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Editorial

Legal education in the contemporary world has assumed a multi-faceted dimension due to burgeoning technological intervention, marketing drive and economic competition in the field of training, teaching and research. Kashmir Law College as the premier legal institute of the state in the private sector has created a niche of its own, in terms of infrastructure, library facilities; qualified teaching faculty, able administration coupled with responsive auxiliary staff. It has been publishing its highly acclaimed refereed research journal, ***Kashmir Journal of Legal Studies*** regularly. In its 4th edition KJLS has tried to cover a broad spectrum of themes, spanning from criminal law to environmental law; gender justice to information technology law; international law to juvenile justice, restorative justice etc. Needless to say that the research papers are published only after getting academic clearance from subject experts on the principle of first come first basis.

The first article, *"Dispute Settlement Mechanism of WTO vis-à-vis International Law "by* **Mr.Iqbal Ali Khan** *and* **Mr.Humayun Rashid Khan** have tried to focus on application of International law principles like Vienna Convention in dispute resolution by WTO.

Ms.Rehana Shawl & **Mr.S.M. Afzal Qadri** in their paper titled *"A Conceptual Study of Philosophy of Punishment: An Indian Perspective*" have laid emphasis on the desirability and objectives of punishment in contemporary criminal administration of justice.

Ms.Shabina Arfat & Ms.beauty Banday in their paper *"Women – Victims of conflict: A Human Rights Perspective"* have evaluated International humanitarian & human rights law relating to women in conflict like situations warranting the need to introduce gender analysis with an emphasis on women's rights.

Mr.Iftikhar Hussain in his paper *"Legal Management and Conservation of Medicinal Plants: A Critical Appraisal of Law in India"* has in his attempt critically examined the legal framework related to the conservation and sustainable use of medicinal plants in India.

Mir Junaid Alam & Mohd Younis Bhat in their joint research paper "*Bio prospecting in Traditional and Indigenous Medicinal Plants: A Socio Legal Study with Special Reference to the Valley of Kashmir*" have raised a sensitive issue by highlighting that Kashmir Valley has

great prospectus of bio prospecting in Medicinal plants. The paper emphasizes that there should be proper benefit sharing arrangement with the indigenous people after properly tapping the precious species of medicinal plants.

Mr.Debajit Kumar Sarma in his paper "*Section 66A of the Information Technology Act, 2000: A critical Appraisal"* has highlighted the constitutional validity of Sec.66A of the I.T. Act.

Ms.Sushmita .P. Mallaya in her paper "*Compensatory Jurisprudence under Criminal Law in India: Need for Reforms"* has scrutinized the law related to compensation and its impact on the victims of crime.

Ms.Seemeen Muzafar & Mr.Altaf Ahmad Mir in their write-up *"Doctrine of Legitimate Expectation: Great Expectations?"*, have underlined the desirability of legitimate expectation doctrine in administrative matters.

Ms.Shimayil Wani in her paper *"Juvenile Justice in India and J&K ; A critical juxtaposition of the Juvenile Justice (Care & Protection of Children) Act, 2000 & the J&K Juvenile Justice Act, 1997"* has made a comparative study of juvenile Justice system in India & J&K and attempted to bring to surface the synergic points of the two systems as well as the austere differences.

Ms.Gulafroz Jan & Ms. Nasheman Ferozan in their paper *"sexual harassment of woman At workplace-A study of hospitals and courts in District Srinagar and Pulwama*" have analyzed the problem and gravity of sexual harassment among women at workplaces and the need for its control.

Ms.Shazia Ahad Bhat in her research paper *"Status of Women after Marriage in the State of Jammu and Kashmir: A Socio- Legal Study*" has made an analysis of post marital status of women residents of J& K after their marriage with a non-state subject.

Mr.Mohammad Rafiq Dar in his paper *"Legal and Ethical Aspects of Advertisement"* has critically evaluated the law relating to advertisements in India and the need of a statutory body to enforce the existing provisions of relevant law.

Mr.Mehmood Ahmad Malik in his paper *"Education as a Service under the Consumer Protection Act, 1986: Some legal Perspectives*" has emphasised the need to differentiate statutory and admintrative functions to harness the benefit of education as a service.

In the write-up, *Restorative Justice in India: a Critical Appraisal*, the writer, **Ms.Saba Ganai**, has deliberated upon the concept of Restorative Justice and its relevance in the contemporary Criminal Justice System.

The article on "*Socio-Legal dimensions of Beggary vis-à-vis Right to Live with Dignity*: An Indian Perspective" by **Ms. Rubina Iqbal Ganai** deliberates upon the concept of begging and its regulation under law and constitutional guarantees.

Ms. Insha Hamid in her paper "*Role of Judiciary in Widening the Scope of Article 21 with special reference to Right to Education*" has made an attempt to analyze the role of judiciary in widening the scope of Article 21 with special focus on right to education.

I am thankful to the members of the Editorial Committee and other subject experts for editing the manuscripts and ensuring that the present volume finds its own niche in the academic and other relevant fields.

I will be failing in my duty if I do not place on record the appreciation for the untiring work of Dr. Fareed Ahmad Rafiqi, Associate Editor and Dr.Rehana Shawl, Assistant Editor, for bringing out this issue.

I am thankful to *Mr. Omer Javeed Zargar* & *Mr. Arif Ahmad* for Computer Layout and the design of the journal. I am also grateful to the Salasar Imaging systems, Delhi for printing the Journal with meticulous care.

The editor acknowledges with great appreciation the support and co-operation of all the members of the management of the college in general and Mr. Altaf Ahmad Bazaz in particular whose patronage has enabled the publication of the present issue of the journal.

A S Bhat

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Notes And Comments

Dispute Settlement Mechanism of WTO Vis-a-Vis International Law

Prof. Iqbal Ali Khan[*]
Dr. Humayun Rasheed Khan[**]

Abstract

It is a well known fact that the decisions taken by an appellate body are greatly influenced by powerful countries. Now the time has changed and the trade disputes between the two countries should be settled in a just and reasonable manner. Since the WTO is in operation from last one and half decades and functions as judicialized institutions at Global level but still there is a significant role for diplomacy and non-legal arguments in the system. Probably the most fundamental issue for the dispute settlement body at present is how to interpret WTO agreement.

Key words: ***WTO, Dispute Settlement Mechanism, GATT, International Law, Vienna Convention.***

Introduction

International and National relations have become increasingly dominated by economic factors. The World Trade Organization (WTO) system has moved away from its former more 'power oriented diplomatic' approach to trade relations and embraced 'rule oriented diplomatic' approach to trade and impartial dispute settlement. Addressing the need for fairness in international economic relations, dispute panels provide a forum for the airing of dispute regardless of a party's economic power or influence. Developing countries are given an opportunity to challenge the trade measures of economically strong states that normally dominate international negotiations and multilateral decision making.

The global acceptance of a compulsory dispute settlement system as part of WTO Agreements lends credence to developments in

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International trade law and elevates the importance of public International Law generally. The advent of WTO dispute resolution system suggests that the process of settling trade disputes has become judicialized. Yet, there is still a significant role for diplomacy and non-legal arguments in this system. Unlike the original 1947 General Agreement on Trade and Tariffs (GATT), the 1994 Agreement establishing the World Trade Organization (Marrakech Agreement) covers a much wider range of trade. It extends beyond goods embraces services, intellectual property, procurement, investment and agriculture.

Since the WTO is in operation from last one and half decades and functions as judicialized institution at global level, it is bound to come across the question of applicability or non applicability of various principles of customary International Law while making interpretation of various Covered Agreements. Probably the most fundamental issue for the Dispute Settlement Body is how to interpret WTO agreement.

The WTO Agreement ushers in a new era in decision making by the parties and in the resolution of disputes. Under the Dispute Settlement Understanding (DSU)[1] a Dispute Settlement Body consisting of dispute panels and an Appellate Body now adjudicates trade disputes between the parties. A WTO member may invoke the compulsory jurisdiction of the Dispute Settlement Body by requesting the establishment of a panel to settle a dispute.[2] There is then a right to appeal the Panel's decision.[3]

In fact, the global acceptance of a compulsory dispute settlement system as part of the WTO agreements lends credence to developments in international trade law and elevates the importance of public International Law generally. The DSU furthers the role of legal adjudication in international trade law by creating a permanent appellate tribunal. This reflects the need to create a neutral arbiter of

1 WTO Agreement (1994), Annex 2, 33m I.L.M. 1226

2. Article 6 of the DSU

3. Article 6 of the DSU

trade disputes, primarily based on legal interpretation of the WTO Agreements.

The WTO case law covers not only matters of interpretation and the function of the Dispute Settlement Body (DSB) but also includes aspects of customary International Law, as well as general legal principles. Issues such as the burden of proof and judicial economy as well as the procedural fairness, have entered the discourse, enabling the DSB to develop a body of law, rather than simply act as an *ad hoc* arbitrator. Interpreting WTO law consistently with International Law and other general legal principles enhances legal security and consistency in the WTO legal system as well as the parties' tacit acceptance of third party adjudication.[4]

This article examines how Dispute Settlement Body's decisions have made use of the general jurisprudence of international law, how far the Vienna Convention on Law of Treaties, 1969 is applicable to WTO agreements? What is the role of different legal principles in the operation of dispute settlement process of the WTO?

Articles 31 and 32 of the Vienna Convention, 1969 and the Dispute Settlement

There was a lot of uncertainty with regard to the application of Vienna Convention on the law of Treaties, 1969 in case of GATT whose character as a binding treaty was doubted by some experts.[5] By contract, the WTO agreements are treated as any other treaties in international law, having major implications in determining its relationship with other international agreements and International Law in general. Unlike previous GATT panels, Dispute Settlement body under WTO is explicitly required to invoke the rules of interpretation of treaties as a source to clarify WTO agreements. Article 3.2 of the DSU states that WTO agreements are to be interpreted in accordance

4. E.U, Petersmann; "The GATT/WTO Dispute Settlement System" (Kluwer Law International, London, 1997,p *17,*

5. P. Nicholas;"GATT Doctrine 1996", 2 Virginia journal of International Trade Law, p. 422.

with the customary rules of interpretation of public International law.[6] On one occasion, it has been referred to as providing the only rules of interpretation of the WTO Agreement.[7] There may have been tacit acceptance of the application of the Vienna Convention on Law of Treaties, 1969 under the GATT 1947 regime. The sources of interpretation of the GATT 1947, Panels often attached undue importance to drafting history of the agreement or they would look to other material beyond the text of the GATT.[8]

Under the Dispute Settlement Body system, it is imperative that the ground work for interpretation and application of GATT rules laid down so as to guide negotiator, decision makers and future Panels. By outlying this principle, the dispute resolution process is perceived to be more efficient and WTO Agreements are more clearly understood. This can lead to the speedier resolution of disputes and indeed dispute avoidance, because a correct interpretation can be determinative of future issues consistent, coherent and authoritative interpretation aids the development of trade regime, connecting adjudication with the constitutional function of the WTO and providing interested parties with grounds for trust.

What constitute customary International Law in the interpretation of treaties is generally taken to be expressed in Articles 31 and 32 of the Vienna Convention on Law of Treaties? The Appellate Body noted that there was a need to achieve classification of the WTO Agreements by reference to the fundamental rule of treaty interpretation in Article

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6. *This interpretative Requirement Extend Beyond GATT 1994 and includes other Agreement such as TRIPS (India - patent protection for pharmaceutical and agricultural products, WT/DS/50/ AB/R, Dec. 1997) and the Agreement on Textile and Clothing (US) Restrictions on Imports of Cotton and Man Made Fiber Underwear Adopted on 25 Feb. 1997, WT/DS/24/R.*

7. *James Cameron and Kevin R. Gray; "Principles of International Law in the WTO Dispute Settlement Body", International and Comparative Law Quarterly, p, 252*

8. *P. Nicholus, op. cit, p.430.*

31(1) of the Vienna Convention on Law of Treaties. The universal application of the provisions of the Vienna Convention on Law of Treaties 1969 to international trade law is problematic, as some WTO members, including the United States, are not parties. However the Appellate Body in *Japan-Taxes* implicitly resolved any uncertainty about its application to non-parties by declaring that the Vienna Convention on Law of Treaties represents a codification of customary International Law and is therefore binding on all states.[9]

The treaty shall be interpreted in good faith in accordance with the ordinary meaning and in the light of its object and purpose.[10] In addition to text, including its Preamble and annexes, agreements concluded in connection with the treaty between all the parties, any agreement between one or more parties in connection with the conclusion of the treaty and accepted by other parties, as an instrument related to the treaty, is relevant.[11] Any subsequent agreement between the parties regarding the interpretation of the treaty, any subsequent practice in the application of the treaty, and any relevant rules of International Law applicable, between the parties, shall be taken into account.[12]

Under the supplementary rules to Article 32, the preparatory word to the treaty and the circumstances of its conclusion may also be looked into to resolve the meaning of ambiguous or obscured words etc. This provision, when taken together, leaves discretion to the Panels/Appellate Body under DSU leading to different approaches by Panels/Appellate Body leading to inconsistencies. While the most common approach is to see text, context, object, and purpose. Sometimes, the context and object and purpose may confirm the textual meaning, while at other times, it may be impossible to even identify that ordinary meaning without looking at the context and/or

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9. Id., p. 429.
10. Art. 31 para 1 of Vienna Convention of Law of Treaties.
11 Ibid para 2
12 Ibid para 3

object and purpose.[13] While the object and purpose of the treaty may, in some cases, be ascertained from the plain meaning of the word thereof. Others in interpreting may also consider the broad range of potential meaning and ancillary documents in support of another approach to interpretation.

In *Reformulated Gasoline*[14] both Venezuela and Brazil brought a complaint concerning the effect of rules prescribed under the US Clean Air Act to foreign exported Gasoline. Before the Panel, the US attempted to justify its measure under Article XX of the GATT1994, because it related to conserving natural resources pursuant to Article 20 (g). The Panel was criticized by the Appellate Body for not giving full effect to Article 31 of the Vienna Convention on Law of Treaties in interpreting the crucial phase In Article 20(g) of the GATT 1994, whether the rule constituted a measure relating to the conservation of exhaustible natural resources'. Relying on GATT 1947 jurisprudence, the Panel interpreted the terms 'relating to' as meaning 'primarily aimed at' the Appellate Body disagreed with the Panels finding that the calculation of base line level of clean Gasoline quality, applicable to foreign producers, could be isolated from the overall policy objective of the legislation, so that the measure was not, on its own, 'primarily aimed at' conservation.

In fact, Article 31(1) of the Vienna Convention on Law of Treaties states that treaty's are to be interpreted in good faith in accordance with the ordinary meaning given to the terms of treaty in their context and in the light of the treaty's object and purpose. A tribunal began with the word as agreed and looked for meaning there. Particular attention is to be paid to the context of the treaties since a provision should not be interpreted in isolation but in its context, in that part of agreement and then in relation to entire Agreement. In the *Underwear* Panel decision, the entire text of the agreement on Textiles

13. Rao, M.B. & Guru Manjula; WTO Dispute Settlement and Developing Countries, Lexis Nexis Butterworth, New Delhi, p. 44.

14. WT/DS2/AB/R,1996.

and Clothing (ATC)[15] was deemed relevant in order to interpret Articles 6.2 and 6.4 of the ATC. The cross reference and inter-relationship between all of the WTO Agreements open up the possibility of considering them when interpreting a particular agreement.

Article 32 of the Vienna Convention on the Law of Treaties (VCLT) codifies another fundamental rule of treaty interpretation applicable to WTO Agreements. In fact, Article 32 of the Vienna Convention on the Law of Treaties is to be resorted to only when Article 31 fails to resolve a problem of interpretation. Article 32 was applied in the E. C, *Bananas case*[16] in order to confirm the Panel.

In fact, the link between Articles 31 and 32 of the VCLT and the interpretation requirements stated in Article 3.2 of the DSU is now entrenched in WTO law. This connection has emerged into a legal test from which Panels cannot deviate when reviewing provisions in the WTO Agreements. Failing to apply this test or using alternative methods of treaty interpretation can result in overturned rulings.[17] In the fcc*Shrimp-Turtk dispute,* the Panel was criticized by the Appellate Body for not following all the steps in applying the customary rules of interpretation of Public International Law.[18]

Moreover, the rules of treaty interpretation under International Law are not limited to what is expressed in VCLT. The principle of effectiveness *(Ut res magis valeat quam pereat)* is a fundamental tenet of treaty interpretation, flowing from the contextual analysis required

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15. WT/DS6, United States - Measures affecting Imports of Women Wool Shirts and Blouses from India {Complainant India), 14th March 1996=
16. WT/DS364, European Communities - Regime for the Importation of Bananas (Complainant Panama), 22 June 2007.
17. The Panel in LAN Computers dispute was overruled by the Appellate Body, for its failure to examine the context of a tariff schedule or the object and purpose of the WTO Agreement and the GATT 1994, before resorting to an examination of the legitimate expectations of the parties.

15. WT/DS58/AB/R, US - Import Prohibition of certain shrimp and shrimp products (1998).

under Article 31 of the VCLT. If, a treaty is open to two interpretations with one of them disabling the treaty from having the appropriate effects, good faith and the objects and purpose of the treaty demand that the effective interpretation should be adopted.[19]

The interrelationship of the WTO Agreements constitutes a comprehensive legal system governing international trade. A contextual analysis of a specific article mandates an understanding of how the agreements function together. Applying the principle of effectiveness challenges the notion of *lex specialis,* where each agreement would operate in isolation from each other. The Panel in the *Canadian Periodicals* endorsed this approach, ruling that the ordinary meaning of the texts of GATT 1994 and GATS as well as Article 11:2 of the WTO Agreement, taken together, indicate that Obligations under GATT 1994 and GATS Co-exist and that one does not override the other.[20] The finding was consistent with the rulings by the Panel and the Appellate Body in EC *Bananas* where in accordance with Articles 31 and 32 of the Vienna Convention on Law of Treaties 1969, the GATS was not limited to measures that directly govern or affect the supply of the service.[21]

It, therefore, becomes evident that reading agreements together is the preferred approach by the Appellate Body. It is so because there are potential conflicts between the provisions of the various agreements.

In, *Guatemala-Anti Dumping*[22] the appellants argued that the dispute settlement provisions under the Anti-Dumping Agreement took precedence over the general dispute settlement rules in the DSU. The Appellate Body noted that although the former provides for special

16. (1966) Yearbook of the International Law Commission, Vol.11, p.219. as referred to by the Appellate Body in Japan-Taxes.
17. (1966) Yearbook of the International Law Commission, Vol.11, p.219. as referred to by the Appellate Body in Japan-Taxes.
18. European communities - Regime for the Importation, Sale and Distribution of Bananas WT/DS27/AB/R.
19. Guatemala - And Dumping Investigation Regarding Portland Cement from Mexico (WT/DS60/AB/R).

rules and procedures, they only prevail over the DSU where there is a divergence between the provisions. It is only in situation of a conflict where adherence to the one provision will lead to a violation of the other that the Anti-Dumping Agreement provision would prevail.[23] Where there is no difference, the rules of the procedures of the DSU apply together with the special provisions of the covered agreement.[24]

It is now Crystal clear that the need for flexibility in interpreting WTO Agreements has been recognized by the ruling of Panel and Appellate Body. The Appellate Body in the *Japan-Taxes* case appreciated *the* need for having definitive interpretations of GATT 1994. WTO rules were needed to be reliable/ comprehensible and enforceable. However, the Appellate Body added that interpretation is not to be as rigid or inflexible as not to leave room for reasoned judgments in confronting the endless ever changing ebb and flow of real facts in the real cases in the real world.[25]

Article 31 (3) of the Vienna Convention on Law of Treaties 1969 allows the Appellate Body to refer to subsequent practice when Interpreting a treaty as well as subsequent decisions of the parties. The *Desiccated Coconut* Panel discussed the difference between the two.[26] In that case, the Panel dealt with the relationship between GATT 1947, the 1979_y Subsidies and Countervailing Measures Code (CMC) and GATT 1994. While in the practice of SCM Code, it was clearly not relevant to be the interpretation of Article VI of GATT 1994. Practice in this context relates only to agreements regarding interpretation.

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[23]. Ibid.

[24]. A difference was found by the Appellate Body in Brazil - Export Financing Programme for Aircraft (WT/DS46/AB/R) para 132, with respect to the provisions governing the implementation of the recommendations and rulings of the DSB in a dispute pursuant to Article 4 of the SCM Agreement

[25]. Japan-Taxes, Section G,H (1) (2) (c).

[26]. Brazil - Measures Affecting Desiccated Coconut (1997) WT/DS 22/R, Section VI, A, 1(b) (ii).

RULES OF INTERPRETATION:

a) Doctrine of In Dubio Mitius

It is an important rule of interpretation widely recognized as a supplementary means of interpretation whereby difference is accorded to the sovereignty of states. The Permanent Court of International Justice in a case called *Frontier between Turky and* Iraq[27] identified the principle of In *Dubio Mitius* as meaning that if the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligation for the parties should be adopted. In other words, the doctrine seeks to deal with situation in which ambiguity crops in because of a term. In such situation, the meaning to be preferred is the one that is less onerous on the party assuming an obligation; least interferes with territorial and personal supremacy, or imposes fewer general restrictions.[28] In *Beef Hormones,* the Penal ruled that the measures taken by EC must be 'based on' international standard under Article 3:1 of the SPS Agreement meaning that they must 'confirm to' international standard as required under Article 32 of the SPS Agreement.

The Appellate Body concluded that in applying the principle In *Dubio Mitius* that it was wrong to assume that sovereign states intended to Impose upon them the more onerous obligation, rather than less burden sum obligation by mandating conformity or compliance with standards, guidelines and recommendations.[29]

Article 31(3) of the Vienna Convention on Law of Treaties 1969, allows the Appellate Body to refer to subsequent practice when interpreting a treaty as well as subsequent decision of the parties, In *Desiccated Coconut,* the Panel discussed the difference between the two,...[30] In this case the Panel dealt with the relationship between the GATT 1947, the 1979 Subsidies and Countervailing Measure Code

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27. (1925) Series B, No. 12 at 25.
28. E.G. Measures Concerning Meat and Meat Products (Hormones) WT/DS26/AB/R, WT/DS48/AB.
29. Supra Note 7, p. 259.
30. Brazil - Measures Affecting Desiccated Coconut (1997), WT/DS 22/R

(SCM) and the GATT 1994. It was observed by the panel that the subsidies and Countervailing Measures Code (SCM) was a subsequent agreement but not customary practice of the GATT 1947. Practice in this context relates only to agreement regarding interpretation. The panel adopted a narrow view as to what comprises subsequent practice and held that only practice under Article VI of GATT 1947 was legally relevant for the interpretation of Article VI of GATT 1994.

(b) Doctrine of Legitimate Expectation

The doctrine of 'legitimate expectation' has been applied in many cases. However, it is probably derived from German Law and is general principle of interpretation applied by European Court of Justice (ECJ)[31] developed in the context of something that traders can rely on, it is something held by reasonable person as to matters likely to occur in the normal course of his affairs.[32] There are certain other international legal principles that are related to the Doctrine of Legitimate Expectation, such as *pacta sunt servanda,* estopple and the abuse of rights doctrine.

In the Lotus Case,[33] the Permanent Court of International Justice (PCI]) held that conduct not explicitly prohibited by international law remained lawful, similarly lawful, measure adopted by some states easily frustrated the intention of GATT 1947 parties. In response, it became a well established GATT principle that the legitimate expectations of member regarding the conditions of competition were to be protected in order to inject security and predictability into the multilateral trading system. The need for the protection of legitimate expectation is bolstered by the dispute settlement provisions found in Article XXIII of the Dispute Settlement Understanding that allows an avenue for redress to non-violation complaints, this offers an effective mechanism affording protection to the parties who have not suffered

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31. Germany vs. Council (Re-Banana Regime) ~ Case 280/93, (1998), ECR, 1019.

32. J. Steiner and L. Woods, Text Book on EC Law, (London) Black Stone Press Ltd, 1998, p. 105

33. S.S. Lotus, Judgment No. 9, (P.C.I.J.), Ser. A. No,. 10 (1927)

direct injury arising from a specific treaty violation. The application of the doctrine of legitimate expectation can preclude or limit the use of exceptions in the WTO Agreement. In the *Underwear dispute* the panel review the wording, the context and the overall purpose of the Agreement on Textiles and Clothing (ATC) concluded that exporting members could legitimately expect that transitional safeguard adopted under Article VI of the Agreement on Textiles and clothing will be exercised sparingly. Members could legitimately expect that importer would not frustrate market access and investment. As a result the panel ruled that resort to transitional safeguard was permitted on an exception basis by virtue of the need to protect legitimate expectation of the parties.[34] The questions of 'legitimate expectation' re-appeared in the LAN *Computers Panel Report,* concerning the interpretation of a tariff schedule. The Panel asserted that the protection of legitimate expectation of the tariff treatment of a bound item is one of the GATT 1994, tariff concessions that the price effects of the tariff concession will not be systematically offset. The panel concluded that despite the re-classification by the EC, the prevailing practices of the EC during the Uruguay Round formed a legitimate expectation that LAN equipment would continue to be given the same tariff treatment accorded to ADP machine. The security and predictability agreement directed to the substantial reduction of tariff and other barriers to trade could not be maintained without respect for legitimate expectation. This was held to be consistent with the principle of good faith as codified in Article 31 of the Vienna Convention on Law of Treaties, 1969.

The Appellate Body disagreed with the Panel's ruling that the meaning of tariff concession can be determined in the light of 'legitimate expectation' of the exporting member. Interpreting a concession in the light of the legitimate expectation of an exporter was not consistent with the principle of good faith under Article 31 of the

34. James Cameron and Kevin R. Gray; op. cit, p. 261.

Vienna Convention on the Law of Treaties *1969,* since it applied the concept to the treaty that were not intended by the parties. The Appellate Body held that the purpose of treaty interpretation was to ascertain the common intentions of the parties, which cannot be understood on the basis of subjective and unilaterally determined expectation of one of the parties to the WTO Agreement.

C. Doctrine of Stare Decisis: The Question of its applicability

The Doctrine of 'Stare Decisis' has established its authority in municipal legal systems operating in different parts of the world. But the question of its applicability in international sphere in general and in WTO Dispute Settlement Mechanism in particular, is still uncertain and controversial.[35] In fact, in the functioning of the International Court of Justice, the doctrine of Stare Decisis has no application. Article 50 of the Statute of International Court of Justice expressly states that 'the decision' of the court has no binding force except between the parties and in respect of the particular case.

The role of GATT Panel decision in interpreting WTO Agreement received some attention by the Appellate Body in *Japan-Taxes dispute.*[36] The Appellate Body interpreted Article XVI:I of the WTO Agreement[37] and paragraph 1 (b)(IV) of Annex 1 incorporating GATT 1994 into the WTO Agreement as bringing the legal history and experience under the GATT 1947 into the new realm of WTO to ensure continuity and consistency in a smooth transition. The experience acquired by the parties to the GATT 1947 was deemed relevant to the experience of the new trading system under the WTO.

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35. Id. p. 274

36. Japan-Taxes on Alcoholic Beverages (Complaint European Communities) WT DS 8, 1995 Japan Taxes on Alcoholic Beverages Complaint Canada DS!), 1995. Japan Taxes on Alcoholic Beverages (Complainant U.S.) WT DS 11,1995.

37. Except as otherwise provide under this Agreement or multilateral Agreements the WTO shall be guided by the contracting parties to GATT 1947 and the bodies established in the framework of GATT 1947.

Following from that experience, are Panel reports that became an important part of that system/ often considered by future panel.

The Appellate Body refused to accord any binding effect to the previous panel report of GATT 1947. Panel reports required an adoption by the contracting parties in order to have effect. Lack of adoption under the GATT 1947 regime can lessen the weight given to a panel's decisions. Where the decision to adopt a panel report is made, it still cannot constitute an agreement by contracting parties on the legal reasoning contained in panel report. The decision to adopt a report by the parties did not constitute a definitive interpretation of the relevant provision of GATT 1947 for the future.

Under the WTO system, exclusive authority in interpreting GATT |W4 is conferred on the Ministerial Conference and the General Council which have the sole power to adopt interpretation, with decision taken by a three quarters majority of the members.[38] The Dispute Settlement Body can issue recommendation and adopt rulings but they are prohibited from adding or diminishing the parties' rights and obligations. This effectively prevents the incorporation of other interpretations into the WTO Agreements. By referring to the legislative branch of WTO, the Appellate Body in *Japan Taxes* limited the role of the Dispute Settlement Body to merely clarifying and not making WTO law.[39]

In fact the Appellate Body in *]apan Taxes* concluded that the Panel decisions were not binding except with respect to resolving that particular dispute between the parties. Panels are not bound by the details and legal reasoning of prior panel reports, since there are other factors to be considered including other GATT practices and the particular circumstances of the complaint. Decisions are deemed to be isolated acts that are generally not sufficient to establish subsequent

38. Article IX:2 of the WTO Agreement, Article 3(2) of the Dispute Settlement Understanding sand XIX;2 of the WTO Agreement.

39. James Cameron and Kelvin R. Gray, op. cit., p. 274.

practice, since they do not form a sequence of acts establishing an agreement of party.

However, there are prominent experts like E.U. Petersmann and Prof. John Jackson who are critical of Appellate Body reasoning and approach as mentioned above. E.U. Petersmann challenges the Appellate Body approach on the ground that it neglects the contextual difference between a judgment by the International Court of Justice and a GATT Panel Report, whose subsequent deliberation and adoption by both the council and Annual Conference of the GATT contracting parties could make such report more than an isolated act.[40] Prof, John Jackson criticizes the Appellate Body's ruling in Japan-Taxes whereby a comparison was made between Dispute Settlement Body of WTO with that of International Court of Justice[41] because the ICJ is governed explicitly by Article 59 of the Statute of International Court of Justice which negates any *Stare desisis* in the ICJ jurisprudence,[42] Prof, Jackson says that the approach adopted by the Appellate Body is not well founded because the development by the ICJ of a body of a case law points out that a considerable reliance is placed on the value of previous decisions of the International Court of Justice.

In the new era of dispute settlement it appears that the development of case law under the Dispute Settlement Body may provide guidance for subsequent decisions. Experience shows that the Panel and Appellate Body, through its decisions, have applied legal tests established in earlier decisions. It appears that as the number of panel decision increases in future; there will be a growing reliance on

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40. E.U. Petersmann; International Trade Law and The GATT/WTO Dispute Settlement System, 1948 to 1996: An Introduction, p. *37.*

41. J. Jackson; The World Trading System; Law and Policy of International Economic Relations (Second Ed.) M.I.T. Press, Cambridge, 1997, p. 32.

42. It is generally considered that the previous decision by International Tribunal lack formal precedential effect: L Brownlie: Principle of Public International Law 5th ed., p. 21, New York, Clarendon Press, 1998.

them to substantiate a party's position. The reasoning of panels, indeed, can provide useful guidance for future decisions, even to the point of being persuasive in a more formal sense; this is a concept familiar to common law lawyers.[43]

d) Burden of Proof in Dispute Settlement Proceeding

The burden of proof is an evidentiary rule, fundamental to legal system. In World Trade Organization Law, the burden is normally allocated to the complainant to establish that a violation of GATT 1994, as well as other WTO Agreements, has occurred. The burden of proof, in fact, rests with the party, which asserts the affirmative of a particular claim or defence. In *Shirts and Blouses dispute,*[44] the panel found that the burden of proof rested with India to prove that there was a violation of the Agreement on Textile and Clothing due to US safeguards measures. It was for India to advance factual and legal arguments in order to establish that the import restriction was inconsistent with Article 2 of the Agreement on Textiles and Clothing's and that the US determination results in serious damage or actual threat, pursuant to Article 6 of the Agreement on Textiles and Clothing, was not evident.

When the dispute came before the Appellate Body was brought, discussion was made on the doctrine of burden of proof in the context of International Law by the Appellate Body, In rejecting India's contention that the burden of proof was initially on the US, the Appellate Body questioned how any system of judicial settlement could function where a mere assertion of the claim amounts to proof.[45] It is generally accepted principle of Law applicable in most jurisdictions that the burden of proof rests upon the party who raised a particular claim or defence. This was generally accepted cannon of

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43. Desiccated Coconut, Panel Report (WT)/DS22/R at Section VI A, 1 B III para 258.
44. United State Measures Affecting Imports Woven and Wool Shirts and Blouses from India WT/DS 33, (1st April 1996)- http//www,wto.org.
45. J. Camaron and K.R. Gray. Op. *cit.,* p.277.

evidence in civil law, Common Law and in most other legal systems. How much and what kind of evidence is required to establish the presumption will, however, vary from measure to measure, provision to provision and case to case. The burden of proof, indeed, serves as a benchmark for any effective dispute resolution system. It maintains fairness and order by presuming that WTO members are in compliance with their obligation until proven otherwise.[46]

A dispute settlement mechanism operating under such a principle assures members that the benefit accruing directly or indirectly to them under the General Agreement on Trade and Tariffs1994 will be protected. If a member feels that its benefits are nullified or impaired, dispute settlement is available.[47] The complainant is initially required to demonstrate a prime *facie* case of nullification or impairment. The complaint party establishes this in the absence of effective refutation by the defendant. Where there is an infringement of the obligations under one of the WTO Agreements, the action constitute a *prima facie* case of nullification or impairment of benefits.[48]

There is presumption that a breach of WTO rule produces an adverse impact on other members thereby compelling a member, against whom the complaint is brought, to rebut the charge. In the Foot *Wear case,* the Panel attempted to define what a presumption is. It held that in conformity with the ordinary meaning of the words, as spell out in the Black's Law Dictionary,[49] *(Lexique de termers juridiques)* and other similar dictionaries, a presumption constitute an inference in favour of a particular fact. It would also refer to a conclusion reached in the absence of direct evidence. Setting out the violation of a WTO Agreement activates the presumption that a member's benefits have been, or will potentially be, nullified or impaired. The burden of

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46. Ibid.
47. Article XXIII (a) of Marrakesh Agreement Establishing WTO, allows a party to Bring forward a complaint when any provision of the WTO Agreement is violated.
48. Article 3:8 of the Dispute Settlement Understanding.
49. *6th* Edition, West Publishing (1991)

proving a violation is not insurmountably onerous, in international dispute, tribunals are given considerable flexibility in evaluating claims before it. A common problem is that a party cannot obtain access to specific evidence to proof a prima facie violation where a non-violation complaint is asserted, the rule on the burden of proof is modified. Non violation complaint places the onus on the complainant to provide a detailed justification of its claim. This is a practice in the WTO recognized in 1979 Understanding Regarding Notification, consultation, Dispute Settlement and Surveillance. Article 26(1) (a) of the Dispute Settlement Understanding deals with non-violation claims, proving that the claiming party must present a detailed justification to support their claim.[50]

A prima facie case is established if in the absence of effective refutation by the defending party, a Panel is required as a matter of law, to rule in favour of prima facie case. Once the prima facie case is sufficiently demonstrated the burden shifts to the other party to adduce to rebut presumption. Where a party attempts to invoke an exception under the GATT 1994 or other WTO Agreements the burden is shifted to that party.[51] The Appellate Body in reformulated *Gasoline Dispute* held that a party claiming an exception under Article XX carries a heavier burden than simply showing that the measure is categorically within the boundaries of the permitted action. The party invoking the general exception under Article XX should demonstrate that its measure does not constitute abuse of the exception under that provision. The burden of proof issue was given a procedural context by

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50. J. Cameron and K.R. Gray, op. cit, p. 278.

51. In Shirts and Blouses Dispute, India was required to put forward evidence and legal arguments sufficient to demonstrate the safeguard by the US was inconsistent with obligations assumed by the US under Article 2 and 6 of Agreements on Textiles and Clothing. The Onus then shifted to US to bring forward evidence and disprove the claim.

the Appellate Body in the *Korea Milk Dispute*[52] In this dispute, the appellant argued that the respondent did not meet its burden of showing prima facie violation of Article 4 of Agreement on safeguards. Hence the doctrine of burden of proof has been taken into consideration both by the Penal and Appellate Body and applied to different disputes in somewhat modified manner as compared to its application in different municipal law systems.

e) Judicial Economy in Dispute Settlement

Judicial economy is succinctly defined as an attempt to settle as many issues as possible in a single proceeding.[53] The panel members of General Agreement on Tariff and Trade 1947, in the context of hearing two separate proceedings that involve similar parties and/or similar trade measures, made discussion on judicial economy in dispute settlement. Panel constituted under GATT 1947 usually conducted dispute in a restrictive manner addressing the issues framed only in the terms of reference, and would not examine exceptions under the GATT 1947 unless the parties raised them.[54] The Penal members under GATT 1947, in most of the disputes gave priority to the principle of judicial economy in dispute settlement. Meaning thereby the penal members after determining that a GATT 1947 violation existed would refrain from discussing whether other GATT 1947 provisions were violated. Applying judicial economy resulted in forgoing an Article XX analysis when no violation of GATT 1947 was found.

Article 9(1) of the Dispute Settlement Understanding has codified the practice of joining dispute, giving a panel full discretion to do this when it is requested by more than one WTO member.[55] Where a party

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52. Korea-Safeguard Measures on Dairy Product WT/DS27/AB/R, adopted on 25th September 1997, posted on official WTO website Iittp://www.wto.org
53. P. Nicholas, op. cit., p. 403.
54. Tuna- Dolphin I, Section 337 of Tariff Act of 1930,1989,36 Supp. BISD, 345.
55. Annex two the WTO Agreement Understanding on Rules and Procedure Governing the Settlement of Dispute,

would refuse to have their complaints combined, GATT 1947 panels would accede to this and two separate proceeding would result. The concept of judicial economy evolved in WTO jurisprudence to outline the penal's freedom to determine to what issues it will respond to. The need for judicial economy is greater

under WTO because each particular argument advanced by the parties is much broader in scope. Responding to all of them undermines the effectiveness of the Dispute Settlement Body to respond expeditiously to complaints made by the parties. The WTO Agreement has ushered in new era of International Law that is more complicated than pre-existing GATT Law. Panels are asked to rule on the provision of the various agreements and the intricate relationship existing between them. There are numerous references to other international agreement as well as customary rules of interpretation of public International law.[56]

The Appellate Body in *Shirt and Blouses* dispute ruled that nothing in Article II of the Dispute Settlement Understanding, or previous GATT practice, mandated an examination of all legal claims made by the complaining party. It was conceded that some panels do take the liberty of deciding issues that are not necessary to the disposition of the particular dispute. It may be submitted here that the above-mentioned decision of Appellate Body is quite appreciative because it will go a long way in avoiding delays in the dispute settlement and would consequently establish the roots of judicial economy in the dispute settlement mechanism of the World Trade Organization. Another feature of judicial economy is of procedural nature. In *Reformulated Gasoline dispute,* the Appellate Body denied attempts by Venezuela and Brazil to raise arguments on a matter that was not appealed. Venezuela and Brazil had failed to fill appellant's submission, pursuant to Rules 23(1) nor separate appeal under 23(4) of the working procedures, but made new arguments on their submissions filing them under Rule 22, To permit Venezuela and Brazil to advance

56. J. Cameron and K.R. Gray, op. cit, p. 282.

position not mentioned in their initial submission would force the Appellate Body to disregard its own procedure, which it would not do in the absence of a compelling reason based on grounds such as fundamental fairness or *force majeure,* The inverse of judicial economy occurs where a Penal or Appellate Body rules on issues that are not within the parameters of the case before it. Although this is common practice for tribunal and courts empowered to rule on the law within their jurisdiction, it might be expected from the members of the WTO system that the Dispute Settlement Body is limited to addressing the question before it. It is not surprising that the Appellate Body would be willing to rule on matters outside the scope of the dispute as presented to it, so that ambiguities in the WTO Agreement can be clarified. In one sense, such 'judicial activism' can prevent future dispute over dubious terms.[57]

f. Other Principles

There are certain other general principles of International Law which sometimes are taken into consideration by the panels or Appellate Body while deciding disputes between the members of World Trade Organization the most prominent amongst them are:

The principle of State responsibility, doctrine of estopple and *abus de droit* which are discussed in brief herein under;

(i) State Responsibility: An indirect reference was made to the principle of state responsibility by the Appellate Body in *Shrimp-Turtle,* where the U.S. was held to be responsible for acts of its departments and branches including its judiciary. The relevance of state responsibility is apparent when determining whether certain measures can be impugned as attributable to a Member State, It was implicitly applied in a few GATT 1947 disputes.[58]

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57. J.P. Gaffney; "Due Process in the World Trade Organization: The need for Procedural Justice in the Dispute Settlement System" 14 (99) Am. Univ. Int. I. Rev. 1173, p. 1192,

58. C Tiete, "Voluntary Eco-Labelling Programmes and Questions of State Responsibility in the WTO/GATT Legal System" (1995) 28 (5) Journal of World Trade Law, 123 p. 148.

Another dimension of state responsibility is the relationship between domestic and International law. The Panel in *Footwear dispute,* discussed the use of national law to excuse an international trade obligation. Argentina argued that they were not in violation of Article II since their legal system afforded an adequate judicial remedy to correct an apparent breach. The Argentine constitution provided that International Law would take precedence over national legislation and all Argentine Judges were obligated to recognize the supremacy of WTO rules over inconsistent Argentine measures. The panel rejected this argument. Although Argentine Judges were required to recognize the supremacy of WTO rules over an inconsistent Argentine measure, a party can still be in violation regardless of any available judicial remedy. Hence, a WTO member cannot assert that its internal system provides for a remedy to certain individuals, either national or foreign, so that it could never be in violation of a WTO agreement.

(ii) Estopel: Another principle of International Law considered by Panels is Estoppel. Originating in both Civil and common law, Estoppel prevents a state from denying a clear and unequivocal representation made with intention that it should be relied on Estoppel is applied where the other party, relying on the representation, changes its position to its detriment or suffers some prejudice.[59] It has been explicitly recognised in Trade disputes.

In the *German Starch Case,*[60] Benelux government complained that Germany had not acted on its promise to reduce its tariffs immediately on varieties of starch. Germany's promises were manifest in the form of general assurance made during the negotiations that their duties would be reduced as soon as possible and that Germany would commence negotiations of the tariffs in 1952. Detrimental reliance was

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59. Claims based on acquiescence and estopple were accepted in GATT 1947 arbitration award on Canada/EC Article XXVIII Rights (BATT 8ISD 375/80).

60. (1950) BISD 35/77- German Import duties on Starch. EEC- Members Import Regimes for Banas, 1993.

evidenced by the Benelux government's unreciprocated tariffs concessions, given during the negotiations, which were based on the promise of future German tariffs reductions. The ruling was not determinative in the dispute as the Panel recommended that the parties find an acceptable resolution of the problem. Therefore, in what can be considered as obiter dicta, the Panel noted that the subsequent agreement by Germany to grant tariff concessions implied that Germany would have been stopped from refusing to provide the expected tariff concessions. Then there is *'abus de droit'* (abuse of rights), which is rooted in the principles of good faith and equity,[61] The basic purpose of this doctrine is to prohibit action which, while not contrary to the letter of law or agreement, deviates from their purpose and frustrates legitimate expectations relating to the exercise of the corresponding obligations.

The doctrine was applied in trade context in the *Ammonium Sulphate Case.*[62] In this case, Chile and Australia negotiated for mutual tariff concessions on ammonium sulphate fertilizers. Australia discontinued its system of subsidies for Chilean fertilizer that was in place at the time of negotiations. Chile complained that its expected benefits under the GATT 1947 were impaired by the withdrawal. During negotiations, Chile's concession was reasonably based on the assumption that the subsidies would continue, as they had existed for years, Australia replied that it had no obligation under GATT 1947 to continue subsidizing foreign production. The Panel conceded that the removal of a subsidy did not result in nullification or impairment of benefits. However, the situation at the time of negotiations was such that Chile relied on the subsidy of which the removal created an imbalance in trading relations. Chile was ruled to have a legitimate expectation of the subsidy not being revoked, basing their own

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61. A. Kissf L; Abus de Droit en Droit International, (1953), Recueil des courts.

62. The Australian Subsidy on Ammonium Sulphate, 3 April, 1950, BED 11/188.

concessions on the availability of the subsidy. The discussion carried out in this chapter makes it crystal clear that no dispute settlement system could operate without the help of the principles of customary International Law, which are rooted deeply not only in different Municipal Law systems the world over but are also firmly Ingrained into the International Law system operative under the statute of International Court of Justice in particular and United Nations in general. Again the provisions of Vienna Convention on Law of Treaties 1969, particularly Articles 31 and 32 have influenced both Panel members and Appellate Body in determination of various trade disputes brought before them by member countries. So far as the applicability of doctrine of *stare decisis* is concerned, it has no pervasive role to play in the dispute settlement process of World Trade Organization. One reason for the weak position of this doctrine in dispute settlement process is that Article 59 of the Statute of International Court of Justice expressly negates its application in relation to its decisions. It is indeed, true that the application of the doctrine of *stare decisis* in resolution of international trade disputes cannot be applied given the present structure of the dispute settlement mechanism. Then there is doctrine of burden of proof and its application in the dispute settlement proceeding. The doctrine of burden of proof which is an evidentiary rule fundamental to all legal systems, has got clear and fine application in the dispute settlement mechanism of World Trade Organization. In fact, the doctrine of burden of proof is so omnipresent that the Panel members and Appellate Body can't escape this basic evidentiary rule and the same is evident in prominent cases mentioned in this chapter such as *Shirt and Blouses* dispute, *Beef Hormones* case and *Korea Milk* case.Expeditious disposal of cases is fundamental to the basic principle of natural justice ingrained in the concept of "Justice Delayed is Justice Denied". No judicial institution can ever escape from the concept of speedy trial or speedy disposal of disputes and dispute settlement mechanism of World Trade Organization stands, no exception to this general principle of law. The concept of judicial economy in the dispute

settlement system under the World Trade Organization is the incorporation of speedy disposal in a different shape and size. Article 9 (1) of Dispute Settlement Understanding incorporates this principle in its own manner. Then there are certain other principles of International Law, which are often considered by the Panel, and Appellate Body while determining trade disputes amongst member countries. These principles are state responsibility, estople and *abuse de droit,* which are firmly rooted in the concept of good faith and equity.

Conclusion

It, therefore, becomes crystal clear from discussion carried out in this article that the principles of customary International Law have not only largely influenced the dispute settlement mechanism of World Trade Organization but has also introduced more element of legalism in the functioning of Dispute Settlement Body jurisprudence. At the institutional level, the global community becomes more secure with the knowledge that an international dispute resolution regime can function in a mutually satisfactory, principled and efficient way.

A Conceptual Study of Philosophy of Punishment: An Indian Perspective

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Abstract

Punishing the offenders is a primary function of all civil societies. The incidence of crime and its retribution has always been an unending fascination for human mind. However during the last two hundred years the practice of punishment and public opinion concerning it has been profoundly modified due to the rapidly changing social values and sentiments of people. The crucial problem today is whether a criminal is to be regarded by society as a nuisance to be abated or an enemy to be crushed or a patient to be treated or a refractory child to be disciplined? Or should he be regarded as none of these things but simply be punished to show to others that anti-social conduct does not finally pay. It is in this perspective that the problem of crime, criminal and punishment is engaging the attention of criminologists and penologists all around the world. The object of criminal justice is to protect the society against the criminals by punishing them under the existing penal law. Thus punishment can be used as a method of reducing the incidence of criminal behavior either by deterring the potential offenders or by incapacitating or by reforming them into law abiding citizens. It is this principle which underlies the doctrines concerning the desirability and objectives of punishment. The object of this paper is to go through the policies regarding handling of crime and criminals.

Keywords: ***Punishment, Theories, Deterrent, Preventive, Retributive, Reformative, Criminal Justice System.***

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Introduction:

Punishment is the method by which the state enforces its laws against the offenders.[1]It may be imposed on the person or on the property of the accused, depending on the nature and extent of crime in a particular case. Punishment aims to protect society from mischievous elements, by deterring potential offenders, to eradicate crime, to eradicate evils and to reform criminals and to turn them into law-abiding citizens. Reaction to crime has been different at different stages of human civilisation and even at a given time they have been different in various societies.[2] It has rightly been said that attitude towards crime and criminals at a given time in society represents the basic values of that society. The attitude towards criminals has always been colored by extreme of emotions displayed by society. In the words of Elbert Hubert Johnson, he (criminal) may be described as a monster or be pictured as a hunted animal or as the helpless victim of brutality. Three types of reactions can be described in various societies like[3]:-

1)--Traditional Approach: It is of universal nature also termed as the punitive approach. It regards criminal as basically bad and dangerous sort of person and the object under this approach is to inflict punishment on the offender in order to protect society from his onslaughts.

2)--Therapeutic Approach: It is of recent origin considers the criminal as a victim of circumstances and the product of various factors in a society. This approach since it regards the criminal as sick person requiring treatment is termed as the therapeutic approach.

3)--Preventive Approach: Finally there is preventive approach which instead of focusing attention on particular offender seeks to eliminate those conditions which are responsible for crime causation.

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1 Salmond; jurisprudence(12th Ed)p.92

2 Sir Walter Moberly:The Ethics of Punishment(1968 Ed.)p.14

3 H.L.A.Hart:Punishment and responsibility(1968).

It should however be understood that the three approaches are not mutually exclusive ,not only do they overlap with each other, but sometimes they may co-exist as parts of the overall system in a society. It should, however, be understood that the theories reflecting these approaches are not 'theories' in any normal sense, they are not assertions but are in the nature of moral claims. Punishing the offender is a primary function of all civil states. The incidence of crime and its retribution has always been an unending fascination for human mind. However, during the last two hundred years, the practice of punishment and public opinion concerning it has been profoundly modified due to the rapidly changing social values and sometimes of the people. The crucial problem today is whether a criminal is to be regarded by society as a nuisance to be abated or an enemy to be crushed or a patient to be treated or a refractory child to be disciplined? Or should he be regarded as none of these things but simply be punished to show to others that anti-social conduct does not finally pay. It is in this perspective that the problem of crime, criminal and punishment is engaging the attention of criminologists and penologists all around the world. A crime has been defined by Salmond as an act deemed by law as harmful for society as a whole although its immediate victim may be an individual. Thus a murderer injures primarily a particular victim, but its blatant disregard of human life puts it beyond a matter of mere compensation between the murderer and the victim's family. Those who commit such acts, if convicted, are punished by the state. It is, therefore, evident that the object of Criminal Justice is to protect the society against criminals by punishing them under the existing penal law.

Historical Perspective

In primitive societies, men shared with animals the emotion of resentment at injury. The sense of fear and ignorance led to barbarous method of treatment of offenders'. The concept of law and order was not yet known, consequently the common methods of settling disputes were

through personal vengeance such as duel blood feuds and reparation etc[4], .According to Prof. Gillin ,in those days punishment was reflective reaction to injury. Thus in early societies led to exploitation of the weaker by the stronger which resulted in to complete chaos. The life and property were insecure and always exposed to dangers. At times even the family members of the victim or his clan settled disputes with the offender or his family. According to Bhagwat Gita, killing is justified in some cases as noble-a virtuous act and to act contrary to it is a sin, an act of cowardice, which is unbecoming of a man. According to Dharmasastra killing a murderer is one's duty, may the killer be a preceptor, child, old man or even a learned Brahman. With the advance of civilization, the sense or respect for mutual rights and duties developed among people which eventually led to the evolution of law. Later the state came in to existence and took to itself the task of maintaining law and order in the community by punishing the law-breaker. In early days, the popular mode of punishment was exile, banishment and outlawry. These methods acted as an effective deterrent in maintaining law and order within the community. Then the medieval period in the history of human civilization witnessed an era of religious predominance in the western world. The tenets of religion had great influence on the administration of justice and penal policy, crime began to be identified with sin and violence was abhorred. Ecclesiastical punishments were mixed up with the religious notions of cleansing of the soul for the reformation of the criminal. Ordeal by fire and water were commonly used to establish the guilt or innocence of the accused.[5]During medieval period, the condition of prisons was awfully bad prisoners were virtually living a life of hell on earth. Deterrence was the cardial rule of justice which meant considerable torture and harassment of offenders. Punishment was a means to inflict pain on the offenders. The theory of vengeance which is otherwise known as lex-talionis (poetic-penalties) was nothing but a perverted form of retributive

4 An American Report onCrime and punishment entitled."Strugle for justice"prepared by American friends committee(New York 1971),p.112

5 Dr.Pendse S.N.: Oath and Ordeals in Dharmsastra,p.2

justice[6]. With new criminological developments, particularly in the field of penology, it has been generally accepted that punishment must be in proportion to the gravity of the offence. It has been further suggested that reformation of criminal rather than his expulsion from society is more purposeful for his rehabilitation .With this aim in view the modern penologists have focussed their attention on individualisation of offenders through treatment methods. Today old barbarous methods of punishment such as, mutilation, branding, drowning, burning, stoning, flogging, amputation, starving the criminal to death or subjecting him to pillory or poetic punishment, etc. are completely abandoned. The present modes of punishment commonly include imposition of monetary fines, segregation of the offender temporarily or permanently through imprisonments or externment or compensation by way of damages from the wrong doer in case of civil injury. Undoubtedly the credit goes to eminent criminologists, notably, Beccaria, Bentham, Garafalo, Ferri, Tarde and others who formulated sound principles of penology and made all out efforts to ensure rehabilitation of the offenders so as to make him useful member of society once again .It is now well recognised that prevention of crime and protection of society are the main objects of punishment. Commenting on this Caldwell observed:

"Punishment is an art which involves the balancing of retribution, deterrence and reformation in terms not only of the court but also of the values in which it takes place and the balancing these purposes of punishments, first one and then the other receives emphasis as the accompanying conditions change." The modern penal logical thinking favours rationalisation of punishment by taking into consideration the various approaches in their proper perspective and making use of them to suit the given situation and requirement of the offender in accordance with the principles of individualisation[7]

6 Sir Leo Page:Crime and the Community p.347

7 Sen,P.K. : Penology Old and New(1943 Ed.) P.45

Nature and Concept of Punishment in India

To punish criminals is a recognised function of all the civilized states for centuries.[8]The object of punishment has been well summarised by Manu, the great Hindu law giver, in the following words:

"Punishment governs all mankind: punishment alone preserves them: punishment wakes while their guards are asleep: the wise consider the punishment (danda) as the perfection of justice"

This object is achieved partly by, inflicting pain in order to deter criminals and others from indulging in crime and partly, by reforming criminals. It is also asserted that respect for law grows largely out of opposition to those who violate the law. The amount of punishment, however, is not uniform in all cases. It varies according to the nature of offence, intention, age, mental condition of the accused and the circumstances in which the offence is committed. For, instance a boy of 10 years will be treated differently from a grown up man of 30 years, for committing the same offence, because of the difference in the mental capacity of the two, to distinguish between right and wrong. Likewise, a man of unsound mind would be treated differently from a man of sound mind, who commits murder with intention.

Prof.H.L.A. Hart defines punishment in terms of the following five elements—

I) It must involve pain or other consequences normally considered unpleasant.

II) It must be for an offence against illegal rules.

III) It must be intentionally administered by human beings other than the offender.

IV) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

8 Paranjape N.V.Dr. :Indian Legal and Constitutional History (6th Ed. 2006) P.181

The nature of punishment is imparted, determined by reference to its purposes and function. The nature of punishment can be drawn with reference to following characteristics:

I) Punishment is a privation (evil, pain, and disvalue)

II) punishment is coercive

III) Punishment is inflicted in the name of the state: it is authorised.

IV) punishment presupposes rules, their violations and more or less formal determination of that, expressed in a judgment.

V) Punishment is inflicted upon an offender who has committed a harm and this presupposes a set of values by reference to which both the harm and punishment are ethically significant.

VI) The extent or the type of punishment is in some defended way related to the commission of a harm e.g, proportionately to the gravity of offence or mitigated by reference to the personality, of the offender, his motives and temptation.[9]

In sum, punishment is for the transgression of rules: and it is inflicted by legally authorized persons. Certain modern creationists hold that punishment is an unmitigated "absolute" evil. Plato regarded it has having instrumental value, as a necessary cure, no more evil than a bitter medicine which a physician might administer. Punishment is good since it is corrective deterrent and necessary for the public welfare.[10]

Theories of Punishment

Various theories are advocated to explain the meaning and purpose of punishment, namely:

i)-Retributive theory;

ii)-Deterrent theory;

iii)-Preventive theory;

iv)-Expiatory theory;

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9 Hart,H.L.A.in Radzinomicz and Wolfgang (Eds.),crime and justice voll.ii,1971-21.

10 Hall Jerome;The Aims Of Criminal Law (1958).

v)-Reformative theory;

Expiatory theory is one peculiar to Hindu jurisprudence alone.

I)-Retributive Theory:-

Such kind of punishment was in practice in primitive societies. This theory is based on the rule of natural justice which is expressed by the maxim "an eye for an eye and a tooth for a tooth."This theory, therefore, emphasis that the pain to be inflicted on the offender by way of punishment must outweigh the pleasure derived by him from his criminal act. Thus the retributive theory suggests that punishment is an expression of society's disapprobation for the offender's criminal act. It has been pointed out also by Sir Walter Moberly that "the drama of wrong doing and its retribution has indeed been an unending fascination for the human mind."He further suggests that retributive punishment serves to express and satisfy the righteous indignation with which a healthy minded community regards transgression as an anti-social behaviour of persons.[11]

It can be questionable whether retribution can be justified on the ground of social policy. The theory of retribution has its origin in the crude animal instinct of individual or group to retaliate when hurt and, therefore its approach to offender is vindictive and out of tune with the modern reformative concept of punishment. Closely connected with the idea of retribution is the notion of expiation which means blotting out the guilt by suffering an appropriate punishment. This, in other words means, that guilt plus punishment is equal to innocence. The philosophy underlying expiatory theory is that to suffer punishment is to pay a debt due to the law that has been violated.

As Salmond rightly pointed out, Revenge is the right of the injured person. The penalty of wrong doing is a debt which the offender owes to his victim, and when the punishment has been endured, the debt is paid, the liability extinguished, innocence is substituted for guilt and the vincutum jusris forged by crime is dissolved. The object o true redress is to substitute justice for injustice. Though expiatory theory is based on

11 Barnes and Teeters;New Horizons in Criminology,(3rd Ed.) p 216.

self-satisfaction and penance for ones wrong doing, its practical utility cannot be undermined. It is an expression of refinement and purification of the criminal by self-motivation which ultimately gives him satisfaction that his guilt has been washed off[12].

2)-Deterrent Theory;

Earlier methods of punishment were by and large deterrent in nature. Deterrent punishment seeks to create some kind of fear in the minds of others by deterring potential offenders from repeating their criminal activities again and again. According to Salmond; "punishment is before all things deterrent and the chief aim of law of crime is to make the evil-doer an example and a warning to all that are like-minded with him". Considered from this point of view, punishment is a means of attaining social security and it seeks to protect the society by deterring the potential offenders. Salmond asserted that offences are committed by reason of a conflict of interests of the offender and the society. Punishment prevents such offences by destroying the conflict of interests by making acts which are injurious to others as injurious to the doer himself. This end of criminal justice is achieved by inflicting deterrent punishment on the offenders. The deterrent theory, therefore, justifies exemplary punishment because it not only dissuades the offender from repeating crimes and it deters others. Paton also supported this view and observed that deterrent theory emphasises the necessity of protecting of protecting society by treating offenders in a manner so that others are deterred from law-breaking. It is significant to note that deterrent theory of punishment was supported by Manu, the great law-commentator of ancient India. He treated punishment or danda, as the source of righteousness because people are reframed from committing wrongful acts through the fear of punishment.

3)-Preventive Theory;

This theory is based on the idea of preventing repetition of crime by disabling the offender through measures such as imprisonment, forfeiture of property, death punishment; suspension of licences, etc.,

12 Blackstone : Commentaries iv,P.11

Professor Patron suggests that preventive theory seeks to prevent the prisoner from committing the crime by disabling him. This theory does not lay much emphasis on the motive of the wrong-doer but seeks to take away his physical power to commit the offence. It pre-supposes that need for punishment for crime arises simply out of social necessities. In punishing a criminal, the order in general. Commenting on preventive theory, Fichte writes, the end of all penal laws is that they are not to be applied. Thus when a land owner puts a notice'' trespassers will be prosecuted. "He does not want an actual trespasser and to have the treble and expense of setting the law in motion against him.[13]

4)-Expiatory Theory;

This theory is also known as theory of penance. According to this theory punishment is necessary for the purification of the offender. It is a kind of expiation or penance for the misdeeds of a person. Manu says :'Men who are guilty of crimes, when condemned by the king become pure and go to the heaven in the same way as good and virtuous men go'. In view of Hindu jurists expiation or penance washes away the sin. In modern times expiation theory is accepted in a modified form and is considered by some to be a part of the retributive theory. Fry observes that punishment should be in order to adjust the sufferings to the sin. Some maintain that the offender becomes purified either by beating or by scourging while others say that it is the purification not of the individual but of the community as a whole. Thus Kohler treats suffering (i.e, punishment) as the antidote of one's misdeeds. Salmond too appears to support this theory when he agrees that punishment blots out crime. To suffer punishment is to pay a debt due to the law that has been violated", maintains salmond.

That being the obvious purpose of the punishment suffering must be equal to the guilt if it were to wipe it out. It is difficult to work out this theory successfully in so far as it is difficult to ascertain an equivalent of guilt in terms of suffering. It is impossible to weigh the guilt in that fine

13 Ibid.,P100.

scale of suffering.[14] The second difficulty with regard to this theory is that suffering cannot be standardised even though it were possible to judge crimes according to moral scale no equivalent of punishment would be prepared in terms of suffering. The effect to the same punishment may vary upon two different accused. To one it may amount to torture while to the other it may be a Childs play. The external conduct of the wrong doer which led to the commission of crime cannot be measured. Thus the theory is not sound because it is out means capacity to work it out. Expiation is akin to the idea of retribution. The first object of punishment is to make satisfaction to outraged law .The penalty of wrong-doing is a debt which the offender owes to his victim and when the punishment has been endured the debt is paid, the liability is extinguished, and innocence is substituted for guilt. The fact that in the expiatory theory satisfaction is conceived as due rather to the outraged majesty of the law than to the victim of the offence, merely marks a further stage in the refinement and the purification of the primitive conception. Salmond calls this kind of satisfaction of debt as purely abstract payment which men have no moral right to enforce.

5)-Reformatory Theory:-

As against Deterrent retributive, preventive and expiatory theories of punishment, reformative theory tries to bring about change in the attitude of the offender. This theory of punishment emphasis on reformation of criminals through the methods of individualisation. It is based on humanistic principle that even if an offender commits a crime, he does not cease to be a human being. There an effort should be made to reform him during the period of his incarceration. While awarding the punishment the judge must take into consideration the age, character and his antecedents and also the circumstances under which he committed the criminal act .Thus as opposed to deterrent theory, the reformative theory aims at socialisation of the offender so that the factors which motivated him to commit crime are eliminated.

14 Ibid.,:P.102

Punishment is used to reclaim the offender and not to torture him. The theory, therefore, condemns all kinds of corporal punishments. The major thrust of the reformist theory is rehabilitation of inmates in penal institutions so that they are transformed into good citizens. It focuses greater attention on humanly treatment of prisoners inside the prison.[15]

This theory suggests that punishment is only justifiable if it looks to the future and not to the past. It should not be regarded "as setting an old account but rather as opening a new one."Thus the advocates of this theory justify preconisation not solely for the purpose of isolating criminals and eliminating them from the society but to bring about a change in their mental attitude. The stigma of punishment, it is well known that punishment carries with it a stigma in as much as it fetters the normal liberty of the prisoner. It has become an integral part of law enforcement for securing social control. More recently the reformative theory is being extensively used to develop criminal method of treatment of mentally depraved offenders. The present trend is to treat the offender rather than to punish him.[16]This is done by classifying offenders on the basis of sex, age, gravity of offence and mental depravity. No single theory would serve the interest of criminal justice administration. Undoubtedly reformative theory must be given due credence but at the same time the deterrent and preventive aspect of punishment must also not be completely ignored. Thus reformation may be used as a general method of treating the offenders but those who do not respond favourably to this corrective method of treatment must be severely punished. The penal measures must be directed to show society's abhorrence to crime. An ideal penal policy should resort to reformation in case of juveniles or first offenders and deterrence for recidivists and hardened criminals. It is for this reason that modern penologists give more importance to institutional methods of treating the offenders rather than resorting to the conventional methods of punishment which have now become absolute and outdated. The punishment should be directed

15 A History of the Criminal Law Of England (1883),pp.81-82

16 Nigel Walker:Sentencing in a Rational Society (1972),p.17

to minimise suffering to offenders and at the same time develop social morals and discipline among citizens.

The forms of punishment are;-

1)-Corporal punishments which include of
a)-Flogging
b)-Mutilation
C-Branding
d)-Chaining
e)-Execution of sentence publicly.
2)-Fine
3)-Confiscation of property.
4)-Security Bond
5)-Deportation
6)-Imprisonment
7)-Solitary confinement
8)-Capital punishment

Conclusion

While drawing up a penal programmes for the prevention of crime and treatment of offenders, it must be born in mind that human nature is complex and it is not possible to comprehend it fully. This is the reason why all human beings do not respond in the same manner in a given situation. This basic realisation has led to the innovation of treatment methods for offenders. It has been realised that protection of society can be better ensured if the offender is corrected and reformed through individualised treatment. Experience has shown that mere treatment in institutions does not help in the ultimate rehabilitation of the offenders because of the stigma society attaches to the released inmates. An adequate after-care service programmes, therefore, most vital requirement in the correctional field. The penal system should be so devised as to cause minimum of suffering to offenders and at the same time develop morals and social discipline among citizens. There has been a sweeping transformation in the penal programmes of progressive

countries but there is still a greater need for some deeper insight into some of the manifestations of crimes and criminals such as the classification of offenders, working of penal institutions and effectiveness of punishment and other methods of treatment. This is possible by reaffirming faith in fundamental human rights and realising the dignity and worth of human beings. Under this dispensation the implementation of criminal justice system will work effectively in order to attain the desired objectives of progressive penology.

Women – Victims of Conflict: A Human Rights Perspective

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Beauty Banday**

Abstract

In this paper an attempt of comprehensive evaluation of International Humanitarian law and Human Rights relating to women in conflict like situations has been made. The purpose is to consider a range of ways in which women's rights are affected by armed conflict and to assess the adequacy of international law in protecting them. As most of today's conflicts take place within states, they have tragic feature in common- women and girls suffer their impact disproportionately. Women bear excessively and suffer violations of human rights in situations of conflict, including terrorism, torture, disappearance, rape, ethnic cleansing, family separation, widowhood, displacement, lifelong social and psychological traumas. The obvious starting point is the human rights, when reflecting generally on the role that International law plays in providing protection for women from the effects of violence. International Humanitarian law may be said to protect the "hard core" of human rights in times of conflict by limiting the suffering and the damage caused by conflict. In recent years, particular attention has been given to the question of violence against women in armed conflict. Women and girls have right to remedy and reparation under international law. The protection accorded to victims of conflict must be without any discrimination. As women and men have different, culturally-determined social roles, they experience conflict in different ways. Recognising the gendered nature of conflict some key documents outlining the rights and obligations of the international community, governments and civil society with regard to women in

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conflict has been framed. While at the normative level the needs of women in armed conflict are adequately addressed, the challenge lies in ensuring respect for and implementation of the existing rules. The wars and conflicts that are continuously emerging in all parts of the world should have a gender analysis, as men and women experience war and conflict differently.

Key Words: ***Armed conflict, gender justice, International Law, women, human rights.***

1. Introduction

"The fact is that women's exploitation is a reality and gender justice a fragile myth."[1]

The term women's rights refers to the freedoms inherently possessed by women and girls of all ages, which may be institutionalised, ignored or suppressed by law, custom, and behavior in a particular society.[2] Every women and girl is entitled to the realization of all human rights-civil, political, economic, social and cultural- on equal terms with men, free from discrimination. Women and girls also enjoy certain human rights specifically linked to their status as women. The world has recognised that the human rights of the women are "an inalienable, integral and indivisible part of universal human rights".[3] There are various instruments for the protection of human rights[4].

1 P.Sathasivam, 'Gender justice a myth', November 10, 2011, The Times of India, Availabe at htpp:www.articles.timesofindia.indiatimes.com/2011-11-10/india/30381515-1-gender-justice-

2 "Women and Human Rights", B.S. Aswal, Cyberpublicatios, 2010.

3 Vienna Declaration and Programme of Action, Para 18.

4 For instance: Convention on the Prevention and Punishment of the Crime of Genocide,1948; Convention on the Political Rights of Women,1953; Convention relating to Status of Refugees, 1953; International Convention on the Elimination of All Forms of Racial Discrimination,1966; International Covenant on Economic, Social and Cultural Rights,1966; Optional Protocol to the International Convention on Civil and Political Rights,1966; Convention on the Elimination of All Forms of

Human rights are today a main instrument in conflict prevention. The highest priority in protecting human rights should be the subject of assessing the human rights violations.[5] There is undoubtedly a close relationship between humanitarian law and human rights law.[6] Both are applicable during internal armed conflict– humanitarian law through specific provisions to that effect and through customary law, human rights in so far as they govern relationship between a state and its subject gender justice can be defined as "the protection and promotion of civil, political, economic and social rights on the basis of gender equality. It necessitates taking a gender perspective on the rights themselves, as well as the assessment of access and obstacles to the enjoyment of these rights for women, men, girls and boys, and adopting gender-sensitive strategies for protecting and promoting them."[7] The conceptual essay by Anne Marie Goetz offers a map for understanding gender justice and the debates on citizenship and entitlement. Goetz contends that the term

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Discrimination against Women,1999; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women,1999; Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment,1984; Optional Protocol to the Convention on the Rights of the Child on the Involvement of children in Armed Conflict,2000; International Convention on the Protection of the Rights of All Migrant Workers and their Families,1990; Convention Against Discrimination in Education,1960; European Convention for the Protection of Human Rights and Fundamental Freedoms,1950; American Convention on Human Rights,1969; Inter-American convention on the Prevention, Punishment and Eradication of Violence against Women, 1994; Inter-American Convention on Forced Disappearance of Persons,1994; African Charter on the Rights and Welfare of the Child, 1990; Arab Charter on Human Rights,1994.

5 Stanely Hoffmann, Duties Beyond Borders, 1981, Syracuse University Press, Syracuse.

6 Jean S. Pictet, Humanitarian Law and the Protection of War Victims, 1975, p. 14-15, Leiden.

7 Kai Ambos, Judith Large, Marieke Wierda, 'Building Future in Peace and Justice', Studies on Transitionl Justice, Peace and Development, The Nuremberg Declaration on Peace and Justice, Springer.

'gender justice' is increasingly used by activists and academics because of the growing concern and realization that that terms like 'gender equality' or 'gender mainstreaming' have failed to communicate, or provide redress for, the ongoing gender based injustices from which women suffer.[8]

2. Women in Armed Conflict

The nature of armed conflicts has changed dramatically during the latter half of the twentieth century, with increasing casualties among civilians. Women and girls became especially vulnerable in such conflicts. Their psychological, reproductive and overall well-being is often severely compromised in times of conflict.[9] The causes of wars and conflicts are varied in all cases, and it impacts women and men differently. They suffer displacement, loss of home and property, involuntary disappearances, sexual slavery, rape, sexual abuse, widowhood and forced pregnancy in situations of armed conflict, especially as a result of policies of ethnic cleansing and other new and emerging forms of violence. The proliferation of armed conflicts and the high levels of military and civilian casualties in those conflicts have meant that there are large numbers of widows in many countries. This has a major impact not only on women but on society in general. Widowhood often changes the social and economic roles of women in the household and community, and the structure of the family. Women whose husbands have disappeared or are missing experience many of the same problems as widows, but without official recognition of their status, and this again creates specific problems. In addition, they have to suffer the psychological effects and insecurity that stem from not

8 Gender Justice, Citizenship and Development, Edited by Maitrayee Mukhopadhyay and Navsharan Singh, Jointly published (2007) by Zubaan and the International Development Research Centre,
Availabe at http: www.zubaanbooks.com

9 The Impact of Armed Conflict on Women and Girls: A Consultative Meeting on Mainstreaming Gender in Areas of Conflict and Reconstruction Bratislava, Slovakia, 13–15 November 2001, United Nations Population Fund. Availabe at http://www.un.org

knowing their husband's fate and not being able to bury their loved ones and mourn properly, and the long-term consequences of raising children without a father and not being able to remarry.

Essentially, the effect of war on women is not only determined by the character and stage of the conflict, but also by the particular role of each woman caught up in it. Certainly, it is significant to recognize the general needs of women, but it is also vital to respond to women's specific needs – be they combatants, persons deprived of their freedom, refugees, internally displaced persons (IDPs), mothers and/or members of the civilian population. In addition, the very notion of vulnerability demands an appreciation of what makes people vulnerable. This differs according to whether one is male or female, adult or child, rich or poor, deprived of freedom, displaced or a member of the civilian population generally. As women and men have different, culturally-determined social roles, they experience conflict in different ways. It is imperative to recognize these diverse factors of vulnerability and their consequences in order to adapt responses accordingly. However, by virtue of their gender, women and girls have not enjoyed their human rights, as seen from the various violations against them. Gender justice will only be truly realised in an event where the universality of human rights is fairly acknowledged. Justice for a woman is protection of her rights as a woman.

The incorporation of gender justice into accountability mechanisms has so far emphasized two key objectives: acknowledging and seeking justice for women's experiences of violence during conflict; and securing representation of women in policy making and decision making on post-conflict issues, as well as in the transitional justice methods themselves. Justice, truth, reconciliation and guarantees of non-repetition for victims in the wake of conflict are just some of the central goals pursued by societies through the employment of transitional justice mechanisms. None of these goals are attainable in a context of exclusion and inequality. Since inequality, an injustice in itself, is also a causal factor of conflict. The processes and reparation mechanisms need to target violations committed against women and develop procedures and

special measures to ensure women's protection and effective participation not only as victims and witnesses but also as judges, commissioners and policymakers in the justice system.

As per United Nations study, armed conflicts violate the following rights[10]:

- The human right to life;
- The human right to freedom from violence, torture and cruel, inhuman treatment or punishment;
- The human right to freedom from arbitrary executions, detention and disappearance;
- The human right to freedom from genocide, ethnic cleansing and rape as a strategy of war;
- The human right to freedom from religious intolerance;
- The human right to freedom from foreign occupation or domination;
- The human right to self-determination of peoples;
- The human right to the highest attainable standard of physical and mental health;
- The human right to protection and assistance to displaced and refugee women;
- The human right to live by the rule of law;
- The human right to an adequate standard of living, including adequate food, medical care and necessary social services;
- The human right to sustainable development;
- The human right of the child to an environment appropriate for his or her physical, mental, spiritual and moral well-being and development;
- The human right of all people to full and equal participation in decision-making and efforts aimed at the prevention and resolution of conflicts.

10 The Impact of Armed Conflict on Women, Centre for Women Economic and Social Commission for Western Asia United Nations Beirut-Lebanon. More information, Available at http:// www.pdhre.org.

3. Protection of Women: Human Rights Aspect

Human rights law today is enshrined in a number of universal and regional instruments covering wide-ranging issues, such as civil and political rights, or focusing on specific rights, e.g. the prohibition on torture, or specific beneficiaries, e.g. women or children.[11] Adoption of the Universal Declaration of Human Rights in 1948, came as a result of the human atrocities created following World Wars I and II and the dictatorial ideologies of Italy and Germany. As a way of enforcing human rights globally, a number of instruments and conventions were adopted. In 1993, 45 years after the adoption of the Universal Declaration of Human Rights, and eight years after Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) entered into force, the UN World Conference on Human Rights in Vienna confirmed that women's rights were human rights (UNFPA, 2008). Further, the International Conference on Population and Education in Cairo (ICPD) articulated and affirmed the relationship between advancement and fulfillment of rights and gender equality and equity. The introduction of the Statute of the International Criminal Court, where a broad range of sexual violence crimes are addressed, has made an unprecedented impact in the promotion and protection of women's rights.

Over the years, CEDAW's initial focus on the prevention of discrimination has been substantially modified. Today, CEDAW is nested within a number of other declarations and conventions on human and women's' rights which have come to constitute an 'international

11 These instruments include the International Convention on Civil and Political Rights (ICCPR), the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), the European Convention on the Human Rights (ECHR), , the 1981 African Charter on Human and Peoples' Rights (ACHPR), the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the 1984 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, and the 1989 Convention on Rights of the Child.

women's rights regime'.[12] This has produced a positive conception of gender justice not just as a key component of concepts of human rights, but as a set of positive commitments by states to redress injustice. The positive conception of gender justice is part of a contemporary 'rights-based approach' to development thinking that state's role as a guarantor of rights involves:

- An obligation to respect (the state's duty not to interfere).
- An obligation to protect (setting safety standards).
- An obligation to fulfil (positive action in identifying vulnerable groups and facilitating their access to resources.[13]

Despite the many challenges of delivering justice to women in post-conflict societies, transitional periods can offer new political space in which to advance women's rights. Since many transitional institutions carry on into subsequent phases, it is essential that women's rights be safeguarded so that they can be adequately protected in the post transition and development phases.[14]

There have been unprecedented developments in international gender justice since the United Nations Security Council set up the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) in 1993 and 1994 respectively. Sexual and gender-based violence during armed conflict is increasingly well documented, and there is a growing worldwide recognition that these acts are, indeed, war crimes, crimes against humanity and instruments of genocide. In fact, all contemporary international war crimes tribunals do include at least rape as a crime against humanity in their statutes, and the jurisprudence of these tribunals has gone even further to recognize other

12 Kardam, Nuket (2004) Global Women's Human Rights Norms and Local Practices: The Turkish Experience, Ashgate, Hampshire.

13 Gaiha, R. (2003) 'Does the Right to Food Matter?' Economic and Political Weekly, Mumbai.

14 Gender Equality and Justice Programming: Equitable Access to Justice for Women, Primers in gender and democratic governance, Availabe at http:// www.un.org.

forms of sexual violence. The ICC statute explicitly includes jurisdiction over a much more comprehensive set of gender crimes, including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, persecution and trafficking.[15] The significance of these developments is considerable. In 1993 U.N. World Conference on Human Rights won recognition that women's rights are human rights. This issue is, in theory, on the international agenda. For example, the 1995 Beijing Platform for Action calls on "governments, the international community and civil society, including non-governmental organisations and the private sector . . . to take strategic action" in relation to the "[t]he effects of armed or other kinds of conflict on women, including those living under foreign occupation." Recognition of the gendered nature of conflict was codified in the Beijing Declaration and Platform for Action (1995) and Security Council Resolution 1325 on Women, Peace and Security (2000), two key documents outlining the rights and obligations of the international community, governments and civil society with regard to women in conflict.

3.1. Protection Provided By Humanitarian Law

The provisions dealing with the protection of women are found in what is fre-quently referred to as the Law of Geneva.[16] They are, however, drafted in different language from the provisions protecting combatants and civilians generally. For one thing, they are expressed in

15 Message from the Co-conveners: The International Gender Justice Dialogue (April 20-21, 2010) Puerta Vallarta, Mexico, Availabe at http ://www.iccwomen.org; www.nobelwomensinitiative.org

16 The law of armed conflict is divided into the Law of Geneva and the Law of The Hague. The former is based on principles developed through the auspices of the ICRC, whose purposes are to ensure respect for human life in armed conflict as far as is compatible with military necessity and public order. The Law of Geneva imposes no restrictions on the means and methods of warfare but provides for such matters as the treatment of prisoners of war, civilians in occupied territories and persons hors de combat. The Law of The Hague deals with the regulation of the conduct of warfare itself. For further information visit Http://www.icrc.org

terms of "protection" rather than prohibition. Although Human rights law and the law of armed conflict have much in Common they also differ in significant aspects. Human rights have had to develop within the constraints of sovereignty but within that limitation, albeit a very significant one, their focus has been on conferring rights on individuals to protect them from arbitrary actions by the State. By way of contrast, the law of armed conflict primarily confers rights on States that are designed to further military efficiency.[17]

In striving to limit the suffering and the damage caused by armed conflict, International Humanitarian Law (IHL) may be said to protect the "hard core" of human rights in times of conflict. This includes the right to life, the prohibition of slavery, the prohibition of torture and inhuman treatment, and the prohibition of any retroactive application of the law. Unlike other rights (such as freedom of speech, of movement and of association), which may be derogated in times of national emergencies, the core protection afforded by IHL can never be suspended. International Humanitarian Law and human rights law complement each other in protecting the life and dignity of those caught in armed conflict.

International Humanitarian Law tends to protect following fundamental human rights in armed conflicts:

- The protection accorded to victims of war must be without any discrimination[18];

17 Chris af Jochnik and Roger Normand, "The Legitimation of Violence: A Critical History of the Laws of War (1994) 35 Harv.I.L.J. 49, 58.

18 Articles 12 (Geneva Convention) GC I and GC II. That women are to be afforded equal protection to men is expressly spelled out in GC III, Article 14, which provides that "women shall (…) in all cases benefit by treatment as favourable as that granted to men". Non-discrimination provisions are also set out in common Article 3 GCs; Articles 88 (2) and (3) GC III; Articles 27 and 98 GC IV; Articles 9 and 75 (Aditional Protocol)AP I and Articles 2 and 4 AP II; The principle of non-discrimination in the treatment to be granted *inter alia* to persons deprived of their liberty is reiterated in Article 27 GC IV, Article 75 AP I and Article 4 AP II; Article 14 of the Third Geneva Convention, which states that "women shall be

- A great deal of humanitarian law is devoted to the protection of life, especially the life of civilians and people not involved in the conflict;
- Restricts the imposition of the death penalty;
- By protecting the means necessary for life;
- Prohibits torture and inhuman treatment;
- Prohibits slavery: prisoners of war are not to be seen as the property of those who captured them;
- Judicial guarantees are codified in the Geneva Conventions and the Additional Protocols;
- Provides protection to children and family life
- The respect for religion is taken into account in the rules concerning prisoners of war as well as in customs of burial.

The General Assembly has noted that 'armed conflicts are continuing in various parts of the world, often resulting in serious violations of international humanitarian law *and* human rights law'.[19] The ICJ concluded that there are three different facets of their interrelation: some rights may be exclusively a matter of International Humanitarian Law, some exclusively of Human Rights Law, whereas others may be regulated by both branches of law.[20] Despite the

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treated with all the regard due to their sex and shall in all circumstances benefit by treatment as favourable as that granted to men" and in Article 16 which provides that "taking into account the provisions of the present Convention relating to (...) sex (...) all prisoners of war shall be treated alike by the Detaining Power, without adverse distinction ..."; For example, the rule requiring that women be especially protected against attacks on their honour, in particular against rape, enforced prostitution or any form of indecent assault (Article 27 GC IV) is applicable to *all* women in situations of armed conflict, including those who have been deprived of their liberty.

19 GA, A/RES/63/183 (2008), P 5.

20 *Wall Advisory Opinion*, para. 106. *In* Human Rights In Armed Conflict From The Perspective Of The Contemporary State Practice In The United Nations: Factual Answers To Certain Hypothetical Challenges, Ilia Siatitsa

persistence of a handful of countries, there is no longer any ground to support the claim that Human Rights Law ceases to apply during armed conflict.[21] In principle, human rights law is applicable at all times, i.e. both in peacetime and in situations of armed conflict. However, certain human rights instruments permit States to derogate from certain rights in times of public emergency.[22] That being said, it is not possible to derogate at any time from the right to life or from the prohibitions on torture or cruel, inhuman or degrading treatment, slavery and servitude, and retroactive criminal laws.

The issue of compensation, although of significance to all victims of armed conflict, has particular manifestations in the context of women.[23] Compensation for individuals for the effects of armed conflict

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and Maia Titberidze. Availabe at http://www.geneva-academy.ch/RULAC/pdf/HRL-in-AC.pdf

21 Ilia Siatitsa and Maia Titberidze, Human Rights In Armed Conflict From The Perspective Of The Contemporary State Practice In The United Nations: Factual Answers To Certain Hypothetical Challenges. Availabe at http://www.geneva-academy.ch/RULAC/pdf/HRL-in-AC.pdf

22 The public emergency must threaten the life of the nation and the derogations must comply with certain conditions: they must be proportional to the crisis at hand; they cannot be introduced on a discriminatory basis; and they must not contravene other rules of international law, including international humanitarian law. Additionally, states making such derogations are required to make a declaration informing those responsible for the implementation of the human rights instrument of the measures that have been suspended and of the reasons there for (Article 4, 1966 International Covenant on Civil and Political Rights (ICCPR); Article 15, 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Article 27, 1969 American Convention on Human Rights (ACHR).

23 The importance of compensation for women victims of armed conflict has been acknowledged on several occasions. See, Beijing Platform for Action; Peace: Measures to Eradicate Violence Against Women in the Family and Society: Report by the Secretary-General, U.N. ESCOR, Comm'n on the Status of Women, 38th Sess., Agenda Item 5(c), 91 72, U.N. Doc. E/CN.6/1994/4 (1994); Report on the Situation of Human

is not specifically addressed by IHL. Its provisions protect individuals within the confines of the traditional rules of state responsibility. In other words, harm to individuals is considered an injury to the state and is pursued on that level. States, however, are generally not willing to pursue claims where the individuals concerned have little political or economic status, which is the case with women.[24] Where particular States have adopted measures to provide compensation to victims of armed conflict, a gender perspective has been missing.[25] The central instrument for the protection of rights has been, and must remain, the state.[26] While at the normative level the needs of women in armed conflict are adequately addressed, the challenge lies in ensuring respect for and implementation of the existing rules. A further difficulty in ensuring full respect for the rules protecting women in situations of armed conflict lies in the very nature of human rights law. However, in practice this view is being challenged, and human rights are increasingly being referred to in such circumstances. In addition to the existence of rules and the need to respect them, mechanisms for enforcing rights and redressing violations are also of crucial importance. In this respect, the recent developments both at national and at international level - in the

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Rights in Rwanda Submitted by Mr. Ren Degni-Sequi, Special Rapporteur of the Commission on Human Rights, Under Paragraph 20 of Resolution S -3/1 of 25 May 1994, U.N. ESCOR, Comm'n on Hum. Rts., 52d Sess., Agenda Item 10, 1 141, U.N. Doc. E/CN.4/1996/68 (1996).

24 Christine Chinkin, Rape and Sexual Abuse of Women in International Law Issues, 5 Eur. J . Int'l L. 326 (1994); Judith Gardam, Women and the Law of Armed Conflict: Why the Silence?, 46 INT'L & COMP. L.Q. (1997) 55, 59-61.

25 Judith Gardam and Hilary Charlesworth, Protection of Women in Armed Conflict, , Human Rights Quarterly, Vol. 22, No. 1 (Feb., 2000), pp. 148-166, The Johns Hopkins University Press,
Available at http://www.jstor.org/stable/4489270

26 Maxine Molyneux and Shahra Razavi, Gender Justice, Development and Rights: Democracy, Governance and Human Rights Programme, Paper Number 10 (January 2003) United Nations Research Institute for Social DevelopmentT (UNRISD), Available at http:// www.un.org

prosecution of those responsible for war crimes are a very important step forward in the fight against impunity, not only because the perpetrators are actually brought to justice, but also because of the general deterrent effect which it is hoped such developments will have. However, the general and specific protection to which women are entitled must become a reality.[27]

In addition many of the instruments establish judicial or quasijudicial bodies which oversee the implementation of the treaties and which are directly accessible to individuals claiming to have suffered violations of their rights. Such bodies can issue binding decisions requiring the respondent States to terminate the violation and, where appropriate, to make reparations.

3.2. Protection Provided By Human Rights Instruments

Numerous principles of human rights law aim at protecting individuals' personal safety. They include, most notably, the right to life and the prohibition on cruel, inhuman and degrading treatment or punishment.[28]Although the right to life in the various universal and regional conventions is not absolute – for example, the instruments do not prohibit the death penalty – States are under a duty both not to infringe this right themselves and to protect it from infringement by others. Moreover, it is important to note that the right to life and the prohibition on cruel, inhuman and degrading treatment are rights from which there can be no derogation, even in times of public emergency.

Of the conventions which focus specifically on women's rights, only the 1994 Inter- American Convention on the Prevention, Punishment and Eradication of Violence against Women addresses the

27 Charlotte Lindsey, Women Facing War, Icrc Study On The Impact Of Armed Conflict On Women, Executive Summary, International Committee of the Red Cross (ICRC), Available at http://www.icrc.org

28 Article 6,7 (International Covenant on Civil and Political Rights) ICCPR, Article 2,3 ECHR (European Convention on Human Rights), Article 4,5 ACHR (American Convention on Human Rights) and Article 4,5 ACHPR (The African Charter On Human And Peoples' Rights).

issue of physical safety.[29] This instrument prohibits "conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere". The Convention is very wide in scope, enshrining women's right to be free from violence, whether it occurs within the family or within the community, or is perpetrated or condoned by the State or its agents.[30] Reference should also be made to the non-binding Declaration on the Elimination of Violence against Women adopted by the UN General Assembly in 1993[31] and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict adopted by the UN General Assembly in 1974.[32] Even though not expressly stated in each instrument, sexual violence obviously falls within the prohibitions on torture and cruel, inhuman and degrading treatment in the other human rights instruments. Sexual offences and sexual violence are specifically addressed in the Convention on the Rights of the Child, which requires

29 The Convention states that every woman is entitled *inter alia* to the following rights – the right to have her life respected; the right to have her physical, mental and moral integrity respected; the right to personal liberty and security; the right not to be subjected to torture; and the right to have the inherent dignity of her person respected and her family protected (Art.4).

30 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 1994. Articles 1, 2 and 3.

31 Declaration on the Elimination of Violence Against Women, adopted by UN General Assembly resolution 48/104 of 20 December 1993.

32 Declaration on the Protection of Women and Children in Emergency and Armed Conflict, adopted by UN General Assembly resolution 3318 (XXIX) of 14 December 1974. This Declaration brings together, with special reference to women and children in situations of emergency and armed conflict and calls upon States to refrain from carrying out attacks on the civilian population and from using chemical or bacteriological weapons, and to abide fully by their obligations under the 1925 Geneva Gas Protocol and the 1949 Geneva Conventions. It prohibits all forms of repression and cruel and inhuman treatment of women and children, including imprisonment, torture, shooting, mass arrests and collective punishment (Articles 1 to 6).

States Parties to protect children from all forms of sexual exploitation and sexual abuse.[33]

The right to respect for family life is recognized by a number of universal and regional human rights instruments. For example, the International Covenant on Civil and Political Rights provides that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence".[34] Similar provisions are included in the African, American and European Conventions on Human Rights.[35] The European Court of Human Rights has interpreted the right to respect for family life as including protection against expulsion in situations where such a measure would sever all family links.[36] The Convention on the Rights of the Child provides that children have the right to an identity and family relations, prohibits their arbitrary separation and lays down provisions concerning the maintenance of contact with parents and measures to promote family reunification.[37]

Much greater prominence is given to the issue of a right to an effective remedy in human rights instruments. Both the International Covenant on Civil and Political Rights and the regional treaties require States to provide an effective remedy for violations of the rights they enshrine.[38] Additionally, the instruments also lay down a right to a fair and public hearing within a reasonable time before an independent and impartial tribunal for the determination not only of criminal charges but

33 Article 34, 1989 Convention on the Rights of the Child (CRC).

34 Article 17(1) ICCPR.

35 Article 18 ACHPR, Article 17 ACHR, Article 8 ECHR, Article 10(1) ICESCR (International Covenant on Economic, Social And Cultural Rights).

36 *Berrehab v. Netherlands* (1988) Series A, Publications of the European Court of Human Rights, No. 138; *Beldjoudi v. France* (1992) Series A, Publications of the European Court of Human Rights, No. 234-A2.

37 Articles 7-9 CRC.

38 Article 2(3) ICCPR, Article 13 ECHR, Article 25 ACHR and Article 7(1) ACHPR.

also of civil rights and obligations.[39] These rights too must be granted without discrimination *inter alia* on the basis of sex.

While the Human Rights Committee in response to individual petitions can only issue views on whether there has been a violation of the International Covenant on Civil and Political Rights, the European and American courts of human rights can also award "just satisfaction" – i.e. compensation – and the African Commission, although not specifically empowered to do so, has considered claims for compensation.[40] Compensation is paid by the respondent State to the individual victim.[41] The more common problem is state's doesn't effectively protect human rights. State's failure must be taken seriously when thinking about the causes of - and remedies for - human rights abuse. There is an implicit tension in the relationship between states and rights: states are simultaneously a threat to human rights and their principal protector.[42]

Uncertainty about the fate of missing family members is a harsh reality for countless families and close friends, who are, as a result, themselves victims of armed conflict or internal strife. It is important to recall that all such persons affected by armed conflict or internal strife have the right to exchange news with their families, wherever their

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39 Article 14 ICCPR, Article 6 ECHR, Article 8 ACHR and Article 7 ACHPR.

40 Article 41 Protocol 11 to the ECHR, Article 63 ACHR and Communication 59/91 to the African Commission on Human and Peoples' Rights,

41 Charlotte Lindsey, (October 2001)Women Facing War, ICRC Study On The Impact Of Armed Conflict On Women, International Committee of the Red Cross ,Women and War,19 Avenue de la Paix,1202 Geneva, Switzerland, Available at http://www.icrc.org

42 Donnelly, Jack (2003) Universal Human Rights: In Theory and Practice, 2nd edn., Ithaca, NY: Cornell University Press, 35-37; *In* State Capacity, State Failure, and Human Rights, Neil A. Englehart, Journal of Peace Research, Vol. 46, No. 2 (march 2009), pp. 163-180, Sage Publications Ltd, Available at http://www.jstor.org/stable/25654378, Accessed: 16/01/2013 02:54.

relatives may be, including members of the armed forces/armed groups and persons deprived of their freedom. Judicial guarantees or fair-trial rights are a set of principles and rules that aim to protect the life, physical and psychological integrity of individuals who are deprived of their freedom. They apply from the moment of deprivation of freedom until the moment of release. Women may be particularly disadvantaged in obtaining a fair trial if they are illiterate, indigent or their social status makes access to legal assistance virtually impossible. Human rights law also contains a considerable number of rules pertaining to the right to a fair trial in various instruments.[43]

One of the major weaknesses of the international human rights regime is that human rights instruments tend to contain clauses allowing derogation from certain provisions in particular circumstances.[44]The European Court of Human Rights sees derogation as possible only in "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the original life of the community of which the state is composed."[45] The International Court of Justice has stated, "the protection of the International Covenant on Civil and political Rights does not cease in times of war, except by operation of Article 4 of the covenant".[46] This is of clearly of fundamental

43 International Covenant on Civil and Political Rights; Convention on the Elimination of All Forms of Discrimination Against Women. Relevant human rights principles may also be found in non-treaty standards, such as the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, the Standard Minimum Rules for the Treatment of Prisoners and the Basic Principles on the Role of Lawyers; See also 'Addressing the Needs of Women Affected by Armed Conflict' An ICRC Guidance Document, March 2004, Available at http://www.icrc.org.

44 Chowdhury S.R., Rule of Law in a State of Emergency, London, 1989; Jaime Oria, Human Rights in States of Emergency in International law, Oxford, 1992.

45 (Lawless v. Ireland) (Merits) 1 EHRR 15 at 31.

46 Advisory opinion on the legality of the threat or use of nuclear weapons, ICJ Reports 1996, 225 at paragraph 25.

importance during internal conflict, and means that even human rights provisions which are in principle derogable according to the particular instrument cannot validly be derogated from if those human rights are restated in, or otherwise protected by, the applicable humanitarian law. Human rights instruments therefore remain valuable in several ways during internal conflict. First, and perhaps most importantly, they can be used as an interpretative device to expand upon and clarify the various protections afforded by humanitarian law. Secondly, human rights can apply fully alongside humanitarian law, providing more detailed protection in many circumstances, should the affected state decide not to derogate from its obligations. Thirdly several human rights provisions remain non-derogable and thus operational regardless, although these vary from one instrument to another; and finally, the enforcement mechanisms contained in human rights instruments can possibly be used as a alternative methods of implementing and enforcing humanitarian protection during armed conflict.

Although the contemporary doctrine of human rights has many antecedents, both political and philosophical, it is principally a legacy of World War II. The Preamble of the UN Charter had affirmed eternal faith in fundamental human rights, and Article (1) committed the United Nations Organisation to encourage respect for human rights and for fundamental freedoms for all.[47]

3.3. Reparation to Victims of Human Rights Violations

Reparation is the term for the concrete measures that should be taken to address the suffering of the survivors and victims and to help them rebuild their lives. The aim of reparation measures is to "as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed." [48] Of course, in situations where victims suffer

47 'Conflict Resolution, Human Rights and Democracy', Edt., D.D. Khanna, G. W. Kueck, Shipra Publications, 2003, http://www.shiprapublicatios.com.

48 Permanent Court of Arbitration: Chorzow Factory Case (Germany v. Poland), 1928.

serious harm – such as sexual violence – or when family members are killed, it is impossible to fully restore them to the situation which existed before the violation occurred.[49]

The idea of reparation can have multiple and sophisticated meaning;[50] legal meaning, social justice meaning, and meanings involving the will to shared historical memories and a common understanding of the contribution that victims and survivors bring to rebuilding trust. From a women's rights perspective, reparation also corresponds to women and girls capacity to rebuild their lives by restoring their dignity and their sense of self. States bear the primary responsibility for providing reparation to victims of human rights violations in their country. There is an express legal obligation on the state to provide reparation when violations are committed by agents of the state or under the state's authority. In some cases, it may be appropriate for authorities to establish reparation programmes to ensure that victims have access to a range of services and benefits. When crimes are committed by agents of other states or non-state actors then the state has an obligation to ensure that victims can claim reparation against those responsible, including by making claims before national courts. Reparation can be described as a process of rehabilitating the lives of victims of armed violence, human rights abuses and disasters through social development packages and economic empowerment for communities and individuals.

Not all of these forms of reparation will be required for all human rights violations. In each situation or case, a determination will need to be made about what reparation measures are needed to address the specific harm caused. It is important that reparations are not perceived as a humanitarian gesture, but rather they are viewed as they are – a rights-based framework for redress. Often in post-conflict situations, a

49 Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation. 19-21 March 2007. Article 3(e).

50 For example governments of Argentina, Chile, Peru, East Timor, Brazil or South Africa have developed different reparation programmes depending on the needs of the victims.

lack of resources is cited by governments as reasons for ignoring the duty to ensure reparation due to survivors. Support for victims through reparation for past injustices cannot be separated from the right of access to justice - the two are linked.

3.3.1. Reparation for Women

There are many instruments of international laws, conventions, treaties and protocols that support reparation for victims, and oblige state parties to take action on behalf of victims of armed conflicts and human rights violations through legal remedies and rehabilitative programmes.[51]

- Women have a right to a benefit from reparation programmes by providing restitution, compensation, reintegration, and under transitional justice namely reinsertion, satisfaction and the guarantee of non-recurrence.

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51 Universal Declaration of Human Rights (UDHR) adopted in 1948. Article 8 "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."Available at http:// www.un.org/en/documents/udhr/index;The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: Section 2 of the Basic Principles asserts that states are required under international law to make available adequate, effective, prompt and appropriate remedies including reparation, other provisions for justice for victims, and prosecution and punishment for perpetrators; Article 2 of the International Covenant on Civil and Political Rights; Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance; Article 39 of the Convention on the Rights of the Child; Article 3 of the Hague Convention Respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV); Article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977; Articles 68 and 75 of the Rome Statute of the International Criminal Court.

- In reparation, reconstruction, and development programmes, affirmative action measures are necessary to respond to the needs and experience of women victims. Victims face particular obstacles in seizing the opportunities provided by such programmes, thus risking their continued exclusion.
- Truth telling requires the identification of human rights violations. Such abuses are named and recognized in order to raise awareness. Strategy for reparation and measures that support reparation should be encouraged, for instance by helping to build a shared memory and history.
- Victim's full participation in peace process, while respecting their right to dignity, privacy, safety and security is an important measure for reconciliation.
- Reparation measures should always take into consideration the gravity of the crimes, violations and harm suffered especially in sexual violence and other gender based crimes, in such cases their families and society require special treatment.
- Combination of all forms of reparation will be required to adequately address all forms of violations of women's human rights.

4. Indian Scenario: A Brief

The Indian Constitution is a very fine constitution because it enables courts to lay down parameters for a great enhancement of women's rights in various fields of activity. India's emergence as a leading player in international business and politics is increasingly drawing global attention to the nation's approach toward redressing and preventing violations of fundamental human rights, including the rights of Indian women. In addition to enforcing the state's constitutional obligations, the Court has been positive about holding the Indian government to the international commitments it has made when ratifying numerous United Nations (U.N.) treaties.[52] In considering the extent to

52 Including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on

which international conventions can be "read into" national laws, the Indian judiciary has consulted case law from other countries and concluded that treaty provisions that "elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by courts as facets of those fundamental rights and hence, are enforceable as such." [53] The principle of gender equality is enshrined in the Indian Constitution in its Preamble, Fundamental Rights, Fundamental Duties and Directive Principles. The Constitution not only grants equality to women, but also empowers the State to adopt measures of positive discrimination in favour of women for neutralizing the cumulative socio economic and political disadvantages faced by them. India, the world's most populous democracy, continues to have a vibrant media, an active civil society, a respected judiciary, and significant human rights problems. As per the reports[54] impunity for abuses committed by security forces particularly in Jammu and Kashmir, the northeast, and areas facing Maoist insurgency are also prevalent. Thousands of Kashmir's have allegedly been forcibly disappeared during two decades of conflict in the region and their whereabouts are unknown. A police investigation in 2011 by the Jammu and Kashmir State Human Rights Commission (SHRC) found 2,730 bodies dumped into unmarked graves at 38 sites in north Kashmir. The government has yet to improve health services for survivors of sexual assault but has

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the Rights of the Child (CRC); See *Status of Ratifications of the Principal International Human Rights Treaties* (June 9, 2004), Office of the U.N. High Comm'r for Human Rights, Available at http://www.unhchr.ch/pdf/report.pdf.

53 People's Union for Civil Liberties v. Union of India, A.I.R. 1997 S.C. 1203, P 13, 15 (India).*In* The Absence of a Gender Justice Framework in Social Justice Organizing (July 2008) Linda Burnham, Social Activist Center for the Education of Women University of Michigan, 330 E. Liberty St. Ann Arbor, www.cew.umich.edu.

54 *Human Rights Watch*, World Report 2012: India, Available at http//: www.hrw.org

taken steps to provide compensation for rape survivors.[55] According to the report[56] of UN Human Rights Council, "India has failed to comprehensively address recommendations calling for an end to impunity and repeal of laws that have led to widespread human rights violations. Despite repeated pledges to "zero tolerance" for human rights violations, the government has not amended laws that effectively provide immunity to military and paramilitary personnel implicated in serious abuses. Without an impartial and transparent process, such abuses will continue and remain unpunished. The government has also failed to accept recommendations to review the Armed Forces Special Powers Act. The law provides the armed forces with widespread powers in internal conflict situations, facilitating severe human rights violations while protecting personnel from criminal prosecution. Even the National Human Rights Commission cannot independently investigate allegations of abuse against members of the armed forces."[57]

5. Conclusion

Gender issues are more complicated. Definitions vary and are frequently confused with women's issues relating to equality and equity. The concept of gender implies more than merely women's equality and equity. Gender justice is a challenge that faces the world currently, and despite of various efforts, gender justice is still far from being achieved. The wars and conflicts that are continuously emerging in all parts of the world should have a gender analysis, as men and women experience war and conflict differently. Human rights are inherent in everyone's life by virtue of being humans, but for women the story is different. Women have no voice, their basic rights are frequently violated especially in conflict like situations. During wars they are used as weapons. No justice

55 Ibid

56 Adoption of the Outcome of India's UPR, Oral Statement Under Item 6, UN Human Rights Council, September 20, 2012, Available at http://www.hrw.org/news/2012/9/20/un.human-rights-council-adoption-outcome-indias-upr

57 Ibid

is accorded them after conflict is over. It is in this regard that connection between gender justice and human rights comes to light. Human Rights Law demands that States take the responsibility and enforce measures for the protection of individual human rights, including those of women. However, even with these instruments meant to protect women's rights, gender based violence still persists. This is so because of the lack of political will and commitment by States in respect to women's rights.

6. Suggestions

- Recognize that the impact of armed conflicts, including gender-based violence, are violations of human rights rather than merely private or cultural concerns that are unavoidable outcomes of wars.
- Provide gender training and raise awareness among policymakers on the importance of including women in conflict resolution and post-conflict reconstruction efforts.
- Involve local women organizations in decision-making while conducting relief or conflict-related interventions.
- Provide specialized services for women who suffer from violent impacts of armed conflict, including counselling and outreach programmes to manage reproductive health concerns related to physical assault, as well as psychological traumas resulting from armed conflict.
- Public awareness should be strengthened through the provision of information on legal and human rights.
- Income generation for vulnerable groups, such as female-headed households, widows, orphans, and war-disabled and sexual violence survivors, should be an integrated part of post conflict relief programming.
- The need to engage broader constituencies with issues of women's human rights and gender Justice and to identify a global strategy for strengthening justice and accountability for women.
- Take action to investigate and punish members of the police, security and armed forces and others who perpetrate acts of violence against women, violations of international humanitarian law and violations of the human rights of women in situations of armed conflict;

- Consider the ratification of or accession to international instruments containing provisions relative to the protection of women in armed conflicts.
- Respect the norms of international humanitarian law in armed conflicts and take all measures required for the protection of women in particular against gender crimes.
- Strengthen the role of women and ensure equal representation of women at all decision-making levels in national and international institutions which may make or influence policy with regard to matters related to prevention of gender based crimes in conflict and protection of rights of victims because justice for victims of the gravest human rights crimes cannot be achieved without their participation.
- Possible amendments in the criminal laws and other relevant laws to provide for quicker investigation, prosecution and trial as also enhanced punishment for criminals accused of committing sexual assault of extreme nature against women, and connected areas such as gender justice, respect towards womanhood, and ancillary matters.

LEGAL MANAGEMENT AND CONSERVATION OF MEDICINAL PLANTS: A CRITICAL APPRIASAL OF LAW IN INDIA

Iftikhar Hussian Bhat[*]

Abstract

Nearly all cultures from ancient times to the present day have used plants as a source of medicines. A considerable percentage of the peoples in both developed and developing countries use medicinal plant remedies and the number is on the increase. In the industrialized countries, consumers are seeking visible alternatives to modern medicine with its dangers of over-medication. This great surge of public interest in the use of plants as medicines has been based on the assumption that the plants will be available on a continuing basis. However, no concerted effort has been made to ensure this, in the face of the threats of increasing demand, a vastly increasing human population and extensive destruction of plant-rich habitats such as the tropical forests. Today many medicinal plants face extinction or severe genetic loss, but detailed information is lacking. For most of the endangered medicinal plant species no conservation action has been taken. India has been known to be rich repository of medicinal plants. The climatic and altitudinal variations, coupled with varied ecological habitats of the country, have contributed to the development of immensely rich vegetation with a unique diversity in medicinal plants which provides an important source of medicinal raw materials for traditional medicine systems as well as for pharmaceutical industries in the country and abroad. This paper attempts to critically examine the legal framework related to the conservation and sustainable use of medicinal plants in India.

Key Words: ***Medicinal plants, biological diversity, Endangered Species, conservation, equitable sharing***.

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Introduction

Biological resources have been the source of food, clothing, and housing, and medicines, spiritual and intellectual nourishment for humanity right from its emergence. Plants equal life. They are the primary producers that sustain all other life forms. They regulate air and water quality, shape ecosystems and control the climate. They provide food, medicine, clothes, shelter and the raw materials from which innumerable other products are made. These benefits are widely recognised but poorly understood. Plant based medicaments have been employed since the dawn of civilization for prolonging the life of man by combating various ailments. Such plants have been one of the valuable tools in the traditional systems of medicine and also provide active ingredients to formulate new medicine by the pharmaceutical industry. They not only provide accessible and affordable medicine to poor people; they can also generate income, employment and foreign exchange for developing countries. This is the reason why the WHO has time and again emphasized the need to revive the indigenous system of medicine based on locally available raw materials.

India is one of the most medico-culturally diverse countries in the world where the medicinal sector is part of a time-honoured tradition which is respected even today. The medicinal plants continue to supplement limited public health facilities, and the consequent expanding demand due to increasing population has put tremendous pressure on the natural supply. Substantial body of information has been generated in recent years through many publications such as proceedings of international meetings highlighting the importance of screening, bioprospecting and cultivation of medicinal plants. Harvesting of medicinal plants by cash-needy collectors to supply the growing urban and international markets has increasingly intensified since these materials are cheaper and more accessible. A majority of medicinal plants are collected from the wild. With the large increase in domestic and international demand, there has been a sharp increase in collection. With the large increase in domestic and international demand, there has been a sharp increase in collection. There has been no serious attempt to

augment the availability of these plants through cultivation. This has naturally led to an imbalance in the plant population of many species and many species face threat of extinction. There is a need to develop a sound legal strategy and programme for medicinal plants conservation, utilization and documentation, including their location, existing population, place(s) of conservation, and known traditional uses. The conservation and sustainable use of medicinal plants is only possible in the shadow of an effective system of governance supported by the rule of law. At the international level the issues of natural resources conservation and the traditional communities' right to manage and share these resources have evinced much concern particularly after the U.N. Convention on Biological Diversity in 1992 In India, there are number of union laws enacted with direct and indirect relevance to medicinal plants. Against the above background, this paper shall critically examine the legal and policy framework related to the conservation and sustainable use of medicinal plants in India.

Medicinal Plants: Their Role and Significance

Plants have been utilized as medicines for thousands of years. These medicines initially took the form of crude drugs such as tinctures, teas, poultices, powders and other herbal formulations. The specific plants to be used and the methods of application for particular ailments were passed through oral tradition. Eventually information regarding medicinal plants was recorded in herbal pharmacopoeias. Modern allopathic medicine has its roots in ancient medicine and it is likely that many important new remedies will be discovered and commercialised in the future, as it has been till now, by following the leads provided by traditional knowledge and experiences.

The significance of medicinal plants is highlighted by the fact that worldwide more than 50, 000 plant species, covering about 13% of all flowering plants, are estimated to be medicinally important.[1] Their

1 Schippmann, U., J.D. Leaman and A.B. Cunningham: Impact of cultivation and gathering of medicinal plants on biodiversity: Global trends and issues, Inter-Departmental Working Group on Biological Diversity for Food and Agriculture, Rome (2002).

relevance is further accentuated by the fact that traditional medicine is important for the poor and marginalized sections of the society, especially in the remote areas where modern medical facilities are not available.[2] It has been estimated that in developing nations approximately 80 percent of the people totally depend on traditional medicines.[3] Moreover, interest in herbal medicines and natural products has increased substantially in developed as well as developing nations. This scenario is well reflected by the available trade figures. The international medicinal plant trade, estimated at US $ 60 billion, is presently growing at a rate of 7 percent per year.[4] This is besides the fact that a substantial part of the trade goes unrecorded, partly because much of it is illegal. Further, a large proportion of medicinal plant material is used domestically and these figures are again not documented, hence the total trade of medicinal plants remains far greater than the suggested figures. Among ancient civilizations, India has been known to be rich repository of medicinal plants. The climatic and altitudinal variations, coupled with varied ecological habitats of the country, have contributed to the development of immensely rich vegetation with a unique diversity in medicinal plants which provides an important source of medicinal raw materials for traditional medicine systems as well as for pharmaceutical industries in the country and abroad. The wild medicinal plants are one of the sources of income generation due to their various traditional and modern therapeutic uses. The indigenous and traditional health care system based on the rich diversity of plants and associated knowledge serves more than 70% of the Indian population. More than 7500 species of plants have been used in Indian medicinal traditions and over 2700 documented species of plants are used in classical medical system of

2 Belt, J., Lengkeek, A. and Van der Zant, J., 2003. Cultivating a healthy enterprise: developing a sustainable medicinal plant chain in Uttaranchal-India. KIT Publishers, Amsterdam. KIT Bulletin no. 350. Available at :http://www.kit.nl/publishers/assets/images/isbn9068328395_compleet.pdf

3 Holley, J. and K. Cherla. 1998. The Medicinal Plants Sector in India IDRC. Delhi.

4 Supra note 2 at 47.

Ayurveda, Unani and Siddha. About 1800 plants are documented in various Ayurvedic tenets, about 400 in Unani and approximately 500 in the Siddha system.[5] Even the Allopathic system of medicine has adopted a number of plant-derived drugs which form an important segment of modern pharmacopoeia. Besides meeting national demands, India caters to the global herbal trade. In recent years, trade in herbal-based products has quantum leaped, particularly in the volume of plant material traded within and outside the country. Bearing in mind the importance of medicinal plants and their trade estimates and the ironical fact that most of the raw material is collected from wild, medicinal plant cultivation and management has become highly remunerative in economic terms for the small-scale growers. The sustainable management of the traditionally used plants not only has implications in conservation of biodiversity but also provide critical resources to sustain livelihoods. Besides cultivation, proper value addition and subsistence oriented application of medicinal plants can create a large number of jobs in rural areas. Conversion of socio-cultural traditions and indigenous knowledge into livelihood means and opportunities would also help in conserving the traditional knowledge base.

International dimensions of medicinal plants conservation

The drive to conserve biodiversity has resulted in concerted efforts at the global, national and local levels to control and minimise loss of biodiversity. International conventions are important tools for biodiversity conservation. They bring to conservation a global perspective which is essential, as specifies and ecosystems do not respect national borders. They can encourage or pressure authorities in signatory states to take local biodiversity resources more seriously and act to protect them. These efforts have been directed towards conservation within the natural environment (*in situ* conservation) or elsewhere in an artificial environment under artificial conditions (*ex situ* conservation),

5 Dar, M. Ayoub, *Indigenous Medicinal Plants and the People: Modulating conservation and Law in Action in Jammu and Kashmir,* KULR, 2001, at 17-18.

such as in gene and seeds banks.Some important international conventions that are relevant to biodiversity conservation including medicinal plants in India are discussed below.

Convention on Biological Diversity (CBD) 1992

The Convention on Biological (CBD) Diversity is arguably the primary international instrument for the conservation of biodiversity.[6] The Convention represents a historical landmark by being the first global agreement to address comprehensively all aspects of biodiversity - genetic resources, species and ecosystems. It affirms that biological diversity should be conserved and used sustainably for reasons of ethics, economic benefits and human survival.[7] The Convention goes beyond the conservation and sustainable use of biodiversity *per se* by also dealing with such issues as access to genetic resources and the sharing of benefits from their use. It stipulates that the authority to determine access to genetic resources rests with the national governments which can demand a share in the benefits arising from the use of the genetic resources in return. The purpose is twofold: to promote a more fair sharing of benefits between developing and developed countries in accordance with the objective of the Convention, and to create an economic incentive to conserve and sustainably use biodiversity.

The CBD is a framework convention and has a true bottom-up approach in the sense that it leaves it up to individual countries to determine how most of its provisions are to be implemented. The provisions are mostly expressed as overall goals and policies rather than as hard and precise obligations. Thus, an essential provision is Article 6 which requires each Party to develop national strategies, plans or programmes for conservation and sustainable use of biodiversity. Article 8 sets out the major policies for effective *in-situ* conservation giving Parties a set of goals against which to match their own laws and policies.

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6 Entered into force on 29 December, 1993. It is noteworthy to consider that the required 30 ratifications for entry into force were acquired in a relative short space of time. This can be seen as a sign of governments recognising the importance to protect biodiversity.

7 Preamble of the CBD.

The same is done for *ex-situ* conservation, sustainable use of biological resources and environmental impact assessment in Articles 9, 10 and 14. The articles on access to genetic resources (Article 15), while laying down a fundamental new principle on each States' sovereignty to genetic resources, also leaves much to each Party to decide regarding their implementation. The Convention encapsulates the need for a holistic approach towards conservation as opposed to the conservation of a single species. In the preamble to the Convention, biodiversity is regarded as a common concern of humankind. Article 1 of the Convention stipulates the main objectives of the convention and emphasis is placed on the conservation, sustainable use and sharing of benefits derived from biodiversity. Article 3 concerns the sovereign right of states to exploit their resources according to their own environmental laws. This must be done in a way not causing harm to other states.[8] In contrast to the sovereign notion contained in article 3, article 15(2) states that:

Each Contracting Party shall endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and not to impose restrictions that run counter to the objectives of this Convention.

The use of the word 'shall' may counter the notion of absolute sovereignty. Biodiversity and the conservation thereof cannot be confined to national borders and thus the notion of state sovereignty cannot be absolute. This finding can be substantiated by the following important provisions extracted from the CBD which dilute the notion of absolute state sovereignty.

Article 4 defines the jurisdictional scope of the CBD and stipulates that the provisions of the CBD can apply 'beyond the limits of national jurisdiction'.[9] Importantly, in the light of cross-border conservation of biodiversity, Article 4 implicitly requires cooperation between states.

8 Article 3 of the CBD.

9 Clearly the CBD does not confine itself to be an instrument limited to the respective national borders of countries and therefore implicitly emphasises cooperation between states.

Moreover, article 5 places a duty on contracting parties to cooperate when matters of cross-border importance arise.[10] Article 6 contributes to the dilution of absolute sovereignty by ordering integration and sustainable use as well as conservation of biodiversity into sectoral or cross-sectoral plans, programmes and policies. Articles 8 and 9 also contribute to the above and specifically provide measures for conservation. Article 8 deals with *in situ* conservation. This refers to conservation of biodiversity within its natural surroundings which may include an area traversing a border should the 'natural surroundings' indeed extend beyond a national border. Article 9 deals with ex *situ* conservation, referring to the conservation of biodiversity outside their natural habitats. This article could hold an interesting interpretation and could mean that even if the 'natural surroundings' do not extend across a border, conserving it across the border could be possible.[11] When considering articles 8 and 9 together it may be derived that the CBD prescribes a holistic and integrated approach towards the conservation of biodiversity even across borders.

Further incentives for cooperation can be extracted from provision made for information exchange[12] and technical and scientific cooperation.[13] This provision seems to form an integral part of the principle of common but differentiated responsibility in that it recognises the special needs of developing countries. Transfer of technology and information exchange, contributes to capacity building and in turn lead to greater capacity for the conservation of biodiversity across borders.

10 Article 5 states:
Each Contracting Party shall, as far as possible and as appropriate, cooperate with other Contracting Parties, directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity.

11 Of course with such an interpretation, respect for state sovereignty must be heeded as contained in the CBD. See article 3 of the CBD.

12 Article 17 of the CBD.

13 Article 18 of the CBD.

With regard to biodiversity related knowledge, the Convention acknowledges the relevance of intellectual property rights but requires member states to ensure that intellectual property rights support the Convention's objectives.[14]

It is clear from the provisions of the Convention that in the quest for sustainable use and conservation, a great emphasis is placed on cooperation, especially in the form of cross-border biodiversity conservation.

3.2. Nagoya Protocol 2010[15]

Sharing of benefit arising from utilization of genetic resources is the most appropriate way to promote sustainable and balanced use of traditional medicinal plants. "Fair and equitable sharing of the benefits" is one of the three objectives of the Convention on Biological Diversity.[16] Bonn Guidelines on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising out of their Utilization was adopted under decision VI/24 A. To build international consensus on benefit sharing the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity has been adopted recently in 2010. The COP 10 Decision X/1 also recognizes the objectives of the International Treaty on Plant Genetic Resources for Food and Agriculture as the conservation and sustainable use of plant genetic resources for food and agriculture, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security. The Protocol is legally binding on 193 parties to the CBD and aims to ensure that the benefits derived from the use of genetic resources are shared fairly and equitably, and thereby contributing to the conservation of biological diversity and the sustainable use of its components. This Protocol is being hailed by delegates and non-

14 Article 16 of the CBD.

15 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, 2010

16 Article 15 of the CBD.

governmental organizations as one of the most important measures the world has ever taken against misappropriation of traditional knowledge and bio-resources.

The World Heritage Convention 1972

The Convention Concerning the Protection of the World Cultural and Natural Heritage (the World Heritage Convention) is a successful global instrument for the protection of cultural and natural heritage. The World Heritage Convention was adopted by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) General Conference at its 17th session in Paris on 16 November 1972. The Convention came into force in 1975. The World Heritage Convention aims to promote cooperation among nations to protect heritage around the world that is of such outstanding universal value that its conservation is important for current and future generations.[17] It is intended that, unlike the seven wonders of the ancient world, properties on the World Heritage List will be conserved for all time. States that are parties to the Convention agree to identify, protect, conserve, and present World Heritage properties. States recognise that the identification and safeguarding of heritage located in their territory is primarily their responsibility. They agree to do all they can with their own resources to protect their World Heritage properties. Parties must do this to the utmost of their own resources, but where appropriate, international assistance and cooperation in financial, artistic, scientific and technical assistance and cooperation can be obtained.[18] The World Heritage Convention is administered by a World Heritage Committee, which meets annually and consists of 21 members elected from those States that are parties to the Convention. A trust fund, the World Heritage Fund for the Protection of World Cultural and Natural Heritage of Outstanding Universal Value (the World Heritage Fund), is established

17 Preamble of The Convention Concerning the Protection of the World Cultural and Natural Heritage 1972.

18 *Ibid* Article 4.

under the Convention.[19] The Fund is financed by contributions from state parties and contributions from private organisations and individuals.[20] Funds are used when state parties request assistance to protect their World Heritage-listed sites, and to meet the urgent conservation needs of properties on the List of World Heritage in Danger. State parties can request international assistance from the World Heritage Fund for studies, provision of experts and technicians, training of staff and specialists, and the supply of equipment.[21] They can also apply for long-term loans and, in special cases, non-repayable grants.[22] Again, cooperation across borders is encouraged and the traditional notion of sovereignty diluted.

CITES 1973

The most important convention on the preservation of wildlife is the Convention on International Trade in Endangered Species of Wild Fauna and Flora, CITES (also known as Washington Convention) signed on 3rd March 1973, which was subsequently amended at Bonn on 22nd June 1979. The Convention's goals are to monitor and stop commercial international trade in endangered species, maintain those species under international commercial exploitation as an ecological balance and assist countries enabling a sustainable use of the species through international trade.[23] The draft policy of the CITES includes 25 articles, highlighting definitions, fundamental principles, regulation of trade of animals in Appendix I- III, international measures, legislation, amendments and resolution of disputes. CITES parties regulate wildlife trade through controls, regulations and certifications on the species listed in three appendices. The Ministry of Environment & Forests, Government of India adopts a national legislation to provide official designation of a Management Authority for issuing the permits and certificates based on

19 *Ibid* Article 15.

20 *Ibid*

21 *Ibid Article 19.*

22 *Ibid Article 22.*

23 Preamble of The Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1972.

the advice of a designated Scientific Authority (Zoological Survey of India for faunal matters). These two designated national authorities also enhance the CITES enforcement through cooperation with customs, police or appropriate authorities. Appendices - I, II and III of CITES includes articles related to trade and export of any specimen of a species that require prior grant and presentation of an export permit issued by scientific and management authority. Similarly, such authorities also regulate the import. The scientific authorities' permits only after satisfying that such export-imports will not be detrimental to the survival of the species. The principle of such export-import policy is to determine that the species in question have a consistent level throughout its range/ecosystem. Appendix-I include all species threatened with extinction, which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances. Appendix-II includes– i. all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization in compatible with their survival; and ii. Other species which must be subject to regulation in order that trade in specimens referred to in above subparagraph (i) may be brought under effective control. Appendix-III shall include all species, which any party identifies as being subject to the regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and needing the cooperation of other parties in the control of trade. Thus by eliminating and regulating international trade CITES strives to conserve endangered species. Strangely, explicit provisions for cooperation between parties seem to be absent from CITES. Trade in endangered species is indeed a great problem in India and is an issue that can arguably not be tackled without cross-border cooperation and integration of legislation and policies.

NATIONAL LEGAL AND POLICY FRAMEWORK FOR THE CONSERVATION OF MEDICINAL PLANTS

Realizing the importance of conservation and sustainable use of biodiversity as well as fair and equitable sharing of benefits arising out of it, India has developed a relatively robust legislative and policy framework for biodiversity governance.

The idea of protection of the environment, including biodiversity, is enshrined in the Constitution of India. It enjoins both the State and the citizens to take appropriate steps in this direction. The Directive Principles of State Policy and fundamental duties chapters expressly enunciate the national commitment to protect and improve the environment. Judicial interpretation has strengthened the constitutional mandate. Though part III of the Constitution does not contain any provision to provide right to pollution free environment as a fundamental right, but in view of the liberal interpretation given to article 21 coupled with articles 48-A and 51-A(g), the Supreme Court interpreted the right life and personal liberty to include the right to wholesome environment.[24] Article 48-A of the Constitution of India states that "[t]he State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country", and Article 51-A (g) states that "[i]t shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures".

In 2006, India brought out a comprehensive policy statement, the National Environment Policy, to `infuse a common approach' and to achieve `balance and harmony between economic, social and environmental needs of the country'. It has seven main objectives: (i) conservation of critical environmental resources; (ii) intra-generational equity: livelihood security for the poor; (iii) inter-generational equity; (iv) integration of environmental concerns in economic and social

24 *Rural Litigation and Entitlement Kendra vs. State of U.P* AIR 1988 SC 2187*, M.C. Mehta vs. Union of India,* AIR 1987 SC 1086, *T. Damodar Rao vs. S.O., Municipal Corporation Hyderabad* AIR 1987 A.P. 171.

development; (v) efficiency in environmental resources use; (vi) environmental governance; and (vii) enhancement of resources for environmental conservation. The policy also lays down a number of principles including *inter alia* the 'public trust doctrine', 'precautionary approach', 'polluter pays', 'equity' and 'entities with incomparable values'.[25]

The raw materials for these traditional systems are largely native plant species growing in the forests (about 95%). So in order to maintain a sustainable supply of the raw materials from the forests, overharvesting has to be stopped and conservation of forests has to be done. But there are no separate policies or regulations for conserving medicinal plants in India. Their conservation is generally covered under existing laws pertaining to forestry.

4.1. Indian Forest Act, 1927

The Indian Forest Act of 1927 is a colonial and timber centric approach of forest management while gauging at forest based biodiversity. It was enacted to consolidate the law related to forest, the transit of forest produce and the duty liveable on timber and other forest produce.[26] Subsequently, the Forest (Conservation) Act was promulgated in 1980 to make certain reforms over the preceding Act of 1927. The 1927 Act deals with the four categories of the forests, namely reserved forests, village forests, protected forests and private forests. A state may declare forest lands or waste lands as reserved forest and may sell the produce from these forests. Any unauthorized felling of trees quarrying, grazing and hunting in reserved forests is punishable with a fine or imprisonment, or both. Reserved forests assigned to a village Community is called village forests. The state governments are empowered to designate protected forests and may prohibit the felling of trees, quarrying and the removal of forest produce from these forests. The preservation of protected forests is enforces through rules, licenses

25 India, Ministry of Environment and Forests, `National Environment Policy, 2006' (New Delhi, 2006).

26 Preamble of The Indian Forest Act of 1927.

and criminal prosecutions. Forest officers and their staff administer the Forest Act.[27] The protection of biodiversity is direct reservation of forest patches where the entry of common person, without authorization of the forest officer, is an offence. Declaration of a forest patch into a reserve forest is made by a designated forest settlement officer. On the other hand, in Protected Forests, more concessions are allowed to tenants for removing forest produce whereas in Village Forest the local villagers have a greater say.[28]

4.2. Wildlife (Protection) Act, 1972

Whereas the Indian Forest Act focuses on the overall protection & management of forests, the Wildlife (Protection) Act of 1972 is an intensive Act to conserve the biodiversity with specific focus of wildlife (both animals and plants) with *in situ* and *ex situ* measures. The Act is aimed at preservation of wildlife with ultimate minimisation of negative impacts on wild life and it has very stringent actions against the offenders. It strongly recommends for a wildlife advisory board to look into the proper management of wildlife and their protection and propagation.[29] There are strict provisions for protection of specified plants including medicinal plants under Chapter IIIA.[30] No person shall – (a) willfully pick, uproot, damage destroy, acquire or collect any specified plant from any forest land and area specified, by notification, by the Central Government; (b) possess, sell, other for sale, or transfer by way of gift or otherwise, or transport any specified plant, whether alive or dead, or part or derivative thereof.[31] However, a member of a scheduled tribe is allowed to go for picking, collecting or possessing in the district in which he resides any specified plant or part or derivative thereof for his bonafide personal use.[32] The Chief Wild Life Warden may with the previous permission of the State Government, grant to any

27 The Indian Forest Act of 1927 at Sections 3 to 27.

28 The Indian Forest Act of 1927 at Sections 29 to 34.

29 The Wildlife (Protection) Act of 1972 at Sections 4 to 6.

30 Chapter IIIA inserted by Act 44 of 1991, sec. 13.

31 The Wildlife (Protection) Act of 1972 at Section 17-A.

32 *Ibid*

person a permit to pick, uproot, acquire or collect from a forest land or the area specified under section 17A or transport, subject to such conditions as may be specified therein, any specified plant for the purpose of education, scientific research, collection, preservation and display in a herbarium of any scientific institutions, or propagation by a person or an institution approved by the Central Government in this regard.[33] No person shall cultivate a specified plant except under, and in accordance with a licence granted by the Chief Wild Life Warden or any other officer authorised by the State Government in this behalf.[34] No person shall, except under and in accordance with a licence granted by the Chief Wild Life Warden or any other officer authorised by the State Government in this behalf, commence or carry on business or occupation as a dealer in a specified plant or part or derivative thereof.[35] Every specified plant or part or derivative thereof, in respect of which any offence against this Act or any rule or order made thereunder has been committed, shall be the property of the State Government, and, where such plant or part or derivative thereof has been collected or acquired from a sanctuary or National Park declared by the Central Government, such plant or part or derivative thereof shall be the property of the Central Government.[36]

Wildlife Protection (Amendment) Act, 2002 provides for establishment of four kinds of protected areas: sanctuaries, National Parks, community reserves, and conservation reserves. The last two categories were introduced so as to involve local communities in wildlife protection or recognize any such effort by them. Rights of people are restricted more in sanctuaries and national parks than in other two, and national parks essentially require discontinuation of all human habitations.

33 The Wildlife (Protection) Act of 1972 at Section 17-B.

34 The Wildlife (Protection) Act of 1972 at Section 17-C.

35 The Wildlife (Protection) Act of 1972 at Section 17-D.

36 The Wildlife (Protection) Act of 1972 at Section 17-H.

4.3. Forest (Conservation) Act, 1980

The Forest Conservation Act, 1980 is the Act to provide for the conservation of forests and it details out the rules and regulations for conversion of forest lands for non-forestry activities. It restricts the state government in dereserving any reserve forests used for any non-forest purpose without prior permission of the central government.[37] It put a restriction on the dereservation of forests or on the use of forest land for non-forest purposes which included the cultivation of tea, coffee, spices, rubber, palms, oil-bearing plants, horticultural crops or medicinal plants.[38] The Act is supervised by an advisory committee constituted at the Centre.[39] The Forest Conservation Act is applicable to all forestlands including reserved forest, protected forest or any area recorded as forest in the government records. However, it is not applicable to the plantations raised on private lands, except notified private forests. Felling of trees in these private plantation are be governed by various Acts and Rules. Felling of trees in notified private forests will be as per the working plan/management plan duly approved by Government of India. Harvesting of fodder grasses, legumes etc. which grow naturally in forest areas, without removal of the tree growth, will not require prior approval of the Central Government. However, lease of such areas to any organization or individual would necessarily require permission under the Act. The Act strictly prohibits the use of forest lands for non-forest activities such as cultivation of tea, coffee, spices, rubber, palm and fruit and oil bearing trees. However, the species indigenous in the area in question and planting according to afforestation programme is considered as forestry activities. Similarly for diversion of forest land for regularization of encroachments to be undertaken compensatory afforestation should be kept already at Division level as per the plans at division level. In addition, a time plan for eviction of ineligible

37 The Forest Conservation Act, 1980 at Section 2.

38 *Ibid*

39 The Forest Conservation Act, 1980 at Section 3.

encroachers is also made. The Act has the provision for "No compensatory afforestation" in specific cases.

4.4. Biological Diversity Act, 2002

The Biological Diversity Act, 2002 was adopted following India's ratification of the Convention on Biological Diversity at international level. The Act has, however, also been informed by developments in other contexts such as the adoption of the TRIPS agreement. In fact, the Act does not provide a comprehensive regime for the conservation and sustainable use of biological resources but focuses on the question of access to resources and related issues. Its response to the current challenges is to rely on the time-tested principle of permanent sovereignty over natural resources. The salient features of this Act may be broadly specified as follows:

Approval of Indian Government is needed for transfer of Indian genetic material outside the country and for anyone claiming an Intellectual Property Right (IPR), such as a patent, over biodiversity or related knowledge.

Other than local communities all Indian nationals were regulated for collection and use of biodiversity.

Measures for sharing of benefits from the use of biodiversity, including transfer of technology, monetary returns, joint research & development, joint IPR ownership, etc.;

Measures to conserve and sustainably use biological resources, including habitat and species protection, environmental impact assessments (EIAs) of projects, integration of biodiversity into the plans, programmes, and policies of various departments/sectors;

Provisions for local communities to have a say in the use of their resources and knowledge, and to charge fees for this;

Protection of indigenous or traditional knowledge, through appropriate laws or other measures such as registration of such knowledge;

Regulation of the use of genetically modified organisms;

Setting up of National, State, and Local Biodiversity Funds, to be used to support conservation and benefit-sharing;

Setting up of Biodiversity Management Committees (BMC) at local village level, StateBiodiversity Boards (SBB) at state level, and a National Biodiversity Authority (NBA).

In Chapter II – **section 7 --** Regulation of Access to Biological Diversity, under the heading "Prior intimation to State Biodiversity Board for obtaining biological resource for certain purposes" it states that

No person, who is a citizen of India or a body corporate, association or organization which is registered in India, shall obtain any biological resource for commercial utilization, or bio-survey and bio-utilization for commercial utilization except after giving prior intimation to the State Biodiversity Board concerned: "Provided that the provisions of this section shall not apply to the local people and communities of the area, including growers and cultivators of biodiversity, and vaids and hakims, who have been practicing indigenous medicine.

The Biological Diversity Act of India, 2002 and the Biological Diversity Rules, 2004, is being implemented by the National Biodiversity Authority (NBA) established by the Government of India. Some key functions and powers of NBA are: to regulate activities, approve and advice the Government of India on matters relating to the conservation of biodiversity, sustainable use of its components and equitable sharing of benefits arising out of the utilization of biological resources. to grant approval under Section 3, 4 and 6 of the Biodiversity Act 2002. to select and notify the areas of biodiversity importance as biodiversity heritage sites under this Act and perform other functions as may be necessary to carry out the provisions of the Act. to take necessary measures to protect the biological diversity of the country as well as to oppose the grant of intellectual property rights to any country outside India on any biological resource obtained from India or knowledge associated with such biological resource derived from India to build up database and documentation system, create awareness through mass media training of personnel, necessary measures in the areas of Intellectual Property Rights, State Biodiversity Boards etc. The BDA primarily addresses the issues concerning access to genetic

resources and associated knowledge by foreign nationals, institutions or companies, and equitable sharing of benefits arising out of the use of these resources and associated knowledge by the country and its people. The Act governs access and benefit sharing (ABS) through a three tier system, i.e., National Biodiversity Authority (NBA) at the national level, the State Biodiversity Board (SBB) and Biodiversity Management Committees (BMCs) at local levels. The NBA deals with the requests for access to bioresources and associated traditional knowledge by foreign nationals, institutions or companies, and all matters pertaining to the transfer of research findings to any foreign national, imposition of terms and conditions to secure equitable sharing of benefits, establish sovereign rights over the bio-resources of India and approval for seeking any form of Intellectual Property Rights (IPRs) in or outside India for an invention based on research or information pertaining to a biological resource and associated traditional knowledge obtained from India. SBBs deal with matters relating to access to bio-resources by Indians for commercial purposes and restrict any activity which violates the objectives of conservation, sustainable use and equitable sharing of benefits. The mandate of the BMCs is conservation, sustainable use, and documentation of biodiversity and chronicling of knowledge relating to biodiversity. In order to safeguard the interests of the local people and to allow research by Indian citizens within the country, free access to biological resources for use within India for any purpose other than commercial use for Indian people has been given to the traditional physicians (Vaids and Haqims) and other citizens.

Recent Developments under the National Biodiversity Authority implementation of different sections of the Biological Diversity Act includes establishment of Designated National Repository (DNR) as an essential part of the infrastructure for biodiversity conservation.[40] Designated National Repository consists of service providers and repositories of preserved specimen consisting of all fauna, herbarium (dried plant material for research), living cells, genomes of organism,

40 The Biological Diversity Act at Section 39.

and information relating to heredity and functions of biological systems. Designated National Repositories also contain collections of culturable organisms (e.g. micro-organisms, plant, animal and human cells), replicable parts of these (e.g. genomes, plasmids, viruses, DNAs), viable but not yet culturable organisms, cells and tissues, as well as databases containing molecular, physiological and structural information relevant to these collections and related bioinformatics." Guidelines for access to bio resources or associated knowledge for research or for commercial purpose by foreigners[41] and determination of equitable benefit sharing arising out of the use of accessed biological resources, their by-products, innovations and practices associated with their use and applications and knowledge[42], transfer of results of any research relating to any biological resources occurring in or obtained from India for further research or for commercialization[43], intellectual property rights of invention based on any research or information on a biological resources obtained from India[44], biological resources normally traded as commodities[45], and areas of importance as Biodiversity Heritage sites[46] are in the process of notification under the Act.

4.4.1.Complexities & Discrepancies in Biological Diversity Act

The process of formulating BD Act started only after India becoming a signatory to the Convention on Biological Diversity in 1992. Even then it took a good 10 years for the Act to be notified. There is no denying that the efforts of government officials, NGOs and academicians have also contributed to highlighting and pressing for the need for the conservation of biodiversity. However, according to many experts, the gaps in the Act and subsequently in the rules indicate that the real push was an international treaty obligation. When the Act was

41 The Biological Diversity Act at Section 3.
42 Ibid at Section 21.
43 Ibid at Section 4.
44 Ibid at Section 6.
45 Ibid at Section 40.
46 Ibid at Section 37.

notified, it threw up mixed responses. While many environmentalists were happy that the government had taken the first legal step to protect biodiversity, there was dissatisfaction over the actual provisions of the Act. The special privileges granted to Indian companies raised questions; there were also concerns that the Act had practically sanctioned IPRs on biodiversity by outlining a process for accepting applications, screening them and thereafter approving such claims.

On 15 April 2004, the Union Ministry of Environment and Forests (MoEF) notified the Biological Diversity Rules under the BD Act. The Act mandated the establishment of Biodiversity Management Committees (BMC) which could have enabled local communities to have some voice in the conservation, sustainable use, and equitable benefit-sharing of biological resources. There is a strong opinion from experts that the space provided to local representation in the BD Act has been completely diluted with the new set of Rules; because as per the Rules the role of the BMCs is merely limited to preparing People's Biodiversity Registers (PBRs) that document local knowledge and bio resources. This immensely undermines the rights of local communities who are the most important stakeholders when it comes to conservation of biological resources. Documentation, without any legal protection is also a sure recipe for exploitation. The BMCs would be preparing the PBRs, but without the powers to ensure that they will not be liable for theft or piracy. There is an apparent lack of faith in the competence of local groups in taking decisions, as well as an attempt to centralize natural resource management all over again. This step (even after the 73rd and 74th Amendments to the Constitution of India which have upheld the need for decision making at the village level) seems completely retrograde and in complete contrast to the spirit of country's legal system.

The Act does not provide a comprehensive regime for the conservation and sustainable use of biological resources but focuses on the question of access to resources and related issues. It requires that all inventors obtain the consent of the National Biodiversity Authority before applying for intellectual property rights where the invention is

based on any biological resource obtained from India, and grants the authority the power to "impose benefit sharing fee or royalty or both or impose conditions including the sharing of economic benefits arising out of the commercial utilization of such rights." Given the lack of extra-territorial jurisdiction of the National Biodiversity Authority and its inability to monitor applications overseas, the efficacy of such a provision will be extremely doubtful. The act condones the introduction of intellectual property rights in the management of biological resources provided for in the TRIPS agreement but does not directly address the subordination of intellectual property rights to the goals of the biodiversity convention as mandated by Article 16 of the convention.

The Act is quite vague in its treatment of traditional and local knowledge, merely requiring the central government to "endeavour to respect and protect" such knowledge, especially in the Indian context is important enough to not be left to the discretion of the executive and to require a definitive statement of law. It completely obliterates common property arrangements whose importance and extent in the context of the management of biological resources is still immense. The Act centralizes property rights either in the hands of the state through sovereign appropriation or in the hands of private inventors through monopoly intellectual property rights. It does not, however, provide a framework for the rights of all other holders of biological resources and related knowledge. The consequence is that resources and knowledge that are not allocated to private entities through intellectual property rights or to the state can be deemed freely available.

5. National Medicinal Plants Board (NMPB)

The Medicinal Plants Board was set up by the Government of India on 24th November 2000 under the Chairpersonship of Union Health & Family Welfare Minister. The National Medicinal Plants Board (NMPB) is supposed to be the appropriate mechanism for coordination and implementation of policies relating to medicinal plants both at the Central and State levels is necessary to facilitate inter-Ministry, inter-state and institutional collaboration and to avoid duplication of efforts. The Board has the primary mandate of coordinating all matters relating

to medicinal plants and support policies and programmes for growth of trade, export, conservation and cultivation. The objectives of establishing a Board is to establish an agency which would be responsible for co-ordination of all matters relating to medicinal plants, including drawing up policies and strategies for conservation, proper harvesting, cost-effective cultivation, research and development, processing, marketing of raw material in order to protect, sustain and develop this sector. The work would continue to be carried out by the respective Departments, Organisations but the Board would provide a focus and a direction to the activities. The Board is functioning with administrative/technical support of the following committees which have been carved out of the key Departments and have the administrative/technical capability for each specific area.

Co-ordination with Ministries/Departments/Organizations/State/UT Governments for development of medicinal plants in general and specifically in the following fields:-

1. Assessment of demand/supply position relating to medicinal plants both within the country and abroad.

2. Advise concerned Ministries/ Departments/ Organizations/ State/ UT Governments on policy matters relating to schemes and programmes for development of medicinal plants.

3. Provide guidance in the formulation of proposals, schemes and programmes etc. to be taken-up by agencies having access to land for cultivation and infrastructure for collection, storage and transportation of medicinal plants.

4. Identification, inventorisation and quantification of medicinal plants.

5. Promotion of ex-situ/in-situ cultivation and conservation of medicinal plants.

6. Promotion of co-operative efforts among collectors and growers and assisting them to store, transport and market their produce effectively.

7. Setting up of data-base system for inventorisation, dissemination of information and facilitating the prevention of Patents being obtained for medicinal use of plants which is in the public domain.

8. Matters relating to import/export of raw material, as well as value added products either as medicine, food supplements or as herbal cosmetics including adoption of better techniques for marketing of product to increase their reputation for quality and reliability in the country and abroad.

9. Undertaking and awarding Scientific, Technological research and cost-effectiveness studies.

10. Development of protocols for cultivation and quality control.

11. Encouraging the Protection of patent Rights and IPR.

Conclusion and Suggestions

Medicinal plants are different from other plants in that they are important for human health. Their extinction, or serious depletion, should, therefore, be avoided as a matter of priority and their sustainable exploitation organised on a sound basis. Legislation protecting endangered or rare species is of course essential to prevent extinctions. It is, however generally inadequate to ensure sustainable exploitation. The very few laws that deal specifically with the conservation and exploitation of medicinal plants provide a useful basis for the management of wild populations of these plants but do not take into consideration all the relevant factors, in particular the necessity to maintain the resource base and to protect important habitats. Ideally, legislation on the exploitation and management of medicinal plants should address the followings points:

a) Prevention of over-collection

The prevention of over-exploitation is essential. Medicinal plants may be particularly at risk because the newly discovered medicinal property of a plant or even a sudden influx of demand for a well-known plant may result in the collection of very large quantities to supply the pharmaceutical industry. By the time adequate controls have been instituted the species may be seriously depleted. The solution is a permit

requirement for the collection of any wild plant for commercial purposes.

b) Permits as management instruments

The advantage of a permit system is that it allows for considerable flexibility, at the discretion of the issuing authorities, on the way collection is to proceed. There is no need, therefore, to adopt special regulations governing the collection of each species. To close an area to collection, either permanently or on a rotational basis, all that is needed is to refrain from issuing permits authorising collection in that area. Similarly, the quantities that may be collected may vary from one permit to another, according to areas or dates; the total number of permits may also be limited. Collection pressure may, therefore, be adjusted to the optimum sustainable yield of the species concerned or to the relative abundance of the plants in any given region. Conditions attached to permits may also impose collection methods causing the least possible damage to the plants concerned. They may, for instance, prohibit uprooting if only the aerial parts of the plants need to be collected, or the use of certain implements or methods which may unnecessarily damage the plants or the ecosystem. The permit system may be an extremely refined management tool, provided it is based on good scientific data and that enforcement is reasonably effective.

c) Management plans

The permit system will, however, only operate satisfactorily if there is a management plan for the species concerned (or where the species is seriously depleted, a recovery plan). Any management plan will have to be based on adequate knowledge of the distribution, conservation status and ecology of the species. Adequate staff should, therefore, be provided to operate the system. Appropriate penalties for violations of permit conditions are also essential. The most effective type of penalty is probably the revocation of the permit and the prohibition to apply for a new permit for a certain period of time. For serious or multiple offences, the revocation of the permit for life can be envisaged.

d) Trade controls

Trade in medicinal plants should always be subject to a permit. Transactions between private persons and small scale local trade will, however, generally be difficult to control. In most cases, however, such trade will not have serious consequences. Prohibitions are, however, important as a deterrent. Dealers, growers, industries and laboratories, importers and exporters are easier to control provided that certain basic rules such as licensing and the obligation to hold registers where all transactions are recorded, are provided and enforced. Inspections will often be necessary and adequate staff should, therefore, be available. Penalties such as the revocation of licences can be extremely effective.

e) Habitat protection

There is clearly a need to prevent the destruction of medicinal plants and their habitats in the course of activities unconnected with collection, such as agriculture, forestry or construction. Legislation prohibiting the destruction of wild plants and natural habitats is, however, notoriously ineffective unless it can be supplemented by adequate land-use controls. In most cases, there will be a need to establish special reserves as a means to safeguard the gene pool of the species concerned and as a source of propagation material for artificially propagated plants. In these reserves, it should be prohibited to disturb the natural vegetation, unless specific management measures are required to enhance the chances of survival of the medicinal plants concerned. Usually, there will also be a need for a management plan. Activities which do not affect the vegetation, such as hunting, may not necessarily be prohibited. It is particularly important to ensure that reserves provide lasting protection for the plant species they contain. Obviously, government ownership of the land, if need be by acquisition or expropriation, will usually be the answer to this problem. This may not, however, always be possible and other forms of protection, such as the imposition of land-use controls by administrative order, may often provide an acceptable substitute to State ownership. Landowners may, in these cases, be entitled to compensation. In any event, it will always be of major importance to tailor conservation regulations to the

requirements of the species. In particular, the biological processes which govern the reproduction of the plant species which the reserve purports to preserve will also have to be preserved. This could mean that the pollinators and/or seed dispersers of the species, and perhaps also their habitat, in the reserve and sometimes outside it, may need to be protected by regulations.

Bioprospecting in Traditional and Indigenous Medicinal Plants: A Socio-Legal Study with Special Reference to the Valley of Kashmir

Mir Junaid Alam*
Mohd Younis Bhat**

Abstract

Diversity is the key to sustainability. It is the basis of mutuality and reciprocity- the "Law of return" based on the recognition of the rights of all species to happiness and freedom from suffering. Yet the law of return based on freedom and diversity is being replaced by the logic of return on investments. Diversity and high productivity go hand-in-hand if diverse outputs are taken into account and the costs of external inputs are added to the cost of inputs. Approximately two decades ago, there were no laws about what one can or cannot take from nature. In many instances, a researcher could arrive at the field site, collect samples and take them home. There was no applicable law. The researcher might obtain informal permission from local community or land holder, as much for being on the land as for collecting. At most, the researcher might obtain a permit to collect from national lands. The State of Jammu and Kashmir is the habitat for a wide variety of biodiversity. This biodiversity need proper tapping through a process known as Biodiversity Prospecting. It is in the light of these issues that the present paper encompasses analytical scrutiny of CBD especially in relation to IPR system.

Keywords: ***Bio-prospecting, CBD, MAPs, Kuth (Sausurrea lappa), Patent,***

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Introduction

There is importance of and linkage between the protection of Intellectual Property (IP) competitiveness in international trade and techno-economic developments as well as in encouraging, nourishing and sustaining creative expressions. Biodiversity prospecting, or Bio-prospecting or natural products drug discovery (NPDD),as it is practised today, is the search for bioactive compounds contained in natural sources such as plants, fungi, insects, microbes, and marine organisms. For several decades, it was believed that NPDD could be replaced by synthetic creation of new compounds. In recent years, however it has become clear that natural products remain a crucial starting point for drug discovery.[1] The relationship between rational drug design and natural product is that although a chemist can synthetically modify and improve a molecule, no chemist can "dream up" the complex bioactive molecules produced by nature.[2] This is essentially the rationale for biodiversity prospecting. In the light of Biodiversity convention, biodiversity prospecting has been touted, inter alia, as an incentive for conservation, the means for discovering the next AIDS or cancer cure, and a vehicle for sustainable economic development. While there are clearly potential benefits to biodiversity prospecting, there are also potential dangers. Because almost all screening facilities are located in the developed world, the benefits (often in the form of royalties) from discoveries of novel bioactive compounds may never return to the source country. In addition, the identification of valuable plant may create such a tremendous demand that expansive harvesting leads to extinction.India is gifted with a rich wealth of medicinal plants. The Himalyan region is one of the well-defined and better known phytogeographical regions of the Indian sub-continent. It is extremely rich in plant life and abounds in

1 Edgar J. Asbey and Jill D. Kempenaaar, " Biodiversity Prospecting: Fulfilling the Mandate of Biodiversity Convention", Vanderbilt Journal of Transnational Law, 28(4) 706 (1995)

2 Ibid

genetic diversity of MAP (medicinal and aromatic plants), with large number of peculiar medicinal plants in different habitats such as alpine meadows, rocks, moraine rivulets, ponds, lake, etc. Medicinal plants are essential natural resources which constitutes one of the potential sources of new products and bio-active compounds for drug development.[3]

Biodiversity and IPR issues

In the present era the importance of medicinal herbs in health care has gained impetus once again even in advanced nations of the world. So far as bioprospecting of medicinal plants is concerned, it is now-a-days undertaken by Transnational pharma companies without acknowledging the role of indigenous communities in preservation of Traditional knowledge associated with the exploration of medicinal properties of these plants. Developing nations have struggled to appreciate refusal by the modern western paradigm of property that fervently celebrates IP, to treat contributions that enable creation of such property, genetic resources as part of IP. Nevertheless this era has also seen a push towards global recognition of intellectual property rights (IPRs).Intellectual Property can be loosely divided into five types viz; patents, trademarks, copy rights, plant breeder's and farmers rights and trade secrets. Some authors place much faith in the proposition that stronger and more pervasive protections of intellectual property rights will lead to improved environmental protection.[4] However, others note that, in the international context, biotechnology firms do not want to share profits with developing countries and use intellectual property rights to protect their large profits from the efforts of developing countries to claim a portion of the benefits particularly through patents.

In modern times different IPRs receive differential treatment due to economic disparities in them. Some of these IPRs have become

3 Shahid Ali Khan , Raghunath Mashelkar, Intellectual Property and Competitive Strategies in the 21st Century, Second Edition(2009), p.2

4 Michael A. Gollin, Using Intellectual Property to Improve Environmental Protection, 4 HARV. J.L. & TECH. 193,194 (1991)

contentious legal issues especially the patent regime in drug and pharmaceutical sector. One of this legal issue in patent regime in bioprospecting or biodiversity prospecting. Biodiversity conservation and its sustainable economic utilization have become increasingly important to many developing countries like India. India is endowed with highly diverse biological resources and traditional knowledge, which represent a considerable environmental and economic wealth. Biodiversity is important for income generation and livelihood security of the rural poor. Introduction of the UN Convention on Biological Diversity and the growth of biotechnology processes have recently led into the rapidly moving, ethically and philosophically challenging field of bioprospecting or exploring biological diversity for commercially valuable genetic and biological as well as biochemical resources. These resources provide a wide range of products and services, such as watershed protection, carbon sequestration,eco-tourism, products derived from bioprospecting, intermediate and final products. Some of these have been a source of innovation and representing a major production input for the pharmaceutical, biotechnology, cosmetic and agro-chemical industries. Biodiversity resources have multiple values based on the products and services they provide to present and future generations. For some of the products and services, such as fruits, timber and non-timber forest products and ecotourism, the market has assigned an economic value. However, other products and services of biodiversity have indirect market value yet, their economic significance depends on biodiversity.[5]

World market for products and services derived from biodiversity are expanding due to new scientific inventions, to a growing biotechnology sector, to the need of the industries to intensify research for developing their products, and to a renewed interest by consumers in "natural products". Relevant industrial sectors include: Pharmaceuticals,

5 S. Kannaiyan, V.A. Parthasarathy, et. al (eds.), Intellectual Property Rights in Horticulture 21 (Associated Publishing Company' New Delhi, 2008)

botanical medicines, major agricultural crops, horticulture crops, crop protection products, cosmetic and personal care products, and applications of biotechnology in fields other than healthcare and agriculture. The world market of products and services derived renewable resources is estimated to be more than US $900 billion per year. For example, world markets for herbal remedies in 1997 amounted to US $16.5 billion (Europe 46%, North America 19%,Asia 19%,japan 15%,rest of world 1%).By 2011, this market was estimated to grow to US $ 40 billion annually. The eco-tourism market is also becoming an important niche within the tourism industry. The major consumers of products and services derived from biodiversity are United States, the European Union and Japan. National markets within developing countries for these products are growing, although they are neither widely known, nor capture a high market share yet. An important trend of these markets, however, is the dynamic and continuous growth of the demand for products and services that include social and biological sustainability criteria. The consumers are developing a growing preference for products that are “environment-friendly” and “socially fair”. As a consequence, producers and exporters from Africa, Asia and Latin America supported by associations and NGOs are trying to include in their practices environmentally safe, ecologically sound and socially acceptable practices and certification systems. In this way, they can profit from new market opportunities while contributing to the sustainable use of resources. Traditional knowledge associated with biological resources is an intangible component of the resource itself for latter and effective utilisation. It has the potential of being translated into commercial benefits by providing leads for development of useful products and processes. These valuable leads save time, money and investment for modern biotech industry in research and product development. Hence, a share of benefits must accrue to holders of the traditional or associated knowledge of the bioresources.

Until the 1970’s the biodiversity and its associated traditional knowledge were considered to be part of the “common heritage of human kind”. Under the new biological diversity conservation regime,

biological resources are belonging to the public domain and are not owned by any individual, group or state. The last three decades have seen a significant change in the regime governing access to biodiversity and bioresources. From a common heritage of mankind, biodiversity is evolving into a resource under the sovereign right of nation states and is subject to intellectual property rights (IPRs). A major concern particularly for developing countries is the TRIPS agreement which obliges all members of the WTO regime to provide patents in all fields of technology and also to provide a sui generis system of protection. In the process, the primary concerns face South Asian countries including India in formulating their IPR policies in biodiversity sector including agriculture and horticulture. The major issues include the implications of IPRs on the price structure of seeds, the increased trend of bio-privacy through patenting of indigenous medicinal knowledge, access of farmers to seeds and the impact of property rights on biodiversity by local and indigenous communities. Moreover, it is widely accepted that society will continue to benefit in the future from the preservation and application of traditional knowledge and practices and consequently it appears only equitable, and in conformity with the objectives of the CBD, that traditional societies should benefit accordingly.[6]

Patent Law is the mechanism that presently attracts the most attention from benefit-sharing advocates. The Uruguary Round of GATT[7] is the most recent effort to formalize an international intellectual property law system capable of addressing biodiversity prospecting. The subject is highly controversial. Developing countries assert that intellectual property rights over biotechnology are a major obstacle to

6 Id. at p. 22

7 Uruguary Round of GATT provides New Forum for Debating Germplasm Ownership Issues, 6 DIVERSITY 39(1990)

benefit-sharing and conservation.[8] Developed countries disagree; they assert that intellectual property rightsprotect fair rewards for innovation and increase the technological benefits of biodiversity by enhancing the commercial value of the genetic resources.[9]

Patent law is a product of the legal systems of the North. As the system is currently structured, patent law does not allow a naturally-occurring substance to be patented; this is the "product of nature exception".[10] However, where a substance, "previously unknown in its purified and isolated form", is refined so that the product can be distinguished in kind, and where it also demonstrates" unexpected properties", the refined substance is patentable.[11] The challenge is to accommodate the interests of both the North and South within the broader context of a political and economic debate of global proportions. If the answer to the biodiversity question lies in intellectual property, the answer will be long in coming .Because the needs of developing countries and concerns regarding "biopiracy" are pressing, the search for solution outside patent law continues.

The Biodiversity Convention:

A Legally binding agreement, Convention on Biological Diversity (CBD), was adopted by the United Nations Conference on Environment and Development, held at Rio de janerio in 1992. The CBD accords primacy to "national sovereignty" than to "common heritage".[12] The

8 David R. Downes, New Diplomacy for Biodiversity Trade: Biodiversity, Biotechnology, and Intellectual Property in the Convetion on Biological Diversity, 4 TOURO J. TRANSNATIONAL

9 Id at p.7

10 The term "Product of nature" is a term of art in United States patent law and should not be confused with "natural products" , which are the materials from which pharmaceuticals are created.

11 Shaya Kadilal, Plants, Poverty, and Pharmaceutical Patents, 103 YALE L. J 238 (1993)

12 Alan E. Boyle, " The Convention on Biological Diversity" in Luigi Campilagalio et al.(ed.) The Environment After Rio: International Law

preamble as well as Article 3 states that National Government has right to decide the utilization of genetic resources including collection of payment of such utilization.[13] Such access is being subjected to a new law Prior Informed Consent (PIC) of the country where collection takes place in situ and must be on mutually agreed terms.[14] Developing countries in spite of their endorsement to Convention are sensitive to national sovereignty and mechanism for access of genetic resources. State can exercise sovereignty rights over genetic resources by legislation. The State shall endeavour to facilitate access not to impose restriction contrary to the convention. Providing access on mutually agreed terms ensures fairness and equitableness among providing and recipient countries. In reality, the entire permit system is heavily seated under the legacy of Trade Related Intellectual Property Rights (TRIPS) of World Trade Organisation (WTO). The convention seems oblivious on in blue printing of Access and Benefit Sharing (ABS) model for access of genetic resources.[15]

The CBD advance deep commitments to conservation of biological diversity, sustainable use of natural resources, and fair and equitable benefit sharing of genetic resources. This has been experienced that high-yielding varieties, pharmaceuticals, therapeutic and surgical

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and Economics(International Environmental Law and Policy Series) (1994).

13 Article 3, Convention on Biological Diversity, 1992 reads as: " States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.

14 Article 8 CBD, 1992

15 Fredric Hendrics et. al; " Convention on Biological Diversity, Access to Genetic Resources : A legal Analysis" , XXIII (6) Environmental Policy and Law 250-258 (1993)

resources is denied to developing countries. The objectives of conservation of biological diversity, sustainable use, and fair and equitable benefits is operationalised under Article 15 of the CBD which envisages the blue print of Access and Benefit Sharing(ABS), Mutually Agreed Terms (MAT), Prior Informed Consent(PIC), full participation of parties for access to genetic resources and benefit-sharing. It also recognises the sovereignty of States over their natural resources and provides that access to these resources shall be subject to prior informed consent of the contracting party providing such resources. The access to genetic resources shall be based on mutually agreed terms, equitable sharing of benefits and utilization of genetic resources with provider country.[16]

Bonn Guidelines

In line with CBD the "access and benefit sharing" provisions the " Bonn Guidelines in Access to Genetic Resources and Fair and Equitable sharing of the Benefits arising out of their Utilization" was promulgated. The guidelines are intended to help them when establishing Legislative, administrative or Policy measures on access and benefit-sharing and/or when negotiating contractual arrangements for access and benefit sharing.[17] The Bonn Guidelines provide for country of origin as well as indigenous and local communities by the development of mutually agreed terms to facilitate legal certainty and the minimization of cost. The specification of non-monetary and/or monetary benefits the collector will transfer the collected genetic resources to another party.[18]

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16 Supra n. 16 at p. 49.

17 Secretariat of the Convention on Biological Diversity, Bonn Guidelines on Access to Genetic Resources and Fair and Equitable sharing of the Benefits Arising out of their Utilization, IV (2002), Montreal: Secretariat of the Convention on Biological Diversity.

18 Md. Zafar Mahfoz Nomani, Biological Diversity, IPR and Sustainable Development: A Critical appraisal of Access and Benefit Models of U.S., Australia and India, International Journal of Environmental Consumerism 47,

Biological Diversity Act, 2002

A decade after signing the United Nations Convention on Biological Diversity 1992, the parliament of India enacted the Biological Diversity Act, 2002 which extends to whole of India including the State of Jammu and Kashmir. A comprehensive definition of the term biological diversity has been given under section 2(b) of the Act. The section defines it as "the variability among living organisms from all sources and the ecological complexes of which they are part and includes diversity within species or between species of eco-systems." Likewise the term "biological resources" under section 2(c) of the Act means "plants, animals and micro-organisms or parts thereof, there genetic material and by-products(excluding value added products) with actual or potential use or value but does not include human genetic material. The Act, has used some other terms which are vital to the conservation of biological diversity under the law.[19] The term "benefit claimers" means the conservers of biological resources, their by-products, creators and holders of knowledge and information relating to the use of such biological resources, innovations and practices associated with such use and application. Bio-survey and bio-utilization means "survey or collection of species, sub-species, genes, components and extracts of biological resources for any purpose and includes characterization, inventorisation and bioassay. Of all the terms used, the term "commercial utilization" is of paramount significance under the Act which means "end user of biological resources for commercial utilization such as drugs, industrial enzymes, food flavours, fragrance, cosmetics, emulsifiers, oleoresins, colours, extracts and genes used for improving crops and livestock through genetic intervention". The Act, provides for fair and equitable sharing of benefits arising out of the use of accessed biological resources, thereby products, innovations and practices associated with their use and application, and knowledge

19 M. Ayub Dar, "Biological Diversity in Jammu and Kashmir: An appraisal of Legal Conservation and Concerns." Religion and Law Review- Vol. XVIII-XIX 2009-2010

relating thereto in accordance with mutually agreed terms and conditions between the persons applying for such approval, local bodies concerned and the benefit claimers.[20]

With the above premise the Act, provides for the establishment of the National Biodiversity Authority. The Authority as a representative of the Central Government is invested with power to take all necessary measures to oppose the grant of intellectual property rights in any country outside India on any biological resource obtained from India or knowledge associated with such biological resource which is derived from India.[21]In order to bio-piracy the persons mentioned in Sec. 3 of the Act, are required to obtain the prior approval of the National Biodiversity Authority before accessing any biological resource occurring in India or knowledge associated thereto for research or for commercial utilization or for bio-survey and bio-utilization. The safeguards provided in this Act, are more or less sufficient check to prevent the illegal robbing of the precious flora, which is otherwise vulnerable.

Scope of Bioprospecting in the Valley of Kashmir:

Nearly all cultures, from ancient times, have used plants as a source of medicine. In many developing countries traditional medicine is still the mainstay of the healthcare, and most of the drugs and cures used come from plants. In developed countries too people are turning to herbal remedies. Besides, modern scientific medicine still depends on plants, and the knowledge gained from them, for some essential drugs. People in India and China are known to have used plants for healthcare for over 5000 years.

Traditional medicine is the sum total of the knowledge and practices based on theories, beliefs and experiences indigenous to different cultures and used in the maintenance of health, as well as in

20 Section 21 of Biological Diversity Act, 2002

21 Id. Sec. 18(4)

the prevention, diagnosis and treatment of physical and mental illness. Traditional medicines have a long history and have been field tested for centuries by thousands of people, resulting in the accumulation of much empirical knowledge in the communities, passed on by generations of healers. Traditional medicine is perceived as efficient, safe and cost effective. Moreover, it is accessible to the poor and those living in remote areas. In view of this broad appeal, the general lack of research on the safety and efficacy of traditional medicines is of great concern. International, national and non-governmental agencies continue to make efforts to ensure that safe, effective and affordable treatments for a wide range of diseases are available where they are most needed.

The World Health Organisation(WHO) estimates that about 80% of people living in developing countries rely almost exclusively on traditional medicines for their primary health care needs. Since the medicinal plants are the backbone of the traditional medicine, this means that, 3300 million people in the underdeveloped countries utilize medicinal plants on a regular basis.[22]The role of medicinal plants is particularly important in Himalayan region. These areas are richly endowed with a variety of plant species, many of which have medicinal properties. A large population of rural population in these areas depends on locally available plants to meet their health care requirements. The Valley of Kashmir being a reservoir of rich biodiversity, has been using many plants and plant products in ameliorating various disorders. More than 50% of plant species described in British Pharmacopeia is reported to grow in Kashmir Valley.Nearly 570 plant species are reported to be of medicinal importance.[23]

Kashmir valley is having extensive areas under forest, enriched with flora which has a great potential in establishing pharmaceutical

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P.C Trivedi (ed.) Medicinal Plants : Traditional Knowledge, I.K. International Publishing, P.1

23 Global Conference on Unani Medicine-Emerging Trends and Future Prospects, Directorate of ISM, J&K Govt.(2012)

industry-based upon herbal medicine. There are number of plant species reported to be used commonly by tribal and other folk inhabitants of the state to treat diseases involving inflammation, free radical mediated damages and microbial infections. It is necessary to analyse and characterize such plants rather than going on traditional but hopeful belief. There is vast potential for the evaluation and actual assessment of these medicinal and aromatic plants. A strategic team effort in aromatic and medicinal plant research and development will pave the way for reaping the benefits of this rich diversity of valley which is its major repository. But wholesale exploitation of these species without the formulation of any policy should never be allowed. Due to fragile ecology and biodiversity of the state wild species of the plants which are having medicinal value should be brought into different conservation strategies and cultivation systems. Conservation of these species can reduce the extent, to which wild populations are harvested, minimize the environmental degradation and loss of genetic diversity.

Besides CBD, State has its own legislative framework in the form of various enactments inter alia which The Jammu and Kashmir Wildlife (Protection) Act,[24] Forest Act[25] and Environment Protection Act[26] are of

24 The J&K Wildlife (Protection)Act, 1978. Section 2(11) of the Act, defines "demarcated forest" which means and includes the demarcated forest as defined under clause (c) of section 2 of the Jammu and Kashmir Forest Act, Samvat 1987. Section 2(c) of this Act defines "demarcated forest" as forest land or waste land under the control of the Forest Department, of which the boundaries have already been demarcated by means of pillars of stone or masonry or by another conspicuous mark, or, which hereafter be constituted a demarcated forest under Section 3; Section 2(g) defines "forest produce" includes:- (a)the following, when found in or brought from, a forest or not, that is to say ; timber cautchus, catechu, wood oil, resin, natural varnish, bark,lac,mahus flowers, myrabolams and Krench lobidwola-dioscoria, fire wood, humus, charcoal, rasoant, carbon chips, rosin, turpentine and fungi (guchies); and (b) the following when found in, or brought from, a forest that is to say: (i) trees and leaves, flowers and

immense importance. These enactments will help in tapping these resources in a well-planned manner. An impetus will be given to bioprospecting by their implementation in collaboration with CBD and Biological Diversity Act, 2002.

The resurgence of wealth of medicinally important herbs provide an elixir for hopeless & helpless patients suffering from various ailments. Ranging from cold desert of Ladakh through temperate zone of Kashmir Valley to the sub-tropical area of Jammu province, the area offers congenial habitats for luxuriance of the species with wide ranging ecological requirements. The area has a fairly rich representation of plants utilitarian in nature a sizeable number of which find usage in the treatment of various ailments and or consumed or directly used or used as raw material for extracting of active principles. It is worthy of note that about 40% of medicinal herbs inhabiting the area are used in the Indian pharmaceutical industry alone. Quite a few find use in local medicinal system and some are highly valued in the foreign market. Till about 20 years ago the country used to export 374,921 Kgs. of Kuth (Saussurca lappa) to Hong Kong, Singapore, Thiland, Vietnam, Japan, Srilanka and France. The medicinal plants inhabiting this part of Himalya include some endemic elements too which are predominantly represented in Ranunculacea, Apiaceae, Asteraceae and Lamiaceae etc. Many of these herbs are of a high pharmacological potential and commercially viable. Reportedly, truckloads of raw material in the form of vegetative propagules and even seeds used to be smuggled out of the region without any legislative sanction/imposition. The situation now is that hardly sporadic and single plants are traceable after long distances of trekking. Being indiscriminately used and over exploited from times

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fruits and all other parts or produce not herein before mentioned of such trees; (ii) plants not being trees (including kutch grass, creepers, reeds and moss) and all parts of produce of such plants:

25 The J&K Forest Act, 1987

26 The Environment (Protection) Act, 1986

immemorial their very survival in the region has been threatened and today majority of these herbs are at the brink of extinction.[27] There is a need to tap these natural resources in a strategic and legalized manner. This can be done by laying down a comprehensive legal frame work in order to cover bioprospecting of traditional medicinal knowledge. Bioprospecting can also take into account the current patent regime for securing protection of these bioresources which is itself an offshoot of IPR regime.The intellectual property system refers to the entire gamut of Intellectual Property Laws, procedures, practices and institutions responsible for protecting, administering, enforcing and using intellectual assets for social, cultural and economic progress.[28]

Conclusion

Legal tools are being developed whereby developing countries and other biodiversity rich countries may exert greater leverage over the use of their resources. This leverage can be used to earn revenues, promote conservation, and train and educate biochemists. However, the required legal tools-legislation, agreements and Court action- are sophisticated and difficult to employ. It has been far easier to engage in political,

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27 Rubaya Sultan, Manzoor Ahmad and Irshad A.Nawchoo, " Unabated Loss of Medicinal Plant Diversity in
Himalya : A serious Socio Economic Concern and Urgency to Salvage Whatever is Left," 014, 013 GIo. Ad. Ros
J . Med. Plants.

28 While IPRs are private rights and in essence, pertain to individuals, in practice, these rights are being exercised more and more by corporate entities such as firms, businesses, corporations and other institutions that can legally hold, exercise, dispose of these rights. It is no wonder that IP system has become an important instrument of economic and trade policies in many countries worldwide,apart from its role at the enterprise level where the IP strategy of enterprise is a key component of its growth plan. The protections of IPRs enable countries to participate more actively in international trade as well as influence investment decisions.

economical, technological, and ethical debates than to find legal frame works for action.

Nonetheless, given the growing legal and practical risks, it is wise to enter into an access and benefit-sharing agreement for every collection.

Section 66A of the Information Technology Act, 2000: A Critical appraisal

Debajit Kumar Sarmah*

Abstract

The Information Revolution has been referred to as the third major revolution in human civilization after the agricultural revolution and industrial revolution. The most powerful instrumentality behind the new regime is the Internet. Internet has dramatically changed the way of expression of human freedom to speech and opinions. On one hand it has given a new impetus to the fundamental right of speech and expression guaranteed under Article 19(1)(a) of the Constitution of India, on the other hand new challenges as regards misuse of unrestricted freedom. Section 66A of the IT Act inserted by an amendment in 2008 is a regulatory provision in the freedom of speech and expression through internet. The paper elucidates diverse legal aspects as regards the constitutional validity of Section 66A of the IT Act. The same is being done in the light of the legislative history of the provision, international influence and judicial view points.

Key Words: ***Cyber space, Information Technology, Offensive Messages, Freedom of Speech and Expression, Reasonable Restrictions.***

Introduction

The virtual space, as commonly called the cyber space, is a culmination of communication technology, software, hardware, internet services, devices and connectivity all in one package. Cyber space created by the Information Revolution with unique distinction and

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complexities compared to the physical space has brought about a paradigm shift for people to connect with each other. It has thrown up new opportunities for information generation and dissemination for the Intelligentsia, Government, Industry, Civil Society and Citizens. It has provided a democratic space for everyone to express his/her opinion on any issue affecting the society and hence in a way is a medium for freedom of speech and expression. However, the same Cyberspace has also been reported to be misused by public "for spreading hate mails, posting inflammatory, harmful and offensive information in the form of images, photos, videos and texts. Provision for addressing such offences exists in section 66 A of the Information Technology Act, 2000"[1].

The Information Technology Act, 2000:

"The Information Technology Act, 2000 was enacted in India as legislation to provide legal recognition for transactions carried out by means of electronic data interchange and other means of an electronic communication commonly referred to as electronic commerce, which involved the use of alternatives to paper-based methods of communication and storage of information. "Other objectives behind the enactment of Information Technology Act, 2000 were to facilitate electronic filing of documents with Government agencies and to further amend four different laws, viz. the Indian Penal Code, the Indian Evidence Act, 1872, the Bankers' Books Evidence Act, and the Reserve Bank of India, 1935". [2] Section 66A of the IT Act, 2000 which was added by the Information Technology (Amendment) Act, 2008, deals with Punishment for sending offensive messages through communication service, etc.[3]

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1 Advisory to State/UT Govt. on implementation of Section 66A of the IT Act, 2000 dated January 9, 2013, para 1
(available at: http://deity.gov.in/content/notification), visited on April 29,2014

2 *Common Cause* v. *Union of India* W.P.(C) No. 21 of 2013 para 5, page 8.

3 Section 66A: Any person who sends, by means of a computer resource or a communication device,–

Legislative History of Section 66A:

The Information Technology Act, 2000 was further amended by the Information Technology (Amendment) Act, 2008.[4] "The Amendment Bill, which was introduced in Parliament in 2006, had only the first two sub-clauses under Section 66A. The Standing Committee on Information Technology, in its 2007 Report, recommended that the Bill be made more stringent. Thus, sub clause (c) was added to the provision, besides increasing the punishment for violation to three years imprisonment from up to two years on the basis of the recommendations of the Standing Committee on Information Technology".[5]

"The Report of the committee reveals that Section 66A was originally intended to tackle spam, defined as unwanted and unwarranted e-mails. The Department of Information Technology told the committee

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a) any information that is grossly offensive or has menacing character; or
b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred, or ill will, persistently makes by making use of such computer resource or a communication device; or
c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages shall be punishable with imprisonment for a term which may extend to two three years and with fine.
Explanation: For the purpose of this terms "electronic mail" and "electronic mail message" means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including section, attachments in text image, audio, video and any other electronic record, which may be transmitted with the message available at: http://deity.gov.in/content/information-technology-act) visited April 29,2014.

4 The Information Technology (Amendment) Act, 2008, inserted various provisions including Section 66 A in the Information Technology Act, 2000

5 V.Venkatesan, 'Cyber Challenge',*26 The Frontline*(25), 15-28 Dec(2012)

that subsection (b) of Section 66A and Clause (i) of Section 43 of the Act appropriately addressed the issue pertaining to spam. However, the committee was not convinced, and sought specific provisions to effectively deal with such e-mails in view of the irritation and agony that their recipients go through.

The Bill sought to tone down the quantum of punishment for various types of cyber crimes. But the Central Bureau of Investigation (CBI) and Industry representatives maintained that in view of their gravity, offences under the Act should be made cognisable. But the department argued that these punishments were proposed to be rationalised because while penal provisions were necessary to prevent flagrant abuse of the system, care had to be taken so that such provisions did not give occasion for harassment of legitimate users and the common man, who is generally ignorant of the nuances of IT. The department's contention was that since it was not easy to get bail, it proposed to keep offences under the Act non-cognisable. The committee disagreed with the department, maintaining that facilitation of bail to the alleged offenders of cybercrimes could not and should not be construed as a valid reason for reducing the quantum of punishment and thereby making it non-cognisable. The committee also disputed the department's claim that the alleged offenders were not aware of the nuances of IT and that ignorance could not be an excuse for perpetrating crimes".[6]

The committee recommended conferment of powers of interception on the State governments. It recommended that interception should be allowed for prevention of any cognisable offence in addition to the already prescribed grounds.[7] Since cybercrimes are a global phenomenon, taking place at lightning speed unmindful of the adverse ramifications they have on all sections of society, the committee urged

6 *Id*

7 *Id*

the department to make cyber offences cognisable.[8] Thus, sub clause (c) became a provision under Section 66A.

International Influence:

The Government justifies the legality of Section 66A, introduced in the 2009 amendments to the IT Act, on the ground that it has been taken from Section 127 of the U.K. Communications Act, 2003.[9] In fact, Section 66A is very different from Section 127 which, moreover, has been 'read down' by the House of Lords on the grounds that Parliament could not have intended to criminals statements that one person may reasonably find to be polite and acceptable and another may decide it to be 'grossly offensive.' Section 66A (a) refers to the sending of any information through a communication service that is 'grossly offensive' or has 'menacing character'. In the U.K., Section 127(1) (a) makes the sending of 'matter that is grossly offensive or of an indecent, obscene or menacing character' an offence. The drafters of the 2009 amendments to the IT Act in India presumably omitted the words 'indecent, obscene' as Section 67 of the IT Act makes the publishing or transmittal of obscene material in electrical form an offence. The meaning of the term "grossly offensive" in both Section 66A(a) and Section 127(1)(a) is crucial and remains yet undefined in India. [10]

In a 2006 judgment in Director of Public Prosecutions v. Collins[11], arising out of racist references in messages left by a constituent on the answering machine of a British MP, the House of Lords laid down a

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8 The amendment to the Bill was moved by the then Communications Minister on December 16, 2008. It was passed by the Lok Sabha on December 22, 2008, and by the Rajya Sabha on December 23, 2008, without any discussion.

9 The UK Communications Act,2003 (available at: http://www.legislation.gov.uk/ukpga/2003/21/section/127) visited on April 29, 2014

10 Aparna Viswanathan, ' An unreasonable restriction' *The Hindu,* February 20, 2013

11 [2006] UKHL 40

seminal test for determining whether a message is 'grossly offensive.' It agreed with the formulation by the Queen's Bench Divisional Court that, in determining whether a message is 'grossly offensive' the "Justices must apply the standards of an open and just multi-racial society, and that the words must be judged taking account of their context and all relevant circumstances." The House of Lords added that "there can be no yardstick of gross offensiveness otherwise than by the application of reasonably enlightened, but not perfectionist, contemporary standards to the particular message sent in its particular context." Most importantly, the House of Lords held that whether a message was grossly offensive did not depend merely on the degree of offence taken by the complainant but on whether it violates the basic standards of an open and just multi-racial society. This is considered a 'reading down' by the House of Lords of Section 127(1) of the U.K. Communications Act 2003, a hugely controversial legislation in the U.K. for its chilling effect on speech.

The Indian government defends Section 66A by saying that it has been copied from Section 127 of the U.K. Act, while in the U.K., there are calls for repeal of this Section, already 'read down' by the House of Lords in order to ensure compliance with Article 17 of the European Convention on Human Rights. However, the punishment for the offence in Section 127(1)(b) is a maximum of six months' imprisonment or a fine of £5,000 while Section 66A imposes a much more serious punishment of imprisonment up to three years and a fine without limit. Therefore, Section 66A(b) of the IT Act is not the same as Section 127(1)(b) of the U.K. Communications Act, 2003 in terms of scope of the offence or the punishment. [12]

Constitutional Premise on Free Speech:

In India, the Constitutional protection available to citizens, in respect of their Freedom to Speech and Expression, is enshrined in Article 19(1)(a) of the Constitution:

12 Aparna Viswanathan, ' An unreasonable restriction' *The Himalayan Mirror,* February 22, 2013 available at site http/ *himalayanmirror.net*

19. Protection of certain rights regarding freedom of speech, etc.-

(1) All citizens shall have the right-

(a) to freedom of speech and expression;

The absolute nature of this freedom has been later specifically curtailed in Article 19(2):

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

Thus, it is clear that while the Constitution of India enables the citizens of the country to enjoy freedom in their speech and expression, the State has been empowered to legislate in order to reasonably curtail this freedom in relevant circumstances. Noteworthy among these, is the restriction in the interest of decency and morality.

Section 66A in contemporary debate:

In the past few years, there has been widespread debate on the use of amended Information Technology Act 2000 (now IT Act 2008) section 66 (A) which relates to freedom of speech and freedom of expression. The arrests of Jadavpur University Professor Ambikesh Mahaptra, Cartoonist Aseem Trivedi and Businessman Ravi Srinivasan by the Puducherry Police for tweeting about Kartik Chidambaram (son of then Union Finance Minister P. Chidambaram) triggered serious controversy. The arrest of two girls, Shaheen Dhada and her friend Rini Shrinivasan, in Palghar, Maharashtra, for posting comments criticising the bandh after a political party's leader's death also drew wide public debate about Section 66A of the IT Act. The above incidents were coupled with the incident of 2011 which led to the arrest in May 2012, of two men from Mumbai, Mr K.V. Rao and Mr.Mayank for allegedly posting offensive comments against some political leaders on their Face

book group. The two accused had shared a joke and distorted a political party's election flag to express their angst against the politicians.

Many argued that the arrests of Shaheen and Rini for their personal messages on Facebook were neither disrespecting anyone nor were they promoting hatred towards any community. It was just expression of an opinion that there was no need for Mumbai to be shut down due to death of a leader. A certain section of the society, particularly the followers of a popular leader may not agree with this opinion. But this did not make a proper case for the arrest of two girls under IPC section 295A {later changed to IPC Section 505(2)} and the IT Act Section 66(A). Many people have opined that these arrests have led to curbing the freedom of speech which is fundamental to our democracy.

After the eruption of the series of controversy, the Government has issued an Advisory to states on how to implement the controversial Section 66(A) of the IT Act. To quote the Advisory dated January 9,2013 issued by the Government of India:

"...the concerned police officer or police station may not register any complaints (under IT Act Section 66 (A)) unless he has obtained prior approval at the level of an officer not below the Deputy Commissioner of Police/Superintendent of Police rank in urban and rural areas and Inspector General of Police level in metros."

Section 66 A of IT Act: Judicial Response:

Matters have now come to a head before the Apex Court, where a series of cases have been scheduled to be taken up together, all challenging various aspects of the IT Act and associated Rules, among which Section 66A features with much prominence. Some of these cases to be decided by the Supreme Court are mentioned herein below:

Shreya Singhal v. Union of India[13] – Concerned by the recurring arrests made under Section 66A, this petition was filed in

13 W.P.(Crl).No.167 of 2012

public interest before the Supreme Court challenging the constitutionality of 66A. The petitioner argued that the impugned Section was too broad in its sweep and contained several undefined words/terms, making it susceptible to wanton abuse. This creates a 'chilling effect' where citizens are severely disincentivized from exercising their constitutionally protected right to free speech for fear of frivolous prosecution. Thus, Section 66A is violative of Articles 14, 19 and 21 of the Constitution of India that guarantee citizens the Fundamental Rights to equality, free speech and life respectively. In addition to declaring Section 66A as unconstitutional, the petitioner urges the Court to issue a guideline stipulating the treatment of all offences involving free speech concerns as non-cognizable. In the course of proceedings, the Supreme Court through an interim order directed the State Governments to ensure compliance with the Central advisory issued in January 2013, thereby ensuring that no arrests under Section 66A are made without prior approval.

Rajeev Chandrashekhar v. Union of India[14] – Filed by a Member of Parliament, Rajeev Chandrashekhar, this public interest petition seeks to declare Section 66A and certain provisions of the Information Technology (Intermediaries Guidelines) Rules, 2011 as unconstitutional. The petitioner points out that Section 66A is ambiguous in its phraseology and imposes statutory limits on the exercise of internet freedom. Further, the Intermediaries Guidelines Rules are similarly ambiguous and require private intermediaries to subjectively assess objectionable content. They actively water down the exemptions from liability granted to intermediaries by Section 79 of the IT Act, and prescribe unfeasibly minuscule time-frames for the removal of objectionable content. Section 66A of the Act, and the Rules are thus violative of Articles 14, 19 and 21 of the Constitution and the petitioner prays that they be declared as such.

14 W.P.(C) No. 23 of 2013

Common Cause v. Union of India[15] – Spurred by the 66A arrests, this petition was filed in public interest before the Supreme Court challenging the constitutionality of Sections 66A, 69A and 80 of the IT Act. It is argued that the grounds for incrimination under 66A are beyond the scope of reasonable restrictions on Fundamental Rights allowed by Article 19(2) of the Constitution. In addition, the vagueness of language invites blatant transgressions of Fundamental Rights. Section 69A, which effectively enables State-censorship of the internet, neither provides for a redressed mechanism on censorship, nor does it contain provisions with respect to unblocking of blocked content. Further, Section 80 of the Act grants unbridled powers to the police to arrest or investigate without warrant, any person suspected of having committed an offence under the Act. The petitioner argues that these provisions stand in violation of Articles 14, 19 and 21 of the Constitution, and are thus liable to be set aside.

Dilipkumar Tulsidas v. Union of India [16]– This petition was filed before the Supreme Court in public interest, based on the lack of a regulatory framework for the effective investigation of cyber crimes, coupled with a lack of awareness regarding cyber crimes on the part of police authorities. In the absence of proper procedures for investigation and safeguards, citizens are vulnerable to police harassment. There is also no uniformity in cyber security control and enforcement practices. While the IT Act has provided that any police officer of the rank of sub-inspector can investigate cyber offences, there are no provisions for training or knowledge for such officers in order to properly equip them to handle cyber crimes. The petitioner thus prays that the Supreme Court formulate, and also direct the respondents to formulate an appropriate regulatory framework of Rules, regulations and guidelines for the effective investigation of cyber crimes, keeping in mind the Fundamental Rights of citizens. He also prays that the Court direct the

15 W.P.(C) No. 21 of 2013

16 W.P.(C).No. 97 of 2013

respondents to carry out awareness campaigns particularly for investigating agencies, intermediaries and the judiciary regarding the various forms of cyber crimes sought to be penalized.

People's Union for Civil Liberties v. Union of India[17] – This writ petition was filed in public interest before the Supreme Court as there are instances of complaints under Section 66A of the IT Act as well as misuse of the Rules framed under the Act all over the country despite the SC directing compliance with the Central Advisory in Shreya Singhal v. UoI. Due to the vague and undefined purported offences contained within 66A, the power to punish speakers and writers through arrest and threat of criminal trial is at the first instance granted to complainants with offended sentiments and police officials.

A significant proportion of the offences in Section 66A do not even fall within the permissible categories of restriction in Article 19(2) of the Constitution. Further, the Intermediaries Guidelines Rules provide for vague and undefined categories that require legal determinations and effective censorship by private online service providers. The Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 provide for blocking of web pages without proper publication or notice to public containing the reasons for blocking. The process of blocking is entirely secret and ex facie fail to meet constitutional safeguards of natural justice. The petitioner argues that these provisions violate Articles 14, 19 and 21 of the Constitution and requests their suspension. In the alternative, the petitioner requests the notification of certain guidelines towards ensuring their fair operation.

MouthShut.com (India) Pvt. Ltd. v. Union of India[18]– This petition was filed in before the Supreme Court towards quashing the Intermediaries Guidelines Rules. They force intermediaries to screen

17 W.P.(Crl) No. 199 of 2013

18 W.P.(C).No. 217 of 2013

content and exercise on-line censorship. While a private party may allege that certain content is defamatory or infringes copyright, such determinations are usually made by judges and involve factual inquiry and careful balancing of competing interests and factors, which the intermediaries are not equipped to make. Thus, it is argued that the Rules liable to be set aside as they contain arbitrary provisions which place unreasonable restrictions on the exercise of free speech and expression, as well as the freedom to practise any profession, or to carry out any occupation, trade or business as guaranteed by Articles 19(1)(a) and 19(1)(g) of the Constitution. They are also liable to be struck down because of their failure to conform to the Statute under which they are made and exceeding the limits of authority conferred by the enabling IT Act.

Taslima Nasrin v. State of UP[19] – This petition was filed by Bangladeshi author Taslima Nasrin, seeking to quash an FIR filed against her under Section 66A, on the basis of certain tweets made by her against an Islamic leader and reported in a Hindi newspaper. It is argued that the wide language used in Section 66A, coupled with the use of vague/undefined terms, makes it susceptible to abuse and thus, the Section falls foul of Articles 14 and 21 of the Constitution. It is also accused of placing unreasonable restrictions on free speech. For these reasons, and since the FIR in question was filed without conducting the appropriate preliminary inquiries, the petitioner prays that the FIR be quashed and police authorities directed to take no further coercive action in the matter. The Supreme Court has directed that the above-mentioned cases will be heard 'on merit'. The scheduled hearing will be interesting, to say the least, since several substantial questions of law have been raised in the collective, the answers to which will have far-reaching implications on Indian technology law and the civil liberties of its citizens.

19 W.P.(Crl) No. 222 of 2013

Arguments in favour of striking down Section 66A as unconstitutional:

I) All terms constituting an offence under Section 66 A of the IT Act has not been defined either under the IT Act, 2000 or under the General Clauses Act or under any other legislation. Hence it is difficult to judge it on objective parameters and thus susceptible to abuse at many a times;

II) Article 14 confers to all citizens the equality before law and equal protection of law. If a law is arbitrary or irrational it would fall foul of Article 14. Extremely wide meaning of the terms in Section 66A, such as annoyance, inconvenience etc. gives a discretionary and unrestricted powers in the hands of the authorities ;

III) Article 19(1) (a) guarantees to all citizens the freedom of speech and expression, subject to reasonable restrictions under Article 19 (2) such as public order, decency or morality. Article 66 A does not have a direct and proximate nexus to its object i.e. attaining public order. If at all, the relation is conjectural, far-fetched and hypothetical in nature. Previously, the only way an ordinary citizen could express her views in the media was through a letter to the editor. Now, with the advent of social media websites, a citizen can reach out on a much wider platform with as much as a click. Causing annoyance or inconvenience can never imperil public order directly.

Secondly, a State is entitled to bring about legislation abridging the freedom of expression only if the curtailment of liberty is justified by the clear and present danger test, viz., that the utterance, if allowed, would really imperil public safety,

"The substantive evil must be extremely serious and the decree of imminence extremely high.[20]" The anticipated damage should not be remote, conjectural or far-fetched. It should have a direct and proximate nexus to the expression. The American Test of Clear and Present Danger has been applied in India in several cases. It was held in Romesh

20 *Bridges* v. *California* (1941) 314 US 252

Thappar v. State of Madras[21] that local breaches of public order are not grounds for restricting the Freedom of Speech and that it cannot be got under the ambit of "Present and Clear Danger Test". Also, public order is not the same thing as public safety. Hence no restrictions can be imposed on the right to freedom of speech and expression on the ground that public safety is endangered.

IV) Liberal interpretation of Article 21 of the Constitution includes within its ambit such activities which give adequate opportunities for expression of human self. Article 66 A of the I.T. Act, 2000 takes away the right to socialize with members of one's family and friends as it can make interactions between individuals also a criminal offence. Hence Section 66A violates Article 21 of the Constitution;

V) The Section 66A of the Information Technology Act negates the law laid down in Life Insurance Corporation of India & Union of India & Anr. v. Prof Manubhai D. Shah & Cinemart Foundation[22], wherein the Court held the freedom of speech to be a basic human right in the following words:

"Speech is God's gift to mankind. Through speech a human being conveys his thoughts, sentiments and feelings to others. Freedom of speech and expression is thus a natural right which a human being acquires on birth. It is, therefore, a basic human right. "Everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinions without interference and to seek and receive and impart information and ideas through any media and regardless of frontiers" proclaims the Universal Declaration of Human Rights (1948). The People of India declared in the Preamble of the Constitution which they gave unto themselves their resolve to secure to all citizens liberty of thought and expression. The words 'freedom of speech and expression' must, therefore, be broadly construed to include the freedom to circulate one's views by words of mouth or in writing or through audio-visual instrumentalities. It, therefore, includes the right to propagate one's

21 (1950) SCR 694 (602)

22 AIR 1993 SC 171

views through the print media or through any other communication channel e.g. the radio and the television. Every citizen of this free country, therefore, has the right to air his or her views through the printing and/or the electronic media subject of course to permissible restrictions imposed under Article 19(2) of the Constitution.";

VI) Section 66(A) in its current form fails to define the categories mentioned in it, which has led to inconsistent and arbitrary use of the provision. In the case of 66(A), interpreting it to include any form of communication transmitted using computer resource or communication device renders it to be absurd and arbitrary. It is so vast that is gives a tremendous handle in the hands of the complainant and the police to target anyone. When one sends either by means of a Computer, Computer System, Computer Network or using Mobile Phone, Smart Phone, iPhone, iPad, Tablet, Smart Devices, BlackBerry or any other communication devices, any information, i.e. data, message, text, images, sound, voice, codes, computer programmes, software and databases or micro film or computer generated micro fiche, one can be brought under the purview of Section 66A.

VII) Section 66A applies only to online communications. So a speech which can be considered legal in physical communications such as pamphlets or in addressing public gatherings can be called "illegal" simply because it is published online. While abusing a person who is physically present is not a crime, if someone abuses a person over phone or an electronic device, it is a crime as per section 66A. It is a logically inconsistent section. There is no objective criterion laid down about what is offensive;

Arguments in favour of constitutionality of Section 66A:

I) A statute carries with it a presumption of constitutionality. A further presumption may also be drawn that the statutory authority will discharge their duties honestly and in accordance with the law and would not exercise the power arbitrarily. There is always a difference between a statute and the action taken under a statute i.e. the statute may be valid and constitutional but the action taken under it is invalid. The bare

possibility that the discretionary power may be abused is no ground for invalidating a statute. If the power is actually abused in any case, the exercise of the power may be challenged as discriminatory or mala fide, but the statute will not fail on that ground. A discretionary power is not necessarily a discriminatory power and abuse of power is not easily to be assumed. Section 66A is the substantive law whereas the safeguards against its improper use have been adequately provided in the Code of Criminal Procedure, 1974. Hence, Article 66 A is not violative of Article 14;

II) 19(1) (a) guarantees freedom of speech and expression, subject to reasonable restrictions. Individual rights cannot be absolute in a welfare state. It has to be subservient to the Rights of the public at large. If the legislation indirectly or incidentally affects a citizen's right under Art. 19(1) it will not introduce any infirmity to the validity of the legislation. A piece of legislation which may impose unreasonable restrictions in one set of circumstances may be eminently reasonable in a different set of circumstances. In such cases, public interests should be kept in mind. No restriction can be said to be unreasonable merely because in a given case it operates harshly. Article 66 A has a direct and proximate nexus to its object i.e. maintenance of public order and tranquility as it is a measure which provides against apprehended injury arising from various factors. Also, the mere possibility of abuse of power cannot invalidate a Statute. Hence, Article 66 A does not violate Article 19(1) (a);

III) The right of life and liberty so guaranteed under Article 21 is subject to the rule of proportionality. Liberty is itself the gift of law and may by law be forfeited or abridged. Where individual liberty comes into conflict with an interest of the security of the state or public order, the liberty of the individual must give way to the larger interest of the nation. Therefore, Article 66 A is not violative of Article 21;

IV) When the condition precedent for the exercise of the power is the judgment or opinion or subjective satisfaction of the authority upon whom the power is conferred, the court cannot interfere with that judgment or opinion or inquire into the propriety of the

grounds for forming such opinion, unless the person or authority exercises the power in bad faith in for a collateral purpose. This is laid down in Section 41 of Cr.P.C.

Where the precedent condition to exercise of power is subjective, the satisfaction of the authority cannot be questioned as has been stated: "He is alone to decide in the forum of his conscience whether he has a reasonable cause of belief and he cannot, if he has acted in good faith, be called on to disclose to anyone but himself that these circumstances constituted a reasonable cause and belief" [23]

In other words, the existence of the circumstances which upon which the authority was satisfied cannot be questioned by the Courts and the only question left for the Court is whether the authority exercised the power in good faith. The Court cannot undertake such an investigation as to sufficiency of the materials on which such satisfaction was grounded.

Conclusion and recommendations:

The broad phrasing of Section 66 A, as inserted by an amendment of the IT Act in 2008, seeks to check and address the growing proliferation of irresponsible electronic messages and communications. Therefore, the terminology likes 'annoyance' and 'inconvenience' have been used as ingredients of Section 66 A. The provision has also been criticized for being beyond the reasonable restrictions on the exercise of free speech contained under Article 19(2) of the Constitution of India. Further the problem lies in the fact that the provision criminalizes new form of conduct above and beyond the provisions for offensive messages contained under Chapter XXII of the Indian Penal Code, 1860. This is because explanation to Section 66 A is clear about offensive messages via communication service rather than via person. The fact remains that when something is not offensive through verbal communications, how can the same be offensive through electronic communications? These are

23 *R. Brixton prison,* (1916) 2 KB 742

some of the contentious issues as regards the operational implications of the Section 66 A is concerned which will hopefully be addressed in the days to come.

Despite its relative merits and demerits as may be, one cannot perhaps undermine the necessity of the law in the interest of the decency, morality and standards in social discourses. The Government has already issued an advisory (discussed above) to ensure that powers being given to the police are not being abused and to the end an arrest under Section 66A can only be made with the approval of the competent senior officers. Hence in the fear of being misused by police, Section 66A does not require to be held unconstitutional. Mechanisms need to be placed whereby police remains accountable for any action taken under Section 66A of IT Act.

COMPENSATORY JURISPRUDENCE UNDER CRIMINAL LAW IN INDIA: NEED FOR REFORMS

Dr.Susmitha P Mallaya[*]

Abstract

Compensatory jurisprudence became an indispensable part of criminal Justice system of India in the recent past. The interests of victims in crime cannot be ignored and should not be left to their fate unnoticed by the society. It should be victim oriented rather than offender oriented. While State initiates measures through community services to correct and rehabilitate the offender, it fails to display equal concern to compensate the victims of crime. There is a growing concern for the welfare of the victims of crime in India and has attracted adequate attention and it would be the responsibility of the State to protect its citizens failing which it shall compensate the victims of crime to prevent individual retaliatory behavior. There is no comprehensive legislation in India which provides compensation by the State or by the offender to the victim of crime. The judiciary derives its power to award compensation from the numerous laws in order to assist and rehabilitate the victims and it is a matter of discretion of the courts to award compensation. The victim of a crime cannot claim it as a matter of right. There is lack of proper parameters to award compensation to the victims of crime which may result in its malpractice. The victim is quite often sidelined from the process and more importance is given to convict the wrongdoer. This paper aims to examine and evaluate the flaws in the existing laws governing the payment of compensation to victims of crime and also to make an attempt to suggest some reforms in criminal law to compensate victims.

Key words: ***Criminal Law, Victim, Compensation, State, Crime.***

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Introduction

There is an increase of violence in our society in general and against women in particular, especially, in the metropolitan cities[1]. In all these incidences, the society cannot ignore the interests of victims and leave them uncared and unnoticed. In recent times, it can be seen that the solidarity of the public to express their sympathy towards the victims has increased. The Apex Court of our country also started adding new dimension to criminal law by awarding compensation to the victims of crime by invoking Article 21 of the Constitution of India which resulted in the concept of compensatory jurisprudence in our country.[2] Thus it can be seen that compensation was provided to the victims of crime of custodial violence, sexual assault, rape, illegal detention etc. Apart from criminal cases, the court has undertaken the task of protecting the right to life and personal liberty of all persons and there are several reported judgments of Supreme Court and High Courts, which deal with the problems of compensation under Articles 32 and 226 for public wrongs.[3] In cases of public wrong, liability to pay compensation is fixed on the State on the basis of tortuous act committed by its servants.

The plight of victims has attracted adequate attention in the criminal cases and it would be the responsibility of the State to protect its citizens failing which it shall compensate the victims of crime to prevent individual retaliatory behaviors. However, the issue that needs

1 For example; Gang Rapes, Acid Attack, Also refer *Laxmi* v. *Union of India*, (2014) 4 SCC 427.

2 Article 21 provides for the protection of life and personal liberty of a person in our country by the State, however Supreme Court has extended the benefit of Art.21 even against a private person. In Re: India Woman says Gang-raped on orders of Village Court published in Business & Financial News dated 23-1-2014, AIR 2014 SC 2816. In *Bodhisattva Gautam* v.*Subhra Chakravarthy* (1996)1 SCC 490, interim compensation to the victim of rape was granted by the court.

3 Art.32 of Constitution of India provides power to Supreme Court to issue directions or orders for violation of fundamental right. Art 226, *inter alia* also empowers the High Court of a State to issue an appropriate direction, order or writ against 'any person, authority or government' for the enforcement of the fundamental rights.

to be addressed is the payment of compensation to the victims. The question is whether the State should pay from the tax payer's money? There is lack of conceptual basis for the award of compensation by the State and the apex court according to facts and situation of each case which brings in uncertainty to the victims of crime regarding the quantum of compensation paid to them. There is no comprehensive legislation in India which provides compensation by the State or by the offender to the victims of crime. The High Courts and trial courts in India confront with the question of whether there is a duty to advert to the question of awarding compensation to the victim and record reasons while granting or refusing relief to them[4]. Therefore the award of compensation to the victims of crime by judiciary becomes discretionary.

Evolution of Compensatory Jurisprudence: Role of Judiciary

The basic object of the criminal justice system is to protect the society against crime and to punish the offender.[5] In order to maintain law and order in the society, the civilized State does not allow a victim to take the law in his own hands to punish the wrongdoer for the loss suffered.[6] Earlier, it was assumed by the criminal administration of justice that the claim of the victim gets satisfied by the conviction and the sentence of the offender.[7] There is a change in this traditional concept of conviction of offender and the State is resorting to every possible measure for correction and rehabilitation of the offender. The irony is that the offender is lodged, fed, clothed, warmed and entertained in model prison at the expenses of the State which may also include the taxes that the victim pays to the treasury. It is rightly observed by Supreme Court that it is the weakness of our criminal jurisprudence that

4 *Ankush Sivaji Gaikward* v. *State of Maharastra*, (2013) 6 SCC 770.

5 K.D.Guar, *Criminal Law: Cases and Materials*, LexisNexis Butterworths Wadhwa, Nagpur (2009), p.33

6 *Ibid*.

7 R.D.Dubey, "How Effective is the Indian Criminal Justice System in Protecting her Citizen?: Some Contemporary Reflections", 1 *Indian Human Rights Law Review* 2010, p.37.

the victims of crime do not get proper attention.[8] In order to overcome these lacunae, apex court in India started giving importance to the interest of the victims of crime by awarding compensation and paved way for the development of compensatory jurisprudence. Earlier, the question of liability of State to compensate the victim was posed before the Supreme Court of India in *Khatri* v.*State of Bihar*[9] and in *Veena Sethi* v. *State of Bihar.*[10] In both these cases, the court refused to compensate the victims though in one of the cases the court directed the State of Bihar to provide best treatment to the victim at the cost of the State. It was in the landmark verdict of the apex Court in *Rudul Shah,*[11] that awarding compensation to the victims of crime originated which in turn resulted in the birth of compensatory jurisprudence in India. The court in this case observed that a person is entitled to compensation for the loss or injury caused by the offence, and it includes the wife, husband, parent and children of the deceased victim.[12] The Court exercised its jurisdiction under Article 32.[13] This judgment assumes special significance as it added new dimension to judicial activism on the one hand and raised a vital question regarding the liability of the State to compensate for unlawful detention. Later the apex court in *Bhim Singh* v. *State of J & K*[14], observed that compensation for illegal arrest and detention is an area which unearthed new doctrines pertaining to compensatory jurisprudence in India. In this case a Member of Jammu & Kashmir Assembly was arrested and detained with a malicious and mischievous intention by the police in connivance with the local A.D.M. while he was on his way to attend the assembly session. The State was directed to pay compensation of Rs.50, 000/- to the petitioner for the violation of his legal and constitutional right. Mostly compensation is

8 *Ratan Singh* v. *State of Punjab*, (1979) 4 SCC 719
9 A.I.R. 1981 SC 928.
10 A.I.R. 1983 SC 339.
11 *Rudul Shah* v. *State of Bihar*, A.I.R.1983 SC 1086.
12 *Ibid.*
13 See Article 32 of the Constitution of India
14 AIR 1986 SC 498.

awarded by the courts by interpreting Article 21 of the Constitution which deals with the life and liberty of the person.

In *State of Maharastra* v. *Christain Community Welfare Council of India,*[15] the apex court was called upon to decide whether the compensation paid by the State to the victim can be recovered from the guilty officer. In *R.Gandhi* v. *Union of India*,[16] the District Collector of Coimbatore had recommended that the State Government shall pay compensation to those families of Sikhs and others living in Coimbatore, who were victims of arson and rioting in the wake of assassination of the former Prime Minister of India, Shri. Rajeev Gandhi. In *D.K.Basu* v. *State of West Bengal*,[17] Supreme Court made the following observation:

The monetary and pecuniary compensation is an appropriate and indeed an effective effective and sometimes perhaps the only suitable remedy for the redressal of the established infringement of the fundamental right to life of a citizen by the public servants. The State is vicariously liable to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the state, which shall have the right to be indemnified from the wrongdoer.

Compensation to Victims under Legislative Frame Work

The legislative framework which deals with the compensation to the victims of crime can be traced through two major legislations under criminal law the Code of Criminal Procedure, 1973[18] and Probation of Offenders Act, 1958[19].

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15 AIR 2004 SC 7

16 (2004) Cri.L.J.510 (Mad.)

17 AIR 1997 SC 610

18 S.357 (1) "Whenever under any law in force for the time being a criminal court imposes a fine..or a sentence of which fine forms a part, the court may, when passing judgment, order the whole or any part of the fine recovered to be applied…"

19 S.5 (1) "The court directing the release of an offender under section 3 or section 4, may, if it thinks fit, make at the same time a further order directing him to pay (a) such compensation as the Court thinks reasonable for loss or injury caused to any person by the commission of the offence…"

In pursuance of recommendation of Law Commission of India in its 41st Report 1969, comprehensive provision for compensation to the victims of crime has been provided. This added new positive dimension to Indian philosophy of compensation. This provision under the Code of Criminal Procedure provides power to the trial court to award compensation to the victims of crime. However, this power is the discretion of the courts and mostly confined to only those cases where the court imposes a fine. Mostly it provides compensation as an alternative to fine. The power of the court to award compensation is unlimited. However in practice they are used in a limited way by the courts. A magistrate can order for higher compensation than the amount of fine he can impose. It can be seen that this legislative power has not been resorted to by the lower judiciary in spite of the direction of the apex court from time to time. Apex court has directed all courts in India to exercise their power under section 357 of the Code of Criminal Procedure liberally. In *Sarwan Singh* v. *State of Punjab*[20] , the apex court enumerated the factors which courts should take into consideration while ordering award of compensation to the victim of crime. These factors include capacity of the accused to pay, nature of the offence and the nature of injury suffered by the victim. The court ruled that the quantum of compensation must be reasonable, depending upon the facts, circumstances and justness of victims claim. The accused must be given reasonable time for payment of compensation if required, it may be ordered to be paid in installments. Referring to subsection 3 of S.357 of the Criminal Procedure Code, the court observed,

It is important provision but courts have seldom invoked it, perhaps due to ignorance of its object. It empowers the Court to award compensation to victims while passing judgment of conviction. In addition to conviction, the court may order the accused to pay some amount by way of compensation to victim who has suffered by action of accused. It may be noted that this power of court to award compensation is not ancillary to other sentences but it is in addition thereto. This

20 A.I.R.1988 SC 2131

power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well as reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes.[21]

It is to be remembered that this section entertains the question of compensation only at the time the court imposes a fine as a part of its judgment. A victim of crime requires financial assistance soon after the calamity and not after the pronouncement of the judgment which takes long years from appeal to high court and then to the Supreme Court. While awarding compensation to the victims of crime the trial courts generally refrain and shows reluctance to exercise their power is indicative of the fact that s.357 of the Code does not bear the seal of policy.[22]

Therefore, this legislative provision is inappropriate to respond to the needs and requirements of a victim. This is perhaps because of the discretionary nature imposed on the judiciary by the legislature. It is a matter of charity and generosity than a substantive right as far as victim is concerned. Apart from this, there is no provision under legislation directing to compensate the victim by the accused. It is thus evident that legislative response to compensate victims of crime is limited. Apart from this, victims also invoke S.482 of the Code of Criminal Procedure, 1973[23] seeking compensation from High Courts, the Supreme Court rejected this and in *Palaniappa Gounder* v. *State of Tamil Nadu* ,[24] the court observed,If there is an express provision in a Statute governing a particular subject matter, there is no scope for invoking or exercising the

21 *Hari Kishan and State of Haryana* v. *Sukhbir Singh*, A.I.R. 1988 SC 2127 at 2137

22 Devinder Raheja, "Victim Compensation", 20 *Kurukshetra Law Journal*1 (1999-2000)

23 S.482 "Saving of inherent powers of High Court. Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice".

24 AIR 1977 SC 1323

inherent power of the court because the court ought to apply the provisions of the Statute. Hence, the application made by the heirs of the deceased for compensation could not have been made under section 482 since 357 expressly confers powers on the court to pass an order for payment of compensation in the circumstances mentioned therein.

The Probation of Offenders Act, 1958[25] empowers the trial court to order for compensation. The plain reading of this section shows that the power to award compensation vests only with the trial court.[26] From the victim's point of view the provisions are inadequate. The award of compensation and costs is at the discretion of the Court. The dependent may be paid compensation from the fine amount which a Magistrate may impose on the accused under Section 357 of the Criminal Procedure Code. This makes it amply clear that such a power vests only with the court releasing an offender and is purely within its discretion. Even the Appellate Court or High Court cannot interfere unless it is of the view that such power has been exercised capriciously and unreasonably. At times the trial courts do not invoke Section 357 inspite of the repeated directions issued by Supreme Court. Thus in *Harikrishna* v. *Sukhbir Singh*[27] directed all courts to exercise S.357 of Code of Criminal Procedure liberally and award adequate compensation. However it also cautioned the courts to exercise it in a reasonable and just manner taking into consideration the nature of crime, veracity of the claim and the ability of the accused to pay.

Therefore, it can be seen that there are various constraints for the use of the legislative provisions available under criminal law. The legislative scheme of award and payment of compensation to the victims of crime does not mandate the court to compensate the victims. It does not even create any legal right to be compensated to the victims of crime. It entirely leaves it to the sweet will of a criminal court to compensate the victims. Apart from this, many a times there is a general

25 *Supra* n.12
26 See S. 5 (1) (a) of Probation of Offenders Act,1958
27 (1988) 4 SCC 551

reluctance on the part of criminal courts regarding the use of these provisions for compensation coupled with the indifference and even ignorance on the part of lawyers and clients and many opportunities are lost because of their default.

Compensatory Provision: A Constitutional Perspective

The Supreme Court of India by exercising its power under Article 32 evolved a new strategy to compensate victims of administrative wrongs. The Court has undertaken the task of protecting the right to life and personal liberty of all persons irrespective of the absence of any express constitutional provision and of judicial precedents[28]. This constitutional interpretation was extended to award compensation to the victims of crime also. The Court also noted that the purpose of compensation is not just to restore the victim's life. It is also 'exemplary' in nature without obviating its discretion to individuate principles and recommendatory sums, some thresholds have to be set[29]. The compensatory relief was granted by the Supreme Court in *Sebastian M Hongaray*[30], *Bhim Singh*[31] etc. In many of these cases, State was made liable to pay to the victims on the basis of public wrong. However, in *State of Maharastra* v. *Ravikant S.Patil*[32] Supreme Court absolved the inspector of Police from personal liability to pay compensation and directed the state to pay compensation. This is erroneous view and if the police commit an unlawful act in individual capacity, there is no reason why he should not be made personally liable. There is inconsistency in the court decisions since there is no clear rules and regulation to decide cases on compensation to victim. Moreover, the compensation under

28 See Upendra Baxi, The Supreme Court under Trial: Under Trials and the Supreme Court, (1980) 1 SCC (J) 35.

29 See Rajeev Dhavan, , "Strengthening Capabilities: Reflecting on the National Human Rights Commission's (5th Report),42 *JILI* (2001) 469 at 488.

30 *Sebastian Hongaray* v. *Union of India*, A.I.R.1984 SC571.

31 *Supra n.14.*

32 (1991)2 SCC373.

writ proceeding will not be awarded in all cases[33]. Mostly the ambit of Compensatory jurisprudence under Article 32 has been extended to the underprivileged sections as well as to individual cases involving grave injustice. The Supreme Court has awarded compensation in favour of the next kins of those who had lost their lives in the anti-sikh riots. It has directed the Government to pay 3.50 lakhs to the dependents of each of the riot victims killed in the aftermath of the assassination of the then Prime Minister Mrs. Indira Gandhi. The court condemned the failure of the police to protect the lives of the citizens. Compensatory relief was given to the poor victims of illegal detention at the hands of executive and death caused due to police atrocities[34]. Apart from this, the apex Court has awarded compensation to the victims of hazardous activity[35], custodial death[36], and rape victims[37].

Compensatory Relief to Rape Victims: An Evaluation

Victims of rape remain the most vulnerable group in our society. Rape is a crime against the most basic human right and violates the victims most cherished fundamental right[38]. It gives a serious blow to her womanhood and also offends her self-esteem. Therefore, providing punishment to the offender will not rehabilitate her to the normal life. After analyzing the issues pertaining to rape victims the apex court expanded its compensatory jurisprudence to the victims of rape also[39]. In *Delhi Domestic Working Women's Forum* v. *Union of India*[40] the apex

33 In *State of Maharastra* v. *Dadaji Kachary*, (1984) Cri.L.J.1028 (Bom.) the Bombay High Court used its inherent power under S.482 of the Code of Criminal Procedure and awarded compensation for violation of the constitutional freedom of the accused that was arrested and detained on "Untrustworthy and meaningless evidence".

34 *Saheli, a Woman Resource Centre* v. *Commissioner of Police*, AIR 1990 SC 513, *D.K.Basu* v. *State of West Bengal*, AIR 1997 SC 610

35 *M.C.Mehta* v. *Union of India*, AIR 1987 SC 965

36 *Nilabati Behera* v. *State of Orissa*, A.I.R.1993 SC 1960

37 *Bodhisattwa Gautam* v. *Subhra Chakraborty*, (1996) 1 SCC 490

38 See Article 21 of the Constitution of India

39 *Gudalure M J Cherian* v. *Union of India* (1995) Supp. 3 SCC 387. *Railway Board* v. *Chandrima Das*, (2000) 2 SCC 465

40 (1995) 1 SCC 14

court, by highlighting ordeals of victim of rape and defects in the present criminal law systems, outlined a set of broad parameters to assist the victims of rape. Drawing inspiration from the Criminal Justice Act, 1991 of the United Kingdom, dealing with an institutionalized payment of compensation to victims of crime including rape, stressed the need to set-up a Criminal Injuries Compensation Board (CICB) to compensate victims of rape. Further, it emphasized that courts in India should award compensation to rape victims on conviction of the offender and also by the proposed CICB even if the offender is acquitted. The court relied upon Article 38 (1) of the Constitution[41]. In this case, court directed payment of Rs.10,000 as ex gratia to each of the victims. Later, exercising its inherent power under Article 142 of the Constitution of India, the apex court in *Bodhisattwa Gautam* v. *Subhra Chakraborty*[42] case suo motu gave effect to the right of a rape victim to claim compensation from the offender for violation of her constitutional right to live with human dignity. The Court in this case noted:

Rape is a crime not only against the person of a woman; it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is, therefore, a most dreaded crime. It is violative of the victim's most cherished right, namely right to life, which includes right to live with human dignity as contained in Art.21 of the constitution.The Court directed the offender to pay the victim a sum of Rs.1000 every month as interim compensation during the pendency of the criminal trial and also to pay arrears of compensation at the same rate from the date of the institution of the complaint by the victim. The court further ruled that compensation to the victim under such conditions will be justified even when the accused was not convicted. However, it may be noted that this case was not a case of rape but of offences relating to marriage, causing miscarriage,

41 Article 38 (1): The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all institutions of the national life.

42 *Supra* n.25

cheating etc. It is, therefore, difficult to appreciate the judicial propriety in awarding interim compensation with arrears in the absence of an appropriate compensation scheme to assist victims of rape[43].

The 154th Law Commission report recommended to incorporate a New Section 357-A in Code of Criminal Procedure to provide for a comprehensive scheme of payment of compensation for all victims fairly and adequately by the courts. Apart from this the question of payment of compensation to victims of crime from the wages of prison labour came up for consideration in *State of Gujarat* v. *Hon'ble High Court of Gujrat.*[44] The Supreme Court observed that the State should make a law for setting apart a portion of wages earned by prisoners to be paid as compensation to deserving victims of the offence either directly or through a common fund to be created for this purpose.

Nonetheless, it can be seen that the apex court in *Vishakha* v. *State of Rajasthan*[45] brushed aside the issue of the payment of compensation to the alleged victim of gang rape. It has not paid attention to its earlier decision where they recognized the right of a rape victim to be compensated for violation of her fundamental right to live with dignity.

Conclusion and Suggestions

The case for compensation to victims of crime rests primarily on two grounds. One is that the criminal who inflicted injury to the person must compensate for the loss and the second one is that the State which failed in its duty to protect the life and dignity of the victim should compensate the victim for the same. But under criminal justice system, the State takes the entire payment by way of fine and leaves the victim at their own plight. It is the responsibility of the State to protect its citizens failing which it shall compensate the victims of crime to prevent individual retaliatory behavior. There is no comprehensive legislation in India which provides compensation by the State or by the offender to the victim of crime. The judiciary on the other hand derives its power to

43 See, K.N.Chandrasekharan Pillai, "A Comment on *Bodhisattwa Gautam* v. *Subhra Chakraborty*", 20 *Academy Law Review* 205 (1996).

44 (1998) 7 SCC 392.

45 AIR 1997 SC3011.

award compensation from the numerous laws in order to assist and rehabilitate the victims. It is always a matter of discretion of the courts and victim of a crime cannot claim it as a matter of right. Though there is Section 357 under CrPC, the trial courts in our country seldom invoke this provision. The whole legislative paradigm coupled with lack of judicial determination has exposed numerous flaws of the present legal system about awarding of the compensation to the victims. Generally, when the state makes *ex-gratia* payment to the innocent victims of violence in major accidents, which is not only *ad hoc* and discretionary but also inadequate[46]. Moreover undue delay in making an award of compensation to the victims of crime and violence will defeat the very purpose of providing the support and relief to them. Indian criminal law system does not provide for institutionalized payment of compensation to the victim of a crime for any loss or injury, whether physical, mental or psychological, caused to them by the offender.

In pursuant to the provision under Code of Criminal Procedure[47] for preparation of a scheme for providing funds for the purpose of compensation to the victim or their dependents who have suffered loss or injury as a result of the crime and who require rehabilitation, only 17 States and 7 Union Territories have prepared "Victim Compensation Scheme". The compensation provided in these schemes is not adequate and uniform. This was highlighted by the apex court in its decision on compensation to the victims of acid attacks.[48] In *State of Rajasthan* v. *Sanyam Lodha*,[49] the apex court held that failure to grant uniform ex-gratia relief is not arbitrary or unconstitutional. It was held that the quantum may depend on facts of each case.

Therefore there is a need for the effective implementation of the scheme of compensation as suggested by the court in *Delhi Domestic*

46 K.I.Vibhute, "Compensating Victims of Crime in India: An Appraisal, 32 JILI 68 (1990).

47 Section 357-A inserted by Act 5 of 2009 w.e.f.31.12.2009

48 *Laxmi* v *Union of India*, (2014) 4 SCC 427.

49 (2011) 13 SCC 262.

Working Women's Forum[50] and the same needs to be materialized. As suggested in this case Central Government should formulate a compensatory scheme for victims of crime on the lines of British Criminal Injuries Compensation Scheme to enable victims to seek compensation from the offender and the State. The executive should response to these judicial directives to render justice to the victims. The court which does not award compensation to the victims should state the reasons for not providing compensation to the victims. The apex court observed that the power to award compensation to the victim was intended to reassure them that they are not forgotten in the criminal justice system[51]. Therefore if the application of mind to the question of award of compensation to the victim of crime in every case is not considered mandatory under Section 357 of Code of Criminal Procedure, then it will defeat the very object of the provision under the Code. It is true that no compensation can be adequate or will bring respite for any victim of crime but monetary compensation will at least provide some solace to them. The principles of compensation to the victims of crime need to be reviewed and expanded to cover all cases of crime. The judicial discretion should not become a hindrance to award compensation to the victims and it is suggested that the provision should be mandatorily used with reasonableness and fairness by the courts relying on apex court directions. Also the State should try to recover it from the accused or any alternative measures need to be implemented so that the taxpayers money are not used for the same.

50 *Supra* 39.

51 *Ankush Shivaji Gaikwad* v. *State of Maharastra*, (2013) 6 SCC 770.

DOCTRINE OF LEGITIMATE EXPECTATION: GREAT EXPECTATIONS?

Abstract

This article "Doctrine of legitimate expectation- Great Expectations?" throws light upon the new legal order which has influenced the administrative process greatly. This legal order in the Administrative Law has emerged in India in the middle of 20th century. Life of every individual is greatly influenced by the administrative process. In the actions of a Welfare State, the constitutional mandates occupy predominant position even in administrative matters. It operates in public domain and in appropriate cases constitutes substantive and enforceable right. The term legitimate expectation pertains to the field of public law. It envisages grant of relief to a person when he is not able to justify his claim on the basis of law in true sense of term although he may have suffered a civil consequence. An attempt has been made in this article to analyze the role of judiciary in India in checking the growing abuse of administrative power; role of judiciary in Europe in developing this doctrine has also been studied. It reflects how reasonable opportunity of being heard is given to the affected parties against administrative action, although it doesn't create any legal right as such.

***KEY WORDS**: Legitimate expectation, Administrative Actions, Judiciary, Public authority, Fairness.*

Introduction

The underlying principles of the doctrine of legitimate expectation are well-known. Where a public authority represents (either by way of an express promise or implicitly by way of past practice) that it will conduct itself in a particular way, that representation may give rise to a legitimate expectation on the part of the person making representation that the public authority will so act, and the public authority may have to

give effect to that expectation.[1] Such legitimate expectations are commonly divided into procedural legitimate expectations, where the expectation is of a procedural benefit such as notice or consultation before any change of tack on the part of the public authority, and substantive legitimate expectations, where the expectation is that the public authority will act in accordance with its representation as a matter of substance.

Development of the doctrine in the English courts

Legitimate expectation of a procedural right

The doctrine had originally arisen in German administrative law which was incorporated into English law[2]. The judicial evolution of the doctrine of 'legitimate expectation' can be traced to the opinion of the Judicial Committee delivered by Lord Fraser in **Attorney-General of Hong Kong vs. Ng Tuen Shiu.**[3] Ng. was an illegal immigrant from Macau. The government announced a policy of repatriating such persons and stated that each would be interviewed and each case treated on its merits. Ng. was interviewed and his removal ordered. His complaint was that at the interview he had not been allowed to explain the humanitarian grounds on which he might be allowed to stay, but only to answer the questions put to him; that he was given a hearing, but not the hearing in effect promised, as the promise was to give one at which 'mercy' could be argued. The judicial Committee agreed that, on that narrow point, the government's promise had not been implemented; his

1 Jonathan Moffett in his paper, 'Resiling from Legitimate Expectation' (23.7.08) www.no8chambers.co.uk%2Fdocs%2FTHE%2520DOCTRINE%2520OF%2520LEGITIMATE%2520EXPECTATION.docx&ei=-9SIU8vLHMyYkgXmg4HQCg&usg=AFQjCNGl3LepDZ6t6NH5U6ysiSTfyrEVRw

2 B.N.Pandey, "Doctrine of Legitimate Expectation" 31 Ban.L.J.(2002) 57-65

3 (1983) 2 A.C. 629, (1983) 3 All. E.R. 346.

case had not been considered on its merits, and the removal order was quashed. Ng succeeded on the basis that he had a legitimate expectation that he would be allowed to put his case, arising out of the government promise that everyone affected would be allowed to do so.

The doctrine of legitimate expectation originates from common law principles of fairness. English courts developed this doctrine largely to encourage good administration and prevent abuses by decision-makers. Generally, the courts will grant judicial review of an administrative decision based on an individual's legitimate expectation if a public authority has made a representation to the individual within its powers. The individual has to show that the representation was a clear and unambiguous promise, an established practice or a public announcement. This is largely a factual inquiry.

The key idea is that under certain circumstances where a representation has been made by a public authority to an individual who would be affected by a decision by the authority, the individual expects to be heard before the decision is made. To deny the right to be heard amounts to unfairness. The court will thus be inclined to quash a decision if there has been unfairness and reliance by the individual on the representation to his detriment. This is demonstrated in the 1983 House of Lords decision ***Council of Civil Service Unions v. Minister for the Civil Service*** **(the GCHQ case).**[4]This case involved the trade unions of employees of the Government Communications Headquarters (GCHQ), a government signals and intelligence department, who argued that they had an expectation to be consulted before the Minister took the decision to deny them the right to join trade unions. The Minister argued that it had been necessary to take that step as the trade unions were conducting strikes that crippled GCHQ operations and threatened the national security of the United Kingdom. The Court established that in the past the trade unions had been consulted on employment-related

4 *Council of Civil Service Unions v. Minister for the Civil Service* [1983] UKHL 6, [1985] A.C. 374, House of Lords (UK) ("GCHQ case").

matters, even though it was not a rule. However, their Lordships clearly recognized that an individual can have a legitimate expectation to be consulted before a decision is taken when it is proven that this is the practice[5]. Such a representation can come in the form of a clear and unambiguous promise to hear the individual or an established practice to consult those affected before taking the decision. Nonetheless, on the facts of the case, their Lordships agreed that they could not review the Minister's decision even though there was an enforceable legitimate expectation as the decision had been made on national security grounds.

Legitimate expectation of a substantive benefit

The English courts initially wavered in recognizing that an individual has a legitimate expectation of a substantive benefit arising from a representation from the authorities. The notion of protecting a substantive legitimate expectation was espoused in the 1995 High Court decision in **R. v. Ministry of Agriculture, Fisheries and Food, ex parte Hamble (Off-shore) Fisheries Ltd.**[6] In that controversial case, Justice Stephen Sedley formulated the framework for legitimate expectations as the balance of the requirements of fairness against the decision-maker's reasons to change the policy. This was in step with the development of the doctrine of proportionality as prescribed in the Treaty on European Union,[5] and in European Court of Justice case law. The decision wove proportionality back into the fabric of judicial review in the UK under the banner of an expanding doctrine of "fair administration" despite the clear rejection of proportionality as a self-

5 Matthew Groves; SUBSTANTIVE LEGITIMATE EXPECTATIONS IN AUSTRALIAN ADMINISTRATIVE LAW; 2008 MULR 470

6 *R. v. Ministry of Agriculture, Fisheries and Food, ex parte Hamble (Off-shore) Fisheries Ltd.* [1995] 2 All E.R. 714, High Court (Queen's Bench) (England & Wales).

standing ground of review by the House of Lords in **R. v. Secretary of State for the Home Department, ex parte Brind (1991).**[7]

In 1996, the Court of Appeal opined in **R. v. Secretary of State for the Home Department, ex parte Hargreaves**[8] that "[o]n matters of substance (as contrasted with procedure) Wednesbury provides the correct test". In Associated Provincial Picture Houses v. Wednesbury Corporation (1947)[8] the High Court had introduced the idea of Wednesbury unreasonableness, that is, a public authority's decision is unlawful if, although they have "kept within the four corners of the matters they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it".[10] The inference to be made from ex parte Hargreaves was that where an applicant claimed to have a substantive expectation, it was not for the court to judge if that expectation should be protected vis-à-vis the broader public interest. The court should only intervene if the decision-maker's exercise of its discretion satisfied the Wednesbury threshold.

However, the courts' role in protecting substantive legitimate expectations was clearly established by the Court of Appeal of England and Wales in **R. v. North and East Devon Health Authority, ex parte Coughlan (1999)**[9] The case involved an applicant who was promised by her local authority that a new nursing home would be her "home for life". The Court granted the application for review on the ground that the applicant had a legitimate expectation to have the substantive benefit of staying in the nursing home as promised by the local authority. It also set out the approach to be taken in safeguarding procedural and substantive

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7 *R. v. Secretary of State for the Home Department, ex parte Brind* [1991] UKHL 4, [1991] 1 A.C. 696, H.L.

8 *Associated Provincial Picture Houses v. Wednesbury Corporation* [1947] EWCA Civ 1, [1948] 1 K.B. 223, C.A. (England & Wales)

9 *R. v. North and East Devon Health Authority, ex parte Coughlan* [1999] EWCA Civ 1871, [2001] Q.B. 213, C.A.

legitimate expectations. Where procedural legitimate expectations were concerned, courts would require an opportunity for consultation to be given unless there was an overriding reason to resile from it (such as the national security concern that arose in the GCHQ case). As regards substantive legitimate expectations, courts would decide whether cases lie "... in what may inelegantly be called the macro-political field",[10] or are those "where the expectation is confined to one person or a few people, giving the promise or representation the character of a contract". In the first situation, the public authority "is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course", and the court may only review the authority's decision on the ground of Wednesbury unreasonableness. On the other hand, when assessing a case in the second situation, the court decides whether for an authority to frustrate an expectation is so unfair that it amounts to an abuse of power. The court must weigh the requirements of fairness towards the individual against any overriding interests relied by the authorities to justify the change of policy.

A slightly different approach has been adopted by Lord Justice John Laws. In R. v. Secretary of State for Education and Employment, ex parte Begbie (1999),[11] he suggested that the Coughlan categories are not "hermetically sealed", and in **Nadarajah v. Secretary of State for the Home Department (2005)**,[12]he expanded on this by taking a proportionality approach:

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10 *R. v. Secretary of State for Education and Employment, ex parte Begbie* [1999] EWCA Civ 2100, [2000] 1 W.L.R. 1115 at 1131, C.A. (England & Wales).

11 *R. v. Secretary of State for Education and Employment, ex parte Begbie* [1999] EWCA Civ 2100, [2000] 1 W.L.R. 1115 at 1131, C.A. (England & Wales).

12 *Nadarajah v. Secretary of State for the Home Department* [2005] EWCA Civ 1363, C.A. (England & Wales).

[A] public body's promise or practice as to future conduct may only be denied ... in circumstances where to do so is the public body's legal duty, or is otherwise ... a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest.

In Coughlan the view was expressed that the court will assess whether it is unfair for an authority to frustrate a legitimate expectation when the expectation is "confined to one person or a few people, giving the promise or representation the character of a contract" In ***R. (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No. 2)*** **(2007),**[13] it was accepted that members of a group of close to a thousand or even up to several thousand people[14] could have a legitimate expectation of a substantive benefit following the government's announcement of its intentions.

Where a person convinces the court that his or her substantive legitimate expectation has been frustrated, the usual remedy is for the court to order that the public authority fulfil the expectation. However, in R. (Bibi) v. Newham London Borough Council (2001)[15] it was held that when the decision in question is "informed by social and political value judgments as to priorities of expenditure" it is more appropriate for the authority to make the decision,and the court may order that the authority should merely reconsider its decision, taking into account the person's substantive legitimate expectation.[16]

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13 *R. (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2007] EWCA Civ 498, [2008] Q.B. 365, C.A.

14 *R. (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* [2000] EWHC 413 (Admin), [2001] Q.B. 1067 at 1078, para. 6, H.C. (Q.B.) (England & Wales).

15 *R. (Bibi) v. Newham London Borough Council* [2001] EWCA Civ 607, [2002] 1 W.L.R. 237, C.A. (England & Wales).

Coughlan has been criticized for allowing the doctrine of proportionality to affect administrative law, as the court has to judge the merits of a case when granting a review on grounds of substantive legitimate expectation and, in a sense, usurp the discretion of the executive branch of government. This is arguably inconsistent with the court's traditional role in judicial review which is to avoid examining the merits of administrative decisions and only scrutinize them for compliance with the law.[17]

Development in India

The legal position in India is similar to that of England. This doctrine was invoked on several occasions by the Supreme Court of India while dealing with a variety of issues ranging from tenders to allotment of housing. For instance in Navjyoti Coop. Group Housing Society v. Union of India[18] , the Supreme Court recognised that by reason of application of the said doctrine, an aggrieved party would be entitled to seek judicial review, "if he could show that a decision of the public authority affected him of some benefit or advantage which in the past he had been permitted to enjoy and which he legitimately expected to be permitted to continue to enjoy either until he was given reasons for withdrawal and the opportunity to be heard". In this case the seniority as per the existing list of cooperative housing society for allotment of land was altered by subsequent decision. The previous policy was that the seniority amongst housing societies in regard to allotment of land was to be based on the date of registration of the society with the Registrar. But on 20.1.1990, the policy was changed by reckoning seniority as based upon the date of approval of the final list by the Registrar. This altered the existing seniority of the society for allotment of land. The Supreme Court held that the societies were entitled to a "legitimate expectation" that the past consistent practice in the matter of

18 (1992) 4 SCC 477.

allotment be followed even if there was no right in private law for such allotment. The authority was not entitled to defeat the legitimate expectation of the societies as per the previous seniority list without some overriding reason of public policy as to justify change in the criterion. No such overriding public interest was shown.

The Supreme Court recognised that the doctrine, in essence, imposes a duty on public authority to act fairly taking into consideration all relevant factors before effecting a change in its policies which would affect a person who had been beneficiary of the continuing policy.[19] In **Madras City Wine Merchants Association v. State of Tamil Nadu[20],** wherein it was held :

The legitimate expectation may arise as (a) if there is an express promise given by a public authority; or (b) because of the existence of regular practice which the claimant can reasonably expect to continue; (c) such an expectation must be reasonable; and if there is a change in policy or in public interest the position is altered by a rule or legislation no question of legitimate expectation would arise.

In **Food Corporation of India v. Kamdhenu Cattle Feed Industries[21]**.the Supreme Court elaborately discussed the doctrine as follows:

"... In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law : A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his

19 1992(60)ELT674(SC)

20 ibid

21 AIR1993SC16017

interaction with the State and its instrumentalities, with this element forming a necessary component of the decision making process in all State actions.

To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.

The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent."

In Ghaziabad Development Authority and State of U.P. Vs. Delhi Auto & General Finance Pvt. Ltd. and others and Maha Maya General Finance Co. Ltd. and another[22] it was held that:

It was clearly indicated in that decision that non-consideration of legitimate expectation of a person adversely affected by a decision may invalidate the decision on the ground of arbitrariness even though the legitimate expectation of that person is not an enforceable right to provide the foundation for challenge of the decision on that basis alone. In other words, the plea of legitimate expectation relates to procedural fairness in decision making and forms a part of the rule of non-arbitrariness; and it is not meant to confer an independent right enforceable by itself. That apart, the manner in which legitimate expectation has been relied on by the High Court in the present case, is difficult to appreciate.

The basic principles in this branch relating to 'legitimate expectation were enunciated by Lord Diplock in **Council of Civil Service Unions v. Minister of the Civil Services**[23].

It was observed that for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision maker that they will not be withdrawn without giving him first an opportunity or advancing reasons for contending that they should not be withdrawn. The procedural part of it relates to a representation that a hearing or other appropriate procedure

22 AIR1994SC2263,

23 1985 AC 374

will be afforded before the decision is made. The substantive part of the principle is that if a representation is made that a benefit of a substantive nature will be granted or if the person is already in receipt of the benefit that it will be continued and not be substantially varied, then the same could be enforced. In the above case, Lord Frasser accepted that the civil servants had a legitimate expectation that they would be consulted before their trade union membership was withdrawn because prior constitution in the past was the standard practice whenever conditions of service were significantly altered. Lord Diplock went a little further, when he said that they have a legitimate expectation that they would continue to enjoy the benefit of the trade union membership. The interest in regard to which a legitimate expectation could be had must be one which was protectable. An expectation could be based on an express promise or representation or by established past action of settled conduct. The representation must be clear and unambiguous. It could be a representation to the individual or generally to a class of person"

In **Union of India v. Hindustan Development Corporation**[24]**,** Supreme Court of India observed as under:

The doctrine does not give scope to claim relief straightaway from the administrative authorities as no crystallised right as such is involved. The protection of such legitimate expectation does not require the fulfilment of the expectation where an overriding public interest requires otherwise. A case of legitimate expectation would arise when a body by representation or by past practice aroused expectation which it would be within its powers to fulfil.

If a denial of legitimate expectation in a given case amounts to denial of right guaranteed or is arbitrary, discriminatory, unfair or biased, gross abuse of power or violation of principles of natural justice, the same can be questioned on the well-known grounds attracting Article

24 AIR 1994 SC 988

14 but a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles It follows that the concept of legitimate expectation is "not the key which unlocks the treasury of natural justice and it ought not to unlock the gates which shuts the Court out of review on the merits", particularly when the element of speculation and uncertainty is inherent in that very concept.

In **National Buildings Construction Corporation v. S. Raghunathan**[25] , the Supreme Court laid down thus:

The doctrine of "Legitimate Expectation" has its genesis in the field of administrative law. The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without any iota of abuse of discretion. The policy statements cannot be disregarded unfairly or applied selectively. Unfairness in the form of unreasonableness is akin to violation of natural justice. It was in this context that the doctrine of "Legitimate Expectation" was evolved which has today become a source of substantive as well as procedural rights. But claims based on "Legitimate Expectation" have been held to require reliance on representations and resulting detriment to the claimant in the same way as claims based on promissory estoppel.

In **State of West Bengal v. Niranjan Sinha,**[26] , the Supreme Court reiterated the principle in F.C.I, v. Kamdhenu Cattle Feed Industries (supra) and observed as under.

If it is a case of extension of the existing agreement on the same terms and conditions and such consideration gives rise to a question of legitimate expectation being a part of the concerned agreement,

25 AIR 1998 SC 2779

26 (2001) 2 SCC 326

economic consideration of getting higher bid for the same period would be a relevant consideration. If the Governmental authorities had found that it would be feasible to have the agency, as in the present case, on fresh terms by enhancing the amount payable to the Government, it would be a relevant factor and in such a case it cannot be said that the legitimate expectation of the respondent had been affected because the public interest would out-weigh the extension of the period of the agreement. The doctrine of "legitimate expectation" is only an aspect of Article 14 of the Constitution in dealing with the citizens in a non-arbitrary manner and thus, by itself, docs not give rise to an enforceable right but in testing the action taken by the Government authority whether arbitrary or otherwise it would be relevant.

The decision in ***Food Corporation of India v. Kamdhenu Cattle Feed*** *Industries (supra) does not lay down any principle which detracts from what we have stated now. In a case where the agency is granted for collection of toll or taxes, as in the present case, it can "be easily discerned that the claim of the respondent for extension of the period of the agency would not come in the way of the Government if it is economically more beneficial to have a fresh agreement by enhancing the consideration payable to the Government. In such an event, it cannot be said that the action of the Government inviting fresh bids is arbitrary. Moreover, the respondent can also participate in the tender process and get his bid considered.....*

In **Punjab Communications Ltd. v. Union of India**[27], the Supreme Court held that substantive legitimate expectation permits the Court to find out whether the change of policy resulting in defeating or denying legitimate expectation is irrational or unreasonable. The following principles were laid down by the Supreme Court:

(i) For a legitimate expectation to arise, the decisions of administrative authority must affect the person by depriving him of some

27 [1999] 2 SCR 1033

benefit or advantage, which he had in the past or been permitted by the decision maker, which the person can legitimately expect to be permitted to continue and the person received assurances from the decision maker that the benefit will not be withdrawn without giving him an opportunity of advancing reasons;

(ii) The procedural aspect of legitimate expectation relates to representation for hearing or other appropriate procedure;

(iii) Substantive part of the principle is that, representation made for a benefit of substantive nature, will be granted or if the person is already in receipt of the benefit, it will be continued and not varied;

(iv) The decision makers permitting to change the policy in public interest, cannot be fettered by the application of principle of substantive legitimate expectation;

(v) If the authority proposes to defeat a person's legitimate expectation, the authority should afford the person an opportunity to make a representation in the matter. From this point of view, the doctrine imposed a duty to act fairly by taking into consideration all relevant factors relating to such legitimate expectation;

(vi) The protection of legitimate expectation do not require the fulfilment of legitimate expectation, where an overriding public interest required otherwise;

(vii) If a person is denied the benefit by virtue of a legislative enactment or change in the statutory rules, it is always taken that the result of a change in the policy by Legislation, does not give rise to legitimate expectation;

(viii) The principle of legitimate expectation certainly gives the person sufficient locus standi to seek judicial review; and

(ix) The substantive legitimate expectation merely permits the Courts to find out if the change of policy resulting in defeating legitimate expectation was irrational or unreasonable."

Conclusion

The Doctrine of legitimate expectation was evolved to impart procedural due process however it is evolving beyond the original purpose for which it was created and is now being applied by courts to grant substantial rights. However the boundaries of the substantive doctrine of legitimate expectation are not yet fixed by the courts. This will create a powerful weapon against the arbitrariness of the state in its dealings with the citizens especially in the present times when the corporate power is getting a hold if the state machinery. The future development of the substantive doctrine has to be seen in the arena of land rights and access to natural resources.

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"Juvenile Justice in India and J&K ; A critical juxtaposition of the Juvenile Justice (Care & Protection of Children) Act, 2000 & the J&K Juvenile Justice Act, 1997"

Abstract

Juvenile Justice in India is regulated by the Juvenile Justice (Care and Protection of Children) Act 2000 which was devised to bring the system of juvenile justice at par with the United Nations Convention on the Rights of the Child 1989 and to cover up the drawbacks of its predecessor Juvenile Justice Act 1986. However, this Central Legislation is applicable to and is implemented in all the States of the Country except Jammu and Kashmir due to the provisions of Article 370 of the Indian Constitution which guarantees a special status to the State. For this reason, the system of juvenile justice in the State is governed under separate legislations. The Jammu and Kashmir Juvenile Justice Act, 1997 was implemented in the State which was repealed in 2013, and the Juvenile Justice (Care and Protection of Children) Act, 2013 was introduced in its place. This paper attempts to compare critically the system of juvenile justice in India and Jammu and Kashmir by comparing the Central Legislation vis-a-vis the State Legislation through a threadbare analysis. It attempts to focus on the synergical points of the Juvenile Justice (Care and Protection of Children) Act 2000 and the Juvenile Justice (Care and Protection of Children) Act, 2013. Furthermore, certain technical difficulties arising as a result of these legislations have been analyzed with support of certain decisions of the Supreme Court and decisions of the Lower Judiciary of Kashmir

***Key Words**: **Juveniles in Conflict with Law, Juvenile Justice, Legislations, Age, Issues, Offences, Care and Protection**.*

1. Brief Introduction to the Legislative Background

India has a long history of juvenile justice which can be divided into five periods by reference to legislative and other landmark developments. a) prior to 1773 b) 1773-1850 c)1850 – 1918 d) 1919-1950 and, e) post 1950. The juvenile justice system in India up to 1950 can be briefly traced by emphasizing the different provisions for children under the Hindu and Muslim laws, the emergence of the East India Company etc. Certain landmark developments in this period have been, for example, the Female Infanticide Act 1870, Vaccinations Act 1880, Reformatory Schools Act 1876 etc.[1] The Apprentices Act 1850 was the first legislation dealing with children in conflict with law, providing for binding-over of children under the age of 15 years found to have committed petty offences as apprentices. All these Acts included two categories of children – delinquent and neglected children and provided for establishment of separate Courts for trying juveniles and establishment of separate residential institutions.[2]

After independence, the Parliament of India enacted the first Central legislation, namely Children Act, 1960 as the model legislation. It introduced a sex-discriminatory definition of children, established two separate adjudicatory bodies to deal with children in conflict with law and children in need of care and prohibited death penality.[3] In 1986, a uniform legislation was applied to the whole country in form of the Juvenile Justice Act, 1986 which aimed to

bring the administration of juvenile justice in conformity with the United Nations Standard Minimum Rules for Administration of Juvenile Justice, 1985 (the Beijing Rules). In 1989 United Nations passed the Convention on the Rights of the Child which focuses on the 'best interests' of the children. India ratified the United Nations

1 Kumari, Ved, 2004. *The Juvenile Justice System in India: From Welfare to Rights*. Oxford University Press, New Delhi, pp. 48-74.

2 Kumari, Ved, 2009. Juvenile Justice: Securing the Rights of Children During 1998-2008, *NUJS Law Review*, 2(4): 557-572.

3 *Ibid*., p. 558.

Convention on the Rights of the Child in 1992 and hence, as a State party to it, India was obliged to bring the system of juvenile justice in the country at par with United Nations Convention on the Rights of the Child. However, it took eight years before India passed the Juvenile Justice (Care and Protection of Children) Act, 2000 to bring the juvenile justice in the country in consonance with the United Nations Convention on the Rights of the Child. The Juvenile Justice (Care and Protection of Children) Act, 2000 has been further amended in 2006 and 2011.

Jammu and Kashmir has also shown concern with the protection and development of children. The Juvenile Court Act was in force in the State till the passing of Jammu and Kashmir Children Act 1970. The Jammu and Kashmir Juvenile Justice Act, 1997 replaced both these earlier Acts with its enforcement in the whole State on 1 April 1998.[4] The reason for a separate legislation is that the State is guaranteed a special status under Article 370 of the Indian constitution. To the J&K Juvenile Justice Act 1997, Model Rules were also added in 2007. Under continuous recommendations of several international and national organizations like, United Nations, Amnesty International (AI), Asian Centre for Human Rights (ACHR), the National Commission for Protection of child Rights (NCPCR) to bring the juvenile justice in the State at par with the rest of the country, the Government of Jammu and Kashmir in its Legislative Assembly passed 'The Jammu and Kashmir Juvenile Justice (Care and Protection of Children) Bill, 2013 [LA Bill No. 7 of 2013],[5] in March 2013 which aimed to consolidate and amend the law relating juveniles in conflict with law and children in need of care and protection. The new legislation governing the system of juvenile justice in the State is the Juvenile Justice (Care and Protection of Children) Act 2013.

4 Kumari, Ved (2004), *op.cit*., p. 132.

5 "LA Passes Juvenile Justice Bill with Amendment," *Kashmir Times*, Jammu, Mar 28, 2013.

2. Comparative Analysis: Highlighting the Synergy Between the Two Legislations

In this section the main focus will be on the similarities as well as the differences between the Juvenile Justice (Care and Protection of Children) Act, 2000 and the Justice (Care and Protection of Children) Act 2013. This section will also address the problems that were earlier faced under the J&K Juvenile Justice Act 1997.

2.1 Basic Mandate

Both the legislations aim to cater two categories of children: 'Juveniles in Conflict with Law'(who are alleged to have committed some offence) and 'Children in Need of Care and Protection'(vulnerable children or at-risk children). Both the legislations adopt a child-friendly, and a non-punitive approach and aim towards restoration and rehabilitation of the children.[6]

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6 The preamble of the JJA reads- ' *An Act to consolidate and amend the law relating to juveniles in conflict with law and children in need of care and protection, by providing for proper care, protection and treatment by catering to their development needs, and by adopting a child –friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation through various institutions established under their enactment.*" Whereas the JK JJA 1997 reads- "*An Act to provide for the care, protection, treatment, development and rehabilitation of neglected and delinquent juveniles and for the adjudication of certain matters relating to and disposition of, delinquent Juvenile*." The Juvenile Justice (Care and Protection of Children) Bill 2013 reads: A Bill to consolidate and amend the law relating to juveniles in conflict will1 law and children in need *of* care and protection, by providing for proper care, protection and treatment by catering to their development needs, and for the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation and for matters connected therewith or incidental thereto.

See *Juvenile Justice (Care and protection of Children) Act 2000* at: wcd.nic.in/childprot/jjact2000.pdf *Jammu and Kashmir Juvenile Justice Act 1997* at:

2.2 Who is a Juvenile in Conflict with Law?

Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000 defines "Juvenile" or "Child" as a person who has not completed eighteenth year of age (both boys and girls) and "Juvenile in Conflict with Law" means a Juvenile who is alleged to have committed an offence. The Juvenile Justice (Care and Protection of Children) Act, 2000 does not make any discrimination in the upper age limit of juvenility between the sexes. The J&K Juvenile Justice Act 1997 had a different upper age limit for both the sexes. Under it the upper age limit of juvenility for a boy was 16 years and for a girl it was 18 years [Section 2(h)]. Hence, the State legislation made discrimination between sexes in fixing the upper age limit of juvenility which neither complied with the Juvenile Justice (Care and Protection of Children) Act, 2000 nor the United Nations Convention on the Rights of the Child 1989. As the J&K Juvenile Justice Act 1997 got repealed, the new legislation, the Juvenile Justice (Care and Protection of Children) Act 2013, adopted a similar upper age limit for both the sexes, that is 18 years. The new legislation is similar to the Juvenile Justice (Care and Protection of Children) Act, 2000 with the difference that the former does not contain any provision on adoption.

In the wake of a gruesome rape of a young women on 16th December 2012 in Delhi, a heated debate was raging throughout the nation on lowering the upper age limit of juvenility either to 16 or 14 years. On 27th February 2013, the Ministry for Women and Child Development told Rajya Sabha, "we are not changing the age of juvenile as it may hurt the larger interests of children in the country." The Criminal law Amendment Bill, 2013 retained the age of consent for

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http://jammu.nic.in/district/documents/JuvenilejusticeAct1997.PDF, Juvenile Justice (Care and Protection of Children) Bill 2013 at: http://jklegislativecouncil.nic.in/Governor/BILLS%20TRANSMITTED/Bill%20No.8.pdf

the sex to 18 years.[7] But once again, the Ministry of Women and Child Development tabled the Juvenile Justice (Care and Protection of Children) Bill 2014 in Lok Sabha in August 2014 which aims to bring the upper age limit of juvenility from 18 to 16.[8] The Bill also proposes to empower the Juvenile Justice Board to decide whether a juvenile in conflict with law who is involved in a heinous offence like rape is to be sent to an observation home or tried in a regular Court.

In Jammu and Kashmir also, a Bill was tabled on 26 August 2014 in the Legislative Council to amend the newly formed Juvenile Justice (Care and Protection of Children) Act 2013 and to once again bring down the upper age limit of juvenility for boys from 18 to 16. One of the members of the Legislative Council from National Conference tabled the Bill proposing the amendment on the reason that the statistics of the National Crime Records Bureau show that the maximum juveniles in conflict with law in India belong to the age group of 16-18. However, this Bill was rejected as the Minister for

Social Welfare, Sakina Itoo believed that the J&K Juvenile Justice Act 1997 was already repealed in 2013 (with increasing the upper age limit of juvenility for boys from 16-18) , therefore there was no merit in the plea to make another amendment.[9]

On the one hand, the State Government of Jammu and Kashmir through 'the Juvenile Justice (Care and Protection of Children) Act

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7 Asian Centre for Human Rights(ACHR) Report, March 2013. *Nobody's Children: Juveniles of Conflict Affected Districts of India*, New Delhi, P. 1. Available at: http://www.achrweb.org/reports/india/JJ-Nobodys_Children2013.pdf

8 "Juvenile Justice Bill Introduced in Lok Sabha," *The Indian Express*, August 12. Available at: http://indianexpress.com/article/india/india-others/juvenile-justice-bill-introduced-in-lok-sabha/

9 "Government Refuses to Amend JJ Act to Reduce Juvenile Age by Two Years," *Daily Excelsior*, Aug. 27, 2014. Available at: http://www.dailyexcelsior.com/govt-refuses-amend-jj-act-reduce-juvenile-age-2-years/

2013,' has increased the upper age limit of juvenility for boys from 16 to 18 and at the other, the Central Government through 'the Juvenile Justice (Care and Protection of Children) Bill 2014,' is proposing to decrease the upper age limit of juvenility from 18 to 16. It may be said that presently the State of Jammu and Kashmir is heading towards achieving international standards of juvenile justice through its new legislation whereas the Central Government is going to degrade all the international standards of juvenile justice and child rights, if the proposed Bill is passed.

2.3 Minimum Age of Criminal Responsibility

Section 82 of the 1860 Indian Penal Code (IPC) defines minimum age of criminal responsibility at 7 years of age, while Section 83 of the Indian Penal Code lays out 'doli incapax' provisions for children between 7 and 12 years of age,

"Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion."[10]

Hence under the Indian law, a child below 7 years of age who has committed an offence cannot be prosecuted and does not come under the category of a juvenile in conflict with law. Furthermore, if a child between 7-12 years has committed some offence, he falls under the 'doli incapax' provision of the Indian Penal Code and is supposed to be produced before a Child Welfare Committee for his care, protection and rehabilitation.[11] Even the international conventions, particularly the United Nations Convention on the Rights of the Child 1989, recommend

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10 UNICEF Report, "*South Asia and the Minimum Age of Criminal Responsibility: Raising the Standard of Protection for Children's Rights*," Prepared for UNICEF Regional Office for South Asia, Nepal. Available at: www.unicef.org

11 Adenwala, Marukh, *Child Protection and Juvenile Justice System for Children in Conflict with Law* (Mumbai, 2006, Child Line India Foundation), p. 24.

12 year as the admissible minimum age of juvenile accountability as far as the law transgression is concerned and it highly condemns the minimum age of criminal responsibility lower than this.[12]

As far as Jammu and Kashmir is concerned, the new legislation Juvenile Justice (Care and Protection of Children) Act 2013, also fixes 12 as the minimum age of criminal responsibility for juveniles in conflict with law. In fact, the minimum age of criminal responsibility under the J&K Juvenile Justice Act 1997 was also 12 years.

2.4 Competent Authority

Section 2 (g) of the Juvenile Justice (Care and Protection of Children) Act, 2000 defines competent authority "a Committee in relation to children in need of care and protection" and "a Board in relation to juveniles in conflict with law." To be clear, a Child Welfare Committee (CWC) is the competent authority in dealing with children in need of care and protection and a Juvenile Justice Board (JJB) is the competent authority in dealing with the juveniles in conflict with law under the Act. The Juvenile Justice (Care and Protection of Children) Act 2013, under Section 2(h), has laid down similar definitions of the institutions dealing with the children.

As opposed to this, the J&K Juvenile Justice Act 1997, under its Section 2(d) defined competent authority "a board in relation to neglected juveniles" and "a Juvenile Court in relation to delinquent juveniles," and subsequently, authorized different institutions in dealing with the juveniles in conflict with law and children in need of care and protection. For example, under the Juvenile Justice (Care and Protection of Children) Act, 2000, a Child Welfare Committee deals with children in need of care and protection but under the J&K Juvenile Justice Act 1997, a Board was authorized to deal with such children. Again, the J&K Juvenile Justice Act 1997 defined 'children in need of care and

12 See, United Nations Convention on Rights of the Child 1989: Available at: http://www.unesco.org/education/pdf/CHILD_E.PDF

protection' as 'neglected delinquent' and a 'juvenile in conflict with law' as a 'delinquent juvenile.' It reveals that the J&K Juvenile Justice Act 1997 was just a reflection of the Juvenile Justice Act 1989 and hence, treatment of children in Jammu and Kashmir did not comply with either Juvenile Justice (Care and Protection of Children) Act, 2000 or the United Nations Convention on the Rights of the Child 1989.

2.5 Special Juvenile Police Unit

Crime, in different forms has always been present in society. What becomes extremely important are the diverse ways of handling the criminals by the law enforcement or the police. Professor H. Bailey observes, "Crime in India is bewildering in its variety; the police must cope with a range of crime as diverse as any in the world."[13] The police are the first and foremost with whom a juvenile comes in touch, the relationship between the both is often hostile and strained.[14]

Section 63 of the Juvenile Justice (Care and Protection of Children) Act, 2000 provides for a 'special juvenile police unit,' that is, a unit of the police force of a State designated for handling juveniles in conflict with law. The J&K Juvenile Justice Act 1997 nowhere mentioned the role of police in handling juveniles in conflict with law. The role of police was only been briefly defined in the Jammu and Kashmir Juvenile Justice Rules 2007.[15] But now the problem has been solved with the introduction of the new state legislation which clearly mentions the role of a 'special juvenile police unit' through its Section 62.

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13 Siddique, Ahmad, 2009. *Criminology and Penology*. Eastern Book Company, Luknow, p.325.

14 James, S.and Polk, K., 1989. "Policing Youth: Themes and Directions," pp.41-62. In: D. Chappell and P. Wilson (eds.). *Australian Policing: Contemporary Issues*. Butterworths, Melbourne.

15 See, *Jammu and Kashmir Juvenile Justice Rules, 2007*, Government of J&K , Notification of the Social
Welfare Department, Jammu, 11th April, 2007.

3. Certain Critical Issues

The focus of this section are the several issues that serve as impediments in achieving juvenile justice in the country as prescribed by the United Nations Convention on the Rights of the Child 1989.

3.1 Relevant Date for Determining Juvenility

The age is the most important aspect which would decide whether a child is to be treated under the juvenile justice system or the criminal justice system. This issue has profoundly been contested. In case of Umesh Chandra V. State of Rajasthan[16] the Supreme Court held that it is the date of commission of the offence which would decide the juvenility of the child offender. But this decision was overturned is case of Arnit Das V. State of Bihar [17] by the Supreme Court which held that it is the age when the juvenile is first produced before the competent authority that would determine the applicability of the Act. Subsequently, it was again overturned by a five Judges bench in Pratap Singh V. State of Jharkhand[18] when the Supreme Court held that it is the commission of offence and not the first date of production before the competent authority which will decide the application of the Act. This bewilderment caused by the different and contradictory judgments of the Supreme Court at different times in dealing with juveniles in conflict with law has been resolved by the JJ (Amendment) Act 2006[19] through amendment in the Section 20 of the Principal Act {the JJ Amendment Act 2006 defines Juvenile Justice (Care and Protection of Children) Act, 2000 as 'Principal Act'} which makes it clear that it is the date of commission of the offence which would determine the age of the offender and hence the applicability of the Act.

16 *AIR* 1982 SC 1057 SCC 202.

17 *AIR* 2000 SC 2264.

18 *AIR* 2005 SC 2731.

19 See, *JJ (Amendment) Act 2006*. Available at: http://meghpol.nic.in/acts/central/juvenile_justice_care-protection_children_amendment_act_2011.pdf

"JUVENILE JUSTICE IN INDIA AND J&K ;

Despite overriding effect of the Juvenile Justice (Care and Protection of Children) Act, 2000 over all other Special and Local Laws (SLLs), in a number of cases the juvenile offenders of the State of Jammu and Kashmir {who were below 16 years of age (in case of boys) or below 18 years (in case of girls) at the time of commission of the offence}, were tried as adults until the J&K Juvenile Justice Act was repealed. In case of Fayaz Ahmad Bhat V. State of Jammu and Kashmir[20] an FIR was lodged against him in 1995 against Section 302 (Murder) of the Ranbir Penal Code (RPC) {in Jammu and Kashmir Indian Penal Code(IPC) is not applicable under Article 370 of the Indian Constitution, although, the RPC is just a reflection of the IPC} and years later, the Court held that the age certificate issued by his school for determination of juvenility is genuine and that the offender was only 9 years old at the time of the commission of the offence (an offence which is not committed by him and police arrested him on account of mistaken identity, according to Fayaz). In spite of the Court's order, Fayaz remained detained, first in central jail and afterwards in observation home in R.S. Pura, Jammu. His case was pending and the victim attained adulthood (now 28) in jails and observation homes.[21]

Section 3 of the Juvenile Justice (Care and Protection of Children) Act, 2013 has cleared the confusion regarding the relevant date for determining juvenility of a juvenile in conflict with law, which in consonance with the Juvenile Justice (Care and Protection of Children) Act, 2000, makes it clear that it is the date of commission of the offence which would determine the age of the offender and hence the applicability of the Act. The provision gets a further explanation in the

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20 *FIR No*. 42/1995, Records of the Office of the Chief Judicial Magistrate, Lower Court, Srinagar.

21 Asian Centre for Human Rights (ACHR) Report, Nov. 2011, *Juveniles of Jammu and Kashmir Unequal Before the Law and Denied Justice in Custody*, New Delhi, p.14. Available at: http://www.achrweb.org/reports/india/JJ-J&K-2011.pdf

Section 21 [22] of the Juvenile Justice (Care and Protection of Children) Act, 2013.

3.2 Plea of Child Status

Article 7 A has been inserted in the Juvenile Justice (Care and Protection of Children) Act, 2000 by JJ (Amendment) Act 2006 which gives benefit to the juveniles to raise plea of being a child or a person below the prescribed age range within which he/she cannot be tried as an adult criminal. Through this section the claim of juvenility can be raised even after disposal of the case.[23] The article reads:

"7A.(1) Whenever a claim of juvenility is raised before any Court or a Court is of the opinion that the accused person was a juvenile on the date of the commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as early as may be: Provided that a claim of juvenility may be raised before any Court and it shall be recognized at any stage, even after final disposal of the case, and such claim shall be determined in terms of provisions

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22 Secion 21 In all pending cases including trial, revision, appeal or any other criminal proceedings in respect o f a juvenile in conflict with law. in any court, the determination of juvenility of' the said juvenile shall be in terms o f clause (n) of' section 2, even if the juvenile ceases to be so on or before the date of
comrnencernent of the Act and the provisions of the Act shall apply as if the said provisions had been
in force, for all purposes and at all material times when the alleged offence was committed. See, *Juvenile Justice (Care and Protection of Children) Bill 2013* at:
http://jklegislativecouncil.nic.in/Governor/BILLS%20TRANSMITTED/Bill%20No.8.pdf

23 See, *JJ (Amendment) Act 2006*. Available at: http://meghpol.nic.in/acts/central/juvenile_justice_care-protection_children_amendment_act_2011.pdf

contained in this Act and the rules made there under, even if the juvenile has ceased to be so on or before the date of commencement of this Act

(2) If the Court finds a person to be a juvenile on date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate order, and the sentence if any, passed by a Court shall be deemed to have no effect."[24]

All the juveniles in conflict with law in the country used to enjoy this benefit except the State of Jammu and Kashmir because the Juvenile Justice (Care and Protection of Children) Act, 2000 and its Amendment in 2006 are not applicable to the State and the J&K Juvenile Justice Act 1997 had no such provisions. Even the Rules 2007 added to the J&K Juvenile Justice Act 1997 did not make any such mention. In a number of cases the juveniles had been tried as adults and their cases were decided and disposed off on criminal grounds. With the introduction of the Juvenile Justice (Care and Protection of Children) Act, 2013, a juvenile in conflict with law in the State also enjoys the benefit of raising plea of being a child under Section 8 of the new legislation. But the ignorance of law is a serious concern even after the passing of the new legislation. It was reported by a lawyer who handles cases relating juveniles in conflict with law that, "most often, the juveniles are never acquainted about this benefit by their lawyers who want the cases to linger on and keep getting get fees by their clients." [25] At times, even the judges, defense lawyers as well as the prosecution officers are unaware about the law which causes grave injustice to the juveniles.

3.3 Overriding Effect of the Legislation

Under the Juvenile Justice (Care and Protection of Children) Act, 2000, all the juvenile cases have to be dealt with under it irrespective of the type of the offence. Juvenile legislation prescribes a different adjudicatory, sentencing, apprehension and custodial mechanism. In Raj Singh V. State of Haryana[26], the Supreme Court held that the juvenile legislation shall reign supreme in the cases relating juveniles regardless

24 *Ibid*.

25 Wani, Shimayil, *op. cit*., pp. 228-229.

26 *AIR* 2000 6 SSC 759, 2000 SCC (cri) 1270.

of the nature of the offence committed by the juvenile. To the Juvenile Justice (Care and Protection of Children) Act, 2000, after Sub-Section (3), the following Sub-Section has been inserted " (4) Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all cases involving detention, prosecution, penalty or sentence of imprisonment of juveniles in conflict with law under such other law."[27] Thus, whatever crime a juvenile commits he is to be dealt with only the juvenile legislation.

The overriding effect of the Juvenile Justice (Care and Protection of Children) Act, 2000 has been violated a number of times with arrest and detainment of the juveniles in conflict with law under the criminal justice system. For example, 17 year old Bashir Ahmad Dar, a rikshaw puller on Delhi streets, was allegedly picked up from the old Delhi railway station a couple of days after the 2001 December Parliament attack. The victim said that he was first detained for three months at the Delhi Gate Station, then moved to Lajpat Nagar police station and finally released in January 2003 and during detainment, he was subjected to torture in the police stations.[28]

Although, the J&K Juvenile Justice Act 1997 did not define the overriding effect, Section 1(3) [29] of the Juvenile Justice (Care and Protection of Children) Act, 2013 makes it clear that it is only this Act that shall apply to all the cases relating juveniles in conflict with law in the State of Jammu and Kashmir.

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27 *JJ (Amendment) Act 2006*, The Gazette of India, Ministry of Law and Justice.

28 Asian Centre for Human Rights Report, 2003. *The Status of Children in India*, (An Alternate Report to the United nations Committee on the Rights of the Child on India's First Periodic Report), New Delhi, 6-10 Oct., p.47. Available at: http://www.childlineindia.org.in/CP-CR Downloads/ACHR%20India%20Children%20Report.pdf

29 *"Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all cases involving detention, prosecution, penalty or sentence of imprisonment of juveniles in conflict with law under such other laws."*

3.4 Overlapping of the Central Legislation, State Legislation and Several Special and Local Laws (SLLs).

The situation of juveniles in conflict with law in Jammu and Kashmir is worst than rest of the country because it is a zone of armed conflict. Children have been arrested, and incarcerated under the Armed Forces (Special Powers) Act (AFSPA) 1959, the Public Safety Act (PSA) 1978, Narcotic Drugs and Psychotrophic Substances Act 1985 and others including the Motor Vehicle Act, Forest Act etc. The Special and Local Laws (SLLs) keep the juvenile legislations from attaining the purpose for which they were actually framed. A study done in 2013 in the Kashmir province shows that out of a total of 200 juvenile cases, registered in all the Courts dealing with juveniles in conflict with law throughout Kashmir, 58 cases, that is, 29.00 % of the total have been arrested under the Special and Local Laws other than the offences under the Ranbir Penal Code. Again, out of the total, 22% have been arrested under the Public Safety Act 1978.[30] In a report in 2012, Amnesty International explained in detail how the Public Safety Act violates India's obligation under the international human rights law in Kashmir. There is no communication of the grounds of detention by the detaining authorities, there is a common practice of revolving door detentions of children in Kashmir and there is non-application of mind by detaining authorities. The children are put to torture, ill treatment and there is lack of medical care in the detention centers and sometimes detentions are held in unknown places where even the families of the juveniles are not allowed any communication usually referred to as "incommunicado" detentions.[31]

Although, the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2013 clearly state its overriding effect, it is

30 Wani, Shimayil, *op. cit*., pp. 158-173.

31 Amnesty International Report, 2012. *Still A lawless Law: Detentions Under the Jammu and Kashmir Public Safety Act, 1978*. Amnesty International Publications, London, pp. 5-22. Available at: http://www.amnesty.org/en/library/info/ASA20/035/2012

doubtful that the juveniles in conflict with law and children in need of care and protection will be treated only under it because of the strong hold of the State's Special and Local Laws and the fact that Kashmir is a zone of armed conflict.

4. Conclusion

India has been showing acquiescence with the international community in deliverance of justice to its children through the Juvenile Justice (Care and Protection of Children) Act, 2000 and its amendments. India has undoubtedly, endeavored to bring the system of juvenile justice in consonance with the all the international conventions ratified by it. The Supreme Court, the High Courts as well as other Courts of lower judiciary dealing with juveniles in conflict with law have been elucidating the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 in order to promote the principle of juvenile justice. Despite these efforts, the juvenile justice system in India is replete with examples of torture and ill treatment of the juveniles in conflict with law. The juvenile justice system in Kashmir is worst than any other State of the country. It is noteworthy that India has always shown enthusiasm about the child welfare and has undertaken several welfare programs for benefit of its children but what is troublesome is that most of these welfare programs are inapplicable in State of Jammu and Kashmir due to its special status under the Article 370 of the Indian Constitution. Undoubtedly, the Government of Jammu and Kashmir, with support from the Central Government, has achieved a big target by repealing the J&K Juvenile Justice Act 1997 and by introducing a new legislation. If implemented properly, the system of juvenile justice in Jammu and Kashmir will soon meet the international standards of juvenile justice.

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Status of Women after Marriage in the State of Jammu and Kashmir: A-Socio- Legal Study

Abstract

After the decision of Hon'ble High Court of J&K in State of J&K v. Dr Susheela Sawhney [2003], the position of woman marrying outside the state has undergone a paradigm shift. The female subjects marrying outside the state of Jammu and Kashmir now do not lose their status of permanent resident, but still their children cannot claim the inheritance right over the property. Those who support the view that female state subjects marrying outside the state will not lose their status and are entitled to all the rights allege that by depriving their children to claim inheritance right over the property these female state subjects were stripped of all the rights and gender discrimination crept into the interpretation of state subject and permanent residence laws. Opponents describing it as a threat to the special status of the state under Article 370 under which the law on permanent residents of the state as a part of the state Constitution was enacted and which incorporates the safeguards for the citizens of the state provided in the state subject law. The arguments for and against the status of women permanent residents fell largely along the lines of a false and dangerous dichotomy, casting feminism and Kashmiri autonomy as inherent opposites. In this paper an attempt has been made to analyze the status of women permanent residents in the state of Jammu and Kashmir after their marriage outside the state and to analyze the role of judiciary in this regard.

Keywords: ***State Subject, Gender Discrimination, Permanent Residents, Feminism, Autonomy, Judiciary.***

I. Introduction

The existing contours of the Indian administered state of Jammu and Kashmir find their roots fundamentally in the Treaty of Amritsar of

1846, through which an amalgamation of various small territories were gifted to a Dogra lord as a reward for his cooperation with the victorious British in the Anglo-Sikh War1. Following the treaty, Jammu and Kashmir was then a sovereign state under the paramountcy of the British crown from 1846 to 19472.In the late twenties, the people of Jammu and Kashmir were agitating for the protection of their rights against the superior competing interests of the non residents of the state. The Government through Maharaja Hari Singh in response to this popular agitation promulgated a notification in 1927[3] and provided a strict definition of the term state subject[4]. This notification read with the state

1 The Treaty of Amritsar, signed on March 16, 1846, formalized the arrangements in the Treaty of Lahore between the British East India Company and Maharaja Gulab Singh Dogra after the First Anglo-Sikh War. The Treaty of Amritsar marked the beginning of Dogra rule in the state of Jammu and Kashmir

2 See, Sehla Ashai, *The Jammu And Kashmir State Subjects Controversy of 2004* 2 Drexel L. Rev. (2009-2010)

3 Notification No I-L/84, dated 20th April 1927 Retrieved from http://www.kashmir information.com/LegalDocs/44.html(last visited April 29, 2014)

4 The term "State subject" means and includes: Class I.—All persons born and residing within the State before the commencement of the reign of His Highness the late Maharaja Gulab Singh Sahib Bahadur, and also person who settled therein before the commencement of samvat year 1942 and have since been permanently residing therein.

Class II.—All persons other than those belonging to Class I who settled within the State before the close of samvat year 1968 and have since permanently resided and acquired immovable property therein. Class III.—All persons other than those belonging to Class I and Class II permanently residing within the State, who have acquired under "rayatnama" any immovable property therein or who may hereafter acquire such property under an "*ijazatnama*" and may execute "rayatnama" after ten years' continuous residence therein. Class IV.—Companies which have been registered as such within the State and which being companies in which the Government are financially interested or as to economic benefit to the State or to the financial stability of which the

notification of 1932[5] provided to some extent the law of citizenship of the state. In 1950 the Constitution of India came into force and Article 370[6] of the same covered the case of Jammu and Kashmir. The power of the Indian Parliament to make laws for the state of Jammu and Kashmir is limited by Article 370(1). Clause 2 of Article 370 reserved the right for a future state Constituent Assembly to ratify or reject any agreements executed by the interim Government and to frame a separate Constitution for its Government. Under clause 3 of Article 370, it provided that the article can be removed or changed only on the recommendations of the Constituent Assembly of J&K and that is why it was called a temporary provision. Since, the Constituent Assembly on July 14, 1954, decided that the Article 370, which was temporary in nature, shall remain in force and therefore it became a permanent feature of the Indian Constitution. By virtue of the powers conferred by Article 370, the President of India, in concurrence of the Government of Jammu and Kashmir, issued an order, 1950[7] on 26th of Jan 1950. This order

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Government are satisfied, have by a special order of His Highness been declared to be State subjects.

5 State Notification No 13/L dated 27th June 1932Retreived from http://www.jklaw.nic.in/Costitution_of_J&K.pdf(last visited May 4, 2014).

6 Article 370deals with Temporary provisions with respect to the State of Jammu and Kashmir. (1) Notwithstanding anything contained in this Constitution,—(a) the provisions of article 238 shall not apply in relation to the state of Jammu and Kashmir;(b) the power of Parliament to make laws for the said state shall be limited to—(i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and(ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

7 Constitutional Order 10 of 1950 Retrieved from

enumerated the provisions of the Constitution of India, which were to apply to the state of Jammu and Kashmir in addition to the provisions of Article 370 and Article 1[8]. Part II of the Constitution of India dealing with citizenship was not made applicable to Jammu and Kashmir State. The omission of citizenship from entry 17 of the union list[9] in its application to Jammu and Kashmir in fact meant that in the state the old citizenship law prevailed. Thus, the people of Jammu and Kashmir State were protected subjects in the rest of India even after India became a republic in 1950. There were historical and political reasons which necessitated such constitutional safeguards. Firstly, the Government of India did not want to exercise too much authority over Kashmir, since it had committed itself to giving an opportunity to the people of Kashmir to finalize their future affiliations. Secondly, the popular ministry in Kashmir, when it came to power in 1948 had assured the people of the state that their rights as subjects of Kashmir would be protected. This necessarily meant that the law of the state dealing with state subjects should not be interfered with. In 1954 the Government of India agreed that state subjects of the state could have special rights, but they were to have common Indian citizenship. This was welcomed in the state and to avoid any misunderstanding, it was agreed that the term *state subjects* be deleted and in its place *permanent residents* be substituted for such

http://www.jeywin.com/wpcontent/uploads/2009/12/Constitution-of-India-Constitution-Order-10.pdf(last visited April 15, 2014)

8 Article1 in the Constitution states that India, that is Bharat, shall be a Union of States. The territory of India shall consist of: The territories of the states, The Union territories and any territory that may be acquired. Article 1 of the Jammu And Kashmir Constitution states that Jammu And Kashmir is and shall be an integral part of India.

9 Constitution of India, list 1, seventh schedule Retrieved from http://lawmin.nic.in/olwing/coi/coi-english/Const.Pock%202Pg.Rom8Fsss(35).pdf(last visited March 9, 2014)

persons who were state subjects under the provisions of the state subject notification[10].

The Constitution of Jammu and Kashmir came into force on 26th Jan. 1957. Jammu and Kashmir is the only territory within the Indian union that maintains its own State Constitution, a result of its unique position at the time of India and Pakistan's creation in 1947. A most prominent feature of the Constitution of Jammu and Kashmir, as distinguished from the rest of India, is the provision for special treatment of the permanent residents of Jammu and Kashmir State. The permanent residents are such persons as are declared to be so by any existing law of the state or by any future law enacted by the legislature of the state. And any such law may either confer special rights or privileges or impose restrictions upon the permanent residents with respect to any or all of the following matters like employments under the State Government acquisition of immovable property in the state, settlement in the state, right to scholarships and such other forms of aid as the State Government may provide such legislation shall be valid notwithstanding that it is inconsistent with the fundamental rights conferred by the Constitution upon other citizens of India, such as discrimination on grounds of place of birth[11], equality of opportunity for employment[12] , the right to acquire, hold and dispose of property[13] and right to reside and settle in any part of the territory of India[14].The main focus of controversy surrounds the standing of women permanent residents after their marriage with a non permanent resident outside the state, whether they lose their status as permanent resident or continue to remain as permanent resident in the state. Arguments are being raised on both sides

10 See State Subject Notification No. I-L/84 dated 20th April, 1927 read with Notification No. 13/L dated 27th June, 1932

11 Dr. J.N Pandey, *The constitutional law of India*" (45th Edition) Allahabad (2008).See art 15(1)

12 *Ibid*, art 16(1)

13 *Id,* art 19 (1) (f)

14 *Id,* art 19(1) (e)

on one side, it is alleged that Article 370 is deeply unfair for the women of the state if they were to marry a non state subject as it deprives a women to continue to remain a permanent resident in the state after marrying a non resident, but the other side describes it as threat to special status to the state under Article 370 through which this status is defined. This paper makes an analysis of the position of women permanent residents in the state after marriage and the approach of judiciary towards the same.

II. Constitutional Provisions Relating To the Permanent Residents

The Jammu and Kashmir legislature made provisions regarding the permanent residents by inserting Section 5A to 5F in the Constitution Act, 1939 in 1954[15]. These regulations were to remain in force till the state legislature repealed, altered or amended them. These remained in force till the coming into force of the Constitution of Jammu and Kashmir. The Constitution of Jammu and Kashmir came into force on 26th Jan. 1957.Part III of the Jammu and Kashmir Constitution contains provisions relating to permanent residents, the power of the state legislature to make any law defining the classes of persons who are or shall be permanent residents of the state, special provision for bills relating to permanent residents and fundamental rights guaranteed to them under the Constitution of India.[16] The permanent residents of the

15 See, Ghulam Shah, G.N. Reshi, *Statesubjectship in Jammu and Kashmir* October (1989) P. 122-123

16 Every person who, is or is deemed to be, a citizen of India under the provisions of the constitution of India shall be a permanent resident of the state, if on the fourteenth day of May, 1954:a) he was a state subject of class I (all persons born and residing within the state before the commencement of the reign of his Highness the late Maharaja Gulab Singh and also persons who settled therein before the commencement of samvat year 1942, and have since been permanently residing therein) or the class II(all persons other than those belonging to class I who settled within the state before the close of samvat year 1968,and have since

state shall have all the rights guaranteed to them under the Constitution of India. Sec 6 of the Jammu and Kashmir Constitution identifies the classes of people of the state who are the permanent residents of the state. The power to enact law defining the classes of persons who are, or shall be, permanent residents of the state is left to state legislatures by Sec 8 of the State Constitution. But any such law which defines or alters the definition of the classes of persons who are or shall be permanent residents of the state has to be passed by a majority of not less than two third of the total membership of the legislature[17]. The general effect of these provisions is that the separate citizenship of the state has been abolished and the laws of Indian citizenship extend to the state. The legislature can, however confer special rights and privileges to permanent residents of the state. Another class of persons whose interests had to be safeguarded were those who had left the state on account of the disturbances of 1947. If they returned to the state under a permit for resettlement or under a permanent return issued under the authority of the state legislature for the purposes of permanently residing

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permanently resided and acquired immovable property therein) or b) having lawfully acquired immovable property in the state, he has been ordinarily resident in the state for not less than ten years prior to the date.2) Any person who before the fourteenth day of may, 1954, was a state subject of class I or of class II and who have migrated after the first day of march, 1947, to the territory now included in Pakistan returns to the state under a permit for re settlement in the state or for permanent return issued by or under the authority of any law made by the state legislature shall on such return be a permanent resident of the state.

17 Section 9 of the Constitution of Jammu and Kashmir deals with special provision for bills relating to permanent residents. Such a Bill is deemed to be passed by either House of the legislature only if it is passed by a majority of not less than 2/3rds of the total membership of that House. Section 10 of the State Constitution guarantees to the permanent residents of the State all the rights guaranteed to them under the Constitution of India.

in the state, then they were to be entitled to the rights, privileges and obligations of citizenship[18].

As regards the power of the state legislature to make special provisions for the permanent residents, it was deemed necessary that some provision be made in the Constitution of India to cover that case. Accordingly, Article 35A was inserted by section 2(4)(j)[19] of the order 1954. Article 35A of the Constitution of India provides for savings of laws with respect to permanent residents and their rights.

III. Status of Women Permanent Residents After Marriage: Judicial Attitude

The Note III dated 20th April, 1927 provides: the wife or a widow of a state subject of any class shall acquire the status of her husband as a state subject of the same class as her husband, so long as she resides in the state and does not leave the state for permanent residence outside the state. This notification was being interpreted both before and after the coming into force of the 1957 Constitution, to hold that on marriage with a non resident even the daughter of a permanent resident would lose her status as a permanent resident of the state. This implied that such a female would lose her status as a permanent resident of that state such a female could not hold any property or get a scholarship, employment etc. in the state if she married a non permanent resident. This was applicable to the females who were already permanent residents of the states, being descendent of a permanent resident of the state but marrying a non state subject.

18 Justice A.S Anand, *The Constitution of Jammu and Kashmir its development and comments* (6th Edition) universal law publishing New Delhi (2010). P. 206

19 Retrieved from http://www.archive.india.gov.in/govt/documents/english/coi_appendix.pdf (last visited March 29,2014)

In *Prakash v. Mst Shahni*[20]

The High Court took the view that a female must follow the domicile of her husband and by marrying a non state subject, lost her status as a permanent resident of the state.

In the above case the British concept of domicile was introduced to define the status of female state subjects. The judgment of the division bench is almost based on the rule governing the domicile of a married woman under the *British Nationality and Status of Aliens Act, 1914*[21]. Under Section 10 of the Act, a woman on marriage took her husband's nationality and during converture the wife's nationality changed to that of the husband. On the death of her husband or on divorce, the married women retained her married nationality. Until 1974, the rule was that the domicile of a husband was communicated to his wife immediately on marriage and it was necessary and inevitably retained by her for duration of marriage. In *Formosa v. Formosa*[22] this rule was much criticized as

20 AIR 1965 J&K 83; 1965 KASHMIR LI 85

21 This legislation came into force on 1 Jan. 1915. British subject status was acquired as follows: birth within His Majesty's dominions, naturalisation in the United Kingdom or a part of His Majesty's dominions which had adopted Imperial naturalization criteria, descent through the legitimate male line (child born outside His Majesty's dominions to a British subject father). This was limited to one generation although further legislation in 1922 allowed subsequent generations born overseas to be registered as British subjects within one year of birth, foreign women who married British subject men, former British subjects who had lost British subject status on marriage or through a parent's loss of status could resume it in specific circumstances (e.g. if a woman became widowed, or children immediately upon turning .British subject status was normally lost by: naturalisation in a foreign state, such as the United States of America or France, in the case of a woman, upon marriage to a foreign man. Prior to 1933, British subject status was lost even if the woman did not acquire her husband's nationality, a child of a father who lost British subject status, provided the child also had the father's new nationality and renunciation.

22 (1962)3All E.R.419

the most barbarous relic of wife's servitude and was abolished by Section 1 of the *Domicile and Matrimonial Proceedings Act*, 1973[23] which introduced fundamental changes in the domicile of wife. Now domicile of a married woman is to be ascertained in the same way as the domicile of an independent person is ascertained. Because of change in British laws with regard to domicile of a married woman the judgment of *Mst Shahni* which was based on English law no longer hold good.

The legal battle had started in 1978, one person Amarjeet Kaur of chogal village in Kupwara district sought to acquire her share of property left behind to three siblings by their father. Since, Amarjeet and her sister were married in Punjab to non-residents, their brother Harjeet Singh claimed that his sisters were no longer residents and therefore could not get possession of the property. Here, the judiciary has shown a positive attitude to recognize the right to equality of female in case of *Harjeet Singh v. Amarjeet Kaur*[24]. The trial court held that plaintiff is entitled to inherit the suit property as heir of her father namely Ram Singh. Though, the defendants contested the claim of the plaintiff by pleading that the plaintiff being married to non-permanent resident of the state is debarred from inheriting the property of her father. Amarjeet won in the trial court, from where the case came to the High Court on appeal. K N, Bhat, Amarjeet's advocate, called the ruling an "*historic verdict in favour of women's rights"*.

The tribunal has shown a negative attitude to recognize the right of equality of women in case of *Kamla Rani v. State of Jammu and Kashmir*[25] petitioner was the daughter of Amar Nath, a permanent resident of the state of Jammu and Kashmir. It was complained by

23 An Act to amend the law relating to the domicile of married women and persons not of full age, to matters connected with domicile and to jurisdiction in matrimonial proceedings including actions for reduction of consistorial decrees; to make further provision about the recognition of divorces and legal separations; and for purposes connected therewith.

24 2003(1) JKJ P.36

25 2003 (1) JKJ 38

Kishan Chand before the Deputy Commissioner, Udhampur, alleging that she has lost the status of a permanent resident of the state, after having married outside the State of Jammu and Kashmir, and has obtained a permanent residence certificate by concealing her marriage to non-state subject. The Jammu and Kashmir State Special Tribunal cancelled the permanent resident certificate.

The controversy regarding the loss of status as permanent residents to a permanent resident daughter on her marriage with a non permanent resident created a lot of confusion and resentment among such females. This indeed was alleged an act of grave discrimination against the state subject girls, marrying non state subjects only on the ground of sex[26]. In the landmark judgment delivered by the Jammu and Kashmir High Court after clubbing all the cases relating to the permanent resident certificate in case of *State of Jammu and Kashmir v. Dr Susheela Sawhney*[27] has shown a positive attitude to eradicate discrimination on the basis of sex A full bench of the High Court by its judgment dated Oct. 7, 2002 answered the issue in negative. After a detailed discussion V, K Jhangi, J (presiding over the bench held)

In the ultimate analysis, my answer is in negative to the question referred to the full bench for its consideration. Accordingly, I hold that the daughter of a permanent resident of the state of Jammu and Kashmir will not lose her status as a permanent resident of the state of Jammu and Kashmir on her marriage with a person who is not a permanent resident of the state of Jammu and Kashmir.

26 *Supra note* 18 P. 212

27 AIR 2003 J K 83, 2003 (1) JKJ 35 ... 24/79: LPA of 29 of 1979 in this case Dr Susheela challenged the selection of Dr Ravinder Maadan to the post of Assistant Professor in the Department of obstetrics and gynecology, Govt. Medical College Jammu which was quashed by a single judge of the J&K High Court on the ground that she was married to a non state subject.

T.S Doabia J in his concurring view opined*:*

I am accordingly of the view that Note III does not deal with the rights of the female state subject marrying a non state subject and therefore her losing this status on account of Note III would not arise. That Note III deals with a wife who acquires for the first time the status of state subject and this status, which she acquires is the same which is enjoyed by her husband. Such wife if she becomes a widow and who has acquired the status would lose the same if she moves out of the state for permanent residence outside the state. A female who comes from a state other than the state of Jammu and Kashmir can be cited by way of illustration. That the concept of domicile has nothing to do with the concept of citizenship and the concept of state subject, domicile has something to do with the residence, but residence and citizenship are not synonymous state subject status is nearer to the concept of citizenship and one can lose this status in the same manner as in the case of citizenship.

Muzaffar Jan J, while generally agreeing with the view of the majority, however, struck a discord and opined:

In the ultimate analysis, I, agree with the view of Brother V.K Jhangi J, only to the extent that a female non permanent resident of the state of her marriage to the permanent resident of the state will have right to inherit the property in accordance with the personal law of the deceased, regarding employment, education and other rights. However, I do not agree to the ultimate conclusion that a female will not lose the status as a permanent resident on her marriage with a non permanent resident of the state.

The full bench finally concluded:

In view of the majority opinion we hold that a daughter of a permanent resident marrying a non permanent resident will not lose the status of permanent resident of the state of Jammu and Kashmir.

The decision of the Jammu and Kashmir High Court in *State of Jammu & Kashmir v. Sawhney* states that the fundamental rights of the Indian Constitution can be applied in such a way as to invalidate a gender-discriminatory practice with respect to the permanent residency laws of Kashmir, where that practice was pursuant to a High Court decision which was wrongly decided. The High Court held that the current practice of revoking permanent resident status for women married to non permanent residents was based on a wrongly decided case in *Prakash v. Shahni*[28]. In that case, observing British law and private international law, the High Court noted that a woman takes on the domicile and nationality of her husband. The Court in *susheela sawhney* accordingly ruled that the laws on which the *Prakash* decision was based no longer apply, and therefore, permanent resident women who marry non permanent resident men should no longer be divested of their status as permanent residents. The High Court noted, however, that the state legislature would have been empowered to create such a rule defining permanent residents to exclude women who married non-permanent resident men, but that the legislature had not "in its wisdom" yet done so[29].

Not satisfied with the full bench judgment of the High Court, the State Government filed a special leave petition in the Supreme Court, which later on they withdrew, since there existed no law prescribing any disqualification of woman state subject of losing that status merely on marriage with a non state subject, who was otherwise an Indian citizen. Sec 22(d) of the Jammu and Kashmir Constitution, though only a part of the directive principles, does lay down that the state shall endeavor to secure to all woman the right to full equality in all social, educational political and legal matters and therefore, the SLP was withdrawn avoiding a final verdict of the Supreme Court on the issue.

28 A.I.R.1965 (J&K) 83

29 State of Jammu & Kashmir v. Sawhney, AIR2003, (J&K) 83 pp. 44-46

IV. Jammu and Kashmir Permanent Resident Disqualification Bill-An Analysis

The Government of Jammu and Kashmir state introduced the Jammu and Kashmir Permanent Resident (Disqualification) Bill, 2004[30] in the state legislature, which proposed that women who married non state subjects could no longer claim state subject status and would thereby lose both preferential treatment in Government hiring and the ability to acquire new property in the State[31]. The Disqualification Bill which reads in part:

Notwithstanding anything to the contrary contained in any law, a female permanent resident, on her marriage with a person who is not a permanent resident, shall with effect from the date of such marriage cease to be a permanent resident[32].

Various political actors decried the Disqualification Bill violation of Kashmiri women's fundamental rights under the Indian Constitution, while proponents of the Disqualification Bill issued apocalyptic pronouncements about the end of constitutionally guaranteed autonomy for Jammu and Kashmir state, if the Disqualification Bill failed to pass[33].

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30 The state of objects and reasons of the bill reads as under; Sec 6 of the Jammu and Kashmir constitution defines the expression permanent residents and accordingly the persons belonging to the class I or the class II of the state subjects or having lawfully acquired immovable property in the state shall be deemed to be permanent residents. Accordingly, a female permanent resident acquires the status of her husband and ceases to be a permanent resident on her marriage to a person who does not belong to any class of permanent residents.

31 The Jammu and Kashmir Permanent Resident (Disqualification) Bill, 2004, 116 Jammu &Kashmir Government's Gazette (hereinafter Disqualification Bill)

32 Retrieved from http://www.tehelka.com/do-women-enjoy-equal-rights-in-jk/(last visited April 20, 2014)

33 *Supra* note 2 P.537

The Disqualification Bill was then re-introduced in Aug. 2004[34]. This time around, instead of verbal attacks and vocal disruptions, members of the legislative assembly catapulted chairs and tables at each other, and disrupted speakers by marching and sloganeering inside the legislative houses. After again drawing national attention and inspiring yet another fracas, the Disqualification Bill failed to garner the necessary two-third vote to pass[35]. The discourse around this controversy created a false and dangerous dichotomy. Proponents argue that the Disqualification Bill is necessary to protect the autonomy of Jammu and Kashmir State, and therefore, it should pass, while opponents counter that the Disqualification Bill is unjust and unconstitutional under the Indian Constitution, and should therefore fail. Proponents allege that by invoking the fundamental rights of the Indian Constitution to strike down the Jammu and Kashmir legislature's exercise of its authority under Section 8 of the Jammu and Kashmir Constitution would be ineffective politically, and legally. From a procedural perspective, consent from the Jammu and Kashmir assembly to the application of fundamental rights to the state was required under Article 370[36]. Even if the fundamental rights of the Indian Constitution did apply to the state, there is no statutory or constitutional basis for the argument that those rights override any provision of the Jammu and Kashmir Constitution, in light of Article 35-A and Article 370[37]. Article 370 explicitly states that any Indian law outside the enumerated powers of the Indian state must be ratified by the state legislature in order for it to have an effect in the State[38]. Article 370 has never ceased to be operative and the validity of the Constitution application to Jammu and Kashmir order 1954 as well as other orders made thereunder by the President has been upheld by the High Court.[39] The Bill was again brought in the Upper House by Peoples

34 *Id*

35 *Id*

36 See, Art 370 Sec 1 cl (b) (ii) of the Constitution of India

37 *Id* Art. 35 cl. (a) and Art. 370 Sec 1 cl (b) (ii)

38 *Supra note* 36

39 Sampat Prakash v. State of Jammu and Kashmir 1971 JKLR 83

Democratic Party in March 2010, again raising the tempers. After about 15 days, the chairman of the legislative council said it was a Constitutional Bill and should be introduced in the assembly and accordingly the Bill was dropped[40].

V. Controversy On The Endorsement "valid till marriage"After the High Court ruling in case of *State of Jammu and Kashmir v. Dr Susheela Sawhney* the endorsement "valid till marriage" which used to be stamped on the state subjects of women permanent residents has to be dispensed with because of the effect of this ruling. But the Government did not retract its stand and continued as usual with its caption "valid till marriage" on the state subjects issued to woman permanent residents of the state. This was challenged in a public interest litigation entitled *Hari Om v. State of Jammu and Kashmir*[41] in which as an interim measure, the court directed the respondents not to make an endorsement of "valid till marriage" on the state subject certificates issued to unmarried daughters of the state subjects. Instead of obeying the direction of the Court, the commissioner's secretary to the Government revenue department issued a controversial circular no rev. LB 87/74 on Jan 2005, it provides that "*the certificate may be reissued after marriage to indicate if the lady has married a state subject or a non state subject"* it appears that the official apparatus had been used to evade the High Court ruling, this led the petitioner to file a contempt petition against the Government entitled *Dr Hari Om v. Dr S.S Bleoria*[42] the Government withdrew the controversial circular and communicated the same to the High Court, thus, with the withdrawal of the circular, both PIL and contempt petition were rendered infructuous and were accordingly

40 Retrieved from http://www.greaterkashmir.com/news/2012/jun/17/govt-dumps-permanent-resident-women disqualification-bill-58.asp (last visited April 23, 2014)

41 PIL No 1002/2004 & CMP No 108/ 2004

42 PIL No 2/2005

disposed of. But the State Government had retraced its steps on this issue and no final word has been written in the state subject law[43].

VI. Conclusion

There is an excessive legal illiteracy about the status of the Jammu and Kashmir State in the union of India as well as Article 370 of the Indian Constitution through which this status is defined. The relationship of Jammu and Kashmir State with the rest of the country was governed by a special set of circumstances, and hence was given a special position. Some people have expressed disquiet about Article 370 as an outrage to Indian federalism because it gives special status to the state of Jammu and Kashmir. This, by itself grossly misunderstands the nature of Indian federalism which is founded on a theory of "unequal federalism" under which all states are not equal and many enjoy a special status. Under Article 370, except for defence, foreign affairs, communications and ancillary matters (matters specified in the instrument of accession), the Indian Parliament needs the State Government's concurrence for applying all other laws. So, a separate set of laws is made for the people residing in the state, which includes all those related to ownership of property, citizenship as well as fundamental rights. Article 35-A of the Union Constitution empowers the Jammu and Kashmir legislature to define its permanent residents and limits the rights to settlement and owning immovable property. There has been a lot of debate in recent times on Article 370 of the Indian Constitution. It is alleged that this article is deeply unfair for the women of the state, if they were to marry a non state subject. There have been attempts and demands to abrogate Article 370 against the wishes and aspirations of its people. Repeal of Article 370 can have serious repercussions and could prove counterproductive. Article 370 provides itself immunity from revocation. Unless and until its revocation is accepted by the Jammu and Kashmir legislature and its constituent assembly now that the constituent assembly of the state no longer exists, it is a big question how to

43 Prof S K Sharma, *The Constitution of Jammu and Kashmir* universal Law publishing (New Delhi) 2011 pp. 106-107

implement the amendment of Article 370. In order to overcome the controversy regarding the issue more importantly, there is a need to define the permanent resident status in a just and fair manner along with the property based residential rights in the state of Jammu and Kashmir as the state of Jammu and Kashmir cannot be opened up to enable anyone and everyone to claim property based residency rights.

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Status of Women after Marriage in the State of Jammu and Kashmir: A-Socio- Legal Study

Abstract

After the decision of Hon'ble High Court of J&K in State of J&K v. Dr Susheela Sawhney [2003], the position of woman marrying outside the state has undergone a paradigm shift. The female subjects marrying outside the state of Jammu and Kashmir now do not lose their status of permanent resident, but still their children cannot claim the inheritance right over the property. Those who support the view that female state subjects marrying outside the state will not lose their status and are entitled to all the rights allege that by depriving their children to claim inheritance right over the property these female state subjects were stripped of all the rights and gender discrimination crept into the interpretation of state subject and permanent residence laws. Opponents describing it as a threat to the special status of the state under Article 370 under which the law on permanent residents of the state as a part of the state Constitution was enacted and which incorporates the safeguards for the citizens of the state provided in the state subject law. The arguments for and against the status of women permanent residents fell largely along the lines of a false and dangerous dichotomy, casting feminism and Kashmiri autonomy as inherent opposites. In this paper an attempt has been made to analyze the status of women permanent residents in the state of Jammu and Kashmir after their marriage outside the state and to analyze the role of judiciary in this regard.

Keywords: State Subject, Gender Discrimination, Permanent Residents, Feminism, Autonomy, Judiciary.

I. Introduction

The existing contours of the Indian administered state of Jammu and Kashmir find their roots fundamentally in the Treaty of Amritsar of

1846, through which an amalgamation of various small territories were gifted to a Dogra lord as a reward for his cooperation with the victorious British in the Anglo-Sikh War1. Following the treaty, Jammu and Kashmir was then a sovereign state under the paramountcy of the British crown from 1846 to 19472.In the late twenties, the people of Jammu and Kashmir were agitating for the protection of their rights against the superior competing interests of the non residents of the state. The Government through Maharaja Hari Singh in response to this popular agitation promulgated a notification in 1927[3] and provided a strict definition of the term state subject[4]. This notification read with the state

1 The Treaty of Amritsar, signed on March 16, 1846, formalized the arrangements in the Treaty of Lahore between the British East India Company and Maharaja Gulab Singh Dogra after the First Anglo-Sikh War. The Treaty of Amritsar marked the beginning of Dogra rule in the state of Jammu and Kashmir

2 See, Sehla Ashai, *The Jammu And Kashmir State Subjects Controversy of 2004* 2 Drexel L. Rev. (2009-2010)

3 Notification No I-L/84, dated 20th April 1927 Retrieved from http://www.kashmir information.com/LegalDocs/44.html(last visited April 29, 2014)

4 The term "State subject" means and includes: Class I.—All persons born and residing within the State before the commencement of the reign of His Highness the late Maharaja Gulab Singh Sahib Bahadur, and also person who settled therein before the commencement of samvat year 1942 and have since been permanently residing therein.

Class II.—All persons other than those belonging to Class I who settled within the State before the close of samvat year 1968 and have since permanently resided and acquired immovable property therein. Class III.—All persons other than those belonging to Class I and Class II permanently residing within the State, who have acquired under "rayatnama" any immovable property therein or who may hereafter acquire such property under an "*ijazatnama*" and may execute "rayatnama" after ten years' continuous residence therein. Class IV.—Companies which have been registered as such within the State and which being companies in which the Government are financially interested or as to economic benefit to the State or to the financial stability of which the

notification of 1932[5] provided to some extent the law of citizenship of the state. In 1950 the Constitution of India came into force and Article 370[6] of the same covered the case of Jammu and Kashmir. The power of the Indian Parliament to make laws for the state of Jammu and Kashmir is limited by Article 370(1). Clause 2 of Article 370 reserved the right for a future state Constituent Assembly to ratify or reject any agreements executed by the interim Government and to frame a separate Constitution for its Government. Under clause 3 of Article 370, it provided that the article can be removed or changed only on the recommendations of the Constituent Assembly of J&K and that is why it was called a temporary provision. Since, the Constituent Assembly on July 14, 1954, decided that the Article 370, which was temporary in nature, shall remain in force and therefore it became a permanent feature of the Indian Constitution. By virtue of the powers conferred by Article 370, the President of India, in concurrence of the Government of Jammu and Kashmir, issued an order, 1950[7] on 26th of Jan 1950. This order

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Government are satisfied, have by a special order of His Highness been declared to be State subjects.

5 State Notification No 13/L dated 27th June 1932Retreived from http://www.jklaw.nic.in/Costitution_of_J&K.pdf(last visited May 4, 2014).

6 Article 370deals with Temporary provisions with respect to the State of Jammu and Kashmir. (1) Notwithstanding anything contained in this Constitution,—(a) the provisions of article 238 shall not apply in relation to the state of Jammu and Kashmir;(b) the power of Parliament to make laws for the said state shall be limited to—(i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and(ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

7 Constitutional Order 10 of 1950 Retrieved from

enumerated the provisions of the Constitution of India, which were to apply to the state of Jammu and Kashmir in addition to the provisions of Article 370 and Article 1[8]. Part II of the Constitution of India dealing with citizenship was not made applicable to Jammu and Kashmir State. The omission of citizenship from entry 17 of the union list[9] in its application to Jammu and Kashmir in fact meant that in the state the old citizenship law prevailed. Thus, the people of Jammu and Kashmir State were protected subjects in the rest of India even after India became a republic in 1950. There were historical and political reasons which necessitated such constitutional safeguards. Firstly, the Government of India did not want to exercise too much authority over Kashmir, since it had committed itself to giving an opportunity to the people of Kashmir to finalize their future affiliations. Secondly, the popular ministry in Kashmir, when it came to power in 1948 had assured the people of the state that their rights as subjects of Kashmir would be protected. This necessarily meant that the law of the state dealing with state subjects should not be interfered with. In 1954 the Government of India agreed that state subjects of the state could have special rights, but they were to have common Indian citizenship. This was welcomed in the state and to avoid any misunderstanding, it was agreed that the term *state subjects* be deleted and in its place *permanent residents* be substituted for such

http://www.jeywin.com/wpcontent/uploads/2009/12/Constitution-of-India-Constitution-Order-10.pdf(last visited April 15, 2014)

8 Article1 in the Constitution states that India, that is Bharat, shall be a Union of States. The territory of India shall consist of: The territories of the states, The Union territories and any territory that may be acquired. Article 1 of the Jammu And Kashmir Constitution states that Jammu And Kashmir is and shall be an integral part of India.

9 Constitution of India, list 1, seventh schedule Retrieved from http://lawmin.nic.in/olwing/coi/coi-english/Const.Pock%202Pg.Rom8Fsss(35).pdf(last visited March 9, 2014)

persons who were state subjects under the provisions of the state subject notification[10].

The Constitution of Jammu and Kashmir came into force on 26th Jan. 1957. Jammu and Kashmir is the only territory within the Indian union that maintains its own State Constitution, a result of its unique position at the time of India and Pakistan's creation in 1947. A most prominent feature of the Constitution of Jammu and Kashmir, as distinguished from the rest of India, is the provision for special treatment of the permanent residents of Jammu and Kashmir State. The permanent residents are such persons as are declared to be so by any existing law of the state or by any future law enacted by the legislature of the state. And any such law may either confer special rights or privileges or impose restrictions upon the permanent residents with respect to any or all of the following matters like employments under the State Government acquisition of immovable property in the state, settlement in the state, right to scholarships and such other forms of aid as the State Government may provide such legislation shall be valid notwithstanding that it is inconsistent with the fundamental rights conferred by the Constitution upon other citizens of India, such as discrimination on grounds of place of birth[11], equality of opportunity for employment[12] , the right to acquire, hold and dispose of property[13] and right to reside and settle in any part of the territory of India[14].The main focus of controversy surrounds the standing of women permanent residents after their marriage with a non permanent resident outside the state, whether they lose their status as permanent resident or continue to remain as permanent resident in the state. Arguments are being raised on both sides

10 See State Subject Notification No. I-L/84 dated 20th April, 1927 read with Notification No. 13/L dated 27th June, 1932

11 Dr. J.N Pandey, *The constitutional law of India*" (45th Edition) Allahabad (2008).See art 15(1)

12 *Ibid*, art 16(1)

13 *Id,* art 19 (1) (f)

14 *Id,* art 19(1) (e)

on one side, it is alleged that Article 370 is deeply unfair for the women of the state if they were to marry a non state subject as it deprives a women to continue to remain a permanent resident in the state after marrying a non resident, but the other side describes it as threat to special status to the state under Article 370 through which this status is defined. This paper makes an analysis of the position of women permanent residents in the state after marriage and the approach of judiciary towards the same.

II. Constitutional Provisions Relating To the Permanent Residents

The Jammu and Kashmir legislature made provisions regarding the permanent residents by inserting Section 5A to 5F in the Constitution Act, 1939 in 1954[15]. These regulations were to remain in force till the state legislature repealed, altered or amended them. These remained in force till the coming into force of the Constitution of Jammu and Kashmir. The Constitution of Jammu and Kashmir came into force on 26th Jan. 1957.Part III of the Jammu and Kashmir Constitution contains provisions relating to permanent residents, the power of the state legislature to make any law defining the classes of persons who are or shall be permanent residents of the state, special provision for bills relating to permanent residents and fundamental rights guaranteed to them under the Constitution of India.[16] The permanent residents of the

15 See, Ghulam Shah, G.N. Reshi, *Statesubjectship in Jammu and Kashmir* October (1989) P. 122-123

16 Every person who, is or is deemed to be, a citizen of India under the provisions of the constitution of India shall be a permanent resident of the state, if on the fourteenth day of May, 1954:a) he was a state subject of class I (all persons born and residing within the state before the commencement of the reign of his Highness the late Maharaja Gulab Singh and also persons who settled therein before the commencement of samvat year 1942, and have since been permanently residing therein) or the class II(all persons other than those belonging to class I who settled within the state before the close of samvat year 1968,and have since permanently resided and acquired immovable property therein) or b)

state shall have all the rights guaranteed to them under the Constitution of India. Sec 6 of the Jammu and Kashmir Constitution identifies the classes of people of the state who are the permanent residents of the state. The power to enact law defining the classes of persons who are, or shall be, permanent residents of the state is left to state legislatures by Sec 8 of the State Constitution. But any such law which defines or alters the definition of the classes of persons who are or shall be permanent residents of the state has to be passed by a majority of not less than two third of the total membership of the legislature[17]. The general effect of these provisions is that the separate citizenship of the state has been abolished and the laws of Indian citizenship extend to the state. The legislature can, however confer special rights and privileges to permanent residents of the state. Another class of persons whose interests had to be safeguarded were those who had left the state on account of the disturbances of 1947. If they returned to the state under a permit for resettlement or under a permanent return issued under the authority of the state legislature for the purposes of permanently residing

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having lawfully acquired immovable property in the state, he has been ordinarily resident in the state for not less than ten years prior to the date.2) Any person who before the fourteenth day of may, 1954, was a state subject of class I or of class II and who have migrated after the first day of march, 1947, to the territory now included in Pakistan returns to the state under a permit for re settlement in the state or for permanent return issued by or under the authority of any law made by the state legislature shall on such return be a permanent resident of the state.

17 Section 9 of the Constitution of Jammu and Kashmir deals with special provision for bills relating to permanent residents. Such a Bill is deemed to be passed by either House of the legislature only if it is passed by a majority of not less than 2/3rds of the total membership of that House. Section 10 of the State Constitution guarantees to the permanent residents of the State all the rights guaranteed to them under the Constitution of India.

in the state, then they were to be entitled to the rights, privileges and obligations of citizenship[18].

As regards the power of the state legislature to make special provisions for the permanent residents, it was deemed necessary that some provision be made in the Constitution of India to cover that case. Accordingly, Article 35A was inserted by section 2(4)(j)[19] of the order 1954. Article 35A of the Constitution of India provides for savings of laws with respect to permanent residents and their rights.

III. Status of Women Permanent Residents After Marriage: Judicial Attitude

The Note III dated 20th April, 1927 provides: the wife or a widow of a state subject of any class shall acquire the status of her husband as a state subject of the same class as her husband, so long as she resides in the state and does not leave the state for permanent residence outside the state. This notification was being interpreted both before and after the coming into force of the 1957 Constitution, to hold that on marriage with a non resident even the daughter of a permanent resident would lose her status as a permanent resident of the state. This implied that such a female would lose her status as a permanent resident of that state such a female could not hold any property or get a scholarship, employment etc. in the state if she married a non permanent resident. This was applicable to the females who were already permanent residents of the states, being descendent of a permanent resident of the state but marrying a non state subject.

18 Justice A.S Anand, *The Constitution of Jammu and Kashmir its development and comments* (6th Edition) universal law publishing New Delhi (2010). P. 206

19 Retrieved from http://www.archive.india.gov.in/govt/documents/english/coi_appendix.pdf (last visited March 29,2014)

In *Prakash v. Mst Shahni*[20]

The High Court took the view that a female must follow the domicile of her husband and by marrying a non state subject, lost her status as a permanent resident of the state.

In the above case the British concept of domicile was introduced to define the status of female state subjects. The judgment of the division bench is almost based on the rule governing the domicile of a married woman under the *British Nationality and Status of Aliens Act, 1914*[21]. Under Section 10 of the Act, a woman on marriage took her husband's nationality and during converture the wife's nationality changed to that of the husband. On the death of her husband or on divorce, the married women retained her married nationality. Until 1974, the rule was that the domicile of a husband was communicated to his wife immediately on marriage and it was necessary and inevitably retained by her for duration of marriage. In *Formosa v. Formosa*[22] this rule was much criticized as

20 AIR 1965 J&K 83; 1965 KASHMIR LI 85

21 This legislation came into force on 1 Jan. 1915. British subject status was acquired as follows: birth within His Majesty's dominions, naturalisation in the United Kingdom or a part of His Majesty's dominions which had adopted Imperial naturalization criteria, descent through the legitimate male line (child born outside His Majesty's dominions to a British subject father). This was limited to one generation although further legislation in 1922 allowed subsequent generations born overseas to be registered as British subjects within one year of birth, foreign women who married British subject men, former British subjects who had lost British subject status on marriage or through a parent's loss of status could resume it in specific circumstances (e.g. if a woman became widowed, or children immediately upon turning .British subject status was normally lost by: naturalisation in a foreign state, such as the United States of America or France, in the case of a woman, upon marriage to a foreign man. Prior to 1933, British subject status was lost even if the woman did not acquire her husband's nationality, a child of a father who lost British subject status, provided the child also had the father's new nationality and renunciation.

22 (1962)3All E.R.419

the most barbarous relic of wife's servitude and was abolished by Section 1 of the *Domicile and Matrimonial Proceedings Act*, 1973[23] which introduced fundamental changes in the domicile of wife. Now domicile of a married woman is to be ascertained in the same way as the domicile of an independent person is ascertained. Because of change in British laws with regard to domicile of a married woman the judgment of *Mst Shahni* which was based on English law no longer hold good.

The legal battle had started in 1978, one person Amarjeet Kaur of chogal village in Kupwara district sought to acquire her share of property left behind to three siblings by their father. Since, Amarjeet and her sister were married in Punjab to non-residents, their brother Harjeet Singh claimed that his sisters were no longer residents and therefore could not get possession of the property. Here, the judiciary has shown a positive attitude to recognize the right to equality of female in case of *Harjeet Singh v. Amarjeet Kaur*[24]. The trial court held that plaintiff is entitled to inherit the suit property as heir of her father namely Ram Singh. Though, the defendants contested the claim of the plaintiff by pleading that the plaintiff being married to non-permanent resident of the state is debarred from inheriting the property of her father. Amarjeet won in the trial court, from where the case came to the High Court on appeal. K N, Bhat, Amarjeet's advocate, called the ruling an "*historic verdict in favour of women's rights"*.

The tribunal has shown a negative attitude to recognize the right of equality of women in case of *Kamla Rani v. State of Jammu and Kashmir*[25] petitioner was the daughter of Amar Nath, a permanent resident of the state of Jammu and Kashmir. It was complained by

23 An Act to amend the law relating to the domicile of married women and persons not of full age, to matters connected with domicile and to jurisdiction in matrimonial proceedings including actions for reduction of consistorial decrees; to make further provision about the recognition of divorces and legal separations; and for purposes connected therewith.

24 2003(1) JKJ P.36

25 2003 (1) JKJ 38

Kishan Chand before the Deputy Commissioner, Udhampur, alleging that she has lost the status of a permanent resident of the state, after having married outside the State of Jammu and Kashmir, and has obtained a permanent residence certificate by concealing her marriage to non-state subject. The Jammu and Kashmir State Special Tribunal cancelled the permanent resident certificate.

The controversy regarding the loss of status as permanent residents to a permanent resident daughter on her marriage with a non permanent resident created a lot of confusion and resentment among such females. This indeed was alleged an act of grave discrimination against the state subject girls, marrying non state subjects only on the ground of sex[26]. In the landmark judgment delivered by the Jammu and Kashmir High Court after clubbing all the cases relating to the permanent resident certificate in case of *State of Jammu and Kashmir v. Dr Susheela Sawhney*[27] has shown a positive attitude to eradicate discrimination on the basis of sex A full bench of the High Court by its judgment dated Oct. 7, 2002 answered the issue in negative. After a detailed discussion V, K Jhangi, J (presiding over the bench held)

In the ultimate analysis, my answer is in negative to the question referred to the full bench for its consideration. Accordingly, I hold that the daughter of a permanent resident of the state of Jammu and Kashmir will not lose her status as a permanent resident of the state of Jammu and Kashmir on her marriage with a person who is not a permanent resident of the state of Jammu and Kashmir.

26 *Supra note* 18 P. 212

27 AIR 2003 J K 83, 2003 (1) JKJ 35 ... 24/79: LPA of 29 of 1979 in this case Dr Susheela challenged the selection of Dr Ravinder Maadan to the post of Assistant Professor in the Department of obstetrics and gynecology, Govt. Medical College Jammu which was quashed by a single judge of the J&K High Court on the ground that she was married to a non state subject.

T.S Doabia J in his concurring view opined*:*

I am accordingly of the view that Note III does not deal with the rights of the female state subject marrying a non state subject and therefore her losing this status on account of Note III would not arise. That Note III deals with a wife who acquires for the first time the status of state subject and this status, which she acquires is the same which is enjoyed by her husband. Such wife if she becomes a widow and who has acquired the status would lose the same if she moves out of the state for permanent residence outside the state. A female who comes from a state other than the state of Jammu and Kashmir can be cited by way of illustration. That the concept of domicile has nothing to do with the concept of citizenship and the concept of state subject, domicile has something to do with the residence, but residence and citizenship are not synonymous state subject status is nearer to the concept of citizenship and one can lose this status in the same manner as in the case of citizenship.

Muzaffar Jan J, while generally agreeing with the view of the majority, however, struck a discord and opined:

In the ultimate analysis, I, agree with the view of Brother V.K Jhangi J, only to the extent that a female non permanent resident of the state of her marriage to the permanent resident of the state will have right to inherit the property in accordance with the personal law of the deceased, regarding employment, education and other rights. However, I do not agree to the ultimate conclusion that a female will not lose the status as a permanent resident on her marriage with a non permanent resident of the state.

The full bench finally concluded:

In view of the majority opinion we hold that a daughter of a permanent resident marrying a non permanent resident will not lose the status of permanent resident of the state of Jammu and Kashmir.

The decision of the Jammu and Kashmir High Court in *State of Jammu & Kashmir v. Sawhney* states that the fundamental rights of the Indian Constitution can be applied in such a way as to invalidate a gender-discriminatory practice with respect to the permanent residency laws of Kashmir, where that practice was pursuant to a High Court decision which was wrongly decided. The High Court held that the current practice of revoking permanent resident status for women married to non permanent residents was based on a wrongly decided case in *Prakash v. Shahni*[28]. In that case, observing British law and private international law, the High Court noted that a woman takes on the domicile and nationality of her husband. The Court in *susheela sawhney* accordingly ruled that the laws on which the *Prakash* decision was based no longer apply, and therefore, permanent resident women who marry non permanent resident men should no longer be divested of their status as permanent residents. The High Court noted, however, that the state legislature would have been empowered to create such a rule defining permanent residents to exclude women who married non-permanent resident men, but that the legislature had not "in its wisdom" yet done so[29].

Not satisfied with the full bench judgment of the High Court, the State Government filed a special leave petition in the Supreme Court, which later on they withdrew, since there existed no law prescribing any disqualification of woman state subject of losing that status merely on marriage with a non state subject, who was otherwise an Indian citizen. Sec 22(d) of the Jammu and Kashmir Constitution, though only a part of the directive principles, does lay down that the state shall endeavor to secure to all woman the right to full equality in all social, educational political and legal matters and therefore, the SLP was withdrawn avoiding a final verdict of the Supreme Court on the issue.

28 A.I.R.1965 (J&K) 83

29 State of Jammu & Kashmir v. Sawhney, AIR2003, (J&K) 83 pp. 44-46

IV. Jammu and Kashmir Permanent Resident Disqualification Bill-An Analysis

The Government of Jammu and Kashmir state introduced the Jammu and Kashmir Permanent Resident (Disqualification) Bill, 2004[30] in the state legislature, which proposed that women who married non state subjects could no longer claim state subject status and would thereby lose both preferential treatment in Government hiring and the ability to acquire new property in the State[31]. The Disqualification Bill which reads in part:

Notwithstanding anything to the contrary contained in any law, a female permanent resident, on her marriage with a person who is not a permanent resident, shall with effect from the date of such marriage cease to be a permanent resident[32].

Various political actors decried the Disqualification Bill violation of Kashmiri women's fundamental rights under the Indian Constitution, while proponents of the Disqualification Bill issued apocalyptic pronouncements about the end of constitutionally guaranteed autonomy for Jammu and Kashmir state, if the Disqualification Bill failed to pass[33].

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30 The state of objects and reasons of the bill reads as under; Sec 6 of the Jammu and Kashmir constitution defines the expression permanent residents and accordingly the persons belonging to the class I or the class II of the state subjects or having lawfully acquired immovable property in the state shall be deemed to be permanent residents. Accordingly, a female permanent resident acquires the status of her husband and ceases to be a permanent resident on her marriage to a person who does not belong to any class of permanent residents.

31 The Jammu and Kashmir Permanent Resident (Disqualification) Bill, 2004, 116 Jammu &Kashmir Government's Gazette (hereinafter Disqualification Bill)

32 Retrieved from http://www.tehelka.com/do-women-enjoy-equal-rights-in-jk/(last visited April 20, 2014)

33 *Supra* note 2 P.537

The Disqualification Bill was then re-introduced in Aug. 2004[34]. This time around, instead of verbal attacks and vocal disruptions, members of the legislative assembly catapulted chairs and tables at each other, and disrupted speakers by marching and sloganeering inside the legislative houses. After again drawing national attention and inspiring yet another fracas, the Disqualification Bill failed to garner the necessary two-third vote to pass[35]. The discourse around this controversy created a false and dangerous dichotomy. Proponents argue that the Disqualification Bill is necessary to protect the autonomy of Jammu and Kashmir State, and therefore, it should pass, while opponents counter that the Disqualification Bill is unjust and unconstitutional under the Indian Constitution, and should therefore fail. Proponents allege that by invoking the fundamental rights of the Indian Constitution to strike down the Jammu and Kashmir legislature's exercise of its authority under Section 8 of the Jammu and Kashmir Constitution would be ineffective politically, and legally. From a procedural perspective, consent from the Jammu and Kashmir assembly to the application of fundamental rights to the state was required under Article 370[36]. Even if the fundamental rights of the Indian Constitution did apply to the state, there is no statutory or constitutional basis for the argument that those rights override any provision of the Jammu and Kashmir Constitution, in light of Article 35-A and Article 370[37]. Article 370 explicitly states that any Indian law outside the enumerated powers of the Indian state must be ratified by the state legislature in order for it to have an effect in the State[38]. Article 370 has never ceased to be operative and the validity of the Constitution application to Jammu and Kashmir order 1954 as well as other orders made thereunder by the President has been upheld by the High Court.[39] The Bill was again brought in the Upper House by Peoples

34 *Id*

35 *Id*

36 See, Art 370 Sec 1 cl (b) (ii) of the Constitution of India

37 *Id* Art. 35 cl. (a) and Art. 370 Sec 1 cl (b) (ii)

38 *Supra note* 36

39 Sampat Prakash v. State of Jammu and Kashmir 1971 JKLR 83

Democratic Party in March 2010, again raising the tempers. After about 15 days, the chairman of the legislative council said it was a Constitutional Bill and should be introduced in the assembly and accordingly the Bill was dropped[40].

V. Controversy On The Endorsement "valid till marriage"After the High Court ruling in case of *State of Jammu and Kashmir v. Dr Susheela Sawhney* the endorsement "valid till marriage" which used to be stamped on the state subjects of women permanent residents has to be dispensed with because of the effect of this ruling. But the Government did not retract its stand and continued as usual with its caption "valid till marriage" on the state subjects issued to woman permanent residents of the state. This was challenged in a public interest litigation entitled *Hari Om v. State of Jammu and Kashmir*[41] in which as an interim measure, the court directed the respondents not to make an endorsement of "valid till marriage" on the state subject certificates issued to unmarried daughters of the state subjects. Instead of obeying the direction of the Court, the commissioner's secretary to the Government revenue department issued a controversial circular no rev. LB 87/74 on Jan 2005, it provides that "*the certificate may be reissued after marriage to indicate if the lady has married a state subject or a non state subject"* it appears that the official apparatus had been used to evade the High Court ruling, this led the petitioner to file a contempt petition against the Government entitled *Dr Hari Om v. Dr S.S Bleoria*[42] the Government withdrew the controversial circular and communicated the same to the High Court, thus, with the withdrawal of the circular, both PIL and contempt petition were rendered infructuous and were accordingly

40 Retrieved from http://www.greaterkashmir.com/news/2012/jun/17/govt-dumps-permanent-resident-women disqualification-bill-58.asp (last visited April 23, 2014)

41 PIL No 1002/2004 & CMP No 108/ 2004

42 PIL No 2/2005

disposed of. But the State Government had retraced its steps on this issue and no final word has been written in the state subject law[43].

VI. Conclusion

There is an excessive legal illiteracy about the status of the Jammu and Kashmir State in the union of India as well as Article 370 of the Indian Constitution through which this status is defined. The relationship of Jammu and Kashmir State with the rest of the country was governed by a special set of circumstances, and hence was given a special position. Some people have expressed disquiet about Article 370 as an outrage to Indian federalism because it gives special status to the state of Jammu and Kashmir. This, by itself grossly misunderstands the nature of Indian federalism which is founded on a theory of "unequal federalism" under which all states are not equal and many enjoy a special status. Under Article 370, except for defence, foreign affairs, communications and ancillary matters (matters specified in the instrument of accession), the Indian Parliament needs the State Government's concurrence for applying all other laws. So, a separate set of laws is made for the people residing in the state, which includes all those related to ownership of property, citizenship as well as fundamental rights. Article 35-A of the Union Constitution empowers the Jammu and Kashmir legislature to define its permanent residents and limits the rights to settlement and owning immovable property. There has been a lot of debate in recent times on Article 370 of the Indian Constitution. It is alleged that this article is deeply unfair for the women of the state, if they were to marry a non state subject. There have been attempts and demands to abrogate Article 370 against the wishes and aspirations of its people. Repeal of Article 370 can have serious repercussions and could prove counterproductive. Article 370 provides itself immunity from revocation. Unless and until its revocation is accepted by the Jammu and Kashmir legislature and its constituent assembly now that the constituent assembly of the state no longer exists, it is a big question how to

43 Prof S K Sharma, *The Constitution of Jammu and Kashmir* universal Law publishing (New Delhi) 2011 pp. 106-107

implement the amendment of Article 370. In order to overcome the controversy regarding the issue more importantly, there is a need to define the permanent resident status in a just and fair manner along with the property based residential rights in the state of Jammu and Kashmir as the state of Jammu and Kashmir cannot be opened up to enable anyone and everyone to claim property based residency rights.

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Legal and Ethical Aspects of Advertising

Abstract

Advertising has a great role to play in shaping the consumer behavior and at the same time it can be used as a tool to exploit and cheat the consumers. In the modern era sale of goods is promoted with the advertisement through almost all means of communication. We come across the different types of advertisements in our day-to-day life. J. Walter Thompson had once quoted ***"Advertising is a non-moral force, like electricity, which not only illuminates but electrocutes. Its worth to civilization depends upon how it is used."****So, advertising carries several responsibilities as it is one of the most vital tools in marketing communications and involves not only informing but also caters to persuasion. The advertising trends have been greatly impacted by rising awareness on consumer rights and protection. The influence of advertisements on consumer choice is undeniable. And it's this fact that makes it imperative that advertisements should be fair and truthful. Misleading and false advertisements are not just unethical; they also affect competition and consumer choice. A false and misleading advertisement in fact violates several basic rights of consumers: the right to information, the right to choice, the right to be protected against unsafe goods and services as well as unfair trade practices. Since advertisements are basically meant to promote a product or a service, one does see some exaggeration in the way they extol the virtues of the product. But when it goes beyond that and deliberately utters a falsehood or tries to misrepresent facts thereby misleading the consumer, then it*

becomes objectionable. This paper examines, the legal issues of advertising, the impact of false and misleading advertising on consumers in particular and trade and commerce in general. There are legislations affecting advertising in India like the Consumer Protection Act; The Monopolies and Restrictive Trade Practices (MRTP) Act; Drugs and Cosmetics Act etc. Even the self regulatory bodies like Advertising

Standards Council of India (ASCI) and Advertising Agencies Association of India (AAAI) etc guides the advertisers in their commitment to honest advertising and fair competition in the market place.

Keywords: ***Deceptive advertising, SEBI, Puffery, Ayurvedic, Siddha, Unani, Consumer protection.***

Introduction

Advertising means the act or practice of calling public attention to one's product, service, need, etc., especially by paid announcements in newspapers and magazines, over radio or television, on billboards, etc. to get more customers.[1]One definition of advertising is: "Advertising is the nonpersonal communication of information usually paid for and usually persuasive in nature about products, services or ideas by identified sponsors through the various media."[2]It is very important for every industry to improve its public image. This is especially important for the advertising profession, an industry that has great visibility. Unfortunately, there is a considerable amount of evidence that the public is quite annoyed with the advertising industry.[3] Even advertising executives are concerned about the large number of bad advertisements. The industry continues to work on improving its image and curbing abuses. The more the advertising industry knows about how it is viewed by the public, the easier it will be for the industry to improve its image. Research by Storholm and Friedman (1989) demonstrates how an understanding of the myths and unethical practices of direct marketing professionals about their industry could be used to better the image of that industry[4].

1 Oxford dictionary

2 (*Bovee,* 1992, p.7).

3 Wells, Burnett, andMoriarty (1998), p. 43.

4 ["*ETHICS IN ADVERTISING* H.H Friedman, BJ Lewis… - *BUSINESS AND BEHAVIORAL*"…, 2000 - asbbs.org]

Advertising reflects contemporary society. The making of an ad copy, its message, its illustrations, the product advertised, the appeal-used all these have a social flavour. Advertising affects society and gets affected by it. It is therefore, necessary to use this weapon with caution to avoid a corrosive effect on social values. Consumers are exposed to hundreds of commercial messages per day in one form or another -- from the boring, copy-laden radio commercial to the easily skimmed, forgettable newspaper ad, and from the billboard on the side of the bus to the logo on the side of the building. [5]

When is advertising deceptive-

The Federal Trade Commission (FTC) defines Deceptive Advertising as "a representation, omission or practice that is likely

to mislead the consumer and practices that have been found misleading or deceptive in specific cases include false oral or written representations, misleading price claims, sales of hazardous or systematically defective products or services without adequate disclosures, failure to disclose information regarding pyramid sales, use of bait and switch techniques, failure to perform promised services, and failure to meet warranty obligations" The Constitution of India advertising .It is interesting to note that there is a slight difference in the degree to which the constitutional guarantee of freedom of speech and expression can be enjoyed by the advertising industry as compared to other branches of the mass media. guarantees freedom of speech. Special restraint is needed in commercial speech including Article 19 (1) [a]states simply "All citizens shall have the right to freedom of speech and expression". The companion Article 19(2) qualifies this right by providing that the State can impose reasonable restrictions on its exercise "in the interest of the sovereignty and integrity of India, friendly ties with foreign states, public order, decency and morality or in relation to contempt of court, defamation or incitement to an offence".[6] As far

5 http://answers.google.com/answers/threadview?id=56750

6 Article 19 Constitution of India.

back as 1960, the Supreme Court, in the case *Hamdard Dawakhana* v. *Union of India*, [7] ruled that a distinction needed to be made between commercial advertising and advertising aimed at expression and propagation of ideas. It was only the latter form of advertising, opined the apex court, that could legitimately claim the full protection of Article 19 (1) [a]. The effect of the Supreme Court judgement thus is that although an advertisement is a form of speech, its true character is reflected in the object for the promotion of which it was employed. The right to publish and distribute a commercial advertisement, promoting an individual's personal business is not a part of the freedom of speech guaranteed by our Constitution. The apex Court in another case, ***Tata Press* v. *Mahanager Telephone Limited and Others*,** [8]commenting on the role of advertising observed that low prices for consumers were dependent upon mass production, mass production was-dependent upon volume sales and volumes sales were dependent upon advertising.The Supreme Court, in that case in 1995, concluded that `commercial speech' cannot be denied as a right to a person because that person was a businessman. While setting aside the judgement of the Bombay High Court in the matter, the three judge bench of Justices Kuldip Singh, B L Hansalia and S B Majumdar said "...the public at large has the right to receive the `commercial speech. Article 19(1) (a) not only guarantees freedom of speech and expression, it also protects the rights of an individual to listen, read and receive the said speech". The bench further said. "The protection of Article19 (1) [a] is available to the speaker as well as to the recipient of the speech. The recipient of `commercial speech' may be having a much deeper interest in the advertisement than the business man who is behind the publication". The apex court further observed that advertising as a commercial speech had two facets. "Advertising which is no more than a commercial transaction is nonetheless a commercial dissemination of information regarding the product advertised. The public at large is benefited by the information

7 1960 AIR 554, 1960 SCR (2) 671.

8 1995 AIR 2438, 1995 SCC (5) 139

made available through the advertisement".To scrutinize certain principles and fairness in the sphere of advertising, Advertising Standards Council of India (ASCI) was established in India in 1985. ASCI deals with complaints received from consumers and industry against such advertisements which are false, misleading, indecent, illegal, leading to unsafe practices or unfair to competition and are in contravention to the advertising code [9]. Even though there is no as such provision for regulating advertisement policy in the Constitution of India, which should be adopted by press or media, the Supreme Court has given guidelines for the same through a series of decisions.[10] which should be adopted by press or media, the Supreme Court has given guidelines for the same through a series of decisions. Consumer Protection Act, 1986 provides better protection of the interests of consumers and to make provision for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and for matters connected to it, including protection against unfair trade practices.[11]

India is one of the very few countries in the world besides Singapore to have legislated Cyber laws.[12] The Information Technology Act, 2000 specifically empowers that anyone who publishes in the electronic form, any material which is lascivious or which tends to

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9 See http://www.ascionline.org/ for Advertising Code. The ASCI Code is a self-regulatory code which is not legally binding on parties. However, in practice ASCI members include various media, publishers etc. who normally abide by decisions of the Complaints Council set up by ASCI. The ASCI Code covers all media including the online media.

10 Hamdard Dawakhana v. Union of India AIR 1960 SC.

11 As the Monopolistic and Restrictive Trade Practices Act, 1984 is repealed after the coming into force of Competition Act, 2002 the unfair trade practices provisions of theMRTP Act will be enforced under the Consumer Protection Act.

12 Guide to Cyber Laws (Information Technology Act, 2000, E-commerce, Data Protection & the Internet, Rodney D. Ryder, 2nd Edn. Reprint 2005, p.399.

degrade persons who are likely to read, see or hear the matter contained or embodied in it, shall be punishable with imprisonment and fine[13]. Even there is a provision in the IT Act, which applies to any offence by which any person shall be punished irrespective of his/her nationality if the act constituting the offence involves a computer, computer system or computer network locatedin India[14].As per the provisions of Indian Penal Code, 1860 certain advertisements are considered as criminal offences. It is dealt under different provisions of the Code. The Young Persons (Harmful Publications) Act, 1956 prevents the dissemination of certain publications harmful to young persons. To be precise harmful publication indicates such publication which would tend to corrupt a young person whether by inciting or encouraging him to commit offences. The Act also proclaims that whoever advertises or makes known by any means that any harmful publication can be procured from or through any person, he shall be punished with imprisonment or with fine, or with both[15]. Indecent Representation of Women (Prohibition) Act, 1986 prohibits indecent representation of women through advertisements or in publications, writings, paintings, figures or in any other manner and for matters connected therewith or incidental thereto. The Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 states that no person shall advertise for the distribution, sale or supply of cigarettes, and also shall not take part in the publication of such advertisement, unless the specified warning is included in such advertisement[16]. The Drugs and Magic

13 Section 67 of the IT Act, 2000

14 Section 75 of *the IT Act, 2000*

15 Section 2(a) of *the Indecent Representation of Women (Prohibition) Act, 1986* defines advertisement- "Advertisement" includes any notice, circular, label, wrapper or other document and also includes any visible representation made by means of any light, sound, smoke or gas.

16 Section 2(a) of *the Drugs and Magical Remedies (Objectionable Advertisements Act), 1954 defines* " advertisement " includes any notice,

Remedies (Objectionable Advertisements) Act, 1954 (DMRA) controls the advertisement of such drugs which are said to provide magical remedies and to deal with other matters relating to it. Section 3 of *the Harmful Publications*

Act, 1956. As per the Drugs and Cosmetics Act, 1940 (DCA), no person shall himself or by any other person on his behalf offer for sale[17] any drug or cosmetic which is not of a standard quality, or is misbranded, adulterated or spurious The Act gives similar restrictions to advertisements for traditional drugs such as Ayurvedic, Siddha and Unani. The Emblems and Names (Prevention of Improper Use) Act, 1950 is enacted to prevent the improper use of certain emblems and names, for professional and commercial purposes. In the exercise of the powers conferred by section 30 of the Securities and Exchange Board of India (SEBI) Act[18], 1992, the Board makes the regulations on the code of conduct for Stock-brokers to be known as SEBI Stock-brokers and Sub-brokers Rules in 1992. The provisions of the Rules specified that a stock-broker or sub-broker is prohibited from advertising his business publicly unless permitted by the stock exchange, including in their internet sites, by its subsidiaries, group companies etc. The Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, contains provision which prohibits advertisements relating to predetermination of sex. The Act provides for the prohibition of advertisements of any kind for anybody or person pertaining to facilities for pre-natal diagnosis of sex available at any centre or place. The Transplantation of Human Organs Act, 1994 provides for the regulation of removal, storage and transplantation of human organs for therapeutic

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circular, label, wrapper, or other document, and any announcement made orally or by any means of producing or transmitting light, sound or smoke;

17 Section 2(a) of *the Emblems and Names (Prevention of Improper Use) Act, 1950* defines emblem as any emblem, seal, flag, insignia, coat-of-arms or pictorial representation specified in the Schedule.

18 http://www.sebi.gov.in/acts/act15ac.html

purposes and for the prevention of commercial dealings in human organs and for matters relating to it and provisions are there for the punishment for commercial dealings in human organs. While detailing the provisions of the Representation of the People (Amendment) Act, 1951 (RPA),[19] It is observed that during the period of forty-eight hours before the conclusion of the poll for any elections in that polling area, a person shall not display to the public any election matter by means of cinematograph, television or other similar apparatus. The statute provides penalty for anyone including the advertisers who contravene the above provision with imprisonment or fine or with both.

The Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992 as Amended in 2003 regulates the production, supply and distribution of infant milk substitutes, feeding bottles and infant foods with a view for protecting and promoting breastfeeding and for the matters relating to it including advertisement of the same. The Competition Act, 2002 provides prohibition of certain agreements in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which cause or is likely to cause an appreciable adverse effect on competition within India[20].The provisions of Trademarks Act, 1999 clearly emphasize that the following are considered as trademark infringement if it is advertised in such a way as to[21]:-

a) take 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 trade mark.

19 Section 126 of *The Representation of the People (Amendment) Act, 1951 (RPA)*

20 Chapter II of the Competition Act, 2002.

21 Section 29(8) of Trademarks Act, 1999.

Thus if used properly and without any malafide intention, then comparative advertisement can prove beneficial otherwise that may mislead consumers resulting into irreparable loss as well as legal battles[22]. As per the Contract Act, 1872, the advertisements for gambling, lottery and prize games have held to be wagering contracts and thus void and unenforceable, are prohibited in India. While reading the provisions of the Act along with the ASCI guidelines it is understood that even the incorporation of a visual representation of such gaming room or table could be construed as indirect advertisement.The Civil Defence Act, 1968 gives power to the Central Government to make rules for securing civil defence[23] for prohibiting the printing and publication of any book or other document containing matters prejudicial to civil defence. Rules could also be made for demanding security from any press used for the purpose of printing/publishing of any book or other document containing matters prejudicial to civil defence.Service providers often tack on the fees and surcharges that are not disclosed to the customer in the advertised price one of the most common is for activation of services such as mobile phones, but is also common in broadband, telephony, gym memberships, and air travel. In most cases, the fees are hidden in fine print, though in a few cases they are so confused and obfuscated by ambiguous terminology that they are essentially undisclosed. Hidden fees are frequently used in airline and air travel advertising. Many colleges misrepresent in their prospectus that the institution is affiliated to a particular university and an accredited one. In one of the cases decided in 1995, the complainant daughter took admission in B.Pharma course believing representations made in prospectus that college was recognized by the Pondicherry University. The fee was paid in addition to Rs. 25,000/- towards donation. Subsequently on notice issued by the University Administration it

22 *Reckitt Benckiser* v *Hindustan Lever* 2008 (38) PTC 139; *Pepsi Co Inc* v *Hindustan Coca Cola Ltd* 2003 (27) PTC 305 (Del)

23 Chapter II of the Civil Defence Act, 1968

transpired that the course was not affiliated and the student was stranded at cross roads of her career. It was held that there was deficiency in service and unfair trade practice on the part of opposite party, compensation of Rs. 30,000/- was granted. In ***Bhupesh Khurana*** **v.** ***Vishwa Buddha Parishad,***[4242] a class action suit was filed by twelve students who had joined the BDS course offered by the Buddhist Mission Dental College run by Vishwa Buddha Parishad. The students' complaint was that the college, in its advertisement and prospectus inviting applications for the course, had given the impression that it was affiliated to Magadh University, Bodh Gaya nor recognized by the Dental Council of India and was fully equipped to give the degree of Bachelor of Dental Science. However, after joining the college and attending classes, the students found to their dismay that the annual examinations were not being held because the college was neither affiliated to Magadh University, Bodh Gaya nor recognized by the Dental Council of India. As a result the students lost two precious academic years, but also spent money on fees, hostel charges, etc. Holding the college to be deficient the National Commission directed it to refund the admission expenses of all the twelve students along with interest of 12 percent companies advertise products highlighting health cures and drugs of questionable efficacy and health gadgets of unknown values. One of the instances is that tempted by an advertisement, claiming to increase a person's height, Nadiya, a Class VIII student having a height of 135 cms got admitted to Fathima Hospital for surgery, on 24-7-1996, for increasing her height. The surgery was conducted and a ring fixator was fixed on the legs which had to be adjusted every six hours. To her dismay Nadiya found her left leg shorter by ½ inch, and therefore she could not walk. By September 1996, the pain had increased and the complainant was bed-ridden till March, 1998. The Commission held the hospital and the doctors negligent and deficient in their service

24 (2000 CTJ 801 (CP))

and directed them to pay Rs. 5,00,000 with costs amounting to Rs. 2,000 to the complainant.[25]

Puffery means the use of harmless superlatives. The advertisers use them to enhance the merits of their products (best, finest, number one, etc.). "Courts cannot continue to follow old English precedents, which recognised the right of manufacturers to indulge in puffery while advertising their products," the Madras High Court has said. Allowing an Original Application filed by Colgate-Palmolive against Anchor Health and Beauty Care, Justice V. Ramasubramanian said recognising such right of the manufacturers would amount to de-recognising the rights of the consumers."[26]

Conclusion

Advertising has a great influence on our purchasing decisions. We are exposed to countless commercial messages every day persuading us to buy brand name products, creating images for us to adopt, and convincing us that we need and want more. Because of this, it's important for us to carefully examine ads to determine exactly what they are saying. Ads should clearly and conspicuously disclose all the information about an offer that is likely to affect a consumer's purchasing decision. While advertisements can honestly inform and educate us, some are false or deceptive - and illegal. Advertising aimed at Wisconsin consumers is subject to the state's deceptive advertising law. The law forbids statements that are "untrue, deceptive or misleading," and applies to written ads in newspapers, magazines, and promotional brochures, radio and TV commercials as well as online representations. The law also covers oral misrepresentations, including verbal misstatements about a product or service. Though there is a self regulatory mechanism within the industry, yet everything cannot be allocated to it. There is adire need of a statutory body, to enforce the

25 (*Nadiya (Minor) Represented by Guardian* v. *Proprietor Fathima Hospital, Calicut & Ors*. 2001 (1) CPR 559).

26 *supra* note 10.

existing provisions of relevant law. The role of judiciary cannot be undermined, yet it becomes all the more important that new law regarding the regulation of advertising must be legislated so that enforcement agencies and judiciary may not find themselves helpless in rendering justice because of the absence of the relevant law.

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Education as a Service under the Consumer Protection Act, 1986: Some Legal Perspectives

Abstract

It was in 1986 that the all important piece of legislation under the title of consumer protection Act, 1986 saw the dawn of the day. What this important piece of legislation has exactly done is that it has ushered in a new era of socio-economic justice in India. The Act under section 2(1) (0) gives a long list of services whereby a consumer is armed to file a complaint in case of deficiency of services. But despite being a long list of services it does not include education as a service. There has been a substantial and significant legal battle going on among the legal minds and the legal institutions like courts of law and consumer forums regarding the fact that whether education falls under the ambit of section 2(1)(o) as a service. Conflicting opinions have been highlighted in various judgments' regarding the same. This paper attempts to give a brief and a lucid account of some of the important judgments' affirming and negating to treat education as a service and it further attempts to strive at giving a possible reconciliation of those conflicting but nevertheless logically significant judgments'.

Key Words: ***Consumerism, Consumer, deceptive practices, Education, Institutions, Service.***

Introduction

Consumerism has emerged as one of the important philosophical and legal developments in modern times. Consumer protection is the very heart and soul of consumerism. Its emphasis is on the protection of consumers from certain business practices and from business community. One of the important manifestations of this consumerism is in the form of various consumer protection laws. Nearly every civilized legal system of the world now provides protection to its citizens as far as their status of consumer is concerned. India being one of the well known

civilized legal systems of the world could not afford to remain behind in such a legal and philosophical development. It was in 1986 that India came up with an extremely important piece of legislation, The Consumer Protection Act, 1986, which ushered in an era of consumerism in India. The Act while providing a long list of services whereby a consumer can file a complaint in case of deficiency of services, it is silent about many other important subjects as far as their nature as services is concerned. One such important subject is education. Whether education can be counted as a service or not under section 2(1) (o) of the Act, has been a subject of serious legal discussions in India. Judicial opinion on the subject is controversial but highly interesting and significant. In following pages I endeavor to provide an analysis of the conflicting judgments on the subject with a possible way of reconciliation between them and in the end there is a conclusion wherein a humble suggestion to treat certain aspects of education as services while leaving others as untouched is made.

Education: Then and Now

"Let's think of education as a means of developing our greatest abilities because in each of us there is a private hope and dream which fulfilled can be transformed into benefit for everyone and greater strength for our nation". These golden and unalterable words of John F. Kennedy sufficiently reveal the importance of education in our lives both as individuals and as a nation. There was a time when education was regarded as a great liberating and emancipating force. It performed a pious function of smoothening the wandering and searching souls. Education as such was a strong spiritual bond between a teacher and a student. This bond went beyond the imaginations. Teachers acted as spiritual as well as material guides of their students. But all this has changed so rapidly that we witness a transformation of education from a spiritual and cultural bondage to a commercial enterprise. In our times education is looked at more as a commodity with a market value. Unfortunately the profit hungry people have largely started grinding their axes in a noble job like education. Unfair and deceptive practices are being used to allure the aspiring students in the field of education.

Taking an undue advantage of the innocence of students and their unshattered belief about education as a pious and sacred intercourse, they are easily allured by some cunning people to invest money for their education in various institutions which in reality are without any valid recognition. Further various lacunas in the recognized educational institutions like universities make students to suffer to a great deal. Now to redress such an unfortunate happening people have started visualizing education as a service rather than a noble and pious job. The ushering in of the philosophy of consumerism has substantially affected the field of education. Questions are being asked and raised about education being treated as a service. However, Considerable difference regarding this subject of education as a service have come to the surface. Where would all this lead, is a substantial and important question to ask. Courts have tried and deliberated at length on this subject but the law is still unsettled regarding the same. It is up to the learned and capable Indian judiciary and juristic personalities to come up with a well settled opinion and in fact a law on the subject of education as a service.

Education as a Service

The term "service" has been defined in section 2(1)(0) of Consumer Protection Act , 1986 as:

`Service' means service of any description which is made available to potential users and includes, but not limited to, the provisions of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;

The term "service" has a variety of meanings. It may mean any benefit or any act resulting in promoting interest or happiness. It may be contractual, professional, public, domestic, legal, statutory etc. The concept of service thus is very wide. How it should be understood and what it means depends in the context in which it has been used in an enactment. Commenting upon the scope of the "service" as defined

under C.P.Act, the Supreme Court in Lucknow Development Authority v. M.K. Gupta[1] observed:

…..The entire purpose of widening the definition is to include in it not only day today buying and selling activities undertaken by a common man. But even to such activities which are otherwise not commercial in nature yet they partake of a character in which some benefit is conferred on te consumers.

Thus in view of the apex court's observation, it can be safely said that education is a service offered by the government and the private institutions, and if it is offered for consideration it will come within the definition of term 'service' as given in clause (o) of section 2(1) of the C.P.Act. When the issue whether education falls within the purview of the C.P. Act under the definition of 'service' came for deliberation, consumer Redressal Agencies expressed conflicting opinions. The state commission of Orissa in Monisa Samal v. Sambalpur University [2] held:

The word 'service' as defined in the C.P.Act includes 'services' of any kind in wide spectrum except the exclusionary part of section 2(1)(o). The word 'includes' does not limit the operational parameter of the C.P.Act. Examinations and publications of results is a service since the same gives benefit to a person who appears at the examination and becomes successful. For rendering the service, opposite party charges fees which can be said to be the hiring charges for such service, it is not a personal service.

The above Orissa commission was followed by the Gujarat state commission in Oza Nirav Kanubhai v. Central Head Apple Industries Ltd. & Ors[3], Maharashtra state commission in Abel Pacheio Gracior v.

1 (1994) 1 SCC 243

2 (1991) CPJ 373 (Ori.). In this case the University issued an identical roll number to more than one examinee was held to be a deficient service but no liability was imposed because the other candidate with the same Roll No. did not appear and the apprehension of the complainant examinee that her marks might have gone to the benefit of the candidate , was not borne out by the facts. The the complaint was liable to be dismissed

3 1992 (1) CPR 735

Principal Bharathi Vidya Peeth[4], Karnataka state commission in M. Subesh v. Official in charge[5] and Haryana state commission in Tilak Raj v. Haryana School Education Board[6].It was laid down that " it is true that in the definition of service education does not find mention in express terms like other activities which have been specifically so labeled. However, it deserves highlighting that the enumerated services are only a part of the inclusive definition and in no way constrict the essence and the meaning of the word "service" for the purposes of the C.P.Act. That the same has been very widely defined is manifest from the language used which says that 'service' means service of any description which is made available to potential users. The legislature has deliberately cast the net very wide to bring within its ambit the services of any description when rendered for consideration barring those under a contract of personal service. Whenever education is imparted for a consideration, it is obvious that there exists a quid pro quo for the provision of education and a monetary recompense there for. On principle there does not seem any logical reason for excluding education from the ambit of the definition of service under the C.P.Act.

This view is in fact influenced by the opinion expressed by a seven member Bench of the Supreme Court in Bangalore Water Supply v. A. Rajappa & Ors.[7]Wherein it held:

Education can be and is, in its institutional form an industry as defined in section 2(i) of the industrial Disputes Act.

In Secretary, Board of Secondary Education, Orissa & Others v. Ms. Sasmita Moharana[8], it was held that "No doubt earlier the view was that the educational institutions were not rendering services as they were performing the statutory duty while holding examination." However, the Supreme Court's judgments' in Lucknow Development Authority and

4 (1992) 1 CPJ 105
5 (1992)11 CPJ 933
6 1991 (2) CPR 309
7 AIR 1978 SC 548
8 2007 (2) CPR 129 (NC)

GDA v Balbir Singh[9] have changed the view. Now, "Holding examination may be statutory duty, but administrative functions connected with such duty e.g. issuing correct marks sheets and certificates in time etc. is a part of service covered under Consumer Protection Act under the garb of non-statutory function." Similarly, the supreme court in the President, Board of Secondary Education, Orissa and others v. D. Surankar and another[10] held that issuance of an incorrect marks sheet, even where large number of students appeared in the examination, amounted to negligence.

Pertinent to mention the important case of Buddhist Mission Dental College & Hospital v. Bhupesh Khuran[11] which without a whiff of doubt is a landmark judgment wherein the supreme court laid down that the educational institutions offering courses by making false promise and assurance to prospective students through advertisement and prospectus regarding their affiliation with recognized universities and status of recognition shall have to pay huge compensation to the affected students if it was proved at a later stage that the said assurance and promise were falsely made.

The court held that

Education is a service provided to the community; hence the university is an industry.

The complainant hired the services of BMDCH for consideration and hence they are covered under the definition of 'consumer' under the C.P.Act, 1986

This was a case of total misrepresentation on behalf of the institute which tantamount to unfair trade practice. The act of the institute falls within the purview of 'deficiency' as defined in the consumer protection Act, 1986.

Therefore, a plethora of judicial pronouncements exist in favour of education as a service. Some important deliberations by the apex court of the country have regarded education as a service and the deficiency of

9 2004(5) SCC 65
10 2006(12) SCALE 24
11 (2009) 1 CPJ 25 (SC)

which would amount to violation of the Consumer Protection Act, 1986. But there have been certain recent developments where the Supreme Court has diverged from its earlier opinion and has refused to treat education as a service. The next section is an attempt to look at such judgments wherein education was denied the status of a service under the section 2(1)(o) of C.P.ACT 1986.

Education not a Service

It was in T.N Taneja v. Calcutta District Forum[12] where the Calcutta High Court expressed the following important observation:

From the definition of consumer and service as in the C.P.Act, it is abundantly clear that education does not come under the purview of the C.P.Act. The service rendered by a teacher is not a kind of service as described in section 2(1)(o) of the Act ...The definition of 'service' under section 2(1)(o) if read with section 2(1)(c)(iii), section 2(1)(d)(ii) and 2(1)(g), it becomes apparent that the relationship of teacher and student of an educational institution is not a service or hire because student is not such a consumer which is linked any way with the buyer of any economic goods and hire has not been linked with education, teacher and student. ....The subject of education does not come within the scope of the C.P.Act.

While agreeing with the above judgment, the madras High Court in Registrar, University of Madras, Chepauk v. Union of India[13] held:

The words "consumer" and "service" as defined in C.P.Act should be construed to comprehend services for commercial and trade oriented nature in the context of unfair or restrictive trade practices and not otherwise. Educational institutions and education will not come under the ambit of these provisions.

The National commission in its decision in Registrar, Evaluation, and University of Karnataka v. Poornima G. Bhandhari[14] observed as:

We are clearly of the view that in carrying its functions of conducting examinations, valuing answer papers and publishing result,

12 AIR 1992 Cal. 95 (107)
13 (1995) 3 CTJ 100 (Mad.,HC)(CP)
14 First Appear No.245/92

the university was not performing any service for consideration and candidate cannot be regarded as a person who had hired or availed of the services of the university for consideration. The complainant was not, therefore, a consumer entitled to seek any relief under C.P.Act.

The same view was echoed by the National commission in University of Bombay v. Mumbai Gahak Panchayat, Bombay[15]. In Deputy Registrar (colleges) and Another v. Ruchika Jain and others[16], the National commission in a revision petition regarded an interim order passed by the district forum providing relief to a student against the educational institution as illegal and arbitrary. It further directed that in future no such interim order shall be passed by the consumer fora. In Bihar School Examination Board v. Suresh Prasad Sinha[17], the supreme court of India scrutinized the relation between a school and its students to determine whether it would be the same as that of a 'service provider' and 'consumer'. The court held:

Process of holding examinations, evaluating answer scripts, declaring results and issuing certificates are different stages of a single statutory non-commercial function. It is not possible to divide this function as partly statutory and partly administrative. When examination Board conducts an examination in charge of its statutory function, it does not offer its 'services' to any candidate. Nor does a student who participates in examination conducted by Board, hire or avail any service from the Board for a consideration. On the other hand, a candidate who participates in examination is a person who has undergone a course of study and who request the Board to test him as to whether he has imbibed sufficient knowledge to be fit to be declared as having successfully completed the said course of education and if so, determine his position or rank or competence vis-à-vis other examinees. The process is not therefore availment of a service by a student.

15 1994(2) CPR 487 (NC)
16 2006(3) CPR 18 (NC)
17 (2009) iv CP

So judgments' are in abundance highlighting the subject of education as not a service. These judgments' show a strong tendency to keep education out of the ambit of services mentioned under the provisions of C.P.Act. These equally poised judgments in favour and against education as a service are in a pressing need of reconciliation which would be taken care of in the next section of the paper.

Reconciliation

These two divergent views about whether education is a service or not have given rise to an important but controversial legal question. The need is to find a way where both of these views can be reconciled so that an unambiguous position regarding the subject can be made out. The following points would be helpful for bringing such a reconciliation of the conflict.

Under the Consumer Protection Act though consumer fora can pass an interim order on a complaint but that is only in relation to relief that it can grant. So it has been rightly held[18] that consumer fora cannot pass interim order to give provisional admission to candidates who are below prescribed cut off for admission in that course as it is beyond its functions and would be illegal.

There is an ambiguous conflict in case law on the nature and scope of various functions of the educational institutions for the applicability of the consumer protection Act, 1986. A student is neither a 'consumer' nor education service rendered by university etc. a 'service' when the university /college is performing its statutory duty while holding examinations[19].

But a student is a 'consumer' and education is also 'service' when educational institutions are performing administrative functions of issuing marks sheets, certificates etc. 'connected' with such statutory duty.

However, a clarification by a Supreme Court judgment in an appropriate case will be of immense help to the student's consumer

18 Supra note 16, Ruchika Jains Case

19 Supra note 15

community and legal fraternity because of the apparent conflict regarding statutory and non-statutory functions of the educational institutions[20]

Conclusion

In an age of commercialization and consumerism like ours one cannot easily rule out the possibility of treating education as a service as provided under the C.P.Act. In fact, "placing educational system outside the purview of the C.P.Act will do more harm than good to the society as a whole. The time has gone when education was treated as a mission and vocation rather than a profession, trade or business. There is mushroom growth of teaching shops who make lofty but false claims about the affiliation , recognition , standard of the institution , facilities and job prospectus with a view to allure the unemployed youth and thus mint money".[21] But at the same time we need to be cautious to treat every aspect of education as a service as understood in the consumer jurisprudence. An important distinction of statutory functions and administrative functions of educational institutions must necessarily be taken into consideration while deciding a matter regarding educational services. Further it would be a great relief for both the students and the legal fraternity if a clear cut judgment from the apex court in this controversial but significant matter sees the light of the day.

Mehmood Ahmad Malik*

20 Is student 'consumer' and education 'service' under the Consumer Protection Act, 1986 ? , By N.K.Rohtagi, M.A.LL.M., Advocate, Delhi. Formerly, Reader in Law, Delhi University

21 Dr. Mohmmad Akram Mir, Education as a service to the consumer: Judical Approach; II KULR 1995 at p.143

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Restorative Justice in India: A Critical Appraisal

Abstract

Crime victims have traditionally been given virtually no legal standing in the process of doing justice in courts, even though the justice system exists because individual citizens have been hurt by criminal behavior. Till recently, victims of crime felt increasingly frustrated and alienated by the prevalent system of justice. The crime was against the state and state interest derived in the process of doing justice. Individual crime victims were left on the sideline with little, if any, input. Though the victim is being recognized as a vital participant of the criminal justice system around the world, in India, the victim still remains at the periphery, the forgotten actor having no say in the process of justice.

Key Words: ***Crime Victims, Restorative Justice, Criminal Justice System, Compensation, Code of Criminal Procedure, Victim Compensation Schemes.***

Introduction

Victims, once on the margins of criminology research are now a central focus of academic research. Victim surveys, both national and international, and qualitative studies of the impact of crime, and of victim needs have permanently altered the criminological agenda. Victims complicate the old triumvirate of crime, criminals and their control. The world has been obliged to recognize that crime has consequences more painful than once acknowledged, the victim has moved from being a forgotten actor to become a key player in the criminal justice process.[1] The promotion of victim rights at both national and international level connotes a shift in penological thinking that challenges the prevailing paradigm of retributive punishment.

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1 Mike Maguire, Rod Morgon, (eds.), *The Oxford Handbook of Criminology* 165 (Oxford University Press, Oxford, III edn., 2002).

Victim and the Criminal Justice System

Crime victims have traditionally been given virtually no legal standing in the process of doing justice in courts, even though the justice system exists because individual citizens have been hurt by criminal behavior. Till recently, victims of crime felt increasingly frustrated and alienated by the prevalent system of justice. The crime was against the State and State interests derived the process of doing justice. Individual crime victims were left on the sideline with little, if any, input.[2]

Not so long ago, crime victims were consigned to a peripheral position, necessary as background players but of no true importance. Once their crime report and their statement had been recorded, they typically were ignored. Victims were robbed, hurt, their homes invaded, their handbags or wallets stolen on the street. Then they were victimized for the second time, this second insult being inflicted by the authorities. Law enforcement personnel, hardened from having dealt with so many crimes for so long, failed to understand that for most people, victimization is rare, often a unique and novel experience. Further frustrated by their inability to stem offences, law enforcement agents tend to be abrupt and dismissive in the face of the victims despair. The experience with courts is no better. In those rare instances when a case goes to trial, the victim has to suffer through any number of postponements, endure a grilling by the defense that is meant to humiliate, and often not be provided with vital information regarding the process, court date changes and even the final disposition of the case. Rarely do criminal justice professionals take the time to listen to the fears and concerns of crime victims, seek their input, or invite their participation in holding an offender accountable. In the end, the crime victim usually receives little satisfaction and much of resentment,

2 Adam Crawford, Jo Goodey (eds.), *Integrating a Victim Perspective within Criminal Justice: International Debates* 56 (Ash gate, Dartmouth, Burlington USA, 2000).

irritation and anger.[3] Crime victims could be key actors in the criminal justice process, but more often they are kept at periphery. Studies have shown that victim cooperation may be highly critical in helping the police to make arrests and prosecutors to secure convictions. Despite the value of victims to the system, it is widely recognized that in its haste to enhance the efficiency of prosecutions and convictions, the criminal justice system has not always responded sufficiently to the special demands and challenging problems of crime victims. Moreover, the response of criminal justice personnel often is regarded as having a negative impact on the emotional problems of victims. So prevalent is the tendency of the victims to experience difficulties in their encounters with the criminal justice system that its effect on victims is often characterized as a second wound. Crime victims are the forgotten persons of the criminal justice system, valued only for their capacity to report crimes and to appear in courts as witnesses. Victims are expected to support a criminal justice system that has treated them with less respect than it has treated the offender.[4]

The Rise of Restorative Justice

A significant new development in the thinking about crime and justice is the growing international interest in field of Restorative Justice. Restorative justice offers a fundamentally different framework for understanding and responding to crime and victimization. Restorative justice emphasizes the importance of elevating the role of crime victims and community members, holding offenders directly accountable to the people they have violated, restoring the emotional and material losses of victims, and providing a range of opportunities for dialogue, negotiation

3 Kathleen Daly, "Restorative justice: The Real story" in Carolyn Hoyle, (ed.), *Restorative justice: Critical Concepts in Criminology* 283 (Rutledge, London and New York, Vol I. The Rise of Restorative Justice, 2010).

4 Harvy Wallace, Cliff Riberson, *Victimology: Legal, Psychological and Social Perspective 9* (Prentice Hall, Boston, 2011).

and problem solving, which can lead to a greater sense of community safety, conflict resolution, and closure for all involved.[5]

In contrast to the offender-driven nature of our current system of justice, restorative justice focuses upon four client groups: crime victims, offenders, community members and the government. It represents a growing international movement with a relatively clear set of values, principles and guidelines for practice. This new theory is gaining support among a growing number of correctional policy makers and practitioners, victim advocates, court officials and law enforcement officials all around the world. At its best, restorative justice provides an entirely different way of thinking about crime and victimization. Under previous criminal justice paradigms the state was viewed as the primary victim of criminal acts, and victim played a passive role. Restorative Justice recognizes crime as first and foremost being directed against individual people. It assumes that those most affected by crime should have the opportunity to become actively involved in resolving the conflict. The emphasis is on restoring losses, compensating, allowing offenders to take direct responsibility for their actions, and assisting victim in moving beyond their sense of vulnerability and achieving some closure.[6] These goals stand in sharp contrast to those of traditional paradigms, which focused on past criminal behavior through ever increasing levels of punishment.

Restorative Justice: Past and Present.

Restorative justice has been around in various forms for centuries. It is grounded in traditions of justice found in Arab, Greek and Roman civilizations. Much of it is found in restitution, a form of payment in kind, labor, or money in compensation for the wrong done. The Code of Hammurabi espoused the practice of individual

5 Gerry Johnstone, *Restorative Justice: Ideas, Values, Debates.* p IX (Willan Publishing, Cullompton, 2002.)

6 Gerry Johnstone, Daniel Van Ness (eds.), *Handbook of Restorative Justice* 14-16 (Willan Publishing, Cullompton, 2007).

compensation for victim of the harm. The early Hebrews used restitution and various forms of restorative justice for personal crimes. Restitution was an important means of resolving conflict and maintaining peace, especially for personal crimes. For societies without a strong chief or that lacked a central authority figure, the main reason for restoration was to avoid a blood feud. As a simple society gave way to a State, the rulers took interest in maintaining a costly peace, the need of the victim became less important and progressively the needs of the state took prominence. The declining of victims' role in settling disputes signified an important change in the nature of social control. By the end of the 12th century, the erosion of restorative justice was complete, because the common victim of crime could no longer expect to receive compensation from the offender. The idea of restoration, though never died completely. Bentham, in the late 18th century advocated for the use of restitution whenever possible. One hundred years later, international symposiums and penal congresses discussed the idea as well. An important development was experiments with victim-offender mediation and reconciliation carried out in America and Britain in the 1970s. The family group conferencing in Australia, Singapore, The United Kingdom, Ireland, South Africa, the United States and Canada also influenced the reemergence of restorative justice. Other influences were the Healing and Sentencing Circles in Canadian First Nations and the Navajo Justice and Healing Ceremonies.[7] An important root for restorative justice is the argument for of the crime system towards the victim. This is founded on the argument that crime is not only a wrong against society but often represents also a private wrong done by the offender to a specific victim. Making good, it is argued, should be the primary aim of the criminal justice system. Justice consisted of the culpable offender making good the loss he has caused. This, it is claimed, would reduce reliance on negative, solely punitive disposals,

7 Marian Liebmann, *Restorative Justice: How It Works* 146 (Jessica Kingsley Publishers, London, 2007).

and institute in their place positive attempts to rectify the specific harm caused by the crime. More recently, restorative justice has been strongly influenced by models of community justice in use in western cultures, particularly the indigenous populations of North America (Native American Sentencing Circles) and New Zealand (Maori Justice). Academic writings by John Braithwait, Mark Umbreit, and Howard Zehr, among others, have highly influential in promoting Restorative Justice[8].

The United Nations defines restorative justice as *a process which the victim, the offender and/ or any other individuals or community members affected by a crime participate actively together in the resolution of matters arising from the crime. The group discusses the offence, the circumstances underlying it, its effects on the victim, and how relationships have been affected by it. The principle purpose is to share information and collectively, and to formulate a plan about how best to deal with the offending"*. A comprehensive model of restorative justice recognizes that there are four parties affected by crime: the victim, the offender, the community and the government. The government and the community have a need for safety. The victim and the offender are to achieve a resolution of their conflict. This is done through understanding and a measure of reparations. Through the efforts, in part, of government imposed order, community safety is achieved by forming strong, stable, peaceful relationships among its members. The victim seeks a measure of vindication from the government, too. This means the government recognizes the victim is not responsible for the pain and loss and that the victim claims are legitimate. The government, for its part, demands order from the offender by adhering to the precepts of the law. The offender is expected to provide communal recompense. In addition to paying restitution to the victim, the offender is to take an active role in mending the damage. The community is to provide the victim with sufficient support in overcoming the loss so the victim can start the healing process. It is crucial that the government redresses the

8 Ibid. p.147

victims' complaints and that it treats the offender with fairness.[9] Restorative justice, thus, represents a truly different paradigm based upon following values; Restorative Justice elevates the importance of the victim in the criminal justice process, through increased involvement, input and advice. Restorative Justice is far more concerned about restoration of the victim than the ever more costly punishment of the offender. Restorative justice requires that the offender be held directly accountable to the persons and the community that they victimized. Restorative Justice places greater emphasis on the offender accepting responsibility for his or her behavior, and making amends, whenever possible, than on severity of punishment. Restorative Justice encourages the entire community to be involved in holding the offender accountable and promoting a healing response to the needs of victims. Restorative Justice aims at providing the victims purposeful access to the courts and correctional processes, which allow them to assist in shaping offender obligations. Restorative justice can be expressed through a wide range of policies and practices directed towards crime victims and offenders, including victim support and advocacy, court compensations, victim impact panels, victim support groups, restitution, victim-offender mediation etc[10].

Restorative Justice in India.

Restorative justice, as a full developed aspect of criminal justice is largely absent in India. Our system does not recognize the emotion of a crime victim for support, therapeutic treatment, mediation, grief counseling etc. And even if it does, nothing has been done to ensure that victims have access to such amenities. What our criminal justice system does recognize (as a glimmer of restoration) is compensation to the victim of crime.

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9 Howard Zehr, Harry Mika, "Fundamental Concepts of Restorative Justice" C JR, 47-51 (1998).

10 Ibid.

The only statutory measures for the restoration of victims of crime can be found in compensation clauses in the Code of Criminal Procedure 1973, the Probation of Offenders Act, 1958, and the Fatal Accidents Act. Under section 357[11], compensation can be given to the victim, but only when the offender is convicted and sentenced. Also, if the sentence is of fine, it can be applied in the payment of compensation. In order, however, to claim compensation under this section, it is necessary to show that

1. The victim has suffered "loss" or "injury"
2. Such loss or injury has been caused by the offence, and
3. The victim can recover compensation in a civil court[12].

Proof of the first two facts alone does not entitle a victim to claim compensation if he fails to prove the third one. This means that the payment of compensation can be ordered only when the compensation is, in the opinion of the court, recoverable by the victim in a civil court. In other words, such payment under the Cr.PC is possible only when the act is both a tort as well as a crime. Sub Section (3) of section 357, empowers a criminal Court, in its distinction, to order the accused to pay by way of compensation, a specific amount to victims of the offence even if it does not form a part of the sentence imposed on him[13].

Under section 5 of the Probation of Offenders Act, 1958, while releasing the accused on probation or with admonition, the court can, in its discretion, order the offender to grant "reasonable compensation" to the victim for the loss or injury caused to him by commission of the offence. It is worth noting that courts in India have rarely resorted to these provisions to exercise their discretionary power to compensate victims of crime.

Since last several years, some amendments have been made in criminal laws in India giving some rights to crime victims at different stages of criminal justice system but so far as status of crime victims in

11 Section 357, The Code of Criminal Procedure, 1973.

12 Section 357 (1) (b), The Code of Criminal Procedure, 1973.

13 Section 357 (3), The Code of Criminal Procedure, 1973.

criminal justice system in India is concerned, it is inadequate and requires legislative attention.

A crime victim has the right to oppose the release of accused on bail but he has no right or status to be informed if bail is filed. Except in few matters, he is not a necessary party in criminal revisions, appeals or writs filed by accused. His evidence is necessary for recording conviction of accused but he need not be informed for hearing on the point of sentence. He is entitled to get compensation but before determination of compensation, he has no vested right to be heard. A victim has no status to watch the trial. There are definite places for judge, prosecutor, defense lawyer, accused and staff of court in court room but no place has been assigned to victim in a court room to watch the progress of trial

The Criminal law Amendment Act, 2008.

Keeping in view the pressing need to revisit the status of victim in the criminal justice system, through the Amendment of 2008, new provisions were inserted in the Cr.PC by way of various sections, starting with Section 2(wa) in the definition clause, defining a "victim" as;

"victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir"[14]

It is pertinent to mention here that prior to the insertion of this definition there was no statutory definition of "victim" in India. Who was a victim was left entirely to the interpretation of the courts. Before the Code of Criminal Procedure (Amendment) Act, 2008, there was no statutory obligation on the state to constitute a victim compensation scheme. But, a desire was expressed by the higher judiciary and academicians to introduce statutory provisions for the constitution of

14 Inserted by Act 5 of 2009, Sec. 2, The Code of Criminal Procedure, 1973, (w.e.f. 31.12.2009) (vide S.O. 3313(E) dated 30.12.2009).

victim welfare board or council. Hence, another very important addition to the CrPc was the insertion of section 357A[15], that is "the Victim Compensation Scheme", by the Amendment of 2008. The provisions to the section are as follows:

Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation[16].

Whenever a recommendation is made by the court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub – section (1).[17]

If the trail court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.[18]

Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the state or the district legal services authority for award of compensation[19].

Creation of Victim Welfare Fund:

The Government of Tamil Nadu was the first in India to constitute a Victim Assistance fund. This fund, created in 1995 by Tamil Nadu, over a decade before the Cr.PC Amendment of 2008, provides financial

15 Inserted by Act 5 of 2009, Sec. 28, The Code of Criminal Procedure,1973, (w.e.f. 31.12.2009).

16 Section 357 A (1), The Code of Criminal Procedure, 1973.

17 Section 357 A (2), The Code of Criminal Procedure, 1973.

18 Section 357 A (3), The Code of Criminal Procedure, 1973.

19 Section 357 A (4), The Code of Criminal Procedure, 1973.

assistance to some selected categories of victims of violent crimes such as legal heirs of victims of murder and victims of grievous hurt, rape and dowry victims, particularly to help women and children in distress (Government of Tamil Nadu, 1995). Subsequently some additions and amendments in the scheme were brought in for more effective implementation of the scheme (Government of Tamil Nadu, 1997).

As of today there are Victim Compensation Schemes in various states across the country like Bihar, Tamil Nadu, Jammu and Kashmir, Kerala, Rajasthan, Maharashtra, Karnataka, Assam to name a few.

Amendment of Section 372. — Another important addition from the victim perspective has been made in section 372 of the principal Act, where the following proviso has been inserted, namely:—

"Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall be to the Court to which an appeal ordinarily lies against the order of conviction of such Court."[20].

The Criminal Law (Amendment) Act, 2013

Through the Criminal Law (Amendment) Act, 2013 the most important change that has been made is the change in rape laws under Section 375, IPC. Except in certain aggravated situation the punishment will be imprisonment not less than seven years but which may extend to imprisonment for life, and shall also be liable to fine. In aggravated situations, punishment will be rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

A new section, 376A has been added which states that if a person committing the offence of sexual assault, "inflicts an injury which causes

20 Inserted by Act 5 of 2009, Sec. 29, The Code of Criminal Procedure, 1973, (w.e.f. 31.12.2009).

the death of the person or causes the person to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean the remainder of that person's natural life, or with death." In case of "gang rape", persons involved regardless of their gender shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life and shall pay compensation to the victim which shall be reasonable to meet the medical expenses and rehabilitation of the victim. The age of consent in India has been increased to 18 years, which means any sexual activity irrespective of presence of consent with a woman below the age of 18 will constitute statutory rape.

From the above it can be seen that some rudimentary provisions of victim compensation are being introduced into the Indian criminal justice system. However compensation is not the only facet of victim restoration. Other facets of victim restoration, like Victim assistance, crisis intervention, counseling, emergency transportation and sheltering and victim rehabilitation are still by and large missing.

Restorative Justice in Jammu and Kashmir.

The situation is similar, if not worse, in the state of Jammu and Kashmir. The laws operating in the state are, in sprit, the same ones that are operative at the national level. It will not be an exaggeration to claim that the philosophy of restoration is alien to this place. In the state, there is hardly any judicial trend towards providing the victims of crime with any compensation, nor is there any administrative body to look towards the emotional healing of the victims. It might be another forty years before the ideals of restorative justice find roots in Jammu and Kashmir.

The Amendment in the JK Cr.PC in April 2012 is the first sign of rudimentary restorative provisions being introduced in the state's criminal justice system.

Sub section 3 added to Section 545 provides for payment of compensation by accused on conviction.

Section 545A is a new addition to the code which provides for preparation of schemes by Govt. for providing funds for the purpose of compensation to victims or their dependants.

The Jammu and Kashmir Victim Compensation Scheme, 2013

In exercise of the power conferred upon it by sub section (1) of sec. 545 A, of the JK Cr.PC, the government of J&K propounded the scheme in April 2013.

Under the definition clause of the scheme, *"victim" has been defined as a person who himself has suffered loss or injury as a result of crime and require rehabilitation and includes dependent family members*[21].

Also the Government shall allot a separate budget for the purpose of the scheme every year and the funds shall be operated by the Member Secretary, Jammu and Kashmir State Legal Services Authority[22].

Eligibility for Compensation:

A victim shall be eligible for the grant of compensation if:-

a) The offender is not traced or identified, but the victim is identified, and where no trial takes place, such victim may also apply for grant of compensation under sub-section (4) of Section 545-A of the Act;

b) He/She should not have been compensated for the loss or injury under any other scheme of the Central/State Government, Insurance Company or any other Institution;

c) The victim/claimant shall co-operate with the police and prosecution during the investigation and trial of the case.

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21 Definition Clause (d), The Jammu & Kashmir Victim Compensation Scheme, 2013.

22 Section 2, clause (2)and (3), The Jammu & Kashmir Victim Compensation Scheme, 2013.

d) The compensation shall be provided to the victim/claimant only after filing of charge sheet or final report in the competent court of law.[23]

The concerned District Legal Services Authority to decide quantum of compensation to be awarded to victim or his dependents on basis of losses caused to victim, medical expenses incurred on treatment, minimum sustenance amount required for rehabilitation including funeral expenses etc[24]. Compensation may vary from case to case depending on facts of each case[25].

Quantum of compensation is not to exceed the amount mentioned in the Schedule-I appended to the scheme. It is of interest here to mention the quantum of compensation laid out in the original Schedule-I. In cases of injury causing severe mental agony to women and child victims in case like human trafficking, the quantum of compensation was not to exceed Rs.l0000. For a rape victim, the maximum amount of compensation was Rs 50000. Loss of any limb or part of body resulting in 80% or above handicap Rs 50000[26] etc. This Schedule had to be revised in just six months time because of the complete lack of respect it reflected toward victims and their plight. The revised Schedule-I, notified in September 2013, reflected more reasonable rates of compensation, like Rs 1 lack for victims of human trafficking, Rs. 2 lack for victims of rape, Rs. 2 lack for anyone who suffers loss of any limb or part of body resulting in 80% or above handicap[27], etc. How effectively this scheme is implemented is yet to be seen, however the coming into

23 Section 2, (Eligibility clause) The Jammu & Kashmir Victim Compensation Scheme, 2013.

24 Section 3 (5), The Jammu & Kashmir Victim Compensation Scheme, 2013.

25 Ibid.

26 Schedule-I to Notification SRO 229 Dated 23.4.2013(of the Jammu & Kashmir Victim Compensation Scheme, 2013).

27 Schedule-I to Notification SRO 394 Dated 9.9.2013(The Jammu & Kashmir Victim Compensation Scheme, 2013).

force of this Victim oriented piece of legislation is the first step in the right direction.

Conclusion

It might not be wholly untrue to state that the revolution in Criminal Justice system around the world, brought about by restorative justice has left the Indian Criminal Justice System untouched. Indian Criminal Justice system is still predominately offender centric. The concept of restorative justice and the rights of the crime victim do not find response in our administration of criminal justice. Our system sill looks at the offender as the key player, the victim is just a by-product of the whole situation. The current philosophies of justice and correction in India are dominated by a humanitarian and therapeutic approach making every possible effort to “reform” and "treat” offenders for their effective and meaningful re-socialization and re-assimilation in the social mainstream from which they deviated. Our criminal Justice process, however, does not show half as much concern for the victims of crime, who suffer not only physical repercussions but also emotional and psychological trauma. Our criminal law and criminal process, traditionally, assumes that the claim of the victim is sufficiently satisfied by conviction and sentence of the offender. But is this assumption not unjust, unfair and inequitable when our society and state is resorting to every possible measure for correction and rehabilitation of the offender, and not displaying anywhere near such concern for the victims of crime.

The brief review of the existing legal framework in relation restoration of victims reveals that except in the area of providing compensation, very little has been done, either statutorily or through schemes to address the entire range of problems faced by the victims of crime. There will always be debate about what can and should be offered, however it is high time for the legislature to come out with diverse and elevating restorative statutes and schemes which will genuinely benefit crime victims and mitigate their plight, as the

provisions under Cr.PC are not able to meet the needs of crime victims for justice.

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Socio-Legal Dimensions of Beggary vis-à-vis Right to Live with Dignity: An Indian Perspective

Abstract

Beggary is an age old problem. In India the problem of beggary has assumed a stupendous proportion. Beggary has changed its form in modern period and the problem has become a colossal one. Beggars lead a life of horrible moral corruption. The fact that "beggary" has its root in religious mendicancy, it has its socio-economic ramifications and that has made "beggary" a major social problem of the 21st century. At present there are more than half a million beggars in India and if we include among these those persons who occasionally beg, the number will swell into a few millions. It is high time we draw a blue print to eradicate this social menace. The sole intention of this paper is to draw attention to the legal, sociological, economic and social condition beggars; how they are deprived of the right to live with dignity and which needs to be discussed.

***Key Notes*: Beggars, Destitute, Law, Menace, Social Problem and Dignity.**

Introduction

Of all social evils today begging is perhaps the most demoralizing. It constitutes a very complex socio-economic problem.[1] In our day to day life we often come across with the phenomenon of beggary, which is growing rapidly in our surroundings. Beggary is an age old problem.[2] The so-called beggars are actually ordinary, old, sick and infirm people, who have come to this stage out of poverty & destitution. They are alternatively called 'people in distresses. Because of Poverty and low socio-economic conditions, people find no other means to earn their

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1 Asuina Kartika, "*Statistical Survey*" 35 Social Defence 44 (1994).

2 S.K. Bhattacharya, "*Beggars and the Law*" 19 Journal of Indian Law Institute 498 (1977).

livelihood for survival except begging. Generally they are available at rubbish dumb, road sides, and traffic lights and under flyovers. Beggars are a common sight.[3] The foreign press and television have often put India to shame by graphically showing pictures of beggars fighting like dogs for few coins, swarming like bees for food left over in hotels and restaurants, naked women sleeping on floor and children sucking. These scenes show India in very lurid colours.[4]

Every individual has certain rights bestowed by nature which are preserved, protected and promoted in this era of globalization in the name of human rights and human dignity. Right to live with dignity is the core stone of all rights and the reason of their meaning. Right to live with dignity is the natural right of a person and it is for both the society and government to ensure the full development of all men, women and children. Thus, the responsibility of every government is to ensure and protect the dignity of its citizens, which includes beggars also.[5]

Beggary in Indian - Historical Overview

India is a home of beggars.[6] Beggary is considered more or less one of the oldest professions of our society, though its tag has been usually contradictory with the parameter of law. In the early days of civilization, religious leaders preached the idea of the charity which is an essential element of all leading faiths. The basic principle underlying all religion is "charity to man is the service to God". In Hinduism this

3 Chitra Vaisakh, "*Problem of Beggary in India*" 34 Social Defence 48 (1994).

4 Rajendar Kumar Sharma, *Urban Sociology* 24 (Atlantic Publishers & Distributers, New Delhi, First Impression, 2004).

5 S.P. Mullick and C.J. Malhotra, "Human Rights and Teaching", available at: http://www.Wikipedia.HumanRightsandHumanTeaching.org.com, (visited on September 8, 2013).

6 Millan Chaterjee, "Indian Beggars", Available at: http://www.wikipedia.html.com, (visited on October 9, 2013.

concept of the word 'Dharma' denoting faith or religion also connotes 'charity' which means devoting a part of wealth to charity, just as Hinduism, Islam also plays an equally significant role in promoting the idea of charity. The early churches cared for their own poor but took great pains to prevent pauperization. Thus the religious basis of begging had its root deep in man's desire to free him from din by giving alms to a beggar and on the other hand got its justification from the desire to attain salvation by becoming a beggar.

2.1 The Legal Framework

The first legal measure against beggary and vagrancy in India was the European Vagrancy Act, 1874, and was primarily to deal with the vagrants of European descent. However, under general power of prevention of offences security proceedings could be launched against vagrants, beggars and other categories of status offenders in terms of the provisions of the Code of Criminal Procedure (Act V of 1898)· The provision directly related to vagrants and beggars was section 109 which empowered the Magistrate to ask "a person with no ostensible means of subsistence, or who cannot give a satisfactory account of himself" to execute a bond, with sureties, (or good behaviour up to one year. This provision became the basis for arrest and detention of all "undesirable persons" and vagabonds)'. In addition to this a vagrant or a beggar was subjected to the penal provisions under the local Acts in diverse fields, which related to vagrancy and beggary incidentally.[7]

The handling of this problem acquired distinctly formal and penal character in the I940s, when the migrant rural working class faced serious destabilization on account of post-war unemployment and

7 E.g., Madras City Police Act, 1833, the Howrah Nuisance Act, 1866_ The Calcutta Suburban Police Act, 1866, The Bombay Police Act. 1861. The Punjab Municipalities Act. 1911 (S. 15), The U.P. Municipalities Act. 19J6 (S. 248), The CP and Barar Municipalities Act, 1922 IS. 206), The Ajmer and Merwara Municipalities Act, 1925 (S. 191) and the Indian Railways Act, 1941.

economic recession. All the metropolitan towns and other industrial centres experienced the menace of large scale vagrancy and beggary, but the problem assumed most acute form in Bengal where the situation was even worst on account of recurring famines.[8] The post-independence period beggary prevention laws have followed, by and large, the earlier policy. Though several states have amended and up-dated their legislations, but none has altered substantially the punitive scheme of the earlier. It is significant that growing member of states have enacted similar beggary prevention laws.[9] 15 States and 2 Union Territories have already enacted laws in this field.[10]

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8 The Bengal Rural Poor and Unemployed Relief Act was passed in 1939, which contemplated; the formation of the Union Boards for the administration of Poor Funds for the unemployed and the destitute population. The problem of urban poor led to the passing of the Bengal Vagrancy Act, 1943. In the same lines beggary prevention laws were passed in the states of Madras (1945), Bombay (1945), Mysore (1944), and Kerala (1945). The significance of these legislations emerging almost in the same period can be better appreciated by understanding the subtle working class control function performed by these laws.

9 B.B. Pande, "vagrants, beggars and status offender" in Upendra Baxi, (ed.), law and poverty 263-264 (1998).

10 In accordance with the Constitution of India, the subject of beggary falls in Item 15 of List III of the seventh schedule, the implementation of the programmes pertaining to the eradication of beggary is within the jurisdiction of the state governments. The States of Andhra Pradesh, Assam, Bihar, Gujarat, Haryana, Jammu & Kashmir, Karnataka, Kerala, Madhya Pradesh, Maharashtra, Tamil Nadu and West Bengal and the Union Territories of Delhi and Goa have enforced anti-beggary Acts in their respective areas. All these Acts provide for the prevention of begging through the-detention, training and -employment of beggars and also for the custody, trial and punishment of beggars. Begging is a cognizable offence under these Acts and special police squads operate in areas where the anti-beggary legislation is in force. The police can round up beggars

The law that defined, begging for the first time was (Bombay Prevention of Begging Act, 1959) hereinafter known as BPBA. This BPBA is the basis of all the latter Acts related to begging. As per the BPBA, the begging is defined as, **"soliciting or receiving alms in a public place and includes anyone having no visible means of subsistence and, wondering about or remaining in any public place in such condition or manner, as it is likely that the person doing so exist by soliciting or receiving alms".**

2.2 Beggary Laws and Its Effect

India's beggary laws are a throwback to the centuries old European vagrancy laws which instead of addressing the socio-economic issues make the poor criminally responsible for their position. The anti-beggar legislation is aimed at removing the poor from the face of the city. There are provisions for vocational training in the government run beggar homes. But these are worse than the third rate jails where convicts can spend up to 10 years. India as a nation needs to think for its begging population. With the nation aspiring to achieve world standards in every field socio-economic measures are needed to curb the begging problem in India. Despite, the number of legislations passed by the different state legislatures the menace of begging is uncontrollable. The Indian Penal Code (Section 363A) deals with the kidnapping and maiming of a minor for purposes of begging. However, there is hardly any evidence on the part of law enforcement agency to arrest people who maim or coerce children, who were living off their earnings, for

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and produce them before the court. In passing any order under the provisions of the Act, the court considers the report of the probation officer with regard to the age, character, circumstances and conditions in which the accused was living, his health, etc., and if he is found to be a beggar, he is sent to an institution for treatment, care and training for a period of not less than one year, but not more than three years – S.K. Bhattacharya, "Beggars and the Law", 19 Journal of Indian Law Institute 500 (1977).

purposes of begging.[11] These laws are not able to eradicate begging altogether. Still we find beggars in abundance. The concerned governments are doing nothing, to curb this socio-legal disorganization called begging. The solution calls for a comprehensive programme and reorientation of the existing programmers. Philanthropic approach to beggar problem should be replaced by therapeutic and rehabilitative work.

Factors Responsible For Beggary

The various factors responsible for begging are discussed as below:

3.1 Economic Causes:

The most important causal head for explaining beggary is the economic condition. Beggary is related to economic condition in two ways. First, beggary might be the consequence of adverse economic condition or distress. Second, under certain situations beggary might be motivated by economic gain considerations, this is particularly relevant in case of organized or exploitative beggary. Causal factor such as unemployment or under-employment, landlessness, poverty, calamity or famines and various other conditions of destitution are all variants of economic causes in the first sense. In the pre-independence era a large section of the Indian population remained perpetually under economic stress mainly on account of unjust land relations and oppressive wage structure. One of the main factors which forces people to take begging is destitution. Having no sufficient means to support themselves or their families many persons resort to begging. Lack of employment opportunities in villages either, because of tiny holding or non-availability of other work forces thousands resort to begging when they

11 Dr. S.R. Myneni, Sociology for law students 535 (Allahabad Law Agency, Faridabad, Second Edition, 2007).

cannot find employment in the cities.[12] However, the number of people that were sucked into new urban centres was far more than those who could be gainfully employed. The jobless and unemployed were left with very limited choice. Going back to the villages which he had left in hope of better prospects in the towns was not feasible on account of limited employment avenues and increased pressure on land back home. Settled employment in the urban industries could be secured by a relatively small percentage. The only alternative (for the larger numbers) was to hang around in the urban centre's and wait for a chance, which invariably meant leading the life of a vagrant and surviving through beggary.[13]

3.2 Social Cause:

Another cause of beggary is social disorders like the break-down of joint family, anomie, cultural conflict, community disorganization, faulty socialization etc.[14] Joint family has been a very vital social institution for the management and control of beggary in India. The individual secures substantial support from the family in the event of economic or other forms of social hardship. Members, who failed to fend for themselves for any reason, could fall back upon the joint family lap. However, the break-down of joint family institution on account of large scale migration, weakening of the traditional family structure and the emergence of individualistic considerations seems to have changed the situation considerably. The absence of joint family and other social institution to share and provide support forces quite a few persons in crises situations to a life of beggary.

The anxieties, insecurities and the anonymous mode of urban existence engender a

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12 Gurumukh Ram Das, Indian Social Problems – social disorganization and reconstruction 229 (Allied Publishers Ltd, New Delhi, 1976).

13 Ibid.

14 B.B. Pande, "vagrants, beggars and status offender" in Upendra Baxi, (ed.), law and poverty 261 (1998).

condition of anomie for the rural migrant, who rarely suffer from any inhibitions and succumbs to the temptations of beggary easily. Furthermore in some instances beggary and allied pattern of existence might be a reflection of cultural conflict. The beggars might be acting in consonance with their cultural pattern or they might have considered deviant activity like begging as the best way out under the situation. Social disorganization is yet another cause of beggars; social change and industrialization have been responsible for considerable disorganization in the social institutions and structures. The institutions relating to orphans, infirm and aged, lepers, lunatics, windows, divorces and other socially handicapped categories are in a state of disarray on account of lack of resources and uncertainty of the policy. This also leads to an increase in the number of beggars.[15]

3.3 Biological Cause:

Sickness or disease, physical disability or deformity, mental infirmity and old age can be described as biological causes of beggary. The discussion relating to different types of beggars amply shows that a large majority of beggars suffer from some kind of biological disability that makes them less than normal. Though biological disability may itself be seen as a cause, but actually only those biologically afflicted persons resort to begging who are not in a position to fight out their disability economically. Often they have to carry on with their sickness for a long time, starving and begging till the end. In the absence of any reasonable alternative such persons feel compelled to beg[16].

3.4 Religious Cause:

In India, the phenomenon of beggary is related to religion and culture. Religious mendicancy is not only tolerated by a large section of Hindus, Muslims and Christian population, but even supported on

15 N. Jayapalan, Problem of Beggary - Urban Sociology 268 (Atlantic Publishers & Distributers, New Delhi, 2oo2).

16 Supra Note 2 at 499.

religious grounds. That is why religious mendicants are often exempted from the operation of general laws prohibiting beggary. A sort of religious sanctity is attached to alms. Religious festivals and congregations prove God-sent opportunities for such operations. There are many social customs which force us to give something or other to the beggars, orphans and religious mendicants. Among the Hindus during Shradh observance, birth and marriage ceremonies and at certain other religious days and among Muslims in the month of Ramzan it is obligatory to offer alms. This religious concept of charity encourages beggary to a great extent.

3.5 Natural Calamities:

The natural calamities such as earthquakes, flood, tsunami, hurricane and drought compel people to leave homes, leaving everything behind them and under circumstances of immediate needs, the persons who are unable to find work feel compelled to beg to save themselves from starvation and death.[17] Years of drought or earthquakes swell the number of those who starve and beg for food first, it may be, in the villages or near-by towns and then in the distant cities.[18] Further people, who suffer due to act of God, mostly have no choice but to beg.

Types Of Begging

The beggars can be classified under the following prominent types:

4.1 The Child Beggars:

Beggary is an accepted way of life for a large section of orphan, destitute and neglected children in our society. In urban areas we often

17 Dr. S.R. Myneni, Law and Poverty 271 (Allahabad Law Agency, Third Edition, 2009).

18 R.K. Mukherjee, "Causes Of Beggary" Our Beggary Problem : How To Tackle It 27-28 in Dr .J.M. Kumarappa, ed., (Fadma Publications, Bombay, First edition, 1945).

come across children operating alone or in groups, soliciting money or food for privately run orphanages or homes. Apart from these a large number of children fend for their survival alone or in informal groups of two or three. These children can be seen making appeals for private charity in various ways in the railway stations, religious centre's and picnic spots. Such children are usually drawn from families where the parents are either too poor to care for their children or too busy to provide the required support or guidance. Finally, some child beggars may adopt the way of life of their parents. Such children often become part of organized gangs of beggars and are often the victims of the beggary evil.[19] The children in misery arouse great piety. They cry, whine, and wail so pathetically that they are given alms simply in order to be free their painful presence.[20]

4.2 The Physically Handicapped Beggars:

The large percentage of the beggar population suffers from physical deformity or handicaps that might be congenital or acquired later on in life. Physical disabilities like, blindness, deafness or dumbness, limb or bodily deformities and other kinds of physical disorganization excludes a large section of the population from normal work and employment such a disabled population is often compelled to struggle for its survival through private charity or other forms of vocations. The class of physically handicapped are most in successful in arousing sympathy and compassion in the heart of the alms givers. That is why physically handicapped and bodily deformed are in great demand for organized beggary.[21]

19 Supra Note 17 at 268.

20 Supra Note 15 at. 267.

21 Supra Note 14 at 256.

4.3 The Mentally Handicapped or Insane Beggars:

Like the physically handicapped the mentally handicapped ones suffer from disqualification in most of the areas of employment. Mental handicaps like insanity or serious forms of mental disorder renders these persons unfit even as a domestic help. Life for such a kind of mentally handicapped person means living on other's resources. In the event of limited family resources the mentally handicapped are compelled to fall back on private charity, often in public places. The persons suffering from mental deficiency, mental defects and epilepsy are the most common trait of a majority of beggars.[22]

4.4 The Diseased Beggars:

A large section of our population suffers from chronic illness such as tuberculosis, leprosy, venereal diseases, skin diseases, heart condition etc. such chronic from illness, in the case of undernourished population, means serious impairment of physical capacity and the resolve to work. Such diseased and sick need prolonged medical treatment and proper nourishment that is why they are often compelled to resort to private charity. These are the persons who cannot earn their livelihood because they are too ill to work.[23] In poor families, due to under nourishment people suffer from chronic illness, they are not able to work and also they cannot afford prolonged medical treatment and proper nourishment and are compelled to live in alms to survive.

4.5 The Religious Mendicant's Beggars:

There are quite a few religions in India that sanction founding of mendicant orders and ordain mendicant way of life for its members. Bairagis. Kabir-panthis among Hindus, fakir and darveshes among Muslims and nank-shahis and gianis among Sikhs are known vagrant

22 Ibid.

23 Gurumukh Ram Das, Indian Social Problems – social disorganization and reconstruction 234 (Allied Publishers Ltd., New Delhi, ISSN: 2278-6236, 1976).

and mendicant way of life. Such religious orders grow around shrines, mosques, mazars. Gurudwars and other religious centre's, but the members belonging to such religious order often resort to private charity and receive alms in private as well as public places.[24]

4.6 Professional / Hereditary Beggars:

Certain communities consider begging as their profession and indulge in begging as a traditional or customary activity. This type of beggary is prevalent amongst the members of certain caste or tribal groups who lead a nomadic way of existence and earn their living by entertaining people through singing, dancing or performing acrobatic feats. These groups consider nothing wrong or disrespectful in living on charity and lead a precarious existence. Because of social customs in certain communities they consider begging as their hereditary profession. Among these may be included: Nats, Bajigars, Sains, Jugglers, Bhats and Kanjars. To some of them their children are an asset who can excite more pity in human heart and can earn more and support their parents.[25]

4.7 Exploiter Beggars:

There are some beggars who practice organized beggary. They take begging as any other business and trade activity and perform the begging operations within a set organizational structure. The leader who masterminds the operations often stays in the background and leaves the job of actual begging, collecting the daily proceeds and the supervision of the other members to his trusted men. Such organized beggars kidnap and deploy children for doing the actual begging work and merely provide them with some food and shelter in return. These groups are also known to be responsible maiming and disfiguring the children to assure their permanent membership for the organization. In view of the

24 Ibid.

25 Ibid.

seriousness of this type of beggary the law has designed special provisions which subject the exploiter beggars to serious penal consequences.[26]

4.8 The Employed Beggars:

This may seem a contradiction in terms, but in India there are a larger number of men and women who work night shifts in mills and factories and go out begging during the day. Very often they earn more by begging during the day than by their labour in the factories and mills at night, and therefore become irregular in their attendance at work. The unsteady nature of the job and extremely poor wages often serve as an inducement to begging. Thus we have the curious phenomenon of the night labourer becoming a beggar by day.

4.9 The Able- Bodied:

Much less nauseating but far more exasperating is the able-bodied beggar. This type considers begging its birth-right and bullies, harasses and troubles the public into giving him alms. If a person happens to turn a deaf ear or to remonstrate with him for not working even though physically fit, he will turn round and use such abusive language that the person retires within his shell and makes up his mind never to address a beggar again. If offered a job he will flatly explain that he is ancestrally a beggar and as he has never worked in his life, his bones are stiffened and his constitution will not allow him to work.

Migrant Beggars

A third view of begging as a livelihood strategy pursued by a large number of people in various parts of the world. For poor

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26 Section 363A of the Indian Penal Code, 1860 provides upto 10 years imprisonment for kidnapping a minor for begging and up to life imprisonment for maiming a minor for begging. Similarly the various beggary laws contemplate stringent action against exploiter beggars.

households, it may be a precursor to another, more permanent way of making a living, or it may be an enduring phenomenon. Scholars of migration have paid little attention to this way of making a living. In India, people migrate from villages to beg, are because of the four crucial reasons and they were: (a) To meet daily household expenses and educational costs; (b) To make more substantial purchases, for instance, of land for economic improvement; (c) To recover losses from crop damage from natural calamities; and (d) Migration by young people to visit new places and earn cash.

Modus Operandi / Techniques Employed In Begging

The beggar employs his techniques in such a manner so as to appeal to human sentiments and arouse sympathy on the one hand and adjusts himself to the varying situations and circumstances on the other. The blessing that the beggar showers on the giver of alms has a direct reference to the fulfillment of this desire. Women are more easily lured by such stimulated pleadings, such as predicting good health and longevity of their husbands and children, while old men and women are fit subject for the glorification of their future life and the means necessary for securing it.[27] When he is unable to elicit any response in this way he starts relating tales of misery and ill luck that have befallen him. If he is diseased or if he is harbouring some sore or untreated wound he exposes it to attract their sympathy. In addition to display of handicaps imposed upon him by nature, he employs various other means such as evidence of his incompetency in printed letters and giving some false pathetic stories. Sometimes they give melodious songs or show certain tricks to attract the attention of the passers-by. Sen Gupta points out that the beggar in his begging appeals banks upon the sentiments inherent in human nature and attempts to touch the personality at all its vulnerable points.[28] "He appeals to your religious sentiments, to your

27 Supra Note 12 at 234-235.

28 Ibid.

sense of dependence on divine grace when he shouts, 'may god give you happiness' (Tumko parmatma sukhi rakkhay, baba) ; he appeals to you as a parent when he blesses your children (tumeharay bal bachcha sukhi rahey) ; he appeals to your sense of greed when unfold wealth and even a kingdom is promised to you or a nice husband or a job in exchange for a price, and seeks your protection for himself and his starving family; and finally he tells you of his illness, hard luck, bereavement and utter destitution."[29] A beggar may force a man by turning himself as a nuisance to him by holding or toughing the feet, by coming nearer the people, by showing such wounds or actions of abnormality physical or mental so that one may like to avoid his or her sight. One can avoid such person only by giving some money to him.

Right to Live with Dignity in India, under Indian Constitution

The drafters of Constitution were aware of the significance of human dignity and worthiness and therefore they incorporated this term in the preamble of the constitution. This shows that the framers showed an uncompromising respect for human dignity. The term "dignity" has been derived from the Latin word "dignitas" which denotes a quality of being worthy or honorable. It suggests a high rank of position of distinction in community.[30] Thus the term is referred as quality of being worthy of esteem or honour of high repute, proper pride and self respect. In the words of Justice Bhagwati:

"They are the necessary conditions which must be fulfilled if everyone in the society is to be assured a life of basic human dignity and complete self fulfillment which is the objective and goal of human rights. From this position it must follow as a logical corollary

29 N. N. Sen Gupta, "Mental Traits of Beggars", In Our Beggary Problems 28 (1945).

30 Dr Sunil Deshta and Dr Partap Singh, Human Rights in India 63 (Allahabad Law Agency, Faridabad, First edition, 2004).

to the right to development (which regards as the most comprehensive human right) includes within its ambit both civil and political rights as well as social and economic rights and contains within it the right to food, health and basic necessities of life. I am also convinced that the right to food and health, because with hunger and ill-health freedom can have no meaning. I want them to live a life of human dignity and for that; they must have the basic necessities of life including food and health.[31]

Chief Justice of India J.S. Verma has rightly stated that **'human dignity is the quintessence of human rights'**.[32] However, dignity has never been precisely defined on the basis of consensus, but it accords roughly with justice and good society. The poor have moral rights to be assisted in securing the basic necessities of life, understood as rights to an adequate standard of living, to food, health, education and social security entails them to claims upon the conduct of other agents.[33] Right to live with dignity is fundamental to all human rights and it aims at ensuring the fullest development of human personality.

6.1 Preamble:

The preamble to the Constitution of India assures among other things "dignity of an individual". Personal liberty and human dignity are most cherished values of our constitution. These are necessary epitomes which help in the development of an individual's personality and the realization of human rights.[34] The Preamble to the Constitution of India

31 Justice Bhagwati, XXIV Mainstream 11-12 (1986).

32 Justice J.S. Verma, "Human Rights Redefined: The New Universe of Human Rights", 1 Journal of National Human Rights Commission 3 (2002).

33 Thomas Pogge (ed.), "Freedom from Poverty as a Human Right: Who owes what to the very poor", Book review by Margot E. Salomon, 8 Human Rights Law Review 581-582 (2008).

34 Ibid, at p.129.

is aimed at to protect and promote the human rights of all the people, which include right to live with dignity.

6.2 Fundamental Rights:

One of the most important rights guaranteed by the constitution of India is the **"RIGHT TO LIFE"** under Article 21. Article 21 dealt with the right to personal liberty was a lifeless incantation for long.[35] In **Kharak Singh v. State of U.P,**[36] the Supreme Court observed that the right to life is not merely confined to physical existence but it includes within its ambit the right to live with **HUMAN DIGNITY**. The right to life is not restricted to mere animal existence, but a right to the possession of all organs- his arms, legs, etc. The right to life, thus, means right to live with human dignity, without humiliation and deprivation or denial of any sort.[37] It means something more than just physical survival. Thus, the **"Right To Live With Dignity"**[38] means to live with human dignity and all that goes along with it, namely, the bare necessities of life, such as, adequate nutrition, clothing and shelter and facilities for reading, writing and expressing ourselves in diverse forms, freely moving about and mixing and commingling with fellow human being".[39]

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35 Sunil Batra v. Delhi Administration, AIR 1978 SC 1675, the court held that right to Human Dignity and protection from inhuman treatment towards a convict waiting imposition of death penalty was declared to be violation of Article 21- Sheikh Showkat Hussain, "India and International Human Rights Law", XIII Kashmir University Law Reporter 101-102 (2006).

36 AIR 1963 SC 1295.

37 Paras Dewan and Peeyushi Dewan, Human Rights and the Law 16 (Jain Book Agency, New Delhi, First Edition, 1996).

38 Francis Coralie v Union Territory of Delhi, (1981) 1 SCC 608: AIR 1981 SC 746.

39 Dr. J.N. Pandey, The Constitutional Law of India 245 (Central Law Agency, Allahabad, 47th Edition, 2010).

Right to live includes the right to live consistently with human dignity and decency.[40]

In **Olga Tellis Vs Bombay Municipal Corporation,**[41] popularly known as Pavement dwellers case a five judge bench of the court has finally ruled that the word 'life' in Article 21 includes the Right to 'Livelihood' also.[42] The court said:[43]

"It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of death sentence, except according to procedure established by law. This is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because no person can live without the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest ways of depriving a person of his right to life would be to deprive him of his means of livelihood. In view of the fact that Article 39(a) and 4 require the state to secure to the citizens an adequate means of livelihood and the right to work, it would sheer pendentary to exclude the right to livelihood from the content of the right to life".[44]

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40 In A.K. Gopalan v. State of Madras, AIR 1950 SC 27, The Supreme Court propounded the thesis that "personal liberty" in Article 21 was used as a compendious term to include within itself all the varieties of rights which went to make up "personal liberty" of a man minus the right guaranteed under Article 19(1).

41 AIR 1986 SC 180.

42 In C. Ram Konda Reddy v. State of A.P, AIR 1989 AP 235, the court held that Art.21 is so fundamental and basic that no compromise is possible with this right. It is "non-negotiable". This is the minimum requirement which must be guaranteed to enable a citizen to live with dignity.

43 Supra note 39.

44 In Chandra Raja Kumari v. Police Commissioner Hyderabad, AIR 1998 AP 302, it has been held that the right to live includes right to live with dignity or decency and, therefore, holding of beauty contest is repugnant to dignity or decency of women and offends Art.21 of the Constitution.

In **Dr. Mehmood Nayyar Azam v. State of Chhattisgarh and Ors**,[45] the Supreme Court held that under Article 21 of the Indian Constitution Right to Life includes right to live with dignity, dignity cannot be allowed to be comatosed. The right to life is enshrined in Article 21 of the Constitution and it includes the right to live with human dignity and all that goes along with it. The majesty of law protects the dignity of a citizen in a society governed by law. It cannot be forgotten that the welfare state is governed by rule of law which has paramountcy.

The significance of economic, social, and cultural rights was underlined in **C.E.S.C. Ltd. v. Subhash Chandra Bose,**[46] where the Supreme Court observed:

"Right to human dignity, development of personality, social protection, right to rest and leisure as fundamental human rights to common man mean nothing more than the status without means. To the tiller of the soil, wage earner, labourer, wood cutters, rickshaw pullers, scavengers and hut dwellers, the civil and political rights are 'mere cosmetic' rights. Socio-economic and cultural rights are their means and relevant to them to realise the basic aspirations of meaningful right to life."

6.3 The Directive Principles of the State Policy:

The Directive Principles of the State Policy (DPSPs),[47] provided under part-IV of the Constitution, have provisions which also helps to protect and preserve the dignity of individuals. It sets out the ideals and objectives related with Social, economic and cultural upliftment. The framers of the Indian Constitution were aware that country was suffering from poverty, unemployment, illiteracy, social, economic and political backwardness; therefore, Part-IV on Directive Principles of State Policy

45 AIR 2012 SC 2573.

46 AIR 1992 SC 573.

47 From Articles 31 to 51 of the Indian Constitution.

(Articles 36 to51) was included in the Constitution in non-justiciable category.[48]

Article 38 of the Constitution provides that "the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life" clause 2 of Article 38 required, "the State shall, in particular, strive to minimize the inequalities in income, and Endeavour to eliminate inequalities in status, facilities and opportunities , not only among individuals but also among groups of people residing in different areas or engaged in different vocations.' According to Art 38 (1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice, social, economic and political shall inform all the institutions of national life.

Basic amenities of life are part of human dignity also. The Court ,while expanding the concept of human dignity ,declared that this right to live with dignity enshrined in Article 21 derives its breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of the Articles 39,41 and 42 ,which includes protection of the health and strength of the workers. The state has to ensure all the basic amenities and facilities of life like healthcare facility, educational facility, just and

48 India has pumped in a lot of public money on NRHM, NREGS, Bharat Nirman and Public Distribution System but poverty, unemployment and livelihood security have remained a major concern. There is illiteracy despite a National Literacy Mission; high rate of infant malnutrition and mortality despite ICDS; children out of school despite sarv shiksha abhian; rampant child labour and child begging despite national Child Labour Eradication Programme and National Commission for Children; rural livelihood crises despite NREGS and PDS at place and high rate of maternal and child deaths despite a National Rural Health Mission. The story goes unending as these schemes sub serve the interests of politico-bureaucratic stakeholders.

human conditions of work and maternity relief.[49] These are the minimum requirements which must exist in order to enable a person to live with human dignity. Article 45 envisages free and compulsory education for children up to the age of 14 years. It has been held to be a Fundamental Right forming part of "Right to Life" secured by Article 21.[50]

Numbers of rights are available to the citizens of India, but so far as the poor, destitute and beggars are concerned they are living a life of horrible disposition. To reduce the menace of beggary the main issue which came to lime light is eradication of poverty and unemployment. The State also focuses her attention for implementation of welfare provisions provided in the Indian constitution and other laws, but all squander. Beggary is in fact a right, issue where survival and protection itself remains at stake. The basic need fulfillment, denial to dignity and respect, suspicion and stigma are the issues that need to be addressed. The homeless of any city have the same human rights as any other citizen. These rights are recognized under the constitution of India, Indian National laws and various International Conventions, yet beggars are the most deprived people in the lot who are not benefited by these rights.

Role of Judiciary:

The role of judiciary in this regard has not been significant. The courts are trying to give judgments which help to rehabilitate the beggars as well as make the country free from beggars for the long run, but these judgments are not properly executed. Thus, the courts in India have to play a vital role in eradicating this menace as well as to provide some sort of remedy to these destitute beggars. The Courts have to render justice in the true sense, by protecting the weak from inhuman exploiters and at the same time delivering society form the bane of begging.

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49 Justice Bhagwati in Bandhua Mukti Morcha v Union of India, AIR 1984 SC 802.

50 Uni Krishnan v. State of A.P, AIR 1993 SC 2178.

Whereas, in the State of Jammu and Kashmir, the judiciary has not interfered much so far as the beggary laws and beggars are concerned. However, in March 2014, through a PIL filed by practicing lawyer Parimoksh Seth, the HC directs DGP to hold survey across JK on beggar's population and also directed the DGP to make all efforts for proper implementation of the, The Prevention of Jammu and Kashmir Beggary Act, 1960. This is the first step towards highlighting the menace of beggary and taking major steps for eradicating it through judicial intervention in Jammu and Kashmir. It is to be seen now that what will be the effect of this court order, to curb this menace of beggary from the State of Jammu and Kashmir.

Suggestions

To begin with, we have to recognize and combat structural injustices in society and expand livelihood options for the marginalized population (i.e., beggars) in a growth-driven and shining economy such as India.

Laws dealing with beggary should be strictly enforced;

Effective planning should be done by the government to solve unemployment and poverty;

Beggars should not be allowed to stay in public places like railway stations, bus stops, market places, etc.

Proper development should be brought in agricultural and industrial sector which provide them employment opportunity to stand on their own legs;

Huge amounts are often spent by way of distributing food to beggars at holy places. Such expenditure may be channelised through well organised institutions so that the helpless beggars get not only food but treatment, training and work facilities as well;

The Government should open special clinics to take care of those who are unable to pay for treatment of diseases like leprosy etc;

In the contrary, all the orphans and handicapped should be taken care of by opening more and more rehabilitation centre's;

To eradicate beggary it is necessary that we must provide everyone a constitutional right to work and also raise the minimum wages;

The people should be enlightened about the realities of beggary and its effects on the society as a whole and make them stop giving alms to the beggars;

Conclusion

In more than five decades of freedom, India is not one India. It is two India's. One is "We the People of India" that is those people who are rich, wealthy and powerful and the other category is "We the Other People of India" those who are poor, downtrodden, dalits, Harijans, have-nots, disadvantaged etc., etc., sections of society.[51] It would be everybody's wish in free India, in the 21st century to at least if not achieved, aspire to have some fruits of what is provided in the preamble of India. Right to live is the natural right of human beings but the human right to live with dignity is very fundamental, and so far as beggars are concerned they are the most deprived ones. Chief Justice Bhagwati, in an address in Bombay, emphasized what is a text-book lesson for developmental jurisprudence. He argued: "I am also convinced that the right to freedom has been correctly associated with the right to food and health, because with hunger and ill-health freedom can have no meaning. But I do not like the expression "right to survive". I would prefer the expression "right to live". I do not want any people just to survive. I want them to live a life of human dignity and, for that; they must have the basic necessities of life including food and health. The right to life in my opinion includes right to basic necessities of life." Same applies to

51 Ranbir Singh, "Fundamental Rights-An Audit in the New Millennium", Constitution of India – Review and Reassessment, in Dr. Subhash C. Kashyap (ed.), Constitution of India – Review and Reassessment 54 (Universal Law Publishing Co. Pvt. Ltd., Delhi, 2006).

beggars and the concerned government should take care of beggars in such a way, that make them good citizen and they live a dignified life.

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Role of Judiciary in widening the scope of Article 21 with special reference to Right to Education

"The destiny of India is being made in class room" National Education policy 1964

Abstract

Judiciary is regarded as the pivotal organ of the Government. In every mature and developed legal system of the world the judiciary is of paramount importance so far as socio-economic development is concerned. The role of the judiciary is not only to adjudicate the disputes between the parties, it also helps in the growth of law by supplanting the lacunas of the formal legislation while applying the law. The Indian judiciary especially the apex court has not remained far behind so far its role as the guardian of the rights of the people is concerned. By using the creative interpretation, the apex court has broadened the scope of many articles of the constitution. The greatest beneficiary of this approach is article 21 of the constitution. The apex court has carved out many rights from this article among which right to livelihood, right to live with dignity, right to clean environment, right to speedy trial, right to privacy and right to education are most important ones. This paper is an attempt to analyse the role of judiciary in widening the scope of Article 21 with a special focus on right to education.

***Key words:* Judiciary, Constitution, Supreme Court, Education, Fundamental Rights, Directive Principles of State Policy, judicial discourse**

Introduction

The concept of justice is ever changing, at different times and in different societies, law must live up to the aspiration of the society and the age. In other words law should be dynamic and in order to justify its existence it should be socially alive . In its practical applications law is faced with two perpetual problems of (i) maintaining a delicate balance

between change and stability and (ii) and to ascertain those social desiderata which law should attempt to achieve.[1]

The constitution of India enjoins the judiciary to uphold the constitution and makes the supreme court the final arbiter and interpreter of the law. The purpose of the law is to reconcile, the conflicting interests, of not only those between individuals but also between the individuals and the society. In the walfare state, law has to function as an instrument of justice on the one hand and on the other, it should be an instrument to suppress mischief. The constitutional revolution of bringing about a progressive transformation of the traditional colonial feudal society to post industrial egalitarian society founded on non arbitrariness, is the duty not only of the legislative and executive but also those who operate the levers of judicial machine in the legal world. As observed by Justice Krishna Iyer, "while the court is independent of the executive ,it is not independent of the nation or the constitution, it is accountable to nation and work under the constitution .All power including the judicial power is a peoples trust. That is why the goal of social revolution assured by Part (III), which enunciates the fundamental rights and Part(IV), which articulates Directive Principles of state policy, has to be shared and not shunned by the judicial process.[2] Article 141 [3] of the Constitution of India enacts that the law declared by the Supreme Court of India shall be binding on all courts in the territory of India. The expression "law declared", is wider then the law found or made and implies the law creating role of the court. [4] The power of Judicial

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1 Bakshish Singh, NEW HORIZONSIN THE DISTANCE EDUCATION IN HONOUR OF PROF. G. REDDY, p 10

2 Krishna Iyer,"THE JUDICIAL SYSTEM –HAS IT A FUNCTIONAL FUTURE IN OUR CONSTITUTIONALORDER"? *Supreme Court cases, VOL.3,(1979), P.7*

3 Article 141 of the Indian constitution of India states that,law declared by the Supreme Court of India is binding on all courts – The law declared by the Supreme Court shallbe binding on all courts in the Territory of India

4 *S.P.Gupta v. Union of India, AIR1982 SC 149.*

Review combined with " judicial legislation" or judicial constitution making and judicial usurpation of legislature and constituent power exercised by Supreme Court makes it an important institution, which may contribute and accelerate, instead of impeding the social progress by comprehending and sympathizing with the urgent needs of common man.[5]

The judicial process in India has to play a role of catalytic agent, in bringing about the socio-economic revolution. The constitution makers visualized the establishment of socialist democracy and envisaged a change in the present social order. The resistance to change is desired and incumbent. A judiciary being an important legal institution[6] cannot be expected to remain immune from this. If the nation is to advance change cannot be resisted for long.[7] The negligence and the apathy abundantly demonstrated by executive, towards the directives in Part IV, especially Article 45 of the constitution has led to the supreme court to evolve dynamic jurisprudence concepts, implementing and enforcing the directives, observing this Prof. Upendra Baxi states, the Supreme court of India is at last becoming, after 32 years of the Republic, the Supreme court for Indians. For too long, the apex constitutional court had become an arena for legal grabbing for men with long purses. Now the court is being identified by justices as well as the people as the last resort for the oppressed and the bewildered. The transition from a traditional captive agency with a low social visibility into a liberated with a high social politic visibility is a remarkable development in the carrier of the Indian Appellate Judiciary...[8]

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5 M.C.Sharma, "COURT AS AN INSTRUMENT FOR DELIVERY OF SOCIO-ECONOMIC JUSTICEIN INDIA" in Ram Avtar Sharma (ed.), court as an instrument for delivery of Socio-Economic Justice in India p.24

6 Rajeev Dhavan, THE SUPREME COURT OF INDIA, p. XIV

7 Supra 10 at 25

8 COURT OF INDIA, *Delhi Law Review(1980) at p.91* AIR 1996 2426.

Thus it could be asserted that the cause of Socio-Economic justice can be accomplished only by the union of judicial awareness, judicial activism and judicial creativity in order to attain the constitutional goal of achieving an egalitarian society.

Widening Scope of Article 21

The Indian judiciary and particularly the apex court has to a large extent successfully lived up to the expectations of enhancing the scope of some of the fundamental rights guaranteed under part III of the Indian constitution through a revolutionary methodology of judicial activism and judicial creativity. The biggest beneficiary of this approach has been Article 21. By reading Article with the directive Principles, the Supreme court has read many rights which are otherwise not expressly guaranteed by the article. Article 21 [9] assures every persons right to life and personal liberty. The term life has been given a very expansive meaning.[10]

The supreme court of India has interpreted the term "life" used in the Article 21 on the same lines as was used by *Field j. In Munn v. Illinois.*[11]

" By the term life as here used something more is meant than the mere animal existence .The inhibition against the deprivation equally prohibits the mutilation of the body by the amputation of an arm or leg or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with outer world."

Justice Bhagwati, agreeing with the preposition of Justice Field, further adds that, "we think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare

9 Article 21 says that "No person shall be deprived of his life and personal liberty except according to the procedure established by law .

10 P.N.Singh, "FROM MENIKA TO MITHU:SOME DOCTRINAL STRANDS IN THE INTERPRETATIONOF ARTICLE 21: AND VINDICATION PUBLIC INTRESTTHROUGH JUDICIAL PROCESS:TREANDS AND ISSUES"

11 *Munn v. People of Illinois 94 US 133*

necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow beings" [12]

It was not for the first time in the Unni Krishnan case that the Indian Supreme court has given the Directive Principles a central place in interpreting fundamental rights. The Supreme court had already on a number of occasion done the same. The expansive interpretation of the term life had lead the Supreme Court on a number of occasion to declare certain directive principles as aspects of fundamental right to life.

The term" life" was expanded to include the "right to environment" by the supreme court of India. Article 48A[13] of the constitution of India along with the Article51(A) (g)[14] of the constitution of India gives the resolve of the state to protect environment .But no where does these provisions give the individuals the right to environment. Even though the supreme court has read, and rightly so, that there is a fundamental right to environment, as an aspect of fundamental right to life.It was reasonable to hold the enjoyment of life and its attainment and fulfilment guaranteed by Article 21 of the constitution embraces the protection and preservation of natures gifts without which life cannot be enjoyed .There is no reason practice of violent extinguishment of life can alone be regarded as violative of Article 21. Under the constitutional scheme the state is not only to protect the environment but also to improve it, for the full enjoyment of life. The Article's of Part IV were used extensively, to read such a norm of right as they were not merely

12 *Francis Coralie v Union Territory of Delhi* 1981 1 SCC608

13 Article 48A of the constitution of India states, protection and improvement of environment and safe guarding of forests and wild life – the state shall endeavour to protect and improve the environment and the safeguard the forests and the wild life of country.

14 Article 51 (A) of the constitution states that; Fundamental Duties, IT shall be the duty of every citizen of India. (g) to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures.

show pieces in the window dressings, but were fundamental for governance of the country.[15]

Another aspect where the supreme court of India has emphasized, is that the right to life includes the right to livelihood .The Supreme Court has recognised the right to livelihood in case of *Olga Tellis v. Bombay Municipal Corporation,*[16] where the court said that, where any person is deprived of his right to livelihood except according to just procedure established by law, he can challenge the deprivation as offending the right to life conferred by article 21. A similar resolve is there in Part IV of the constitution of India , Article 39(a)[17],which the honourable court made it to be reflected in the expanded meaning of right to life to include right to livelihood. Further more Article 38(2)[18] of the Part IV of Indian Constitution provides for minimizing the inequalities of facilities. The Supreme court has again interpreted such a provision within the aspect

15 A number of cases had laid down the fundamental right to environment as an aspect of right to life. see, Rural *Litigation and Entitlement Kendra, Dehradun v. State of Utter Pradesh,* AIR 1992187, *M.C Mehta v. Union of India, AIR 1988 SC1037,T. Damodar Rao v.The Special Officer, Muncipal Corpration of Hyderabad, AIR 1987 AP 171, Subhash Kumar v. State of Bihar,1991, 1SCC 598.*

16 AIR 1986 180.

17 Article 39(a) of the constitution states; 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.

18 Article 38(2) of the constitution of India provides state to secure a social order for the promotion of welfare of the people,(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 among individuals but also amongst groups of people residing in different areas or engaged in different vocations. **Ins. By s.9,the constitution(Forty-fourth Amendment) Act,1978 (w.e.f 20-6-1979).**

of right to life in Article 21, Part III of the constitution.[19] The Supreme court has observed that right to life in article 21 embraces not only physical existence but also of the quality of life and for the residents of hilly areas, access to road is access to life itself. Another area where the judiciary has interpreted the directives in realm of right to life, as provided in Part III of the constitution, is within the preview of Article 49[20], Part IV of the constitution . This provision has been judicially given a facet of life under Article 21, where life includes all that gives meaning to man's life including his traditions, culture and heritage and protection of that heritage in its full measures.[21]

Judicial Response to Compulsory Education

As it has been realized, in the preceding part, that the supreme court has not remained far behind, in realization of the desiderata as envisaged in Part IV of the constitution of India.The judiciary has responded positively to its obligation under the constitution and even expanded the meaning of the term 'life' to a new dynamic level so as to correlate it with the present societal needs and aspirations of the people of India. The judiciary has effectively read the directives within the realm of the fundamental rights in Part III of the constitution, and thus has been able to give the content a shape. It was the continuation of same creative judicial approach which finally led the apex court to declare education as a fundamental right. It will be my endeavour to analyze the judicial discourse of such important and far reaching declaration.

The supreme court has been playing an important role in achieving and promoting the rights of social, economic and political sphere. It is expected that the judiciary will endeavour to recognize the development of the nation and apply established principles of the positions which the nation of its progress from time to time assumes. The judicial organ would otherwise separate itself from the progressive life of the

19 *State of Himachal Pradesh v. Umod Ram* AIR1986 SC 847

20 Article 49 of the constitution states, protection of monument and place.

21 *Rameshran Autyanprasi v . union of India 1989 supp(2) SCC 251.*

community and act as clog upon the legislative and executive departments rather than as an interpreter.[22]

The wisdom of judiciary is clearly reflected from its various decisions where the judiciary has said in no uncertain terms, that education determines the development, prosperity, welfare and security of the people. In this context, it is therefore imperative to make an earnest attempt here to highlight the role of the judiciary in accomplishing the constitutional goal of free compulsory education in India.

The significant role of Indian judiciary in this regard is that it has on many occasions strongly held that if the pace of a nations development was to be archived, there was a need for a well-defined bold and imaginative educational policy. The judiciary has rightly visualized that there was a need to use education as a powerful weapon of social, economic and political change and therefore, relate it to the long term national aspiration, the programme of national development on which the country was engaged and the difficult short term problems it was called upon to face .The fact that right to education occurs in as many as three Article in Part IV viz. Article 41,45 and 46 shows the importance attached to it by the founding fathers. Even some Articles in Part III viz Article 29 and 30 speak of education.[23]

The close scrutiny of the decisions of the courts of India reveals that in the earlier phase, the courts relied on the famous case of *Oliver Brown v. Board of Education.*[24] The Apex court rightly observed, "Today education is perhaps the most important function of the state and local government." The court went to the extent of saying that education was a principle instrument in awakening the child to cultural values, in preparing them for better, professional training, and in helping them to

22 Ram Rajput, DOCTRINE OF STARE DECISIC PERSPECTIVE OVERRULINGAND ACQUIESCENCE-A CRITIQUE, Supreme court journal ,vol 2

23 *Unni Krishnan v. state of A.P.* AIR 1993 SC 2178.

24 347 US 483.

adjust normally to this environment. It is required in the performance of our most basic responsibilities, even services in the armed forces. It is very foundation of good citizenship.

While highlighting the sprit contained in Article 45 of our constitution, the supreme court of India in Re Kerala Education Bill, 1957 very lucidly and with considerable warmth of feeling and indignation maintained that no minorities should be permitted to stand in the way of implementation of the children of country so as to bring them up properly and to make them fit for discharging the duties and responsibilities of a good citizens.[25] The court went to extent of adding that it was not for the court to question the wisdom of the supreme law of the land because it was the people of India who had given to themselves the constitution which was not for any particular community or section but for all. The court held that the provisions of the constitution were intended to protect all, minority as well as the majority communities.

Moreover, the true objectives of these provisions are to guarantee certain cherished rights of the minorities concerning their language, culture and religion. These concession must have been made to them for good and valid reason.[26] The court observed that there was nothing which could prevent the state from discharging its solemn obligation through government and aided schools, nor was it required to be discharged at the expense of minority community. The court conceived that it was the duty of the court to uphold the fundamental rights and thereby honour the scared obligation to the minority communities in consonance with the sprit of the constitution.[27]

Similarly, the Andhra Pradesh high court in *Murali Krishna Public School*[28] case pronounced: "Right to education to Dalits is a Fundamental Right and it is mandatory duty of the state to provide

25 Re Kerala Education Bill AIR 1958 SC 985.

26 *Id,p.986*

27 Re Kerala Education Bill AIR 1958 SC 986.

28 AIR 1968 A.P.204

adequate opportunities to advance educational interests by establishing institutes."

The decision of Andhra Pradesh High Court in the instant case has really paved the glorious path for the better educational opportunities for Dalit children. The Dalits, hitherto neglected specimens of humanity, who are dragging their earthy existence under a grinding poverty, have Fundamental Right to Education and they can compel the state to take positive action to provide better and adequate educational facilities, economic support and proper atmosphere to the children belonging to the lower strata of the society has now been declared as violative not only of Article 21 of the constitution.

The judicial response to the right to education has always been quite positive and progressive to secure in particular to the children of weaker section of the society the proclaimed socio-economic justice.[29]The court has played a parental role while directing the central Government to persuade the workmen to send their children to nearby school and arrange not only for the school but also provide free of charge , books and other facilities such as transportation, etc. The court has very daringly shown the courage to direct the government to ask the contractor to make special provisions for providing free and compulsory education to the children of the poor workers. The court has cast the duty on the government to make special provision in the contract whereby the contractors are compelled to provide free and compulsory education to their children of their labourers.[30]Education is enlightenment. It is the one that lends dignity to a man as was rightly observed[31] that education seeks to build up the personality of the pupil by assisting his physical, intellectual, moral and emotional development. Further, Delhi High

29 R.Revathi,CHILD LABOUR; A CHALLENGE TO THE NATION". S*upreme Court Journal, vol.3,1992* P.22. also see *vidyaranayan Education society v. director of school v .Director of School Education, Andhra Pradesh AIR1995 AP 95.*

30 Laborers working in *social Hydro Project v.State Of J&K.* AIR 1984 SC 117

31 Gajendragadkar, J in *University of Delhi v. Ram Nath* AIR 1963 SC 1873.

Court in a famous case of *Anand Vardhan Chandel v. University of Delhi*[32] has held that education is a fundamental right under our constitution. The court right observed:

"The law is therefore, now settled that the expression of life and personal liberty in Article 21 of the constitution includes a variety of rights though they are not enumerated in Part III of the constitution, provided that they are necessary for the full development of personality of the individual can be included in the various aspects of liberty of the individual. The right to education is therefore, included in Article 21 of the constitution"

In recently decided case[33], the Supreme court held that the children are means under Article 45 of the constitution to be subjected to free and compulsory education under Article 45 of the constitution until they complete the age of 14 years. The court was quite critical to observe that the Directive Principle of state policy had still remained a far cry and thought according to his provision, all children up to age of 14 years were supposed to be in school.

It is in the similar enthusiasm that the Supreme court of India in a landmark case of *Mohini Jain v. State of Karnataka*[34] held that the directive principles which are fundamental in the governance of the country cannot be isolated from the fundamental rights guaranteed under Part III. The preamble promises to secure to all citizens of India "justice, social, economic and political", "liberty of thought, expression, belief, faith and worship". It assures dignity of individual. The preamble embodies the goal which the state has to achieve in order to establish social justice and to make the masses free in the private sense. The court emphasised that the objective of social justice envisaged under different provision of our National Charter cannot be achieved unless free and Compulsory education is provided to the bulk of the people who are illiterate. The court made it clear that these objectives as enshrined in the

32 AIR 1978 Delhi High Court 308.

33 *M.C.Mehta v. State of Tamil Nadu AIR 1991 SC 147.*

34 AIR 1992 SC 1859.

Preamble can't be achieved and shall remain on paper unless the people in the country are educated. The court strongly observed that it was only the education which equips a citizen to participate in achieving the objectives enshrined in the preamble; the directive principles in part IV of the constitution are also with the same objective. It is primarily the education which brings forth the dignity of man. The court reminded the nation of the fact that the framers of the constitution were already aware of the fact that more than seventy percent of the people, to whom they were giving the constitution of India, were illiterate, however, they were hopeful that within a period of ten years illiteracy would be wiped out from the country. It was with that hope that Article 41 and 45 were brought in Chapter IV of the constitution.

The question that arose before the Supreme Court in *Mohini jain v. State of Karnataka*[35] was whether the right to life was limited only to protection of limb or faculty or could it go further and embrace something more. The court held that the right to life included the right to live with human dignity which embraced within its comprehensive limit many valuable things, 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 mingling with fellow human beings. The court emphatically said that every citizen had a right to education under the constitution. The state is obligated to establish educational institutions to enable the citizens to enjoy the said right. The state may discharge its obligation through state owned or state recognised educational institutions.

A similar question arose in landmark case of *J.P.Umnikrishan v. State of A.P*[36] the question which came before the court for active consideration was whether a citizen had a fundamental right to Education or not. Whether right to primary education , as mentioned in Article 45 of the constitution, was a fundamental Right under Article 21,

35 *Ibid.*

36 AIR 1993 SC 2187.

the court while taking the realistic stand held that right to free and compulsory education under Article 45 of the Constitution, was included within the ambit of Article 21. The Court, however, maintained that the right to free and compulsory education could not be enforced against the state. Emphasis was laid upon the language used in the Article 45 which require the state to 'endeavour to provide" for the free and compulsory education of children. A comparison of the language of Article 45 with that of Article 49 was made and it was suggested that whereas in Article 49 an "obligation" was placed upon the state, what was required by Article 45 was "endeavour" by the state.

The court emphasized 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 mind, the sublimation of emotions and the illumination of the sprit. Education is the preparation for a living and for life, here and hereafter. The court said that the context of democratic form of government which depends or its sustenance upon the enlightenment of the populace, education is at once a social and political necessity. Even several decades ago, the leaders harped upon universal primary education as a need for national progress, the foremost goals to be satisfied by our education is therefore the eradication of illiteracy which persists in a depressing measures. Any effort taken in this direction cannot be deemed to be too much.[37]

Justice Mohan went a step forward by stating "victories are gained, peace is preserved, progress is achieved, civilization is built up and history is made not on the battle fields where ghastly murders are committed in the name of patriotism, not in the council chambers where insipid speeches are spun out in the nature 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 destines of the future, are trained. From their ranks will come out when they grow up, statesmen and

37 Id p,2188.

soldiers, patriots and philosophers, who will determine the progress of the land."[38]

Justice Mohan further said that if Article 21,which is the touchstone of fundamental rights has received meaning from time to time there is no justification as to why it cannot be interpreted in the light of Article 45 wherein the state is obligated to provide education up to 14 years of age, within the prescribed limit.[39]

The court further observed that 10 years spoken to under the constitution had long come to an end. Yet if Article 45 were to remain a pious wish and a fond hope, what fond it would then serve. A time limit was prescribed under the article. Such a time limit is found only here. If therefore, endeavour has not been made till now to make this article reverberate with life and articulate with meaning, the court should step in. The state can be obligated to ensure a right to free education of every child up to age of 14 years[40]. The passage of 44 years more than the four times the period stipulated in Article 45 convert the obligation created by the article into an enforceable right. The constitution contemplated a crash course to implement the goal and whereas the state has been funding the education programmes without priority towards the primary education. Article 45 is not limited with the economic capacity and development as Article 41 does, which inter alia speaks of right to education.[41]

The court further observed that the right to education means that a citizen has a right to call upon the state to provide educational facilities to him within the economic capacity and development of the state. By doing this they were relying on Article 41 to illustrate the content of right to life. The magnitude and content of the right which was made subject to the economic capacity and development can't overlook the basic necessities of life and also the right to carry on such functions and

38 Ibid.

39 Id p.2191.

40 Id p.2198.

41 Id, p. 2232.

activities as constitute the bare minimum expression of the human self[42]. Thus the right to education is implicit in right to life.[43]

In *State of Himachal Pradesh v. H. P. State Recognised And Aided School managing committee and Ors*[44] state recognised and aided school, it was held that the state has obligation to provide free education to up to age of 14 years and this right cannot be circumvented on the ground of financial strain and state endeavour to increase budget allocation under the head education.[45]

In *Murlidhar Dayandev keskar v,Biswanath Panday Bardea*[46], the apex court held that right to life under Article comprehends within its ambit right to education, health, speedy trial and equal wages for equal work.

In *Punchikunhi Chekku Hajji v. State of Kerala*[47], it was held that in view of larger interest…….of children who have fundamental right to education procedural technicalities should not be allowed to subsume the substance.

In *Ganapathi National Middle School v. Mdurai Kanan*[48], the apex court held that right to education is a fundamental right of every child.

The decision of Unnikrishnan came up for further consideration in *T.M.A Pai Foundation and others v. State of Kerela and Others*[49]. Where in it was held that the scheme framed in Unnikrishnan case and

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43 Trilok Nath Arora, JUDICIAL EDIFICATION OF EDUCATION, Supreme court Journal, Vol 3(1995), at p.56

44 1995 (4) SC 507

45 Even in *Ratlam Muncipality v. Vardhichand* AIR 1980 SC 1622 the Supreme Court has emphasized that the human right under the Part III of the constitution have to be respected by state regardless of the economic capacity or its budgetary provisions.

46 1995 Supp (2)SCC 849.

47 1995 Supp (2) SCC 382.

48 (2000) 10 SCC 648.

49 (2002) 8 SCC 481.

the direction to impose the same, except where it holds that primary education is a fundamental right, is unconstitutional.

Conclusion:

The cardinal position enjoyed by the supreme court to interpret the law of the land and to give accordance to the wishes and aspiration of the people of the nation is indeed an encouraging development. The supreme courts pivotal role in making up of the lethargy of the legislative and inefficiency of the executive is highly commendable. In developing the policy prescription into fundamental provision ,the supreme court has provided the law of the land with a dynamism unique in its own character . The extent of judification of education by the supreme court has been to declare the right to education and elevating it to the pedestal of fundamental right in spite of the fact that such a right, till the 86th constitutional Amendment Act 2002 had not been specifically mentioned in part III of the constitution. The right to education has now been expressly recognised under Article 21 A. Under this article the state is under an obligation to provide free and compulsory education to all children of the age of six to fourteen years and the state cannot circumvent its obligations on the ground of financial incapacity.

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