capacity to produce formulations and only a few of these countries invest in R &D or have pliable R & D capabilities for new drugs or even to conduct research in pharmaceutical sector. The only hope for these countries is to import generic drugs through compulsory licensing. Generic drugs can improve healthcare and reduce the monopoly of the patent holder, but the possibility to import is remote and debatable under the existing WTO/TRIPS regime.

3. Compulsory Licensing Regime of TRIPS

To protect against abuses such as excessive pricing and a failure to satisfy local demand, many patent systems have historically made provision for compulsory licenses, which may allow for the introduction of generic competition without the patent holder's consent. But a systematic use of compulsory licenses is stated to effect adversely innovation and investments, [17] reducing incentives for enterprises to engage in R&D, which may diminish global welfare by lowering the future stock of useful inventions. However, the benefit to developing countries of increased R&D in the developed countries is often remote, and there is no evidence that the granting of compulsory licenses has led to a reduction in R&D investment. [18] Compulsory licenses may help in putting a downward pressure on prices. Compulsory licenses are permitted under Article 5A (2) of the Paris Convention. They may

17 Kommerskollegium, *The WTO Decision on Compulsory Licensing: Does it enable import of medicines for developing countries with grave health problems?* (Report of the National Board of Trade, Sweden, 2008:2 www.kommers.se) p 7.

18 See S.K. Verma, "TRIPS – Development and Transfer of Technology," 27 International Review of Industrial Property and Copyright Law 331 (1996); F.M. Scherer, *Comments* in Robert Anderson and Nancy Gallini (Eds.) *Competition policy and intellectual property rights in the knowledge-based economy,* University of Calgary Press, Alberta 1998.

constitute a strategic tool for improving the negotiating position of the government vis-à-vis the patent holder to access a particular invention.

TRIPS Agreement allows the granting of compulsory license for the domestic use under Article 31 with certain terms and conditions, which include a case-by-case determination of compulsory license applications, the need to demonstrate prior (unsuccessful) negotiations with the patent owner for a voluntary license, limited scope and duration of use of license, non-exclusivity and non-assignability of license, use predominantly for the supply of domestic market (this condition is not applicable in case to remedy the anti-competitive practice), termination of license after the circumstances cease to exist for its issuance, and the adequate remuneration to be paid to the right holder. Where compulsory licenses are granted to address a national emergency or other circumstances of extreme urgency, certain requirements are waived to obtain a voluntary license from the patent holder. It leaves Members full freedom to stipulate other grounds, such as those related to non-working or failure to work of patents, public health or public interest as grounds of issuance of compulsory license.

While countries are empowered, under Article 31, to issue non-voluntary and non-exclusive uses of patents, paragraph (f) of Article 31 stipulates that "any such use shall be authorized predominantly for the supply of the domestic market" of the Member authorizing such use, "subject to certain exceptions."[19] The import of the provision is unclear. It has been argued that compulsory license, under this provision, can be used for local consumption and not for export. Thus, the provision is of no avail to developing countries and LDCs if they lack technological capacity to manufacture generics locally. [20] However, the word 'predominantly' in Article 31(f) does not quantify the share in the domestic market of the supply by the licensee of the production under

19 As an exception, Article 31 (k) provides: "Members are not obliged to [this condition]..where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive".

20 E. Durojaye, *op. cit.* 12, at 50.

the compulsory license, but it certainly is more than fifty percent. It means that under Article 31(f), the government can authorize the licensee to produce for export, so long the licensee predominantly produces for the domestic market and imports are not in competition with the patent holder in the importing country.[21] But it is doubtful whether 'predominantly' will help in exporting the generic drugs to countries in dire need of drugs for epidemics/pandemics, with no manufacturing capacity, nor would it allow the importing country to issue license to import generics of life-saving drugs. It will hamper the access to medicines to countries with no or insufficient capabilities in two ways: (i) by limiting availability of imported drugs made under compulsory license, it invariably restricts countries that are unable to support manufacturing under compulsory license; and (ii) requiring licensees to restrict to predominant part of their production to domestic market, limits flexibility of countries to authorize the export of compulsory licensed drugs and thus to exploit economy of scale.[22] Apparently, Article 31(f) does not prohibit *per se* the issuance of compulsory license for export purposes with some restrictions on such exports, viz., safeguarding the rights of the patent holder. In the case of national emergency, other circumstances of extreme urgency and public non-commercial use, prior negotiation with the patent holder need not be pursued. The license can be terminated as soon as the circumstances which led to its granting no longer exist (Art. 31(g)). This provision is a big disincentive for applicants of compulsory license, since the licensee may be exposed to the revocation at any time.[23] On the other hand, for

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21 A.S. Lowenfeld, *International Economic Law,* 108 (Oxford University Press 2002, London)

22 F.M. Abbott, *WTO TRIPS Agreement and its Implications for Access to Medicines in Developing*
Countries, a report prepared for Intellectual Property Rights Commission p. 17 (Washington DC, Intellectual Property Rights Commission 2002)

23 *UNCTAD –ICTSD - Resource Book on TRIPS and Development***,** Ch. 25: Patents: Non-Voluntary Uses (Compulsory Licences) 460, at p. 474 (2005, Cambridge University Press).

the granting of compulsory license, it is necessary to establish that (a) the party being granted license within the country has the capability to exploit it through manufacturing or import. This requires financial ability or technical capability of the country concerned; (b) there must be evidence of an existing sound legal and political structure to permit the granting and monitoring of the license.

Going by these pre-conditions for exploiting compulsory licenses, only few developing countries and developed countries would be able to successfully use these exceptions. Countries without domestic production capacity may not use them. Many LDCs lack financial resources and technical expertise to meet these pre-conditions. Nevertheless, the issuance of compulsory license, especially in case of import, remains a viable tool in advancing access to medicines and right to health in most of these countries, because it may promote competition and break the monopoly enjoyed by the patent holder and facilitate access to cheap drugs. [24] Article 31(b) of TRIPS, explicitly states that governments do not need to consult with patent holders when issuing a compulsory licence for national emergencies or public non-commercial use.

However, to make the compulsory licenses workable, developing countries need to establish workable laws and procedures to give effect to compulsory licensing, and provide appropriate provisions for government use. Article 30 of the TRIPS Agreement authorizes the members to provide limited exceptions to exclusive rights conferred on the patentee, " provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably

24 The provisions for compulsory licenses are provided in the developed countries' legislations. Even Canada and the United States threatened to use compulsory license over Bayer's *ciprofloxacin*, which was useful for the treatment of anthrax after the events of 9/11/2001. The USA could manage to win a major price concession from Bayer. See D. Alexander, "'Duplicated' drugs life-line for millions in Africa: US anthrax scare renews debate on generic drugs law", The Monitor 15 (1 Nov. 2001.

prejudice the legitimate interests of the patent owner...."[25] This provision can be used to produce and export patented drug to another member to meet the public health needs if a compulsory license has been issued in the importing country.[26]

Compulsory licenses are rarely being used by developing countries for number of reasons, viz., absence of administrative and legal infrastructure; fear of sanctions; use predominantly for the domestic market; non-exclusive nature and limited duration, which make them less attractive for the holder of compulsory license. In certain cases, unless these issues are addressed, compulsory license will remain only a paper-tiger, though aimed at preventing abuses of the IP system.

4. Doha Declaration On Public Health

In 2001, a special Ministerial Declaration at the WTO Ministerial Conference in Doha on "The TRIPS Agreement and Public Health"[27] was adopted to clarify ambiguities between the need to apply the principles of public health and the terms of the TRIPS Agreement. The Declaration has seven paragraphs. In the opening paragraph, the Members recognized the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics, and the need for national and international action to address the issue.

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25 The use of this provision by Canada to speed up the introduction of generic drugs in Canada has already become controversial on the EU's complaint against Canada before the WTO dispute settlement body. See Panel Report in WT/DS114/R, *Canada—Patent Protection of Pharmaceutical Products,* adopted on 7 April 2000. The use of this provision in public health crisis is a matter of interpretation.

26 The European Parliament had adopted an Amendment to the European Directive on 23 October 2002, which provides, *"Manufacturing shall be allowed if the medicinal product is intended for export to a third country that has issued a compulsory license for that product, or where a patent is not in force and if there is a request to that effect of the competent public health authorities of that third country. "* Art. 10(4), sub-Para 1a (new), Directive 2001/83/EC.

27 See, *op.cit. 5.*

The Declaration affirms that "the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health" and the Agreement "can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all" [Para 4]. Paragraph 5 in its relevant part states:

(b) Each Member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted.

(c) Each Member has the right to determine what constitutes national emergency or other circumstances of extreme urgency…

(d) Each member [is] free to establish its own regime of […] exhaustion without challenge….

Thus, the use of exceptions such as compulsory licenses and their grounds for invocation are left to the Members to decide as well as to determine its own regime of exhaustion of IPRs and may thereby decide to allow parallel imports. From a legal perspective, these provisions do not add any thing new to the TRIPS obligations. It merely clarifies the extent of existing rights and obligations of members under TRIPS and reaffirms their right to use, to the full, the provisions which provide flexibility for this purpose. While paragraph (b) relates to Members' discretion with regard to the grounds upon which compulsory licenses are granted, paragraph (c) refers to Article 31(b), making it clear that the definition of the term 'national emergency' and 'other circumstances of extreme urgency' is up to Members' discretion. Paragraph (d) reiterates Article 6 of TRIPS Agreement. This leaves Members considerable room for the pursuit of public policy objectives related to public health. The Declaration, however, was unable to find a solution to Article 31(f) of the TRIPS Agreement, perceived as a stumbling block to the use of compulsory licensing by developing countries.

During the Ministerial Meeting, the issue of the incapacity of WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector also came up, which could face difficulties in making effective use of compulsory license under the TRIPS to meet the

public health crisis. Therefore in the Declaration, recommendation was made to find 'expeditious solution' to this problem. Paragraph 6 of the Declaration reads:

We recognize that WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and report to the General Council before the end of 2002.

The Declaration also granted extension of transition period to least-developed countries under Article 65 of the TRIPS Agreement up to January 1, 2016.[28] However, the extension is limited to the obligations under provisions in the TRIPS Agreement relating to patents and marketing rights, and data protection for pharmaceutical products.[29] From a public health perspective, this extension of the transition period for LDCs is of significant importance. It is a recognition of the implications of patent protection on public health, and is expected that all LDCs adopt the necessary measures to use the 2016 transition period in relation to pharmaceutical patents and test data protection. However, most of the least-developed countries already grant patent protection to pharmaceuticals under different bilateral or regional FTAs, thus leaving practically very little effect of the apparent concession granted under the Declaration.

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28 Para 7 of the Doha Declaration allowed the formal introduction of patent protection for pharmaceuticals and of the protection of undisclosed regulatory data in least developed countries until January 1, 2016. Earlier it was up to January 2010.

29 On 8 July 2002, the General Council adopted a Decision on Article 70.9, adopted by, with a view to ensure attainment of the objectives of paragraph 7 of the Doha Declaration. It says LDCs will not have to give exclusive marketing rights to pharmaceuticals that are subject of a patent application until January 2016, but would be obliged to implement the rest of their obligations under the TRIPS Agreement as of 2006

The Doha Declaration represents the first public acknowledgement by the WTO that all may not be well with TRIPS. In expressly identifying the Paragraph 6 problem, it instructed 'the Council for TRIPS to find an expeditious solution to this problem'. The Declaration responds to the concerns of developing countries about the obstacles they face when seeking to implement measures to promote access to affordable medicines in the interest of public health in general, without limitation to certain diseases. While acknowledging the role of intellectual property protection "for the development of new medicines" [Para 3], the Declaration specifically recognizes concerns about its effects on prices [Para 7]. The TRIPS when taken together with the Declaration, does not say that a government has to declare a national or health emergency before issuing a compulsory license. The Declaration clarifies that all Members States have the right to grant compulsory license to protect public health and improve access to medicines. Under the Declaration, each Member can determine what constitutes a national emergency or other circumstances of extreme urgency; and that public health crisis, such as HIV/AIDS, Tuberculosis, malaria and other epidemic can constitute such circumstances.

The reference to some specific epidemics does not imply that the Declaration is limited to them. It covers any "public health problem"[30], including those that may be derived from diseases that affect the population in developing as well as developed countries. It may be invoked in all public health emergencies and may cover not only medicines, but any product, method or technology for health care.[31]

The Declaration, however, did not change materially the then existing situation under the TRIPS Agreement as it did not provide any mechanism or exception to TRIPS obligations under Article 31 for the

30 In Para 1 of the Declaration, members recognized, " the gravity of the *public health problems* afflicting many developing and least developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics." (emphasis added).

31 Carlos M. Correa, *op. cit.* 16, p. 5.

use of compulsory licensing. The Declaration nevertheless recognized differentiation in patent rules necessary to protect public health and it may easily be concluded that pharmaceutical patents stand on a different footing under the WTO/TRIPS dispensation. It singled out public health, which had been the controversial issue since the adoption of TRIPS Agreement, particularly pharmaceutical patents.

The legal status of the Declaration is also a debatable issue. Being a declaration, it is considered to be merely of persuasive value in interpreting the TRIPS Agreement and is `legally not binding`.[32]Correa, however, states that it is a Ministerial Decision with legal effects on the members and on the WTO bodies, particularly the Dispute Settlement Body (DSB) and the Council of TRIPS.[33] But it will certainly have the persuasive value for the interpretation of the text of the Agreement.

5. Decision On Paragraph 6 And Article 31*bis*

In furtherance of paragraph 6 of the Doha Declaration, which mandated the TRIPS Council to find an *expeditious solution* (before the end of 2002) to the problem of WTO members with little or no manufacturing capacities in the pharmaceutical sector, the TRIPS Council adopted a Decision (the Decision)[34] on 30 August 2003.[35] The Decision lays down the grounds for the use of compulsory license by the

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32 A.O. Sykes, "TRIPS, Pharmaceuticals, Developing Countries and the Doha 'Solution'", 3 *Chicago JIL* pp. 47-68 (2002).

33 Carlos M. Correa, *op. cit.* 25, pp. viii and 34

34 For an analytical account of the Decision, see generally, Paul Vandoren and Jean Charles van Eeckhaute, "The WTO Decision on Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health", 6 JWIP 779 (2003); Frederick M. Abbott, *The containment of TRIPS to Promote Public Health: A Commentary on the Decision on Implementation of Paragraph 6 of the Doha Declaration* (2004); Carlos Correa, *Implementation of the WTO General Council Decision on Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health* (WHO, 2004).

35 The 2003 Decision is often called the paragraph 6 System because it implements Para 6 of the 2001 Doha Declaration on TRIPS and Public Health

importing and exporting countries. It establishes a mechanism to overcome the restriction of Article 31(f), which limits compulsory license *predominantly* to the supply of the domestic market. It will be waived for an exporting Member when it is requested by an eligible importing Member to supply products under compulsory license issued in the exporting country. Similarly, the requirement of payment of adequate remuneration to the right holder on compulsory license under Article 31(h) is waived for the importing country.

The Decision in paragraph 1(a) defines 'Pharmaceutical product' as 'any patented product, or product manufactured through a patented process, of the pharmaceutical sector needed to address the public health problems as recognized in paragraph 1 of the Declaration. It is understood that active pharmaceutical ingredients (APIs) necessary for its manufacture and diagnostic kits needed for its use would be included.'[36] This definition is sufficiently broad and requires members other than LDC members to submit a notification of their intention to use the system in whole or in part, which may be modified at any time.[37] The notification establishes a Member as an 'eligible importing Member'.[38]

The Decision sets out a detailed process whereby one country can issue a compulsory license to import drugs and a second country can

36 This subparagraph is without prejudice to sub paragraph 1(b), which defines an 'eligible importing country'.

37 Such a notification does not need to be approved by a WTO body in order to use the system set out in the Decision, see paragraph 1(b) of the Decision.

38 'Eligible importing Member' under the Decision is any least developed country Member, and any other Member that has made a notification to the Council for TRIPS of the intention to use the system as an importer, it is being understood that a Member may notify at any time that it will use the system in whole or in a limited way, for example only in the case of national emergency or other circumstances of extreme urgency or in case of public non-commercial use. It is understood that some Members will not use the system as importing Members and it lists 23 countries in this category, see fn 2 & 3 to paragraph 1(b) of the Decision.

issue a compulsory license to export the drugs to the needy country. Conditions for use of the waiver are detailed in Paragraph 2. The importing Member must notify the TRIPS Council of its needs and (except for LDC Members) must indicate that it has determined that it has insufficient or no manufacturing capacity for the product(s) in question. The latter determination is made in accordance with the Annex to the Decision.[39] When there is a patent in the importing Member, it must indicate that it has issued, or intends to issue, a compulsory license (except for LDC Members that elect not to enforce patents pursuant to Paragraph 7 of the Doha Declaration). The exporting Member must notify the TRIPS Council of the terms of the export license it issues, including the destination, quantities to be supplied and the duration of the license. The products supplied under the license must be identified by special packaging and /or colouring/shaping. Before quantities are shipped, the licensee must post on a publicly accessible website the destination and means it has used to identify the products as supplied under the system.

Paragraph 3 provides waiver from remuneration to the importing country under Article 31(h) if adequate remuneration for the same product has been paid by the exporting country under a compulsory license. Paragraph 4 requires an importing member country to take reasonable measures to prevent diversion of products imported under the system. The Decision does not specify the nature of such means but if an importing member experiences difficulty in taking measures to prevent diversion, developed Member countries can, on request, provide technical and financial cooperation. Other Members are required to prevent the importation of diverted products into their territories. If these

39 The Annex established the criterion in either of the following two ways: (i) the Member in question has established that it has no manufacturing capacity in the pharmaceutical sector; or (ii) where the Member has some manufacturing capacity, it is currently insufficient for the purposes of meeting its needs.

measures prove to be insufficient, the TRIPS Council may review the matter at the request of that Member (paragraph 5).

Paragraph 6 provides an additional waiver to Article 31(f) for regional trading arrangements in order to enhance the purchasing power and facilitating the local production of pharmaceutical products, where at least half are LDCs, like in Africa. This waiver allows a Member to export to countries throughout the region under a single compulsory license issued under Article 31(f), although it does not expressly waive the requirement for licenses to be issued by importing countries of the region. The main benefit of the waiver may be to allow the import of APIs formulation into finished products and export throughout the region that share the health problem in question. It will also help in addressing the problem of the size of the market of importing country, which is a determinant factor for the licensee to export to make it financially viable. The need for the grant of regional patents has also been recognized.

Paragraph 7 recognizes the desirability of promoting transfer of technology to LDCs and capacity building in the pharmaceutical sector in pursuant of Article 66.2 of the TRIPS Agreement and paragraph 7 of the Declaration. The annual review of the system by the TRIPS Council will be enough as the renewal of the waiver (paragraph 8). This Decision is without prejudice to rights, obligations and flexibilities that Members have under the provisions of TRIPS Agreement (such as the potential for exports under Article 30 or Article 31(f) to export pharmaceutical products under a compulsory license). Paragraph 10 precludes any nullification or impairment action under Article 23 of the GATT against any measure taken in conformity with the provisions of the waiver.

While the Decision was a consensus statement of the members of the WTO in protecting the public health under the TRIPS Agreement, it has been criticized as administratively too complex and burdensome to be a truly effective means to remove obstacles to access cheaper drugs. Among the scholars, it is a common view that the Decision will create more hurdles than solution to paragraph 6 problem of the Doha Declaration. It is saddled with many administrative pre-requisites, which

will hamper the very purpose of the Para 6 System. A country in need of required drugs to meet the health emergency, and lacking manufacturing capacity will have to go through many layers of procedure. It will have to invoke compulsory license to request another government or suspend the rights of patent holder and the other government will provide license to local firm(s) to produce and export the needed drugs. They have to notify the TRIPS Council about the intention to use this system and the country that has issued the compulsory license has to meet many conditions. All these measures not only will delay the manufacture and supply but increase the cost of the drugs.[40] Decision is termed to be a temporary solution which is difficult to operate, which is not faithful to Doha Declaration on Public Health. [41]

6. Article 31*bis*

Two years after the adoption of the waiver, on 6 December 2005, the TRIPS Council adopted the Protocol amending the TRIPS Agreement, by inserting Article 31*bis* after Article 31 and Annex after Article 73. [42]Annex to the Protocol specifies the provisions of Article 31*bis*. The new Article reiterates the provisions of the Decision. The amendment, the first ever to the 1994 TRIPS Agreement, implements a waiver that was temporarily agreed on 30 August 2003, making it possible for countries to export medicines under compulsory license to countries with no or inadequate production facilities. Article 31*bis* provides for limited exceptions to Article 31(f), by allowing members to issue compulsory licenses for the production and export of pharmaceuticals to an eligible importing Member.

The amendment is in no way different in elements substantially from the Decision, save for some slight changes in structure. The small changes in the language between the two are inserted to bring the Article

40 K.R. Srinivas, "Interpreting Paragraph 6 Deal on Patents and Access to Treatment," Economic And Political Weekly, 20 Sep. 2003

41 Ebenezer Durojaye, *op. cit.* 12, at 52.

42 *Op. cit.* 7. For the text of Article 31bis, see the WTO website <http://www.wto.org/english/tratop_e/trips_e/pharmapatent_e.htm>

in the format of the TRIPS. The text of the Article contains the entire August 30 Decision barring the preamble and paragraph 11 of the Decision which contained the mandate to find a permanent solution and established a waiver from the requirements of Article 31(f) of the Agreement. It is also to be noted that the Decision remains operative in a WTO member state until the amendment takes effect in that member state (Para 11 of the Decision). In other words, amendment has in no way abolished the Decision. Since the effective date of the amendment is not clearly ascertained, the implication of this is that the Decision may still be binding on members of the WTO.

The Protocol amending the TRIP Agreement has three main parts. Firstly, there is Article 31*bis* which contains about five paragraphs in which the substantive part of the Decision finds a place that tally with the main text of paragraphs 2, 3, sub-paragraph 6(1), paragraphs 10, and 9 of the Decision respectively. Secondly, the other part of the amendment is the Annex to the TRIPS Agreement which contains 7 paragraphs corresponding in substance to paragraph 1, sub-paragraphs 2(a), 2(b) and 2(c), paragraphs 4 and 5, sub-paragraph 6(ii) and paragraphs 7 and 8 of the Decision respectively. Finally, there is the Appendix to the Annex to the TRIPS Agreement which corresponds to the Annex to the Decision and deals with assessment of manufacturing capacities for the product in question to be imported by the least developed or developing country concerned.

In its five paragraphs, Article 31*bis* contains 3 waiver provisions of the Decision: non-application of Article 31(f), non-violation complaints, and preservation of TRIPS flexibilities The Annex sets-out terms for using Paragraph 6 system. Paragraph 1 of Article 31*bis* restates paragraph 2 of the Decision; paragraph 2 of the Article reproduces paragraph 3 of the Decision; paragraph 3 incorporates paragraph 6 of the Decision.[43] Paragraph 4 is paragraph 10 of the Decision and paragraph 5 is the reiteration of paragraph 9 of the Decision.

43 In the case of least developing country, which is a Member of a regional trade agreement, the export to the markets of other developing or least

Annex to the TRIPS Agreement defines in Paragraph 1 the 'pharmaceutical product', 'eligible importing Member' and 'exporting Member' similar to the Decision. In order to give effect to paragraph 1 of Article 31*bis,* to export pharmaceutical product to an eligible importing Member(s), the Annex outlines the terms and conditions for the exporting and importing members. The eligible importing Member(s) needs to make a notification to the TRIPS Council, which should:

(i) Specify the names and expected quantities of the product(s) needed;

(ii) Confirm that the importing member (other than the least developed country member) has insufficient or no manufacturing capacity as established in accordance with the Appendix; and

(iii) Confirm in case of a pharmaceutical product patented in its territory that it has granted or intends to grant a compulsory license in accordance with Article 31 and 31*bis* and the provisions of this Annex.

The compulsory license issued by the exporting Member should contain the following details:

(i) The amount necessary to meet the needs of the eligible importing Member(s) that may be manufactured under the license and exported to the eligible importing Member(s);

(ii) Clearly identify products produced under the license through specific labelling or marking. Suppliers should distinguish such products through special packaging and/or special colouring/shaping of the products, provided that such distinction is feasible and does not impact the prices significantly;

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developed country parties to the regional trade agreement facing the same health problem, the Annex clarifies that a joint notification providing the information about the required quantities of the product(s), and establishing that it intends to or has granted compulsory license (where the product is patented in its territory) in accordance with Articles 31 and 31*bis*, by the regional organization(s) on behalf of eligible importing countries, that are parties to the system, with the agreement of those parties, see footnote 4 to the Annex.

(iii) The licensee is required to post on the website[44] the following details before the shipment starts:

a. quantities supplied to each destination; and

b. The distinguishing features of the product(s)

In addition, the exporting Member is required to notify the TRIPS Council about the grant of the license and the conditions attached to it. The information will relate to the details of the licensee, the product(s) and the quantity, the importing country/(ies) and the duration of the license. The notification to be issued by the eligible importing Member(s) need not to be approved by a WTO body, but it will be made available publicly by the WTO Secretariat on its website.[45]

Reiterating paragraph 4 of the Decision, paragraph 3 of the Annex requires importing country to take measures to prevent diversion of products imported under the system. Paragraph 4 requires other Members to take effective measures to prevent the importation of such products into their territories. Paragraphs 5, 6 and 7 of the Annex restate paragraphs 6, 7 and 8 of the Decision related to exports to regional trading arrangements, transfer of technology and the annual review of the waiver by the Council of TRIPS. In the adoption of Article 31*bis,* it was noted that certain Members will not use the system as importing countries specified in the footnote.[46]

The new rules of Para 6 System will be applicable where the product is patented in both the exporting and importing countries, both are required to grant compulsory license, but if the product is not patented in the importing country but in the exporting country, only exporting country would grant the license. Where the product is not

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44 Footnote 9 of the Annex provides that for this purpose, the licensee can use its own website or, with the assistance of the WTO Secretariat, the page on the WTO website specified for the system.

45 Cf. footnotes 2 and 5 of the Annex. WTO website for this purpose is : http://www.wto.org/English/tratop_e/public_health_e.htm .

46 Countries mentioned in footnote 3 of the Annex are: Australia, Canada, European Communities with its member States, Iceland, Japan, New Zealand, Norway, Switzerland, and the United States.

patented in the exporting country, but in the importing country, new rules will not be used and the importing country will issue the 'regular' compulsory license under Article 31. Where the product is not patented in both the countries, the new rules are not used, and the product may be imported from any manufacturer. The system will not to be used if local production is feasible, or voluntary licenses have been issued by the patent-holder, or if no patent exists for the pharmaceutical product in the exporting country, or the exporting country is not a member of the WTO.

Article *31bis,* in accordance with Article X: 3 of the WTO Agreement will be formally built into the TRIPS Agreement after two thirds of the WTO members have accepted the change.[47] The amendment will take effect in those members and will replace the 2003 waiver for them. Originally the Protocol was open for acceptance until 1 December 2007, which has since been extended thrice until 31 December 2013.[48] Meanwhile, the 2003 waiver remains in effect.

This amendment of the TRIPS Agreement is aimed at to make it easier for countries with insufficient or no manufacturing capacity for pharmaceuticals to gain access to essential pharmaceuticals at an affordable price. But as it is in the case of the Decision, Article 31*bis* regrettably is saddled with the same administrative hurdles,[49] as of the Decision to the extent of making it unworkable. This is evident from the cases of Medicines Sans Frontiers (MSF) and Rwanda.

In May 2004, the MSF placed an order under the new rules, outlined in the Decision, for its project in a developing country, which required the MSF to locate a local generic manufacturing company

47 Presently 34 WTO members (including the European Union) have accepted the Protocol.

48 See, WTO/TRIPS Council Doc. WT/L/785 21 December 2009; see at http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm

49 Frederick M. Abbott* and Jerome H. Reichman, "The Doha Round's Public Health Legacy: Strategies for the Production and Diffusion of Patented Medicines under the Amended TRIPS Provisions", 10 Journal of Int'l Economic Law 921-987 (2007:4).

within Canada.[50] The MSF approached Apotex, a generic pharmaceutical company in Canada that agreed to produce a three-in-one antiretroviral combination of zidovudine, lamivudine and nevirapine (AZT+3TC+NVP) drugs, which represent one of the first-line treatment regimens for HIV recommended by the WHO. Apotex had to develop a fixed-dose combination of these drugs to simplify treatment for those in need. As the new fixed-dose combination drug was not included in the schedule of drugs qualified to be exported under the Canadian legislation, it required an amendment of the Canadian law. After the required amendment was put in place, Apotex in 2006 negotiated with the company holding the patent over the proposed drugs to be exported under compulsory license. Apotex was only able to get the go-ahead from the patent holder sometime in August of 2007. In the meantime, the MSF abandoned the attempt when two Indian generic drug companies started marketing the copies of the certified quality of the same drug at a lower price than Canada. The drug was not patented in India.

In the case of Rwanda, it notified the WTO on July 19, 2007 to import pharmaceuticals produced under a compulsory license.[51] Product wanted by the MSF and Rwanda was not on the list of Canadian law and it took three months to put it in the schedule of the Canadian law. Canadian company applied for the compulsory license to export to Rwanda. The license was granted and the patent holders agreed to forgo the compensation on certain conditions. The medicine was the same as in the case of MSF, in which the Indian companies have an edge in terms

50 R. Elliot, 'Will They Deliver Treatment Access?: WTO Rules and Canada's Law on Generic Medicine Exports', 11 *Canadian HIV/AIDS Law Policy Review* (2006) p. 13.

51 See Notification dated July 17, 2007 (IP/N/RWA/1) by Rwanda under Para 2(a) on the Implementation of Para 6 of the Doha Declaration on the TRIPS Agreement and Public Health, available at http://www.wto.org/english/news_e/news07_e/trips_health_notif_oct07_e.htm

of price.[52] These cases indicate the inadequacy of the new rules under Article *31bis* and the August 2003 Decision of the Council for TRIPS devised to resolve the problem of inaccessibility to drugs faced by poor countries. They also highlight the difficulties in successfully invoking the use of compulsory licensing even in developed jurisdictions.

7. Implementation Of Para 6 System

The Doha Declaration has tried to resolve the pressing problem of access to medicines, which had remained a burning issue since the coming into force of TRIPS. However, ever since its adoption in 2001 and the subsequent adoption of the August 30 Decision on the Implementation of paragraph 6 of the Declaration and Article 31*bis* on the amendment of the TRIPS Agreement, international consensus has for the most part still not been translated into domestic policy and law. [53] Legislative amendments are required to enable a country to use the provisions of the Para 6 System as an importing or exporting Member.

Implementation of new rules is, however, independent to whether or not the country has accepted Article 31*bis.* So far only a handful of countries, the potential exporters, have taken legislative measures. Canada,[54] Norway,[55] India[56] and EU[57] were the first to implement the

52 See Canadian Notification to the TRIPS Council by Canada dated October 5, 2005 (IP/N/10?CAN?1) under Para 2(c) on issuing first compulsory license to export generic drug, available at http://www.wto.org/english/news_e/news07_e/trips_health_notif_oct07_e.htm .Canada sent 15.6 million pills to Rwanda.

53 See http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm.

54 Bill C -9, An Act to amend the Patent Act and the Food and Drugs Act (The Jean Chretien Pledge to Africa) assented on 14 May 2004; see WTO Doc. IP/C/W/464, 15 Nov. 2005. Under the law, non-WTO members do not qualify as importing countries for the purpose of exports.

55 Regulations amending the Patent Regulations of 20 Dec. 1996, No. 1162, Ss. 107 -109, WTO Doc. IP/C/W/427, 17 Sep. 2004.

56 India inserted a new sec. 92A and amended sec. 90(1) of the Patents (Amendment) Act, 2005. See WTO Doc. IP/N/I? IND/D/2-5.

57 EC Regulation No. 816/2006 of the European Parliament and of the Council of 17 May 2006 on compulsory licensing of patents relating to the

rules. Now Hong Kong-China, China, Switzerland, Philippines, Singapore, Albania, and Croatia have also made the changes in their laws and notified the WTO.[58] But most of the potential importing countries have yet to respond. A plausible explanation for this inaction is that most of these countries are now parties to bilateral or regional free trade agreements (FTAs), which has curtailed their flexibilities in utilizing the new Para 6 System rules.

8. Implementation Of Para 6 System In India

India is the first among the developing countries, with proven manufacturing capacity in the pharmaceutical sector, to give effect to the 2003 Decision. It has been one of the largest producers of generic drugs and has the capacity to produce them at a very cheap price. India is a major source of low-priced quality medicines and active pharmaceutical ingredients (APIs) as well as a major supplier of vaccines.[59] India introduced product patents for pharmaceuticals and drugs from 1 January 2005 by amending its patent law in 2005. Prior to the adoption of Patents (Amendment) Act, 2005, the Patent Act of 1970 prohibited product patent for pharmaceuticals, drugs and chemicals. This helped in the growth of a strong generic pharmaceutical industry in India, which now accounts for more than 70 percent of the domestic market, meeting nearly all the demands for formulations.[60] A significant consequence of this development in the generic pharmaceutical industry is the lower prices of drugs in India compared to other countries of the world. India supplies about half the generic drugs in Africa. After the introduction of

manufacture of pharmaceutical products for export to countries with public health problems. Official Journal of the EU L/157/1, 9 June 2006.

58 See WTO Doc. IP/C/57, 10 December 2010.

59 Cheri Grace, "The effect of changing intellectual property on pharmaceutical industry prospects in India and China", DFID Issues paper – Access to medicines, June 2004.

60 Government of India, Department of Chemicals and Petrochemicals, 'Annual Report (1999-2000)', available at <chemicals.nic.in/annrep99.htm>

the product patents, this may not be possible, though the likely implication of this change has remained uncertain so far.

While switching over to product patents in pharmaceuticals, drugs and chemicals, India gave effect to the Doha Declaration and the Decision to fulfill the health needs of its vast population. It contains provisions on compulsory licenses, parallel imports and exportation of drugs to countries with no or insufficient manufacturing capacity to manufacture drugs. Despite switching over to product patent, it is still possible that drugs under patent elsewhere, but which are currently manufactured and marketed in India; and those which are currently not manufactured in India but their patent applications were filed before 1 January 1995, or with priority date before 1 January 2005 will continue to be available in generic form in/from India. Only new drugs, whose applications were filed in India on or after 1 January 1995, would be product patent protected. They cannot be manufactured, sold or exported without appropriate authorization of the patentee.

In the case of 'mailbox' applications received by India under Chapter IVA (inserted in the Patents Act in 1999[61] and has been repealed by the 2005), between 1.1.1995 – 31.12.2004, the right of the patentee shall accrue from the date of grant of patent. Enterprises, which were producing and marketing that drug prior to 1.1.2005 and which continue to manufacture the product covered by the patent on the date of grant of patent (ongoing generic production), will not be subjected to infringement action and patent holder will get reasonable royalty only (S. 11A), provided the manufacturers have made significant investment.

61 The Patents (Amendment) Act, 1999, which became operative from 1 January 1995, formally gave effect to mailbox procedure and EMRs for patent applications related to pharmaceutical and agro-chemical products under TRIPS Article 70.8 and 70.9 respectively. The amendment was inserted after India lost the case filed by the USA before the WTO's Appellate Body for India's failure to provide a legal regime for mailbox and EMR applications. See, WT/DS50/AB/R (4 Dec. 1997), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds50_e.htm

The Act, however, does not quantify 'the significant investment' nor does it specify the parameters of 'reasonable royalty'.

In order to keep its generic drug industry functional and vibrant, and to meet its national and international obligations, the amended Act does not allow patents for relatively trivial changes, known as "ever-greening", but only for new chemical entities under section 3(d).[62] *Explanation* to sec. 3(d) has particular reference to pharmaceutical inventions. The underlying assumption behind section 3(d) is that derivatives, such as salt forms, polymorphs, isomers etc that are structurally similar to known pharmaceutical substances are likely to be functionally equivalent as well, and if this is not the case and the new form of an existing substance works better than the old form, it is up to the patent applicant to demonstrate this and justify the claim.

Given that the majority of patent claims made are for minor changes, often verging on discoveries rather than innovations, it is arguably unlikely that patents will be granted to a substantial number of applications which are currently being held under 'mailbox' system.[63] The new provision was challenged in *Novartis AG & Anr. v Union of India & Others*[64], but the Court decided against the Novartis. Since then, this provision has been invoked in other patent applications as well.

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62 Sec. 3 (d) of the Act provides: "The inventions which are '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 or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant…'"are not patentable.

63 A total of 8,926 mailbox applications were filed with the Indian Patent Office prior to 1 January 2005.

64 (2007) 4 MLJ 1153. The provision was challenged for allegedly being in contravention of TRIPS Agreement and in violation of the Constitution of India, when Novartis' application for the drug Glivec (which was the beta crystalline form of imatinib mesylate) was rejected by the Patent Office.

On the issuance of compulsory license, the amended Patents Act is TRIPS compliant (Chapter XVI). The grounds for granting compulsory licenses are that the: reasonable requirements of the public with respect to the patented invention have not been satisfied; or patented invention is not available to the public at a reasonable and affordable price; or patented invention is not worked in the territory of India (sec. 84(1). Reasonable requirements of the public shall be deemed to have not been met if due to patentee's refusal: (i) establishment of new trade/industry in India has suffered, (ii) the demand of the patented article has not been met, (iii) a market of export of patented article manufactured in India has not been supplied, and (iv) development of commercial activities in India has been prejudiced (sec. 84(7)).

Compulsory licenses can also be issued on notification by the Central Government in the Official Journal in circumstances of national emergency or in cases of extreme urgency or in cases of public non-commercial use, which may include public health crises relating to HIV/AIDS, tuberculosis, malaria or other epidemic (sec. 92). The Controller, while granting the compulsory license, shall endeavour to secure that the articles so manufactured shall be available to the public at the lowest prices consistent with the patentees deriving a reasonable advantage from their patent rights. Under the Drugs Price Control Order (DPCO), 1995, the government sets price ceiling on many drugs. Also, the National Pharmaceutical Pricing Authority (NPPA) determines about drugs for price control.

India accepted Article *31bis* on 26 March 2007 and in order to comply with Paragraph 6 system of the Doha Declaration and to give effect to the Decision of August 2003, the Patents Act, 2005 has added section 92A, which provides:

1. Compulsory license shall be available for manufacture and export of patented

Pharmaceutical products to any country having insufficient or no manufacturing capacity in the pharmaceutical sector for the concerned product to address public health problems, provided compulsory license has been granted by such country or such country has, by notification or

otherwise allowed importation of the patented pharmaceutical products from India.

2. The Controller shall, on receipt of an application in the prescribed manner, grant a compulsory license solely for manufacture and export of the concerned pharmaceutical product to such country under such terms and conditions as may be specified and published by him.

Explanation - 'pharmaceutical products' means any patented product, or product manufactured through a patented process, of the pharmaceutical sector needed to address public health problems and shall be inclusive of ingredients necessary for the manufacture and diagnostic kits required for their use."

Thus, compulsory license can be issued to facilitate export of patented pharmaceutical products by Indian companies to countries that have insufficient or no manufacturing capacities in the pharmaceutical sector to address public health needs, provided compulsory license has been granted by such country or such country has, by notification or otherwise, allowed importation of the patented pharmaceutical products from India. Products manufactured under this provision will be meant for exports to meet the public health emergencies in these countries. The provision was invoked in September 2007 by NATCO, an Indian generic drug manufacturing firm, when it made three separate applications to the Patent Office to export generic copies of Pfizer's patented anti-cancer drug Sutent and Roche's patented drug Tarceva to Nepal in view of the public health needs in Nepal. NATCO subsequently withdrew its applications in September 2008 for certain drawbacks in its applications.

Fears have already been expressed in many African countries that the amended patent law of India may likely to hinder access to cheaper drugs in future. In AIDS pandemic cases, presently there are few pending mailbox applications before the Patents Office for Antiretroviral (ARVs) drugs, which are related to ARVs of pre-1995 patented medicines and India's current production of these will not be affected by what is in the mailbox, unless patents are sought and granted for improvements. It is most likely that some of existing ARVs will remain

available and off-patent in India (in the light of sections 3(d) and 11A) even now. This is, for example, the situation with the medicines that MSF could buy from India without using the Decision as they would have had to do in Canada. But after switching over to product patent regime, India or any other developing country with manufacturing capacity in the pharmaceutical sector, henceforth will not be able to produce generics of new medicines, introduced and patented after 1.1.2005. It is also important to note that HIV is a highly changeable virus and patients need to switch and change their medicines regularly. India may not be able to provide generics of second and third line of AIDS drugs without the consent of the patent holders. Presently, India can supply generics of first line of AIDS medicines only. On the other hand, with limited financial resources and high cost of drugs for second and third line of drugs for HIV/AIDS treatment, most of the LDCs will not be able to import these drugs.

9. Developments In The Use Of Compulsory Licensing Under Para 6 System

So far poor countries with insufficient or no manufacturing capacity have been slow to act under Para 6 System to expand access to medicines, except the solitary case of Rwanda. Few have made use of their existing laws to increase access to essential medicines.[65] It is possible that the new rules, with the possibility of compulsory licenses, may improve the importing countries negotiating position and may help in lowering the prices. However, it is too early to predict with certainty about the price effects of these rules. One reason for this inaction could be that till recently it was possible for these countries to import cheap medicines from India, which has introduced product patents for

65 Brazil and Thailand made use of their existing laws to access the generic drugs. Zimbabwe, in 2002, before the Decision on paragraph 6 of the Doha Round was taken, issued compulsory license under its Patent Act (Chap 26:03), 1971, under Ss 34 & 35 to import generics of Antiretroviral drug from India which was substantially cheaper than the patented drug. See www.cptech.org/ip/health/c/zimbabwe/msf05292002.html.

pharmaceuticals in 2005. Now the new drugs will be patented in India, there is a greater likelihood that importing countries may use the waiver.

Besides, as noted above, the Para 6 System is plagued with administrative hurdles. The use of compulsory license – whether for import or to manufacture drugs locally – requires essentially both technological capability and political commitment on the part of a government, which is absent in most of these countries. The administrative hurdles, as highlighted in MSF case, is not a singular problem. The case of Zimbabwe points out towards another pertinent problem, i.e., where almost 350,000 people are afflicted with HIV/AIDS and the harsh economic realities has resulted in to a critically low supply of ARVs in the country. [66] This is in contrast to the situation that existed in 2002, when Zimbabwe issued compulsory license to import the drug.[67] Present situation of Zimbabwe is an indication that the use of compulsory license, whether to import or to manufacture drugs, requires essentially both technological capability and political commitment/capability on the part of the importing government. In the case of exports, the licensee would like to be assured of some financial returns for undertaking the task of manufacturing and exporting the required drugs. In considering various approaches to the problem of compulsory licensing in countries with little or no manufacturing capacity or insufficient market demand, members must be mindful of choosing an approach that provides adequate incentives for the production and export of the medicines in need.

10. Conclusion

The Para 6 of the Doha Declaration – the Decision/Article 31*bis*, have given the WTO a human face by addressing the public health issue

66 At the end of 2006, about 350,000 people in Zimbabwe were in need of ARVs, See WHO, "Towards Universal Access: Scaling up Priority HIV/AIDS Interventions in the Health Sector," April 2007, available at < www.who.int/hiv/mediacentre/universal_access_progress_report_en.pdf>.

67 In 2002, the Zimbabwe Government declared a state of emergency in the country under sections 34 & 35 of the Patent Act, 1971. See MSF *op.cit.* 93

and crisis in poor countries. It has also worked to lower prices on medicines for diseases such as HIV/AIDS. However, the new rules touch on a small part of the interface of intellectual property and public health. They can be used when there is insufficient or no domestic production capacity in the importing country and the patent exists on the medicine in the exporting country. The countries that can not make their own generic drugs can import them under a compulsory license. So far there has not been enough empirical data to assess the credibility of the new rules on compulsory licensing. The analysis above reviews the potential for new rules to enable import of patented medicines to developing countries. Pertinent questions still remain to be answered: Are all the necessary pre-requisites in place? Can the countries with little or no capacity put the system in place effectively to meet the health emergencies? How to overcome the administrative obstacles to access the medicines within a reasonable time at affordable prices? How the cases like the MSF or Rwanda can be met where an insurmountable time was taken to address the health crisis?

The analysis above shows that the potential of new rules to address these issues is limited. The market size for exports will be a decisive factor. Beside the legal regime of the TRIPS Agreement, the other international commitments of the countries and the political factors will also go a long way to make the new system work. The Para 6 System may not work efficiently for many other reasons. It will take time to develop a new drug and also to get necessary approvals/notifications as required under Para 6 System and the national laws. These provisions may be useful to an extent but not adequate to meet national health emergencies if the drug concerned is new and the generic copies of that has to be developed. It would take at least 36-48 months, because the production of a new generic drug requires investment in plant and machinery, as well as bio-equivalence tests and regulatory approval. Initial costs will be high. This will make it difficult to access the competitive procurement of the drug under the Decision. Furthermore, the new manufacturer has to be ensured of some returns, which will greatly depend upon the size of the market. A big market will be an

incentive to off-set the costs. For small markets the Decision may be totally unworkable. Hence, economic difficulties of production costs and market potential would need to be addressed to make the system work.[68] In this context, the 'expeditious solution' to the problem of Para 6 of the Doha Declaration remains an unmet goal. In fact, the new rules are too harsh for poor countries, imposing upon them an expensive, cumbersome and time-consuming process. At the most they can be used as a negotiating tool by importing countries in putting some pressure on pharmaceutical companies to lower prices under the threat of a compulsory license.

The fact also remains that so far not many countries have put in place the required national measures to make the new system work. Fears have already being expressed that failure to bring the Amendment into force will open the door to a campaign to undermine the Waiver Decision and will leave the present situation unchanged. In case 31*bis* fails to materialize, the alternative lies in the in-built flexibilities in the TRIPS Agreement. The flexibilities which Doha Declaration talks about can be resorted to by these countries, with the issuance of compulsory licenses under Article 30 and 31. They may resort to safeguard provisions, such as parallel imports by making provision of international exhaustion in their patent laws under Article 6 of the TRIPS Agreement. On the other hand, in order to stop the entry of cheap drugs, originating from the same source into high-priced areas, developed countries can resort to "national exhaustion" principle, stopping thereby the parallel imports of those drugs coming from developing countries, where that product is being sold at a lower price.[69] The developed countries must help in improving the manufacturing capacity of poor countries through transfer of technology. As a last resort, pharmaceuticals may be kept out of the realm of patents.

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68 See Report of the Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy* 45 (UK, 2002)

69 *Ibid.* at 41

Understanding Right to Development As Envisaged By the Constitution of India: A Perceptive Analysis of a Prospective Agenda

M. Afzal Wani *

1. Introduction

Development is an inclusive concept encompassing both economic growth and human development. Economic growth is measured in terms of national income and output as GNP while as human development cannot be confined to the rise or the fall of the GNP, but to 'expanding the life style choices people can lead or live. The United Nations Declaration on Right to Development, 1986 defines development as "a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom".[1]In the contemporary context, the development is viewed as 'a process of expanding the *real freedom* that people enjoy'.[2] Freedom is necessary for development because growth is basically evaluated to find out whether it has enhanced freedoms and development can be achieved if people have meaningful freedom in economic, social and political spheres of life. Further, adequate development *process* includes enhanced capability of economic, social and political institutions and effective public participation. Though the Declaration does not suggest a specific model of economic development, any model of development people may choose should aim at the realisation of the Right to Development (RTD) for every individual and all people. The policy should provide equality of opportunity to everyone, including women, to basic resources, education, health

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The United Nations Declaration on Right to Development (1986), Preamble, para 2.

2 Amarteya Kumar Sen, *Freedom as development* (1999).

services, food, housing, employment and help realise human rights for all.[3] The Constitution of India was adopted by the people of India to shape their nation into a modern vibrant democracy mainly featured by a true concept of development addressing the issues related to the progress and prosperity of all living in this country. In this article are examined various provisions of this Constitution assuring many rights to the people of India which together aim at attaining the objectives of development as enshrined in the United Nations Declaration on Right to Development, 1986. This contextual exposition of rights in the perspective of RTD would be of great benefit to policy makers and academics by opening a rights-based window for policy making as well as research, teaching and general literacy.

2. RIGHT TO DEVELOPMENT UNDER THE CONSTITUTION OF INDIA

The Constitution of India seeks to secure to all its citizens: JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation... It contains a full-fledged chapter on fundamental rights guaranteeing most important human rights to attain the goals of justice, liberty, equality and fraternity as set out in the given expression of the people of the country in the Preamble of the Constitution at the end of the long battle for independence. A list of directive principles has been given in a separate chapter for the guidance of state in attaining the objectives of the Constitution, which though not enforceable through court, are fundamental to the governance of the country. The content of right to development as reflected by the Declaration on Right to Development, 1986 is quite apparent from these two chapters of the Constitution. The constitutional processes and the institutions prescribed in its various other provisions aim at the same end of assuring people their due as envisaged. The judicial interpretation of the guaranteed rights and the

3 *Supra note* 1,Article 8.

directive principles makes the point more than clear as is obvious from pro rights attitude of courts and widening of the horizon of certain rights like right to life and liberty. Presently the right to dignity and the right to development hold the key to enjoy any other right making the state pay maximum attention towards citizens' right to education, health and so on.

Granville Austin has observed that two revolutions, the national and the social, had been running parallel in India since the end of the First World War. With independence, the national revolution could be completed, but the social revolution must go on. Freedom was not an end in itself but only a means to an end, that end being the raising of the people to higher level and hence the general advancement of humanity. [Granville Austin, *The Indian Constitution- Corner stone of a Nation*]. Pandit Jawahar Lal Nehru told in the Constituent Assembly that the first task of that Assembly was to free India through a new Constitution, to feed the starving people, clothe the naked masses, and to give every Indian the fullest opportunity to develop himself according to his capacity. The National Human Rights Commission (NHRC) in its Annual Reports of 1996-97 referring to the famous "Tryst with density" speech of Jawahar Lal Nehru put a question to itself in the context of its statutory responsibility of promoting and protecting human rights, the first Prime Minister, thus speaking on 14-15 August, 1947 said: "Long years ago we made a tryst with destiny, and now the time comes when we shall redeem our pledge, wholly or in full measure, but very substantially".

Seen in the context of right to development, the National Human Rights Commission has stated that it has a conviction that all human rights whether civil or political, economical, social, and cultural must be viewed, as the 1993 Vienna Declaration of Programme of action did as "universal, indivisible, inter dependent and inter related". The human rights are classified as: civil and political rights; economic, social and cultural rights; and collective rights of self-determination and right to development. The first category of these rights is contained in Part III of

the Constitution of India under the heading of "Fundamental Rights" which are enforceable through courts. The second category of rights are contained in Part IV of the Constitution under the heading of 'Directive Principles of State Policy' which are not enforceable by any court, but the principles there in laid down are nevertheless fundamental in the governance of the country and it is the duty of the state to apply these principles in making law. The third category of these human rights are contained in various provisions of the Constitution spread over in different chapters related to individual and national development including part IX and IX-A of the Constitution. The Constitution 73rd and 74th amendment acts contained in Part IX and IX-A of the Constitution were enacted to create institutions of local self government. These institutions are meant for decentralized planning which is in reality a requirement for the exercise of right to development.

The Declaration on Right to Development, though does not suggest a specific model of economic development, any model of development people may choose should, however, aim at the realisation of that right for every individual and all people. In the least, the policy should provide equality of opportunity to everyone, including women, to basic resources, education, health services, food, housing, employment and help realise human rights for all.[4] The Indian constitutional model for development, as described, is a theoretical exposition of the expected inclusion of basic principles in any nation's developmental model. An over view of the rights and principles expressly mentioned in the Indian Constitution will further explain the position.

3. EQUALITY FOR DEVELOPMENT

Article 14 of the Constitution provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India and article 15 prohibits discrimination by State against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. And no citizen be on such grounds be subject to any disability, liability, restriction or condition with regard

4 *Ibid.*

to—(*a*) access to shops, public restaurants, hotels and places of public entertainment; or (*b*) the use of wells, tanks, bathing *ghats*, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public. The State may, however, make any special provision for women and children or for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. By 93rd amendment of the Constitution in 2005 it has been added that the State can make any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.[5]

About equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State, article 16 states that no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State, but the Parliament may make any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment. It may also make any provision for the reservation of appointments or posts or for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

The State is empowered to consider any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any

5 See below 'right to protect culture and establishment of educational institutions'.

above mentioned provision for reservation as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year. All this apart, the State can make a law to provide that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

These provisions are to enable participation of all Indian people, both privileged and underprivileged, in the development of the country as well as in the use of opportunities for individual development.

To strengthen equality, article 17 of the Constitution abolishes 'untouchability' and forbids its practice in any form. The enforcement of any disability arising out of 'untouchability' has been declared as an offence punishable in accordance with law. In the following article 18 it is provided that no title of a military or academic distinction should be conferred by the State and no citizen of India shall accept any title from any foreign State. It is further provided that any citizen of India holding any office of profit or trust under the State cannot, without the consent of the President, accept any title, present, emolument, or office of any kind from or under any foreign State.

4. BASIC FREEDOMS

With equality a prelude to development is right to basic freedoms which any person should possess to develop and prosper. Article 19 of the Constitution guarantees to all Indian citizens: right—(*a*) to freedom of speech and expression; (*b*) to assemble peaceably and without arms; (*c*) to form associations or unions; (*d*) to move freely throughout the territory of India; (*e*) to reside and settle in any part of the territory of India; (*g*) to practise any profession, or to carry on any occupation, trade or business. The right can be reasonably restricted by the state on grounds of nation's sovereignty, integrity, security, friendly relations

with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

5. FAIR SENSE OF SECURITY

To infuse a fair sense of security in the mind of an individual, article 20 assures that 'no person can be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence'. It prevents double jeopardy saying that 'no person shall be prosecuted and punished for the same offence more than once'. Self incrimination is also prohibited as article 20 also says that 'no person accused of any offence shall be compelled to be a witness against himself'.

6. RIGHT TO LIFE AND PERSONAL LIBERTY AS RIGHT TO DEVELOPMENT

Most important article of the Constitution is article 21which reads that "No person shall be deprived of his life or personal liberty except according to procedure established by law". The judiciary has given a very wide connotation to the expression 'life' and 'personal liberty' to include all the rights together constituting the right to development. In this regard some words from the decision of the Supreme Court of India in *Francis C. Mullin* v. *Administrator, Union Territory of Delhi*, are noted by way of an example as follows:[6]

[W]hether the right to life is limited only to protection of limb or faculty or does it go further and embrace something more. We think that the right to life includes right to live with human dignity and all that along with it, namely, the bare necessaries of life such as *adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings.* Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must in any view of the

6 AIR 1981 SC 746.

matter, include right to basic necessities of life and also the right to constitute the bare minimum expression of the human self.

The Supreme Court of India has held several unremunerated rights to fall within the ambit of article 21 as follows:

1) The right to go abroad. [7]
2) The right to privacy. [8]
3) The right against solitary confinement. [9]
4) The right against bar fetters. [10]
5) The right to legal aid. [11]
6) The right to speedy trial.[12]
7) The right against handcuffing.[13]
8) The right against delayed execution.[14]
9) The right against custodial violence.[15]
10) The right against public hanging. [16]
11) The Right to Doctor's assistance. [17]
12) The Right to Shelter. [18]
13) The Right to Know. [19]

It may be noted that the Supreme Court in *BandhuaMuktiMorcha*v.

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7 Satwant Singh Sawhneyv.Ramarathnam, APO, New Delhi, AIR 1967 SC 1836.

8 Govind v. State of MP, (1975) 2 SCC 148, relied on Griswold v. Connecticut, 381 US 479.

9 Sunil Batra v. Delhi Administration, (1978) 4 SCC 494.

10 Charles Sobraj v. Supdt. Central Jail, [(1978) 4 SCC 104

11 M H Hoscot v. State of Maharashtra, (1978) 4 SCC 544.

12 Hussain ara Khatun v. Home Secretary, State of Bihar, (1979) 3 SCR 532.

13 Prem Shanker Shukla v. Delhi Administration, (1980) 3 SCC 526.

14 T V Vatheesswaran v. State of Tamil Nadu, AIR 1983 SC 361.

15 ShelaBarsev.State of Maharashtra,(1983) 2 SCC 96.

16 A G of India v. Lachman Devi, 1996 SC 467.

17 ParmanandKatra v. Union of India, (1989) 4 SCC 268.

18 Shantistar builders v. N K Tomate, (1990) 1 SCC 520.

19 R P Ltd. v. Proprietors of Indian Express, Bombay Pvt. Ltd., AIR 1989 SC 190.

Union of India[20] opined that to live with human dignity and free from exploitation is a fundamental right of everyone in this country assured under Article 21 as interpreted by this Court in *Francis Mullin*.[21] This right to live with human dignity in Article 21 derives its life breath from the Directive Principles of State Police and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42. At the least, therefore, *it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity educational facilities, just and humane conditions of work and maternity relief.* These are the minimum requirements which must exist in order to enable a person to live with human dignity and *no State has the right to take any action which will deprive a person of the enjoyment of these basic essentials.*

Thus in these and many more judgments, the Supreme Court of India has held *right to education as a fundamental right.* Here it is apt to mention that *instruction in art and its promotion is a very significant component of education. Absence of state endeavour in this regard tentamounts to violation of fundamental right to education and disrespect to the directive principles of state policy*. Earl Warrep, CJ, speaking for the Supreme Court of United States in *Brown* v. *Board of Education,*[22] has tried to bring that wide dimension of the right to education to focus in the following words:

Today, education is perhaps the most important function of State and local governments ... It is required in the performance of our most basic responsibilities…. It is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is

20 AIR 1984 (1) SC 802.

21 *Supra* note 6.

22 347 US 483 (1954).

denied the opportunity of an education.

Since societies have grown more complex now every kind of facility for education must be made available by the state. State itself must lake all positive measures necessary for providing education to its citizens. The Supreme Court of United States in *Wisconsin* v. *Yoder*,[23] recognised this obligation of the State saying that providing public schools ranks is at the very apex of the function of a state.

This observation of the court gave due legitimacy to the right to education as a basic necessity of life and as one of the activities constituting "the bare minimum expression of human self. In 1984, the Supreme Court of India in *BandhuMuktiMorcha* v. *Union of India,*[24] held that the right to education is implicit in and flows from ' the right to life. Later, in *Bapuji Education Association* v. *State*,[25] Justice Rama Jois held that right to education is an essential attribute of personal liberty. He observed:

[T]he right of an individual to have and/or to import education is one of the most valuable and sacred rights.

The judge further observed:

Among various types of personal liberties which can be regarded as included in the expression “personal liberty" and in Article 21, education is certainly the foremost.

The question whether a 'right to education' is guaranteed to the people of India under the Constitution was dealt with by the Supreme Court at length in *Mohini Jain* v. *State of Karnataka*.[26] The main question in this case related to the admission of Miss Mohini Jain who was selected for MBBS course but was asked to pay a tuition fee of Rs. 60,000 per annum and a capitation fee of four and a half *lakhs*. The matter after reaching the court became extraordinarily significant. The court through Kuldip Singh J. referred, regarding this issue, to the

23 406 US 205 (1971).

24 See *supra* note 20.

25 AIR 1986 Karnat 119.

26 AIR 1992 SC 1858.

preamble of the Constitution which promises to secure to all citizens of India "justice-social economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity"; and assures dignity of the individual. The court also referred to the Articles 21, 38, 39(a), 39(f), 41 and 45 of the Constitution as noted below:

Article 21:Protection of life and personal liberty. – No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 21A [inserted later by 2002 amendment]:

Right to education.—The state shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may by law determine.

Article 38:State to secure a social order for the promotion of welfare of the people - (I) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all the institution of the national life.

(2) The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

Article 39:Certain principles of policy to be followed by the State. - The State shall, in particular, direct its policy towards securing -

(a) That the citizen, men and women equally, have the right to an adequate means of livelihood; ....

(f) That children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

Article 41:Right to work, to education and to public assistance in certain cases - State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to

education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

Article 45: Provision for free and compulsory education of children. - The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

[replaced by 2002 amendment as under-

Provision for early childhood care and education to children below the age of six years - The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.

After a reference to the relevant constitutional provisions, the court observed that "right to education" had then not as such been guaranteed as fundamental right under Part III of the Constitution but a reading of the above quoted provisions cumulatively manifested it beyond doubt that the framers of the Constitution made it obligatory for the State to provide education to its citizens. The court forcefully put forward the view that the preamble of the Constitution promises to secure to all citizens justice- social, economic and political combining social and economic rights along with political and enforceable/ lega1rights. In order to establish social justice and to make the masses free in the positive sense the State was to strive to achieve the goals set out in the preamble of the Constitution. As regards social justice it has been specifically enjoined as an object of the State under Article 38 of the Constitution. The court raises the question that can the objective which has been so prominently pronounced in the preamble and Article 38 of the Constitution be achieved without providing education to the large majority of citizens who are illiterate, A dispassionate consideration of the question leads to the conclusion that the objectives flowing from the preamble of the Constitution cannot be achieved and shall remain on paper unless the people in this country are educated. The court observed:

The three pronged justice- social, economic and political, promised by the preamble is only an illusion to the teaming-millions who are

illiterate. It is only the education which equips a citizen to participate in achieving the objectives enshrined in the preamble.

Bringing to focus another significant aspect of the issue the court remarked that the preamble also assures the dignity of the individual and the Constitution seeks to achieve this object by guaranteeing fundamental rights to each individual which he can get enforced, if necessary through court of law. The directive principles in part IV of the Constitution are also with the same objective. The court made it clear that:

The dignity of man is inviolable, It is the duty of the State to respect and protect the same, It is primarily education which brings forth the dignity of a man, The framers of the Constitution were aware that more than seventy percent of the people, to whom they were giving the Constitution of India, were illiterate, They were also hopeful that within a period of ten years illiteracy would be wiped out from the Country. It was with this hope that Article 41 and 45 were brought in Part-IV of the Constitution. An individual cannot be assured of human dignity unless his personality is developed and the only way to that is to educate him. That is why the Universal Declaration of Human Rights, 1948 emphasizes “Education shall be directed to the full development of the human personality....”

Another vital question that was considered by the Apex Court related to recognition of an individual's right "to education" in Article 41 of the Constitution which provides that "the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to education". The court observed that:

Although a citizen cannot enforce the directive principles contained in Chapter IV of the Constitution but these were not intended to be mere pious declarations.

The court has invoked in support of its argument the following words of Dr. Ambedkar:

In enacting this part of the Constitution, the Assembly is giving certain directions to the future legislature and the future executive to

show in what manner they are to exercise the legislative and the executive power they will have. Surely it is not the intention to introduce in this part these principles as mere pious declarations. It is the intention of the Assembly that in future both the legislature and the executive should not merely pay lip service to these principles but that they should be made the basis of all legislative and executive action that they may be taking hereafter in the matter of the governance of the Country.[27]

The court accordingly concluded in this respect as follows:

The directive principles which are fundamental in the governance of the country cannot be isolated from the fundamental rights guaranteed under Part Ill. These principles have to be read into the fundamental rights. Both are supplementary to each other. The State is under a constitutional mandate to create conditions in which the fundamental rights guaranteed to the individuals under part III could be enjoyed by all. Without making right to education under Article 41 of the Constitution a reality the fundamental rights under Chapter III shall remain beyond the reach of large majority which is illiterate.

The court also beneficially referred to its earlier observation regarding right to live with human dignity and the Directive Principles of the State Policy in *BandhuMukhtiMorcha* v. *Union of India*[28]as follows:

The right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Article 41and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women, and the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humble conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State – neither the Central Government nor any State Government - has the right to take any action which will

27 Constituent Assembly Debates (CAD), Vol. VII, p. 476.

28 *Supra* note 20.

deprive a person of the enjoyment of these basic essentials.

After a due consideration of all the above given observations the court held that the right to education flows directly from the right to life. It said:

'Right to life' is the compendious expression for all those rights which the courts must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct which the individual is free to pursue. The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. The State Government is under an obligation to make endeavour to provide educational facilities at all levels to its citizens.

The court continued to observe:

The fundamental rights guaranteed under Part III of the Constitution of India including the right to freedom of speech and expression and other rights under Article 19 cannot be appreciated and fully enjoyed unless a citizen is educated and is conscious of his individualistic dignity.

The court then declared:

The "right to education", therefore, is a concomitant to the fundamental rights enshrined under Part III of the Constitution.

Defining the responsibility of the State regarding the matter the court held:

The State is under a constitutional mandate to provide educational institutions at all levels for the benefit of the citizens. The educational institutions must function to the best advantage of the citizens.

The basic question whether the Constitution of India guarantees a fundamental right to education to its citizens came again for consideration before the Supreme Court in *Unni Krishnan* v. *State of A.P.*[29] where writ petitions were filed by private educational institutions engaged in imparting medical and engineering education calling in question the *Mohini Jain* judgment. The views expressed by the

29 (1993) 1 SCC 645.

concerned judges in this case are of great academic and practical significance. The matter was heard by L.M. Sharma, C.J. and S. Ratnavel Pandian, S.Mohan, B.P. Jeevan Reddy and S.P. Bharucha, JJ. The judges delivered three separate judgments each with a novel import. In one of the judgments, Sharma C.J. (for himself and Bharucha, J.) (partly dissenting) said that there is no fundamental right to education for a professional degree that flows from Article 21. As regards the question whether the right to primary education mentioned in Article 45 of the Constitution is a fundamental right or not, Sharma C.J in view of financial and other implications left it to be decided in some subsequent case by a larger bench. The other three judges viz. S. Mohan, Jeevan Reddy and S. Ratnavel Pandian upheld the right to education as a fundamental right. S. Mohan, J. In his separate (concurring) judgment laid much emphasis on the importance of education and held that the State is obliged to provide education to all upto14 years of age, within the prescribed time-limit. He specially mentioned what poet Valluvar (with his famous Tirukkural) said about education:

Learning is excellence of wealth that none destroys; to man nought else affords reality of joy.

The judge, tracing the nexus between the life, living and education, said that the fundamental purpose of 'education is the same at all times and in all places. It is to transfigure the, human personality into a pattern of perfection through a synthetic process of the development of the body, the enrichment of the mind, the sublimation of the emotions and the illumination of the spirit. Education is a preparation for a living and for life, here and hereafter. Besides in a democratic form of Government which depends for its sustenance upon the enlightenment of the populace, education is a social and political necessity. In India, the leaders harped upon universal primary education as a desideratum for national progress but the percentage of illiteracy here is still appalling. In this era of knowledge-explosion when the frontiers of knowledge are enlarging with incredible swiftness it is the foremost need of the State to eradicate illiteracy which persists in a depressing measure.

Again in a very poetic style Mohan, J. Explains the need for eradicating illiteracy as follows:

Victories are gained, peace is preserved, progress is achieved, civilization is built up and history is made not on the battlefield where ghastly murders are committed in the name of patriotism, not in the council chambers where insipid speeches are spun out in the name of debate, not even in factories where are manufactured novel instruments to strangle life, but in educational institutions which are the seed-beds of culture, where children in whose hands quiver the destinies of the future are trained. From their ranks will come out when they grow up statesmen and soldiers, patriots and philosophers, who will determine the progress of the land.

On the basis of all these views Mohan, J. declared right to "education as a fundamental right" of all citizens. Technically he takes it as covered by both the right to personal liberty as 'well as by the right to life.

In 1962, a Constitution Bench comprising of six learned Judges, in Kharak Singh v. State of UP, considered the content of the expression "personal liberty" in Article 21 and Rajagopala Ayangar, J. Speaking for the majority, observed:

We shall now proceed with the examination of the width, scope and content of the expression ' personal liberty' in Article 21. .... We feel unable to hold that the term was intended to bear only this narrow interpretation but on the other hand consider that ' personal liberty ' is used in the article as a compendious term to because great concepts like liberty and life were purposefully left to gather meaning from experience. They relate to the whole domain of social and economic fact changing with time. Political, social and economic changes entail the recognition of new rights and the law grows to meet the ever increasing demands of society. There is no person in whom right to life and liberty does not inhere and the same does not need to be provided in the Constitution in positive terms.

Similarly there is no person in whom right to education does not

inhere and the same being a part of right to life did not need to be expressly provided in the part III of the Constitution. Though in the Constitution the right to education was not stated expressly as a fundamental right the Supreme Court has not followed the rule that unless a right was expressly stated as a fundamental right, it could not be treated so. Freedom of Press is not expressly)' mentioned, yet it has been read into and inferred from the freedom of speech and expression. Particularly, from Article 21have sprung up a whole lot of human rights as mentioned above --*right to legal aid and speedy trial, the right to means of livelihood, right to dignity and privacy, right to health, right to pollution-free environment* and so on. In *Express Newspapers* v. *Union of India*,[30]it was held that the freedom of speech comprehends the freedom of press and the freedom of speech and press are fundamental personal rights of the citizens.

The view that the right to education flows from Article 21 is also supported by what Gagendra gadkar , J. Observed in the *University of Delhi* v. *Ram Nath,*[31]" saying that :

The education seeks to build up the personality of the pupil by assisting his physical, intellectual, moral and emotional development.

Article 45 containing a Directive Principles of State Policy dealing with the policy of education read as follows:

Provision of free and compulsory education of children. - The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

The decisions of the Supreme Court mentioned above have explained the position of the right to education under the Constitution well with reference to its being in Part-IV.

In 2002, notwithstanding above verdicts, the Parliament of India by the Constitution (Eighty Sixth Amendment) Act, 2002 inserted article 21A in Part-III of the Constitution to expressly make right to education a

30 AIR 1958 SC 578.

31 AIR 1963 SC1873.

fundamental right as follows:

21A. Right to education.—The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

Article 45 has been substituted by a new provision as follows:

45. Provision for early childhood care and education to children below the age of six years.—The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.

Further, one more clause, namely (k) was inserted in article 51A of the Constitution dealing with Citizens' Fundamental Duties as under:

51A. Fundamental duties.—It shall be the duty of every citizen of India— (k) who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.

This position makes right to education expressly a fundamental right of all children from six to fourteen years. The right of the children of less than six years is covered by article 45 in Directive Principles of State Policy. It would be apt to observe that the judiciary must, in view of the importance of the pre-school education and its earlier verdicts about interface between Part-III and Part-IV of the Constitution, declare right of children below six years of age also a fundamental right and declare studies related to art and craft an essential component of education in view of its future importance for them.

Now the literacy rate has risen from 16.6 percent in 1951 to 74.04 percent according to the 2011census. Over the last some decades of planned development, rapid growth in facilities has been attempted to provide. The number of educational Institutions has more than doubled, while the number of teachers and students has multiplied many times. But despite that yet all Indians have not real access to schools and more than half, as per certain estimates are drop outs. A large percentage of the dropouts are girls, Scheduled Caste and Tribe members and minorities. Poverty is the main cause for keeping children away from the school.

In the international human rights perspective, under Article 26 of the Universal Declaration of Human Right:

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides:

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the

basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Both these provisions make education a human right, but indicate that initially 'studies in art' and latter 'instruction in art' should be a part of curriculum. In their absence the purpose of education would remain incomplete.

As noted above, in 2002, a new article, namely Article 21A was inserted in the Constitution of India which made free and compulsory education a fundamental right to all children in the age group of six to fourteen years. Pursuant to this amendment, the Parliament enacted *the Right of Children to Free and Compulsory Education Act, 2009* to provide to every child full time elementary education of satisfactory and equitable quality in a formal school which satisfies the essential requirements and standards as may be necessary.

The right to compulsory education casts an obligation on the appropriate government to provide and ensure admission, attendance and completion of elementary education. It is anchored in the belief that the values of equality, social justice and democracy and the creation of a just and humane society can be achieved only through inclusive elementary education to all. The obligation under the Act is not merely on schools run or supported by the appropriate government but also those not dependent on government funds.

The Right of Children to Free and Compulsory Education Act, 2009 in its section 3 provides that every child of the age of six to fourteen years shall have a right to free and compulsory education in a *neighbourhood school* till completion of elementary education. For this purpose no child shall be liable to pay any fee or charges or expenses which may prevent him from pursuing and completing the elementary education.

If a child above six years of age has not been admitted in any school or though admitted, could not complete his elementary education, for such children section 4 of the Act provides that they should be admitted in a class appropriate to his age. Such children should also be given special training as may be necessary and made able to complete their elementary education even if it extends beyond fourteen years of age.

To meet situations of change of place, section 5 of the Act enables a child to seek transfer from one school to another, either within or outside a state, and claim immediate issuance of transfer certificate. The in charge of the school making delay in issuance of such a certificate is liable for disciplinary action.

Duties have been cast by section 6 on central and state governments and local authorities to establish schools in areas where they do not already exist, within a period of three years from the commencement of this Act. Section 7 provides for financial and other responsibilities of the central and state governments and for developing by the central government of a national curriculum and the standards for training of teachers.

Main duties of the appropriate government and local authority under the Act, as enumerated in section 9 to 11, include providing of all infrastructural facilities, teaching staff and learning equipments, and other related facilities. In providing facilities there should not be any discrimination regarding disadvantaged students. Parents and guardians are also required to admit or cause to be admitted his child or ward for elementary education, in a neighbourhood school. Pre-school education arrangements may also be made by the appropriate government for children between the age of three and six years.

Section 13 of the Act prohibits claiming of capitation fee by any school and any kind of screening procedure for admission. The former is punishable with ten times the amount of capitation fee claim and the later with a fine of Rs.25, 000/-for first contravention and Rs.50,000/- for each subsequent contravention. By virtue of sections 15 to 17 no child can be denied admission for lack of age proof or expiry of the admission period or extended admission period, and no child can be held back in any class or expelled from school till the completion of elementary education or subjected to physical punishment and mental harassment.

The Act contains many more provisions about maintenance of standards of education, duties of teachers, pupil-teacher ratio, curriculum and evaluation procedure, monitoring of right to education by National and state commissions for protection of child rights, redress of grievances and constitution of national and state advisory councils for advising governments on implementation of the provisions of the Act in an effective manner.

Under section 19, observance of prescribed norms and standards for schools has been made obligatory and a school shall not be established or recognized, unless it fulfils the norms and standards specified in the Schedule. Where a school established before the commencement of this Act does not fulfil the norms and standards specified in the schedule, it shall take steps to fulfil such norms and standards at its own expenses, within a period of three years from the date of such commencement failing which its recognition can be withdrawn. It is further provided that

with effect from date of withdrawal of recognition, no school shall continue to function. Any person who continues to run a school after the recognition is withdrawn, shall be liable to fine which may extend to one lakh rupees and in case of continuing contraventions, to a fine of ten thousand rupees for each day during which such contravention continues.

Section 21makes the school management committees participatory to include elected representatives of the local authority, parents of guardians of children admitted in such school and teachers. At least three-fourth of members of such Committee should be parents or guardians and that proportionate representation be given to the parents of guardians of children belonging to disadvantages group and weaker section; fifty per cent. of members of such Committees to be women.

The School Management Committees have to perform the functions of: (a) monitor the work of the school; (b) prepare and recommend school development plan; (c) monitor the utilization of the grants received from the appropriate government or local authority or any other source; and (d) perform such other functions as may be prescribed.

Under section 24, the teachers have been made duty bound to: (a) maintain regularly and punctuality in attending school; (b) conduct and complete the curriculum in accordance with the prescribed norms; (c) complete entire curriculum within the specified time; (d) assess the learning ability of each child and accordingly supplement additional instructions, if any, as required; (e) hold regular meetings with parents and guardians and apprise them about the regularity in attendance, ability to learn, progress made in learning and any other relevant information about the child; and (f) perform such other duties as may be prescribed.

Any teacher committing default in performance of these duties is liable to disciplinary action under the service rules applicable. Provided that before taking such disciplinary action, reasonable opportunity of being heard is to be afforded to such teacher.

All the above mentioned provisions of the Right to Free and Compulsory Education Act, 2009 if implemented with sincerity can ensure a literate next generation which can afford to live with dignity

without falling prey to exploitation of any kind, especially child labour.

7. RIGHT AGAINST DETENTION AND HAMPERING DEVELOPMENT

To make an environment of development sustain the Constitution also contains provisions about life free from fear of detention. Detention of a person affects development especially when it is manoeuvred and motivated as it affects both body and mind of a person along with the whole family. It creates fear in the mind of every common man and results into the denial of dignity. Next in the Constitution is, therefore, the provision to prevent deprivation of life and liberty of a person through detention by state authorities. Article 22 is very comprehensively dealing with matters connected thereto providing: "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate." This provision would, however, not apply to an enemy alien; or to any person who is arrested or detained under any law providing for preventive detention. The preventive detention of a person cannot be for a longer period than three months unless—an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as judges of a high court has reported before the expiry of such period that there is sufficient cause for such further detention.

When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds, if not against public interest, on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

Parliament may by law prescribe—in certain circumstances detention of more than three months without obtaining the opinion of an Advisory Board.

8. RIGHT AGAINST EXPLOITATION

The Constitution of India enshrines a very important right in articles 23 and 24 called *Right against Exploitation in the form of traffic in human beings, beggar, child labour and other similar forms of forced labour. Article 23 lays down that t*raffic in human beings and *begar*and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law. However, the State can impose compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

Article 24 states that no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

9. FREEDOM OF CONSCIENCE

For the promotion of spirituality and inner conscience of the people the Constitution of India gives to all persons *Right to Freedom of Religion* making them, by article 25, equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion, of course subject to public order, morality and health and to other fundamental rights guaranteed under this Constitution. The State can regulate by law any economic, financial, political or any other secular activity which may be associated with religious practice. Article 26 recognises the right of every religious denomination or any section thereof to establish and maintain institutions for religious and charitable purposes; to manage its own affairs in matters of religion; to own and acquire movable and immovable property; and to administer such property in accordance with law subject to public order, morality and health. Pursuant to its secular character, Articles 27 and 28 of the Constitution restrict the state from compelling any person to pay any taxes, appropriated for the promotion or maintenance of any particular

religion or religious denomination and prohibit religious instruction in any educational institution wholly maintained out of State funds. If there is any educational institution administered by the State but has been established under any endowment or trust which requires that religious instruction be imparted in such institution no such restriction would apply to that educational institution. Further, any person attending an educational institution recognised by the State or receiving aid out of State funds cannot be required to take part in any religious instruction that may be imparted or to attend any religious worship that may be conducted in such institution or in any premises attached thereto without his or, if such person is a minor, his guardian's consent.

10. RIGHT TO PROTECT CULTURE AND ESTABLISH EDUCATIONAL INSTITUTIONS

Even c*ultural and educational rights* are recognised as fundamental rights in India which are very important for enjoying right to development. Article 29 enables any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own to conserve the same. To seek to attain a pluralistic purpose through law clause (2) of article 29 prevents denial of admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Very importantly it is to be noted that to enable participation of minority groups in national as well as individual development in the country. Article 30(1) guarantees to all minorities, whether based on religion or language, a right to establish and administer educational institutions of their choice. And article 30 (2) provides that the "State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language".

11. RIGHT TO MOVE SUPREME COURT AND HIGH COURT ON DENIAL OF RIGHTS

To strengthen enjoyment of these rights the Constitution in article

32 provides for *Right to Constitutional Remedies*—a right to move the Supreme Court by appropriate proceedings for the enforcement of these guaranteed rights and the Supreme Court has the power to issue directions or orders or writs, including writs in the nature of *habeas corpus, mandamus, prohibition, quo warranto* and *certiorari* as may be appropriate, for the enforcement of any of these rights. Under article 226, every High Court has power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority directions, orders or writs, including writs as Supreme court may issue for the enforcement of any of the rights conferred by Part III and for any other purpose. This power to issue directions, orders or writs to any government, authority or person may also be exercised by any high court within whose jurisdiction area the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such government or authority or the residence of such person is not within those territories. The right so guaranteed is ensured to highly protected, as it cannot be suspended in any way except as provided for by the Constitution itself.

12. DIRECTIVE PRINCIPLES OF STATE POLICY AS AGENDA FOR DEVELOPMENT

Under the directive principles of state policy, various principles have been laid down, which though not enforceable by any court, "are nevertheless fundamental in the governance of the country and it [is]...the duty of the State to apply these principles in making laws". Article 38 requires the State to "strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life". In particular, the State should "strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations". It has been made incumbent by article 39 on the State to act to the end—(*a*) that the citizens, men and women

equally, have the right to an adequate means of livelihood; (*b*) that the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good; (*c*) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; (*d*) that there is equal pay for equal work for both men and women; (*e*) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength; (*f*) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

It is a vanity to think of justice without an efficient judicial system which delivers justice rather than engages litigants to the benefit of the stronger party. To ensure access to justice for all by the state article 39A has been inserted in the Constitution which provides that the operation of the legal system promotes justice, on a basis of equal opportunity, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

For democratic participation of all people in development, Article 40 direct staking of steps to organise village *panchayats* with necessary authority to function as units of self-government. After the working of the Constitution of India for more than 43 years, the people of this country realised that all Human Rights and fundamental freedoms could not be fully realised. Unless Institutions are created at grassroots levels to achieve the objectives contained in Part IV of the Constitution of India. 73rd and 74th Amendments were made to achieve this object. The Supreme Court rightly noticed as to the status of these constitutional instrumentalities in its judgment in the case of *Ahmedabad Municipal Corporation* v. *Nawab Khan Gulab Khan.*[32]In another judgment of

32 AIR 1997 SC 152

Supreme Court in *Air India Statutory Corporation* v. *United labour Union*,[33] it was held that Directive Principles in our Constitution are fore-runners of the UN Convention on right to live as an inalienable Human Right and every person and all people are entitled to, contribute to and enjoy social, cultural and political development in which all human rights and fundamental freedoms would be fully realised. For the realisation of this right to development the Institutions of local self government have been brought to the level of constitutional functionary by 73rd and 74th Amendment Act of the Constitution.

Since 1950 the first task of the people of India should have been the exercise of human rights to development contained in various provisions of the Constitution at all levels allowing an opportunity to people for full participation determining policies at local levels and influencing the decision making showing their actual participation in the process of development for shaping the model of the development of a particular region.

The Eleventh and the Twelfth schedule read with Article 243-G and Article 243-W show that the backwardness of the various regions of this country in economical, social and cultural fields is sought to be removed by empowering people to participate in the preparation of plans for economical development and social justice and by the implementation of directive principles contained in Part IV of the Constitution which cannot be realised alone on the pattern of 'imposition of schemes' by governments but by maximum use of the right to development by participation in the process of development. India as a developing country has, in order to develop into a developed country, honour urge of its all people to participate in its development and also in their own individual development. Any other form of modulating or processing development is destructive of this urge and is devoid of the fruits of development. Thus, the constitutional sentiment is that the right to development is an inalienable human right by virtue of which every human person and all people are entitled to participate in, contribute to

33 AIR 1997 SC 645.

and, enjoy economic, social, cultural and political development.

With the same understanding should some more provisions of the constitution be read and followed. Article 41calls for making, within the limits of its economic capacity and development, effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want. Article 42, in the same vein, directs that the "State shall make provision for securing just and humane conditions of work and for maternity relief" and article 43 states that the state shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas. Article 43A provides that the State shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organisations engaged in any industry. Some other such directives are related to state responsibility for endeavouring:

a) To provide early childhood care and education for all children until they complete the age of six years.[34]

b) To promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall to protect them from social injustice and all forms of exploitation.[35]

c) To regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about

34 Article 45

35 Article 46

prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.[36]

d) To organize agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.[37]

e) To protect and improve the environment and to safeguard the forests and wild life of the country.[38]

f) To protect every monument or place or object of artistic or historic interest, declared by or under law made by Parliament to be of national importance, from spoliation, disfigurement, destruction, removal, disposal or export, as the case may be.[39]

13. FUNDAMENTAL DUTIES WITH DEVELOPMENTAL IMPACT

Article 51A of the Constitution enumerates eleven duties of citizens which have the effect of developing both the individual as well as the nation. These duties are—

a) To abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem; to cherish and follow the noble ideals which inspired our national struggle for freedom;

b) To uphold and protect the sovereignty, unity and integrity of India;

c) To defend the country and render national service when called upon to do so;

d) To promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities;

e) To renounce practices derogatory to the dignity of women;

f) To value and preserve the rich heritage of our composite culture;

g) To protect and improve the natural environment including

36 Article 47

37 Article 48

38 Article 48A

39 Article 49

forests, lakes, rivers and wild life, and to have compassion for living creatures;

h) To develop the scientific temper, humanism and the spirit of inquiry and reform;

i) To safeguard public property and to abjure violence;

j) To strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement;

k) Who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.

Institutional mechanism has to be developed to promote duty culture in the country. The corrupt practice of honoring non-performers should no more be followed. The common man should get a feel and motivation to work for development and expect appreciation from the nation. A tendency has developed that people close to power centers are encouraged to take some initiatives to get rewarded, but those real initiators and performers are de-motivated and discouraged by authorities who could be real agents of change with sincerity. This practice should change to reap an early harvest of the constitutional provisions envisaging fundamental duties.

14. CONCLUSION

As a matter of fact the people of India are in a state of unrest. The constitutional guarantees and the schemes about implementation of the agenda for democracy and development have failed to appeal to the popular sentiment. The reason is the colonial style of successive governments, non-participation of people in decision making and absence of respect for talent of the people because of corruption. There is also an absence of even a proper and sufficient institutional mechanism for ensuring rights to the people who have lived in disarray for centuries now.

The successive governments have been totally oblivious of their Constitutional obligation to create and operate institutions which could

make possible people's participation in individual, local, national and international development. Governments have bitterly failed in initiating and promoting the process of strengthening people through the institution of local self government though some claims of women empowerment through reservation in *panchayats*is frequently being made.

If State fails in its duty to appoint the constitutional functionaries and/or permit or enable them to work with true democratic spirit then it cannot be said to be carrying on in accordance with the provisions of the constitution. It is the duty of the Union of India under article 355 of the Constitution to ensure that the governments' of states is carried on in accordance with the provision of the Constitution. So far only political considerations are dominating the scene. The working of any government should now be evaluated on the basis of achievements made as per the requirements of right to development. The situation now is of 'perform or perish'...!

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United Nations Peace Keeping Role in Afghanistan*

B P Singh Sehgal**

1. Introduction

The United Nations Security Council vide Resolution 1383 endorsed the Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, signed in Bonn, Germany on 5 December 2001 (the Bonn Agreement). This agreement called for a fully representative government to be elected through free and fair elections no later than two years from the date of the Emergency Loya Jirga, which was held in June 2002. In January 2004, the Constitutional Loya Jirga adopted the Constitution of Afghanistan which mandates presidential, parliamentary and regional elections to be held through free, general, secret and direct voting. In February 2003, the President of Afghanistan requested the United Nations Assistance Mission to Afghanistan (UNAMA) to help prepare and organize the electoral process and to coordinate international electoral assistance. As such the UNAMA Electoral Component was set up for this purpose. To strengthen the electoral activities the Security Council[1] authorized the establishment of an International Security Assistance Force (**ISAF**), with an enforcement mandate.[2] It is a Peace keeping force designed to stabilize security assistance, to secure

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1 Resolution, 1386.

2 Chapter VII of UN Charter.

Afghanistan and help in creating congenial atmosphere for free and fair elections. Holding of free and fair elections within two years of the Emergency Loya Jirga was a very complex and large scale logistical exercise requiring a meticulous planning, as well as, highly trained staff with efficient mechanisms for securing preparation, storage, and transportation and counting of ballot papers. Before we take up the Presidential Election Plan in Afghanistan in detail, it is important to note the role and validity of the Peace Keeping Missions initiated by the United Nations.

2. UN Charter Provisions

The basic purpose of the United Nations listed in its Charter is to maintain international peace and security, and to meet that end:

to make effective collective measures for the prevention and removal of threats to the peace, and for the suppression of the acts of aggression or other breaches of the peace, and to bring about by the peaceful means and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.[3]

UN Charter further set out the concrete measures to be taken by the Security Council, the principal organ of the United Nations vested with the primary responsibility for the maintenance of peace and security.[4] International disputes likely to endanger the international peace and security can be brought to the attention of the Security Council or General Assembly[5].

The Security Council is expressly mandated to call on the parties to settle their disputes by peaceful methods, to recommend the appropriate procedures or methods of adjustment and, in addition, to recommend actual terms of a settlement. The action of the Security Council in this case is limited to making of recommendations; essentially, the peaceful settlement of international disputes must be achieved by the parties

3 Article 1(1) of UN Charter.

4 Chapter VI & VII.

5 Chapter VI.

themselves, acting on a voluntary basis to carry out the decisions of the Council in accordance with the Charter.

If the Security Council determines that a threat to the peace and breach of peace or the act of aggression exists, the Security Council may use broad powers given to it in Chapter VII of the Charter. In order to prevent the aggravation of the situation, the Security Council may call upon the parties concerned to comply with such provisional measures, as it deems necessary or desirable. Otherwise, it may decide, the measures not involving the use of armed force are to be employed by the members of the United Nations, including the complete or partial interruption of economic relations, communications, and the severance of diplomatic relations[6].

In case the Security Council feels the measures insufficient, it can take action **such action by Air, sea and Land forces as may be necessary to maintain or restore international peace and security**[7]. For this purpose all members of United Nations undertake to make available to the Security Council, on its call and in accordance with special agreements, the necessary armed forces, assistance and facilities[8]. Plans for the application of the armed force are to be made by the Security Council with the assistance of the Military Staff Committee[9]. All these collective measures are to be taken with the approval of the five permanent members of the Security Council[10].

During the history of the United Nations, this condition has not been met. The difference of opinion among the different Nations, especially between the Five Permanent members of the Security Council, inevitably affected the functioning of the United Nations and it could not take enough collective measures to maintain peace and security. Alternative measures had to be found to stop hostilities and to

6 Article 41.
7 Article 42.
8 Article 48.
9 Article 47.
10 Article 27(3)

control conflicts so that they would not develop into broader conflagrations. It was at this stage that the concept of Peace Keeping operations evolved[11].

3. What is Peace keeping Operation

Peace keeping operations are never purely military. They have always included civilian personnel to carry out political or administrative functions, sometimes on a very large scale, as, for instance in Congo Operation or in the independence process of Namibia or in East Timor. During the resurgence of peace keeping that has taken place in the later 1980's[12], with five new operations being established in two[13] years and many other under active planning, the expectation has developed that the peace keeping operations in future may well be a closely integrated civilian/ military undertaking, with overall responsibility in the field entrusted to the civilian rather than a military officer.

In practice, there has evolved a broad degree of consensus on the essential characteristics of peace- keeping operations and on the conditions that must be met if they are to succeed. The first of the essential condition is that, peace-keeping operations are set up only with

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11 Presently there are more than eighteen UN Peace keeping operations like UN Truce Supervision Organization in Palestine(UNTSO), UN Military Observer Group in India & Pakistan (UNMOGIP), UN Peace keeping Force in Cypress (UNFICYP), UN Disengagement Observer Force in Syria (UNDOF), UN Interim Force in Lebanon (UNIFIL), UN Iraq-Kuwait Observer Mission (UNIKOM), UN Angola Verification Mission (UNAVM), UN Observer Mission in Elsalvador (ONUSAL), UN Mission for the Referendum in Western Sahara (MINURSO), UN Protection Force in Croatia(UNPROFOR), UN Traditional Authority in Cambodia (UNTAL), UN Operation in Mozambique (ONUMOZ), UN Operation in Somalia–II (UNOSOM-II), UN Observer Mission Uganda – Rwanda (UNOMUR), UN Observer Mission in Georgia (UNOMIG), UN Observer Mission in Liberia (UNOMIL), UN Transitional Administration in East Timor (UNTAET), etc.

12 For details see *The Blue Helmets – A Review of United Nations Peace-Keeping*, edition II (1990).

13 Ibid page xvi

the consent of the parties to the conflict. The consent is required not only for the operation's establishment but also, in broad terms, for the way in which it will carry out its mandate. The parties are also consulted about the countries which will contribute the troops to the operation. The requirement of impartiality is fundamental, not only on the grounds of principle but also to ensure that operation is effective. A United Nations operation cannot take sides without becoming a part of the conflict which it has set up to control or resolve. The parties to the conflict are supposed to support the operation by allowing it the freedom of movement and other facilities which it needs for carrying out its task. The peacekeepers have no right of enforcement and their use of force is limited to self defense, as a last resort. This means that if the party chooses not to cooperate, it can effectively defy a peacekeeping operation[14].

It is the responsibility of the Security Council to ensure that the operation is given clear mandate which is acceptable to the parties concerned and practicable in the situation on the ground. The military personnel who serve in peace keeping operations are provided by the Member States on voluntary basis and they pass on under the command of the Secretary General in all operational matters, as Secretary General is responsible for the direction of the operation and is required to report thereon at regular intervals to the Security Council. Those who serve in peace keeping forces are given light defensive weapons but are not authorized to use force except for their self defense. This right is exercised very sparingly because of the obvious danger that if a United Nations force uses its weapons; its impartiality is, however unfairly called in question. This requirement sometimes demands exceptional restraint on the part of the soldiers serving the United Nations Peace-Keeping Forces.

14 In tune with the primary responsibility of Security Council to maintain peace and security, the majority of the peace keeping operations have been approved by the Security Council.

Finally, it is essential that the operation should have a sound financial basis. The financing of the peace-keeping operation has been one of the most controversial and least satisfactory aspects. Almost all operations are financed by obligatory contributions levied on Member States. If the Member States do not pay their contribution promptly and in full, the Secretary General lacks the financial resources needed to reimburse to the troops- contributing governments, the sum due to them. This means that those Governments have to pay an unfairly high share of the cost of the operation in question, in addition to sending their soldiers to serve in unpredictable and sometimes dangerous situations.

4. The Bonn Agreement

On 3 October 2001, the UN Secretary-General appointed Lakhdar Brahimi to be his Special representative, with a widened mandate entailing overall authority for the humanitarian and political endeavors of the United Nations in Afghanistan. On his shoulders fell the responsibility of trying to nurture an agreement between the different groups that aspired to exercise power after the fall of Talibans. In the first instance it was important to build consensus among the Afghanistan's neighbors, Russia and United States. On 12 November 2001, after a high-level meetings in New York, the participants agreed to establish in Afghanistan a broad based, multi-ethnic, politically balanced, freely chosen Afghan administration representative of their aspirations and at peace with its neighbours[15].

With the strong support of the German government, meetings were held from 27 November-5 December 2001 near Bonn between key representatives of various stake holders in Afghanistan. The final result was the 5 December "**Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions**". It was endorsed by the United Nations Security Council[16]. It was not a peace agreement, since the participants in Bonn meeting were not at war with each other, but rather a road map

15 William Maley, **The Afghanistan Wars**, 2002 (Palgrave Macmillam)

16 Resolution 1383.

for the establishment of rudimentary state structure. It did not provide for an interim Government but an Interim Administration. The composition of the Interim Administration was one of the most contested issues in Bonn, but ultimately a consensus was reached. Abdul Sattar Sirat had long been considered a likely candidate for chairman, but his criticism of the United Front for moving into Kabul undermined his claims. Instead, the position of Chairman went to the moderate Pashtun Hamed Karzai who spoke fluently Pushto, Persian and English. While Taliban had initially sought to co-opt him, but later he had become one of their fiercest critics. He had not only deep understanding of the complexities of tribal politics, but ability to work comfortably with non-Pushtun Afghans, and with the United States, where members of his family had lived for many years. The interim Administration took office, as scheduled, at a dignified ceremony in Kabul on 22 December attended by nearly 2000 men, women, with British Royal Marine patrolling outside[17].

The most important challenge before the Interim Administration was the holding of free and fair elections within two years of the Emergency Loya Jirga. For holding elections, meticulous planning is required, as well as, highly trained staff and efficient mechanism for securing preparation, storage, transportation, and counting of ballot papers. It may also be necessary to protect voters against intimidation. Just to meet the deadlines as laid down in Bonn agreement; it became necessary to undertake a number of quite complex tasks at a high speed. However, any attempt to rework the Bonn Agreement would be a recipe for complete mayhem in Afghanistan. The United Nations Assistance Mission in Afghanistan (UNAMA), established by a Resolution of Security Council in 28 March 2002 which played important role in assisting the implementation of this part of Bonn agreement[18].

In February 2003, the President of Afghanistan requested the United Nations Assistance Mission to Afghanistan (UNAMA) “to help

17 **Supra** note 14 p274

18 Resolution 1401.

prepare and organize the electoral process and to coordinate international electoral assistance", and the UNAMA Electoral Component (SECRETARIAT) was set up for this purpose. An initial Umbrella Project was prepared with estimated costs of USD 130 million and a July 2003 the date to start. Since sufficient funding was not forthcoming, a revised strategy of executing the project with voluntary contributions from donor countries and at reduced costs was adopted and a first operational plan presented in July 2003. This plan anticipated a mid-October start, provided its reduced funding requirements of USD 78 million were met by the end of August. In recognition that pledges would not materialize immediately, this plan envisaged a three-phase registration that would start in the eight urban centers in which the United Nations Assistance Mission in Afghanistan had regional offices and progressively cover the country.

Voluntary contributions to the Voter Registration Project (VRP) set up to manage the funds were slow to arrive and the start of voter registration had to be further postponed to December 2003. By this time, the security situation had deteriorated in a number of regions, putting added constraints on the operation. As a result, the early December start was of a much smaller scale than envisaged and because most of the constraints persist, the pace of registration has been much slower than planned.

5. The Voter Registration Process

I A Summary

This plan set out a credible and transparent voter registration operation that sought to meet both international standards for democratic elections and the Bonn timetable requirement of holding Afghan general elections in June 2004.

It was prepared on the existing voter registration operation and through its expansion completed the registration of the estimated 2.5 million voters in regional centers by 7 April 2004. At the same time, it prepared a massive three-week registration drive held concurrently in 4,200 locations throughout the country from 1 to 21 May. Each location

was only required to register up to 2,000 voters, therefore allowing the registration of the remaining 8 million voters in a short period of time.

Both phases were accompanied by nationwide public information and civic education campaigns, using both face-to-face methodologies and mass media, particularly radio.

For one week following registration, temporary voter lists were made available for inspection at registration locations so that voters can challenge the inclusion of any person who may not be eligible to vote. Exclusion lists of successful challenges were compiled against whom voter cards were checked on polling day.

This process contributed much to the planning of the election itself, as the majority of polling center locations was identified and a database of potential polling staff established. This plan also gave increased responsibility to Afghan staff in order to enable Afghans to play coordinating, supervising, planning and managerial roles in future electoral and voter registration processes.

Although this plan allowed some savings because the number of international supervisors was much reduced, the high level of mobilization and the contracted timelines added to the overall cost of the voter registration process. A detailed budget had been developed for the revised strategy, which increased the overall cost of voter registration from USD 78 million to USD 90.5 million.

The success of this plan depended on two major factors:

i. An appropriate level of security prevailing throughout Afghanistan from March to June 2004, and

ii. A high level of commitment from its supporters to meet the plan's needs.

This document detailed the immediate needs to be satisfied for successful registration conducted in accordance with this plan's timetable. Failure to meet these needs by the dates indicated would have made it impossible to hold Presidential elections in October 2004.

The present revised Operational Plan took into account the constraints that have emerged since July 2003 as well as the electoral provisions contained in the constitution, and put forward a revised

strategy of the voter registration operation in order to fulfill the original objectives. The plan also detailed the structure, functions and modalities which governed the voter registration operation.

II. Objectives

The primary objective was to prepare and manage a credible and transparent voter registration according to the international standards for democratic elections.

Capacity-building that allowed Afghans to take the lead in the planning and conduct of this and future elections were the other main objective of this exercise.

The operational objectives of voter registration in relation to the above were:

i. To promote positive attitudes towards the democratic transition, the voter registration and election processes;

ii. To provide voters with accurate, culturally sensitive and timely information on voter registration;

iii. To encourage Afghan women to participate in the voter registration and electoral processes;

iv. To issue a laminated registration card with photograph to all eligible voters of Afghanistan;

v. To conduct exhibition and challenges of preliminary voters lists;

vi. To prepare a national register of voters based on actual registrations;

vii. To plan polling centers based on actual registrations;

viii. To build capacity of Afghans to carry out future voter registration and electoral processes ;

ix. To contribute to building the capacity of Afghan civil society to play an active role in electoral processes and civic education.

In order to fulfill the objective of preparing and managing a transparent and credible voter registration in Afghanistan by June 2004, the UNAMA Electoral Component developed this operational plan. The plan provided a concept of the operation and was a dynamic document. Amendments to dates and details were to be required as circumstances

change. This operational plan was based on the assumption of a target date of June 2004 for the election as set out in the Bonn Agreement. The official date for the election was to be announced by the President of Afghanistan.

The successful development and execution of this plan was dependent on:

i. All the necessary interdependent activities and tasks being identified and sequenced

ii. These activities meeting all legal deadlines outlined in the Bonn Agreement, the Afghan Constitution and the relevant decrees

iii. The responsibilities for the various tasks being assigned

iv. The objectives outlined in this plan being the focus of all activities carried out by the stakeholders in the conduct of this process

III. Principles and Strategies

The operational plan was based on the following principles and strategies:

i. Planning parameters of the voter registration operation closely followed the anticipated needs of the election in order to avoid duplication of work, to allow continuity as well as to ensure the relevance of capacity-building for the election.

ii. Voter registration planning and allocation of responsibilities closely followed the Afghan administrative structure and were highly decentralized in order to ensure the specific approaches as appropriate for local conditions.

iii. Capacity-building aimed to increase participation by Afghans in all aspects of voter registration. Operational planning therefore included a strong focus on the involvement of Afghans in planning, implementation and on-the-job training.

iv. The emphasis was to promote the participation of Afghan women in all aspects of the voter registration process, not only as voters, but also as voter registration planners and administrators through active recruitment of Afghan women.

v. All aspects of operations, procedures, training and public outreach took Afghan culture and traditions as well as their diversity into account, particularly in relation to gender.

vi. Special emphasis was put on increasing understanding of democratic political processes, particularly through public information and civic education, using appropriate media and methodologies.

vii.Educational methods were based on illustrations and dialogue with the audience around visual material.

viii. Civic education and public information worked through partnerships with existing civil society organizations and used their networks in order to develop and reinforce them and built on their experiences.

ix. Wherever possible, voter registration used sustainable methods, including for its procedures, material production, transportation, and public outreach strategies.

6. The Joint Electoral Management Body

The United Nations Assistance Mission in Afghanistan (UNAMA) advised and supported the voter registration process under the oversight of the Joint Electoral Management Body (JEMB), which was established by the President of the Transitional Islamic State of Afghanistan under a Decree of 26 July 2003 (subsequently amended in18 February 2004). The JEMB consisted of the six Commissioners of the Interim Afghan Electoral Commission (IAEC) and five international members appointed by the Special Representative of the Secretary-General. It was responsible for the whole election plan including voter registration process and can be described briefly under the following headings:

I. Civic Education and Public Information

The Civic Education and Public Information section was charged with development and coordination of public information campaigns and civic education activities critical to the success of the voter registration exercise. In addition to providing information about the voter registration process, the unit attempted to foster positive attitudes towards the democratic process, encourage broad participation, and contribute to the capacity building of Afghan civil society. The civic

education program was critical to the success of the voter registration project and, ultimately, to efforts to rebuild Afghanistan and to establish and sustain a democratic system of government. The timeline for the civic education campaign was closely linked to the registration and electoral calendar and Civic Education had developed the strategies that stressed the major dates in the registration and electoral calendar and that linked these processes to important points in the Constitution.

Civic Education used methods based on illustrations. This strategy, aimed primarily at the illiterate population, requires civic educators, who were trained as facilitators, to initiate a dialog with the audience around the visual material and answer questions.

Both Civic Education and Public Information continued to develop partnerships with civil society organizations. The 70 National Civic Educators continued to conduct civic education, community mobilization, briefings, and face-to-face programs. They concentrated on the regional capitals and surrounding areas, with special emphasis on targeted population – developing strategies to increase the registration turnout, with particular focus on women. The two major partner NGOs had 103 National Civic Educators in the eight regional capitals.

A total of 1050 civic educators were eventually employed to work in the provincial offices under the supervision of the provincial civic education trainers/coordinators. The provincial civic education trainers/coordinators and public information officer conducted training of the new civic educators.

HQ Civic Education and Public Information developed concept, artwork and translated in Dari and Pashto of materials that were distributed to our teams in the field and to our partner NGOs. Materials were designed to reach a range of audiences, from educated to illiterate, from urban to rural, men and women. The main civic education tools for disseminating key messages on registration and election processes were flipcharts, posters, leaflets and mass media.

The materials presented information from the Constitution as it related to the election process, governance, political parties and the equality of rights for all voters. Posters covered both general awareness

and specific messages on the registration and election process; Leaflets concentrated specifically on the registration and election process. Posters and leaflets had also been developed to specifically target the participation of women in the registration and election process, and to advise that separate facilities were provided to them. The above materials were mostly visual in order to reach the illiterate population. Prior to the printing of all materials, focus groups were conducted, and the materials tested as to whether the messages were clear, understood and culturally acceptable.

II. Operations

The Operations section was responsible for developing and overseeing the implementation of the operational plan for the voter registration process. The Chief of Operations had overall responsibility to oversee the strategies and activities of the Area Management team, the Procedures and Training team, the Logistics team and the Data Entry team.

The Logistics section was responsible for developing and implementing the logistical plans for voter registration and for providing logistic support to all sections of the SECRETARIAT. It ensured that all human resources, support materials, equipment and facilities were ready and in place as required for voter registration. The Procedures and Training unit was responsible for both the development of the procedural framework and for fulfilling the training needs of the SECRETARIAT and IAEC staff. The Data Entry Center produced the electronic voter register. The Area Managers served as liaison between the HQ and Regional Coordinators.

III. Regional Offices

Eight regional offices were established in the following main population centers: Bamyan, Gardez, Herat, Jalalabad, Kabul, Kandahar, Kunduz and Mazar-e-Sharif. The regional office was responsible for supervising and coordinating the planning and implementation of all voter registration activities within its area of responsibility. A region usually encompassed four or five provinces. Each regional office was led jointly by one Afghan and one international Coordinator. Six

nationals and two internationals were included in the staff in each regional office, including one Logistics Officer. The Regional Coordinators were responsible for supervising and coordinating the overall planning and implementation of the voter registration process in the assigned region.

IV. Provincial Offices

The provincial office was responsible for the planning and implementation of all voter registration activities in its area of responsibility. Provincial offices were set up in all 32 provinces, usually in the provincial capitals. In addition to this, similar offices were set up in three locations where logistics require such support, bringing the total of provincial offices to 35. In the eight provincial capitals that coincide with regional centers, provincial and regional offices were to be co-located.

A provincial office was jointly led by one Afghan and one International Coordinators. It was normally staffed by 15 to 20 SECRETARIAT nationals and four SECRETARIAT internationals. International staff included one Provincial Coordinator, one Voter Registration Training Officer, one Civic Education Trainer/Coordinator, and one Logistics Officer with their counter part as National staff and three Language Assistants and drivers. Staffing varied according to the size of the operation to be carried out in the province. Where and when security instructions prevented access of internationals to a province, international staff was to be located in the regional office and maintain as much contact with the provincial office as possible.

The Provincial Coordinators were responsible for managing the planning, administration and implementation of the voter registration process in the area of responsibility.

V. Field Staff

The field level was to consist of about 80 registration sites in the eight regional centers and some 4,200 registration locations in other urban centers and rural areas, each of which may have one or two registration sites. The link between the provincial offices and the sites was provided by around 1,050 National Field Coordinators who

supervised up to ten registration sites. In some cases there was a need for National Field Coordinators to have district bases in order to service populations and teams beyond the reach of provincial offices.

The National Field Coordinator was responsible for planning and implementing all aspects of the voter registration process in a designated area of responsibility. The National Field Coordinator was charged with supervising and monitoring registration teams in four or more locations, depending on proximity, geography, and accessibility. Duties included assisting with identification of registration sites, recruitment and training of registration Team Leaders, delivery and return of sensitive and non-sensitive registration materials, monitoring the operation of registration sites, and providing logistical and operational assistance when and where required. The National Field Coordinators were national staff members recruited by the provincial office. The number of National Field Coordinators assigned to an office was to be based on the population density in an area and the accessibility of the population.

Under the supervision of provincial civic education staff, some 1,050 National Civic Educators travelled throughout the country to inform and educate voters. National Civic Educators were responsible for conducting face-to-face civic education activities and community mobilizing events at the provincial level. They distributed educational materials to targeted groups and made regular reports on their activities and the effectiveness of the materials and methods. They shared transportation with National Field Coordinators and others to perform their duties.

VI. Registration Locations

Outside the regional centers, a registration location was being chosen for each catchment area of up to 2,000 voters. In densely populated areas, several such catchment areas were combined for registration in a single site. In very sparsely populated areas where there were isolated pockets of less than 2,000 voters, registration locations covered as few as 500 voters.

Every registration location had a male and a female team working, each consisting of two Identification Officers, one of whom acted as

Team Leader, one Photographer and one Laminator. In locations where two female Identification Officers could not be found, the female team operated with one Identification Officer.

In total, up to 388 teams consisting of 1,200 voter registration staff members worked in the eight regional centers, and around 8,400 teams with up to 33,600 staff members elsewhere.

The Asia Foundation and GLOBAL were to contribute their resources, expertise and experience in country for supporting and augmenting the process.

Voter registration relied on donor funding from other countries to meet the costs, on the UN to provide electoral expertise, assistance, coordination and verification, and on the Government of Afghanistan to establish the Electoral Commission, the legal framework and, through its Ministries, provided security, networks and general assistance. The Asia Foundation and GLOBAL provided operational and logistics support, NGOs and civil society support the civic and voter education campaign, ISAF and coalition forces provided wider security cover, the political, community and religious leadership facilitated the process and, above all, the process needed the people of Afghanistan to participate and to support it.

VII. Overview of Registration process

The voter registration operation was carried out in two phases, the first of which was completed by December 2003.

Phase I gave the estimated 2.5 million voters in the eight regional centers an opportunity to register by 7 April 2004. It consisted of an expansion of the current registration operation in Afghanistan's two largest cities and a continuation of the operation in the six other regional centers. Data entry of voters registered in Phase I completed by 21 April 2004.

An exhibition and challenges exercise held in the eight regional centers from 1 to 8 May 2004 using lists produced by the Data Entry Center. Successful challenges reported back to the Data Entry Center for the production of an exclusion list.

At the same time, preparations for the second phase carried out in the other provincial capitals and rural areas. By the end of February, a presence was established in all provinces and recruitment of both provincial and field staff was underway. In March, around 4,200 registration locations throughout the country were identified, more staff recruited and trained. In April the recruitment of registration staff and the training of Team Leaders and registration staff were completed.

Once provincial offices were established a nationwide public information campaign to inform and mobilize the country for voter registration started. This campaign specially targeted women.

VIII. Recruitment and Training of Provincial Staff

Recruitment of qualified provincial staff, National Field Coordinators and National Civic Educators was one of the major bottlenecks for the voter registration operation. The difficulties included:

i. Necessity of carrying out the recruitment in three levels (Provincial staff- National Field Coordinators – Registration staff) unless a partner with reach down to the registration location level helped expedite the process;

ii. Limited pool of sufficiently qualified female candidates;

iii. Choice between a time consuming, fair and transparent recruitment process that would reduce nepotism, intimidation and recruitment of people with political affiliations on the one hand and speedy recruitment on the other; and possibly

iv. High turnover of staff.

For this recruitment, all available means and sources were to be tapped and assistance for the recruitment from government, NGOs, international organizations and agencies was necessary.

Staff was trained using the cascade method. This implied “training of the trainers”: The international Trainers trained the National Trainers who in turn trained the National Field Coordinators (NFC). It was then the responsibility of the NFCs to train the Registration Team Leaders and Identification Officers, who, together, trained their respective registration teams. It was also the responsibility of the NFCs to brief the

Registration Security Police on relevant issues concerning the registration process.

The Regional Coordinators worked closely with the Training section to arrange for additional training as necessary in order to ensure that all staff members involved in the registration process is adequately trained for their tasks. Training staff at the provincial levels was responsible, under the direction of the Provincial Coordinator, for monitoring the quality of the registration field staff, including the registration teams and for providing retraining where necessary.

IX. Identification of Registration Locations and Sites

Thorough planning and ground level reconnaissance were undertaken in order to establish a suitable number of registration locations to cover the entire voting population not registered in Phase I. Planning parameters for a registration location were that it should have up to 2,000 voters. These parameters correlated to the size and number of polling centers that required for the election and therefore allowed site identification to cater for both registration and elections.

Bearing in mind that some locations had significantly less voters but needed to cater for isolated pockets of people, it was estimated that some 4,200 registration locations required in Phase II. The actual number of locations and sites to be established was based on information from regional and provincial planners in the field, relying on advice of community chiefs and village elders, and local estimates of the population's geographic distribution and density. All available sources of local knowledge were used and assistance with identification of locations and sites solicited.

A registration location covered a catchment area of up to 2,000 voters as described above. Identification of such catchment areas initially carried out by the Provincial Coordinators and continued by National Field Coordinators, who generally covered four such locations. The actual number depended on local conditions. The voters of each catchment area were registered by two registration teams, one male and one female. These teams worked in the same or in two separate registration sites. A 'registration site' was defined as a discrete building

or compound in which registration takes place. In densely populated areas, several teams might be working out of the same site.

Sites were to be located in a neutral environment or building, preferably government buildings or other public facilities such as schools and community centers. The identified sites must be as accessible as possible to the people living in the area and easy to locate. The site should also be suitable to serve a reasonable number of applicants at the same time. The privacy of women being photographed must be ensured. Where men and women were registered in the same site, there was to be separate rooms for the two teams.

Mobility was crucial for the work of National Field Coordinators and each required a vehicle. However, depending on local conditions and operational requirements, they travelled in pairs or with other provincial staff, such as National Civic Educators, or together with other vehicles, such as police, Afghan National Army (ANA), or other escort vehicles. Generally, they were accompanied by at least one policeman. National Field Coordinators were issued a Thuraya telephone in order to maintain contact with the provincial office and the registration staff they were responsible for.

X. Public Information

Public Information Officers (PIOs) work with NGOs, media providers and existing Afghan institutions to develop and produce programs about voter registration and elections that target different population groups. In disseminating information and education PIOs utilize existing mass media channels, such as radio and television broadcasts, and printed publications. PIOs also identify and develop new initiatives to target populations who may not have access to existing forms of mass media, including rural populations and women, and partner with other organizations to develop activities to the availability of information to all eligible voters.

(a) Media Relations

It was the responsibility of the Public Information Officers at Headquarters and provincial level to make and maintain close contacts with local and international media organizations and to provide

journalists with accurate and timely information about voter registration and elections. This included writing press notes, scheduling and assisting with interviews with appropriate spokespeople, and contributing to the biweekly UNAMA press briefings.

(b) Media Events

PIOs organized media events, such as the registration of popular local figures, including women, press briefings, and mass participation of women in the voter registration and election process. They also coordinated with local and international media organizations to ensure effective media coverage in all provinces.

(c) Mass Media Projects – Radio and Television

The HQ Public Information team worked with existing media providers, including Radio and Television Afghanistan (RTA), BBC Radio Dari and Pashto service, Radio Azadi, Arman FM and Internews, to develop programming content in different formats such as:

i. Public Service Announcements (concise, creative messages of approximately one minute in length)

ii. Educational programs ;

iii. Roundtable discussion programs;

iv. Soap opera dramas

Programmes targeted different audiences, such as young people, women, educated and illiterate people, and incorporate the key messages and themes of the civic education campaign.

(d) Mass Media Projects– Print

PIOs worked with existing print media producers such as Killid Magazine and the Open Media Fund publications to develop special content dedicated to Voter Registration and elections utilizing written articles, graphics and photo stories. Cartoon strips based on the key messages were also developed and placed in government and independent newspaper and magazine publications in the regional and provincial centers.

(e) Mobile Radio Project

There were fewer means of delivering Public Information using traditional mass media at the provincial and district level. In particular,

marginalized groups, such as rural populations and women, were not having ready access to mass media. The Mobile Radio Project was, therefore, an essential tool for the PIOs and Civic Educators to reach people who did not live within the range of radio broadcast, did not own a radio, or had other limitations accessing traditional mass media.

NRS vehicles were equipped with a mobile radio set (loudspeakers, amplifier, tape player, cassettes, and microphone) and driven to areas where the public gathers (bazaars, mosques, parks). Two mobile radio sets were provided to the CE/PI teams in each provincial office, and will be shared between the PIO and the National Civic Educators. One set was dedicated to covering the provincial center and one to traveling outside of the provincial center. An essential component was that the teams had access to vehicles. This project started as soon as PIOs and the necessary equipment were in place on 1 March and continued until the elections.

SECRETARIAT Public Information staff developed and produced the programming, messages and music for the Mobile Radio Project, and duplicated and distributed them on audio cassettes to the provincial offices. Programming – songs, PSAs and other programs – were played, live announcements made, and supporting materials, such as leaflets, posters and stickers, were distributed. The equipment was also used to announce upcoming events, including the schedule of the Civic Education Face-to-Face activities, and the locations of voter registration sites.

At the district level, the project was implemented through partner NGOs who required funding for personnel, vehicle hire, and equipment. Training on technical and effective use of equipment was provided by the Provincial PIO/Civic Education Trainers/Coordinators.

(f) Mass Communication

Key messages were also displayed through mass communication mechanisms designed to complement the civic education program. These included:

i. Roadside advertising billboards,

ii. Banners,

iii. Signs on public transport buses,

iv. Public art projects (e.g., murals),

v. Promotional items such as pens, shopping bags and buttons imprinted with graphics and text.

A coordinator was required to facilitate these major marketing projects and to ensure that the mechanisms cover all provinces effectively.

(g) Other Projects

The HQ Public Information Office was working with NGOs to develop Mobile Cinema and Mobile Theatre programs. The first Mobile Cinema film about Voter Registration was completed in December 2003 and immediately commenced touring throughout Afghanistan. The traveling screenings were administered by media NGO, AINA and covered 543 locations throughout the eight regions over three months.

Subsequent productions for Mobile Cinema—including one that promotes the participation of women in voter registration and elections—was produced. In addition, there were more dedicated screenings for women, by linking with women's organizations. Screenings of this started on 22 March and run until the end of voter registration. The office was also working with popular Afghan singer, Farhad Darya, to produce a song and video clip to promote positive attitudes towards elections.

X. Strategies Targeting Women

Women are the majority in Afghanistan, around 60 percent of the total population. Therefore, special attention was paid to encourage their participation in the registration and electoral processes. As it was understood that male educators might not be allowed to address Afghan women, concerted efforts were made to recruit women to fill civic education positions, at least in equal numbers to males. Unfortunately, some positions reserved for female civic educators remained vacant. Expansion of the civic education program to the 32 provinces increases the need for female civic educators proportionally. The recruitment of a large number of women throughout the country required the assistance of governmental programs and agencies.

XI. Communications in the Field

National Field Coordinators, who were operating out of provincial offices but in the field most of the time, were supplied with a Thuraya phone for communication with provincial staff. At the Phase II registration locations (later converted into polling sites), the registration team was required to communicate with National Field Coordinators and the provincial base via a Thuraya phone. It was estimated that about 4,200 Thuraya phones were required for this exercise in Phase II.

XII. Minimum Operating Security Standards

UN-recruited international staff members had to operate from premises that meet UNSECOORD Minimum Operational Security Standards (MOSS) at all stages of the operation. Currently all eight regional SECRETARIAT offices were MOSS compliant.

UNAMA had committed to provide or to bring up to MOSS compliant standards all identified office and residential accommodation in each regional capital. UNOPS had committed to make available MOSS compliant office and residential accommodation in each provincial capital. The VRP budget provided funds for 24-hour security guards at all provincial office and residential accommodation. MOI armed guards were supplied at all accommodation at the provincial level on a 24/7 basis.

One of the limiting standards required under MOSS for international staff to live in the provincial capital there generally must be a minimum of three international staff living in each residence, one of whom must be male. This staffing requirement varied in different provincial capitals where other UN agencies were present and accommodation was a shared facility. The management of this matter with staff on leave and absent in the regional center were to be the responsibility of the RC. UNOPS had not committed to providing accommodation to international staff at the provincial level.

Information from UNSECORD indicated that in many provinces and districts, vehicles used by UN staff were requiring staff to be well protected with fragmentation jackets for staff and blast blankets for the vehicles. The details on these recommendations were developed by

UNSECORD. Without the complete details and without a comprehensive survey from UNSECORD it was difficult to ascertain the quantities of these materials required and cost these materials, however it was already acknowledged that there was extreme difficulty in sourcing blast blankets for UN vehicles .

XIII. Police Security Project

(a) Legal Framework

In the overall framework of the UNDP supported project 'Support to Law & Order in Afghanistan', executed by the Ministry of Interior, which was responsible for the overall coordination and implementation of the police component of the special measures for security of the registration process, in close coordination with UNAMA and UNDP.

A Memorandum of Understanding between the Ministry of the Interior of the Islamic Transitional State of Afghanistan, the United Nations Assistance Mission in Afghanistan & the United Nations Development Programme on the Implementation of the Police Component of Special Measures for the Security of the Registration Process was signed on 4 January 2004. It provided for a trained and equipped Registration Security Police, as well as coordination, support and services for the carrying out of the activity.

A Letter of Agreement between the Ministry of Interior and the United Nations Office for Project Services (UNOPS) was being finalized, for the provision of specific services in support to the activity, including logistical support and transportation; equipment procurement, installation, maintenance, and operations; payments of special allowances; training; and recruitment, as required by the MOU.

(b) Registration Security Police Officers

For the particular purpose of close protection of registration sites, personnel and activities, the Ministry had set-up a 'Registration Security Police' (RSP) composed of qualified and trained national policemen and officers especially dedicated to the Activity.

The RSP was entrusted with the following tasks and responsibilities:

i. Protect the safety of the registration staff and as well as that of officials and all other participants observers or monitors who have been authorized by either the Joint Electoral Management Body (JEMB) or UNAMA to be present at the registration site;

ii. Provide mobile security to registration staff and material while in movement between registration sites, or involved in other authorized registration activities such as civic education and reconnaissance duties;

iii. Secure the registration materials and sites.

At each registration site, at least four RSP personnel (two trained national RSP and two provincial RSP) provided security during daytime, and at least two at night. The number of additional RSP personnel, equipment, and weapons and ammunition, required in each province and at each location, and the periods for which they were required, determined by UNAMA in consultation with the Ministry and UNDP.

Each policeman member of the RSP received a special allowance of USD 70 per month calculated at the pro-rata of actual number of days worked. While the responsibility for the payment of the regular salary remains with the Ministry, the special allowance related to the Activity was paid, upon request from the Ministry, directly by UNDP or through an approved implementing partner, in this case UNOPS.

(c) Equipment

Provision of all equipment necessary for the implementation of the activity including, weapons, uniforms was the responsibility of the Ministry of Interior. In particular, the Ministry of Interior ensured that members of the RSP were provided with the uniforms, arms and ammunition necessary for the carrying out their functions. In the framework of UNDP project 'Support to Law & Order in Afghanistan' executed by the Ministry, and upon request from the Ministry, UNDP procured directly equipment necessary for the carrying out of the activity, including vehicles, radio communication equipment, and basic kits, excluding uniforms and weapons.

The activity was financed from the Transitional Islamic State of Afghanistan's own resources and, wherever applicable, from earmarked contributions received through the Law and Order Trust Fund for

Afghanistan (LOTFA) managed by UNDP. An aid of USD 10,325,631 had already been received from, or committed by the European Commission, and the Governments of the Netherlands and Belgium.

(D) Issues and Recommendations

The Ministry of Interior (MoI) deployed Police without functioning weapons and without ammunitions and without prior notice to the provincial police authorities. No arrangements were made for the accommodation of deployed MoI Police. The Registration Security Projects worked relatively well only in Kabul, primarily because accommodation was not an issue.

The assumption that the MoI would be able and willing to take the lead in the Voter Registration Security Police project proved to be wrong. The entire registration security project had to be implemented by the provincial police. A thorough assessment of provincial police assets, both men and material, needed to be carried out in order to clearly determine their ability to support the registration security project. Any shift of responsibilities from MoI to provincial police would have to be implemented with the approval of the MoI, not least because the MoI was the executing body for LOTFA.

XIV. Election Laws

Article 61 of the Constitution provided that for the preparation, organization, conduct and oversight of the first electoral processes, which marked the completion of the transitional period, the Islamic Transitional State of Afghanistan requested the support of the United Nations inter alia through the establishment of the Joint Electoral Management Body (JEMB), with the participation of international experts appointed by the United Nations as provided for in Decree No 110 of 18 February 2004. Until the end of the transitional period, the JEMB was to exercise all the powers of the IEC as laid down in this law. The IEC, after its creation, replaced the Interim Electoral Commission within the JEMB. Upon completion of the transitional period, the IEC assumed all the powers of the IEC under the law. Until that time,

decision-making in the JEMB and the voting rights of the international members remained as defined in above mentioned decree.

Article 17 of the Election Laws promulgated in Afghanistan provided:

1. The President is elected, in accordance with article 61 of the Constitution and this law, by a majority of the valid votes of voters cast in an election.

2. If no candidate wins more than 50% of the valid cast votes in the election, a runoff election shall be held between the two most-voted candidates within 2 weeks after the announcement of the election results. The candidate receiving the most valid cast votes in the runoff election shall be declared elected.

3. The most voted candidate in accordance with Article (160) of the Constitution shall assume his duties thirty days after the result of the election has been proclaimed.

4. In case of death of one of the candidates during the first or second round of polling or after elections and before announcement of the results, then new elections will be held according to the provisions of law.

Conclusion

This was an ambitious Plan prepared by UNAMA and JEMB and was indeed a very large scale and complex logistical exercise with many different elements. Security and access were cases in point. The Plan sought and projected a high level of commitment and resolve from the various stakeholders to the process. A variety of actors, resources and factors needed to come together for the operation to be successful. The much-needed support and resources were available in a very short time frame. That time was of essence for the success of the project to be overemphasized.

Finally the historic elections for the first democratically elected President were held in October 2004. 4900 polling centers with 22000 polling stations were operational in all districts of Afghanistan's 34 provinces. In the largest out of country voting operation ever, 2800 polling stations served refugees in Iran and Pakistan. It was a great day in whole of Afghanistan, people with full enthusiasm both male and female came out in large number to elect their President with an assurance that new Afghanistan will move towards peace and prosperity. There was no large scale violence as security forces were in place to take care. Mr. Hamid Karzai got elected with 55.4 % votes that is more than half votes required for winning the Presidential Election and was installed to the office. People voted with great hopes. Funds started pouring from different countries for development initially.

The voter registration data bank created thus became the basis for the next elections also which took place in 2009. But this election was characterized by lack of security, low voter turnout and wide spread ballot stuffing and intimidation. The vote for the election of the 420 Provincial Councils seats also took place in August 2009, but remained unresolved during the lengthy period of vote counting and fraud investigation. President Hamid Karzai could not get the required more than half of the votes as per the Election Law, as such second round of runoff vote between incumbent Karzai and his main rival Abdullah Abdullah was announced for November 7, 2009. On November 1 however Abdullah announced that he will not contest the runoff because his demands for changes in the Electoral Commission had not been accepted and "a transparent election is not possible". A day later on Nov.2, 2009, Officials of the Election Commission cancelled the runoff and declared Hamid Karzai as President of Afghanistan for another term of 5 years.

Though Hamid Karzai being moderate with forward looking approach is in power for the last almost more than 10 years but Afghanistan is still not secure. NATO forces are still there for its protection. It is difficult to say whether the people of Afghanistan can handle the administration at their own.

There is lot to be done on the following points:

- The Political Administration must establish effective control over whole of Afghanistan especially in Southern Part including Kandahar where the present government is still lacking initiatives.
- The Political, Social & educational Institutions be strengthened, involving especially rural people.
- Legal Institutions must be popularized and people must show their faith in the legal process of law.
- Efforts are needed to involve Women in National Development programmes.
- UN peace keeping forces are to be maintained in Afghanistan for a longer tenure to protect it from resurgence of anti national Forces.
- Civic education is strengthened to enlighten the people about the benefits of Democracy and
- Growth of Drugs / Opium / Charas should be discontinued, and the farmers are provided alternative and modern methods of farming.

Sociology of Law: Theoretical Propositions and Empirical Realities Related to Child Labour

Bashir A. Dabla*

1. Introduction:

Society and law represent two separate social and legal entities but have established a reciprocal relationship from earlier times. Even in primitive and non-literate societies, this relationship existed in unwritten form. With the change in human society from one stage of development to another their inter se relationship in one form or the other got continued and strengthened. Thus, it has been observed that while the social entity [i.e. broader social system and social order] provided much needed support and protection to the legal entity [written/unwritten laws and rules in different societies], the latter also contributed to stability, continuity and legitimacy needed by the former. It was essentially in this type of relationship between society and law that sociologists and legal experts wrote this theme. It was also in this academic context in the contemporary times which gave rise to a sub-discipline in sociology, called Sociology of Law.

Sociology of Law stands for a branch of general sociology just like "Sociology of family and marriage", 'Industrial Sociology' and 'sociology of change'. At the same time, sociology legitimately may also be viewed as an "auxiliary of legal studies, an aid in executing the tasks of the legal profession." Sociological analyses of social phenomena regulated by law may help positively the legislators or even the courts in making important decisions. In this background, there reveals a critical functions in society." It follows that while the legal system and its correlates help sociologists in understanding the formal structure of society, the awareness of social- structural realities made it easy and highly contextual in the operation of informal rules and formal laws.

In terms of themes, sociology of law was enriched constantly. Many of these values are found embodied in law, in substantive rules, as well as, the guiding procedural principles. Again, law is used as a

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diagnostic tool to uncover structural pre- conditions which in other areas remain tacit and less readily observable.

The description of value concerns is only one aspect of the task that confirms basic cleavages in a society.

Law is, more often than not, seen as the dependent variable causally determined by the societal structure. But, law can also be viewed as more active instrument for shaping future behaviour and social forms of individuals and groups. With the emergence of legislation as a major legal institution in capitalist and non-capitalist countries, it lies near at hand to view law as a vehicle of social engineering. The legislators and those who carry out precepts of law set a process of influence into motion which increases and gets formalized over a period. Thus, the function of law is seen as one of communications with the public.

The law offers many opportunities for studying social mechanisms that also occur outside legal institutions. The pervasive problem of conflict and conflict resolution are central to legal and sociological studies. Decision- making, indicating the processes through which those who wield power make their claims when faced with alternative paths towards a goal, has become a catch word in modern social sciences. This has become a focused area of research for both sociologists and legal experts.

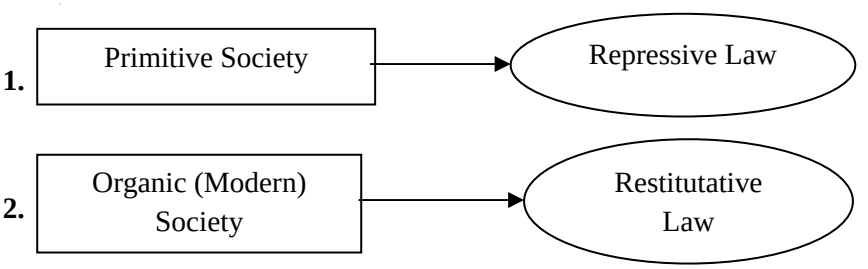
The “roles” especially occupational roles, in modern society are of great intrinsic interest and codified in the sociological analysis. The profession in particular and lawyers in general have been targeted in sociology of law. In fact, all men of law, including private practitioners, attorneys, barristers, and solicitors, have become objects of more attention from sociologists.

Regarding the relationship between law and sociology, it is closer but with certain ambivalence, lawyers and their profession is the subject of sociologists, but they are simultaneously collaborators or even teachers and mentors. Legal thinking and methods of decision-making is

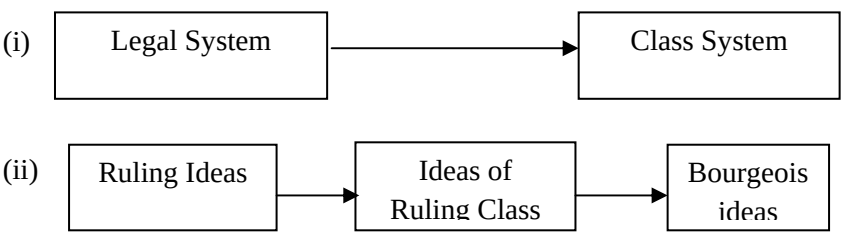
interesting subject – matter for sociological analysis. In this respect, sociology of law could be constructed as a branch of sociology of knowledge dealing with the social circumstances under which certain modes of thought are being applied to solve problems.

2. Classical Contribution to Sociology of Law

Sociologists of the classical order have contributed to the growth and evolution of the sub-discipline of sociology of law, by putting forth particular views about society and law and their relationship. The first great sociologist who analysed this theme was Emile Durkheim whose primary aim was to relate a type of law [retributive] to a type of society [primitive] and to contrast it with another kind of law [repressive] associated with modern industrial [organic] society. This association between law and society reflects in the following diagram:



Karl Marx made two substantial points in this regard. First, since the legal system is part of bourgeois state, it was an important instrument of class oppression. Second, since the ruling ideas of period are the ideas of ruling class, even the most basic legal concepts [right] are part of the system of bourgeois domination. This reflects in the following diagram also:



3. Contemporary Contribution to Sociology of Law

In the contemporary context Max Weber wrote about theory, history and social role of law in different societies. He took a positive view of law and regarded it as an "integrative force in society" He regarded the law as an important contributor in general to historical and rationalization of western societies and a critical component in the system of legal-rational domination, specific to the most advanced capitalist societies. Similarly, scholars like E. Ehrlich and G. Guruitch saw law and legal system as part of society, as social institutions related to other institutions and changing with them. They treated law as one means of social control and related to moral order [a body of customs and ideas]. They perceived the relationship of systems of law to other social sub-systems like the economy, the nature and distribution of authority, and structure of family and kinship relationship.

In the last century, the rise of empiricism and existence of high level of official interest in results of research, related to operation of the legal system, theoretical issues virtually disappeared from the interests of sociologists of law. In that situation, there appeared numberless studies of the police, lawyers, judges and other regulatory systems, plus many purporting to report on the social impact of various laws.

This prolonged bout of usually highly abstracted empiricism appears to be coming to an end. Researchers with theoretical and substantive interests in sociological questions about the law have returned to the founders and sought to develop their work so that it can be applied to contemporary societies. There have also been several recent moves to reintegrate theory and empirical work.

4. Sociology of Law: Empirical Concerns Social Legislation

As is clear from the above explanation, sociology of law does not represent the theoretical concepts, theories and abstractions only, but develop empirical concerns too which are related to basic problems encountered in society. This reminds about the reciprocal relationship

between social and legal systems on the one-hand and sociology and law disciplines on the other. On the whole, both sociology and law contribute to the theoretical and realistic understanding of social-legal phenomena as the existing reality. This relationship specifically reflects in the case of social legislation in modern times characterized by three major features delineated as under:

a. Social legislation represents and reflects fundamental social consensus about values, norms, ideal principles, ideal behavior and so on;

b. Social legislation, primarily and essentially, emphasizes the minimum or maximum degree of social harmony, social stability, social solidarity and social continuity; and

c. Both these features provide the ideational, functional, functional and ideological bases of the concerned social order with all its correlates and characteristics.

5. Legislation on Child Labour

a. Contextual Background

It has been observed that in most of the societies, despite attaching highest degree of importance to the role or welfare of children, they are found either actively involved in undesirable activities, or being abused and exploited at the societal level. While some of them become victim of their own social circumstances, others are forced to involve themselves in these acts. In sociological sense, it follows that normally as per societal norms every person or child must get socialized in ideal social environment and adopt ideal social status and role. This becomes possible when processes of socialization are carried out in family, school and church. These children are taught about basics of social life, societal values and established norms and hence adopt common cultural pattern.

It is generally upheld by members of society that children at early age must necessarily be sent to school. But, majority of parents in India feel compelled not to follow this practice. In other words, they are not able to send their children to school, both boys and girls, up to 14 years

of age, mainly due to reasons directly or indirectly related to poverty. In this situation, children feel compelled to perform manual work for earning for themselves and for their families. They work in different fields, such as, domestic sector, handicraft centers, automobile sector, hotel industry, tourism-related fields and –shops-establishments. At the tender age when ideally they should have been in the school, they work outside their homes on lower wages which are also neither paid fully nor regularly. Many of them work 10-14 hours without any break and holiday. They are often dominated, harassed and exploited. Since a significant proportion of population face poverty, a large number of their children feel compelled to work on petty wages and undesirable sub-human work conditions.

b. Contents and Objectives of legislation

In order to safeguard whole lot of child labourers, there was enacted a special Act of social legislation called Prohibition of Child Labour Act. It was specifically aimed at to save children from the exploitative- abusive conditions and to safeguard their long –term rights and interests. With the formulation and implementation of this Act, a huge number of worst effected children could be taken out of this rot. In actuality, keeping in consideration the objectives of upholding and safeguarding the interests of child labourers, a new law introduced [and subsequently approved] in the Parliament of India in 1986 called the "Child Labour [Prohibition and Regulation] Act, 1986. While the focus of this Act was on children working in domestic and hazardous sectors, the enactment and implementation was made obligatory by all states irrespective of their political differences. Some important features of this important Act include the following:

I. This Act prohibits employment of children below the age of 14 years in 7 occupations and 18 processes. It also regulates the working conditions of the concerned children in the employment.

II. This Act regulates the time and conditions, but not the wages, of some child workers and ban on their work in specified hazardous occupations which include firework and chemical industries.

III. This Act particularly focused on domestic and hazardous sectors wherein the incidence of child labour have been seen more as was felt by the experts; and

IV. This Act was characterized as highly needed and highly desirable in the prevailing conditions of children working outside their homes.

c. Role and Implications of the Act

Despite having several limitations in the Act of 1986, it proved as a vital check on the practice of child labour in the whole country and played a significant positive role in raising consciousness and developing political commitment for anti-child labour measures, formal and informal. The positive role of this Act can be explained in the following points:

[a] The Act proved radical and revolutionary measure in character and helped positively in creating the social and political environment which upheld the basic sacred rights of children of all age groups and negates all arguments for the compulsion of the continuity of child labour.

[b] The Act emphasized directly as well as indirectly ideal role of children in early age which may materialize if they are able to opt for education in place of child labour or school in place of working unit/place. This ideal role, later on, may turn in to positive and production adult role in the life and society.

[c] The Act allotted and prescribed a specific place to children in society, i.e. school, which should become their place of socialization in place of working unit which has neither basic material facilities nor any scope for avoiding its negative effects.

[d] This Act provided children and their parents an alternative role, career, behaviour and life pattern, which many of them may opt for a better future, though with certain difficulties.

[e] This Act gave a new vision and new perspective to the parents of child labourers and motivated them to shift their children from the manual work pattern to school –study pattern. This may be termed a movement from darkness to light.

[f] All courts in the country were empowered to decide in favour of children in all cases of child labour. This helped the courts in liberating them from the curse of child labour. This also generated social forces, trends and movements against the chronic practice of child labour.

6. Conclusion

Sociology of law deals with all fields and dimensions of the relationship between society and law. The social-legal explanation has identified common areas of academic interest, such as, the study of legal profession, role of law in different fields of modern life, status and role of legal practitioners, codification of law and its academic impact, social laws and input –output processes, social background and dynamics of laws and rules, processes of decision-making and conflict resolution. It contributes to the establishment of modern, rational and democratic system and helps in the process of achieving the social and legal objectives. But, at the same time, it reveals a clear bias and particular interests of monopoly groups in the power structure. The social legislation against the practice of child labour represents essentially socio-legal response to this acute practice faced by children in all societies. It clearly and manifestly represents a resolve on the part of society to resolve the problem in a serious and effective way. This Act also gives rise to the consciousness, resolve and commitment to negate and eradicate this most damaging problem to the children.

Alternate Dispute Resolution: Perspectives in India

M.K. Malviya [*]

ABSTRACT

In a democratic State like India, safeguarding human rights and assuring dignity of the Individual is the responsibility of the state. Access to justice and free legal services are, therefore, a prime necessity to attain this objective. Alternate Dispute Resolution or 'ADR' as it is more commonly known, means the wide variety of methods by which conflicts and disputes are resolved otherwise then through formal litigation in courts. Though our constitutional system is based on the philosophy of equality before the law and equal protection of law, but the socio-economic disparities that exist among the member of the democratic society indicate that they are not equal, particularly so far their economic resources are concerned. This movement of ADR, has become a silent resolution bringing mechanism with substantial benefits by reforming the judicial system in the country. It is now becoming a means of bringing access to justice to poor and disadvantaged section of society and fair alternative to the traditional judicial system. A legal adjudication may be flawless but heartless too, however, a negotiated settlement will be satisfying, even if, it departs from strict law". The ground is now set for online Dispute Resolution (ODR) with the application of Information Technology Act, 2000 which is friendly and also statutory recognition for the use thereof. Being a civilized society the rule of law should prevail and principles of natural justice should apply resulting in complete justice.

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Introduction

A vibrant judicial system is a hallmark of greatness of any nation. The judiciary in India is acclaimed all over the world for its realistic and dynamic approach. It has identified the basic issues keeping in view the social objectives. Our Constitution not only assures political justice but also social and economic justice. The innocent and unassisted persons, obviously, are at a great disadvantage to fight a legal battle than a legally aided person.

The Legal aid system is a legal mechanism of peaceful transformation of society so for as ensuring equitable and social justice is concerned. The Constitution of India calls upon the state to provide for free legal aid, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic inability. Indian socio-economic conditions warrant highly motivated and sensitized legal service programs, as large population of consumers of justice (heart of the judicial anatomy) are either poor or ignorant or illiterate or backward, and as such, at a disadvantageous position. The State, therefore, has a duty of secure that the operation of legal system promotes justice on the basis of equal opportunity. Henceforth, the pursuant provision incorporated in the Article 21 of Indian Constitution expresses in a mandatory tone that 'no person shall be deprived of his life or personal liberty, except according to the procedure established by law. The words "life and liberty" are not to be read narrowly in the sense drearily dictated by dictionaries; they are organic terms to be construed meaningfully. Further, the procedure mentioned in Article-21 is not to be taken as some semblance of a procedure but it should be "just, fair and reasonable".

Thus, the Right to Speedy Trial has been rightly held to be a part of Right to Life or Personal Liberty by the Supreme Court of India. The Supreme Court has allowed Article 21 to stretch its arms as wide as it legitimately can. The reason is very simple. This liberal interpretation of Article 21 is to redress that mental agony, expense and strain which a person proceeded against in criminal law has to undergo and which,

coupled with delay, may result in impairing the capability or ability of the accused to defend himself effectively. Thus, the Supreme Court has held the Right to Speedy Trial a manifestation of fair, just and reasonable procedure enshrined in Article 21. It is very difficult for a common and indigent man to enter the shrine of justice without first shouldering the responsibility to carry the entire cost. It has been, therefore, rightly mentioned that doors of justice opens with a golden key. It may be pertinent to remember that the mandate of Article 38 of our constitution, which reads as under:

The State shall strive to promote the welfare of the people by securing and protecting as effectively as it can, a social order in which justice-social, economic and political, shall inform all the institution of national life"

In the said situation the need of the hour is to explore the possibility that may resolve the dispute within the given timeframe. Emphasis on ALTERNATE DISPUTE RESOLUTION MECHANISM or ADR is not a recent phenomenon as the concept of parties settling their disputes themselves or with the help of third party, is very well-known to ancient India. Disputes were peacefully decided by the intervention of Kula's (family assemblies),"MUKHIA", Srenis (guild so men of similar occupation), Parishad, etc. In the Indian subcontinent, Justice delayed is justice denied has been reduced to a mere cliché. With the delay ranging from a couple of years to several decades and often judgment later held to be miscarriage of justice by the courts and judicial proceedings has become an incubus for the common masses. States function through different organs and the judiciary is one vital organ which is directly responsible for the administration of justice. Supreme Court expressed its judicial concern in **Guru Nanak Foundation v. Rattan Singh & Sons,** observed: "Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy resolution of disputes avoiding procedural claptrap and this led them to the arbitration law, conciliation and mediation.

1. ADR: Indian Perspectives

In commonplace perception judiciary is the tangible delivery point of justice. Resolving disputes is the fundamental to peaceful existence of society. Therefore, effective and efficient systems for determination of disputes become an obvious appendage. It was declared that the present justice delivering system is not capable to bear the whole workload and it would be appropriate to deliver justice by the alternative means of disposal of disputes as well. Under this mechanism there is more procedural flexibility, in time and money saving besides the absence of tension of regular trial. Dispute resolution is one of the major functions of a stable society. Through the medium of the State, norms and institutions are created to secure social order and to attain the ends of justice or the least to establish dispute resolution processes. The primary object of ADR movement is avoidance of vexation, expense and delay and promotion of the ideal to "access of justice" for all Justice is the bedrock of any judicial set up. However in the third world setting for some classical problems attached to it, justice has acquired a mutilated dimension and those classical problems are none other than inordinate delays, adjournments, appeals, contradictory court opinions in each court of appeal and frequent reversal prior decisions. In the words of Justice, D. Dharmaadhikari; "judicial process is ailing since long and required intensive treatment in ICU". Nature has endowed people with rationality and they have constantly attempted to discover methods of establishing a cohesive society. The term "alternative dispute resolution" or "ADR" is often used to describe a wide variety of dispute resolution mechanisms that are short of or alternative too, full-scale court processes, established by the Sovereign or the State. The term can refer to everything from facilitated settlement and negotiations in which disputants were encouraged to negotiate directly with each other prior to some other legal process, to arbitration systems or mini trials that look and feel very much like a courtroom process. It included arbitration, as also conciliation, mediation and all other forms of dispute resolution outside the courts of law, which would all fall within the ambit of ADR. ADR

system seeks to provide cheap, simple, quick, less cumbersome and accessible justice. Under this, disputes are settled with the assistance of third party; where proceedings are simple and are conducted, by and large, in the manner agreed to by the parties. So, precisely saying, 'ADR' aims to provide justice that not only resolves dispute but also harmonizes the relation of the parties. It is this spirit that has led to the evolution of ADR mechanisms for the dispensation of justice with efficacy and steadfastness.[1]

2. ODR: A Sound Weapon

Good governance comprises the mechanism process and institutions, through which citizens articulate their interests, exercise their legal rights, meet their obligations, and mediate their differences. As such entitled to obtain justice with the provision of Article 39-A, legal impediments to access justice.[2] In view of ever increasing globalization of trade and commerce at national and international level, it is quite natural that commercial transactions are increased and accordingly frequency of commercial disputes arose. The development of technology has a direct bearing on the growth of online dispute resolution. However, the use of technology in alternative dispute resolution has given rise to significant problems, legal issues, advantages and disadvantages. ADR processes are included the devices such as mediation, conciliation, negotiation and arbitration. In this day of rapid innovation of development in communication technology and electronics growth the courts are facing lot of problems in every endeavor. As such the ODR plays a vital role for quicker dispensation of justice in the Legal regime. In particularly on line dispute resolution, assists all kinds

1 Madabhushi Sridhar, "*Alternative Dispute Resolution: Negotiation and Mediation*", Lexisnexis Butterworth, Wadhwa Nagpur.

2 Arbitration & ADR (An essential revision aid for Law Students), Universal Law Series, Universal Law Publishing Company Ltd.

of dispute resolution, which includes negotiation, mediation and arbitration. By using a cyber space as location for dispute resolution, ODR has further extended the process by moving ADR to the cyberspace and internet, which is a virtual environment. It is much more effective and efficient with the potential weapons: these are (a) Online Negotiation (b) Online Mediation, (c)Online Arbitration, (d) Online Case Appraisal; and (e)Automated Negotiation. ODR is not only suitable to resolve disputes in relation to e-commerce but also to resolve disputes regarding family law in different jurisdiction. ODR is more affordable because it has further reduced the cost compared to ADR.ODR saves time because the sites are open all the times and on seven days a week./ Parties to a dispute can participate in ODR by using computers from the comforts of their home or office. It is very convenient to the parties possessing internet access.

Today, ODR is considered as an inevitable part of the ADR and conflict management system's it is used partially in the Federal Court's e-court and also by government agencies in many countries and in other parts of the world. The success of ODR is obvious as more than 1.5 million mediations have been conducted successfully over the last ten years. More and More people are opting for ODR and in 2003; the Victorian Government found that more than 70% of the respondents opted for ODR for general disputes as well as for disputes with on-line companies. In order to computerize the justice delivery system our Indian government is still implementing E-Court system for the District and Subordinate Courts inside country. For the sake of better understanding one appreciation that, in the days of "time being money", even in games like cricket, we have drifted towards one day, limited over matches instead of the five days, two inning matches. Arbitration, as practiced in India, instead of shortening the lifespan of the dispute resolution, became one more "inning" in the game. Not only that, the

arbitrator and the parties' lawyers treated arbitration as "extra time" or overtime work to be done after attending to court matters.[3]

It is a universally admitted fact that arbitration, conciliation and mediation are efficient alternative means for resolving disputes. Undoubtedly these alternative means are less expensive and are not time consuming which are intact very impartial for protection of commercial relationship. It is the simplest means for redressal of disputes.

3. Legislative Approaches to ADR:

Legislature at the National and State level have contributed by creating a plethora of laws in the realm of social welfare. But merry promises in legal provision can't fill bellies or employment opportunity or give secular in time of distress. Judiciary has always strived to play a crucial role in making the concept of justices real for the people at large. In the 1940 there was a traditional arbitration it was not to the mark, in fact the legal recognition made for social justice. National level implementation of legal aid schemes came to existence in 1980, the Legal Service Authorities Act 1987; it is revised in dispensing of justice on 5th December 1995, the Arbitration and Conciliation Act, 1996 and at last the Amendment's brought in the C.P.C requires the making of a reference to conciliation a mandatory requirement. For instance the newly inserted section 89 requires that in all cases where there seems to be a possibility of an out of court settlement the courts must refer the matter to arbitration, conciliation, mediation.

It is submitted that trend to adopt alternative means of dispute resolution is a reflection of specifically business community whether it is at national or international level which is of the view that taking recourse

3 O.P.Malhotra & Indu Malhotra, *The Law and Practice of Arbitration and Conciliation by Lexisnexis*, Butterworth, Wadhwa Nagpur. & A.R. Lakshmanan, *Arbitration Business & Commercial Laws*, Universal Law Publishing Company Ltd.

to the court of law for settlement of dispute is expensive, time consuming and may result into endless litigation. Thus, wherein money and time considerations are equally involved, it is most appropriate to seek settlement of dispute by alternative means such as mediation, conciliation and arbitration. In modern business world the concept of mediation, has been recognized and considered as one of the effective alternative means of dispute redressed outside the scope of formal legal system. Thus, mediation is an informal legal system which can be followed conveniently as there are no cumbersome technicalities in it. The well known methods of ADR are arbitration, negotiation, conciliation and mediation. There is adequate provision for adoption of one or more of these methods in the Indian Arbitration and Conciliation Act, 1996 and section 89 of the Code of Civil procedure, 1908.Further, with the passing of Information Technology Act, 2000, the ground is now set for Online Dispute Resolution (ODR) because we have now both an ADR-friendly and statutory recognition for the use thereof.

4. ADR: A Sailent Revolution

In due course of this movement for adoption of ADR mechanisms has become a salient resolution bringing substantial benefits by reforming the judicial system in the country. It is now becoming a means of bringing access to justice to the poor and disadvantaged section of society and complete justice to the people of India by strengthening the rule of law.

When a conflict becomes a dispute, it enters into court rooms for adjudication. Some disputes may be resolved by adjudication. Some disputes may be resolved without any need for party assistance. In some cases assistance of third party would facilitate expeditious resolution. Court litigation, as we all know, is quite prohibitive in cost, dilatory , hinders the flow of trade and harms both sides, whoever wins or losses the case. Public anguish against the protracted, expensive, acrimonious and frustrating process of litigation was depicted by judge Krishna Iyer that “A legal adjudication may be flawless but heartless, but a negotiated

settlement will be satisfying, even if, it departs from strict law". These principles, though broad, deserve to be kept in mind by any institution that aims at serving the cause of the poor and deprived sections of society and must be used to form the basic framework for the functioning of every legal institution and other institutions as well. Arbitration is a formal, quasi-judicial process where a neutral third party, Arbitrator' renders a binding award on the basis of material placed before him. Arbitration proceedings closely mirror proceedings in a court of law.[4]

5. Mediation is an Instrument for the mechanism ADR for quick dispensation of justice.

Mediation is the non-binding procedure in which an impartial third party, the conciliator or mediator, assists the parties to a dispute in reaching a mutually satisfactory and agreed settlement of the dispute. Mediation is a process by which disputing parties engage the assistance of a neutral third party to act as a mediator. He is a facilitating intermediary who has no authority to make any binding decisions, but who uses various procedures, techniques and skills to help the parties to resolve their dispute by negotiated agreement without adjudication. The mediator is a facilitator who may in some models of mediation also provide a non-binding evaluation of the merits of the dispute, if required, but who cannot make any binding adjudicatory decisions.

5.1. Rules for Mediation

Since mediation itself is an informal legal system, it is not governed by any statute as such. However, it is expected from the mediator to act honestly and fairly by following the principles of natural justice. Thus, in course of mediation the parties should be heard and given equal opportunity to present their submissions freely and friendly. It is the duty of the mediator to induce the party for amicable settlement of dispute in

4 Gupta & Sethi International Commercial Arbitration & Its Indian Perspective, Universal Law Publishing Company Ltd

cordial atmosphere. A mediator is bound to assist the embarrassed party; It is to be noted that a mediator acts between the two extremes or adopts the middle course, therefore he must maintain balance between the two halves. It is permissible for the mediator to use his goodwill/ knowledge and skill while performing the act of mediating,[5]

It is settled position that a mediator is a third independent person who is expected to be fair and impartial while resolving the disputes. As there is no melee as such in mediation the parties are required to observe moral as well as legal ethics. The parties should abstain themselves from use of unparliamentarily language because the purpose of mediation is to resolve the dispute cordially and amicably by satisfying the parties concerned. Thus, maintaining of friendly atmosphere while exchanging the views and taking up disputed points the mediator's fundamental duty is to ensure that no party is pressurized unduly or forced to arrive at the terrace of so called settlement otherwise the whole object of mediation would stand defeated.[6]

It can be summed up that rules regarding mediation can be found on the basis of "honesty is the best policy." If the business community of the world at large is looking for better prosperity and development and willing to settle their dispute by taking recourse of the alternative means of dispute resolution, it must have this kind of thinking and approach

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5 S. Nariman Fali, *Commentary on the Arbitration and Conciliation Act*, 5th Edn., Malik Justice S.B , Universal Law Publishing Company Ltd.

6 Saharay Madhusudan, *Textbook on Arbitration & Conciliation with Alternative Dispute Resolution*, 2nd Edn., Universal Law Publishing Company Ltd.

7 Sriram Panchu, *Mediation Practice and law*, Lexisnexis Butterworth,Wadhwa Nagpur.

8. Law Commission of India, 188th Report on Proposals for Constitution of Hi-Tech Fast – Track Commercial Division in High Courts December, 2003.

that no man can exist without seeking cooperation from others. The mediator also seeks cooperation from the contending parties to settle their dispute in a more economical and speedier way by abiding the fundamental rules of natural justice and business ethics.[7]

5.2. Limitation of mediator

The field of a mediator is very much restricted as he does not derive any power by any statute. He performs his act under the code prescribed by the disputing parties.[8]

A mediator is not a creation of any statute but he is a third independent person, his main function is to promote settlement of disputes and explain all pros and cons relating to the subject-matter of dispute, A mediator is friend to all but hostile to none. A mediator's

Limitations are as follows:-

(1) He cannot compel attendance of any person or production of any document.

(2) He can only act upon the disputed points raised by the parties and induce them to resolve dispute by exchanging views.

(3) He remains as a mediator till the consent of the parties exists.

(4) Mediation is a statutory function but it lacks enforceability in respect of settlement arrived by compromise without a decree.

(5) He has no power to penalize the non-cooperating party,

(6) He cannot modify the subject-matter of disputes,

(7) He cannot seek expert assistance without the prior consent of the various parties.

(8) Ho has no power to seek the court's intervention on his own.

(9) A mediator can be removed at any time by the party.

10)The function should be concluded promptly.

5.3. Enforcement provisions for Settlement.

It is settled legal position that the mediator's settlement is not legally enforceable while every mediation process is the result of the consent of the parties in each case, there is no such element of mediator's consent in mediation proceedings. The mediator's settlement is not supported by the sanction of the court except in pending litigation; in fact mediator's settlement is a voluntary settlement of the parties with the assistance of a mediator.

Thus, enforceability of the mediator's settlement depends upon the willingness of the parties. If the settlement of mediator is converted into an agreement it attains the enforceability in the eye of law. On the other hand if the parties sign the mediator's settlement it will be final and binding on the parties. In view of Section, 74 of the Arbitration and Conciliation Act, 1996 it appears that the mediator's settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute. Thus, the mediator's settlement has the status and effect of an arbitral award,

It is submitted that a mediator's settlement agreement when signed by the parties and authenticated by the mediator, shall be final and binding on the parties and persons claiming under them. However, no such authentication is required in case of an arbitral award. Inherently, the mediators' settlement is not legally enforceable but the settlement of mediator when made as an agreement and signed by the parties, it is enforceable.[9]

Ordinarily, the court would be reluctant to set aside the settlement agreement when it is challenged. The court may set aside the settlement agreement if it finds that the subject-matter of the dispute is beyond the capability of settlement by mediation or conciliation or that the settlement agreement is in conflict with the public policy of India.

9 Law Commission of India, 76th Report on Arbitration act, 1940, November, 1978.

Negotiation: Negotiation is the most commonly used method of resolving conflicts. It is a voluntary, non-binding process in which parties control the outcome as well as the procedures. By non binding is meant that the parties are under into obligation to comply with any decision or determination resulting from the process, if needed there is one. It is less complicated, in expensive and speedy method of dispute resolution. Most of us negotiate in every day form of life without realizing it.[10]

6. Conciliation

Conciliation is a process similar to mediation but often is not a voluntary process. Conciliation is the willingness of both the parties to resolve their differences. The parties to the dispute present their case to a neutral judge who is a conciliator and assists in settlement. Any dispute can be settled by conciliation where parties agree to seek an amicable settlement.

7. Lokadalat

Lok adalat is another strategy for early resolution of disputes. it is being followed in a large number of cases where the disputes are of comparatively minor nature and can be resolved without going into too much complexities of law and facts. This is much easier to follow in practice as is being done in the past, when the formal courts of law, as at present, were hardly operating in India.[11]

8. Suggestions

10 Law Commission of India, 114h Report on Gram Nyayalayas, August 1986.

11 Law Commission of India, 215th Report on L. Chandra Kumar be revisited by Larger Bench of Supreme Court

Mediation is the most frequently adopted ADR Technique; it contemplates the appointment and intervention of neutral third parties. Who help the parties to reach a negotiated settlement? The use of mediation is an attempt by the society to get back to the old traditional ways of resolving disputes, where people attempt to resolve their difference between themselves rather than relying on the judicial system. Mediation is highly effective. Then sue of pre-litigation mediation may become common object.

i. Informality – No court rules or legal precedent are involved in mediation. The mediator does not impose a decision upon the parties. As opposed to adversarial forums, the mediator helps maintain a business like approach to resolving a dispute. There are no fixed solutions in mediation. Parties can look to developing creative solutions to resolve matters and the solution rests with the parties themselves.

ii. Privacy and Confidentiality – The mediation conference takes place in a private sitting such as a conference room at any of the Arbitration Associations. Mediation is not a matter of public record. Its confidentiality is maintained.

iii. Time and Cost savings – Mediation generally lasts a day. Complex matter may require more time due to highly technical issues and / or multiple parties. Without the formalities found in litigation, mediation usually results in substantial costs savings.

iv. Parties have control over their participation in mediation. A party can decide to terminate their participation at any point in mediation. Mediators help the parties to maintain control over the negotiation that take place.

A mediator was also considered as a god having divine wisdom to adjudicate. A mediator was also considered as an independent, impartial dispenser of justice between the two different disputants.

The concept of mediation is based on the affection and human values. A third person must be appointed as a mediator who will be trained, fair, unbiased, impartial, honest, and independent as well as

interested in the social work to fulfill the objects of mediation. The person shall be soft spoken, trust worthy and acceptable person to the parties. Only experienced, sensitive, legal practioners shall be specifically selected and trained to be responsive to the parties and to acquire the skill and technique of mediation for handling the job. The disillusionment and frustration of people over the inordinate delay in dispensation of justice today looms large as a great threat to erode the confidence of people in the justice system of the country. It is the constitutional obligation of the judiciary to exercise its jurisdiction to reaffirm the faith of the people in the judicial set up. Therefore, evolution of new juristic principles for dispute resolution is not only important but imperative.

9. Conclusion

The technique of ADR is an effort to design a workable and fair alternative to the traditional judicial system. It is a fast track system of dispensing justice. The ADR mechanisms include arbitration, mediation, conciliation, mini-trial, private judging, final offer arbitration, court annexed ADR and summary jury trial. These techniques have been developed on scientific lines in USA, UK, France, Canada, China, Japan, South Africa, Australia and Singapore. The ADR is a significant movement in these countries. IT has helped to reduce cost and time takes for resolution of disputes. IT also provides a congenial atmosphere in less formal and less complicated forum for various types of disputes. It is more flexible as it avoids seeking recourse to the courts. In conciliation/mediation parties are free to withdraw at any stage of time. The parties involved in ADR do not develop strained relations. Rather they maintain the continued relationship between themselves. IT is realized that ADR is able to produce better outcomes than the traditional courts. Firstly, different kinds of disputes may require different kinds of approaches which may not perhaps be available in the courts. Secondly, there is direct involvement and intensive participation by the parties in the negotiations under the ADR system to arrive at a settlement.

However, for the benefits of ADR mechanisms to materialize, it is necessary to meet the challenges, which are concomitant with a radical change like ADR seen as integral to the judicial reform simultaneously with revival and strengthening of traditional system of dispute resolution.

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Applicability of Trademark Law to Cyberspace

Gulafroz Jan*

Abstract

In the competitive markets of today the significance of trademarks and brand names is very high. The protection of trademarks is said to be a "piece of legal underpinning to an essential economic process". But the trademark law has been influenced tremendously in the present day Internet environment. Technologies are changing so fast that even the speed of light seems threatened. Business worldwide have started to realize the significant potential of websites as a primary means of facilitating electronic commerce and this the phenomenal growth of Internet as a commercial medium has brought about new set of concerns in the realm of intellectual property Now e-commerce and trading through internet, has become part of the present day economy and for every commercial organization to survive, a presence in internet, a website is imperative. Since websites should have an address to be located, so in order to facilitate this job, domain names become necessary. Thus, a new concept has arisen in the cyberspace in relation to trademark in real space i.e. domain names. Domain names play the same role in cyberspace as the trademark plays in real space. The proliferation of Internet has thus led to explosion in the number of registered domain names. These trendy '.com' web addresses that have all but transformed modern business and it can be seen that in short span of time the conflict between trademark and domain names, have crept up and this tension has lead to innumerable issues that raise serious questions regarding policy. These policy questions arise because the system of internet, which does not respect any boundaries, do not reconcile with the system designed for physical and territorial world. An attempt has been

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made in this paper to analyze the nature of conflict between trademark law and domain name system ,and the disputes which arise because of such conflict .As the fact cannot be overlooked that the intersection of domain name system (DNS) and intellectual property system is but one example of larger phenomena: the intersection of global medium, in which traffic circulates without cognizance of borders, with territorially based system that emanate from Sovereign authority of the territory.

1. INTRODUCTION

Business worldwide has started to realize the significant potential of websites as a primary means of facilitating electronic commerce. The phenomenal growth of Internet as a commercial medium has brought about new set of concerns in the realm of intellectual property[1]. Today with the advancement of the new technology, every person wants to have access to cyber world, but when Internet first came into picture, people were not aware of such business opportunities. The corporate entities have now commenced with new trading activities for marketing their product on the web and have started using domain name to make others locate them easily on cyberspace. These changes have led to dramatic increase in the importance of domain names. The proliferation of Internet has also led to explosion in the number of registered domain names. Those trendy'.com' web addresses that have all but transformed modern business[2]. But it can be seen that in short span of time the conflict between trademark and domain names, have crept up and this tension has lead to innumerable issues that raise serious questions. These questions arise because the system of internet, which does not respect any boundaries, do not reconcile with the system, designed for physical,

1 P.S. Sangal, Trademarks and Domain Names: Some Recent Developments, Journal of Indian Law Institute (JILI) 1999. p. 36

2 Sourab Goash, Domain Name Dispute and Evaluation of ICANN's URDP, Journal of Intellectual Property Right (JIPR) Sep. 2004. p. 425.

territorial world[3]. Thus the intersection of domain name system (DNS) and trade mark system is but one example of larger phenomena: the intersection of global medium, in which traffic circulates without cognizance of borders, with territorially, based system that emanate from Sovereign authority of the territory.[4]

2. Intersection of Domain Names and Trademark Law

The basic premise of the legal protection of trademark rests on the fact that the trademark being the source identifier of goods and services, anyone, other than its true owner, using it will create consumer confusion as to its source[5]. Another logical basis of this protection is that no one should be allowed to reap benefits of the goodwill created by hard labor and investment of other. The trademark law gives right to prohibit, the use of the word or words, so far as, to protect the owner's good-will against the sale of another product as his[6]. The real protection of trademark does not go beyond the prevention of consumer confusion or protection of goodwill. Thus, the use of the same mark on two different goods, or services in one place and the use of same mark in similar goods or services in two different places, where market overlap is not possible, have been generally allowed because of the lack of consumer confusion[7]. The trademark laws across the globe recognize one-mark many-owner possibility. But these well known principles of trademark jurisprudence do not fit in cyber space. Cyberspace knows no boundaries. It is a global market place that can serve millions of

3 V.K. Unni, Trademark Law and Emerging Concept of Cyber Property Rights, Ist Ed., 2002 Eastern Book House .

4 See report of WIPO entitled "The Management of Internet Names and Addresses: Intellectual Property Issue". Full text available on http://wipo2.wipo.int/process1/report/finalreport.html

5 WCVBTV V. Boston Athletic Association, 17 US PQ 2d (BNA) 168 - 169.

6 Prestonets Inc v. Coty, 264 US 359, 368 ,1924

7 Mead Data Central Inc v. Toyota Motor Sales USA Inc 875 f. 2nd 1026, 1031. Mead's lexus mark and Toyota lexus mark could exist in two different places because of lack of market overlap.

customers across the world[8] and websites acts as a "Shop window". The restrictions that apply throughout the globe for the registration of trademark do not apply for domain name registration. So any name whether generic or invented can be registered as the domain name. Since businesses are free to register any name as their domain name, they generally prefer their trademark or famous marks or any other name, that is easy to remember or guess[9] and, as more and more commercial enterprises trade or advertise their presence on the web, DNS have become more and more valuable and potential for disputes remains very high. Thus these domain names have affected trademark law in many respects which may be enumerated as under:

1. A trademark law allows concurrent use of the same mark on different goods or services or on the same goods or services provided users of trademark are separated by distance and there is no possibility of consumer confusion. This is not possible under current domain name registration system. The domain name being unique, its concurrent use is not possible. Thus one domain name cannot be issued to two persons or companies no matter how distinct their product or markets are because Internet represents simply one large geographic area[10].

2. The domain name registration is based on "first come first served" principle. Any person who may not be associated, in any way, with a well known name can register it, as his domain name, with the result the legitimate owner having goodwill in that name; will be prevented from registering it as his domain name. For instance,

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8 See Yahoo Inc. V. Akash Arora 1999 IPLR 196, noting that an Internetsite could be reached by anyone anywhere in the world who proposes to visit to said Internetsite (pg. 208) also see Rediff Communication v. Cyberbooth AIR 2000 Bom. at 27. Internetis one of important features of information revolution

9 Gayle Weiswasser, Domain Names, the Internet and Trademarks: Infringement in Cyber space, Computer and High Technology Law Journal vol. (13) 1997 at p. 140.

10 Farooq Ahmad, Domain Name Disputes and Trademark Law: Cyber Law in India (Law of Internet), 2001, Pioneer Books p. 139.

"<leberty.com>" can be registered as a domain name even if "liberty" has been registered. It has been laid down that the domain names identify Internet sites to those who reach it, much like a person's name identifies particular person or more relevant to trademark disputes, a company's name identifies a specific company[11].

3. The current technology does not make possible to differentiate domain names through the use of capitalization stylized format or fonts.[12]

4. Since a website can be accessed from any part of the globe, a famous mark of one actually registered in another country in sub domain, can be accessed in the country of its origin and is likely to result in consumer confusion there, especially when the registrant offers the same good or services for which the mark is famous in the country of its origin.[13]

5. The advent of Internet has impacted upon the application of existing substantive and procedural doctrines. The Jurisdictional reach of the courts is confined to the national borders. This nineteenth century doctrine finds it difficult to accommodate the issues that have surfaced by the introduction of Cyberspace which knows no political boundaries and is essentially international in character.[14]

6. The principles governing Jurisdiction, evolved and established by the courts, followed state boundaries and parties more clearly understood the scope of their Jurisdiction, as well as, the location of other parties

11 Id p. 139

12 See Andre Brunel, Billions Registered But No Rules: Scope of Trademark Protection for Internet Domain Names, Journal of Intellectual Proprietary Rights, March 1995, p. 4. (Stating that although the words "wire" and "wired" look quite different on paper the technology of Internet cannot yet allow this differentiation to translate to domain name address).

13 Supra Note 10 p. 14

14 See Howard B. Stravitz, Symposium, Personal Jurisdiction in Cyberspace: Something More is Required on the Electronic Stream of Commerce, 49 S.C.L. Rev.925 (1998).

with whom they were transacting. The question arises that in case of trademark infringement which court has Jurisdiction. The owner of the web site may be residing in one place, web site may be hosted at another place and it can be accessed from any part of the Globe. There is a fundamental gap between the notions of personal Jurisdiction that is basically territorial in nature and the Internet that defies all territorial constraints.[15]

The domain name issues started emerging when a company desirous to register its trademark as domain name found that someone else, not in any way associated with trademark registered it as his own domain name. The challenges of registration of domain names, in the courts on the basis of the trademark law precipitated in an academic debate about the status of domain names and the feasibility of application of the trademark law and with the result two school of thought emerged.[16]

One view is that trademark and domain names are not synonymous. It is argued that domain name is just like a street address or name of building and serves merely as a means of reaching the cyberspace. These domain names are not basically trademarks and are also not used as trademarks and, therefore, legal challenges should not be allowed to succeed, simply, because domain name is similar to someone's registered trademark. Equating domain names with the postal address, it is stated that there has been never an argument that postal address be seen as synonymous with a trademark, no matter how similar the name is to registered mark and thus, should not be subject to cancellation for likelihood of confusion with a registered trademark, any

15 Andrew E. Costa, Comment, Minimum Contacts in Cyberspace: A Taxonomy of the Case law, 35 House. L. Rev. 453, 455-56 (1998).

16 Charlotte Waelde, Domain Names and Trademark: What is in a name p. 63. Also see Farooq Ahmad, Domain Name Disputes, Cyber Law in India (law of Internet), Ist Ed. 2000 Pioner Books, p. 140.

more than a street address or an office building name should be changed if it is too similar to someone else's trademark.[17)]

The other view is that domain names are, undoubtedly, the unique indicators on the indices for the Internet which not only identifies the address of the home page of any given website but it has a secondary role also. Being an alphanumeric address, easy to remember for people to access any given website, it is not only an address but also specific identifier[18] A domain name based on famous trademark or a trade name conveys all the goodwill and intangible value encapsulated in the trademark, even if that domain name is not used for commercial purposes and the company should not loose protection for that mark, simply because it is used in cyberspace. Justification of treating domain names separate from trademarks, would have arisen had domain names been used, only for locating a website. Since domain name has ability to communicate the identity of its source[19], it is this function that brings them within trademark jurisprudence. The important function of domain name to identify the source of the product or service, demands that they should be treated equivalent to trademarks in terms of legal protection and be recognized as capable of infringing other trademarks.[20]

The academic debate aside, the truth of the matter is that a memorable, easy to spell domain name is more valuable than diamond[21]

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17 Richard L. Baum and Robert C. Combow, First Use Test in Internet Domain Name Disputes, 18 NATL. LJ, Feb. 12, 1996, p. 18.

18 Graham J. H. Smith, Internet Law and Regulation 2nd Ed. 1999, p. 47.

19 Satyam Infoway Ltd v. Sifynet Solutions Pvt. Ltd (2004) 6. See 145 in this Case the S/C observed that original role of domain names was no doubt to provide an address for computers on the internet, but the Internet has now developed from a mere means of Communications to a mode of carrying an commercial activities therefore Domain Name not only serves as an address but also identifies the specific internets site.

20 Supra Note 17. p. 30

21. David Yen, Virtual Reality: Can We Ride Trademark Law To Surf Cyberspace? Fordham I.P.M.E.L.J (2000) Vol. 10. 871Domain names are highly valued because millions of Internet users may potentially view them. See Jerome Gilson, Trademark Protection & Practice

for corporations wishing to establish their presence on Internet. People are losing privilege of using words on the Internet because somebody else has already registered these words as his domain name[22]. Search results reveal that virtually all words describing people's daily lives are registered.[23] The reason for this rush for domain name is that only one party can hold any particular domain name and access to that domain name is made even more important by the fact that there is nothing on the Internet equivalent to a phone book or directory assistance. A domain name mirroring a corporate name may be a valuable corporate asset as it facilitates communication with a customer base.[24]

The courts have, however, made their preference clear by holding that the domain name is not mere address or like finding number on Internet but serves the same functions as the trademark. It has been laid down that the domain names identify Internet sites to those who reach it, much like a person's name identifies particular person, or more relevant to trademark disputes, a company's name identifies a specific company.[25]

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§5.11(1)(1997). Similarly in Cardservice Int'l v. Mc. Gee, 1950 F. Supp. 737, 741 (E.D. va 1997), it was laid down that a domain name mirroring a corporate name may be a valuable corporate asset, as it facilitates communication with a customer base.

22 Id at 872

23 Id at 872

24 See card-service int' L v. MC Gee, 950F. Supp. 737, 741 (E.D. Va 1997

25 Marks Spencer v. One-in-a Million 1998 FSR 265; MTV Network v. Curry 867F. Supp. 202, 203 n2 (S.D.N.Y. 1994); Umbro v. Canada, Inc No. 174388; Porsche cars North America, Inc v. PORSCH COM SIF. Supp. ed 707 1999 WL 378360 (E.D.Va June 3) 1994; Card service Int'L v. MC Gee, 950F. Supp. 737. 741 (E.D. Va 1997); Yahool Inc v. Akash Arora and Anr IPLR 1999 April 196; Rediff Communication Limited v. Cyber booth and another AIR 2000Bom. 27. The US Patent and Trademark office has stated that Internet domain names may be registered as trademarks so long as the domain name is used to identify and distinguish the applicant's goods or services. See PTO's Statements on Trademark Examination of Domain Names available at http://www.uspto.gov.

The present spate of domain name disputes is attributed to current domain name system (DNS) which because of the technological constraints makes it impossible for every trader to have domain name identical to its trademark. The alternative available now is directory technology that is expected to relieve much of the pressure on domain names.[26] The directory technology is based on Real name system that in turn is a searching and browsing technology, which will not require domain names to access the Websites, a user can use other means for web access. The domain names will be there but they will not be indispensable as they are today.[27] The new technology will use artificial intelligence and consumers own interest to lead him to the desired web site. Each page will have a recognizable name[28] and national boundaries will be set up in Cyberspace by using the language settings in a surfer's browser. The generic terms will not be registered and trademarks will be approved only for those who legitimately hold them[29]. This technology will prove as the most appropriate one in the long run as it will be much similar to the registration system of the trademarks presently in vogue throughout the globe. However, till this technology is available, there seems no respite in the current spate of Internet domain name disputes.[30]

This emerging area of cyber law eventually involves trademark law, with its emphasis on domain names, with a gradual increase of Internet users of trademarks. There is, no doubt, currently a great deal of

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26 See Domain Name System: Hearing Before the subcomm.on Basic Research of the House Science comm, 105th Cong. 1997 WL 14151463 (1997) cited in Lockheed Martin Corp. v. Network Solutons, Inc, 985F. Supp. 949, 968 (CD. Cal).

27 Eastern Dyson, Chairman of ICANN quoted by Steven lery; we are running out of "Dot Com": Good domain names have become so scarce that the techies need to create a new approach, News week, Oct. 11, 1999, at 79.

28 Ibid.

29 See The Game of the Name, Economist, July 31, 1999, at 59

30 Supra note 24.

confusion surrounding issues of trademark as domain names. Trademark law has to grapple with the issues thrown open by the Internet especially in the field of domain names. The principle allegation is usually one of Trademark infringement. The primary question which arises is whether the use of domain name amounts to trade mark infringement and whether the law of trademark applies to domain names. It will, therefore, be worth devoting some attention to the principles of infringement of trademark before probing into its effect on domain names.

3. Infringement of Trademark- Principles

Indian Trademark Act, 1999 has been passed with an object to amend and consolidate the law relating to trademarks for goods and services and for the prevention and use of fraudulent marks.[31] In simple terms, infringement of a trademark occurs if the person other than the registered proprietor in the course of trade, in relation to the same goods or services for which mark is registered, uses the same mark or a deceptively similar mark.[32]What constitutes infringement of trademark in legal parlance is defined under Sec. 29 of Trademark Act 1999. It differs substantially from its predecessor, the former Act of 1958.[33]

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31 . See Statement of objects and reasons of the Trademark Act 1999. This Act replaces the Trade and Merchandise Marks Act, 1958 which continues to remains the fundamental basis of the TM Act, and nevertheless, some modifications of far reaching implications have been incorporated.

32 Wadhera B. L, Law Relating to Patents, Trademarks, Copyright, Design and Geographical Indications, 2nd Ed. 2000, Univ. Law Publishers Pg. 195.

33 According sec. 29 of Trade and Merchandise Marks Act, a registered trademark is infringed by a person not being the registered proprietor or registered user thereof, using by way of permitted use, uses in the course of trade a mark which is identical with or deceptively similar to trademark and relation to any goods in respect of which the trademark is registered and in such manner as to render the use of mark likely to be taken as being used as trademark. Thus the Trade and Merchandise

The statutory law relating to infringement of trademark is based on the same fundamental idea as the law relating to passing off. But it differs from that law in two particulars:

a. It is concerned only with one method of passing off i.e., the use of trademark.

b. The statutory protection is absolute in the sense that once mark is shown to offend, the user of it cannot escape by showing that by something outside the actual mark itself, he has distinguished the goods from those of registered proprietor.[34]

Relevant for our present discussion are the provisions pertaining to the infringement of trademark and passing off action.[35]

Definition

According to sec. 29 of Trademark Act 1999, a registered trademark is infringed when a mark[36] is used in the course of trade by neither a person who is a registered proprietor nor a person using it by way of permitted use. The mark so used is identical with or deceptively similar[37] to the trademark in relation to goods or services in respect of which the trademark is registered and in such a manner as to render the

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Marks Act has limited application as compared to sec. 29 of Trademark Act 1999.

34 Narayan. P, Law of Trademarks and Passing Off, 6th Ed. 2004 p. 528.

35 Since the TM Act is set to replace the Trade and Merchandise Marks Act 1958 so its provisions have been discussed in this paper as fundamental law to resolve domain name disputes.

36 Mark includes a device broad heading, label, ticket name, signature, word, letter, numeral, shape of goods, packaging or combination of columns or any combination there of. See section 2(m). However, it is to be noted that the list included in the word "mark" is not exhaustive but only illustrative as is indicated by the word "includes". Any other mark which is capable of indicating the source of the goods or services and distinguishes those from the rest will equally be called “mark” for the purposes of the TM Act.

37 A mark shall be deemed to be deceptively similar to another mark if it nearly resembles that other mark.

use of the mark likely to be taken as being used as trademark. There are many situations that give rise to infringement of the registered Trademark. These are:

(1) When a person who is not the registered owner or a person authorized to use, uses a mark in the course of trade which because

(a) Its identity with the registered trademark and the similarity of the goods or services covered by such registered trade mark or

(b) Its similarity to the registered trademark and the identity or similarity' of the goods or services covered by such registered trademark or Its identity with the registered trademark and the identity of the goods or services covered by such registered trademark, is likely to cause confusion on the part of the public, or which is likely to have an association with the registered trademark. However, where a mark used in the course of trade is not only identical with the registered mark but also identical with the goods or services represented by the registered trademark, the court shall presume that it is likely to cause confusion on the part of the public.

(2) When a person who is not the registered owner or a person authorized to use, uses in the course of trade, a mark which is identical with or similar to the registered trademark that has a reputation in India and the use of the mark is in relation to goods or services that are not similar to those for which a trademark is registered. This use, with out due cause takes unfair advantage of or is detrimental to the distinctive character or repute of the registered trademark.

(3) When a person uses a registered trademark as his trade name or part of his trade name, or name of his business concern or part of the name of his business concern dealing in goods or services in respect of which the trademark is registered.

(4) When a person applies such registered trademark to a material intended to be used for labeling or packaging goods as a business paper, or for advertising goods or services, provided such person, when he applied the mark, knew or had reason to believe that the application of the mark was not duly authorized by the proprietor or a license.

(5) When a person advertises a registered trademark and such an advertising (a) takes unfair advantage of and is contrary to honest practices in Industrial or commercial matters; or (b) is detrimental to its distinctive character; or (c) is against the reputation of the trademark.[38]

The owner of an unregistered trademark is not entitled to prevent or to recover damages for the infringement of his unregistered trademark.[39] However, he can bring an action against an infringer for passing off goods or services as the goods of another person or as services provided by another person, or the remedies in respect thereof.[40]

4. Necessary and Sufficient Conditions for Determining Infringement of Trademark

Any person trespassing on rights conferred by registration of trademark infringes the registered trademark. What are the rights conferred by registration in a particular case must be determined in the context of any restrictive conditions or limitations entered on the register.[41] In precise terms, in order to constitute an infringement the act complained of must fulfill the following requirements:

1. (a) The mark used by the person must be either identical with or deceptively similar to the registered trade mark;

(b) The goods or services in respect of which it is used must be specifically covered by the registration;

(c) The use made of the mark must be in the course of trade in areas covered by the registration;

(d) The use must be in such manner as to render it likely to be taken as being use as a trade mark.

(e) The defendant should not be a permitted user under s. 2(l)(r) which includes both registered user and unregistered user. .

38 Sec. 29 of Trademark Act 1999.

39 Sec 27(1) of Trademark Act 1999

40 Sec 27(2).

41 Narayan P., Law of Trademarks and Passing Off, 6th Ed., 2004 p. 531

These conditions are necessary and sufficient for establishing infringement.

However under Sec. 29 the following uses also constitute infringement, if such use is likely to cause confusion among the public or likely to have an association with the registered mark:[42]

(a) Identical mark used in relation to similar goods or services.

(b) Similar mark used in relation to identical or similar goods or services.

2. A registered trademark is also infringed if the following conditions are satisfied:

(a) mark identical with or similar to registered mark,

(b) goods or services not similar,

(c) the registered trade mark has a reputation in India,

(d) the use of the mark by defendant must be without due cause, and

(e) The user of the mark takes unfair advantage of, or is detrimental to, the distinctive character or repute of the registered trade mark.

The above provisions have considerably increased the scope of rules of infringement.

7. Applicability of Trademark Infringement Principles to Domain Names

The principles discussed above have been debated before various courts[43] and carry now a well-defined meaning in the trademark jurisprudence. However, it is yet to be seen how courts in India will

42 Sec 29 of Trademark Act 1999.

43 For cases on the point-see Haidiram Bhujiawala V. Anand Kumar Deepak Kumar 200 (1) Arb. LR 531 se at PP535, Kamal Trading Co. V. Gillette UK Ltd. (1988) ILPR 135; Ham Par Bros International Ltd. v. Tiger Bairn Co. (P) Ltd. and ors 1996 PTC 311; Apple computer Inc v. Apple leasing K. Industries (1993) IJLPR 63; Willium Grant K Sons Ltd. v. MC DoweH and Co. Ltd. I.A. No. 9721 of 1993 in Suite No. 2532 of 1993 Judgement dated 27-05-94.

interpret these principles to encompass domain name disputes. The courts in America have decided a good number of cases on domain names. These cases can help in interpreting the provisions of TM Act relating to infringement of trademark in cases involving domain names. Objectively, a person is said to have infringed a trademark when he makes a commercial use of the mark. That mark is identical with or deceptively similar to a registered mark or (b) dilutes the distinctive quality or repute of the mark that results into consumer confusion.

(a) Commercial Use of the Mark

The plaintiff has to prove in an action for trademark infringement that the defendant has made a "commercial use" of the registered mark. A registered trademark is said to be used in the course of trade by a person, in particular, when (a) he affixes it to goods or the package there of (b) offers or exposes goods for sale, puts, them on the market, or stocks them for those purposes under the registered trademark or offers or supplies services under the registered trademark (c) imports or exports goods under the mark, or (d) uses the registered trademark on business paper or in advertising.[44]

The expression "commercial use" is not confined to the above instances only because the provision contains the wordy "in particular" which suggest that courts may consider any use, of the registered trademark other than the one mentioned in the provision as commercial use.

The words 'commercial use' have found place in the America Lanham Act and Trademark Dilution Act, 1995. While discussing the scope of this expression in domain name context the US courts have laid down many principles.

In Lackheed Martin Corp v. Network Solutions, Inc[45], it was laid down that when the registrar of domain names accepts domain name registration, he cannot be said to have used the domain name for

44 Section 27 (b)

45 985 F Supp. 949 959-60 (C. D. Cal. 1997).

commercial use. The plaintiff has filed an action against the registrar of domain names (NSI) on the ground that his federally registered, service mark 'SKUNK WORKS' was diluted by NSI by registering 'SKUNK WORKS "type domain names to entities other than the plaintiff. The court rejected this argument and distinguished between the technical function of a domain name to designate computers on the Internetand the trademark function of a domain name to identify the source of goods and services. The court outlined the fact that NSI does not trade on the value of domain name as trademarks and the fact that NSI makes a profit from the technical function of domain names does not convent NSI's activity to trademark use.[46]

In *Panavsion Int v. Toeppen*[47], it was held that an attempt to sell trademark based domain names to the rightful trademark holders constitutes commercial use. The ticklish question, whether a registrant who registers a domain name only to warehouse it and to sell it later on for profit is making commercial use of the domain name, has been answered in affirmative. The court in *Intermatic, Inc. v. Toeppen*[48], laid down that the defendants' desire to re-sell the domain name is sufficient to meet the "commercial use" requirement.[49] However, mere registration of a domain name does not constitute commercial use of a trademark. The non-commercial use of a domain name that prevents a trademark owner to use the same domain name is not an infringement of the trademark.[50] The Ninth circuit in *Avery Dennison Corp v. Sumption*[51] a laid down that the commercial use means capitalizing on trademark status.

Where a trademark has not been used as a trademark but for non-trademark purposes, that does not constitute commercial use.[52]

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46 Id at 960 No. 97-55467 1998 WL 178553 at 1 (9th cir Apr. 177598)

47 No. 97-55467 1998 WL 178553 at 1 (9th cir Apr.177598

48 947 F. Supp. 1227, 1239 (N.D.III.1996)

49. Id at 1239.

50 . Panavision Int. L. v. Toeppen, No. 97-55467, 1998 WL 178553 at 1.

51 189 F. 3d 868, 980 (9th Cir. 1999).

52 Id.

But a sham web site using domain name based on some one's trademark does not fall within the exception of non commercial purpose because these web sites are created as a front, a pseudo-legitimate use of the domain name, till the real trademark owner comes forward to purchase it.[53]

In *Panavision International v. Toeppan*[54] the domain name "panavision.com" was registered by the defendant that is based on the plaintiffs federally registered trademark for its motion pictures and photographic equipment's. The defendant used his web site for displaying aerial views of pana and Illinois and contended that he is not making a commercial use of the domain name. The court rejected this argument and held that this element is satisfied by the ultimate goal of arbitrage alone, and that satisfaction is not precluded by the absence of goods or services for sale. The court in *Planned Parenthood Federation of America, incv. Bucc*[55)], defined commercial use as the effect on the plaintiffs activities because of the defendant's appropriation of the plaintiff's mark[56]. The defendant registered the domain name <plannedparenthood.corn> for a web site promoting antiabortion book. The domain name was based on plaintiffs federally registered trademark "Planned Parenthood" that is meant to provide abortion services.

The court found that the defendant used the plaintiffs mark as his domain name in order to reach Internetaudiences who wanted to reach the plaintiffs services and view point By this, the defendant achieved two purposes. First, he succeeded in providing Internetusers competing arid directly opposing information. Second, he prevented users from accessing the plaintiffs services. The court concluded that the defendant's activities of promoting his book, soliciting funds in connection with his anti abortion efforts, and

53 Supra note 40

54 945 F. Supp. 1296. 1303 (C.D.Cal. 1996)

55 42 U.S.P.Q. 2d at 1446

56 Id

harming the plaintiff commercially by using <plannedparenthood.com> constituted commercial use[57]. This proposition was confirmed in Jews for *Jesus v. Brodste*.[58] The plaintiff, an organization of Jews for Jesus had been using this name for over twenty-four years at the time of litigation and was dedicated to the mission of Jesus. The defendant a professional InternetSite developer registered <Jews-for-Jesus.org> as his domain name in 1995. It was held that the defendant calculated to harm the plaintiff commercially by disparaging and preventing then from exploiting its mark. The use of a hyperlink in the defendant's <Jewsforjesus.org> to reach the outreach Judaism organization was held by the court as constituting commercial us.

(b) Similarity of Mark with the Registered Mark

The statutory requirement that the mark in issue should be identical with or deceptively similar to the registered mark so as to call it infringement: is a question of first impression. The determination has to be made from the point of view of a man of average intelligence and of imperfect recollection. The over all structural phonetic similarity and the similarity of the idea in the two marks is reasonably likely to cause confusion to a man of ordinary intelligence.[59] The Bombay High Court in *Hiralal Parbhudas v. M/s Ganesh Trading Co.*[60] has lad down nine non exhaustive principles to determine similarity of the two marks. These are (i) main idea or salient features (ii) general impression of the marks on the public as the marks are remembered by general impressions or by some

57 42 U.S.P.Q. 2d at 1446

58 993 F. Supp. 282, 308 (D.N.J.) aff'd, 159 F. 3d 1351 (3d Cir. 1998)

59 Corn Products Refining Co. v. Shangrila Food Products Ltd. AIR 1960 SC 142.

60 AIR 1984 Bom.218 See also Sachdeva and Sons v. Loti Ram Makhan Lal 2000 PTC 20; Om Prakash Mahjan and Narinder Kumar Mahajan v. Hero Cycles Limited 1999 PTC 23; Visnudas Kishandes v. Vazir Sultan Tobacco Co. Ltd. AIR 1996 SC 2275.

significant detail rather than by a photographic recollection of the whole (iii) overall similarity of the two marks (iv) first impression of a person of average intelligence and imperfect recollection (v) overall structure, phonetic similarity and similarity of idea are important and both visual and phonetic test must be applied (vi) the purchaser must not be placed in a state of wonderment (vii) marks must be compared as a whole, microscopic examination being impermissible (viii) marks should not be placed side by side to find out the commodity,, the class of purchasers, the mode of purchase and other surrounding circumstances have to be taken into account.

The above principles are elastic enough to cover domain name disputes. Almost similar principles have been invoked by the American courts to decide domain name cases.

In *Comp. Examiner Agency, Inc v. Juris*[61], the plaintiff is the owner of trademark JURIS and the defendant registered < Juris.com > as his domain name. Rejecting the plea of the defendant that his domain name is not identical with the plaintiffs trademark, the court held that although the trademark was registered in all capital letters, it is also entitled to protection for other formats and design variations. The trademark is entitled to protection in all lower case letters including in the domain name "Juris.com". Furthermore, because capital letters and lower case letters do not differ functionally on Internet, an Internet user arrives at the same web site with either < JURIS.com> or < Juris.com>.

In *Hasbro v. Internet Entertainment Group Ltd*[62], the plaintiff who is manufacturing popular children's board game "Candy Land", sued Internet Entertainment Group Ltd. (IEG), a Seattle Company who used <candyland.com> for an Internet site featuring sexually explicit material, nudity, and Cybersex. The Court held that the difference between the plaintiff's two-word trademark and the defendant one-word domain name would not prevent a finding of

61 No.96-0213 WMB, 1996 WL 376600 at I (C.D.Cal. Apr.26, 1996)

62 No. C96-I30 WD, 1996 WL 84853 at I (W. D. Wash. Feb. 9, 1996)

similarity. Referring to the above Juris case, it was laid down that the difference in capitalization does not affect the similarity analysis.

(c) Dilution of Trademark

Dilution is a new cause of action created by TM Act. The American Courts have traditionally been granting protection against the dilution of the distinctive qualities of the trademark. The defendant is prevented from "blurring" or "whittling away" of the distinctive quality of the mark and tarnishing of the mark through negative associations created by his use. The Federal Trademark Dilution Act, 1995 provides protection to famous trademarks. This Act defines, dilution as the lessening of the capacity of a famous mark to identify and to distinguish goods or services.[63] This Act did not provide an express solution to domain name issues, it was hoped that this "anti-dilution Statute can help stem the use of deceptive Internet addresses taken by those who are choosing marks that are associated with the products and reputations of others".[64] This Act provides injunctive relief to the plaintiff when he establishes that (a) he is an owner of a famous mark (b) that mark has been used by the defendant in commerce (c) his mark became famous prior to the defendant's use (d) the defendant's use resulted in dilution of the distinctive quality of the mark.

The above dilution theory has extended the reach of the courts even in those cases where consumer confusion is not the likely result but the defendant's unauthorized use of the mark has a tendency or capacity to gradually whittle away the source of goods or services.[65]

Many cases have been decided by the American courts, in the Internet on text, on the ground of dilution. In *Intermatic, Inc v. Toeppen*[66] one of the grounds found by the court against defendant is that the domain name <intermatic.com> registered by him for

63 15U.S.C. § 1125 (c)

64 141CONG. REC. S19, 312 d. Dec.29, 1995) (Statement of Sen. Leahy)

65 15 U.S.C. § 1127 (Supp.IV 1998) (defining dilution)

66 Supra Note 48.

displaying photographs of his home town is based on the plaintiffs famous mark for electronic products that is likely to dilute the distinctiveness of the plaintiff's mark. The court admitted that consumer confusion as to source may not be possible in this case because it is unlikely that consumers will confuse the source of pictures of a small town with the source of well known electronic goods. Nevertheless, the court ruled that the association of the famous mark with something not affiliated with the trademark holder reduces the famous mark's effectiveness to identify and distinguish one source. As against this decision, in *Avery Dennison Corp v. Sumpton*[67], the plaintiff an owner of the registered trademarks, "Avery" and "Dennison", having domain names, <avery.com> and <averydennison.com>, challenged the defendant's domain names <avery. net> and <dennison.net>. The defendant was operating Mail bank under his domain names. The court held that the plaintiff has to establish distinctiveness of his marks through secondary meaning and it was further held that the plaintiff failed to show his marks are famous. The degree of proof in dilution cases is higher and establishing mere distinctiveness of the mark does not satisfy this requirement. The mark has to be distinctive as well as famous. A famous mark is always distinctive feet it is not necessary that the distinctive mark will also be famous.

The above high standard of proof has not been demanded in *Jews for Jesus v Bradsky*[68]. The court observed that the defendant's domain name <Jewsforjesus.org> is identical with the plaintiff's trademark "Jews for Jesus" and its web site <Jews - for - Jesus. org>. The plaintiffs trademark has become famous because nearly half million dollars are being spent per year on advertisement and information is disseminated to the millions of people across the globe. This case is hardly different from "Avery Dennison" and perhaps the trademarks "Avery" and "Dennison" would have been

67 Supra Note 51.

68 Supra Note 58

more famous than "Jews for Jesus" if advertising alone has been considered as a yard stick to measure famousness of the mark.

The standard of proof adopted in Jews for Jesus has been endorsed in *Playboy Enterprises, Inc v. Asia focus International, Inc*[69]. The court ruled that the marks "playboy" and "playmate" have become famous after acquiring goodwill and secondary meaning through incessant advertisements and because of the fame, people generally associate play boy and playmate with the plaintiff's playboy. The distinctiveness of the plaintiffs mark is likely to be diluted by the defendant's use of domain names <asian.playmates.com> and <playmatesasian.com>.

The dilution by tarnishment is also possible in Internet context. The court granted preliminary injunction in *Hasbro Inc v. Internet Entertainment Group, Ltd*[70], against defendant because the plaintiff had a prima-facie case illustrating quite clearly that dilution by tarnishment is the most likely result because defendant had used plaintiffs trademark CANDYLAND as his domain name for a web site carrying pornographic material. The court held that the consumers who accessed <candyland.com> intending to learn more about the game experienced a shocking surprise at the sight of the obscene material - a surprise that could undermine the goodwill associated with Hasbro's trademark. The CANDY LAND was famous for child games but the defendant used this trademark for the promotion of pornographic material on Internet.

(d) Likelihood of Consumer Confusion

The rational basis of trademark protection is to avoid consumer confusion. The standard to determine consumer confusion is that of a man of ordinary intelligence. The courts generally look from the angle of man of average intelligence and imperfect recollection. For ascertaining consumer confusion, the courts generally take into account (a) the nature of the two marks including the letters used, the

69 1998 U.S. Dist. LEXIS 10359 at (E.D. va. Feb. 2, 1998)

70 Supra Note 62.

style of using letters, the devise in which they have been used, the colour combination of the trademark (b) class of customers (c) the extent of reputation (d) the trade channels (e) the existence of any connection in the course of trade.[71]

The above non exhaustive list can still form the basis for deciding the consumer confusion in the Internet context. Nevertheless, some of these principles may be inapplicable in Cyberspace. For instance, it is not possible, in Cyberspace, to differentiate domain names through the use of capitalization, stylized format or fonts.

The courts have followed "average intelligence" test in Cyberspace also. In *Rediff Communication limited v. Cyberbooth*[72], the Bombay High Court rejected the argument that Internet users are sophisticated and only literate people, able to ascertain how to access actual Internet site that they intend to visit. It has been held that even if an individual is a sophisticated user of the Internet, he may be an unsophisticated consumer of information and such a person may find his/her way to the defendant's Internet site. The Delhi High Court in *Yahoo! Inc., v. Akash Arora and Anr*[73] has said that due to easy access of Websites, a very alert vigil is necessary and, a strict view is to be taken to prevent defendant from passing off his goods or services as that of the plaintiff.

The courts have taken the stand that there is no single factor, which could be called as the only factor necessary to establish likelihood of confusion. The test to determine likelihood of confusion depends upon a number of grounds, ft is the overall

71 KedarNath Gupta v JK Organization 1998 PTC 189; Hiralai Parbhuda: v. M/S Ganesh Trading Co. AIR 1984 Bom. 218.

72 AIR 2000 Bom. 27 See; also Jews for Jesus v. Brodsky 993 F. Supp. 282-308.

73 . 40. IPLR 1999 April, 196.

impression of a mark that has to be taken into account.[74] In America the court in Polariod Corp. v. Polariod Elecs. Corp[75], has propounded eight non exclusive grounds to establish likelihood of confusion. These are: (1) the strength of the mark (2) the degree of similarity between the two marks (3) the proximity of the products (4) the likelihood that the prior owner will bridge the gap (5) actual confusion (6) defendant's good faith in adopting its own mark (7) the quality of defendant's product and (8) the sophistication of buyers.

These tests have been invoked by the American courts in Internet context. *In Jews for Jesus v. Brodsky,*[76] the court found defendant's web site <jewsforjesus.org> based on his trademark "Jews for Jesus". The court took overall impression of the two Websites into account and laid down that they may differ in minute details but those subtle differences are not strong enough to ward off the possible confusion because Internet users are not sophisticated enough to comprehend the distinguishing features of the two Websites. Similarly in *Public Service Co. of New Mexico v. Nexus Energy Software*[77] the plaintiff an owner of federally registered service mark, "Energy Place", sued against the defendant for using energy-place as his mark and the domain name <energyplace.com>. The court held that the possibility of consumer confusion cannot be ruled out because the mark and the domain name in question so nearly resembles with the plaintiff's federally registered trademark that the consumer confusion is the likely result.

The plaintiff in *SNA, Inc v. Array, SNA*[78] filed a suit against the use of his trademark "Seawind" by the defendant as his domain name <seawind.net>. The plaintiff was a manufacturer of amphibious

74 Supreme Bedi Factory v. Ardath Tahacco Company Ltd. (1999) PTC (19) 150 at151; Punjab Tractors Limited v. Pramod Garg 2000 PTC 260 at 276; Heralal Prebudas v. M/S Ganesh Trading Co. AIR 1984 Bom. 218

75 287 F 2d492, 495 (2nd Cir 1961)

76 Supra note 45

77 36 F. Supp. 2d 436,437 (D. Mass. 1999)

78 51 F Supp". 2d 542, 5.52 (E.D. Pa. 1999

airplane kits and the defendant used his web site for publishing copies of Seawind builders, News letters and other information. The court held that an impression is being created by the defendant, by using plaintiff's trademark as his domain name, that he is associated with the plaintiff. Since the plaintiff is known by his quality, the defendant tried to cash ride on the goodwill of the plaintiff. The consumers of the information will also, most probably, take defendant's web site as an associate of the plaintiff because they are familiar with this trademark. Thus the users, without knowing the truth, may access the web site of the defendant with this hope that it has a patronage of the plaintiff. They will be confused as to the relationship of the defendant with the plaintiff.

In *Brookfield Communications, Inc v. West Coast Entertainment Corp.*[79], the court developed for the first time *"initial interest confusion"* doctrine in Cyberspace. The plaintiff challenged the registration of the defendant's domain name <moviebuff.com> on the ground that it infringed plaintiffs trademark "Movie Buff'. The court found that the defendant's domain name is identical with the plaintiff's trademark[80] in reaching this conclusion the court laid down that the tests evolved and established in physical environment are not exhaustive and the courts are free to find confusion on the other grounds also. Neither the evidence of actual confusion nor intent to confuse is necessary to establish likelihood of confusion. In the opinion of the court, similarity of the mark and goods and overlap of the marketing channels are the important factors to determine possibility of consumer confusion[81]

The doctrine of "initial interest confusion" has been invoked by the courts where a person initially gets confused as to the source of goods but soon realizes the source's actual identity and no purchase

79 174 F.3d at 1061-65

80 Id at 1054

81 Ibid

is made as a result of the confusion.[82] The rationale behind this doctrine is that the infringer gains an opportunity to secure the initial business contact through assumed association between the parties. While applying the same logic in the present case, the Brookfield court held that even if users on accessing defendant's Websites would realize that they did not reach to the plaintiffs web site, the defendant would still gain customers by appropriating the goodwill that the plaintiff had developed in its mark "Movie Buff'.[83]

Courts have been asked to delineate the contours of the consumer, confusion in cases where the defendant has registered trademark of the plaintiff in the top-level domain that is different from the top-level domain of the plaintiff in which he has registered his trademark.

The courts have expressed conflicting opinions on this issue. In *Avery Denniscn Corp. v. Sumpton*[84], the plaintiff registered his trademark in <.com> whereas the defendant registered plaintiffs trademark as his domain name in <.net>. The court held that Internet users now well know the difference between the two top level domains. The former is meant for commercial purposes and the latter for networks, The distinction is so well recognized among the Internet users that the defendant's domain name would hardly cause any dilution of the plaintiffs trademark. However, in *Playboy Enterprises International, Jnc. v. Global Site Design, Inc*[85], the court did not recognize any distinction between <.com> and <.net> so far as likelihood of consumer confusion is concerned. The court held that once trademark of the plaintiff is registered by the defendant as his sub domain, as consumer's will be confused as to source and the difference in the top level domain will not eliminate that confusion.

82 Interstellar Starship Serv. Ltd v. EPIX Inc. 1999 WL 515658 at 39th Cir. July 19, 1999); Jordache Enters, Inc v. Levi Strauss and Co. 841 F. Supp. 506, 514-515 (S.D.N.Y 1993)

83 Supra note 79 at pp 1062-64.

84 Supra note 44

85 1999 WL 311707 at2J S.D. JFla. Max 15, 1999

Similarly the court in *Washington Speakers Bureau, Inc. V. Leading Authorities, Inc*[86] did not take into account the effect of functional top level domains in determining consumer confusion. The court held defendant liable for infringement inspite of the fact that the competing domain names were registered in <.com> and <.net>. In *Brookfield Communications, Inc. V. West Coast Entertainment Corp*[87], it was further elaborated by the court that to determine possibility of consumer confusion, the defendant's domain and the plaintiff's trademark should be taken into consideration. By applying this principle, the court reached to the conclusion that the defendant's domain name <moviebuff.com> is confusingly similar to (MovieBuff>. The court admitted that in terms of appearance, there are differences in capitalization and the addition of <.com> in the defendant's complete domain name, but pointed out that these differences are inconsequential in light of the fact that web addresses are not caps-sensitive.

CONCLUSION

Thus the present study reveals that emerging area of Cyber law, eventually involves trademark law with its greatest emphasis on domain names. There is presently a great deal of confusion surrounding issues of trademark and domain name, pertaining to their inter-se role. The domain name issues start emerging when a company desires to register its trademark as a domain name found that someone else not in any way associated with trademark registered it as its domain name. A domain name based on a trademark conveys all the goodwill and intangible value encapsulated in trademark. Justification of treating domain names separate from trademark would have arisen, had the domain names been used only for locating a website, since domain name are regarded as source identifiers it is this function of domain name that bring it within trademark jurisprudence. The discovery of the importance of a domain

86 3 3 F. Supp. 2d at 501.

87 174 F. 3d 1036, 1055 (9th Cir. 1999).

name has ensured that organizations are willing to devote to the acquisition of these names, a considerable amount of time and money. This quest has led to the, only-to-be-expected conflicts over the registration of domain names. Numerous disputes have arisen where companies with similar names, or manufacturing the same types of products, have wanted to adopt similar or identical domain names. Trademark Law has to grabble with a number of issues thrown open by interception of Internet domain names which do not have express solution. The courts throughout the globe have given no less protection to the domain names then trademarks. But the well known principles applicable to the trademarks don't fit in cyberspace. Thus the trademark law which has been evolved and established to suit the needs of Physical environment with geographical boundaries is ill suited for the disputes involving domain names.

Government Employee's Right to Strike

Strike is a trade union weapon in the hands of the workers to pressurize the employer and management to accept their demands relating to their terms and conditions of employment. Industrial Disputes Act, 1947 legalizes the strike by declaring certain strikes illegal.[1]

Strike means a cessation of work by a body of persons employed in any industry acting in combination or a concerted refusal under common understanding of any number of persons who are or have been so employed to continue to work or to accept employment[2]. As per this definition a strike can be resorted to only by two or more than two persons who constitute workmen and are working in an industry[3]. The industry where the workmen are working can be associated either with the private sector or with the government sector.

The right to strike in the Indian constitutional set up is not an absolute right but it flows from the fundamental right to form unions[4]. As every other fundamental right is subject to reasonable restrictions, the same is also the case to form trade unions, to give a call to the workers to go on strike and the state can impose reasonable restrictions. The Supreme Court has held that there is a fundamental right to form a trade union but there is no fundamental right to go on strike[5].

The question whether the government employees have a right to strike has been subject to controversy before the Indian judiciary. The question has consistently being answered in the negative. The rights of government employees to go on strike are different from the workmen employed in private concerns. There are different rules which prohibit

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1 24 Industrial Disputes Act, 1947.

2 S.2(q) I.D Act, 1947

3 The words "workmen" and "Industry" have been defined under Sections 2(S) and 2(J) of the I.D. Act, 1947

4 Article 19(c) of the Constitution of India

5 See *Kameshwar Prasad Vs. State of Bihar* 1962 SC 369.

them to go on strike. Central Government employees are governed by the Central Civil Service (Conduct) Rules, 1955. Rule 4-A says that "no government servant shall participate in any demonstration or resort to any strike in connection with any matter pertaining to his conditions of service". Rule 4-A of the Bihar Government Servants Conduct Rules, 1956 is identical with the above Central Rule 4-A. while interpreting Rule 4-A of the Bihar Government Servants Conduct Rules, the Supreme Court in *Kameshwar Prasad Vs. State of Bihar*[6] held Rule 4-A to be valid so far as it referred to strikes but void with respect to demonstrations because it violated the fundamental right of freedom of speech and expression. The conduct rules framed by the government must not be in contravention of the fundamental rights guaranteed by the constitution. Thus a person does not lose his fundamental rights by joining government service.

In *O.K. Ghosh vs. E.X. Joseph*[7] Rule 4-A of the Central Civil Service (Conduct) Rules, 1955 was also challenged before the Apex Court. The Supreme Court following the earlier ruling in the *Kameshwar Prasad's* case held Rule 4-A valid in so far as it relates to strike and void so far as it relates to demonstration and observed that there is no recognized fundamental right to strike.

The question of government employee's right to strike came again before the Supreme Court in an important *case T.K. Rangarajan vs. Government of Tamil Nadu and others*[8] The Supreme Court held that government employees have no moral, equitable, legal or statutory right to strike. Government employees can't claim that they can hold the society at ransom by going on strike. Even if there is injustice to some extent in their case, they shall have to resort to the machinery provided

6 Ibid

7 AIR 1963 SC 814

8 (2003) SCC 581.

under different statutory provisions for redressal of their grievances.[9] The court further observed that strike as a weapon is mostly misused which results in chaos and total mal administration and strike affects the society as a whole and particularly in the instant case when two lakh employees went on strike en masse, bringing the entire administration to a grinding halt.

The court also dealt on the inconvenience that is caused to public when teachers, doctors or transports go on strike. The court suggested that for redressing their grievances, instead of going on strike the employees should do more work.[10]

Despite the judgment being peoples friendly and reminding the government employees their important task of dealing with the public, the decision raised lot of hue and cry among the political parties and trade unionists.[11]

The question came again before the Hon'ble High Court of Jammu & Kashmir in a case namely *Bashir Ahmad Dar and others Vs. State and other*[12].The state government employees had gone on an indefinite strike in connection with their demands for implementation of 6th Pay Commission Recommendations and other related matters. The life was paralyzed and everything came to a standstill. The people were facing lot of problems and difficulties. Under PIL the matter was referred to the Hon'ble High Court for consideration. The court by upholding the ruling of the Supreme Court in *T.K. Rangarajan* case observed that there is no fundamental, legal or statutory right for government employees to go on

9 Ibid

10 Ibid

11 The Communist Party of India (CPI), Communist Party of India Marxist (CPM), All India Trade Union Congress etc, See, the Hindu dated 8-8-2003 &9-8-2003 at 11; "Talking Point", Economic Times dated, 10-8-2003 at 4; Hindustan Times, New Delhi, 7-8-2003; Times of India, New Delhi, 8-8-2003 at 12 &14.

12 OWP (PIL) No. 325/2010, dated 13-04-2010

strike. There is also no moral or equitable justification for the employees to proceed on strike. Rights of the people as a whole cannot be subservient to the claim, even if genuine, of an individual or only a section of the people[13].

The J&K High Court while taking serious note of the government employees suggested that the state government must take all the necessary steps to take a stern legal action against the employees who have proceeded on strike and resorted to misconduct.

After the judgment was delivered the strike was immediately called off and people heaved a sigh of relief.

From the above discussion it is clear that in view of the Government Civil Service Rules and the judgments of the courts it is clear that government employees have no legal right to strike. Although their right to demonstration has been recognized as a fundamental right, but it is not clear whether they can exercise the right to demonstration during working hours with an exception to the Tamil Nadu Government Servants Conduct Rules, 1973 according to which the right to demonstration during or outside working hours, within or outside the premises can be held with the permission of the head of the department[14]. The Supreme Court made a demarcation between right to strike and right to demonstration, allowing the later while as disallowing the former.

G.Q. Mir*

13 Ibid

14 See Rule-22, Tamil Nadu Government Servant Conduct Rules, 1973.

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Regulating Obscenity: With Special Reference to Cyber Pornography

"Indecency, vulgarity, obscenity, these are strictly confined to man; he invented them. Among the higher animals there is no trace of them." – Mark Twain

ABSTRACT

Obscenity is an act or an utterance that corrupt the public morals by its lewdness. A legal term, that applies to anything offensive to morals and is often equated with the term pornography. The main thrust of this research article is to analyse the concept of obscenity in the present cyber world, the legal provisions available in our country for regulating it, and the judicial decisions defining what is obscene. The article shall also map the responsibility of the ISP's in controlling the cyber pornography, the need for a new law and the loopholes in the present Act which needs to be plugged.

Keywords : Obscenity, Cyber Pornography, Cyber World, ISP's

1. Introduction

'Obscene' is filthy, foul, indecent or disgusting. The law of obscenity tries to prevent behaviour which is contrary to moral and aesthetic sense of society. What is moral and what is contrary to it remains difficult to specify because what may be unaesthetic in given situation may not be so in different situation. What is meant by indecent or obscene ? This question came before the Supreme Court in connection with the right of freedom of speech and expression guaranteed by the Constitution in *Ranjeet D. Udeshi v. State of Maharashtra*[1]. This case pertained to an obscene passage in the book," Lady Chatterley's Lover." The Supreme Court said that the word 'obscenity' denotes something which is offensive to modesty or decency, which is filthy and repulsive. Pornography is obscenity in an aggravated form. Treating sex and nudity in art and literature cannot *per se* be regarded as a fundamental right under Article 19(1)(a). Freedom of speech and expression is subject to reasonable restrictions in the interest of decency and morality. In the

1 AIR 1965 SC 881

words of *Hidaytull*a J. "treating with sex in a manner offensive to public decency and morality, judged by our national standard and considered likely to pander to lascivious[2], prurient[3] or sexually precocious minds must determine the result." The judge added that "we need not attempt to bowdlerize all literature and thus rob speech and expression of freedom: a balance must be maintained between freedom of speech and expression and public decency and morality but when the latter is substantially transgressed, the former must give way."

2. Obscenity in Cyber Space

The nature of internet has made its regulation difficult. On internet everybody has easy access to all sorts of materials. At the click of the mouse any kind of material can be uploaded, downloaded and sent to millions of internet users all across the world. The existence of pornographic material on the internet has been the topic of many discussions and even the most stringent restrictions on the internet has not been able to control it. New and less detectable measures of distribution of pornographic stuff are evolved everyday which pose a grave threat to the privacy and sensibilities of the users especially belonging to the younger segment i.e. children and teenagers who are more susceptible. Their impressionable minds can carry impression for years which might hinder their normal development. Obscene matter posted or transmitted through internet can traverse many jurisdictions and can be accessed in any part of the globe. The Indian Supreme Court adopted 'national standard' to determine obscenity. But the American Supreme Court reaffirmed in *Miller v. California*[4] the test propounded in

2 A material is 'lascivious' if its lustful, inciting or evoking lust i.e. creating a desire for sexual activity.

3 'Prurient' means shameful or morbid interest in sex. A material which shows sexual conduct in potently offensive way is to be appealing to the prurient interest in sex. It is creating or encouraging unhealthy obsession with sexual matters.

4 413 US 15 (1973)

Roth v. United States[5] that local community standard should be taken into account for determining obscenity because a national standard is hypothetical and difficult to ask. The question arises, whose community standard or national standard will determine the nature of the matter? Is it the standard of the place of origin or the place of destination, or any place through which the material traversed? Or there is a need to create a new definition of community for an online obscenity case?

3. Test of Obscenity

Obscene is offensively or replusively indecent. To determine the obscene matter, the Supreme Court of U.S issues the following tests in *Miller v. California*[6] :

(i) Whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest:

(ii) Whether the work depicts or describes, in a potently offensive way, sexual conduct:

(iii) Whether the work, taken as a whole, lacks serious, literary, artistic, political, or scientific value.

The test of obscenity under the Indian law has been borrowed from English law. Obscenity should be such as has tendency to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this type may fall[7]. The Supreme Court in *Ranjit D. Udeshi v. State of Maharashtra*[8] , was of the view that the test of obscenity as laid down *In re Hicklin* should not be discarded. It makes the court the judge of obscenity in relation to an impugned book etc., and lays emphasis on the potentiality of the impugned object to deprave and corrupt by immoral influences. It will always remain a question to be

5 354 US 476, 489-493 (1957)

6 *Ibid*

7 In re Hicklin (1868) L.R. 3 QB 360. This observation has been repeated in Indian cases from the earliest times.

8 AIR 1965 SC 881

decided in each case, and it does not compel an adverse decision in all cases. In this case, it was argued that in the light of article 19(1) (a) of the Constitution of India which guarantees freedom of speech and expression, the *Hicklin* test should be discarded. *Hidyatulla* J. said that the Indian Penal Code does not define the word obscene and this delicate task of how to distinguish between that which is artistic and that which is obscene has to be performed by courts, and in the last resort by the Supreme Court. The test must obviously be of general character but it must admit of a just application from case to case by indicating a line of demarcation not necessarily sharp but sufficiently distinct to distinguish between that which is obscene and that which is not. None has so far attempted a definition of obscenity because the meaning can be laid without attempting a definition by describing what must be looked for. It may, however stated that treating sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more. The test of obscenity must square with the freedom of speech and expression guaranteed under our Constitution. This invite the court to reach a decision on a constitutional issue of a most far reaching character and it must be careful not to lean too far away from the guaranteed freedom.

In *United States v. Thomas*[9] , it was laid down that the manner in which the images move does not affect their ability to be viewed on a computer screen or their ability to be printed out in hard copy in the distant location. The court further held that it is the community standard of the place where the material is accessed and not the place of origin which would determine obscenity. The community standard varies from place to place and country to country. To avoid stricter community standard, the defendant must deny access of material to the person of the community. The court also asserted that there is no need to carve out new definition of community for online obscenity cases.

9 74 F 3 d 701 (6th cir., 1996)

4. Legal control of obscenity

In India, the legal provisions that regulate obscenity are Section 292 and 293 of Indian Penal Code, Sections 3 and 4 of the Indecent Representation of Women (Prohibition) Act and Section 67 of the Information Technology Act. The IPC under sections 292 and 293 of the Indian Penal Code, 1860, which deal with sale etc., of obscene books and obscene objects to young persons, respectively are in accordance with the resolution passed by the International Convention for the Suppression and Circulation and Traffic in Obscene Publications, signed at Geneva on behalf of the Governor General in Council on 12.04.1923. The Select Committee in their reports dated 10.02.1925 intended to exclude religious, artistic and scientific writings etc, but they did not think it necessary to enlarge the exception, which they left to be supplemented by a substantial body of case law which they added, made it clear that bona fide religious, artistic and scientific writings, etc. are not obscene within the meaning of the Indian Penal Code. Section 292 and 293 were amended in 1969. While liberalising the law of 'obscenity' in favour of works of science, literature and art, care was taken to prevent obscene publication and objects masquerading under the name and the guise of works of science, literature and art. Therefore, with a view to make the existing law more definite, clause (1) to Section 292 explains specifically the connotation of the expression obscenity. Clause (2) punishes a person who sells or in any manner conveys publically the obscene books or any other material of the same effect. The section makes exception in respect of any representation sculptured, engraved or painted on or in any ancient monument. Where a person is charged for having been in the possession of an offending book, an offence under section 292 would be fastened if possession of the book was for the purposes of its sale. But if such a book is sold to a customer, the seller would be liable for an offence under section 292(2).

In considering the question of obscenity of a publication, the court has to see whether a class, not an isolated case, into whose hands the

book, article or story falls suffer in their moral outlook or become depraved by reading it or might have impure and lecherous thoughts aroused in their minds.[10]

A vulgar writing is not necessarily obscene. Vulgarity arouses a feeling of disgust and revulsion whereas obscenity has the tendency to deprave and corrupt those whose minds are open to such immoral influences. A novel written with a view to expose the evils prevailing in society by laying emphasis on sex and use of slangs and unconventional language did not make it obscene.[11]

In *B. Rosaioh v. State of A.P*[12] , it was held where accused was a mere spectator of a pornographic film and it was not alleged that he had intentionally exhibited or arranged exhibition of the film so as to reflect complicity of the accused in the exhibition of the same, this interposition as a mere spectator to the exhibition of a blue film without any further complicity cannot be taken to be amounting to abetment of the main offence.

The exception to the original sec. 292 was re-drafted after the 1969 amendment. The court has power to call for expert opinion under sec. 45 of the Indian Evidence Act, 1872, when it has to form an opinion on any such matter sec. 293 provides for enhanced punishment to those who sell, distribute, exhibit or circulate any obscene object to persons under the age of twenty years.

Sec. 294 provides that whoever, to the annoyance of others (a) does any obscene act in public place; or (b) sings, recites or utters any obscene songs, ballad or words, in or near any public place, shall be punished under sec. 294, it must cause annoyance either to a particular person or persons in general. The words to the annoyance of others do

10 Chander Kant v. Kalyan Das, AIR 1970 SC 1390

11 Samresh Bose and Another v. Amal Mitra and anr. 1986 Cr LJ 24(SC)

12 1991 Cr LJ 189(AP)

not limit to mean the person who is the intended victim of the obscene act of the accused.[13]

In *Patel H.M Mallagowda v. State of Mysore*[14] , the accused had used abusive and obscene words against a medical doctor in public place. The accused was found guilty under sec. 294 because of the fact that the doctor and some other members of the public were impelled to complain about the abusive or obscene words uttered by the accused which was sufficient indication of the fact that they were all annoyed by the use of such words in a public place, there would be no liability under this section.

Indecent exposure of one's person or sexual intercourse in a public place will be punished under sec. 294. In *Zara Ahmad Khan v. State*[15] , the accused, a rikshawala stopped his riksha near two young girls previously unknown to him and while addressing the girls uttered the following words to the hearing of other persons *"Ae merijann mere rikshey par baithjao. Main tumko pahuncha doonga. Main tumhara intezaar kar raha hoon"*. These words were held to be clearly offensive to the girls. Further this section requires that the obscene acts mentioned under clause (b) must be done in or near a public place. Indecent exposure of one's person in an omnibus[16], in a pubic urinal[17] or in a place go[18] falls under this section.

In *K.P. Moharnrnad v. State of Kerala*[19] , an important question relating to obscenity was raised. The question was whether the cabaret dance is covered by the expression obscene and if it is so, can its exhibition in hotels and restraints be stopped? The Kerala High Court,

13 Zara Ahmad Khan v. State, AIR 1963 All 105
14 1973 Mad LJ (Cr)115
15 AIR 1963 All 105
16 Holmes (1853) Dears Cr C 207
17 Harris (1871) LRICCR 282
18 Wellard (1884) 14 QBD 63
19 1984 Cr LJ 745 (Ker)

while throwing light on the history of cabaret dance, observed that if exhibition of cabaret dance in public places such as hotels, restraints is in accordance with the standards of our country then its exhibition may be permitted and no restriction can be imposed on it.

In *Deepa v. S.I. of Police*[20], in response to an advertisement about performance of cabaret dance in a posh hotel, some persons purchased highly priced tickets and after witnessing the dance made a complaint under sec. 294 of the IPC as the dance was so obscene that it caused annoyance to them. It was held that persons attending a cabaret show in a hotel can complain that annoyance was caused by the obscenity of the performance thereby attracting sec. 293 of the IPC. An enclosed area in a posh hotel where cabaret dance is performed, restricting entry to persons purchasing highly priced tickets is a public place. Otherwise, any public place could be made a private place by enclosing the same and restricting the entry to persons who can afford payment of huge amount. Entry to a hotel just like a cinema house, is not restricted to anybody into who is ready to pay for it. Only because the area is enclosed and entry is restricted to those who opt to pay, it does not cease to be a public place. So also previous advertisement of what is going to be performed cannot have the effect of converting a public place into private place and obscenity into something which is not obscene. No crime can be obviated by consent. So also considerations of the interest of those who are running the show for profit or those who conduct the performance for livelihood and enjoyment and satisfaction of those who derive pleasure by seeing the performance willingly cannot outweigh the interest of the society which should be of paramount consideration.

It is very often that one finds derogatory depiction of women in media. To achieve their commercial and publicity objects, the business, trade and other media often transgress the limits of decency and propriety by exposing and depicting the woman and exposing her body in an objectionable and obscene manner. As this position was not fully

20 1986 Cr LJ 1120 (Ker)

covered by the provisions of the Indian Penal Code regarding obscenity. Parliament passed the Indecent Representation of Women(Prohibition) Act, 1986. The object of the Act was to prevent the depiction of the figure of a woman in a manner which is derogatory to a woman or which is likely to corrupt public morality. “Indecent Representation of women “has been defined in the Act to mean the depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way as to have the effect of being indecent, or derogatory to, or denigrating to women, or is likely to deprave, corrupt or injure the public morality or morals.”

Section 3 of the Act lays down that no person shall publish or cause to be published, or arrange to take part in the publication or exhibition of any advertisement which contains indecent representation of women in any form. Section 4 further lays down that no person shall produce or cause to be produced sell, let or hire, distribute, photograph, representation of figure which contains indecent representation of women in any form. But this prohibition does not apply to:

(a) Any book, pamphlet, paper slide, film, writing, drawing , paintings, photograph, representation on figure:

(i) The publication of which proved to be justified as being for the public good on the ground that such book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure is in the interest of science, literature, art or learning or other objects of general concern; or

(ii) Which is kept or used bona fide for religious purposes;

(b) Any representation sculptured, engraved, painted or otherwise represented on or in :

(i) Any ancient monument within the meaning of the “ Ancient Monument and Archaeological Sites and Remains act, 1958”; or

(ii) Any temple, or any car used for the conveyance of idols, or kept or used for any religious purpose;

(c) Any film in respect of which the provisions of Part II of the Cinematography Act, 1952 will be applicable.

5. Necessity for a new law in cyber age

The advancements in technology have made it easier for pornographers to access obscene material. Huge amounts of pornographic material can be reproduced more quickly and cheaply on new media like hard disks, floppy disks and CD ROMs. The new technology is not merely an extension of the existing forms like text, photographs and images apart from still pictures and images; full motion video clips with sound and complete movies are also available.

The trafficking, distribution, posting and dissemination of obscene material including pornography, indecent exposure and child pornography, constitute one of the most important cyber crimes. This is one cyber crime which threatens to undermine the growth of the younger generation as also leave irreaparable scars and injury on the younger generation, children will naturally like to experiment and explore everything they learn. This includes cyber space and even cyber pornography.

The Information Technology Act, 2000 as amended in 2008 aims to facilitate the development of a secure regulatory environment for electronic commerce. While it is mainly a statute leaning towards regulation of commercial activities, it has several provisions, which refer to penalties and offences. The legislators were clearly intend this to be the fundamental umbrella legislation to govern computer related activity in India. The Information Technology (Amendment) Act, 2008 added new provisions to deal with newer forms of cyber crimes like publicizing sexually explicit material in electronic form, video voyeurism, breach of confidentiality etc.

Section 66E of the Act provides punishment for violation of privacy. Under this section if anyone intentionally or knowingly captures i.e. videotapes, records, photographs or films in any way or transmits the image of the private area, i.e the naked or undergarment clad areas of

human anatomy of any person without his or her consent under circumstances violating the privacy of that person, then such an offence would be punishable with imprisonment up to three years or with fine up to two lakh rupees or with both.

Such a provision was needed to counter the menace of installing hidden cameras in changing rooms in shops, in public urinals, in hotels, rest houses, rented houses and even paying guest accommodations. There are frequent cases involving girls whose pornographic pictures are taken by their boyfriends and then circulated via MMS or uploaded on the net bringing great disrepute to them and their families.

The issue was highlighted in the Delhi Public School MMS Scandal eventually leading to the arrest of the CEO OF Bazee.Com. This new provision will help in prosecuting such offenders too.

Section 67 of the Act makes it an offence to publish, transmit or cause to be published in electronic form any material which (i) is lascivious; or (ii) appeals to the prurient interest; or tends to deprave and corrupt persons who are likely to read, see or hear the matter contained or embodied in it. The punishment provided is imprisonment and fine. On the first conviction, it is imprisonment up to three years and fine up to five lakh rupees; on the second conviction it is imprisonment up to five years and fine up to ten lakh rupees.

The section applies to the publishing and transmission of obscene material and covers a website, e-mail distribution and also a digital rendition on a CD. To prove that there is an offence under Section 67, the first thing would be to prove that there was an electronic publication. It should be proven to be on existence at the alleged site on the alleged date. A copy of the same has to be preserved to be produced before the court. The next step would be to find the person who either himself published or caused the material to be published i.e. who finances and directs the publication. Thereafter the most important aspect that needs to be satisfied is whether the matter contained in the publication was

such as " to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to see or hear it",

From the above, it can be observed that the *Hicklin* test has been adopted from the Indian Penal Code and given a mere fact-lift so that it becomes applicable to internet pornography. Mere possession of obscene material in the privacy of one's home is not an offence under the Act. An offence is committed when the material is disseminated through the mode of publishing or transmission, even if it is done for private use only. The U.S Supreme Court in *United States v. Thomas*[21] held that," the right to possess the obscene materials in the privacy of one's home does not create a correlative right to receive it, transport it, or distribute it in interstate commerce even if it is for private use only." Thus the offence is the transmission or publishing of the obscene material having the said likely effect, irrespective of the face that transmission is meant for private use of the person to whom it is addressed. What is prohibited is the dissemination of the obscene material through mode of transmission or publishing in electronic form when such mode carries with it a significant danger of offending the sensibilities of unwilling recipient or of exposures to juveniles[22]. That the audience of the transmission is intended to the selected few is immaterial, if others are likely to have access to it. Electronic transmission of readable material or visual images that are obscene through use of an on line computer service constitutes an offence under Section 67 of the Information Technology Act, 2000.

The first conviction under Section 67 of the IT Act came in *State of Tamil Nadu v. Suhaskutty* in November 2004. This case was with regard to the posting of obscene, defamatory and annoying message about a divorcee woman in the yahoo message group.

E-mails were also forwarded to the victim for information by the accused through a false e-mail account opened by him in the name of the

21 1996 US Ap Lexis 1069(6th Cir 1996)

22 Miller v. Califormia 413 US 15(1973)

victim. The posting of the message resulted in annoying phone calls to the lady in the belief that she was soliciting. The accused engaged in all this from a cyber cafe. The accused was finally convicted under Section 469 and 509 of the IPC and Section 67 of the IT Act.

Section 67A of the IT Act inserted vide Information Technology (Amendment) Act 2008 prescribes punishment for imprisonment up to five years and in cases of subsequent conviction imprisonment up to seven years and also with fine up to ten lakhs rupees for persons who publish, transmit or cause to be published or transmitted in electronic form any material which contains sexually explicit act or conduct.

Child Pornography is another problem threatening to raise its ugly head in monstrous proportions if not tackled early. There are provisions under the Constitution of India[23], the Immoral Traffic Prevention Act, Indian Penal Code[24], the Juvenile Justice Act, 2000[25] and some other legislations to protect children against illegal trafficking, assault, cruelty and various other kinds of abuses but only one statute[26], which specifically deals with the problem of child pornography. This is the Goa Children's Act, 2003 but this being limited in operation to only the

23 Article 23(1) provides that traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

24 Section 366 B Indian Penal Code, 1860

25 Section 23 and 26 of the Juvenile Justice(Care and Protection of Children) Act, 2000 provides punishment for cruelty against and exploitation of child employees or juveniles.

26 The Goa Children's Act, 2003 not only defines 'child trafficking' but also provides punishment for abuse and assault of children through child trafficking for different purposes such as labour, sale of organs, sexual offences of pedophilia, child prostitution, child pornography, and child sex tourism and illegal adoption. Airport authorities, border police, railway police, traffic police, hotel owners, have all been made responsible under the law for protection of children and for reporting offences against children.

territory of Goa, need was felt for a provision which would be more comprehensive in its coverage of this problem and would extend to the entire country. Therefore in accordance with the Article 3.1 of the Optional Protocol to the Convention on the Rights of the Child(2002) relating to the sale of children, child prostitution and child pornography[27], Section 67B was inserted in the IT Act vide the Information Technology Amendment Act of 2008 which lays down punishment for publishing or transmitting of material depicting children in sexually explicit acts etc, in electronic form.

This provision seeks to keep a check on pedophile activities. In law enforcement the term 'pedophile' is generally used to describe those accused or convicted of the sexual abuse of a minor. Section 67B of the IT Act seeks to criminalize production, distribution, transmission, collection or advertising of any material that depicts children in obscene or indecent manner. Under this provision even browsing through pornographic material has been made punishable. This section although potent in tackling child pornography presents some problems in areas where children below 18 years of age may be involved in sexting or transmitting sexually explicit pictures of themselves or their friends over mobile phones or posting such obscene material on social networking sites. This section could lead to problems of excessive punishments for children. The language of this provision which is too broad and non specific needs to be revised suitably. Moreover, legislations alone cannot succeed in curbing this menace so that the Government needs to float

27 The Protocol insists on the criminalization of child prostitution and pornography. Article 3.1 of the Protocol states that," Each State party shall ensure that, as a minimum, the sale of children, the use of a child for prostitution and pornography are fully covered under its criminal or penal law, whether such offence are committed domestically or transnationally or on an individual or organized basis." India being a signatory to this protocol and having ratified it in 2005 was bound to incorporate its provisions in our domestic laws and remodel the existing laws on the basis of directions given therein.

schemes for raising public awareness so that the demand itself for pornographic material goes down. Such measures would strike at the very roots of child pornography.

6. Liability of Internet Service Provider

Internet Service Providers(ISP) provide internet access service to customers in exchange for a fee. ISPs also store data for their customers use, such as on a Usenet newsgroup server or a World Wide Web server. ISP liability for the activities of its customers is generally based on knowledge of the customer's activity. If the ISP is unaware of the behaviour of its customer, most courts seem reluctant to hold the ISP liable for that behaviour. However, once the ISP becomes aware of the customer's activity, or should have become aware of the activity with reasonable diligence, courts are much more likely to hold the ISP liable for its customer's actions.

As per Section 70 of the IT Act, a network service provider, which means an intermediary cannot be held liable, as such service provider, under the Act or rules or regulations made there under, for any third party information or data made available by him if he is able to prove that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such an offence or contravention.

Obviously, where one directly and intentionally, in violation of any law, circulates prohibited content, he would be liable, whether the circulation is through electronic or other means. It could be matter of argument only where his participation in the communication is not direct, but he provides only the access to communication and the question of his facilitation of the communication arises for determination. Usually between law enforcers and access providers, they have always taken extreme positions. Government tend to hold the access providers responsible for prohibited communications as they provide the means of communication and also on the theory that they are held to know the nature of the traffic. One further reason for pursuing

access providers is that they are available and are credited to have deep pockets, whereas their are customers can make themselves inaccessible, by closing the websites when investigation is afoot. Access providers, on the other hand advance the defence that they are only communication agents, much like the postman and do not know the contents of the message they help transmit nor is it practicable for them to search every communication for lawfulness.

Section 79 may be considered to represent the middle ground as far as the liability of an intermediary access provider is concerned. He would not be liable for any third party information or data transmitted through him if he can prove that the offence, or contravention was committed without his knowledge or he had exercised due diligence to prevent the commission of such offence or contravention. What is due diligence however remains a very subjective concept to be determined on the basis of facts and circumstances of each and every case. In any case, Section 79 of the IT Act, dealing with the liability of network service provider does not cover all aspects of the issue.

One would be an intermediary within the definition of the IT Act, if he, with respect to any other particular electronic records, on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online auction sites, online market places and cyber cafes.[28]

In the first place it should be noted that, under the IT Act, the question of the liability of any service provider would be considered only where an offence or contravention if any of the provisions of this Act, rules or regulations made there under is alleged. For example, this section would not help an owner of a copyright complaining of infringing material being distributed through the intermediary, towards prosecuting him, under this Act, the question of the knowledge or

28 Section 2 (W), ITA, 2000 substituted vide ITAA, 2008

absence of knowledge of the intermediary of the claimed infringement taking place in its system, brings a different matter as transmission or circulation of material infringing a copyright, is not an offence under this Act.

7. Conclusion

The laws to tackle obscenity though appear good enough on paper but still there are some loopholes in their application which need to be plugged. Although sending, publishing and transmitting of obscene material has been made punishable[29], receiving, viewing or mere downloading for personal use has been conveniently overlooked. The law takes cognizance of contraventions committed within as well as outside India by a person of any nationality if it involves a computer, computer system or network located in India[30] but then there are extradition difficulties. The network service provider can also easily escape liability by denying the knowledge of the material transmitted and just saying that he was otherwise vigilant and took proper precautions[31]. Presently, the powers of police officers to enter and search have been restricted to only public places[32], then what about offenders engaged in spreading obscenity from the privacy of their homes?

Some kind of censorship is urgently required against pornographic information on the web. For this we require suitable administrative guidelines whereby the state or central law enforcement authorities may, after a due process of verification order the ISPs mapping the Internet Gateways to block "objectionable sites" which contain pornographic content. A thorough study of the IT Act also reveals that sections 69 and 69A enable any officer of the central government to intercept, monitor or decrypt any information from any computer source including websites and can ban the websites for reasons of obscenity. The Government of

29 Section 67 of the IT Act, 2000

30 Section 75 of the IT Act, 2000

31 Section 79 IT Act, 2000

32 Section 80 of the IT Act, 2000

India has constituted an Indian Computer Emergency Response Team (CERT-In), which is the only agency that has the authority to block a website. CERT-In instructs the Department of Telecommunications in the Ministry of Communication and Information Technology to block a website after verifying the authenticity of the complaint and only after collecting enough evidence which suggests that blocking the website is absolutely essential. The reasons for blocking of website must be convincing enough to warrant such a stringent action.

A provision to this effect is also available in the Communication Convergence Bill which is pending before the Parliament. There should also be laws similar to the "Deleting Online Predators Act" in the U.S.A, which bars certain websites from being accessed from schools and public libraries receiving government funding with the main objective of protecting children from exposure to pornographic content.

It is sincerely hopeful that the existing laws as well as the recent amendments are implemented in their true spirit so as to curb the menace of obscenity online as well as in other forms. It is to be remembered that pleasure of some cannot outweigh the interests of the society which is of paramount consideration in any civilized country.

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Constitutional Dialectics of Presidential Rule

Abstract

Extra-Ordinary powers have been the matter of great controversies in every society since the establishment of an organised political system. Few see them as the necessary evil and justify preserving the peace and order in the society whereas others criticize them on ground of being a noose to straighten the neck of basic freedoms and idea of democracy. Article 356 has been incorporated under the Indian constitution to enable the Central Government to combat internal crisis occasioned on account of, constitutional deadlock due to lack of majority by any party in state elections, militancy, communal and class conflicts, politico-religious turmoils, strikes, bandhs or other incidents of like nature where state government can't be carried on in accordance with the provisions of the Constitution. Though this Article was incorporated in all good faith for the national integrity, it seemed to have paved way for settling personal scores with the states being ruled by other parties. This Article is a humble attempt to analyse the President's power under Article 356 and how far the courts have tried to balance the exercise of this power in India.

Key Words: Presidential rule, Sarkaria Commission Report, failure of constitutional machinery, federal structure,

I. Introductory

Law is understood as power.[1] A Constitution reflects the principles on which the relationship between power holders and power addressees is based.[2] A constitution then becomes the legally permitted matrix for exercise of power validly. A written constitution influences the shape of action in a particular manner designed in the document. The Constitution as an institution, therefore, would regulate the power play in society which it seeks to order. The Constitution of India is a federal constitution

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1 Stone Julius: *Social Dimensions of Law and Justice* (Delhi, Universal Law Publishing Co. Pvt Ltd, 1969) at 589.

2 Lowenstein Karl: *Political Power and the Governmental Processes* (London, The University of Chicago Press, 1965) at 124.

which consists of the Union at the Centre and the States at the periphery each endowed with sovereign powers to be exercised in the field assigned to them respectively by the Constitution. Dictated by the savior-fare and ingenuity, the Constitution makers made a departure from the theory and practice of the typical federal system lest the fissiparous forces should succeed in cocking a snook at the success of the Constitution.[3] Of all the exceptions, making for the deviations from the ideals of the federalism, the most important was the provision contained in Article 356. It envisaged the suspension of the State autonomy and the imposition of President's rule when the Constitutional machinery in state was broken down.[4] Since it was a drastic remedy,

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3 Pandya B. P.: *Article 356 and Judicial Review* (Indian Journal of Public Administration, Vol. XLVII, NO. 4, October- December 2001) at 783.

4 Article 356 (1) of the Constitution reads as:

If the President, on receipt of report from the Governor of the State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation

(a) Assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or anybody or authority in the State other than the Legislature of the State;

(b) Declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;

(c) Make such incidental and consequential provisions as appear to the president to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this constitution relating to anybody or authority in the State.

Provided that nothing in this clause shall authorise the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts.

making both the federal and parliamentary bases of the Constitution to yield and brook the dilution of their ethos, it was intended that this extra ordinary remedy should be called in operation in rarest of rare occasions when parliamentary remedies had failed to redeem the situation.[5] Though this Article was incorporated in all good faith for the national integrity, it seemed to have paved way for settling personal scores with the states being ruled by other parties. In one way or the other the parties in control by manipulating these constitutional provisions have more or less succeeded in quenching their political animosities. So the contemplation of Dr B R Ambedkar towards the rarest application of these provisions has actually gained force in the exactly opposite direction. Against this background there is a felt need to study the real scope and purpose of Article 356. This Article is a humble attempt in this direction.

2. Historical Background

"Emergency rule" or "Crisis government" as it is generally called, has been in existence for almost as long as organised government itself.[6] The farthest backwards that a similar provision can be traced in the Indian context is the Indian Council Act, 1861,[7] which gave power to the Governor-General to make or promulgate ordinances for the peace and good government of India. The Government of India Act of 1919[8]

5 Dr. Ambedkar said, "If at all they are brought into operation, I hope the President, who is endowed with these powers, will take proper precautions before actually suspending the administration of the provinces. I hope the first thing he would do is to issue a warning to the province that had erred, that the things are not happening in the way in which they were intended to happen in the Constitution. If that warning fails, the second thing for him to do will be to order an election allowing the people of the province to settle matters by themselves. It is only when these two remedies fail that he would resort to this article." (C.A. Debates, Vol IX, at 7)

6 Iyer Venkat: *States of Emergency: The Indian Experience* (New Delhi, Butterworths India, 2000) at 1.

7 Section 23 of Act LXVIII of 1861.

8 Sections 21, 22, and 25 of the Government of India Act of 1919.

reaffirmed in the Governor-General the power to promulgate ordinances, in cases of emergency, for the peace and good government of British India. The satisfaction of the Governor-General was held absolute for the exercise of this power. The Government of India Act, 1935, provided a convenient basis for adoption of such provisions latter on by the Constituent Assembly in 1949[9]. The emergence of disruptive forces and widespread violent disturbances in the wake of partition, demonstrated to them the imperative necessity for a special provision for effectively and promptly dealing with grave situations of law and order.[10] Under the Indian Constitution only the President can assume all or any powers or functions acting on the report by the Governor or otherwise, and only he could suspend on whole or part any provisions of the Constitution relating to anybody or authority.[11]

3. Breakdown of Constitutional Machinery in the State

The expression "failure of constitutional machinery" has not been defined. In the Constituent Assembly debates Dr Ambedkar took the position that all provisions of the Constitution stood referred and non

9 Article 356 has been moulded on Section 93 of the Government of India Act, 1935, which provided that if the Governor of the province was satisfied that a situation has arisen in which the Government of the province cannot be carried on in accordance with the provisions of the Act, he may, by proclamation, assume to himself all or any of the powers vested in or exercisable by a provincial body or authority, including the ministry and the legislature and to discharge the functions in his discretion. The only exception was that he could not encroach upon the powers of the High Court.

10 Rao B. Shiva, ed., *The Framing of India's Constitution: Select Documents* (New Delhi, Universal Law Publishing Co. Pvt Ltd, 2004) Vol III, Draft Articles 275-280, at 622-625.

11 Section 93 of the Government of India Act provided that the Governor could assume to himself both the executive and legislative powers of the province but under Article 356, the executive power alone is to be assumed by the President and the legislative power of the State is not to be assumed. The President can only declare that the legislative powers shall be exercisable by or under the authority of the Parliament. Article 356(c).

observance of any Constitutional provision would fall within the reach of the expression.[12] While as, the executive and legislative organs of the State are covered under Article 356, the judicial functions have been consciously excluded[13]. The President may by a proclamation assume to himself all or any functions of the government of the State or all or any of the powers vested in and exercisable by the Governor or any body or authority within the State other than legislature of the State.[14] He may also suspend the operation of any provisions of the Constitution relating to anybody or authority in the State.[15]The scope of Article 356 has not been expressly defined or limited by the text of the Constitution. According to the Supreme Court the word 'failure to run' would mean a legal inability, as well as, physical impossibility.[16]

The breakdown of the Constitutional machinery may be due to a number of reasons, either of law and order or other reasons, or as and when the President comes to know that the machinery of the State is not functioning in accordance with t6he provisions of the Constitution. Breakdown of constitutional machinery is a condition precedent for any action under Article 356 after the Governor, submits a report to the President about the prevailing situation in the State.[17]

Article 355, puts a constitutional duty on the Union "to ensure that the Government of the State is carried on in accordance with the Constitution" it is obvious that Article 356 is not the only provision to

12 *Constitutional Assembly Debates Official Report*, (New Delhi, Lok Sabha Secretariat, 1999) Vol. IX, at 177.

13 See proviso to Article 356 Constitution of India, supra note 4.

14 Article 356 (1) (a) of the Constitution of India.

15 The provision in Article 356(1) (a) is worded elastically to permit remedial response in even a single instance.

16 *S. R. Bommai v. Union of India*, AIR 1994 SC 2033.

17 Kashyap Subash C.: Constitution *Making Since 1950: An Overview*, (New Delhi, Universal Law Publishing Co. Pvt. Ltd, 2004) Vol. 6, at 421. *See* also Article 156 of the Constitution of India.

take care of a situation of failure of Constitutional design[18]. Besides, Article 365 can be used by the Union to oust the state Government for failure to comply its directions[19].

Circumstances of large scale defections leading to reduction of the ruling party in to a minority, withdrawal of support of coalition partners, voluntary resignation by the Government in view of widespread agitation, large scale militancy, judicial disqualification of some members of the ruling party causing loss of majority in the house and the absence of an alternative party capable for forming government, are not apparently, constitutionally contemplated circumstances to warrant invocation of Article 356. The placing of preponderance of power with a political party or parties in the political or administrative process of a State has been identified by the Declaration of Athens, 1955 as hostile to Rule of Law which stands identified as the Basic Structure of the Constitution.[20]

The President has the power and a duty, to issue a proclamation of emergency under such circumstances when all other organs of the state fail to deliver.[21] In other words, when a particular State government is

18 It is important that Article 356 is read with the other relevant Articles viz. 256, 257, 355 and 365 which inter alia provide for mechanism to ensure rule of law in the sates and Union Government's responsibility to monitor it.

19 Article 365 states that "where the State fails to comply with any of the directions of the Union given under any of the provisions of the Constitution, it shall be lawful for the President to hold that a situation has arisen in which the government of a State cannot be carried on in accordance with the provisions of the Constitution".

20 In *Kesavanda Bharti v. State of Kerela* (1973) the Supreme Court enunciated the rule of law as one of the most important aspects of the doctrine of basic structure.

21 The Supreme Court was of the view that the Proclamation issued by the President may either be curative or preventive. But this view also seems to rest on an assumption of a Party Government of the Westminster model. Article 356 cannot be invoked unless to ensure that the government of the

not administered in consonance with the value choices articulated in the preamble, there would be a breakdown of constitutional machinery in the State, and an invoking of the provisions of Article 356 to right the situation would be within the Constitutional contemplation[22].

II. Presidential Rule And Indian Federal Character

It needs to be remembered that only the spirit of "co-operative federalism" can preserve the balance between the Union and the States and promote the good of the people and not an attitude of dominance or superiority. Dr. Ambedkar, who chaired the Drafting Committee of the Constituent Assembly, stressed the importance of describing India as a 'Union of States' rather than a 'Federation of States.' He said:

'... what is important is that the use of the word "Union" is deliberate ... Though the country and the people may be divided into different States for convenience of administration, the country is one integral whole, its people a single people living under a single imperium derived from a single source.[23]

This is in essence how one would describe Centre-State relations in India; excepting provisions for certain emergency situations in the Constitution of India, where the Union would exercise absolute control within the State. On the basis of a study of similar systems in ancient times, like the Achaean League or the Lycian Confederacy, it is revealed that the danger of usurpation of authority by the Federal power would be smaller than the danger of degeneration of the federation into smaller factions that would not be able to defend themselves against external aggression.[24] This is precisely the rationale behind the distribution of power between the Union and the States in India. Besides India having a

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State is carried on in accordance with the Constitution. See *S. R. Bommai v. Union of India*, 1994 SC 1918.

22 See supra note 16.

23 *National Commission to Review the Working of the Constitution, 2002*, Report I, at Para 8.1.2.

24 Madison James: *The Alleged Danger from the Powers of the Union to the State Governments Considered*, Independent Journal, Jan. 1788.

vast and diverse population, with a large number of people living in abject poverty, extraordinary situations are not novel to the Indian political scene. Therefore extraordinary powers to deal with these situations become necessary[25].

The purpose of Article 356 would seem to be to enable the Centre to take remedial action to put the State government back on constitutional rails so that it functions according to the demands o the Rule of Law. Any misuse or abuse of the power by the Union government is prevented by the Constitution allowing directives under Article 256 only to ensure compliance with every law, as the words 'for that purpose' in Article 256 would go to show and providing for an exercise of original jurisdiction by the Supreme Court in disputes between the Union and the State Governments.[26] This mechanism would necessarily require an independent entity to invoke the jurisdiction on behalf of the State. Because the Governor holds office during the pleasure of the President,[27] the Council of Ministers with the Chief Minister at the head can function in that capacity in all cases touching policy implementation which is the frame of Article 256 for the reason that they are to 'aid' the Governor in the discharge of his functions. The legislature can be the body in matter touching on legislations, if the Union were to act arbitrarily.[28]

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25 There are various opinions that one way or the other justifies the invocation of Article 356 diverse reasons. See Srivastava Meera: *Constitutional Crisis in the States in India*, (New Delhi, Concept Publishing Company, 1980), at 24; *Sarkaria Commission Report*, 1987, Vol. 1, Chapter VI, at 171; Basu Durga Das: *Commentary on the Constitution of India*, 7Th Edition, Vol A, at 55; Pylee M. V.: *Constitutional Government in India*, 1968, at 650 etc.

26 The Constitution of India, at Article 131.

27 *Id.* at Article 156 (1)

28 *State of Rajasthan v. Union of India*, AIR 1977 SC 1434. An advice letter by the Home minister of Government of India to the Chief Minister of a State to recommend the Governor for dissolution of an assembly is not a

4. Sarkaria Commission Report

Article 356 was frequently used by the Government of India and often for extraneous reasons lead to the establishment of Sarkaria Commission to review the Centre-State relations in proper constitutional perspective. The Commission recommended extremely rare use of Article 356. The Commission observed that, although the passage "the government of the State cannot be carried on in accordance with the provisions of this Constitution . . ." is vague, each and every breach and infraction of constitutional provisions, irrespective of their significance, extent, and effect, cannot be treated as constituting a failure of the constitutional machinery. According to the Commission, Article 356 provides remedies for a situation in which there has been an actual breakdown of the constitutional machinery in a State. Any abuse or misuse of this drastic power would damage the democratic fabric of the Constitution. The report discourages a literal construction of Article 356(1).[29]

The Commission, after reviewing suggestions placed before it by several parties, individuals and organizations, decided that Article 356 should be used sparingly, as a last measure, when all available alternatives had failed to prevent or rectify a breakdown of constitutional machinery in a State. The report further recommended that a warning be issued to the errant State, in specific terms that it is not carrying on the government of the State in accordance with the Constitution. According to the Commission's report, these alternatives may be dispensed with only in cases of extreme emergency, where failure on the part of the Union to take immediate action under Article 356 would lead to disastrous consequences. Every Proclamation of Emergency is to be

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directive in terms of Article 256; it is not a threat and does not qualify for an injunction or declaration by the State.

29 The Sarkaria Commission Report, (1987).

laid before each House of Parliament at the earliest, in any case before the expiry of the two-month period stated in Article 356(3).[30]

The report recommended appropriately amending Article 356 to include in a Proclamation material facts and grounds on which Article 356(1) is invoked. This, it is observed in the report, would make the remedy of judicial review on the grounds of mala fides more meaningful and the check of Parliament over the exercise of this power by the Union Executive more effective.[31]

5. Imposition of Article 356 in practice

Due to the fact that the expression "the government of a State is not carried on in accordance with the provisions of the Constitution" does not admit of a definite connotation, Article 356 has been used on various grounds such as:[32](a) stable government is not possible (b) the government is misusing the power (c) the government has lost the confidence of the people (d) the government is indulging in secessionist activities (e) the Chief Minister has refused to resign when the major partner withdrew support.

In terms of category (a) Article 356 has also been used when a majority party did not want to form a government and the other parties

30 The State Legislative Assembly should not be dissolved either by the Governor or the President before a Proclamation issued under Article 356 (1) has been laid before Parliament and the latter has had an opportunity to consider it. The Commission's report recommends amending Article 356 suitably to ensure this. The report also recommends using safeguards that would enable the Parliament to review continuance in force of a Proclamation.

31 The Governor's Report, which moves the President to action under Article 356, should be a 'speaking document, containing a precise and clear statement of all material facts and grounds on the basis of which the President may satisfy himself as to the existence or otherwise of the situation contemplated in Article 356.'

32 Siwach J. R.: *Politics of President's Rule in India*, (Shimla, Indian Institute of Advanced Study, 1979), at 439.

constituted a minority.[33] The very first application under this category was in Punjab in 1951.[34] Another instance wherein Article 356 has been invoked was where the in office ministry lost the majority in the legislature and no alternative ministry could be formed by the opposition,[35] because the opposition leader could not muster enough courage to form a Cabinet.[36] There have also been occasions where the Speakers of respective State Assemblies did not allow them to function by adjourning them sine die, due to which the State was placed under

33 See Srivastava, *Supra* note 25 at 80-81.

34 *Id.*at 39. The Sikhs who formed dominant minority never co-operated either with the Congress High Command or with a local Congress leaders in maintaining a stable government. The factional rivalry in the ruling Congress party of the State was a hindrance to the stability of the State government. The Bhargava—Sachar rivalry became so acute that the Congress Parliamentary Board had to intervene at the instance of Jawaharlal Nehru. The Board directed the Chief Minister to resign and forbade other Congress members of the State legislature from trying to form an alternative government, with the result the President's Rule was imposed in Punjab on 20th June 1951. It is interesting to note that in the State legislature of 77 seats, the Congress party had 70, and the Chief Minister Bhargava had the solid support of 40 members. With their strength a person like Bhargava could have been able to give the State a stable and efficient Ministry. But the Governor, in his report to the President recommending imposition of the President's Rule, charged the Bhargava Ministry with "gross maladministration" and "woeful lack of unity".

35 *Id.* at 80-81; Kerela in 1964.

36 *Id.* at 53-54; in Kerela on 2nd September, 1964, inspite of the warning of the Congress High Command, 15 Congress members informed the Governor of their withdrawal of support to the government. This reduced the strength of the Congress to 50 in a House of 126 and no confidence motion was passed on 8th September, 1964. The Governor (later the President of India) V. V. Giri, after ascertaining from the leaders of the opposition parties, reported to the President that no alternative ministry was possible. The President imposed his rule on 10th September, 1964 assuming all the powers and functions of the Kerela government.

President's rule,[37] an expression referring to an assumption of powers by the President. Another variable is a follow up action after the dismissal of ministry, wherein president's rule is imposed.[38] There have also been instances where the ruling party in the Centre has suspended its own party government in a State.[39]

In Chapter Six of its Report, the Sarkaria Commission has set out in detail the number of times the power under article 356 was used. It has classified them into four categories which are as follows:

i. When Ministry Enjoyed Majority

37 *Id.* at 64, in West Bengal in February 1968. (On 11th February, 1968, a group of 18 MLAs belonging to P.D.F and the Congress including two nominated Anglo-Indians defected and formed a new group called Indian National Democratic Front resulting in further instability of the Government. Consequently, the Governor reported the circumstances to the President and President's Rule was imposed in the State for the first time after independence, on February, 1968.

See, in Punjab in March 1968 when Gill had to tender his resignation to the Governor. The Governor, with a view to exploring the possibilities of formation of a new Government, inquired from leaders of the different big and small parties, and when all declined, he sent a report to the President for proclamation of emergency according to Article 356).

38 *Id.* at 52; Kerela in 1959, the Governor of the State made a report to the President that considering the prevailing conditions the administration of the State could not be carried out in accordance with the Constitution any longer and consequently, the President proclaimed emergency on 31 July 1959, dislodging the State legislature. *See* also *Id.* at 62-63 in West Bengal in 1967, Uttar Pradesh in 1970 after a breakup of the Congress into two groups Congress (O) and Congress (R) again the Congress Government was in crisis and Bhanu Gupta had to quit after a year and Charan Singh formed a government on 17th February, 1970, with support of Congress (R), due to friction wrote to the Governor to dismiss all the 26 ministers belonging to Congress (R), after a lot of deliberation and interaction in the State, at last the Governor reported to the President that no party was able to form a government, consequently State administration was taken over by the President on 2nd October, 1970.

39 *Id.*, Bhargava Ministry in Punjab and Mahtab Ministry in Orissa.

President's Rule was imposed in 13 cases even though the Ministry enjoyed a majority support in the Legislative Assembly. These cover instances where provisions of article 356 were invoked to deal with intra-party problems or for considerations not relevant for the purpose of that article. The proclamations of President's Rule in Punjab in June 1951 and in Andhra Pradesh in January 1973 are instances of the use of article 356 for sorting out intra-party disputes. The impositions of President's rule in Tamil Nadu in 1976 and in Manipur in 1979 were also on the consideration that there was maladministration in these States.

ii.Chance Not Given To Form Alternative Government

In as many as 15 cases, where the Ministry resigned, other claimants were not given a chance to form an alternative government and have their majority support tested 20 in the Legislative Assembly. Proclamations of President's rule in Kerela in March 1965 and in Uttar Pradesh in October 1970 are examples of denial of an opportunity to other claimants to form a Government.

iii. No Caretaker Government Formed

In 3 cases, where it was found not possible to form a viable government and fresh elections were necessary, no caretaker Ministry was formed.

iv. President's Rule Inevitable

In as many as 26 cases (including 3 arising out of States Reorganization) it would appear that President's rule was inevitable. Situations arising out of non-compliance with directions of the type contemplated in article 365 have not occurred so far.

To the above four categories must be added another category of wholesale dismissal of State governments and State Legislative Assemblies. Soon after a new Lok Sabha came into existence following the general election held in March 1977, bringing into office the Janta Party government, State governments and Legislative Assemblies of nine States, Haryana, Punjab, Himachal Pradesh, Uttar Pradesh, Bihar, Orissa, West Bengal, Madhya Pradesh and Rajasthan, were

dismissed/dissolved. Again after the Congress Party returned to power in 1980, State governments and Legislative Assemblies in nine States were dismissed/dissolved. The ground on which they were dismissed is identical in both cases, namely, that the elections to Lok Sabha have disclosed that people have lost faith in the parties which were holding office in those States. To wit, the argument in 1977 was that in the aforesaid nine States, the Congress Party has almost been totally rejected by the electorate in the elections to Lok Sabha which showed the disenchantment of the people with the Congress governments in those States. An identical argument was employed in 1980 against the non-Congress parties.

6. Post Sarkaria Report Scenario

Article 356 was invoked in the following instances after the Sarkaria Commission Report was submitted illustrated in Table-A given as under:

S No	State	Date of Invoking art 356	Reason for invocation
1.	Assam	27.11.1990	Law and order situation
2.	Nagaland	2.4.1992	Fluid party position
3.	Nagaland	7.8.1988	Declared by SC as being invoked in derogation of constitution
4.	Karnataka	21.4.1989	Declared by SC as being invoked in derogation of constitution
5.	Meghalaya	11.10.1991	Declared by SC as being invoked in derogation of constitution
6.	Bihar	28.3.1995	Process of election not completed
7.	U.P.	1996	No clear majority in election

8.	Tamil Nadu	30.1.1988	Deadlock due to death of M.G.Ramchandran
9.	Mizoram	7.9.1988	Defection
10.	J & K	18.7.1990	Militancy
11.	Karnataka	10.10.1990	Floor crossing
12.	Goa	14-12-1990	CM disqualified by HC leading to his resignation
13.	Tamil Nadu	30.1.1991	Alleged LTTE activities
14.	Haryana	6.4.1991	Refusal to hold floor test due to resignation of three MLAs
15.	Manipur	7-1-1992	Loss of majority
16.	Tripura	11-3-1993	Failure to control tribal rivalry
17.	U.P.	18-10-1995	Loss of majority
18.	Gujarat	1996	Defections reducing Govt. in minority

In Bihar in 2005 the Governor didn't provide any opportunity to any political party to form the Government and send 3 reports to the president urging for dissolution of the state assembly were sent. The grounds on which he placed his report were based on the hung assembly and the horse trading going on within the state which tampers the constitutional provisions. The Supreme Court held that it was mere ipse dixit (mere opinion) of the governor and declared it as unconstitutional.[40]

When there is a Proclamation under Article 356, the State Assembly has been either suspended or dissolved. Article 356 does not however contemplate dissolution or suspension of the State legislature. Article 356 (1) (b) empowers the President only to declare that the powers of the

40 *Rameswar Prasad v. Union of India,* (2006) 2 SCC 1, 79.

legislature of the State shall be exercisable by or under the authority of Parliament. It has sadly become a convention that the Assembly is either dissolved or kept suspended when Article 356 is invoked.[41]

Article 357(1)(a) contemplates that the Parliament can confer on the President the power of the legislature of the State to make laws and also authorise the President to delegate the power. The first of such Acts made in exercise of assumed legislative power of the State was in 1951.[42] By virtue of Article 357(2) laws made during a Proclamation under Article 356 shall be in force until altered, repealed or amended by the competent legislature i.e. the legislature of the State after it resumes functioning. This provision would have to be noticed in the context of the provision in Article 356(1)(a) prohibiting the President from assuming to himself the powers of the legislature of a State. Article 357(1)(a) which provides that the Parliament can confer the legislative power of the State on the President and authorise him to delegate the power would seem to run counter to the policy in Article 356(1)(a). Being a procedural provision, Article 357(1)(a) may have to be read down to bring it in conformity with the basic policy statement in Article 356(1)(a). Another difficulty with Article 357(1)(a) would be that it seems to do violence to the settled principle that a delegate cannot sub delegate. This objection may be got over by an explanation that it is allowed by the fundamental law. However, if this be allowed, the safeguarding of the Constitution by the President against violations, in terms of Article 60, cannot be whittled down by Article 357(1)(a) and therefore also, this provision will have to be read down. However, in terms of Article 357(1)(a) Parliament has authorized the President to

41 *See* Siwach, *Supra* note 50, at 35.

42 The Punjab State Legislature (Delegation of Powers) Act, 1951. Article 357 (1)(c) of the Constitution gives the power to the President to authorise when the House of the People is not in session, expenditure from the Consolidated Fund of the State pending sanction of such expenditure by the Parliament in circumstances where the power of the State legislature is retained by the Parliament, Article 357 (1)(c) would have no applicability.

exercise the legislative powers of the State, and to delegate the powers to any authority and the President has passed several President's Acts.

7. S. R. Bommai and After

The decision of the Supreme Court in S. R. Bommai v. Union of India is the most vital milestone in the history of the Indian Constitution when it comes to the application of Article 356. It was in this case that the Supreme Court boldly marked out the paradigm and limitations within which Article 356 was to function. In the words of Soli Sorabjee, eminent jurist and former Solicitor-General of India[43]:

After the Supreme Court's judgment in the S. R. Bommai case, it is well settled that Article 356 is an extreme power and is to be used as a last resort in cases where it is manifest that there is an impasse and the constitutional machinery in a State has collapsed.

The views expressed by the various judges of the Supreme Court in this case concur mostly with the recommendations of the Sarkaria Commission and hence need not be set out in extenso. However, the summary of the conclusions of the illustrious judges deciding the case, given in paragraph 434 of the lengthy judgment deserves mention:

I. Article 356 of the Constitution confers a power upon the President to be exercised only where he is satisfied that a situation has arisen where the Government of a State cannot be carried on in accordance with the provisions of the Constitution. Under our Constitution, the power is really that of the Union Council of Ministers with the Prime Minister at its head. The satisfaction contemplated by the article is subjective in nature.

II. The power conferred by Article 356 upon the President is a conditioned power. It is not an absolute power. The existence of material -which may comprise of or include the report(s) of the Governor -is a pre-condition. The satisfaction must be formed on relevant material.

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43 Sorabjee Soli: *Constitutional Morality Violated in Gujarat,* Indian Express, India, Sept. 21, 1996.

III. Though the power of dissolving of the Legislative Assembly can be said to be implicit in clause (1) of Article 356, it must be held, having regard to the overall constitutional scheme that the President shall exercise it only after the Proclamation is approved by both Houses of Parliament under clause (3) and not before. Until such approval, the President can only suspend the Legislative Assembly by suspending the provisions of Constitution relating to the Legislative Assembly under sub-clause (c) of clause (1). The dissolution of Legislative Assembly is not a matter of course. It should be resorted to only where it is found necessary for achieving the purposes of the Proclamation.

IV. The Proclamation under clause (1) can be issued only where the situation contemplated by the clause arises. In such a situation, the Government has to go. There is no room for holding that the President can take over some of the functions and powers of the State Government while keeping the State Government in office. There cannot be two Governments in one sphere.

V. Clause (3) of Article 356 is conceived as a check on the power of the President and also as a safeguard against abuse. In case both Houses of Parliament disapprove or do not approve the Proclamation, the Proclamation lapses at the end of the two- month period. In such a case, Government which was dismissed revives. The Legislative Assembly, which may have been kept in suspended animation, gets reactivated. Since the Proclamation lapses --and is not retrospectively invalidated - the acts done, orders made and laws passed during the period of two months do not become illegal or void. They are, however, subject to review, repeal or modification by the Government/Legislative Assembly or other competent authority.

VI. Article 74(2) merely bars an enquiry into the question whether any, and if so, what advice was tendered by the Ministers to the President. It does not bar the Court from calling upon the Union Council of Ministers (Union of India) to disclose to the Court the material upon which the President had formed the requisite satisfaction. However it

may happen that while defending the Proclamation, the Minister or the official concerned may claim the privilege under Section 123. If and when such privilege is claimed, it will be decided on its own merits in accordance with the provisions of Section 123.

VII. The Proclamation under Article 356(1) is not immune from judicial review. The Supreme Court or the High Court can strike down the Proclamation if it is found to be mala fide or based on wholly irrelevant or extraneous grounds. When called upon, the Union of India has to produce the material on the basis of which action was taken. It cannot refuse to do so, if it seeks to defend the action. The court will not go into the correctness of the material or its adequacy. Its enquiry is limited to see whether the material was relevant to the action.

VIII. If the Court strikes down the proclamation, it has the power to restore the dismissed Government to office and revive and reactivate the Legislative Assembly wherever it may have been dissolved or kept under suspension. In such a case, the Court has the power to declare that acts done, orders passed and laws made during the period the Proclamation was in force shall remain unaffected and be treated as valid. Such declaration, however, shall not preclude the Government/Legislative Assembly or other competent authority to review, repeal or modify such acts, orders and laws.[44]

Thus, it can be seen from the conclusions of this Bench of the Supreme Court that the President's power under Article 356 is not absolute or arbitrary. The President cannot impose Central rule on a State at his whim and will without the existence of a reasonable cause. It is only in cases of grave emergency, like, natural calamity, disruptive practices, disaffection towards people, extra-ordinary law and order situations etc.that can only warrant invocation of state emergency.

8. Conclusion and Suggestions

44 *S.R. Bommai v. Union of India*, (1994) 3 SCC 1, 296-297.

On ground of above observations it is evident that Article 356 has been deliberately incorporated to provide a platform to the amphibian Central Government to change its federal plane into unitary to avoid the political and social contingencies in a state, where its constitutional machinery can't be run according to the mandate of the constitution. Every power is purposive; it depends upon the nature of its application which brings it into repute and disrepute. Despite of its wide utility, Article 356, the dead letter of Dr Ambedkar has become the death letter to the popularly elected governments at states due to its indiscriminate and politically motivated application by union government. A careful observation of constitutional provisions in the light of judicial decisions makes it clear that central government's power under Article 356 is a canalized power bound by the constitutional, judicial and conventional norms and has not been given the blanket immunity. Being extra-ordinary power it is to be exercised sparingly with great caution as a weapon of last resort to dislodge the elected government in a state following breakdown of constitutional machinery therein when all the possible avenues of federal dynamics have been explored and resources of federal solutions to set up an alternative administration exhausted. After going through the intricate dimensions of this constitutional provisions and analyzing the imposition of the president's rule in practice for umpteen times the writer would consider the following suggestions worth a mention:

1. The appropriate provision should be incorporated whereby it provides that until both Houses of Parliament approve the proclamation issued under clause (1) of article 356, the Legislative Assembly cannot be dissolved. If necessary it can be kept only under animated suspension.

2. Arbitrary transfer, posting and removal of governors must be prevented through necessary constitutional amendments so as to prevent them from being the agent of political party in rule at centre. Further in appointment of the governor at least advice of the concerned chief minister must be taken.

3. The single safeguard in the name of parliamentary approval in Article 356(3) is not sufficient because ordinarily the ruling party at Center generally dominates Parliament by a majority. Hence a concise Act incorporating the provisions of constitutional, judicial and conventional norms be passed to regulate the imposition of Article 356(1).

4. Before issuing the proclamation under clause (1), the President/the Central Government should indicate to the State Government the matters wherein the State Government is not acting in accordance with the provisions of the Constitution and give it a reasonable opportunity of redressing the situation, unless the situation is such that following the above course would not be in the interest of security of State or defence of the country.

5. Next it should be made a mandate that once a proclamation is issued, it should not be permissible to withdraw it and issue another proclamation to the same effect with a view to circumvent the requirement in clause (3). Even if a proclamation is substituted by another proclamation, the period prescribed in clause (3) should be calculated from the date of the first proclamation.

6. The proclamation must contain the circumstances and the grounds upon which the President is satisfied that a situation has arisen where the government of the State cannot be carried on in accordance with the provisions of the Constitution. Further, if the Legislative Assembly is sought to be kept under animated suspension or dissolved, reasons for such course of action should also be stated in the appropriate proclamation.

7. Whether the Ministry in a State has lost the confidence of the Legislative Assembly or not, should be decided only on the floor of the Assembly and not in the chamber of governor or else other. If necessary, the Central Government should take necessary steps to enable the Legislative Assembly to meet and freely transact its business. The Governors should not be allowed to dismiss the Ministry so long as it

enjoys the confidence of the House. Only where a Chief Minister of the Ministry refuses to resign after his Ministry is defeated on a motion of no-confidence, should the Governor dismiss the State Government.

In the light of the preceding discussion on Article 356 from various dimensions I tend to incline myself towards the rationale given by the constitutional framers towards the desirability of having such a provision. The intervention of the Supreme Court in the spate of misused applications of this Article for umpteen times seems to have turned the tide from blatant misuse to judicious use. With the reformative role played by the judiciary being laudable, it's now time for the executive to fasten its loose ends and thereby not give any room for criticism.

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Domestic Violence and Media with special Reference to Kashmir

Abstract

Domestic violence also known as domestic abuse is a common phenomenon in our homes that continues in several forms. Sometimes it takes serious form and even leads to deaths. It is s a social crime that eats up the vital components of a society and often leads to moral degradation. Causes and consequences of domestic violence are manifold but materialistic attitude is a basic root cause that leads to this form of violence. Mostly violence within four walls of the house goes unreported due to social stigma attached to the issue. Media fraternity, law enforcement agencies and judiciary often show cold response towards victims of domestic violence and are generally insensitive towards the issue and its repercussions. Though innumerable laws are available to curb this social menace, their poor implementation renders victims helpless and hapless. Mass campaign at grass root level via various forms of traditional and contemporary media and gender sensitization is the need of hour. The paper provides an insight about domestic violence in general, its causes and consequences and resultant effects on society. Various studies have been quoted; interviews conducted and role of media discussed.

Key words: Domestic Violence, social crime, materialistic attitude, social stigma, media fraternity, law enforcement agencies, mass-campaign, Islamic perspective.

1. Introduction:

Domestic violence in India is endemic and widespread.[1] It is the violence taking place within four walls of house and buried there only. There are cases where women have committed suicides because of domestic violence. Due to social stigma attached to the issue, women generally don't speak about this problem. They usually consider it part of their destiny and live with the same. Even society in general and law

1 Ganguly, Sumit. "India's Shame" The Diplomat Retrieved 27 April 2012

enforcement mechanism in particular is insensitive towards this issue. The term used to describe this exploding problem of violence within our homes is Domestic Violence. This violence is towards someone who are in relationship with, be it a wife, husband, son, daughter, mother, father, grandparent or any other family member. It can be a males' or a females' atrocities towards another male or a female. Anyone can be a victim and a victimizer. This violence has a tendency to explode in various forms, such as, physical, sexual or emotional.

Domestic violence is witnessed everywhere, for example, behind closed doors of homes, people are being tortured, beaten and killed; it is happening in rural areas, towns, cities and in metropolitans, transcending all social classes, genders, racial lines and age-groups. It is becoming a legacy being passed on from one generation to another.[2]

Domestic violence implies violence at home in its various forms but legal connotation includes omission or commission of any act or conduct that harms, injures or endangers well- being of a person and includes any form of physical, emotional, verbal, sexual and economic abuse.

Domestic violence also known as domestic abuse, spousal abuse, battering, family violence and intimate partner violence, is defined as a pattern of abusive behaviors by one partner against another, in an intimate relationship, such as, marriage, family or cohabitation.[3]

Domestic violence has many forms including physical aggression or assault (hitting, kicking, biting, restraining, slapping and throwing objects) or threats thereof; sexual abuse; emotional abuse; intimidation and economic deprivation.[4]

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2 Ankur Kumar, Domestic Violence in India: Causes, Consequences and Remedies, February 7, 2010 http://www.youthkiawaaz.com/2010/02/domestic-violence-in-india-causes-consequences-and-remedies-2/

3 From Wikipedia, the free encyclopedia: Domestic Violence (http://en.wikipedia.org/wiki/Domestic_violence)

4 Ibid

Domestic violence and abuse isn't limited to obvious physical violence. Domestic violence can also mean endangerment, criminal coercion, kidnapping, unlawful imprisonment, trespassing, harassment and stalking.[5]

According to Merriam-Webster definition, domestic violence is: "the inflicting of physical injury by one family or household member, on another; also a repeated/ habitual pattern of such behavior." [6]

The US Office on Violence Against Women defines domestic violence as a "pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner". The definition adds that domestic violence "can happen to anyone regardless of race, age, sexual orientation, religion or gender" and can take many forms, including physical abuse, sexual abuse, emotional, economic and psychological abuse.[7]

In this paper an attempt is made to highlight the extent of domestic violence in the state of Jammu and Kashmir, especially the Kashmir valley.

2. Causes of Domestic violence

There are different theories advocated as to the causes of domestic violence. These include psychological theories that consider personality traits and mental characteristics of perpetrator, as well as, social theories, which consider external factors in perpetrator's environment, such as, family structure, stress and social learning. As with many phenomena regarding human experience, no single approach appears to cover all cases.[8]

http://en.wikipedia.org/wiki/Domestic_violence

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5 Ibid

6 From Wikipedia, the free encyclopedia: Domestic Violence http://en.wikipedia.org/wiki/Domestic_violence

7 Ibid. In this paper an attempt is made to highlight the extent of domestic violence in the state of Jammu and Kashmir, especially the Kashmir valley.

8 From Wikipedia, the free encyclopedia: Domestic Violence

Desire to gain control over another family member or to exploit someone for personal gains could be other contributing factor for domestic violence. At times, psychological problems and social influence add to the menace. Besides, greed for dowry and exploiting women for the same, preference of male child and alcoholism of spouse, arguing with partner, indulging in extra-marital affairs, not cooking properly or in time, neglecting children and likewise, leads to domestic violence against women.[9]

There have been many reports of young bride being burnt alive or subjected to continuous harassment for not bringing home the amount of demanded dowry. Apart from this, more income of a working woman than her partner, her absence in house till late night, abusing and neglecting in-laws are its other reasons. Female foeticide and female infanticide continue to be a rising concern. [10]

Domestic violence could be against women, men, children and aged. Women are affected the most. As noted, they are discriminated and ignored, which forms basis of violence against them. Though women have proved themselves in almost every field of life, but reports of violence against them are much higher. Often society considers domestic violence against women, as a norm and doesn't take it that much seriously. [11]

According to National Crime Records Bureau, one crime is committed against women every three minutes, one rape is committed every 29 minutes, one dowry death case is reported every 77 minutes and one case of cruelty by husband and relatives is recorded every nine minutes. [12]

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9 Ankur Kumar, Domestic Violence in India: Causes, Consequences and Remedies, February 7, 2010 http://www.youthkiawaaz.com/2010/02/domestic-violence-in-india-causes-consequences-and-remedies-2/

10 Ibid

11 Ibid

12 www.ncrb.nic.in

United Nation Population Fund Report says around two-third of married Indian women are victims of domestic violence. In India, more than 55 percent of women suffer from domestic violence, especially in states of Bihar, Uttar Pradesh, Madhya Pradesh and other northern states.[13]

Quoting National Crime Bureau Report, 1995, the study, "Resisting dowry in India (Jagori, 2009)" states that about 6000 dowry deaths occur every year. It further quotes study by Vimochana stating that unofficial estimates put number of dowry deaths at 25,000 a year with many more maimed and scarred as a result of attempt on their lives and of 1,133 cases of unnatural deaths of women reported in Bangalore in 1997, where only 157 were found as murder.

3. Domestic Violence: An Emerging Expanse

Domestic violence could be used across the gender or age. It can presently take many forms briefly described as under:

1)Domestic violence against men is gradually increasing in India. General opinion usually is that supremacy of men in society doesn't make them vulnerable to domestic violence. Battering of men by their spouse and family members has become a concerned issue. Males have reported incidences of assault against them including slapping, pushing, shoving and hitting intending to harm them. Cases of domestic violence against men usually go unreported as compared to cases of physical assault of women. Still the number is less and severity of domestic violence against men is less compared to domestic violence against women.[14]

Pertinently, there has been a spate of farmers' suicide in recent years in Karnataka. Several farmers have committed suicide not only because of indebtedness but also because of discord in family and depression resulting out of it. According to statistics of **Save India Family Foundation,** a non-government organization, around 1.2 lakh

13 www.unfpa.org

14 Jagori (2009), Resisting dowry in India http://jagori.org/wp-content/uploads/2009/07/dowry_infopack.pdf

harassed husbands have committed suicide in the country in last four years.[15] http://www.youthkiawaaz.com/2010/02/domestic-violence-in-india-causes-consequences-and-remedies-2/ Reasons behind this form of domestic violence could be many: Not abiding by wives' instructions, not taking proper care of children or abusing spouse's family, spying activities of partner and not trusting her, inadequate earnings of men and likewise.

2) Even children and teenagers face domestic violence. In urban areas, it is mostly confined to four walls of house. Disobeying parents, abusing elders and poor performance in academics are the contributing factors.

In rural areas, reasons could be harassment for child labour, forcing children to stay at home and not allowing them to go to school. Girls in particular are cursed, discriminated and discouraged.

3) There are also instances of abuse against children who are physically or mentally challenged. Instead of caring for them and providing them proper health care, treatment and facilities, they are beaten, ignored, discouraged and neglected by the family. They are even emotionally abused. In fact in poor families, there have been reports of selling body organs of retarded children for getting money in return.[16]

4) With respect to domestic violence involving senior citizens as victims, children and other family members act as perpetrators of crime. Reasons can be property disputes or materialistic orientation of family thus, treating senior citizens as liability given their reduced productivity or age induced unemployment. Usually, they are an ignored lot and such cases go unreported or underreported.

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15 Ankur Kumar, Domestic Violence in India: Causes, Consequences and Remedies, February 7, 2010

16 Ankur Kumar, Domestic Violence in India: Causes, Consequences and Remedies, February 7, 2010 http://www.youthkiawaaz.com/2010/02/domestic-violence-in-india-causes-consequences-and-remedies-2/

4. Consequences of Domestic Violence

Domestic violence leads to various consequences. It affects the performance and psyche of women, including living under constant fear, threat and humiliation. After individual victim, family becomes its ultimate casualty. Suicide and dowry deaths are its deadly consequences, relationships get strained and quality of life gets affected.

Battered women often get emotionally disturbed, which affects their health, mental-make up and routine work. If employed, they lose efficiency and interest in work that affects the final output of work and they may drop-out. The same has negative effect on development of children. Domestic violence can leave deeper and harsher impact on mindset of children that might affect their day-to-day dealings and the future life ahead.

Consequences in case of children are far more drastic and its effect is long lived. Children are sensitive to issues related to violence of any kind as they aren't mature enough to comprehend them. Their studies too get affected. Besides, children are bound to get influenced by negative approach of their parents. They may adopt negative traits and develop a hostile approach in life because of ill-treatment they are subjected to.

Domestic violence often leads to emotional disturbance and depression. Then victims take to various other means like alcoholism, drug addiction and likewise to get rid of feeling and humiliation arising from domestic violence.[17]

A sense of insecurity and hopelessness prevails among victims. Women and elder victims often get isolated, suffer from anxiety, depression and trauma and leave home. Elders in many states find refuge in old age homes. Women often succumb to torture they face. Families suffer on various fronts – social, economic and development. In general,

17 Ankur Kumar, Domestic Violence in India: Causes, Consequences and Remedies, February 7, 2010

it adversely affects healthy development of society. Moral values of family and society get nullified.

5. Situation of Domestic Violence in Kashmir

Domestic violence in Kashmir is increasing and thousands of women bear it silently. Most of them are reluctant to lodge complaint due to social stigma attached to it and to avoid legal hassles and other cumbersome procedures. Jammu and Kashmir has seen rise in number of domestic violence cases during the past few years. Last year, the only women's police station in Kashmir at Srinagar received around 400 cases of domestic violence.

In recent past, valley of Kashmir has witnessed an onslaught of cases of domestic violence, be it in the heart of city or in remote villages. In some instances, death of women resulted due to the physical as well as mental torture by their husbands and in-laws, either for dowry or for bearing a girl child. Reasons are manifold but the problem and outcome is common.

It will be useful to quote from a research study carried out by an eminent sociologist, Prof. Dabla as under:[18]

I. Most women are denied inheritance rights, especially in rural areas. While 43.4 percent women were given their inheritance rights, 36.7 percent were denied these rights.

II. The women had lesser authority than men in the 'in-family and out-family' situations. About 12 percent women were beaten by their husbands, and majority of respondents had given dowry.

III. The women in valley remain actively involved in some economic activity or the other. They work in field of agriculture (36 percent),

18 Dabla, Bashir A Multidimensional Problems of Women in Kashmir valley, A Report January 2000. The study was carried out by Prof. Bashir Ahmad Dabla, former Head, Department of Sociology, University of Kashmir and sponsored by Ministry of Planning and Programme Implementation, New Delhi. The sample survey composed of 4800 respondents selecting 800 from each district.

handicrafts (18.1 percent), small business (7.8 percent), household occupations (7.7 percent) and other economic activities (21.1 percent).

IV. The women get differentiated and exploited, especially in handicraft sector, in which a significant number of girl children work for petty wages. 29.1 percent women working in handicraft sector were getting lesser wages than their male counterparts.

V. In most cases, regular income of women hasn't translated into economic independence. The government programmes/schemes haven't benefited them much either.

VI. The 29.5 percent women were literate in valley. In an average family (having 6.1 members), there were 1.26 male and 1.17 female educated members.

VII. The drop-out rates till schooling stage was found to be 21 percent for boys and 22.3 percent for girls. The research further found that women were harassed continuously at their places of work, which included mental and physical harassment at government and non-government offices. Despite formal complaints, the practice continues.

VIII. Violence against women has steadily increased by 22.1 percent in 2011 as compared to 2010.

Data compiled by Jammu and Kashmir Police Crime branch says that in past two years, it has registered 4066 cases of crimes against women. It included 1797 cases of molestation, 187 rape cases, one gang rape case, 1279 cases of kidnapping and abduction of women/girls, 426 eve teasing cases, one case of dowry death, 177 cases of cruelty at hands of husbands, 195 suicide cases, four cases under Dowry Restraints Prohibition Act, two cases of suppression of immoral trafficking.[19]

In one of a workshop in Srinagar organized by Jammu and Kashmir Institute of Management, Public Administration and Rural Development (IMPA) in collaboration with Lawyers Collective, couple of years ago, it

19 Zeenat Zeeshan Fazil, Data about violence against women, KashmirForum.org - Sunday, March 11, 2012 http://kashmirforumorg.blogspot.in/2012/03/data-about-violence-against-women.html

was observed that on an average, 3-4 women per day approach the court for legal aid in case of matrimonial disputes. Most women specific cases referred to the court are related to dowry.[20]

A case was reported in the workshop wherein a middle-aged woman, mother of three children lived a happy married life till one day cancer was diagnosed in one of her breast that got removed. It was detected after 14 years of her marriage. After couple of months, her husband divorced her.

It has also been observed that after woman files application against domestic violence faced by her, she is primarily thrown out of house (in-laws). It has also been observed that court procedure being long and cumbersome, many don't approach courts.

In order to check the menace of domestic violence in the state of Jammu and Kashmir, an Act was passed which has yet to bear its fruits.[21]

It was reported in media that government has no funds to implement law on domestic violence. Almost a year after Jammu and Kashmir Protection of Women from Domestic Violence Act came into force; government says it is facing "financial constraints" to make its implementation effective.[22]

The law provides for appointment of Protection Officers to ensure justice to victims but government is sitting over it saying it has no funds for creation of key positions under law to make its implementation effective. The law is in vogue in other states of country since 2005.

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20 Afsana Rashid, Domestic Violence Act likely for state, The Tribune – Monday, October 12, 2009 http://www.tribuneindia.com/2009/20091012/j&k.htm#3

21 Jammu and Kashmir Protection of Women from Domestic Violence Act, 2010 with effect from July 12, 2012

22 Muddasir Ali, Govt has no funds to implement law on domestic violence: Minister (Greater Kashmir), Friday, April 27, 2012 http://www.greaterkashmir.com/news/2012/Apr/27/govt-has-no-funds-to-implement-law-on-domestic-violence-minister-65.asp

6. Opinions and Counter-Opinions

Domestic violence poses a serious challenge to the society. It affects the overall development of society. Proper implementation of laws, sensitization of masses and awareness generation among masses especially about their rights can go a long way in liberating society from this social evil.

Society, in a way, has downplayed its role in curbing this social menace. For Huneef Mohammad[23] entire society nourishes sentiment for perpetuation of such violence in homes by collective resignation to symbols like dowry, wrong customs and obsession with materialism. Educated with this context, individuals unconsciously acquire such traits where wife battering becomes a norm rather than exception, he believes.

Mohammad views domestic violence as a social act and not as an individual act. Quoting Jammu and Kashmir bank, a leading bank in Jammu and Kashmir, Mohammad says the bank has "mehandi deposit scheme" which in effect institutionalizes dowry and consequently, entire objective of girl's life is reduced to savings spread over decades in order to make her marriageable.

He asks "what effect will these savings have on psyche of girl child? Don't we make her feel right from her birth that money will make her marriageable? By such collective obsession we are creating the context for increasing appetite of materialistic monster of our societies. That monster nourished over long term resorts to physical abuse as well in order to meet its material objectives."

Mohammad adds in order to break away from this pattern, "we as society need to take materialism out of all relations and need to downplay all evil customs." He further adds poor communication quality plays a role in shaping a situation to move towards domestic violence.

"In this case it is projection of general communication disability in society. As a society we've not evolved to the level where we can

23 Huneef Mohammad is a technocrat associated with multinational company. The author has interviewed him

discuss or elaborate on issues without losing our cool. Our education system hasn't even taught us how to discuss and elaborate on issues," said the technocrat, adding "instead of listening to other person; we listen to social stereotypes and subject everything to generalization that leaves less space and scope for discussion."

Mohammad observes that society needs to evolve and learn to discuss things on the merit of ideas and the thoughts presented, instead of pre-conceived notions or stereotypes prevailing in the society.

He further observes religion is misused and misinterpreted. "What actually is part of customary or bogus cultural practices is unfortunately assumed to be part of religion," he says. Citing an example, he says customary law denies any share of property to woman. Islamic law in contrast, by recognizing her individuality, gives her explicit property rights. Not only that, as per Islamic law, she can demand as much dower (Mehr - marriage gift from husband) as she deems appropriate at time of marriage. He adds her husband has to manage all economic affairs of home and she isn't legally bound to contribute towards running economic affairs of home. "She can instead invest in career and thus, contribute more powerfully in reforming society."

Elaborating that relation between husband and wife is to be one based on caring, mutual respect and kindness, Mohammad quotes Quran stating, "Under no circumstances is violence against women encouraged or allowed in religion. The holy Qur'an contains dozens of verses mandating good treatment towards women. Several verses, specifically enjoin kindness to women (2:229-237; 4:19; 4:25). These verses make it clear that relationship between husband and wife is about kindness, mutual respect and caring."

Adding further, he says "Chapter two, verse 231 of the Quran condemns taking women back after separation in order to hurt them; chapter four, verse 19 prohibits forced marriages; Chapter four, verse 29 prohibits consciously holding a wife in suspense or insecurity; Chapter five, verse 92 removes legal effect from oaths against wives made in anger; and Chapter17, verse 90-91 requires fulfillment of oaths, verbal agreements and commitments. Even in case of divorce, spouses are

instructed to bring an arbiter from each side of family to attempt reconciliation (4:35). Anyone who violates limits set by Allah is labeled a "transgressor" in the Qur'an."

He added Prophet Hazrat Mohammad (SAW) established standard of character of person as one who is best to his wife. "In effect one who establishes justice in this relation will be able to establish justice in any other relation."

Mohammad emphasizes proper understanding and application of religion can play an effective role in addressing the problem. "Muslim women need to improve their knowledge of their own faith and then reclaim their right to define themselves in the light of the Qur'an and the Sunnah, instead of customary practices, traditions and extremist viewpoints. Once they'll be aware about provisions in religion, they can effectively use religion to safeguard their rights."

Women face both physical and mental torture on account of domestic violence, says Chowdri Shafkat Amin[24] adding that mental torture is more serious, heinous and violent than physical violence. She stressed domestic violence has to be stopped and woman has to come forward, and raise voice against it.

The attorney observed not all women approach courts in case of domestic violence due to various limitations including social stigma, women-folk being shy by nature and they think same would bring dishonour to their respective families. She says free legal aid is available for women living below poverty line and even mediation centres that have been recently set-up mostly look into matrimonial disputes.

She added non-government organizations have a role to inform, educate and aware masses in general and women in particular about laws and acts concerning them. Molvis (religious scholars) too have a role in generating awareness among masses and they should deliver sermons in mosques with regard to issues concerning women and their rights, she adds. Amin said women are more important as they've to look after their

24 Chowdri Shafkat Amin is an attorney. The author interviewed her

family and they too have rights and status in a society. "Islam has given her a special status and despite that men torture them," she says, adding law is there and women should raise voice against their sufferings and problems.

Emphasizing that media has a role, the attorney said that it should not only highlight cases of domestic violence, but discuss in detail laws and Acts related to domestic violence and the same should be carried on front page of newspapers.

She added media has power as pen is powerful than sword, as such media's role in this perspective is imperative.

Her counterpart, M D Khan[25] puts forth another perspective. He believes domestic violence vis-à-vis women in Kashmir, is less and no one understands domestic violence vis-à-vis men. He observes till date the most-hyped slogan of domestic violence is used as a weapon against innocent males. Khan believes outcome of the slogan (domestic violence) will be multiplicity of litigations.

He explained in 30 percent cases it is dowry-demand whereas in 70 percent cases it is desire for dowry. He said section 488 that deals with maintenance in case of matrimonial disputes is blindly misused and has tendency to increase matrimonial disputes and break marriages.

Even female advocates argue that maintenance should be in rarest of rare cases as it is misused to a large extent. The advocates believe that the same needs amendments as in majority of cases women don't like their in-laws and don't want to go to their in-laws place.

498A and section 406 Ranbir Penal Code (RPC) deals with dowry related cases and maintenance of women by husband till divorce in case there is any matrimonial dispute between the couple. Maintenance is calculated keeping in view husband's income and his liabilities towards his parents.

Ufaira Rasheed[26] pointed that gold ornaments (jewellery) is usually root-cause for matrimonial disputes in Kashmir valley. She explains

25 M D Khan is an attorney. The author interviewed him

26 Ufaira Rasheed is an attorney. The author interviewed her

usually, in-laws expect their daughter-in-laws to put jewellery, gifted to woman at the time of marriage, in their custody and on the other hand, women's parents want her to take the custody of jewellery, which often results in dispute. Consequently, women start putting up at their parental house and then claim maintenance from their husband.

She informed in comparison to a full-fledged matrimonial court at Jammu that caters to almost 20-25 cases per day, there are 25 courts here in Saddar complex and all look into matrimonial disputes with an average of 10-15 cases per court. Usually matrimonial disputes relate to section 488, 202 (deals with complaint against in-laws that they sold her jewellery) and 406. Rasheed observed few wife-battering cases too have been reported in courts.

"Mediation centres have been established by state legal services authority in all districts of state, since last year. It is a sort of family counseling wherein parties negotiate and advocates and judges mediate," she states.

Reflecting on the three cases wherein she mediated, Rasheed said "finally the cases were compromised." Quoting one of her cases she said "it was about restitution of conjugal rights. Though there were heated arguments among parties just outside the court but finally, good sense prevailed on them. An agreement was made wherein husband declared that he will take care of his wife. The wife had earlier stated that he doesn't take care of her and as such she left his place and started putting up at her parents' place."

Rasheed's counterpart, Shaheen Khan[27] pointed, "Under provision for maintenance, usually women allege that in-laws demanded dowry from them or their husband doesn't care about them or bear their expenses or their husbands have extra-marital affairs. Under section 202, they seek police protection and also approach courts for maintenance."

27 Shaheen Khan is an attorney. The author interviewed her

Khan too shared that maintenance clause is often misused. "Majority of cases claiming maintenance from husbands are fake. There are those instances also where husbands demand dowry."

She stated women claim maintenance, sit at their parents' house and their parents support them for claiming maintenance from husbands. "Once maintenance amount is fixed by court, husband pays it in open court during court proceedings on the respective court-hearings or the same is transferred to her bank account. In case of government employees, same gets deducted from his salary."

She explained "in most cases, women get their in-laws arrested by women police station at Ram Munshi Bagh, Srinagar even in case of a tiff between husband and wife."

With regard to property rights, Rasheed said that women approach courts for property rights once their brothers deny their respective share to them. "Then the court distributes the property as per the Shariah (Islamic religion)."

G N Shaheen[28] said non-availability of courts is prime reason responsible for denial of speedy justice. "Once justice is speedy, it would be deterrent. But deterrence part isn't having its effect on society."

Shaheen termed domestic violence as a continuous phenomenon, unabated. He adds its procedural part in courts is lengthy and same influences justice. He said 488 Criminal Procedure Code of Jammu and Kashmir is one of the offshoots of domestic violence that includes torture, physical abuse, psychological and social humiliation. "488 CrPC is not only a remedy, but it is an additional benefit."

Former Bar Secretary demanded that maximum limit of maintenance should be enhanced, separate accommodation should be provided and its misuse should be prevented.

28 G N Shaheen, former Secretary, High Court Bar Association. The author interviewed him

7. Role of Media:

Media – print, electronic, online, films and documentaries - has an indispensable role in this regard. As part of its social, corporate and moral responsibility, media has to play its role in highlighting cases of violence with utmost care and precaution. It has to demonstrate gender-sensitivity responsibility while tackling this sensitive issue. It has to deliver without sensationalizing the issue or intruding the privacy of parties involved. Journalists need to be sensitized on this issue.

Media also has a responsibility to educate, inform and generate awareness among masses especially women about the laws governing them. It has a role to sensitize administration and police as well on such sensitive issues. Tackling such issues needs utmost care and specialization. There should be separate wing of police handling this issue as they are already over-loaded with other works. Police can simultaneously offer counseling to affected families, which could go a long way in resolving family conflicts or they can tie- up with mediation centres at courts, psychiatrists, psychologists and doctors.

Media has to demonstrate its key responsibility of educating and informing masses about various happenings in and around and finding a solution to it by inviting concerned experts without sensationalizing it or putting it under the carpet or over or under-playing it.

These issues need strong and vibrant media movement together with staunch social action. Only legal framework won't help in this perspective. It requires collective effort from society to be rooted out from the society. Otherwise it is bound to take a heavy toll of the society and the same would be a collective failure of the society.

8. Recommendations and Suggestions:

The response to phenomenon of domestic violence is a typical combination of effort between law enforcement agencies, social service agencies, courts, religious scholars, corrections/probation agencies and media. Domestic violence is a collective challenge for society and efforts at individual level aren't enough to counter it. A collective approach followed by implementation at individual level would go a long way in wiping out the menace from the society.

Legal action together with societal action and social boycott is a key to its withdrawal from the society. Wide-spread awareness programmes and workshops at community level via traditional folk-forms like bandh pather, folklore and conventional and traditional forms of media along length and breadth of society would help in addressing the issue to a large extent.

Religious education campaigns, seminars and workshops can prove of great help in this regard.

Interaction programmes within community and between community heads and experts from various backgrounds and public lectures too can be a useful tool to weed out this evil practice from society.

Sarpanches especially women panch members should be empowered to identify and look into cases of domestic violence in the respective villages and trained to report it with special wing of police formed to tackle the issue at grassroot level or the district court or nearest mediation centre.

Taking feedback from masses telephonically, via letters, e-mails etc vis-à-vis the issue can strengthen the efforts to curb the menace.

Strengthening legal mechanism, strict implementation of laws, punishing violators and follow-ups would send a strong message across and would help to put an end to this form of violence.

Tying up of various government organizations with non-government organizations working to fight the problems generated by domestic violence too would be of great help towards the cause.

As such there is need for strong and collective public support, stringent laws and quick response time by police, judiciary and administration and efficient and effective system to come to the rescue of victim. Well-defined but simple reference mechanism ought to be readily available.

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Redefining the Concept of Security in the Age of Globalization

Abstract

State centric or military security prevalent during the post-11 war period has undergone tremendous changes. New threats have emerged since the end of cold war which are not only non-military in nature but spread over the borders of nation-states make them unable to face with. The nation-states are facing security problems which invites not only the attention of a particular region but the whole world. These threats are beyond the capacity of nation-states and needs cooperation and coordination of whole world for their solution. Threats to security should take into account wellbeing of the people, the health of its citizens and the environment, political stability and social harmony. They have changed the nature of war and peace and made governments unstable. They lie beyond the capacity of nation-states to handle them. The paper seeks to assess the security scenario in the age of globalization that how the concept of security has undergone various changes in the modern age of communication. It attempts to highlight the shift of security from purely military sophistication during the cold war to non military threats of post-cold war period.

Key Words

Security, globalization, non-military threats, environment, cyber security, Human Security etc**,**

1. Introduction

Traditionally the concept of security was constructed around the nation-states wherein the security meant the protection of sovereignty and territorial integrity of state from the external military threats. External dimensions of security had preoccupied the attention of scholars and states alike as Security was always associated with military aspects. States have always concentrated on military threats and often ignored other aspects having harmful effects for human life, thereby reducing the total security. It contributed to a pervasive militarization of

international relations that increased global insecurity in the end.[1] States both strong and weak sought to protect themselves through acquisition of nuclear weapons or building or creating war alliances, to avert dangers of aggressions, territorial occupation and military intervention from outside. Recent history is witness to several armed conflicts in various regions of the world during the period 1945-1990. This was the essence of national security, which dominated security analysis and policy making during the cold war period. Certain changes in world politics in recent years, such as the rising importance of economics, role and influence of non-state actors etc., has hastened the need, to come to terms with widening concept of security.[2]

2. Need for Common Security

In the 21st century, it is fair to say that the traditional concept of security employed in international relations—which tends to focus on military threats—has become increasingly anachronistic. The increasing trend of interdependence made possible by the process of globalization has challenged the concept of security based on military sophistication of cold war period or national security.[3] A conceptual transition is taking place from a Cold War perspective that visualized an enemy expressed in strongly military actions carried out by a state, to a post-Cold War perspective in which threats are diffused, the weight of military factors has diminished and many of the threats appear not to be linked to state actors, and even not to be linked to any particular territory. The Globalization of security has not only brought us the benefits but also the ill effects. The bad news about globalization is the way, in which many previously domestic problems in particular states and societies, have now become global concerns. Security now encompasses potential danger to the well being of the people, their health, the environment; other ethnic and intercommunal conflicts frequently spill over beyond

1 Richard H. Ullman, Redefining Security, International Security, Vol. 8, No. 1 (Summer, 1983), http://www.jstor.org/stable/2538489, p, 4.

2 Special Issue: 'The Non-Military Aspects of Strategy', Survival, Vol. 31, No 6 1989,

3 Paul R. Viotti, Mark V. Kauppi, International Relations and World Politics, security, economy, identity, Dorling Kinderley, India, 2007, p, 4.

state borders, often interstate conflicts threaten the international peace and security. It demonstrates more strongly than in previous eras the need to solve the problems of millions of human beings adversely affected by enormous and growing political, economic, and social, health, personal and cultural insecurities.[4].[5] Today we are facing less predictable and stable global situation wherein, world economy is lurching from one crisis to another. Security fears of a completely different nature and scope have arisen. Fears of global warming and the failure of theoreticians to come with alternatives may prove very destructive for the humanity in near future.[6]The violence has permeating national borders changing its nature, meaning and scope. Environment pollution across borders too constitutes a violation of human security. A lucrative drugs trade in Central Asia poses a major threat to stability in Central Asia.[7]. Some go further and call for a fundamental reexamination of the concepts, theories, and assumptions used to analyze security problems.[8]

4 Francico Rojas Aravena, Human security: Emerging concept of security in the Twentieth first Century, p. 2.

5 Barry Buzan, People, States and Fear: An Agenda for International Security Studies in the post-Cold War Era, International Security in a Global Age: Security in the Twenty-First Century (London: Cass, 2000); Barry Buzan, Ole Wæver and Jaap de Wilde, Security: A New Framework for Analysis (London, Lynne Rienner, 1998). As early as 1989, the London-based International Institute for Strategic Studies published a special issue of its journal to the non-military aspects of what it calls 'strategy', indicating a new way of looking at security issues. Since then, an increasing number of strategic specialists, in particular those belonging to the Copenhagen School, have opened up the subject of international security studies from its narrow traditions and linked it to the wider arena of international studies

6 David Armstrong, Valeria Bello, Julie Gibson, Civil Society and International governance; the role of non state actors- in the global and regional regulatory, Vol. 10 of Routledge/ Garnet series: Europe in the world- Routledge and Garnet series, Taylor and Francis UK, 2011, p, 2.

7 Otfreid Hoffe, Democracy in an Age of globalization, Vol. 3 of Studies in Global Justice, Springer, 2007, Netherlands, p, 3.

8 David A. Baldwin, The Concept of Security, Review of International Studies (1997), 23, 5–26, p, 2.

The author therefore, argues that national security cannot be fixated on the nation-state unless an account of the security of other states is guarded. Since the world is moving in the direction of a global security paradigm if this institution-building continues it may lead to complexes of common practices, shared rules of behavior, and further capabilities for the enforcement of these rules. The above discussion simply indicates that how the concept of security has changed over a period of time owing to the changes of globalization. Globalization has made security issue a really debatable and nations-states cannot be now able to demarcate their lines as far as their security is concerned. Here, in this paper it is not possible to analyze every dimension of the problem so the author has taken human security and cyber security as the tools of experiment.

3. CHANGING DIMENSIONS OF SECURITY IN POST-WAR PERIOD

In the post-Cold war era, there has been a qualitative shift in the perceptions about threats to human security.. The cold war related hopes and expectations about the prospects for peace so widespread at the beginning of 1990s were dashed by the deadly conflicts that followed. Post-cold war period reflects in fact a growing acceptance of a wider conception of peace and security, empowerment of transnational actors, increasing interdependence of security, emergence of new challenges beyond the capacity of national borders to tackle them. Challenges such as international terrorism, drug trafficking, illegal immigration, transnational crime, environment degradation and resource scarcity reflect new threats to individual security which are increasingly becoming international or transnational in nature.[9] The ethnocentric and militarized concepts of security have become outdated in the eyes of nation-states.

Instead, nation-states have argued for an expanded conception of security beyond the limits of parochial national security to include other emerging trends in the arena of security. Burry Buzan, in his study,

9 Manoj Gupta, Indian Ocean Region: Maritime Regimes for Regional Cooperation, Springer, Australia, 2010, p, 51.

people, states and fear, argues for broader concept of security which includes political, economic, societal, environmental as well as military aspects based an international consideration. These debates call for considering security from a global perspective rather than that of individual nations besides the idea of common security.

Recent cases have shown how civil wars changed their scope and implications. More conflicts occurred within countries in the form of civil wars or intra-state conflicts than conflicts between them. The use of Women and children in the conflict, ethnic cleaning in Bosnia-Herzegovina and Rwanda, forcible use of children in the conflicts are live examples of changing nature of wars in post-Cold war period. Sexual violence in conflict is a serious, present-day crisis affecting millions of people around the world. It is used by political and military leaders to achieve political, military and economic ends, destroying the very fabric of society. Practically every day, the UN system receives reports from the field about sexual violence used as a tool or tactic of war. It is a silent, cheap and effective weapon with serious and long-lasting effects, thereby thwart the chances of building an enduring peace.[10]. The 9/11 ugly episode which shook the big power, has changed the course of world politics, as the non state actors became important viz-a-viz nation-states, which has made the international relation more complicated and prone to security susceptibility. [11]Major terrorist attacks in Europe, Asia, Africa, and North America have demonstrated that no matter where one lives, how much money one has, or how powerful one's country is, there is no such thing as absolute security. The Libyan civil war crisis, Tunisian crisis have put the whole Middle East in trouble. The roots of war were reported to have started over unemployment, inflation, corruption, and poor living conditions. To call

10 See it on , http://www.huffingtonpost.com/margot-wallstrom/ending-rape-as-a-war-tact_b_1630165.html

11 Eurasia review, News and analysis, dated august 2012, http://www.eurasiareview.com/29082012-legal-trade-in-small-arms-doubles-in-sixyears/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+eurasiareview%2FVsnE+%28Eurasia+Review%29

them civil wars is a misnomer for they are truly uncivil on account of reckless use of small weapons, which have brought miseries to the millions of innocent civilians. Insecurity clearly transcends socioeconomic and geographic boundaries; the sources of insecurity differ considerably depending on whether one lives in North America or Western Europe.[12] Richard Ullman argues that "defining national security merely (or even primarily) in military terms conveys a profoundly false image of reality." He suggests a broader definition: A threat to national security is an action or sequence of events that (1) threatens drastically and over a relatively brief span of time to degrade the quality of life for the inhabitants of a state or (2) threatens significantly to narrow the range of policy choices available to the government of a state or to private nongovernmental entities (persons, groups, corporations) within the state.[13]

4. Concept of Human Security

State- centric type of security prevalent during the Cold War period is being replaced by the growing concerns about human security. The concept of human security goes beyond the mere physical existence. Now nation-states see the need for a more comprehensive and sustainable view of peace and security that emphasize “root causes” of conflict, structural shifts beyond that “absence of war,” human protection and development. The shift from inter-war to intra-state conflicts, exposed number of state structures to unexpected stresses, for which they were ill- equipped.[14] It included clean and free from pollution environment otherwise quite saturated and hardly good for healthy life.

12 Dan Caldwell, Robert E. Williams, Robert E. Williams, Jr., Seeking Security in an Insecure World, Rowman & Littlefield, 2011, United Kingdom, p, 2.

13 Helga Haftendorn, The Security Puzzle: Theory-Building and Discipline-Building in International Security, International Studies Quarterly, Vol. 35, No. 1 (Mar., 1991), p, 5.

14 Report, Human Security And Peace building In Africa: The Need For An Inclusive Approach , New York, 2009, p, 5. http://www.un.org/africa/osaa/reports/human_security_peacebuilding_africa.pdf

The environment degradation does not afflict any particular nation or region but has engulfed the whole world in its domain. The so called luxuries of modern man are proving themselves **Frankenstein monster**. Accumulations of things have led us nowhere except destruction and self alienation. The so called progress of modern man is inviting ruins to human civilization. We should think of every possibility to save and sustain life on this very planet, otherwise, security of any one individual or nation or region will be impossible.

The risks associated with globalization have made nation-states prone to insecurity which is beyond their capacity. Globalization and economic pressures have generated social tensions within the states which have international implications.[15] The major failures of economic globalization have put human security at risk. Human Development Report of 1994, issued by the United Nations Development Programme calls upon the nation-state to ensure human security which includes seven variables:

"Economic security, Food security, Health security, Environmental security, Personal security, Community security and Political security which made the concept of security broad significant" [16].

The concept of human development came on the forefront stressing on building human capabilities to confront and overcome poverty, illiteracy, and diseases, discrimination, restrictions on political freedom and the threat of violent conflict. The economic gaps created through globalization and capitalistic systems of corporate sector are mainly responsible for economic deprivation in developing world. A recent development has demonstrated how Euro crisis have shattered the dreams of economic security.[17] Since the late 1970s, resources and

15 John Baylis, International security and global security in the post-cold war era, p, 4. http://jeffreyfields.net/pols/Baylis%20on%20security.pdf

16 John Baylis. Steve Smith, Patricia Owens, The Globalization of World Politics: An introduction to international relations, Oxford University Press, 2008, p, 492.

17 By Rosa Balfour, Janis A. Emmanouilidis, Fabian Zuleeg, Political trends and priorities 2011-2012, December 2010,p, 4.

wealth has considerably shifted from South to North and from poor to rich, thereby widen and deepening the gaps between the people of the world.[18] The introduction of Structural adjustment progammes through IMF and World Bank threatened the most basic needs of human beings like subsidized foodstuffs, medicine and other basic public services that are fundamental to human security. UNICEF's efforts to study the impact of structural adjustment on the health, nutrition, and education of children were particularly influential in this regard. Capturing these concerns, Mahbub ul-Haq launched the United Nations' Human Development Report in 1990. In its report, the United Nations Development Program (UNDP) argued that development must be focused on people (even though grouped by country) rather than the security of their national boundaries, and on advancing health, education, and political freedom in addition to economic wellbeing.[19] The economic deprivation has led to the resistance movements in the third world countries. This is the case of globalization from above, here the gains of one become the losses for another or what is called a zero-sum game. It is antidemocratic, as it snatches livelihood of people in general, creating alienation among them in the long run. Globalization from below reflects the diverse and fragmented forms of resistance and support for the extremist wings in the society. The uneven impact of this global economic restructuring has been fundamental in generating resistance against its imposition in all the regions of the world. As long as, the globalization is one sided, world will suffer from all ills as it suffered in the past. The challenge for the twentieth first century, for both the industrialized and developing world is whether a mutually beneficial partnership can be forged, to manage the globalization, for all humanity instead of selected few.[20]

18 Caroline Thomas, Wilkin, Globalization, human Security, and the African Experience, Lynne Rienner, USA, 1999, p, 38.

19 Gary King Christopher J. L. Murray, Rethinking Human Security, Political Science Quarterly, Vol. 116, No. 4, 2001-2002,p, 4.

20 Moses N. Kiggundu, Managing Globalization in Developing Countries and Transition Economies: Building Capacities for a Changing World, Greenwood Publishing Group USA, 2002, p, 9.

The economic growth, as we currently know, requires more energy use, thereby creating emissions and wastes, and an unending thrust for natural resources. Whether the planet can accommodate all of these demands remains an open question. The case of small island countries, like Nauru, Kiribati that are facing the danger of submerging in the sea waters, because of the climate change have changed the scope and nature of security in the globalized age. The polluted coastlines, the climatic extremes, the accelerating deforestation and flooding have plagued the planet.[21] The Forest fires in Indonesia in the recent years have caused great concern in its neighbourhood countries. Droughts in Africa are caused by environmental degradation because of the economic liberalization and privatization. The danger of economic deprivation and political persecution has fuelled refugee flows to neighboring and distant places. Displacement of people has caused tremendous trouble for both refugees, as well as, asylum states. Ethnic and religious conflicts threaten to ignite widespread hostilities in Central and Eastern Europe. The Syrian conflict has claimed up to 20,000 lives since March 2011, according to estimates by various opposition groups and the UN. The UN refugee agency has registered almost 150,000 refugees in four countries bordering Syria. Weapons of mass destruction may reach the hands of untested and unstable powers and new threats from old rivalries may cause serious damage to humanity. At the same time we are facing a world where borders matter less and less, a world that demands joining with other nations to face challenges that range from overpopulation to AIDs, to the very destruction of planet's life support system.

Environmental decline occasionally leads directly to conflict, especially when scarce water resources are to be shared. Generally, however, its impact on nations security is felt in the downward pull on economic performance and, therefore, on political stability. The underlying cause of turmoil is often ignored; instead governments

21 Jessica Tuchman Mathews, Redefining Security, foreign affairs, Vol. 68, No. 2 (spring, 1989), p,5.

address the poverty and instability that are its results.[22] Human suffering and turmoil make countries ripe for authoritarian government or external sub version. Environmental refugees spread the disruption across national borders. Haiti, Haitians are by no means the world's only environmental refugees. In Indonesia, Central America and sub-Saharan Africa, millions have been forced to leave their homes in past because of the loss of tree cover, the disappearance of soil, and other environmental ills making it impossible to grow food. Sudan, despite its civil war, has taken in more than a million refugees from Ethiopia, Uganda and Chad. Climate change unquestionably has the potential to destabilize whole societies and the threat of mass migration driven by fundamental economic need also rapidly globalize a regional problem.

That migration-caused by many factors-has given rise to an explosive growth in the population of most Third World cities. Many are ringed by shantytowns containing millions of squatters, a high proportion of them unemployed, malnourished, and living in squalor condition.[23]Experts have argued about the earth's capacity to support ever increasing human population. Can the earth produce enough food to feed 10 billion? The scarce resources are facing heavy and unsustainable demand from users of all kinds; a short of rainfall on time can make millions of people hungry. If the current water policies continue, farmers will indeed find it difficult to meet the world's food security. Water scarcity can lead to declining food supply and increasing food prices. Excessive diversion of water and overdraft of groundwater have already caused environmental problems in many regions around the world.[24] Over the coming decades the land devoted to cultivating food

22 Jessica Tuchman Mathews, Redefining Security, foreign affairs, Vol. 68, No. 2 (spring, 1989), p,9.

23 Sean M Lynn- Jones, Global Dangers: Changing Dimensions of International Security, MIT Press, 1995, USA, p, 27.

24 Mark W. Rosegrant, Ximing Cai, Sarah A. Cline, Global Water Outlook to 2025: Averting an Impending Crisis, 2020 Vision for Food, Agriculture, and the Environment Initiative International Food Policy Research Institute Washington D.C., U.S.A., International Water Management Institute Colombo, Sri Lanka, 2002, p, 8.

crops will become scarce in the world because of the urbanization, soil degradation and the slow growth in irrigation investment. Each year some 17 million people die due to preventable curable disease such as diarrhea, malaria and measles, three million of which are children. In 1993 acute respiratory infections claimed 4.1 million lives. [25]

If such resource over exploitation and population trends is not addressed, the resulting economic decline leads to frustration, resentment, domestic unrest or even civil war. Human suffering and turmoil make countries ripe for authoritarian government or external sub version. The oceans are presently rising by one-half inch per decade, enough to cause serious erosion and destruction to the human population settled along the coastal areas. The projected rise is one to four feet by the year 2050. Such a large rise in the sea level would inundate vast coastal regions, erode shorelines, destroy coastal marshes and swamps (areas of very high biological productivity), pollute water supplies through the intrusion of salt water, and put at high risk the vastly disproportionate share of the world's economic wealth that is packed along coastlines.

Increasingly, security is being defined as the security of individuals as human beings as such, and not only as citizens of a particular state. To preserve security, the entire human environment is being taken into consideration, including the need to resolve environmental problems and ensure a sustainable future. Despite these changes, the question remains: Do the new challenges to security justify a revised concept of security that includes the environment? Or would this 'stretch' the security concept far beyond its academic and political potential? Most existing international environmental treaties are inadequate because they fail to take these facts into account. These treaties are generally weak in compliance or enforcement measures - if indeed they provide for such measures at all. International agreements are generally a result of processes of intergovernmental negotiations based on notions of state

25 Jon Barnett, the Meaning of Environmental Security: Ecological Politics and Policy in the New Security Era, Zed Books, 2001, UK, 18.

sovereignty that permit clashes of interest perceptions as a legitimate reason for not signing such treaties recent conferences on global warming) or for postponing signature. The incentives for taking protective steps depend on a state's vulnerability to a potential environmental threat. Low-lying states like the Netherlands and the Maldives have particularly strong incentives to have CO2 emissions reduced to prevent global warming because rising sea levels represent an existential threat to them.[26]

5. Cyber Security

A group of governmental experts (GGE), set up by the UN Secretary General, gave a report in 2010 on "developments in the field of ICT in the context of international security". The report noted that there was increasing evidence that states were developing ICTs as "instruments of warfare and intelligence, and for political purposes". The UNGA resolution of 8 December 2010 **(A/RES/65/41)** deals with the impact of ICT on international security. The underlying concern is that ICT should not be used to destabilize international peace and stability. With greater connectivity, this divide is narrowing and every citizen or aspect of life is vulnerable. It is also an important constituent of NCW. The cyber realm, like the universe, is expanding and it is estimated that by 2015 there will be almost double the number of devices connected to the Internet as there are people.[27]

The world of cyber-crime, cyber-terrorism, and cyber-warfare is truly a wild, unruly, and ungoverned place. The cyber security currently presents one of the "most urgent national security problems. Computer security company McAfee estimates that as of 2007 at least 120 countries were engaging in research to use the internet for war fighting purposes, including US and NATO, if not the entire world.[28] The cases

26 Ina Graeger, Environmental Security, Journal of Peace Research, vol. 33, no. 1, 1996, International Peace Research Institute, Oslo (PRIO), p, 5.

27 IDSA Task Force Report March 2012, India's Cyber Security Challenge, p, 27.

28 Ryan T. Kaminski, Escaping the Cyber State of Nature: Cyber Deterrence and International Institutions, Columbia University, New York, USA, p.2. http://www.ccdcoe.org/publications/2010proceedings/Kaminski%20%20E

include cyber attacks against Estonia in April 2007, and Georgia in August 2008. The joint Israeli-U.S. Cyberwar cyber-attacks have decimated internet traffic within Iran. This is a continuation of a joint cyber-terror campaign wherein both these countries have been collaborating all the way since 2006, according to the latest findings from Kaspersky Labs.[29]

The impact of HIV/AIDs, political and military instability and the complex effects of humanitarian assistance, might be exploited by their adversaries utilizing cyberspace for strategic ends. President Barack Obama said in May 2009, 'It's the great irony of our Information Age — the very technologies that empower us to create and to build also empower those who would disrupt and destroy'.[30] Information is becoming a strategic resource that might prove as valuable and influential for Netwar in the post-industrial era as capital and labor have been in the industrial age. Netwar refers to information-related conflict at a grand level between nations or societies. It means trying to disrupt, damage, or modify what a target population "knows" or thinks it knows about itself and the world around it. Cyberwar refers to conducting, and preparing to conduct, military operations according to information-related principles. It means disrupting if not destroying the information and communications systems.[31] The Obama administration's Cyberspace

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scaping%20the%20Cyber%20State%20of%20Nature%20Cyber%20deterrence%20and%20International%20Institutions.pdf

29 Richard Silverstein, US-Israeli Cyber-Attacks Against Iran Continue With Assault On Internet, Eurasia Review News and Analysis, Sunday, October 21, 2012, p, 1. http://www.eurasiareview.com/03102012-us-israeli-cyber-attacks-against-iran-continue-with-assault-on-internet oped/?utm_source=feedburner\&utm_medium=email&utm_campaign=Feed%3A+eurasiareview%2FVsnE+%28Eurasia+Review%29

30 Tim Stevens, A Cyber war of Ideas? Deterrence and Norms in Cyberspace, Contemporary Security Policy, 33:1, Routledge, 2012, P, 2.

31 John Arquilla and David Ronfeld, Cyber war is Coming p, 30. http://www.rand.org/content/dam/rand/pubs/monograph_reports/MR880/MR880.ch2.pf, Through the Shanghai Cooperation Organization (SCO), in 2009 adopted an accord which defined 'information war' as 'dissemination

Policy Review (2009) also makes a mention of deterrence in its introduction. The UN Group of Governmental Experts (GGE) on Developments in the Field of Information and Telecommunications in the Context of International Security makes repeated reference to the development of 'norms pertaining to State use of ICTs, to reduce collective risk and protect critical national and international infrastructure.[32] In late 2011, China, Russia, Tajikistan and Uzbekistan proposed a new code of conduct for consideration by the UN General Assembly.[33]

Stuxnet shows how malicious code can be used to deal serious setbacks to a country's nuclear infrastructure. Wiki Leaks illustrates what can happen when an individual whistle –blower within an organization decides to share proprietary information with the world. The wiki Leaks website encourages transparency and gives individuals a relatively safe secure online environment within which to pursue processes of cyber-espionage. Together these cases reveal that cyber security can pose state against individual and individual against the state. As 2011 New York Times article estimated that Iran lost one-fifth of its nuclear centrifuges through this attack. The Stuxnet virus bypassed computers not connected to internet uploaded through universal serial us either intentionally or unknowingly.[34] In the recent cyber-espionage operation, brought to light in 2009 by Information Warfare Monitor and dubbed "GhostNet"[35], it emerged that computer systems belonging to

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of information harmful to social and political, social and economic systems, as well as spiritual, moral and cultural spheres of other States'

32 United Nations Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, Note by the Secretary-General, 30 July 2010, A/65/201, www.unidir.org/pdf/activites/pdf5-act483.pdf

33 Tim Stevens, A Cyber war of Ideas? Deterrence and Norms in Cyberspace, Contemporary Security Policy, 33:1, Routledge, 2012, P, 15.

34 Kim J. Andreasson, Cybersecurity: Public Sector Threats and Responses, Volume 165 of Public Administration and Public Policy, CRC Press, Taylor and Francis New York, 2011, p, 38.

35 Ghost Net (simplified Chinese) is the name given by researchers at the information warfare monitor to a large-scale cyber spying operation

ministries, embassies and other government offices of India, among others, were infiltrated and sensitive documents were infiltrated.[36]

The increasing centrality of cyberspace to human existence is exemplified by facts and figures brought out recently by the International Telecommunications Union (ITU), according to which the number of Internet users has doubled between 2005 and 2010 and surpasses two billion. India currently has the fastest growing user base for Face book and Twitter, the two top social networking sites. In terms of contribution to the economy, the ICT sector has grown at an annual compounded rate of 33% over the last decade. The contribution of the IT industry to GDP increased from 5.2% in 2006-7 to 6.4% in 2010-11.

Cyber threats can be disaggregated, based on the perpetrators and their motives, into four baskets: cyber espionage, cyber warfare, cyber terrorism, and cyber crime. Cyber attackers use numerous vulnerabilities in cyberspace to commit these acts. They exploit the weaknesses in software and hardware design through the use of malware. The past decade in India has brought about a dramatic change in terms of technology: the internet, satellite stations, and the social networks brought the middle class the knowledge that there are other ways to live, and that they deserve more – more freedom, more democracy, more human rights, progress for women, employment, and release from the grip of tyrants. The Arab revolt of 2011 has been nicknamed “the Face book revolution,” with good reason. But the power of al-Jazeera and Face book has its own limitations.[37] A Secret cyber arms race is under way as a number of countries build sophisticated software attack capabilities. In India internet is spreading faster, changing the nature of

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discovered in March 2009. The operation is likely associated with an advanced persistent threat. Its command and control infrastructure is based mainly in the People's Republic of China and has infiltrated high-value political, economic and media locations

36 Srijith K Nair, the Case for an India-US Partnership in Cybersecurity, 2010, p, 3. takshashila.org.in/wp-content/.../03/TDD-CyberCollab-SKN-1.pdf

37 Yoel Guzansky and Mark A. Heller, One Year of the Arab Spring: Global and Regional Implications, p, 12.

the security environment. A preview of what could happen by way of these cables being disabled took place in 2008 when a series of outages and cable cuts in undersea cables running through the Suez Canal, in the Persian Gulf and Malaysia caused massive communications disruptions to India and West Asia. Terrorists have been known to have used cyberspace for communication, command and control, propaganda, recruitment, training, and funding purposes. From that perspective, the challenge of non-state actors to national security is extremely grave. Especially in the aftermath of the terrorist attack in Mumbai in November 2008. Parliament amended several times the IT Act, which laid emphasis on cyber terrorism and cyber crime, taking into account these threats. Further actions include the passing of rules such as the Information Technology (Guidelines for Cyber Cafe) Rules, 2011 under the umbrella of the IT Act. In doing so, the government has had to walk a fine balance between the fundamental rights to privacy under the Indian Constitution and national security requirements. There have also been cases of offensive action such as reports of shutting down of power systems. Such attacks on critical infrastructure either singly or in multiples are of serious concern, especially with respect to national security. The draft National Cyber Security Policy (NCSP) mainly covers defensive and response measures and makes no mention of the need to develop offensive capacity. This is must if we are to ensure capability for self-defence granted under Article 51 of the UN Charter. India on its growth path is vulnerable. Located in an unstable region where the larger neighbours possess this capacity, it is logical to assume that the country is under serious threat and constant attack. The IT Act of 2008 covers all actions in this domain. Sections 69, 69A and 69B contain provisions for intercepting, monitoring or blocking traffic where, amongst other reasons, there is a threat to national security. Section 70A covers protection of critical infrastructure.[38] Globalization has given acceptance of technology in the whole world, but in India there is no

38 IDSA Task Force Report March 2012, India's Cyber Security Challenge, p, 43.

such comprehensive legal framework that deals with privacy issue.[39]The susceptibility of Indian security is clear from the Assam riots where the use of social media and mobile telephones were used for exploiting Muslim anger, with disastrous consequences.[40]

6. Conclusion

The realist's belief that security is state-centric and nation-states are ultimate savior of life within its domain seems either irrelevant or absurd. New challenges have emerged after the post-cold war period which goes beyond the capacity of individual nation-states. These challenges emerged in the form of human security; cyber security etc transcended the boundaries of nation-states made them susceptible to insecurity, unsafe and fragile.

Richard Ullman argues that "defining national security merely or even primarily in military terms conveys a profoundly false image of reality." He suggests a broader definition: A threat to national security is an action or sequence of events that threatens drastically and over a relatively brief span of time to degrade the quality of life[41] Global security refers to a system of world order or security. It embodies a program of common security for the global community of men, replacing the strategy of mutual deterrence with one of common security that rests on a commitment to joint survival and a program for arms control and disarmament. Stress should be laid on the transformation of' the international system to make it capable of peaceful and orderly

39 as per growing requirement different countries has introduced different legal framework like DPA (Data Protection Act)1998 UK, ECPA(Electronic Communications Privacy Act of 1986) USA etc. from time to time , Shrikant Ardhapurkar, Privacy and Data Protection in Cyberspace in Indian Environment, International Journal of Engineering Science and Technology, Vol. 2(5), 2010, 942-951,p,2.

40 August 24, 2012, Cyber Counter-Intelligence: Need for Finesse – Analysis,http://www.eurasiareview.com/24082012-cyber-counter-intelligence-need-for-inesseanalysis/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+eurasiareview%2FVsnE+%28Eurasia+Review%29,

41 Notions of Security, Shifting Concepts and Perspectives, 2007, p, 18. August 24, 2012

change, suitable for trade and travel, and conducive to the intercultural exchange of ideas and experience.

Against this realist design, Kant (1795/1954) proposes a scheme of "perpetual peace" as a moral norm to be followed by sensible men. His proposal is based on the conviction that the system of nation-states and of dominating national interests can be restructured by an enlightened political order-a republican constitution, a federal state system, and a global citizenship-to forge a community of mankind. For him a compelling reason for nation-states to subsume their national interests under the rule of international law is the rational insight and the moral commitment of individual citizens to a community of mankind.[42]

Given the increasingly central role played by networked infrastructures in the security of a nation and that by cyber power on world affairs, world should develop capabilities to protect their critical systems. There is an urgent need to acquire these capabilities. A strategic collaboration among the nation-states presents a good way for world to stand with incoming uncertainties and insecurities. As with any other technology, collaborations can go a long way in not only gaining ground faster but also allowing for the creation of mutually beneficial frameworks of operation. As far as human security is concerned which transcended the boundaries became the concern of every being on earth can be promoted only through devising the common rules governing the utilization of scarce life saving resources. Maximum life saving resources should be including in the common property list, so that any overexploitation, can be curbed at earlier stage with the pressure of world community.

Firdous Ahmad*

42 Helga Haftendorn , The Security Puzzle: Theory-Building and Discipline-Building in International Security, International Studies Quarterly, Vol. 35, No. 1 (Mar., 1991), Blackwell Publishing, p, 6.

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Criminal Liability and Medical Negligence: An Indian Perspective

Introduction:

Medical negligence means negligence resulting from the failure on the part of the doctor/paramedical staff to act in accordance with medical standards in vogue, which are being practiced ordinarily by a reasonable competent man practicing the same art. If during the course of treatment, a patient suffers injury or dies due to lack of care and reasonable skill, it is negligence. Though various laws, rules and regulations provide a guideline to the doctors/paramedical staff for performance of their ,day to day, duties but it has been found that the doctors are not performing their duties as per the law and in number of cases they are found to be negligent. At the national level number of cases of medical negligence is regularly reported and the state of Jammu and Kashmir is not an exception. The recent incidence of child mortality in one of the city's hospital is a glaring example of this phenomenon[1]. This paper is aimed at highlighting the incidence of medical negligence and doctor's duty of care towards their patients as a legal obligation.

1. Criminal Law and Medical Negligence

Law of crimes does not deal with medical negligence specifically, but any act of medical negligence, causing hurt, grievous hurt, or death may fall within the scope of penal law[2]. A doctor may be guilty under

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1 In the state of Jammu & Kashmir recently more than 800 children died within a span of few weeks in one of the primary Children's hospital reportedly due to gross medical negligence. See Greater Kashmir October 2012.

2 Various provisions of Indian Penal Code provide for offences where injury or death is caused by negligence or rashness, for example, (a) Sec. 304-A of IPC lays down: Whoever causes the death of any person by doing any rash or negligent act not amounting to capable homicide, shall be punished with imprisonment of either description for a term which may extend to two years or with fine or both .(b) Sec. 336 of IPC lays down: whoever does any act so rashly or negligently as to endanger human life or the

any of the above mentioned provisions depending on the nature and gravity of the offence and the rashness or negligence must be such, as can fairly be described criminal. Mere carelessness is not sufficient to hold a person liable.[3] High degree of negligence is necessary to prove the charge of criminal negligence U/S 304-A. IPC. For fixing criminal liability on a doctor or surgeon, the standard of negligence required to be proved should be as high as can be described as surgeon, the standard of negligence required to be proved should be as high as can be described as "gross negligence." It is not merely a lack of necessary care, attention and skill.[4] The Supreme Court in Suresh Gupta's case held:

Thus, a doctor can't be held criminally responsible for a patient's death unless his negligence or incompetence showed such disregard for life and safety of his patients as to amount to crime against the state ... when a patient agrees to go for medical treatment or surgical operation, every careless act of the medical man can't be termed as 'criminal' it can be termed criminal only when the medical man exhibits as gross lack of competence or inaction and wanton indifference to his patients

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personal safety of others, shall be published with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred and fifty rupees, or with both.(c)Sec. 337 of IPC lays down: whoever causes hurt to any person by doing any act harshly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to five hundred rupees or both.(d) Sec. 338 of IPC lays down: whoever causes grievous hurt to any person by doing any act of so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both.

3 Kanji Juma Khoja v. Emperor, AIR. 1938. Sind. 100.

4 R.V. Ademako [1994 (3) All E.R.79)

safety and which is found to have arisen from ignorance gross negligence.[5]

The court further held that where a patient's death results merely from 'Error of judgment' or "an accident, no criminal liability should be attached to it[6]. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but wouldn't suffice to hold him criminally liable.[7] The following concluding observation of the learned authors as quoted by Supreme Court are apt on the subject and a useful guide to the courts in dealing with doctors guilty of negligence leading to death of their patients[8]:

Criminal punishment carries substantial moral overtones. The doctrine of strict liability allows for criminal conviction in the absence of more blame worthiness. Only in very limited circumstances Conviction of any substantial criminal offence requires that the accused person should have acted with a morally blame worthy state of mind. Recklessness and deliberate wrong doing, levels four and five are classification of blame, are normally blame worthy but any conduct falling short of that should not be the subject of criminal liability[9].

To establish medical negligence, there should be gross lack of competency or gross intention, or wanton indifference to the patients safety, which may arise from gross ignorance of the science of medicine and surgery, either in the application and selection of remedies or lack of proper skill in the use of instruments and failure to give proper attention to the patient that is to say in order to put criminal responsibility upon doctors the facts must be such that the negligence of the accused went

5 Dr. Suresh Gupta v.Govt. Of (NCT) of Delhi and another (Cr. Appeal No. 778 of 2004, SLP (Cri) No. 2931 of 2003.

6 Ibid

7 Id.

8 Alan Merry and Alexander McCall Smith; "Errors, medicine and the law."pp. 247-248.

9 Quoted by the Supreme Court in the case of Suresh Gupta (supra note 5).

beyond a mere matter of comprehension and showed such disregard for the life and safety of others as to amount to a crime. Beg J of Allahabad High Court in *Siva Ram-v-State* observed [10]:

Criminal negligence is a gross and culpable neglect, that is to say a failure to exercise that care, and failure to take that precaution which having regard to the circumstances, it was the imperative duty of the individual, to take. Culpable rashness is acting with the consciousness that mischievous consequences that mischievous consequences are likely to follow although the individual hopes, even though he hopes sincerely that such consequences may not follow. The criminality lies in not taking the precautions to prevent the happenings of the consequences in the hope that they may not happen. The law does not permit a man to be unconscious on a hope, however earnest or honest that hope may be[11].

2. Negligence Vs Rashness

Criminal rashness means hazarding a dangerous or wanton act with the knowledge that it is so and that it may cause injury but without intention to cause injury or knowledge that it will probably be caused. For example, a Medical practitioner performing termination of pregnancy in its sixth month resulting in the patient's death is a clear case of negligence and indifference because of its probable effect. To make a person liable the death or injury should have been the direct result of a rash or negligent act and that act must be the direct or proximate cause without the intervention of another's negligence. It must be cause causans and not the cause sine qua non. In Public Prosecutor v. E.O. Christian and others,[12] Andhra Pradesh High Court observed that:

To make out an offence under Section 304-A of IPC, the prosecution must establish that the negligence of the accused went beyond mere carelessness and that the death of the person involved is the

10 AIR. 1995, All. 196.

11 Ibid

12 1971, ACJ 20. A.P.

direct result or cause causans of the rash or negligent act committed by the person without the intervention of another's negligence.

In *R.v.Batesman*[13] Dr. Batesman was prosecuted for manslaughter and the charge of negligence made against him revolved round-

i. Causing the internal ruptures in performing the operation;

ii. Removing part of the uterus along with the placenta;

iii. Delay in sending the patient to the infirmary.

The trial court convicted him. But the court of Appeal observed: in order to establish criminal liability the facts must show that, the negligence of the accused went beyond a mere matter of carelessness and was very grave. It was done in such a way as having no regard for the life and safety of patients.

3. Criteria for Medical Negligence

In United Kingdom the courts have held that in order to establish the negligence in medical cases, the following criteria may be applied:[14]

a. Indifference to an obvious risk of injury to health.

b. Obvious foresight of the risk coupled with the determination nevertheless to run it.

c. An appreciation of the risk coupled with an intention to avoid it, but the attempted avoidance involved such a high degree of negligence as the jury consider it justifies conviction; and

d. Inattention or failure to advert to a serious risk which goes beyond "mere inadvertence" in respect of an obvious and important matter which the defendant's duty demanded, he should address.

In India a doctor registered as a homeopathic practitioner is guilty of negligence in prescribing allopathic medicines[15]. In *Juggan*

13 1925, All. E.R. 49; 94.

14 R.V. Adamko (1993). All E.R. 935.

15 A person who is registered as homeopathic practitioner can practice homeopathic medicine only and he cannot be registered under India Medical Council Act, 1956 or under the State Medical Council Act, because of the restriction on registrations of persons not possessing the

khan v. *State* of *M.P.*[16] registered homeopath administered to the patient suffering from guinea worm, 24 drops of stramonium and a leaf of dhatura without studying its effect and the patient died of poisoning. This rash and negligent act of the doctor to prescribe poisonous medicines without studying their probable effect amounted to taking a hazard whereby injury was the natural consequence. The criminality lies in running the risk of doing such an act with recklessness or indifference to the consequences. The Apex Court held[17]:

The Supreme Court while explaining the medical negligence and responsibility of doctor observed as under that in order to make a doctor criminally responsible for the death of a patient, it must be established that there was negligence or incompetence on the doctor's part which went beyond a mere question of compensation on the basis of civil liability. Criminal liability would arise only if the doctor did something in disregard of the life and safety of the patient.

In *Dr. Krishna Prasad v. State of Karnataka*,[18] where the caesarian operation was conducted under local anesthesia by a doctor possessing a registered degree, the court did not consider such act as negligence.

4. Role of Medical Experts Opinion

Can the case of criminal negligence *be registered without a medical* opinion from expert committee of doctors? The answer to this question sometimes becomes quite crucial. Indian Medical Association {IMA} Punjab claimed they had secured a direction from Director General of Police (DGP) Punjab that no case of criminal negligence be registered against a doctor without a report from an Expert Committee[19]. Similar

requisite qualification. See Poonam Verma v. Ashwin Patel AIR. 1996 SC. 2111.

16 AIR 1965, SC. 831.

17 Jacob Mathew V. State of Punjab and Another, Criminal Appeal No. 144-145 of 2004 decided by the Supreme Court on August 5. 2005

18 1989 (1) ACJ 393

19 Sunday Times Aug 8, 2004:2

situation existed in the State of Delhi where lieutenant Governor issued directions to the Delhi police regarding the arrest of a doctor in medical negligence cases. The Delhi High Court also decided to form guidelines for lower judiciary, as well as, the police to deal with such cases[20]. Hon'ble Supreme Court endorsed the same view on the plea that criminal prosecution of doctors without adequate medical opinion would be a great disservice to the community -as it would shake very fabric of doctor-patient relationship based on mutual confidence and faith. The doctors would be more worried about their own safety instead of giving best treatment to their patients.[21]

However, the opinion of Judiciary is divided over the complexity of cases of negligence. The much debated judgment of Supreme Court in Dr. Suresh Gupta was referred to a larger Bench for reconsideration[22]. The court observed that weighing the degree of carelessness and negligence alleged on the part of the doctor is a difficult task as a higher degree of morally blameworthy conduct is necessary for fixing Criminal liability. The court observed[23]:

To convict, therefore, a doctor, the prosecution has to come out with a case of high degree of negligence on the part of the doctor. The courts have, therefore, always insisted on the case of alleged criminal offence against doctor, causing death of his patient during treatment, that the act complained against the doctor must show negligence or rashness of such a higher degree as to indicate mental state, which can be

20 Fresh rules in Negligence Arrests, The Times of India, Aug 23, 2003:3

21 See supra note 5.

22 A Bench of Mr. Arijit Pasayat and Mr. C.K. Thakkar observed that the words “gross negligence” or “reckless act” did not fall within the definition of Sec. 304-A IPC, defining death due to an act of negligence or the culpable homicide not amounting to murder. See The Tribune, September 10, 2004:1.

23 Ibid

described as totally apathetic towards the patient such gross negligence alone is punishable.

Medical Council of India and State Medical Councils should come forward to strictly implement its regulations[24] over medical profession because the failure of these regulatory bodies to keep check on the erring doctors are the reasons for falling standard of health care in India.

5. Procedure for Filing Complaint in Medical Negligence Cases

A criminal action against a medical practitioner generally begins by a complaint being filed against him by patients, friends or a social activist, though the police can initiate sue motto proceedings. The police generally do not arrest a medical practitioner on the basis of an F.I.R. but may do so in certain cases[25]. Since an offence under section 304-A, 336, 337 and 338 is bailable the question of applying for 'anticipatory bail'[26], does not arise and medical practitioner need not spend efforts to secure this direction from a court apprehending his arrest. A police officer may even discharge a medical practitioner on his executing a bond without sureties for his appearance in investigation. A Magistrate may not issue process unless there is over whelming evidences to the contrary.

6. Burden of Proof

Under normal circumstances, the onus or burden of proof lies heavily on the patient. This has been the practice under English law.

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24 The Indian Medical Council (Professional conduct, Ethics and Etiquettes) regulations (2002)

25 Most of the offences like, 304-A, 336,337 or 338 alleged against the doctors are cognizable, bailable or triable by Magistrate of first class. Schedule to Criminal Procedure Code 1973(J&K 1898).

26 Section 438(1) of Cr. P. C. lays down: when any person has reason to believe that he may be arrested on any acquisition of having committed a non-bailable offence, he may apply to the High Court or Court of Sessions, for direction under the section and that Courts may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

Lord Denning in *Hucks v. Cole*[27] observed that a charge of professional negligence against a medical man was serious. It stood on a different footing to a charge of negligence against a driver of a motor car. The consequences were for more serious. It affected his professional status and reputation. The burden of proof was correspondingly greater. As the charge was so grave, so should the proof be clear with the best skill in the world, things sometimes went amiss in surgical operations, or a medical treatment. Doctor was not to be held negligent simply because something went wrong. Similarly, in *Mohan v.Osbrone*[28] Judge Godasel observed:

I would not for a moment attempt to define a vacua of extent of a surgeons' duty in an operation beyond saying that if he must use reasonable care, nor can I imagine anything more disastrous to the community than to leave it to a jury or to a judge, if sitting alone to lay down what is proper to do in a particular case without the guidance of witnesses who are qualified to speak on the subject.

The Indian courts have followed the suit by declaring that defective treatment cannot always be said to be negligent treatment and the doctor cannot be held responsible for failure in his treatment unless positive evidence including expert evidence is brought on record in support of allegations of negligence, latches and/or deficiency in service on their part.[29]

7. Role of Record

Sometimes the burden of proof can very well be settled if all the treatment records are made available to the patient and also to the doctor. If the patient is not given the medical record or at least the summary of the treatment given by the doctor how the patient can get the opinion of another expert doctor. It is needless to mention that without having the pre-operative and post-operative findings and other investigation reports

27 1968 (118) NLJ 469

28 (1939) 2 K.B 14.

29 See Nagarmal Modi Sewasadan V. Anita Devi. 2002 (1) CPR 320.

no expert can give an opinion whether the treatment/operation was correct or not. Thus, non-production of medical record takes away the opportunity of the complainant to seek an expert opinion.[30] A different observation was, however, earlier made by the National Commission when the patient alleged that the respondent was defiant in rendering services by refusing to part with medical records. It was observed that there can be no question of negligence by reason of such failure to supply the papers unless there was a legal duty cast on the hospital to furnish such documents to a patient. The hospital had duly given to the patient at the time of his discharge, the discharge card and Slip and also a case sheet wherein the particulars of diagnosis and the treatment administered to him had been mentioned. There was no arrangement of hiring of service of the hospital by the patient for consideration with respect to the demand made by patient on the hospital for furnishing such particulars relating to the operation.[31]

With the enforcement of MCI Regulations, 2002 the aforesaid judicial view is likely to shift towards the patient as, now the patient has every right to claim the medical records and hospitals are under obligation to maintain them. However, despite furnishing/filing of medical record, the patient may in some cases, allege fabrication or manipulation of documents, such allegations is at least triable by a civil court. In *Heranbalal Das v. Dr. Ajay Paul,*[32] the complainant while alleging negligence in the performance of cataract operation also alleged fabrications and manipulations of documents against the doctors. The Commission held that the dispute required taking of elaborate oral evidence and adducing of voluminous documentary/documents, and a detailed scrutiny and assessment thereof. Even in such cases if it appears to that forum that the issues raised cannot be determined without

30 See Dr. Shyam Kumar V. Rameshbahi Harmanbahi Kachhiya (CPR)

31 See Poona Medical Foundation V. Maruttrau Tikare. 1995(1) CPR 661 (NC)

32 2001 (2) CPR 498.

taking elaborate evidence, it is open to decline to exercise the jurisdiction and refer the party to his ordinary remedy by way of suit.

In *Basudev Goswani v. Dr. Bhaskar Das*[33] allegation related to orthopedic surgery of right leg of the patient, it was observed that the question whether the surgeon did the operation properly and according to medical science and whether there had been any negligence or carelessness in the operation has to be examined after obtained opinion or evidence of some medico surgical experts. This dispute cannot be decided in a summary procedure. Adjudication of the dispute in hand cannot be done within a time frame. Complainant was directed to take appropriate remedy in Law.

Normally the burden of proof is on the complainant. But under circumstances when the conduct of medical men betrays proper management, the burden shifts on the doctor. In one such case of eye surgery, the diagnosis, the pathology of the disease, the contents of the consent form, the expected treatment and the actual surgery carried out on the patient were all in different directions. It was held, that the patient must prove positive act of omission, but they need not produce evidence to establish the standard of care as the entire surgical procedure is carried out inside the operation theatre in the absence of patient's attendants. Thus the onus of proof shifts upon the opposite parties to substantiate the fact that there was no negligence on their part.[34]

8. Protection to Doctors

If the patients are provided protection for the negligence of doctors equally the doctors rights are also safeguarded. The law provides necessary protection to doctors.[35] The object of this section is to

33 2001 (2) CPR 501,

34 Kedar Nath Sethia V. Dr. P. S. Hardra, 2000 (3) CPR 438.

35 Section 88 IPC reads: Nothing which is not intended to cause death is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause to any person for whose benefit to for it is done in good faith, and who has given a

safeguard people connected with medical profession for acts done in good faith for the benefit of patient. Thus, law intends to protect the surgeons or doctors for justified acts. It should be kept in mind that nobody can be exempted from this crime-

i. If he intended to cause death of patient;
ii. If it is not caused while doing an act for his benefit;
iii. Which was not done in good faith, and
iv. Which was done without patients consent;
v. Consent may not be necessary in certain cases under section 92 of IPC[36].

But 'Consent; and "good faith" can help negligent doctor to escape from liability. At the same time, we can't do away with protection given to the doctors by "Consent" and "good faith," because the doctors will hesitate to operate upon the patients fearing prosecution, if their safeguards are deleted. It will not be out of place to quote the opinion of Denning, L.J in *Roe v.Ministry of Health*,[37] He observed:

We should be doing a disservice to the community at large, if we were to improve liability on hospitals and doctors for everything that happens to go wrong…we must insist on due care for the patient at every point but we must not condemn as negligence, that which is only misadventure.

Again he observes:

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consent, whether, express or implied to suffer the harm or to take the risk of that harm.

36 Sec. 92 of IPC lays down: nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that persons consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent and has no guardian or other person in lawful charge of him from home. It is possible to obtain consent in time for the thing to be done with benefit.

37 (1954) 2 Q.B Pp. 86

That a surgeon operating a table instead of getting on with his work would be forever looking over his shoulder to see, if someone was coming with a dagger… For an action for negligence against a doctor is for him like a dagger.[38]

9. Compensation under Code of Criminal Procedure, 1973

The problem before the patient especially for poor men is that there is no statutory provision specifically enabling the medical negligence victim or his heirs to get compensation. However, according to the Code of Criminal Procedure, 1973, a Court can make orders to pay compensation to the aggrieved person out of the penalty imposed on the accused[39]. Though above provision covers remedy for medical negligence cases also but it has proved to be a paper tiger only because till date no case of compensation to medical negligence victim has been reported.[40]

Lack of awareness on the part of victims, reluctance to help on the part of police, poverty of victims advantageous position of doctors and problems of evidence are the reasons contributing to meager litigations or failure of actions.

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38 Ibid

39 According to Sec. 357 of Cr. P.C. , when a court imposes fine on the accused, it may order that the whole or any part of the fine recovered, be applied in the payment, to any person, for any loss or injury caused by the offence, if such person is entitled to recover compensation in civil court.
Sec. 357(3) of Cr. P. C. Provides that the court may order the accused person to pay by way of compensation, which amount as may be specified in the order to the person, who has suffered any loss or injury by reason of the act for which the accused person has been sentenced.

40 Gour, K.D. Criminal Law, Criminology And Criminal Administration,(2000,Ed),Deep and Deep Publications, New Delhi

10. Professional Duty of Doctors Vis-À-Vis the Operation of Procedural Criminal Law

To hold the wrong doers liable there must be criminal negligence, which depends upon the circumstances of the case, one has to be careful to see that the death, grievous hurt or hurt should have been the direct result of a rash and negligent act of the accused and that act must be proximate and efficient cause without the intervention of another's negligence[41]. This view has been approved by Supreme Court of India in *A.P. Bhett v. State*[42]

A well known social problem which has caused hundreds of unnecessary deaths has been for the fear of police harassment on in cases of people who help accident victims. Ordinary people feel that they may be accused of having caused that accident and doctors feel apprehensive that they may be caught in a legal case if they start treating a critically injured patient without first registering the accident with police. Previous moments slip wastefully, and victim dies or is harmed irreparably because even the most civic mind passer bye and doctor refuse to touch him.

However in 1990, an enlightened discussion on the issue of professional duty of doctors vis-a-vis the operation of procedural criminal law in case of road accidents came up for discussion in *Pramanand Kataria V. Union of India*.[43] It was observed in this case that the criminal procedural routine is that the doctor enters the scene only after the procedural formalities are complete. Perhaps medical men are afraid of over stepping their jurisdiction in case they chose to render medical aid. But should it be given low priority as against the enforcement of criminal process?

41 http://www.medindia.net/india health act/consumer protection act and medical profession doctor patient relationship.htm

42 1972 Cr.L.J 671 (SC.).

43 1990 Cr.LJ 671(SC).

Clear perspective of the issue has been unfolded in the above noted case. The court explicitly states that the law does not and should not cause impediments on the path of doctor to attend the victim, particularly in rendering instant assistance to a victim of road accident the rational is that preservation of human life is of paramount importance. The search for the wrongdoer and investigation of the matter with a view to look for the guilty for punishment can follow.

The former aspect is important in view of the doctor's ethical duty, which besides being a professional norm has also been cast as a legal duty under the code with a view to enable the state to fulfill its obligations in the matter of preservation of life. Accordingly, the court said:

No law or state can intervene to avoid/delay the discharge of paramount obligation cast upon the member of medical profession.

In order to safeguard the doctors respects and dignity the court noted as under: It is expected that unnecessary harassment of the members of medical profession either of way of request for adjournment or by way of request for adjournment or by cross examination should be avoided, so that the apprehension that men in the medical profession have, which prevents them from discharging that duty to a suffering person who needs utmost, is removed and a citizen needing the assistance of a man in the medical profession receives."

Thus, Supreme Court has made it clear that treatment of the patient would not wait for arrival of the police or be delayed for completing legal formalities. It has been made clear that imposition of an obligation under the laws governing the profession, together with duty of state under Article 21[44], the professional regulations made for dealing with the

44 Article 21, of the const. provides that nobody can be deprived of his life or personal liberty except according to procedure established by law.

medico-legal cases, can't operate as fetters. The land mark judgment removes many constraints placed upon the medical professionals by the criminal justice system in India and allows them to act rather be "negligent" towards their patient.

11. Conclusion

The frequent and unobstructed increase in medical negligence cases as revealed by the press reports lead any one to conclude that the main reason of increasing medical malpractices and least litigation of medical negligence cases is the arduous task of proving the guilt and secondary, lack of legal awareness. It is submitted that arbitrary exercise of profession without any fear of prosecution or legal action for criminal neglect should be checked by engrafting legal safeguards and imparting legal literary so that no victim of medical malpractices may hesitate to resort to the court and no wrong doer doctor may escape punishment from the grip of penal law. Procedure as to access to justice needs simplification and to least expensive. Free legal aid to the poor, illiterate and innocent victims can be of vital help in such cases.

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Right to Life versus Capital Punishment: A Constitutional Perspective

1. Introduction

The Term Capital Punishment stands for most severe form of punishment. It is the punishment which is to be awarded for the most heinous, grievous and detestable crimes against humanity. While the definition and extent of such crimes vary from country to country, state to state, age to age--- the implication of capital punishment has always been the death sentence. By common usage in jurisprudence, criminology and penology, capital sentence means a sentence of death. There is practically no country in the world where the death penalty did not exist in one form or the other. It has its basis on the early law which believed that in order to eradicate the crime, criminal should be eliminated. But the modern idea of crime and criminality has entirely changed and now the thrust is on reformation rather than retribution. In india the right to life and liberty is the essential part of Indian constitution. After the Maneka Gandhi case[11] the right to life has been made more liberal, it is in this context that a controversy has arisen, whether the capital punishment is constitutional or not. The object of this paper is to highlight this subject in the light of various court decisions and constitutional aspects of capital punishment.

2. Capital Punishment: Constitutional Imperatives

There is nothing in the constitution of India, which expressly holds capital punishment as unconstitutional. However, there are several provisions in the Constitution, such as, the Fundamental Rights and Directive Principles which can be relied upon for challenging the constitutionality of capital punishment. Since most of the countries have abolished capital punishment, it makes the retention of it in India, quite debatable. Before we discuss the constitutional validity of the Capital Punishment in India, it will be proper to discuss the position of capital punishment in other countries also.

2.1. Position in USA

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1 AIR 1978,S.C.597

The constitutionality of capital punishment, as violative of the Eighth Amendment [2] of the constitution was challenged before the American Supreme Court in Furman v Georgia case[3]. The court by a majority of five to four held that capital punishment violated the 8th and 14th Amendment[4]. Five Judges invalidated the Georgia death penalty statute, while four justices delivered the dissent[5]. Justice Brennen declared death penalty in general unconstitutional, as being violative of eighth Amendment of the US Constitution. Explaining the import of the Eight Amendments the learned Judge observed:

At bottom, then, the cruel and unusual punishment clause prohibits the infliction of uncivilized and inhuman punishments. The state even as it punishes must treat its members with respect for their intrinsic worth as human beings. A punishment is 'cruel and unusual' if does not comport with human dignity……"

Justice Marshall also declared death penalty as constitutionally impermissible. The judge referring to the discrimination inherent in it observed:

Usually the poor, the illiterate, the under privileged, the members of the minority group – The man who, because he is without means, and is defended by a court appointed attorney – Who becomes society's sacrificial lamb… …

Mr. Justice Stewart expressed similar sentiments regarding the discriminatory administration of the death sentence.

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2 Eighth Amendment prohibits infliction of cruel and unusual punishments.

3 1972 408 US 239.

4 Fourteenth Amendment incorporates the right to life of an individual.

5 Out of the majority justice, only two judges Brennen J. and Marshall J. declared all capital punishment unconstitutional. The other three judges who constituted the majority declared the death penalty unconstitutional because of certain factors like wide discretion granted to judges and juries and the racial discrimination.

While some judges expressed themselves in favour of abolition of capital sentence in order to achieve "a major milestone in the long road from barbarism", some others expressed a dissenting opinion and felt that the matter was essentially political and properly the domain of the legislature, not the judiciary. As a result of the Furman decision, thirty-five states in USA made changes in the procedural laws to gear up to the constitutional requirements regarding death penalty.

The solution to the Furman objections was sought to be found in one of the following ways by the various states:-

1. Pre-sentence hearing is made essential after the trial to examine the fairness of the death penalty having regard to similar cases.
2. Death sentence is made mandatory for few specified offences i.e. murder and offences against state.

Five state Supreme Courts have held that the death penalty under the above procedures is constitutional. In 1976, the Supreme Court of US delivered judgements in quite a few cases in the light of law laid down by some of the states and held capital punishment to be constitutional. The reasons given by the court in Gregg v. Georgia[6] are given as under:

1. History and precedent do not support the conclusion that the death sentence is a per-se violation of constitution.
2. The argument that it was indecent and uncivilized had been substantially undercut in the last four years (after Furman) because a large segment of the enlightened population regards the death penalty as appropriate and necessary, as seen in the legislation passed in response to Furman.
3. The death sentence served two principal social purposes of retribution and deterrence. The death sentence for murder was:-

a) not without justification
b) not constitutionally severe
c) not invariably disproportionate to the crime

6 428 US 153 49 l.Ed. 2nd 859 [1976]

Similar decisions in Profit v. Flourida[7] and Jurek v. Taras[8] suggest that Death penalty per se is not violative of the constitution. However, in Woodson v. North Carolina[9] and Roberts v. Louisiana[10] the mandatory death penalty for murder including the murder of an on duty law officer has been declared as "un-constitutional, cruel and unusual punishment".

In Coker v. Georgia[11] the death penalty for rape (where the victim is otherwise unharmed) has been prohibited on the same ground; Thus the constitutional interpretation has effectively confined the death penalty to the punishment of certain forms of murder, even though legislative enactments during 1970's showed strong inclinations in many jurisdictions, to retain certain non-homicidal crimes as capital offences and in some cases to preserve the death penalty as a mandatory punishment.

2.2 Position in Britain

English law recognized over 200 capital offences most of which are now considered minor in importance. According to Professor Radzinowicz, each statute was so broadly framed that actual scope of the death penalty was frequently , three or four times, as extensive as the number of capital provisions would seem to indicate. The early penal reformer Sir Samuel Romilly brought proposals for abolition of death penalty. Six times the House of Commons passed the Bill to abolish Capital punishment, but it could not become law as it was believed that death penalty acted as a deterrent and if it was abolished, offences would increase.

Moved by sentiment of human feeling, Bacaria a famous law reformer maintained that since man was not his own creator, he did not have the right to destroy human life, either individually or collectively. It

7 1976 428 US 243
8 (1976) 428 US 262
9 428 US 280[1976]
10 433 US 633 (1977)
11 433 US 584 (1977)

is in ultimate sense cruel, inhuman and degrading punishment, and violates the right to life.

Baccaria , however, claimed that capital punishment could be justified on two occasions:

1. if an execution would prevent a revolution against a popularly established Government;
2. if an execution was the only way to deter others from committing a crime.

2.3. Position in India

In India the issue of capital punishment has been engaging some attention over the last many years but the punishment is still there on the statute book for a few offences. Due to certain changes in the Criminal Procedure Code and the version of the judiciary particularly at the highest level, to this mode of punishment, the use of capital punishment has progressively declined over last many years.

The abolitionists generally speaking, hold that capital punishment can not be justified in terms of retributive purposes in the contemporary civilized world. Even some of those who are for retention of capital punishment, do not bring in the idea of retribution while dealing with the issue of death sentence and instead they rely rather more heavily on the deterrent aspect of the punishment. Nevertheless, there are some eminent authorities who are openly in favour of retaining capital punishment.Dr. Earnest Van Den Haag, a New York Psychologist and author, is of the view that the death penalty has a very strong symbolic value. He offers a rationalization for the death sentence in the following words:-

The motives for the death penalty may include vengeance. Legal vengeance solidifies social solidarity against law-breakers and probably is the only alternative to the disruptive private revenge of those who feel harmed.

The law commission[12] of India also has supported the element of retribution inherent in capital punishment albeit in somewhat subtle form. Retribution and deterrence, it has been pointed out, are not two divergent ends of capital punishment but ultimately merge into one. The process of merger was explained in the following words:-

The fact remains, however, that whenever there is a serious crime, the society feels a sense of disapprobation, if there is any element of retribution in the law, as administered now, it is not the instinct of the man of jungle but rather a refined evolution of that instinct – the feeling that prevails in the public is a fact of which notice is to be taken. The law does not encourage or exploit it for any undesirable ends. Rather, by reserving the death penalty for murder, and thus visiting this gravest crime with the gravest punishment, the law helps the element of retribution merge into the element of deterrence".

The commission also considered the deterrent aspect of capital punishment and concluded that capital punishment does act as a deterrent. It came to this conclusion on the basis of the following factors:-

1. basically, every human being dreads death.

2. Death, as a penalty, stands on a totally different level from imprisonment for life or any other punishment, the difference is one of quality and not merely of degree.

3. No statistical tests were reported in the study to support the strong and unqualified inferences made regarding the failure of the deterrent aspect.

Not only did Professor Ehrlich find the evidence against the deterrent aspect to be unsatisfactory, he claimed from his own studies to have identified a significant reduction in the murder rate due to the use of capital punishment.

12 35th Report ,para 1097, p 337.

3. Courts And Capital Punishment

In India the constitutionality of death penalty was challenged at number, of times, mainly in pursuance of Article-14[13] and Article 21[14]

The question of death penalty has been engaging the attention of constitutional experts, criminologists and those social activists who favour the abolition of death penalty. The leading case which came before the Court for consideration is Jagmohan Singh's Case[15] , where the question of constitutional validity of capital punishment was challenged before the Supreme Court. It was argued that the law relating death sentence is unreasonable and puts an end to fundamental rights granteed under Article 19(1), clauses (a) to (g). It was further argued that unguided discretion vested in the judges to impose death sentence is violative of article 14 and there is no "procedure established by law" to deprive a person of his right to life. Therefore, death sentence is unconstitutional.

The Supreme Court rejected the contention and held that capital punishment can not be regarded as unreasonable per se or 'not in the public interest' and hence could not be said to be violative of Article 19 of the Constitution.

In Rajendra Prasad v. State of UP ,the Supreme Court oberved[16]:

It is fair to mention that the humanistic imperatives of the Indian Constitution ...have hardly been explored by courts in this field of "life and death" at the hands of law. The main focus of our judgment is on this poignant gap in human rights jurisprudence" within the limits of the Penal Code impregnated by the Constitution.

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13 Art. 14 of the Constitution declares: "Euality before law and Equal protection of laws".

14 Art. 21 of the Constitution guarantees "Right to Life and Liberty"

15 AIR 1973 SC 947

16 AIR 1979 SC 916. Krishna Iyer J delivered the judgment and Desai J concurred .

The learned judge was of the opinion that death sentence should be resorted to only where reformation to a reasonable limit, is impossible. Justice Krishna Iyer also said that "special reasons" to be given for imposition of death penalty, should relate to the criminal and not to the crime.

Justice Sen, who gave his dissenting view held: -

The humanistic approach should not obscure our sense of realities when a man commits a crime against the society, by committing a diabolical cold blooded, preplanned murder, of an innocent person, the brutality of which shocks the conscience of the Court, he must face the consequences of his act. Such a person forfeits his right to life.

There are cases where death sentence has been reduced to life imprisonment, often based on very unscientific reasoning, and cases are not sparse, where commutation has been refused though the accused deserved mitigation of sentence. The following statement helps us to understand the dilemma of an Indian judge:

The plight of these embattled Judges, struggling to provide legal service to a population of 660 million in what is surely the world's most over-worked high appellate court, deserves the sympathy of lawyers every where. But where life and death are at stake, inconsistencies, which are understandable, may not be acceptable.

Menaka Gandhi v. Union of India[1716] resulted in new interpretation of Article 14 and 21 of the constitution. This expansion rendered death penalty vulnerable to new attack. Also, India ratified the International Covenant on civil and political rights.

4. Bachan Singh's case[18]: A High Water Mark of Constitutional Attack

5. The constitutional attack indeed reached a high water mark in this case. The challenge however was based as in earlier case on Article 14, 19 and 21 of the constitution. Justice Sarkaria, who spoke for himself

17 AIR 1978 SC 597.

18 Bachan singh v. state of Punjab,AIR 1980 ,S.C. 898.

and on behalf of Chandrachud, C.J., Justice A.C. Gupta and M.L. Untwalia, delivering the majority Judgement opined that Article 21, if interpreted in accordance with the principles laid down in Menaka Gandhi's Case would read as under:-

No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law, In the converse positive form, the expanded article will read as below:..A person may be deprived of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law.

The learned judge observed that the founding fathers of the constitution also envisaged the state power to deprive a person of his life and personal liberty, in accordance with fair, just and reasonable procedure. State has the power under the Constitution to commute, suspend or remit the sentence – which suggests that death penalty is within the purview of the constitution. The learned judge also drew attention to the right to appeal granted to the person sentenced to death by the High Court.the court held:

While considering the question of sentence to be imposed for the offence of murder under section- 302 IPC the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise that the offence is of an exceptionally heinous character, and constitutes, on account of its designs and the manner of execution, a source of grave danger to society at large, the court may impose the death sentence.

The court in T.S. Vatheeswaran v. State of Tamil Nadu,[19] delivered a judgement by a bench consisting of Justice Chinnapa Reddy and Justice R.B. Mishra, it had been held that the right to get a speedier justice is included in the liberty envisaged in Article-21, if a person under sentence of a death is made to wait for a period exceeding two

19 AIR 1983 SC 361.

years of his execution, then the delay itself will be ground for substituting the death sentence with imprisonment for life.

Yet in one more case Shashi Nayar v. Union of India,[20] an attempt was made to get capital punishment declared unconstitutional. Raj Gopal Nayar, the petitioner's husband, was sentenced to death for killing his father and stepbrother. After having failed to get the death sentence struck off through all the judicial and mercy channels, the constitutionality of death sentence was challenged before the Apex Court employing almost the same arguments as in Jagmohan and Bachan Singh's cases.[21] Besides invoking Article 21 of the constitution and asserting that capital punishment doesn't serve any social purpose, it was argued that the law commission's 35th Report of 1967 which the majority opinion cited in support of the capital punishment in Bachan Singh, ought not to continue to guide the court because much water had flowed under the bridge since then and that there was no empirical study before the court that the situation prevailing in 1967 was still prevailing. The court rejected the argument and held:

The death penalty has a deterrent effect and it does serve a social purpose … … No material has been placed before us to show that the view taken in Bachan Singh requires reconsideration. Further a judicial notice can be taken of the fact that law and order situation in the country has not improved since 1967 but has deteriorated over the years and is fast worsening today. The present is therefore, the most inopportune time to reconsider the law on the subject".[22]

The apex court in Mithu's[23] case observed:

Section 303 IPC is liable to be struck down as unconstitutional being violative of Articles 14 and 21 of the constitution of India"

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20 (1992) 1 SCC 96; 1992 SCC(Cri) 24.

21 Ibid at p.11

22 AIR 1983 SC 473

23 Section 303 of IPC mandates compulsory death sentence for a life convict committing murder.

Chief Justice Chandrachud , (for himself and on behalf of S. Murtaza Fazal Ali, Tulzapurkar and Varadarajan, JJ.) said:

Section 303 of the Penal Code violates the guarantee of equality contained in Article 14 as also the rights conferred by Article 21 of the constitution, that no person shall be deprived of his life or personal liberty except according to procedure established by law.

The section was originally conceived to discourage assaults by life-convicts on the prison staff, but the legislature chose language, which far exceeded its intention. The section also assumes that life convicts are a dangerous breed of humanity as a class. That assumption is not supported by any scientific data". Thus, the grounds and reasons made out by the Hon'ble Supreme Court is that while in all the sections of the code which prescribe death sentence, the death sentence is an alternative punishment to life imprisonment, where as in the case of section 303 it is a mandatory provision. This leads to discrimination between the murderers inter se and violates right to equality as enshrined in Art 14 of the Constitution. The court said section 303 has taken away not only the judicial discretion but also the right of the murderer, the opportunity to show cause as to why he should not be sentenced to a lesser punishment of life imprisonment.

According to Dr. Gillin, the great American Criminologist, "in the present stage of our knowledge all we can do is to reply upon a careful study of the criminals antecedents, his previous history and his mental and physical condition and arrive at a conclusion."

The term being under sentence of imprisonment for life means a person upon whom the sentence has been passed and is subsisting and "the proof requiring are the same as those mentioned under section 302 IPC. In addition to which it must be proved that the accused was at the time of commission of murder under the sentence of imprisonment for life. In other respects the offence is same as offence under section 302 IPC".

In this connection some of the decisions by courts may be taken into consideration. In Po Kun v. The King [24] the Rangoon High Court held that if the accused is conditionally released and in breach of the condition commits murder, the mandate contained in section 303 of IPC is applicable and he shall be punished with death.

But according to the case of Gulam Mohammad v. Emperor[25] , the Sind High Court held, that when an accused has been convicted of murder and sentenced to imprisonment for life and remainder of the sentence has been remitted without condition by the Government under section 401 Cr.P.C., he can no longer said to be under a sentence of imprisonment for life. The sentence having in effect been served and if he commits a second murder, the provisions of this section cannot apply.

The next significant point for consideration is whether section 303 IPC is violative of Article 21 of the constitution, i.e. against the procedure established by law. Here our law differs from the American law. According to the procedure established by law in the Indian Constitution makes the legislature rather than the judiciary the master of the situation in the matters affecting personal liberty, whereas, the due process clause of the American constitution has made judiciary supreme over legislature[26].

An important point for consideration is about the absence of any alternative punishment under section 303 IPC. Is the absence of an alternative provision for sentence making the section ultra vires. Are the legislatures bound to give an alternative in each and every case? Even in lighter offences, where there is the provision for imprisonment and no alternative, whatsoever is provided, how are the courts acting? In such a

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24 AIR 1939 Rangoon 124.

25 AIR 1943 Sind 114.

26 In the celeberated case of A.K,Gopalan v State AIR 1950 SC 27, the distinction between due process of America and procedure established under law ,was clearly demarcated to suggest the superiority of Courts over legislature.

case if release on probation of good conduct (as under section 360 of the Cr.P.C.) or the provisions of the probation of offenders act do not come to rescue, the courts have to impose a sentence of imprisonment. With regard to the constitutional validity of the absence of such an alternative provision, it will not be out of place to quote H.M. Seervai who comments-

It is no part of the judicial function for a judge to read his theories on capital punishment into constitution and law. No, doubt, there is limited sense in which in interpreting the law the judge may make law in the sense of adopting one of the two or more alternatives if such alternatives are open, or involving a new principle to meet unusual situation. But it is not given to him to write his own theories, likes and dislikes into constitution or law, and that the personal view of a judge are irrelevant in considering the reasonableness or unreasonableness of a law.

While dealing with the subject Mr. Seervai further states:-

Another aspect of the same matter has been put forcibly by Mr. Justice Franfuther. Speaking on government under law, he said, 'if judges want to be preachers, they should dedicate themselves to the pulpit'. Self-willed judges are the least defensible offenders of government under law.

The next point for consideration would be non-availability of chance of hearing under section 225 (2) Cr.P.C to a person convicted under section 303 IPC. Furthermore judiciary are being deprived of giving reason or applying their discretion under section 354(3) Cr.P.C while dealing with this particular aspect one has to consider the inter-relation, inter-dependability of substantive and procedural law and superiority of the substantive law over procedural law. Section 235 (2)Cr.P.C says, if the accused is convicted the judge shall, unless he proceeds in accordance with the provisions of section 260, hear the accused on the question of sentence and then pass sentence on him according to law.

Applying the above principles it cannot be held that for the want of procedural law, the substantive criminal law can be can be struck down.

6. Discretion and Discrimination in Awarding capital punishment

The relevant provisions in the Indian penal code vest in most cases a discretion in the court to award the sentence of death or the lesser sentence of imprisonment for life .the question regarding the discretion of court was considered by the law commission of India[27] and the replies received by it fell under three categories those with regard the existing position as satisfactory, those which express the view that the discretion is not being exercised in a proper way ,and, lastly, those which while expressing general agreement with the present provisions, made suggestions on certain points in detail. It is argued that the question of sentence is must always remain a matter of discretion; the vesting of discretion of courts is based on sound and equitable principles. The discretion is necessary, for the individualizing of the offences before fitting the punishment with the criminal.

The court in Bachan sings[28] case took care to declare that capital punishment could only be imposed in the rarest of rare cases. Since in Mithus case,[29] the Supreme Court had declared Sec 303, I.P.C, invalid on the ground that the Sec 303, I.P.C. excludes judicial discretion. It was struck down as unconstitutional held invalid.

7. Discretion And The Value System Of The Judge

There are extreme varations, among judges themselves on when and why the extreme penalty shall or shall not be inflicted. Every one of us has his own philosophy of law and life, moulded and conditioned by his own assessment of the performance and potentials of law and the garnered experience of life. Lord Camdon, one of the greatest purest of English judges, said:

27 35th Report, P.179, para 541.

28 Supra note 18.

29 Supra note 23

That the discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best it is oftentimes caprice; in the worst, it is very vice, folly and passion to which human nature can be liable.

8. Unguided Exercise of Discretion

The judges have been awarding death penalty or refusing to award it according to their own scale of values and social philosophy and it is not possible to discern any consistent approach to the problem in the judicial decisions. It is apparent from a study of the decisions that some judges are readily and regularly inclined to sustain death sentences, others are similarly disinclined and the remaining waver from case to case. Even in the Supreme Court there are divergent attitudes and opinions regard to the imposition of capital punishment. If a case comes before one Bench consisting of judges who believe in social efficacy of capital punishment the death sentence will in all probability be of Judges who are morally and ethically against the death penalty, the death sentence would most likely be commuted to life imprisonment.

Professor Black shield has also in his article 'Capital Punishment in India'' commented on the arbitrary and capricious nature of imposition of death penalty and demonstrated forcibly almost conclusively, that arbitrariness and uneven incidence are inherent and inevitable in the system of capital punishment. He has taken the decision of the Court in Rajender Prasad's case[3029] in which the death sentence was commuted to life imprisonment by a majority consisting of Krishna, Iyer, Desai, and A.P. Sen JJ., dissented and was of the view that death sentence should be confirmed. It will thus be seen that the exercise of discretion whether to inflict death penalty or not depends on the value system and social philosophy of the Judges constituting the Bench.

30 AIR 1979 S.C.916,P 923

9. Differential Application of Capital Punishment

There is also one other characteristic of death penalty that is revealed by a study of the decided cases and it is that death sentence has a class complexion or class bias in ,as much as, it is largely the poor, the down- trodden who are the victims of death penalty. Hardly a rich or affluent person is going to the gallows. Whoever can borrow or hire the serves of great talents has a reasonable chance of escaping the gallows, though he has in fact committed a murder. It is only the poor, the resourceless people who have nobody to support them who usually go to the gallows. The death penalty in its operation is discriminatory. Capital punishment, as pointed out by Warden Duffy is the 'privilege of the poor'.[31]

So also Governor Disalle of Ohio State speaking from his personal experience with the death penalty said:

During my experience as Governor of Ohio, I found the men in death row had one thing in common; they were penniless. There were other common denominators, low mental capacity, little or no education, few friends, broken-homes-but the fact that they had no money was a common factor in there being condemned to death.

The same point was stressed by Krishna Iyer J.in Bishnu Deo's case

There is also the compelling class complexion of death penalty. A tragic by product of social and economic deprivation is that the 'have-nots''in every society always have been subject to greater pressure to commit crimes and a few constraints than their more affluent fellow citizens.so,the burden of capital punishment falls more frequently upon the ignorant, the impoverished and the underprivileged. The question regarding the discriminatory application of death penalty also figured prominently in the 1961 Raja Sabah Debates on the subject of abolition of capital punishment.

31 Quoted in AIR 1982 SC 1325 P.1388.

10. Reasonableness of Capital punishment by Hanging

In Deena v. Union of India[32] the constitutional validity of the mode of execution of the death sentence provided under section 354 (5) of the code of criminal procedure was challenged on the ground that hanging a convict by rope is a cruel and barbarous method of executing a death sentence, which is violative of Article 21 of the constitution. The court held that the method of hanging prescribed by section 354(5) of the Code of Criminal Procedure does not violate the guarantee contained in Article 21 of the constitution. The system of hanging which is now in vogue consists of a mechanism, which is easy to assemble. The method is a quick and certain means of executing the extreme penalty of law. On the question of pain involved in a punishment the concern of law has to be to ensure that the various steps which are attendant upon or incidental to the execution of any sentence, more so the death sentence do not constitute punishments by themselves. At the moment of final impact when life becomes extinct, some physical pain would be implicit in the very process of the ebbing out of life. But, the act of hanging causes the least pain imaginable on account of the fact that death supervenes instaneously.

Thus, the system of hanging is as painless as is possible in the circumstances, that it causes no greater pain than any other known method of executing the death sentence and that it involves no barbarity, torture, or degradation is based on reason, supported by expert evidence and the findings of modern medicine. The study of numerous cases on death sentence leads to the conclusion that the discretion to choose between death and life imprisonment has not been exercised with the pragmatism that it calls for and also the discretion should not be arbitrary, which may violate the constitutional guarantee of equality under Article 14 of the constitution.

32 AIR 1983 SC 1155

11. CONCLUSION

Constitution being a grand norm, hence no code can rise higher than it. The death penalty provided under section 302 of IPC deprives an accused of his fundamental rights, but no fundamental right is absolute and can be restricted reasonably, even can be prohibited totally for the sake of protection of the society in extreme situations. Under constitution states have power to commute suspend or remit the sentence of death which means that death penalty is within the purview of constitution. Thus from the viewpoint of social justice and social benefit the death sentence is not unreasonable or unwanted or absolute type of punishment.

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Sale Promotion Schemes Under Consumer Protection Act, 1986 Need For A Consistent Judicial Approach

Abstract

In the recent times, Indian organized retail industry has developed manifold. With competition in the economy, business houses have entered into aggressive and competitive trade practices to entice the customers. These practices, however, raise questions about the truthfulness and fairness of representation of products, services, advertisements, and schemes and modalities for promotion of products and services. This paper examines this one aspect of unfair trade practices — unfairness in holding of games, contests, lotteries, and similar such schemes for promoting sales and services in the context of India's transition to economic liberalization. The paper also analyses a good number of judgments from both the Apex Court and the National Commission vis-à-vis the transnational approach on the subject, and argues that there is a need for adequate law and a justice delivery system against such unfair trade practices.

I. Introduction

With liberalization of the economy which started in 1985, and formally inaugurated in 1991, competitive thrust in the economy has got directed into two spheres. At the top end, firms have merged and amalgamated to enlarge the firm size, market share, and resource base. Two, firms have got into aggressive and competitive trade practices to entice the customers. The state had begun regulating unfair trade practices in 1984, even before the dawn of liberalization and globalization, by amending the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969. Later on the Consumer Protection Act, 1986 was also amended accordingly. The law on unfair trade practices has thus acquired a meaning in the changed context.[1]

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1 Akhileshwar Pathak, "Legal Responses to Economic Liberalization: The Case of Unfair Trade Practices", 29 *VIKALPA* at 59 (JULY - SEPTEMBER 2004).

Every businessman wants to increase the sale of goods he deals in. Since man has not stopped thinking, he continues to contribute to the development of designs and devices which promote the objective of manufacturer, producer, wholesale dealer, retailer and supplier i.e., sale.[2] In an increasingly competitive market environment, sales promotion is an essential marketing tool. Sales promotion can take many different forms; for example, free offers and gifts, discounts, prize draws and competitions, money off vouchers, loyalty schemes, instant wins and scratch cards. You might have heard about "lakhpati bano", "win a tour to Singapore", "30% extra in a pack of one kg", "scratch the card and win a prize" etc. You might also have heard about gifts like lunch box, pencil box, pen, shampoo pouch etc. offered free with some products. There are also exchange offers, like "in exchange of existing model of a television you can get a new model at a reduced price". You may have also observed in your neighboring markets notices of "winter sale", "summer sale", "trade fairs", "discount up to 50%" and many other schemes to attract customers to buy certain products. All these are incentives offered by manufacturers or dealers to increase the sale of their goods. Thus these incentives may be in the form of free samples, gifts, discount coupons, demonstrations, shows, contests, lotteries etc. All these measures normally motivate the customers to buy more, and thus increase sales of the product. This approach of selling goods is known as "Sales Promotion".

It has been seen that the most difficult job of placing a consumer in a mood to buy has been accomplished by advertising price cuttings, as the statistical figures have more potential to woo the consumers than the words. The hope of getting something for nothing is the most powerful bait. This attracts the customers, children and adults alike.[3]

However, sales promotion differs from advertising and personal selling in terms of its approach and technique. Sales promotion adopts

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2 Farooq Ahmed, *Consumer Protection in India* at 2 (APH Publishing Corporation, New Delhi, 1st edn., 1999).

3 *State v. Lipkin* 169 NC 265 1936.

short term, non-recurring methods to boost up sales in different ways. These offers are not available to the customers throughout the year. During festivals, end of the seasons, year ending and some other occasions these schemes are generally found in the market. Thus, sales promotion consists of all activities other than advertising and personal selling that help to increase sales of a particular commodity.

In order to eliminate possible misuse through such sale promotion schemes, consumer protection laws are in place throughout the globe including India. Yet, however, there is a difference in the approach and permissible limits.[4] This paper is an attempt to weigh up the legal provisions in India and elsewhere in respect of sale promotion schemes and their interpretation by the respective courts. Given the fact that a good number of cases on this subject have been decided by the MRTP Commission and which are likely to be followed by CDRAs[5] under the CP Act, this paper also analyses those decisions in order to highlight the fallacies.

II. Tools of Sales Promotion

In order to understand the subject under discussion properly, it is desirable to explain some of the commonly used tools of sales promotion:

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4 Farooq Ahmed, " Sale Promotion Schemes in Legal Perspective", 16 *KULR* 85 (2010).

5 The MRTP Act, 1969 has been repealed and replaced by the Competition Act, 2002 which came into force on 31st March, 2003. Section 66(4) of the Competition Act provides that all cases pertaining to unfair trade practices other than those referred to in clause (x) of sub-section (1) of Section 36-A of the MRTP Act and pending before the MRTP Commission on or before the commencement of this Act shall on such commencement stand transferred to the National Commission constituted under the Consumer Protection Act, 1986 and the National Commission shall dispose of such cases as if they were cases filed under that Act.

(i) Free Samples: You might have received free samples of shampoo, washing powder, coffee powder, etc. while purchasing various items from the market. Sometimes these free samples are also distributed by the shopkeeper even without purchasing any item from his shop. These are distributed to attract consumers to try out a new product and thereby create new customers. Some businessmen distribute samples among selected persons in order to popularize the product. For example, in the case of medicine free samples are distributed among physicians, in the case of textbooks, specimen copies are distributed among teachers.

(ii) Premium or Bonus offer: A milk shaker along with Nescafe, mug with Bourn vita, toothbrush with 500 grams of toothpaste, 30% extra in a pack of one kg. are the examples of premium or bonus given free with the purchase of a product. They are effective in inducing consumers to buy a particular product. This is also useful for encouraging and rewarding existing customers.

(iii) Exchange schemes: It refers to offering exchange of old product for a new product at a price less than the original price of the product. This is useful for drawing attention to product improvement. 'Bring your old mixer-cum-juicer and exchange it for a new one just by paying Rs.500' or 'exchange your black and white television with a color television' are various popular examples of exchange scheme.

(iv) Price-off offer: Under this offer, products are sold at a price lower than the original price. 'Rs. 2 off on purchase of a Lifebuoy soap, Rs. 15 off on a pack of 250 grams of Taj Mahal tea, Rs. 1000 off on purchase of a cooler etc. are some of the common schemes. This type of scheme is designed to boost up sales in off-season and sometimes while introducing a new product in the market.

(v) Coupons: Sometimes, coupons are issued by manufacturers either in the packet of a product or through an advertisement printed in the newspaper or magazine or through mail. These coupons can be presented to the customer while buying the product. The holder of the coupon gets the product at a discount. For example, you might have come across coupons like, 'show this and get Rs. 15 off on purchase of 5 kg. of Annapurna Atta'. The reduced price under this scheme attracts the

attention of the prospective customers towards new or improved products.

(vi) Fairs and Exhibitions: Fairs and exhibitions may be organized at local, regional, national or international level to introduce new products, demonstrate the products and to explain special features and usefulness of the products. Goods are displayed and demonstrated and their sale is also conducted at a reasonable discount.

(vii) Trading stamps: In case of some specific products, trading stamps are distributed among the customers according to the value of their purchase. The customers are required to collect these stamps of sufficient value within a particular period in order to avail of some benefits. This tool induces customers to buy that product more frequently to collect the stamps of required value.

(viii) Scratch and win offer: To induce the customer to buy a particular product, 'scratch and win' scheme is also offered. Under this scheme a customer scratches a specific marked area on the package of the product and gets the benefit according to the message written there. In this way customers may get some item free as mentioned on the marked area or may avail of price-off, or sometimes visit different places on special tour arranged by the manufacturers.

(ix) Money Back offer: Under this scheme customers are given assurance that full value of the product will be returned to them if they are not satisfied after using the product. This creates confidence among the customers with regard to the quality of the product. This technique is particularly useful while introducing new products in the market.

III. Law in place in India

In India, both the MRTP[6] and CP Acts[7] have provisions to deal with the practice of offering of gifts, prizes or conducting of contest, lottery, game of chance or skill etc. The provisions run as follows; permits -

(a) the offering of gifts, prizes or other items with the intention of not providing them as offered or creating impression that something is

6 Section 36-A (3).

7 Section 2 (1) (r) (3).

being given or offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole;

(b) the conduct of any contest, lottery, game of chance or skill, for the purpose of promoting, directly or indirectly, the sale, use or supply of any product or any business interest;

At this point of time it appears necessary to know what the expression "gifts, prizes and other items" in the above mentioned provision connote. These words have also attracted the attention of authors in Australia and it has been argued that the word "item" means, when read ejusdem generis with prizes and gifts, some tangible items and will naturally exclude the offers like sale of a car with free after sale service. To avoid this interpretation, it has been suggested that the word "item" may be construed as a thing or an object in the list. Otherwise the scope of the section will be restricted which will not be supported by any plausible consideration. However, in India this will hardly cause any difficulty in view of the amendments made in CP Act in 1993. The amended definition of unfair trade practice contains broad words, "unfair method or unfair or deceptive practice," which are similar to Section 5 of the American Federal Trade Commission, as amended by the Wheeler Lea Amendment Act, 1936. So in India, even if the word "item" is read ejusdem generis with the words "gifts and prizes," the words in the main definition of unfair trade practice are wide enough to cover non-tangible items also.[8]

It is also desirable here to mention that neither the MRTP nor the CP Act defines the word "lottery" as used in the second clause of the aforementioned legal provision. The Bombay Lotteries (Control and Tax) and Prize Competition (Tax) Act, 1958 states that the term "lottery" does not include a prize competition. This definition also, however, does not give an idea as to what amounts to a lottery. Even in England, Lotteries and Amusements Act, 1976, without providing any

8 Supra at note 4, p. 89.

definition of lottery, declares that lotteries are unlawful. The term has, thus, been put to judicial gloss.[9]

Hawkins J., in Taylor v. Smetten,[10] has held that in Webster's Dictionary, a lottery is defined to be distribution of prizes by lot or chance. The essential requirements of practice to be called as "lottery" have, however, been outlined by the Madras High Court in Sesha Ayyar v. Krishna Ayyar,[11] which are (1) a prize or some advantage in the nature of a prize; (2) distribution by chance; (3) consideration paid or promised; and (4) risk of loss. But unfortunately, the consideration and risk of loss considered by the courts as essential requirements provided an escape route for those traders who didn't demand separate consideration for holding lottery. Thus whenever such a practice was called into question, the trader argued that the consumer got his money's worth and he participated in the lottery without any consideration. Similarly it was argued that the consumer participated in the lottery without any risk of loss.

In order to clog this loophole, Gujarat High court in the State of Gujarat v. Mohandas Manumal,[12] held;

"Cases have arisen in England where a purchaser paying the real worth of goods gets a chance of a prize while purchasing the goods. In such cases, the contention that the purchaser got the real worth of goods and, therefore, lost nothing and the chance of prize was wholly gratuitous stood negatived in Taylor v. Smetten."[13]

The element of the risk of loss considered essential by the Madras High Court in Krishna Ayyar[14] and followed in State v. Jayantilal

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9 Supra at note 4, p. 91.

10 (1883) 11 Q.B.D.207.

11 AIR 1936 Mad 225 (FB); See also M. *Anraj v. Govt. of Tamil Nadu* (1986) SCC 414.

12 (1979) 20 Guj LR 226.

13 Supra at note 10.

14 Supra at note 11.

Bhimjibhi[15] was disputed in the Mohandas Manumal,[16] and it was made clear that the risk of loss is not necessary and its absence cannot tilt scales in favour of the defendant. This was reiterated in Wim Ltd. v. Liberty Match Co. and Others.[17]

But this even could not stop the conflict. There are a number of case laws decided by the Commissions which show their wavering approach in dealing with the subject. For example, Oswal Agro Mills Ltd. had introduced a campaign where a person could buy two soaps and enter a contest which made him/her eligible for prizes through a draw. The contest was held to be injurious to greater number of persons than those benefited and it was no defence that those who purchased the soap got the worth of it, they paid no extra and consequently suffered no loss.[18]

However, in other cases, the Commission took a different view. In the case of British Airways, Re, the British Airways had advertised a scheme where students who were flying by the British Airways to the US for studies could write 50 words on how 'he believes his further studies in the US will help.' A panel of eminent members was to judge the winners. Prizes included free air tickets. The programme was held to be beneficial to consumers. Also in Mid Day Publications (P) Ltd, Re,[19] Mid-Day, a newspaper, had announced the launching of a 'pick-a-team' contest. A contestant was to pick the ideal World XI Cricket Team using an entry form available in an issue of the newspaper. The team selected by the contestants was to be matched with the team selected by a team of experts. Three prizes were to be awarded for correct entries. The Commission said the scheme involved so nominal an expenditure that it could not be considered a loss.

In their decisions, the benches of the Commission had no doubt that these schemes were 'contest, lottery or game of chance or skill' for

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15 (1968) 9 Guj L.R 603.

16 Supra at note 12.

17 Comp. L. Digest, June 1991 Vol. XX at 29.

18 *Oswal Agro Mills Ltd., Re*, UTPE, No. 25 of 1985.

19 UTPE, no. 50 of 1985.

'directly or indirectly' promoting sales or services. However, there were multiple viewpoints in interpreting the scope and significance of the expression 'loss or injury' as used in the opening part of Section 2 (1) (r) (3) of the CP Act. In some cases, it was assumed that a requirement to purchase a product in order to participate in a contest itself was a loss. In other cases, it was reasoned that those who did not get a prize in a contest suffered a loss. And in yet other cases, it was said that the purchaser got his/her money's worth, and, therefore, the contest caused no loss.

IV. Element of "Loss or Injury" Obviated With

Eventually, a full bench of the MRTP Commission was convened to decide on the meaning of the clause "thereby causes loss or injury" in the Colgate Trigard case.[20] Colgate had advertised that a person could buy two toothbrushes to enter the contest. A simple set of questions on healthy brushing habits, put in a multiple answer format, was to be ticked and submitted. There were several awards for correct answers as well as early replies. There was no doubt that this was a contest within the purview of Section 36-A (3b). The question was whether it was necessary to explore if the contest caused 'loss or injury' to the contestants. The Commission noted:

"Most of the debate before us has centered on the correct meaning of the words 'and thereby causes loss or injury to the consumers of such goods or services.' The two interpretations are: one, the phrase necessarily means that the trade practice must cause loss or injury to the consumers before it can be branded an unfair trade practice. Another argument is that adoption of any of the 15 clauses as mentioned in the Section has the innate character of causing loss or injury to the consumer if it adopts one or the other of the practices mentioned in subsequent paragraphs of Section 36-A." (Emphasis Supplied)

The Commission was clear that a superficial reading of the provision might make it appear that in addition to being an unfair trade

20 *Society for Civic Rights v. Colgate Palmolive Ltd*. (1991) 72 Comp Cas 80 MRTPC.

practice, it was also necessary to know if it caused loss or injury to the consumer. However, the Commission noted that this becomes incongruous when one looks at the five sub-sections of Section 36 A. Sub-section 5 is on hoarding, destruction of goods, and refusal to sell. This inherently causes 'loss or injury to the consumer.' Section 36-A (4) is on sale of goods, not in conformity with safety standards. This can only cause loss or injury to the consumers. Further, false bargain price, provided in Section 36-A (2), can only cause loss and injury. Again, creating an impression that a gift or prize was free while it was being charged for, provided for in Section 36-A (3a), will only lead to a loss for the consumer. Thus, the practices mentioned in Section 36-A have the innate quality of causing loss or injury to the consumers. The key phrase, however, must mean the same thing to all the subsequent paragraphs. The Commission thus ruled:

"Returning to the opening part of Section 36-A, we are of the opinion that the key phrase does not require the causing of actual loss or injury to the consumer. On the other hand, we are of the opinion that the key phrase is a part of the definition which implies that in every trade practice which adopts one or the other of the practices mentioned in the subsequent paragraphs of Section 36A, loss or injury is implicit. By putting the phrase 'thereby causing...' in the context of the section, the Commission reasoned that the legislative intention was to convey that the listed practices had the innate capacity or inherent quality of causing loss or injury to the consumers of the goods and services. The purpose of adding the words was to indicate that the trade practices described in Section 36-A of the Act are vehicles of loss or injury."

(Emphasis Supplied)

Thus, the Commission ordered Colgate Ltd. not to hold such contests in the future. However, soon after the judgment, a comprehensive amendment of the MRTP Act was carried out and the disputed phrase was deleted. The amended opening paragraph instead read as follows:

"In this Part, unless the context otherwise requires, 'unfair trade practice' means a trade practice which, for the purpose of promoting the

sale, use or supply of any goods or for the provisions of any services, adopts any unfair method or unfair or deceptive practice including any of……"

Thereafter, the Commission consistently took the position that a contest or a lottery per se was an unfair trade practice. For example, Usha International Ltd. had announced a gift scheme to promote Usha fans where a person could get a discount of Rs 30 or opt to be a part of the scheme which entitled him/her to prizes through a draw. The Commission considered this to be nothing but a lottery.[21]

V. The Case of Horlicks Hidden Wealth Prize Offer: A Blow to Indian Consumerism

It just took one judgment of the Supreme Court to change everything. In the Horlicks Hidden Wealth Prize Offer case,[22] the HMM Ltd. which manufactured and marketed Horlicks, advertised a scheme in September 1985, called 'Hidden Wealth Prize Offer' for the buyers in Delhi. A lucky purchaser of a bottle of Horlicks could find a coupon inside the bottle. The coupons indicated the prizes which included five Hotline Colour TVs, ten gift vouchers of Rs 2,000 each for Hotline appliances, and other cash prizes. The prizes were to be claimed by January 15, 1986. The advertisements stated that "even if the buyers' coupon did not carry a winning message, he/she had several more chances to try. So get the goodness of Horlicks, now. Because with it, you surely can't lose!"

The Commission had held this to be an unfair trade practice as the system of getting coupon was nothing but a lottery. It was of the opinion that the prize scheme was intended to wean away the consumers from Bournvita by allurements of lucky prizes of high value rather than by fair means. It was also of the view that such schemes did not benefit the general run of consumers as only a small fraction of the buyers of

21 *Director-General v. Usha International Ltd. And Anr*. on 31 October, 1996, *available at*: http://indiankanoon.org/doc/1122886/(Visited on November 17, 2012).

22 *HMM Ltd. v. Director General, MRTPC*, AIR 1998 SC 2691.

Horlicks got the benefit of the said scheme. The prizes were many times costlier than the price of a bottle of Horlicks, a fact on account of which the winning of the prize was of overriding consideration and not the product in question. The Commission had thus held:

On these postulates, it is not difficult to say that the trade practice is no better than a lottery and that the buyer who does not get any prize does lose it as against the one who wins it although both take to the same transaction. So, the trade practice that is meant to wean away the consumer from Bournvita by this allurement is obviously an instrument of facing competition in the market by unfair means and, therefore, prejudicial to public interest.

The Commission gave its judgment in 1989. In the light of its own experiences, it was never an issue that schemes like this were not a 'contest, lottery, game of chance or skill' for 'direct or indirect' promotion of sales. Thus, there was no gain in even emphasizing or elaborating the point.

In an appeal, the Supreme Court, in its short judgment in 1998, commented that this was not a case of lottery as there was no draw of lots or that a price was charged for participation in the draw. The Court said that the fact that some bottles of Horlicks contained a slip of paper which entitled the buyer to a prize is not a lottery in the ordinary sense of the word. At this point of time, the detailed reasoning of the Commission in the Colgate Trigard Case, which was also pending before the Supreme Court, was not brought out. The judgement, thus, merely replied on the opening paragraph in Section 36-A and held that for a trade practice to be an unfair trade practice, there must be loss or injury to the consumer. The judgment went on to further conclude that 'it is difficult to hold that a consumer who bought a bottle of Horlicks that did not entitle him to a prize suffered a loss.'[23]

This judgment of the Supreme Court epitomizes the fact that there is inconsistency of approach among the law courts on the subject in question. Thus the judgment in Horlicks Hidden Wealth Prize Offer

23 Emphasis supplied.

case[24] can be said to have eaten up all that the judgment of National Commission in Colgate Trigard case[25], and the 1991 amendment of MRTP Act, and then of the CP Act gave to the consumers. There had also been a lot of wavering among the judgements given by the Commissions till the National Commission's detailed and well-in-time judgment came in Colgate Trigard case. But the Trigard effect received a massive blow when the Supreme Court delivered its Judgement in Horlicks case. The Supreme Court's judgment in Nirma Industries ltd. v. Director General of Investigation and Registration[26] was also given on the same reasoning as that of Horlicks case.

VI. The Wavering Simmered

Immediately after the judgement of the Apex court in Horlicks Hidden Wealth Prize Offer case, [27] the MRTP Commission altogether changed its tune and tenor in DG (I & R) v. Malayal Manorama and Ors.[28]

The respondent publisher of Malayal Manorama and Mathrabhomi, launched an insurance scheme for its subscribers which gave a benefit of Rs. 1 lakh or two lakhs (depending upon the newspaper and the scheme) to the subscriber who dies in an accident. The entire premium amount @Rs. 3 per subscriber was paid by the respondent and they were not collecting even a single additional paisa from the subscribers. The subscription amount was also not increased. The application forms were, however, available in the respondent's newspaper office. The person interested in insurance cover had to purchase the newspaper for application form and for a period during which his insurance remains in force.

The Commission in plain and unambiguous terms made it clear that an essential ingredient of unfair trade practice is that it must be

24 Supra at note 22.

25 Supra at note 20.

26 1998 (1) CPR/SC 14.

27 Supra at note 22.

28 (1999) 3 Comp LJ 478.

prejudicial to public interest or the interest of any consumer or consumers generally. The Commission said although section 36-A was amended and "loss or injury" to the consumer is not required to be proved, yet for holding a trade practice to be an unfair trade practice, it must be found to have caused "loss or injury." The Commission observed that it is true that the scheme has resulted in the increase of the circulation of the newspaper in question, but mere offer of an insurance cover to the subscriber free of charge cannot be held to be an unfair trade practice.

However, in a subsequent case DG v. Videocon International Limited,[29] the MRTP Commission again did not give much emphasis on "loss or injury" caused to the consumer. It was laid down that if the purpose of a contest is not the sale directly or indirectly, it cannot fell within the ambit of section 36-A of the MRTP Act.

VII. Position in U.S.A and U.K

In America, the accepted policy with respect to the gifts as a method of pricing, merchandising and advertising is dictated by the following propositions

a. There should not be any general prohibition of gifts.

b. The offerer should, however, be required to make full disclosure of details of this offer by filing all the terms and conditions of sale including premiums or free deals.[30]

Commenting on the approach of the Federal Trade commission of America on the gift scheme as a sales promotion device, Rudolf Callmann observes:

"In fact a genuine gift can be a legitimate method of advertising. It differs from other advertisements in the sense that the consumer is the beneficiary who really gets something for nothing. We conclude that a gift is lawful if it is a real gift, not given with an illegal intent to injury a

29 *(2001) 2 CPR 30.*

30 Rudolf Callmann, *The Law of Unfair Competition, Trade Marks and Monopolies* (3er. Ed. 1971) Vol. 1 at 1045 as cited in Farooq Ahmed, " Sale Promotion Schemes in Legal Perspective", 16 *KULR* 85 (2010).

competitor out of business. Indeed this would rarely be one purpose of a gift: one who offers a gift or premium is more interested in increasing his own business than injuring his competitor".

Thus in America offering of gifts or prizes genuinely is not prohibited.

On the other hand, in case of lotteries, the United States Supreme court has in the Federal Trade Commission v. K.F. Keppel & Bros.,[31] through Justice Holmes, held that the public policy requires the condemnation of devices which appeal to the gambling instinct and induce people to buy, what they do not want, by a promise of a gift or the price the nature of which is not known at the moment of making purchase. However, courts have carefully distinguished between cases in which the customer has and those in which he has not paid consideration. The gratuitous distribution of property by lot or chance does not constitute a lottery.

In England, as already pointed out, the Lotteries and Amusements act, 1976 declares all lotteries as unlawful. Since there is no definition of the term "lottery", the courts have made it clear that where a person is asked to "hit blind shots on the hidden target"[32] or to guess what would be the guess of others, such practices are lotteries. But any kind of skill or dexterity whether bodily or mental in which persons can compete would prevent a scheme from being a lottery if the result depends partly upon such skill or dexterity.[33] Section 14(b) of the Lotteries and Amusements Act prohibits any competition in which success does not depend to a substantial degree on the exercise of skill. Like USA, in England also, where no payment or contribution is made by the participants, although the result depends upon the chance, yet such lottery is not prohibited even though the result depends upon the chance.

VIII. Conclusion

31 For critical assessment see 32. Mich L Rev. 1142.

32 *Coles v. Odhams Press Ltd*. (1935) All E.R. Rep 598 per Lord Hewart CJ.

33 *Scot v. D.P.P.* (1914) All E.R. Rep. 825 per Atkin J.

Thus, after over twenty years of introduction of a law to regulate unfair trade practices in holding of lotteries and contests, the interpretation of the law has effectively left the field without any regulation. The reason simply is the inconsistent rulings from the law courts in India. On the other hand, the competitive thrust has led firms to pursue vigorous promotion of their products. The newspapers and television channels are full of advertisements on contests and draws to entice consumers. Each promotion scheme is more attractive than the other. No firm wants to be left behind by the others. Even the limited protection available through the MRTP and CP Act has gone away. Though India made a huge stride in the early nineties when it dispensed with the words "loss or injury" through an amendment in Section 36-A and 2 (1) (r) (3) of the respective Acts, the wavering approach of the courts, thereafter, say for example in Horlicks Hidden Wealth Prize Offer Case, brought the conflict back.

I argue that there is no harm in offering genuine gifts by cutting down profit margin. Where, however, a trader is offering illusory gifts, or where the price of the gift is covered in the price of the goods or services, the practice shall be declared as unfair trade practice. Likewise there is a need to distinguish between different types of lotteries as lotteries vary in nature and scope. The law on lotteries should be made compatible with that in USA and England as discussed above. For example, a lottery which involves a skill or where no payment or contribution is made by the participants should be allowed. Moreover, in India the liability of the trader for false or misleading advertisement goes only to the extent of discontinuing the advertisement. It is only when he repeats the same, the penal consequences ensue. All this can be turned into reality only by a Supreme Court judgment on the issue.

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Case Comment
DMDK Vs Election Commission of India
(2012) 7 SCC 340

1. Introduction

India had a tryst with destiny on the eve of her Independence and became eventually the largest democracy of the world. Parliamentary democracy was obviously the choice because of her multifaceted diversities and pretty long association with 'mother of democracies', the United Kingdom. The elections in a democratic set up form the basis of gauging the public opinion, formal expression of people's voice or measured way of judging constitutional governance through exercise of 'free and fair' adult franchise. But of late, the process of electioneering has suffered due to the indulgence of 'money and muscle' and less than transparent role of politicians. This is ideally the case in which the above decision assumes importance. In this case, the division bench of the Supreme Court, comprising of the present Chief Justice of India, Mr. Justice Altamas Kabir along with Nijjar J, gave the majority judgment and Mr. Justice J.Chelameswar, gave a dissenting judgment. Certain important issues were involved in this case which need some elaboration.

2. Matrix of the case:

The present writ petitions and SLP were filed challenging the constitutional validity of the Amendment (in 2000 of the Election Symbols (Reservation and Allotment) Order, 1968, substituting Para 6 with Para 6-A (i) and (ii). The common grievance in all these writ petitions was with regard to the amendment which mandated that in order to be recognized as a State Party in a State, it would have to secure not less than 6% of the total valid votes polled in the State and should also have returned at least 2 members to the Legislative Assembly of the State. The Supreme Court upheld the constitutional validity of the said amendment and dismissed the writ petitions and the special leave petition filed against this constitutional amendment in the Act.

The grievance of the *Desiya Murpokhu Dravida Kazhagam* (DMDK) is that it had been refused recognition as a state party by the Election Commission of India, although, it secured 8.33% of the valid votes in the Assembly elections. Further grievance of the petitioners was that in view of the amendment made to Para 6 of the Election Symbol Order, 1968, it had been denied recognition on account of cumulative effect of the requirement that political party would not only have to secure not less than 6% of the total valid votes polled, but it had to return at least 2 members to the Legislative Assembly of the State. It is the petitioners' case that despite having secured a larger percentage of the votes than was required, it was denied recognition, since it failed to return 2 members to the Legislative Assembly.

The Election Symbols (Reservation and Allotment) Order, 1968 was promulgated by the Election Commission of India, by virtue of powers conferred on it by Article 324 of the Constitution, read with Section 29-A of the Representation of People Act, 1951 and Rules 5 and 10 of the Conduct of Election Rules, 1961. The primary object of this Order was to streamline the provisions and procedure relating to recognition of political parties in the conduct of elections. It was also envisaged to make registration of political parties as a condition precedent for recognition so that their functioning could be properly monitored, regulated and streamlined.

3. The Decision- An Appreciation

Upholding the validity of the said Order and the subsequent amendment to Para 6 of the Election Symbol Order, the Supreme Court observed:

As the Preamble of the Symbols Order, 1968 states that, the same was promulgated to provide for specification, reservation, choice and allotment of symbols at elections in parliamentary and assembly constituencies; for the recommendation of political parties in relation there to and for matters connected therewith. It was also promulgated in

the interest of purity of elections to the House of People and the Legislative assembly of every State and in the interest of the conduct of such elections in a fair and effective manner. (Para 9)

The court reiterated the power of Election Commission to allot election symbols as under:

The expression 'election' in Article 324 of the Constitution is used in a wide sense so as to include the entire process of election which consists of several stages, some of which have an important bearing on the result of the process but every norm which lays down a code of conduct cannot possibly be elevated to the status of legislation or even delegated legislation. There are certain authorities or persons who may be the source of rules of conduct and who at the same time cannot be equated with authorities or persons who are entitled to make law in the strict sense. The Election Commission has been clothed with plenary powers by Rules 5 and 10 of the Conduct of Election Rules, 1961 in the matter of conducting of elections, which includes the power to allot symbols to candidates during elections[1].

The Election Commission according to the Court has laid down a benchmark which is not unreasonable. In order to gain recognition as a political party, a party has to prove itself and to establish its credibility as a serious player in the political arena of the State. Once it succeeds in doing so, it will become entitled to all the benefits of recognition, including the allotment of a common symbol for the benefit of all the candidates set up by them at any election.

The court tried to make a balance between the voter's right to know and the act of holding elections by observing:

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1 The court relied upon the decision of the Apex Court in: Sadiq Ali v. Election Commission of India ,(1972) 4 SCC 664; All Party Hill Leaders' Conference v. Captain W.A. Sangma, (1977) 4 SCC 161; Roop Lal Sathi v. Nachhattar Singh Gill (1982) 3 SCC ; Subramanian Swamy v. Election Commission of India ,(2008) 14 SCC 318.

No doubt, a voter has the right to know the antecedents of the candidates, but such right has to be balanced with the ground realities of conducting a State-wide poll. The election Commission has kept the said balance in mind while setting the benchmarks to be achieved by a political party in order to be recognized as a State party and become eligible to be given a common election symbol[2]

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4. The Dissenting view: A prelude to Democratic right of expression

The vital points raised in minority judgment rendered by Chelameswar J in the case can be briefly enumerated as under:

i. In a democratic set up, while the majorities rule, minorities are entitled to protection.

ii. It is said that 'democracy envisages rule by successive temporary majorities'. Such transient success or failure cannot be the basis to determine the constitutional rights of the candidates or members of such political parties.

iii. The endeavour of all the political parties is to capture the State power in order to implement their respective policies, professedly for the benefit of the society in general. But it would be wrong to assume that the defeated parties would be condemned forever by the electorate.

iv. The enjoyment of the fundaments rights guaranteed by the Constitution cannot be made dependent upon the popularity of a person or an idea held by the person. If it were to be otherwise, it would be the very antithesis of liberty and freedom.

v. The constitutional guarantees are meant to protect the unpopular, the minorities and their rights.

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2 Union of India v. Assn. for Democratic Reforms, (2002) 5 SCC 294; Peoples' Union for Civil Liberties v. Union of India, (2003) 4 SCC 399.

vi. The restriction imposed under the impugned amendment has created barrier for a political party to seek recognition or allotment of a party symbol, thus violates Art.14 of the Constitution.

vii.Denying the benefits of a symbol to the candidates of a political party, whose performance does not meet the standards set up by the Election Commission, would disable such political party from effectively contesting the election, thereby negating the right of an association to effectively pursue its political brief[3].

viii. In the United States, the right of individuals to associate for the advancement of political beliefs and the right of the qualified voters to cast their votes effectively are considered as the most precious freedoms and are protected by the First and the Fourteenth Amendments[4].

ix. It is only much later (1996) certain legal rights and obligations came to emanate from the factum of recognition or lack of it, such as Sections 33 and 52, RP Act. Notwithstanding all these changes, the constitutional right of a qualified citizen to contest an election to any one of the legislative bodies created by the Constitution, whether supported by a political party or not, be it a recognized or an unrecognized political party, has never been curtailed so far[5].

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3 The learned judge relied upon the Kanhiya Lal Omer v. R.K.Trevedi ,(1985) 4 SCC 628; Subramanian Swamy v. Election Commission of India (2008) 14 SCC 318;

4 See Williams v. Rhodes, 21 L Ed 2d 24, p.31; 393 US 23 (1968) relied upon by the learned judge.

5 The book written by S.K.Ramadevi and S.K.Mendiratta, *How India Votes: Election Laws, Practice And Procedure* was referred to substantiate his views by the dissenting judge.

5. The Judgment in Retrospect

The judgment under review has focused on an important issue: whether denial of election symbol to a political party unable to return 2 members to state Assembly under Para 6-A of Election Symbols order 1968, was justified or not. It is a fact that the EC has the onerous duty to conduct elections, where its impartiality, authority and dispensation of justice in matters related to recognition, conduct of elections and all matters incidental thereto remain of seminal importance. But it has at the same time, duty to see that all sections of people especially the marginal and minority opinion gets its due representation. The impugned amendment has virtually sidelined all small political parties or associations to effectively participate in the electioneering process, so there was need to question the vires of this amendment in terms of voting rights of citizens. But it is submitted here that the majority opinion in this case has not found any patent or latent defect in the impugned act of EC debarring a political party to get election symbol even after getting a sizable number of valid votes polled. This act on the part of EC obviously has posed a threat to the democratic rights of the people especially for those who usually sit at the fringe limits or form a minority view. The impugned order of the EC had in fact created a sort of cushion for larger parties, while as, the role of small and marginal parties seem to have been relegated to a naught.

Mr. Goel who represented one of the petitioners, submitted on the authority of the decision of a Constitution Bench[6] that the voter has a right to know the antecedents of the candidates based on the interpretation of Art.19(1)(a) of the Constitution which unequivocally guarantees freedom of speech and expression, so essential for a true democratic state[7].

Chelameswar J reiterated this position by stating:

6 Union of India v. Assn.of Democratic Reforms (2002)5 SCC 294.

7 Peoples' Union for Civil Liberties v. Union of India (2006) 7 SCC 1.

1 am of the opinion that this batch of petitions raises basic issues of far-reaching consequences in the functioning of the democracy-which 'We the People of India' have 'solemnly resolved to constitute'.

Similarly, in *Wesbesrry v. Sanders* the US Supreme Court remarked[8]:

…No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

In *Mohinder Singh Gill* v. *Chief Election Commissioner*, speaking for the Court, Krishna Iyer, J opined[9]:

Democracy is Government by the people. It is a continual participative operation, not a cataclysmic, periodic exercise. The little man, in his multitude, marking his vote at the poll does asocial audit of his Parliament plus political choice of this proxy. It needs little argument to hold that the heart of the parliamentary system is a free and fair elections periodically held, based on adult franchise, although social and economic democracy may demand much more.

The majority decision is based on the well grounded precedents and is a reasoned decision but it is submitted that given the consequential effect on right to expression through free and fair exercise of franchise, the minority decision in this case seems to be more convincing. The Supreme Court itself has set the example by declaring that where the effect of the precedent is demonstrably inconsistent with the scheme of the Constitution, it becomes the duty of the court to correct the wrong principle laid down[10]. In nutshell, it can be concluded that the Election Symbol Order 1968, in so far as it denies the reservation of a symbol for

8 11 Led 2d 481 : 376 US 1 (1976)

9 (1978) 1 SCC 405.

10 See the observation of the court in Golak Nath v. State of Punjab, AIR 1967 SC 1643.

the exclusive allotment of the candidates, set up by a political party with 'insignificant poll performance' is not free from constitutional challenge. Let every person be free to chose and contribute towards the democratic way of life as enshrined in our Constitution.

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KASHMIR JOURNAL OF LEGAL STUDIES 1 (2011) By Kashmir Law College. Printed at Salasar Imaging systems Delhi. Price Inland Rs 500.00 Overseas: $ 30 Pp 221

The first issue of *Kashmir Journal of Legal Studies*, published by the Kashmir Law College, Srinagar is in my hands. The editor in the Editorial note of the Journal, is at pains to explain the need of the legal journals, especially in the context of modernization of legal education, as well as, realization of the values enshrined in the Constitution, besides, preparing legal professionals for all walks of legal practice, advocacy and social activism, thereby raising the standards of legal profession, in all its manifestation and organization.

It is common knowledge to all the law professionals, both academic and practicing, that a legal journal is an essential tool, not only to express a point of view of an author, but also a vehicle of carrying forward the knowledge of law, its application, its doctrines, precepts, concepts and the plethora of Jurisprudence, involved over time, the publication of the Journal in its subsequent issues and editions.

To have an overview of the scholastic content of the various authors, as well as, the overview of the Journal, it is important to bear in mind that although Indian legal scholarship finds very limited outlet in publishing in legal journals of repute in India (Journals of Indian Law Institute and Indian Society of International Law and some of the Journals published by law Universities, an exception), there are very few Legal Journals being published in the country across the Legal academics, therefore, the publication of *Kashmir Journal of Legal Studies* has an added advantage in the company of few legal journals published in the country. Articles published in *Kashmir Journal of Legal Studies* (Vol. – I, 2011) read in the context of the academic needs of the country, have lot to speak and contribute towards the enlightenment of the legal scholarship. Fourteen articles on diverse subjects of law have been published in this first issue of the journal. A kaleidoscopic view of

the articles published in the Journal shows variety and varied interests of the scholars in the subjects which have been dealt in the Journal.

Prof. Afzal Wani in his Article, "*Curing Carelessness towards Man-Made Disasters through Legislative Actions: Let There Be No More Any Uphar Tragedy"* deals with the subject in terms of how to manage the disasters through legislative action and has suggested that Chapter X of the Disaster Management Act, 2005 needs a fresh look and calls for a separate legislations, so that the tragedies of Uphar type do not recur again. The contribution of Prof. Wani although brief is timely and needs to be taken care of in future legislations tackling the future disasters.

Prof. Rafiqi in his Article, "*Digital Piracy under Copyright Regime: A case for Techno-Legal Control"* is at pains to explain that with the advancement of Internet, dissemination of digital materials and its access and diffusion has thrown up many problems of copyright piracies and that almost all the countries are finding it difficult to cure this menace. The US Digital Millennium Copyright Act, 1998 along with various WIPO Treaties have not proved worth the salt and there is serious dissension in accepting or acknowledging the utility of the United States Law in curbing piracy. Equally, the European Union passed various laws and directives to control the piracy in the copyright domain and on balance the stakeholders are not happy and even not sure about the results of such laws. The Indian legislation is far behind in respect of preventing copyright infringements in the digital world. There is some proposal pending in the Parliament to cure the menace of copyright piracy, as well as, right to information under the law. The author obviously compares the various options available to Indian stakeholders to combat the digital piracy.

"*Taking Environmental Obligation Seriously*", Prof. Dar opens up the vistas of environmental Jurisprudence prior to Bhopal and after, and remarks that these emerging principles have aided to make the legal technicalities easier for the victims and allowed more room for the government to operate, bringing more accountability on the polluters and also caring for the future generations. The impact of the repeated judicial

support to these principles has been that a settled judicial legislation has been independently taking roots in the Indian legal system.

Beauty Banday while dealing with "*Maintenance of Muslim Divorcee from Wakf Property: A Socio-Legal Study"* underlines the pathetic situation of the divorcee and by analytical tools has found that the majority of respondent shall be happy receiving maintenance out of the Wakf properties.

"*Legal Education in the Changing Era of Globalization"* by Prof. Khaki, surveys the subject of Legal Education, as practiced in the Indian Law Schools and suggests various reforms for improving the standards of Legal Education and concludes that Legal Education is an investment which if wisely made will produce most beneficial results for the nation and accelerate the pace of development.

Mushtaq Ahmad in his Article "*Housing Services and Consumer Protection: Judicial Response*" delves in to the area of Consumer Protection Act and builds an argument that the housing as a service should be subjected to the Consumer Protection Act to curb the acts and omissions of Housing Boards for not extending the housing benefits to the poor.

In the Article *"Freedom of Press and Contempt of Court as Reasonable Restriction"* by Saigal, the author demonstrates that the privileges of press of publishing should not extend to the derogation of the dignity of the Courts or casting motives to Judges that will be bad for democracy.

"*Medical Negligence and Consumer Protection Act 1986: A Perspective*", by Dr. Kumar illustrates that doctors, hospitals and nursing homes have been imposed heavy fines. However, Dr. Kumar is interested to develop a thesis that Patients as consumers vis-a-vis Doctors should not be put in the same scale, as ordinary consumers and service providers as the medical profession requires standard of reasonable competence rather than reasonable standards of care.

A long Article by Bhat on "*Reproduction Right in Digital Media"*, underlines the scope of reproducing the Intellectual Property Rights in the form of copies, such as, copyright works, sound recordings, films,

broadcasts etc. The reproduction rights although are protected rights and various International treaties including TRIPS legitimize these rights of the authors not to be reproduced, yet there are possibilities in the digital world that the copyright works get reproduced *ad-inifnitum.* Therefore, the law must be changed to protect the infringements of the copyrighted works by temporary and permanent reproduction, and if any economic benefit accrued to the infringer, the owner of the copyright should be compensated by the infringer.

Suheem Altaf in her small but very valuable Article, "*Investigation Power of Securities and Exchange Board of India: an Overview",* underlines the importance of SEBI and has given many suggestions to make SEBI more meaningful and suggests that study of SEBI should be included in the syllabus of Law courses.

"*Female Participation in Dowry Crimes: A Challenge to Feminism"* by Dr. Gupta and Nayyar develops an argument that in the case of Dowry crimes when female participation happens as an abettor, actor and accomplices, the incidents of convicting such abettors although is comparatively low, yet there needs to be reappraisal of those issues raised in dowry crimes by way of abetment by the female folks.

After reading and reviewing the various articles, their scholastic content and the teleology of the Journal, it's my considered opinion that Kashmir Law College has done a great service to the legal academics by adding a Journal, *Kashmir Journal of Legal Studies* to the already scant and limited publication of legal journals in the country.

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Publication of a standard journal is fundamental to the growth of any educational institution, moreover of a professional one. The journal is the mirror image of the strengths, excellence, and academic environment of an institution. It also reflects the type of the product in intends to produce and its commitment to the society at large.

Among a few of the Law Colleges which have been created, the post 90's and are affiliated to the University of Kashmir, it is the Kashmir Law College which has come out with its qualitative journal "*Kashmir Journal of Legal Studies"*; a flagship of the college.

The journal is of a very good quality and indicates the path of progress; the college has adopted in imparting Legal Education in the State. The first issue of this journal contains papers contributed by members of legal fraternity who matter both, in and outside the State.

All contributions made are of topical significance, well researched and methodologically sound. No doubt, the contributors need to be congratulated for their meaningful efforts, however, the fact remains that the dedicated leadership of the college under which it works deserves all appreciation for the efforts made in order to bring out a class apart ;Legal journal. The journal is undoubtedly an addition to the already existing list of recognized legal journal of the state.

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